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EDUCATION AND THE WORKFORCE
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November 2, 2023

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202

Dear Secretary Cardona:

On May 12, 2023, the Department of Education (Department) released Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools¹ (2023 Guidance) that revised guidance issued on January 21, 2020² (2020 Guidance). The administration's changes to the guidance could undermine students' rights, create ambiguity, and lead to schools infringing on the religious freedom of students.

This nation has protected religious freedom since its founding and any guidance that does not protect this right should not be tolerated, especially in our public schools. The 2023 Guidance calls into question the Department's commitment to protecting religious liberty for all elementary and secondary public school students and therefore merits serious review.

The 2023 Guidance removed language requiring schools to respect a student's decision to include religious views in his or her communication, so long as the student "retain[s] primary control over the content of [his or her] expression."³ In its place, the Department added language that affirms students' religious speech if "not...disseminated under the school's auspices."⁴ This new language raises the possibility that a student may have to remove all religious expression from his or her speech if the school disseminates the student's message.

¹ DEP'T EDUC., GUIDANCE ON CONSTITUTIONALLY PROTECTED PRAYER AND RELIGIOUS EXPRESSION IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS (2023), https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

² Updated Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools, 85 Fed. Reg. 3257 (Jan. 21, 2020) (to be codified at 34 C.F.R. ch. 1).

³ *supra* note 1.

⁴ *Id.*

The 2023 Guidance also removed a detailed explanation of students' right to select group leaders who agree with the group's religious mission. It eliminated language explaining that "the Equal Access Act⁵ permits religious student groups to allow only members of their religion to serve in leadership positions if these leadership positions are positions that affect the religious content of the speech at the group's meetings."⁶ On September 13, 2023, *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.* was decided by the Ninth Circuit Court of Appeals.⁷ The court found that "it makes equal sense that a religious group be allowed to require that its leaders agree with the group's most fundamental beliefs."⁸ Given the court's ruling, the Department's removal of the language from the 2023 Guidance is ill-advised.

In summary, the Department's 2023 Guidance revokes clear language protecting students' religious freedom while at school and unnecessarily introduces doubt about which rights of students are protected. The Department should publicly and unequivocally state that the 2023 Guidance does not undermine these constitutionally protected rights.

I request that the Department answer the following questions by November 16, 2023:

1. Does the Department still hold that a school must respect a student's decision to include religious views in a speech or communication so long as the student "retain[s] primary control over the content of [his or her] expression"?⁹
2. Does the Department hold that students' personal religious speech may be censored if such speech is "disseminated under the school's auspices"?
3. Does the Department still hold that "the Equal Access Act permits religious student groups to allow only members of their religion to serve in leadership positions if these leadership positions are positions that affect the religious content of the speech at the group's meetings"?¹⁰
4. The *Elementary and Secondary Education Act* requires the Secretary to revise and provide guidance on constitutionally protected prayer in public elementary and secondary schools every two years.¹¹ What changes in the case law between 2020 and 2023 justify the Department's removal of the language addressing the *Equal Access Act* and leadership of religious student groups from the 2023 Guidance?

⁵ The EAA prohibits public secondary schools that receive federal funds and provide a "limited open forum" from "deny[ing] equal access or a fair opportunity to, or discriminat[ing] against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a).

⁶ *supra* note 2, at 3272.

⁷ The court ruled that Fellowship of Christian Athletes' (FCA) student clubs can freely gather and hold events on public high school campuses and that religious groups do not have to give up their faith to have equal access to the campus. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, No. 22-15827, slip op (9th Cir. Sept. 23, 2023).

⁸ *Fellowship of Christian Athletes* at 46.

⁹ *supra* note 2, at 3265.

¹⁰ *Id.* at 3272.

¹¹ The Elementary and Secondary Education Act of 1965 as amended by the Every Student Succeeds Act § 8524(a), 20 U.S.C. § 7904.

5. Was the 2023 Guidance reviewed by the Office of Legal Counsel at the Department of Justice?

If you have any questions, please contact Gabriella Pistone at gabriella.pistone@mail.house.gov or 202-225-6558.

I look forward to hearing from you.

Sincerely,



Virginia Foxx
Chairwoman
House Committee on Education and the Workforce