ETHICS AND PUBLIC POLICY CENTER

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Nicholas Kent
Under Secretary of Education
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

RE: Department of Education Proposed Rule, Accountability in Higher Education and Access Through Demand-Driven Workforce Pell: Student Tuition and Transparency System (STATS) and Earnings Accountability, Docket ID ED–2026–OPE–0100, RIN 1840–AE0

Dear Under Secretary Kent:

My name is Eric Kniffin. I am a scholar at the Ethics and Public Policy Center (EPPC), a member of EPPC's Administrative State Accountability Project (ASAP), and a former attorney in the U.S. Department of Justice's (DOJ) Civil Rights Division.

I write to offer public comment in response to the Department of Education's Proposed Rule, "Accountability in Higher Education and Access Through Demand-Driven Workforce Pell: Student Tuition and Transparency System (STATS) and Earnings Accountability," Docket ID ED–2026–OPE–0100, RIN 1840–AE0 ("Proposed Rule").[1]

In the Proposed Rule, the Secretary of Education proposed to amend regulations governing institutional eligibility, general provisions regulations, and the William D. Ford Direct Loan (Direct Loan) Program under title IV of the Higher Education Act (HEA) of 1965, as amended. The proposed regulations would implement statutory changes to the title IV, HEA programs included in the One Big Beautiful Bill Act (OBBB), signed by President Trump on July 4 of last year.

My comment focuses on the impact that the proposed earnings test in the Proposed Rule would have on religious educational institutions and on students who might seek to enroll in programs of religious study. I appreciate Congress' and the Department's goal of ensuring schools are held accountable and students receive a high-quality education that leads to a successful future. However, the Department's actions here are subject to the Religious Freedom Restoration Act (RFRA). As such, any substantial burden the Department's earnings test places on religious liberty is unlawful unless the government can prove that it has no less restrictive way of advancing the federal government's compelling interests.

[1] 91 Fed. Reg.21088 (April 20, 2026).

1730 M Street N.W., Suite 910, Washington, D.C. 20036
tel. 202-682-1200 fax 202-408-0632
www.eppc.org

As set out below, I am doubtful that the Department can satisfy strict scrutiny here. As such, I encourage the Department to create appropriate religious exemptions or accommodations in its final rule.

A. The proposals in the Proposed Rule, like all agency actions, are subject to the Religious Freedom Restoration Act.

Regardless of whether the Department has authority under the OBBB to exempt certain institutions of higher education from the new earnings test, the Department has an independent obligation to ensure that its final rule complies with its obligations under RFRA. As the Department of Education's Office of the General Counsel has recognized, RFRA "must inform all agency rulemaking."[2] "[A]ll agency actions—including, but not limited to, agency rules and grant terms—that impose a substantial burden on an organization or individual's exercise of religion violate the Religious Freedom Restoration Act (RFRA) if they do not survive strict scrutiny."[3]

B. The new earnings test will substantially burden religious exercise.

Under RFRA, a religious claimant bears the initial burden to show that a government action substantially burdens religious liberty.[4] Here, the Proposed Rule itself provides ample evidence that the new earnings test will have far-reaching consequences on religious educational programs. Under these circumstances, the Department can and should account for that substantial burden in the Final Rule, without requiring religious institutions to make an individualized showing down the road.

1. The Proposed Rule provides ample evidence that the new earnings test will substantially burden religious exercise.

The Proposed Rule anticipates that religious programs are expected to fail the proposed earnings test at a higher rate than other higher education programs. According to data published during the negotiated rulemaking process, "Religion/Religious Studies" programs are the most common bachelor's degree programs and the second most common master's degree programs that are estimated to fail the new earnings test. Specifically, 53.3 percent of Title IV students enrolled in "Religion/Religious Studies" bachelor's programs are in programs that are expected to fail, while 89.4 percent of Title IV students in "Religion/Religious Studies" master's programs are in likely failing programs. While the preamble to the proposed rule projects that only 22.5 percent and 14.6 percent of Title IV students are enrolled in undergraduate and graduate "Religion/Religious Studies" programs expected to fail, this projection assessed all programs within 2-digit CIP Code levels 38 and 39, including religious programs but also other programs, such as philosophy programs. The 4-digit CIP Code level projections published during

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[2] United States Department of Education, Office of the General Counsel, *Guidance Regarding Department of Education Grants and Executive Order 13798* at 2 (Aug. 2020), https://www.ed.gov/sites/ed/files/2020/08/Guidance-Regarding-Department-of-Education-Grants-and-Executive-Order-13798.pdf.

[3] *Id*.

[4] 42 U.S.C. 2000bb-1.

negotiated rulemaking, however, more precisely reveal the true negative impact on religion programs.

These projections reflect a basic reality: graduates of religious programs often choose lives of service, ministry, and mission over highly compensated work. Because the earnings test measures a program's value solely by graduates' wages, it treats students' deliberate pursuit of low-paid religious vocations as a mark of failure—and penalizes the institutions that form them for that calling. Yet these are the very programs those religious institutions have judged central to their God-given mission.

Religious colleges and universities have the right to build their academic programs around their faith. For many, that means preparing students for pastoral ministry, missionary work, and other religious vocations. Courts have long recognized that faith-based education lies at the heart of what religious institutions exist to do, and that the government may not condition federal funding in ways that pressure these schools to compromise their religious character.

The proposed earnings test creates exactly that pressure. Programs that train students for ministry and pastoral leadership tend to lead to more modestly paid work—not because the work lacks value, but because it is driven by calling rather than compensation. If those programs fail the earnings test, their students lose access to federal loans, and the programs themselves become far harder to sustain.

Even where no religious program is projected to fail, the test would predictably pressure schools to steer their graduates toward higher-paying secular jobs and away from lower-paying religious vocations, simply to keep their programs in compliance. That pressure is itself a substantial burden on religious exercise. The government "may not force people to choose between participation in a public program and their right to free exercise of religion."[5] Yet that is just what this test would do: it would press faith-based institutions to discourage their graduates from answering a call to ministry—work whose worth to society its compensation will never capture—in order to stay in the federal student-aid program.

For these reasons, the Department should recognize that the proposed earnings test would substantially burden religious exercise.

2. The Department should not repeat the Biden Administration's error of unnecessarily requiring religious entities to make an individualized showing.

Last year, President Trump issued Executive Order 14202, *Eradicating Anti-Christian Bias*,[6] and created a Task Force to Eradicate Anti-Christian Bias to investigate actions taken by the Biden Administration that discriminated against religious individuals and entities. On April 30, 2026, the Task Force issued its report.[7] The DOJ Report found that under the Biden

[5] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 469 (2017) (Gorsuch, J., concurring in part).

[6] Exec. Order No. 14202, *Eradicating Anti-Christian Bias*, 90 Fed. Reg. 9365 (Feb. 6, 2025).

[7] U.S. Department of Justice, Task Force to Eradicate Anti-Christian Bias, *Report on Eradicating Anti-Christian Bias and Restoring Religious Liberty* (April 30, 2026), https://www.justice.gov/opa/media/1438506/dl?inline ("Report").

Administration, "religious rights often suffered," as the Administration "zealously pursued actions to limit Christians' ability to act in accordance with their faith."[8]

One of the patterns that DOJ called out in the Report was the practice of federal agencies under Biden issuing final rules that refused to offer religious exemptions or accommodations based on the agencies' claim that RFRA required them to undertake a "fact-intensive, case-by-case analysis."[9] However, as the Report noted, the agencies' own conduct disproves the claim that RFRA always requires an individualized analysis.

For example, the Report notes, "[f]or more than a decade, HHS was willing to accept a religious organization's sincere religious objection to [the HHS contraception mandate] based on the entity's submission of a one-page form."[10] This longstanding practice, the Report notes, undercuts HHS's 2024 claim in a final rule under Section 1557 of the ACA that RFRA precluded it from offering a religious exemption or accommodation until religious entities showed HHS they were entitled to an exemption on a case-by-case basis.[11]

My colleagues in EPPC's Administrative State Accountability Project made this argument in our own public comment on this same Section 1557 proposal. We argued that, given HHS's willingness to recognize a sincere religious objection based on a self-attestation in one context, the Department "cannot plausibly claim that it needs to conduct a factual inquiry into each entity that raises religious objections to complying with HHS's proposed Section 1557 mandates. It would be arbitrary and capricious for HHS to fail to create a comparable form in this context."[12]

Just as DOJ measured HHS's conduct in the Section 1557 final rule against its willingness to accept a self-attestation under the HHS contraception mandate, the Department should take into account its longstanding practice of allowing religious institutions to submit a letter invoking the religious exemption from Title IX. This Title IX practice has proven workable, and the Department should consider how it could adopt its procedures for the Title IX religious exemption to allow religious institutions to assert religious burdens related to the earnings test as set out in the final rule.

C. The earnings test is not the least restrictive way for the Department to advance the government's compelling interests.

Under RFRA, once a religious entity demonstrates a substantial burden on its religious exercise, the government action in question is unlawful unless the government passes "strict scrutiny" by proving that it cannot advance its compelling interests in any less restrictive way.[13] The interests the proposed earnings rule seeks to advance are good ones—protecting taxpayers,

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[8] *Id*. at 2.

[9] *Id*. at 72.

[10] *Id*.

[11] *Id*.

[12] EPPC, EO 12866 Meeting Comment, "Nondiscrimination in Health Programs and Activities," RIN 0945-AA17 at 10 (Feb. 2, 2024), https://media.eppc.org/2024/02/EPPC-Scholars-Comments-for-EO-12866-Meeting-Section-1557-ACA-.pdf.

[13] 42 U.S.C. 2000bb-1.

safeguarding the integrity of the Title IV programs, and helping students avoid low-earning outcomes. But the Department can advance those interests without punishing religious schools for encouraging people to follow their calling and embrace lives of self-sacrifice.

Insofar as the earnings rule is meant to protect taxpayers and the integrity of federal student-loan programs, the Department should note that religious-program graduates are not likely to default on their loans, even though they earn less than graduates from comparable programs. Applying default-rate and repayment metrics to theology and religious-vocation programs—rather than earnings-premium measures—would still directly target the harms that concern the Department (loan non-repayment and program quality), while avoiding the punishment of programs that deliberately prepare students for modestly compensated religious vocations. This alternative is far less restrictive than the broad-brush approach outlined in the Proposed Rule, yet it advances the same fiscal and program-integrity interests.

Insofar as the earnings rule is meant to protect students, it would be less restrictive to require religious schools to provide students with clear, comparable data about what graduates from their school or their program have earned, while allowing those programs to remain eligible for federal loans. This approach preserves the Department's interest in ensuring that students understand the economic consequences of their choices, but leaves space for those who, with full information, nevertheless choose lower-earning ministries or other religious vocations.

In addition, the Department could tailor the rule so that theology and religious-vocation programs (for example, programs coded under CIP 38 and 39) at institutions that qualify for the Title IX religious exemption are not counted as "low-earning outcome programs" for purposes of institutional sanctions, and are not subject to loss of eligibility so long as they meet reasonable repayment or default benchmarks. Using existing CIP codes and the familiar Title IX religious-exemption framework would allow the Department to continue advancing its accountability and integrity interests across the broader higher-education sector, while narrowly relieving the acute burden on religious institutions whose mission is to prepare students for low-earning but socially valuable religious vocations.

Each of these alternatives relies on tools the Department already uses—CIP codes, default and repayment metrics, transparency disclosures, and the Title IX religious-exemption process—so they are administratively workable while being significantly less restrictive of religious exercise.

CONCLUSION

Thank you for the opportunity to provide public comment. I encourage the Department to carefully consider its obligations under RFRA and the Administration's strong commitment to protecting religious liberty as it crafts its final rule.

Sincerely,

Eric N. Kniffin, J.D.
Fellow
Administrative State Accountability Project
Ethics & Public Policy Center