



## ADVANCING FAITH, FAMILY AND FREEDOM

January 28, 2019

Submitted Electronically

Brittany Bull  
U.S. Department of Education  
Room 6E310  
400 Maryland Avenue SW  
Washington, DC 20202

Re: Proposed Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance  
**Docket ID: ED-2018-OCR-0064**

To whom it may concern:

Family Research Council<sup>1</sup> respectfully submits the following comments on the proposed rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance at 83 Fed. Reg. 61462, November 29, 2018.

Religious freedom rights, including those of faith-based educational institutions, should be robust. In fact, preserving the ability of an institution to operate according to its theological beliefs positively reinforces religious freedom rights. As constitutional law scholar Michael W. McConnell once said in the context of a school's control over academic matters, "religiously distinctive institutions of higher education are necessary for religious freedom."<sup>2</sup> The proposed rule is consistent with the robust view of religious freedom for religious educational institutions that has been expressed by Congress and the U.S. Supreme Court.

In Title IX, 20 U.S.C. §§ 1681-88, Congress affirmed the high value of maintaining the distinctive character of educational institutions that are "controlled by a religious organization," *id.* § 1681(a)(3), by exempting them from its terms, likely because Congress recognized that

---

<sup>1</sup> Family Research Council (FRC) is a 501(c)(3) nonprofit public-policy organization headquartered in Washington, D.C. Founded in 1983, FRC exists to advance faith, family, and freedom in public policy and the culture from a Christian worldview. As part of its work, FRC believes in a robust role for religion in the public square, and it aims to advance religious freedom in the United States and promote an understanding of the Establishment Clause and Free Exercise Clause consistent with their original meanings.

<sup>2</sup> Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 Duke L. J. 303, 315 (1990) (altering capitalization).

certain religiously based practices would contradict the mandate but were necessary to preserve the schools' religious character.

Congress also enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, "in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). RFRA states that the government may not "substantially burden" the free exercise of religion absent a "compelling government interest" furthered by "the least restrictive means." 42 U.S.C. § 2000bb-1(b). Under the definition of "person[s]," *id.*, as defined by the Dictionary Act, 1 U.S.C. § 1, educational institutions are covered by the terms of RFRA and are thus protected from government infringement on their exercise of religion.

This robust protection of religious freedom rights is also consistent with the Supreme Court's rulings in *Burwell* and *Hosana-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). In *Burwell*, the Court concluded that RFRA precluded the application of a federal regulation to closely held, for-profit entities, as the regulation's penalties of up to \$26 million would have constituted a substantial burden on the exercise of the entities' religion. 134 S. Ct. at 2776. And in *Hosana-Tabor*, while acknowledging that society's interest in antidiscrimination laws, particularly in matters of employment, "is undoubtedly important," 565 U.S. at 196, the Court concluded that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision," *id.* at 188. It "infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Id.*

The current regulation set forth in Part 106 to effectuate the Title IX exemption for "[e]ducational institutions controlled by religious organizations," 34 C.F.R. § 106.12, undermines the robust view of religious freedom so expressed by Congress and the Supreme Court. Currently, the U.S. Department of Education's (Department) Office for Civil Rights' website on "Exemptions from Title IX" states that the Department "does not require that a recipient institution submit a written claim of exemption."<sup>3</sup> But 34 C.F.R. § 106.12 states that an educational institution controlled by a religious organization that "wishes to claim the exemption" from the regulations "shall do so by submitting in writing" to the Department "a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization." (Emphasis added.) This express contradiction introduces confusion that imposes a burden on the execution of an institution's religious freedom rights. An institution should not be uncertain of its ability to maintain federally funded programs or the "right to shape its own faith and mission" because

---

<sup>3</sup> "Exemptions from Title IX," Office for Civil Rights, U.S. Dep't of Educ., <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html> (last modified Sept. 25, 2018).

protections for its theologically-based policies<sup>4</sup> are apparently inactive without a written submission by the institution to the Department.

This proposed rule removes this burden from an institution (1) by clarifying that there is no requirement that an institution “seek assurance of its religious exemption” by a written request from the government and (2) by ensuring that an institution can “invoke its religious exemption during the course of any investigation pursued against the institution by the Department,” even if the institution did not seek an assurance of its exemption.<sup>5</sup> Moreover, this proposed rule would not be the first time the government streamlined unnecessary administrative processes imposed upon religious entities seeking to comply with federal law while maintaining their theological beliefs. *See, e.g., Zubik v. Burwell*, 136 S. Ct. 1557, 1559-60 (2016) (stating that the government agreed that “contraceptive coverage could be provided to [objecting employers’] employees, through [said employers’] insurance companies, without any such notice from [employers],” when to do otherwise would violate the objecting employers’ consciences). As the Department recognizes, it “should not impose confusing or burdensome requirements on religious institutions that qualify for the exemption.”<sup>6</sup>

Eliminating the proactive waiver requirement is consistent with a robust view of religious freedom. We urge the government to adopt this proposed rule.

Respectfully submitted,

/s/ Alexandra M. McPhee, Esq.  
Director of Religious Freedom Advocacy

FAMILY RESEARCH COUNCIL  
801 G Street, NW  
Washington, DC 20004  
(202) 393-2100

---

<sup>4</sup> On-campus student housing policies, for instance, can involve a person’s sex, like policies that prohibit cohabitation of same-sex couples or the placement of a transgender individual in housing according to preferred rather than biological sex. *See generally* Andy Birkey, *Dozens of Christian schools win Title IX waivers to ban LGBT students*, The Column (Dec. 1, 2015), <http://thecolu.mn/21270> (describing efforts to obtain Title IX waivers when theologically-based housing policies conflicted with Title IX’s provisions).

<sup>5</sup> “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” regulations.gov, [https://www.regulations.gov/document?D=ED\\_FRDOC\\_0001-0830](https://www.regulations.gov/document?D=ED_FRDOC_0001-0830) (last visited Jan. 28, 2019).

<sup>6</sup> *Id.*