AMERICAN ATHEISTS

August 1, 2019

Frank Brogan
Assistant Secretary of Elementary and Secondary Education
U.S. Department of Education
400 Maryland Avenue SW, Room 3W104
Washington, DC 20202-5900

Re: Comments Regarding "Title I-Improving the Academic Achievement of the Disadvantaged and General Provisions; Technical Amendments" (Doc. Identifier ED-2018-OESE-0106)

Dear Mr. Brogan:

American Atheists writes in response to the Final Rule and request for public comment entitled "Title I-Improving the Academic Achievement of the Disadvantaged and General Provisions; Technical Amendments" published on July 2, 2019.[1] American Atheists has grave concerns regarding the provision of the final rule permitting school districts to contract with religious organizations to use Title I funding. Specifically, the final rule misapplies the holding from the *Trinity Lutheran Church of Columbia, Inc. v. Comer* decision[2] and violates the Administrative Procedure Act (APA)[3] because substantive policy changes were made with no notice and comment period. We urge you to withdraw the provision within the final rule[4] which undermines the religious freedom of students and endangers Title I funding.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. As advocates for religious liberty and equality, American Atheists opposes laws and policies which would favor religion over non-religion or provide special privileges to religious organizations.

The relevant amendment in the final rule relates to what entities may contract with school districts using Title I funding to provide special education services for children enrolled in private schools. The amendment removes protections for the separation of religion and government intended to protect the religious freedom of students. Instead the amendment would permit

[1] 84 FR 31660.
[2] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017). (Hereinafter referred to as "*Trinity Lutheran*").
[3] 5 U.S.C. § 551 et seq. (1946).
[4] CFR 34 § 200.64(b)(3)(ii)(A) (hereinafter, "amendment").

American Atheists
225 Cristiani St.
Cranford, NJ 07016

phone 908.276.7300
fax 908.276.7402
www.atheists.org

Local Education Agencies (LEAs) to contract with religious organizations to provide special educational services for children in private schools. This is a departure from statutory requirements[5] intended to protect religious equality, as required by the by Establishment Clause of the First Amendment.

The final rule applies the holding of *Trinity Lutheran* incorrectly, and it undermines the religious freedom of students.

The relevant amendment was based on the Department's Policy Guidance Letter issued on March 11, 2019. The letter states that the prior regulations "impermissibly exclude[] a class of potential equitable services based solely on their religious status" and that "[i]t categorically excludes religious organizations simply because they are religious."[6] Not only does this letter mischaracterize the relevant provision, it misinterprets *Trinity Lutheran* by broadening the holding to a degree not indicated by the Supreme Court.[7] The Department concedes that this interpretation of the *Trinity Lutheran* decision is the main factor in their decision to include the relevant amendment. However, *Trinity Lutheran* does not compel the relevant amendment, and in fact, the language amended by the final rule was a reasonable and constitutionally required protection for students' religious freedom.

Firstly, *Trinity Lutheran* is a very narrow decision that does not extend to taxpayer-funded special educational services for children in private school. On its face, the decision applies to a narrow circumstance where religious organizations, based on their religious nature alone, were unable to receive public benefits for a secular purpose. However, the amendment at issue deals not with public benefits or grants, but with contracts for special education services. Government contracts to provide essential services are legally distinct from public benefits, and there are valid, nondiscriminatory reasons why such contracts may not be appropriate for religious providers. For example, religious providers may be allowed religious exemptions that undermine the purpose of the statute, or the imposition of a religious provider may result in less accessible services, as beneficiaries who are atheists or religious minorities may be unable or unwilling to access such a provider.

Further, *Trinity Lutheran* does not apply because the amendment was not a simple exclusion of religious organizations but part of a larger regulatory structure with complex contractual requirements. Religious organizations were not the only group excluded from potential contracts with school districts; third party providers that were affiliated with the relevant private schools were also excluded. This is not a simple exclusion based merely on the religious nature of the organizations; it is a good-faith attempt to offer students services while protecting their religious

[5] 20 U.S.C. § 6320(d)(2)(B) (stating that these contracted services will be provided independent of any religious organization).
[6] Key Policy Letter from Education Secretary Betsy DeVos to Speaker of the House of Representatives, Honorable Nancy Pelosi (March 11, 2019). Available at https://www2.ed.gov/policy/elsec/guid/secletter/190311.html (Hereinafter referred to as "the letter").
[7] *Trinity Lutheran*, 137 S.Ct. 2012, 2024 n.3 (2017) (A plurality of the court specifically highlighted that the case is limited to this specific set of facts: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.").

freedom. Congress recognized that there would be serious conflicts of interest and a negative impact on student accessibility if the only special education benefits available to students in private schools were associated with a single religious provider or a single private school, and so the structure is designed to prevent this outcome. This is markedly different from the type of unequal access by religious organizations to public benefits that *Trinity Lutheran* teaches against.

Finally, we note that the amendment removes structural protections for student religious freedom, and therefore it makes more likely religious discrimination against students and improper usage of Title I funding for religious purposes. For this reason the statutory requirement that "educational services or other benefits, including materials and equipment, shall be secular, neutral, and nonideological"[8] becomes even more critical to meet constitutional requirements. We urge the Department to fully and proactively enforce this provision to protect the religious equality of participating students.

The APA prohibits agencies from making substantive changes, such as the relevant amendment, without a notice and comment process.

The APA specifies that as a general matter, agencies must follow a notice and comment process when issuing regulations.[9] While there are limited exceptions to this requirement, the Department must have "good cause" to elide a notice and comment process. A rulemaking may qualify for a good cause exception if the notice and comment process would be impracticable, unnecessary, or contrary to public interest. These exceptions are interpreted very narrowly and require substantial justification by the agency.[10]

Here, the Department declared that the relevant amendment was mandatory due to its misinterpretation of *Trinity Lutheran*, as discussed above. However, the Department did not demonstrate that it had good cause to evade the notice and comment process, and there is no reason to believe that such a process would be impracticable or contrary to the public interest.

Instead, the Department asserts that the notice and comment process is unnecessary because it has labeled the amendment a non-substantive "technical change[]."[11] Moreover, the Department has invited comments subsequent to the issuance of the final rule. However, this process is impermissible under the APA because 1) the relevant amendment is a substantive policy change and 2) the after-the-fact comment period does not cure the Department's procedural missteps.

[8] 20 U.S.C. § 6320(a)(2); 34 CFR § 200.62(c) ("The services and other benefits an LEA provides under this section must be secular, neutral and nonideological.").
[9] 5 U.S.C. § 553.
[10] *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 764 (3d Cir. 1982) ("circumstances justifying reliance on [the good cause] exception are indeed rare") (alterations in original) (internal quotation marks and citation omitted).
[11] 84 FR 31669 ("There is good cause here for waiving rulemaking because these regulations make technical changes only to align with current law and do not establish substantive policy.").

As discussed above, *Trinity Lutheran* does not compel the proposed amendment, but even if the holding did apply to contracts, the removal of these critical religious freedom protections for students would still be a substantive policy change. The Department points to the previously issued Key Policy Letter to imply that this change is not substantive, but the letter constitutes subregulatory guidance and so it was never subject to a notice and comment process. The letter constitutes merely a non-legally binding enforcement priority rather than enforceable regulatory change.

Moreover, this policy change may drastically change the contracting process for third party providers seeking to provide the relevant services to school districts by opening the pool of competitors for these contracts, likely impacting their ability to obtain such contracts. The amendment will also have a significant effect on the student beneficiaries and their families, who now may be forced to receive services from religious providers contracted by the school district. Clearly, this is no mere technical amendment or insignificant change.

Perhaps most significantly, the amendment cannot be characterized as non-substantive because it directly contravenes a statutory requirement intended to protect student's religious freedom.[12] The Department does not have authority to unilaterally declare underlying statutes unconstitutional and thereby void mandatory implementing regulations without even a notice and comment process. To do so makes a mockery of the legal and procedure safeguards Congress established through the APA.

Finally, it is well-established that an after-the fact comment period does not cure procedural infirmities in the rulemaking process.[13] In the Third Circuit's recent case striking down a similar procedurally improper rule, the court noted that the nature of the engagement with the public changes when the required notice and comment process is ignored in this way. This fatally taints the required process by changing the question from whether the amendment should be made at all to whether it should be finalized.

Conclusion

The prior regulations provided appropriate protection for religious freedom, and the holding in *Trinity Lutheran* did not compel their reexamination. Revising the regulations to permit school districts to contract with religious organizations removes structural safeguards intended to protect religious equality for the beneficiaries of these programs, the students receiving special education services. Moreover, because the Department did not follow notice and comment procedures required by the APA, the final rule is invalid. We strongly urge the Department to withdraw the relevant portion of the final rule and to reconsider this ill-conceived attempt to undermine the religious freedom of vulnerable students.

[12] 20 U.S.C. § 6320(d)(2)(B).
[13] *See Pennsylvania v. President United States*, No. 17-3752, 2019 WL 3057657 (3d Cir. July 12, 2019), as amended (July 18, 2019).

If you should have any questions regarding American Atheists' position on this regulation, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Very Truly Yours,

Alison Gill, Esq.
Vice President, Legal and Policy
American Atheists