



**Department of Education
The Expanding Opportunity
Through Quality Charter Schools
Program (CSP)**

DECEMBER 9, 2020



Basic Background

1

The Federal Charter School Program (CSP) is:

- **Bipartisan-supported federal program to create, replicate, and expand high-quality public charter schools in the US**
- **Composed of multiple subcompetitions that award funds to State entities, charter management organizations (CMOs), and charter school developers**
- **Generally speaking, this funding acts as seed money to help support the creation, expansion, and growth of state-authorized public charter schools**





The Expanding Opportunity Through Quality Charter Schools Program (CSP)

2

- ▶ The CSP was added to the Elementary and Secondary Education Act of 1965 (ESEA) by the No Child Left Behind Act of 2001.
- ▶ The ESEA defines “charter school” as a “public school” that is “exempt from significant State or local rules that inhibit the flexible operation and management of public schools,” but that is nonetheless “operated under public supervision and direction.” 20 U.S.C. § 7221i(2)(A), (B).
- ▶ Under the ESEA, a charter school must be both “nonsectarian in its programs, admissions policies, employment practices, and all other operations” and “not affiliated with a sectarian school or religious institution.” *Id.* § 7221i(2)(E).
- ▶ The Department of Education asked the Department of Justice’s Office of Legal Counsel (DOJ OLC) whether excluding religious affiliated charter schools from participating in the CSP was unconstitutional.





DOJ OLC Opinion: Exclusion of Religiously Affiliated Schools from Charter-School Grant Program

- ▶ The DOJ OLC's opinion says that limiting eligibility for the CSP to schools "not affiliated with a sectarian school or religious institution" violates the Free Exercise Clause of the First Amendment.
- ▶ <https://www.justice.gov/olc/file/1330966/download>



What does this mean?

- ▶ A religious institution such as a church, a synagogue, or a mosque may now own or operate a charter school, and the owners or operators of a charter school may now affiliate with a religious institution.



Remember:

- ▶ Religiously affiliated charter schools must still comply with the statute's requirements that the charter school be "nonsectarian in its programs, admission policies, employment practices, and all other operations."





Trinity Lutheran Church of Columbia, Inc. v. Comer

4



Trinity

- ▶ DOJ relied on the Supreme Court's analysis in *Trinity Lutheran*
- ▶ The Court in *Trinity Lutheran* struck down a Missouri policy “of denying grants to any applicant owned or controlled by a church, sect, or other religious entity,” as discrimination on the basis of religious status that violates the Free Exercise Clause
- ▶ “The Free Exercise Clause protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.” *Trinity Lutheran*, 137 S. Ct. at 2022 (internal quotation marks and citation omitted).
- ▶ The Court also found that the interest in “skating as far as possible from religious establishment concerns” was not enough to support such status-based discrimination. *Trinity*, 137 S. Ct. at 2024.



Charter School Program

- ▶ The requirement that schools participating in the CSP not be “not affiliated with a sectarian school or religious institution” unconstitutionally discriminates on the basis of religious status under *Trinity Lutheran*
- ▶ This restriction goes beyond assuring the non-sectarian character of the charter-school program itself. Instead, it is aimed at the religious character of individuals and organizations that seek to create, own, or operate nonsectarian charter schools run under public supervision.
- ▶ The Establishment Clause permits the government to include religious institutions, along with secular ones, in a generally available aid program that is secular in content, like the CSP





RELIGIOUS FREEDOM RESTORATION ACT

5

- RFRA stands for Religious Freedom Restoration Act
- RFRA "provide[s] very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 693 (2014).
- Under RFRA, "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the [organization] — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b).
- A "person" includes an organization, *Hobby Lobby*, 573 U.S. at 708





RELIGIOUS FREEDOM RESTORATION ACT

6

- RFRA is a superstatute; Congress expressly applied RFRA to all Federal law, statutory or otherwise, whether adopted before or after its enactment. 42 U.S.C. § 2000bb-3(a).
- RFRA applies to all laws governing ED programs including the CSP
- RFRA further applies to all actions by ED, including rulemaking, adjudication, or other enforcement actions, and grant or contract distribution and administration. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020).





RFRA INFORMATION SUBMISSION PROCESS

7

- **ED has a RFRA Information Submission Process in place.**
- **Utilizing this process has no impact on an ability to bring an independent lawsuit against the Department under RFRA.**
- **Information may be submitted by the burdened individual or organization, or by an individual on behalf of another burdened person or organization.**





RFRA INFORMATION SUBMISSION PROCESS

8

Information in submission

- Filer contact info
- Burdened person's name
- The following statement, signed by either the burdened person or his or her parent, in appropriate circumstances: "I give the Department of Education my consent to reveal my identity (and that of my minor child/ward on whose behalf the submission is filed) to others to further the Department's investigation and enforcement activities."
- Description of religious exercise at issue
- Explanation of whether religious exercise stems from sincerely held religious belief
- Description of Department program at issue
- Description of how the Department has substantially burdened religious exercise
- Description of how any other entity or individual has substantially burdened religious exercise if the use of Department funds
- The date(s) of any alleged violation, and whether it is ongoing





RFRA INFORMATION SUBMISSION PROCESS

9

- Individuals can email the Department at RFRA@ed.gov.
- Individuals can also mail or fax their submission to OGC.
- OGC will work with CFOT and any relevant program offices or Federal agencies to review the information and determine whether further investigation is warranted.
- Within 30 calendar days of the Department's receipt of the submission, the Department will apprise the filer in writing of any additional actions the Department will take.





RFRA INFORMATION SUBMISSION PROCESS

10

COURSES OF ACTION MAY INCLUDE:

- **Following up for more info from filer, burdened person, or third parties**
- **Directing filer to another organization for further help**
- **Initiating existing remedies for noncompliance against a grant recipient including a State, as outlined in Title 34 of the Code of Federal Regulations, Subpart G of Part 75 and Subpart I of Part 76.**





Other Relevant Information

11

Recommended Next Steps:

- Familiarize yourself with your State's charter laws and requirements, if not already familiar
- Sign up for notifications at [federalregister.gov](https://www.federalregister.gov)
- Review past grant applications, webinars, and other materials at [oese.ed.gov](https://www.oese.ed.gov)
- Visit the Charter School Resource Center at [charterschoolcenter.ed.gov](https://www.charterschoolcenter.ed.gov)

