

# The Federal Update for February 24, 2023

From: Michael Brustein, Julia Martin, Steven Spillan, Kelly Christiansen

Re: Federal Update

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## Legislation and Guidance

### ED Proposes to Roll Back Free Inquiry Rule

On Wednesday, the U.S. Department of Education (ED) issued a Notice of Proposed Rulemaking (NPRM) in which it proposes to rescind a portion of the 2020 Religious Liberty and Free Inquiry rule. The rule, which was issued during the Trump administration, requires public institutions of higher education (IHEs) to uphold the First Amendment and prohibits IHEs from denying religious student groups any benefits that other groups enjoy. If IHEs violate the rule, they risk losing federal education grant funding.

Critics of the 2020 rule noted that it could be interpreted to require IHEs to go beyond First Amendment protections. While the rule was based in Supreme Court precedent in *Trinity Lutheran* (2017), they argue that the rule goes beyond what would be required by that decision. They allege that the rule, as written, requires IHEs to allow faith-based groups to discriminate against other students on campus based on religion, race, sexual orientation, or other factors. In response to these concerns, the Biden administration announced in September of 2021 that ED was conducting a review of regulations related to First Amendment freedoms.

After the almost year-and-a-half review, ED has determined that the rule (1) was not necessary to protect First Amendment rights, (2) has created confusion for IHEs, and (3) is unduly burdensome for ED to manage, as it relates to grant funding. Additionally, ED found that the threat of loss of grant funds did not help achieve the goal of religious freedom. Throughout the NPRM, ED stressed that this proposed rule change does not change its commitment to religious freedom.

ED also issued a separate Request for Information (RFI) on Wednesday. The RFI seeks comments on the parts of the free inquiry rule dealing with grants and free speech compliance. Some have noted that this may lead to ED rescinding the entire rule.

ED will accept comments on the NPRM and RFI through March 24,2023.

[The Notice of Proposed Rulemaking can be found here.](https://www.federalregister.gov/documents/2023/02/22/2023-03670/direct-grant-programs-state-administered-formula-grant-programs)
[The Request for Information can be found here.](https://www.federalregister.gov/documents/2023/02/22/2023-03671/request-for-information-regarding-first-amendment-and-free-inquiry-related-grant-conditions)

Resources:

Katherine Knott, “Biden Administration to Rescind Part of Religious Freedom Rule,”

*Inside Higher Ed*, February 23, 2023.

Author: BNT

## News

### OCR Fields Rapid Rise in Complaints

The U.S. Department of Education’s Office for Civil Rights (OCR) reportedly received more complaints in 2022 than ever before – a record 18,804 from October 2021 to September 2022.

The previous record for complaints was in fiscal year 2016, when the office received more than 16,700. While OCR did not specify how many complaints are related to higher education versus primary and secondary, it did provide that most of them involved allegations regarding accommodations for students with disabilities.

The office also noted that it has been challenging to quickly address the rapidly increased number of complaints, and though it received an increase in appropriations in this fiscal year, it was much less than requested.

In a discussion with the publication *Inside Higher Ed*, former Assistant Secretary for Civil Rights Kenneth Marcus suggested that while there are some differences in who is more willing to file complaints based on political affiliation, many of the changes could come down to the pandemic’s impact on people’s expectations. Marcus said: “I think it has led to a situation in which people are often responding to one another in ways that are less healthy than before COVID. Universities have not been responding well to that. I think they’re overwhelmed, to some extent.”

Resources:
Katherine Knott, “OCR Complaints Show Pandemic’s Effects,” *Inside Higher Ed*, February 21, 2023.
Author: JCM

## Reports

### GAO Issues Report on CSP Enrollment Trends

The Government Accountability Office (GAO) released a report this week that examines enrollment trends in schools receiving Charter School Program (CSP) funds compared to charters not participating in that grant program. CSP funds are intended to help open and expand charter schools.

The report examines a 14-year period from 2006 – 2020 and compared CSP-funded charters to similar charter schools that did not participate in that federal program. GAO generally found that CSP-funded schools had higher enrollment levels compared to charters that did not receive CSP funding – 1.3 to 1.6 times higher enrollment expansion within the period examined. The enrollment gains were even higher in CSP schools with certain demographics, including charters with high numbers of non-white students and low-income students, as well as middle schools and urban schools.

The GAO report also analyzed student subgroup differences between CSP schools, non-CSP schools, and traditional public schools. GAO found that traditional public schools served higher rates of students with disabilities, Asian students, white students, and multiracial students compared to charter schools generally, regardless of whether the charters were CSP participants or not. Charter schools, regardless of whether they received CSP funding, were more likely to serve higher percentages of Hispanic, Black, and Section 504-participating students.

The GAO was required to conduct the analysis under a provision in the fiscal year 2021 appropriations bill.

[The full report is available here](https://www.gao.gov/assets/gao-23-106268.pdf).

Author: KSC

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Contributors: Julia Martin, Kelly Christiansen, Brandi Tennant
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