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The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
Lyndon Baines Johnson
Department of Education Building
400 Maryland Ave, SW
Washington, DC 20202

Re: Comments on the "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program" Docket No. ED-2019-OPE-0080

Dear Secretary DeVos,

I write to provide comments on the U.S. Department of Education's ("DOE") proposed rule concerning grant requirements for religious institutions ("Proposed Rule") that will impact students and organizations across the country and allow them to live out their faith in an educational setting and have access to funding to support their efforts. As the chief legal officer of Indiana, I am glad to see that DOE is working to bring its rules in line with current Supreme Court precedent and President Trump's Executive Order 13831 on the establishment of a White House Faith and Opportunity Initiative. 83 FR 20715 (May 3, 2018)(amending E.O 13279, as amended by E.O. 13559, and other related executive orders). As a general matter, this comes down to fairness—that similarly situated groups should be treated similarly. As a legal matter, this rule boils down to ensuring that DOE and those institutions and organizations that receive funding from DOE, respect Americans' religious liberties and the rule of law.

Religious liberties are a cornerstone of American freedom. The stated goal and purpose of the Proposed Rule is to bring DOE policies in line with Supreme Court of the United States precedent, guidance from the Attorney General, and President Trump's Executive Order 13831. All of these emphasize the importance of ensuring that religious liberties are safeguarded and religious persons and groups are not subject to unconstitutional discrimination. See 85 Fed. Reg. 3190. As the Supreme Court recently held, "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subject to the strictest scrutiny laws that target the religious . . . based on the religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*,

137 S. Ct. 2012 (2017). The Proposed Rule eliminates the unequal treatment of religious institutions when applying for DOE grants, and restores fairness in accordance with what is required by the Constitution.

The Proposed Rule ensures that religious organizations are treated fairly and equal to their secular counterparts by specifying that DOE may not require of religious organizations "assurances or notices where they are not required of non-faith-based organizations." See 85 Fed. Reg. at 3222. Additionally, it allows faith-based organizations autonomy over their organizations regardless of whether they receive funding. For example, the Proposed Rule ensures that faith-based organizations that apply for and receive direct funding may select "board members and employees on the basis of their acceptance and adherence to the religious tenets of the organizations." See *id*. This ensures that the faith-based organizations are not only lead by individuals who share a faith, but the actual programs are carried out by those with whom they share a faith as well.

The Proposed Rule further guarantees that students on our campuses of higher education do not suffer discrimination based on their religion. The rule mandates that public universities not deny any rights or benefits to religious student organizations that are afforded to other secular organizations because of the "beliefs, practices, policies, speech, membership standards, or leadership standards of the religious student organization." See *id*. at 3223. This requirement is at the heart of what the Supreme Court addressed in *Trinity Lutheran*. There, the Court opined that, "this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)(plurality opinion)(citations omitted). By requiring public universities simply to treat religious students fairly, the DOE concomitantly is making sure that public universities are following the law.

Additionally, it is encouraging to see DOE has removed requirements that faith-based organizations be required to provide a secular option – a requirement that was not reciprocated for non-faith-based organizations – as this brings DOE direct grant programs in line with President Trump's Executive Order 13831 and with current Supreme Court precedent. In fact, this was precisely the type of discrimination found to be unconstitutional in *Trinity Lutheran*. As the Court noted, "[t]he free exercise clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran*, 137 S. Ct at 2019 (quoting *Church of Lukumi Babalu Aye, Inc. v Hialeah*, 113 S. Ct 2217 (1993)). The Proposed Rule's goal, which is to protect religious organizations from unequal treatment and simply to treat them similarly to secular organizations, is squarely in line with the Court's opinion in *Trinity Lutheran*.

As noted in the rulemaking docket, it is un-Constitutional to solely burden religious organizations by requiring them to provide a secular alternative. And it makes little sense to burden any organization with a requirement that it offer an alternative for two reasons. One, the consumer can make those decisions prior to obtaining services, and, second, in some cases, especially rural areas, an alternative is simply unavailable. Removing that requirement, and adding language that clarifies that religious organizations are not required to provide assurances or notices that secular organizations similarly are not required to provide, thus guarantees that faith-based and secular organizations are treated equally and fairly under the law. Removing these burdens and putting religious organizations on equal footing will also, hopefully, provide more opportunities for all Hoosiers as more organizations will qualify for funding.

Contrary to many of the comments already submitted, the rule is not an expansion of religious exemptions. As a matter of broad public interest, the rule simply provides that religious or faith-based organizations stand on equal footing with non-faith-based or secular organizations. Those receiving benefits will have more options and will have the opportunity to choose whether they want to obtain services from a faith-based organization or secular organizations. This is in line with the requirements of Executive Order 12866 that provides that promulgation of a regulation is necessary, among other instances, when it is necessary to interpret the law. It is critically important that the rights of students on our public university campuses are safeguarded, and this rule provides simply protection for religious students so that they are not discriminated against. The Proposed Rule strikes a balance between protecting religious and faith-based organizations from discrimination, regardless of whether they are affiliated with traditional or non-traditional sects, while also not giving those organizations a leg up on their non-faith-based counterparts.

In conclusion, I applaud DOE for its efforts to guarantee that the intent of E.O. 13831 is respected by promulgating this rule to ensure that religious organizations are treated fairly. I encourage DOE to continue to review its rules and policies so that all students are treated fairly regardless of their faith.

Very truly yours,

Curtis T. Hill, Jr.
Attorney General