



[Docket ID ED-2019-OPE-0080-0001]

February 18, 2020

Submitted electronically via www.regulations.gov

Lynn Mahaffie
Deputy Assistant Secretary for Policy, Planning, and Innovation
Office of Postsecondary Education
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: RIN 1840-AD45, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program

Dear Ms. Mahaffie:

Public Justice, a non-profit legal advocacy organization with programs dedicated to protecting civil, consumer and workers' rights, as well as environmental sustainability and access to the courts, is writing in response to the Department of Education's proposed rule, published in the Federal Register on January 17, 2020, to expand the religious exemption in Title IX of the Education Amendments of 1972.¹ Public Justice strongly opposes the Department's proposed rule because it would substantially and unjustifiably expand Title IX's limited exemption for religious schools to schools with little or no connection to a religion, at the expense of students who too often face discrimination and harassment—women and girls; lesbian, gay, bisexual, transgender and queer (“LGBTQ”) students; pregnant and parenting students; and students making decisions about their reproductive health. Public Justice is deeply concerned that the proposed rule would eliminate longstanding protections for students, abdicating the Department's legal responsibility to enforce Title IX's nondiscrimination mandate of sex equality in education. For the reasons explained below, Public Justice requests that the Department withdraw its proposed rule and, instead, focus its efforts on enforcing Title IX's mandate of equal access to education for all students.

This request is based on Public Justice's significant experience representing students in federal cases across the country and administrative complaints filed with the Department's Office for Civil Rights (“OCR”) to address the sex discrimination and harassment they have suffered. Our Title IX work focuses on ensuring that K-12 schools and institutions of higher education provide *all* students—regardless of sex, sexual orientation, gender identity, gender expression, race,

¹ 85 Fed. Reg. 3190 (proposed Jan. 17, 2020), to be codified at 2 C.F.R. pt. 3474, 34 C.F.R. pts. 75, 76, 106, 606, 607, 608, 609.

ethnicity, disability, religion, or family status—a safe and welcoming educational environment, free from sex discrimination. And our Title IX work has often resulted in systemic change, designed to protect equal access to education. For example, Public Justice successfully advocated for changes to Claflin University’s policies regarding on-campus housing for expectant mothers, convincing the religiously-affiliated university to abandon its discriminatory policies prohibiting pregnant students from residing on campus. As an organization that represents many students who have suffered sex discrimination and harassment, Public Justice sees the harmful consequences of such conduct and school officials’ failure to fulfill their Title IX obligations to address it.

Public Justice believes that the Department’s proposed rule ignores the prevalence of sex discrimination and harassment in our nation’s schools and would hobble Title IX enforcement, placing a premium on protecting schools from legal liability instead of protecting students from harm.

I. The Proposed Rule Represents an Unwarranted Expansion of Title IX’s Religious Exemption

Title IX permits a limited religious exemption for schools. When a school is “controlled by a religious organization,” and a particular aspect of Title IX would conflict with the tenets of the religious organization that controls it, the school may be eligible for an exemption from that aspect of Title IX.² Contrary to the narrow religious exemption specified in Title IX, the Department’s proposed rule would expand the exemption to a far broader range of schools.³

Title IX includes important limitations on educational institutions that may qualify for an exemption. In particular, an institution must be “controlled by a religious organization.”⁴ This means it is not sufficient for a school to be affiliated with a religion or to follow certain religious principles; the school must be controlled by another organization, one that has specific religious tenets and exerts control over a school.

For more than three decades, the Department has had a specific test in place for determining whether a school is “controlled by a religious organization.” Under its longstanding policy, the Department would typically find that a school is controlled by a religious organization when one of the following is true: (1) it is a divinity school; (2) it requires employees or students to subscribe to the religion of the controlling organization; *or* (3) its official documents say it is controlled by a religious organization or is committed to the doctrines of a religion, *and* the members of its governing board are appointed by the controlling religious organization, *and* it gets “a significant amount of financial support” from the controlling religious organization.⁵ The proposed rule would undo this longstanding test and add a wide range of new grounds on which a school may rely to claim the exemption.⁶

² 20 U.S.C. § 1681(a)(3); *see also* 34 C.F.R. § 106.12(a).

³ Proposed Rule, 85 Fed. Reg. at 3206.

⁴ 20 U.S.C. § 1681(a)(3).

⁵ *See, e.g.*, Office for Civil Rights, “Exemptions from Title IX,” U.S. Department of Education, <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html> (last modified Jan. 15, 2020).

⁶ *See* Proposed Rule, 85 Fed. Reg. at 3226 (proposed 34 C.F.R. pt. 106.12(c)).

Many of the proposed grounds do not require a school to show that it is “controlled by a religious organization,” ignoring the unambiguous text of Title IX. Some of the grounds do not even mention religion at all. For example, if the proposed rule were adopted, the Department’s position would be that schools meet the “controlled by a religious organization” test simply by saying that they “subscribe to specific moral beliefs or practices.”⁷ They would not need to point to any particular religious organization that controls them or a religious organization from which those moral beliefs or practices originated. The proposed rule does not even say those moral beliefs or practices have to be connected to religion at all. Thus, as currently drafted, the proposed rule would permit a school with only a tenuous relationship with religion to claim an exemption. In fact, applied literally, this part of the proposed rule would permit schools that are not religious at all to claim the religious exemption just by saying that they believe in (secular) moral principles.

By interpreting the exemption so broadly, and departing so far from the limited exemption set forth in Title IX’s text, the Department is unjustifiably opening the door for many more schools—beyond those actually controlled by a religious organization—to obtain an exemption. As a result, the proposed rule is “in excess of statutory authority,” in violation of the Administrative Procedure Act that governs the rulemaking process.⁸

II. The Proposed Rule Would Likely Harm Students and Employees

By expanding Title IX’s religious exemption to institutions that are not truly “controlled by a religious organization,” the proposed rule would make it legal for many educational institutions to subject students, as well as teachers and other school employees, to discrimination on the basis of sex. This would result in more students and employees experiencing sex discrimination, including discrimination based on seeking reproductive health care, being pregnant, being LGBTQ, or not conforming to the school’s views of how men and women should look and act.⁹

The harms to students and employees from the proposed rule would include:

- **Direct financial costs**, such as lost tuition for students who are expelled and lost wages for employees who are fired for discriminatory reasons that would otherwise violate Title IX and Title VII’s prohibition of employment discrimination;
- **Lost educational and professional opportunities**, such as the inability to obtain a college degree, maintain a job, or get a promotion; and
- **Health-related costs of increased discrimination**, such as the impact on psychological, emotional, and physical health.

⁷ *Id.* (proposed 34 C.F.R. pt. 106.12(c)(5)).

⁸ 5 U.S.C. § 706.

⁹ These are all forms of prohibited sex discrimination. *See, e.g.*, 34 C.F.R. § 106.40(b)(1) (discrimination based on pregnancy, childbirth or termination of pregnancy); *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358 (3d Cir.) (discrimination based on having had an abortion); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (discrimination based on sex stereotyping); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017) (discrimination based on transgender status); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (discrimination based on sexual orientation).

These harms are not hypothetical. We have seen them happen when schools are allowed to discriminate based on sex. For example, Public Justice represented senior honors student Kamaria Downs after South Carolina's Claflin University kicked her out of its dorms and told her to move off campus because of her pregnancy. For Downs, who had pre-paid her dorm room and meal plan, living at home more than two-and-a-half hours away from school was not an option. Losing the money she had paid for meals and housing, she would not have been able to complete her college degree if not for the help of a university employee who allowed Downs to live at her home for the remainder of the school year.¹⁰

There is also extensive documentation of the emotional, financial, and professional harms to students who have been expelled for being in a same-sex relationship or being transgender,¹¹ and school employees who have been fired for having an abortion,¹² becoming pregnant outside of marriage,¹³ or failing to conform with a school's beliefs about the proper roles of women.¹⁴

Compounding these harms, because the proposed rule would eliminate the requirement that schools give notice of the religious exemptions they seek, many students and employees would have no notice that their school claims to be exempt from Title IX's requirements.¹⁵ At a minimum, if students and employees had notice, they would have an opportunity to matriculate or work at an educational institution where they would not be treated differently based on their sex.

III. The Department Failed to Address Evidence of the Proposed Rule's Adverse Impact on Persons Protected by Title IX

The Department is legally required to explain its reasons for the proposed rule and provide supporting evidence.¹⁶ It is also required to assess all the costs and benefits of the proposed rule.¹⁷ The Department has failed to do any of these things.

¹⁰ Susan Donaldson James, *Student Changes Christian College's Policy After Being Kicked Out For Being Pregnant*, <https://www.nbcnews.com/feature/college-game-plan/student-changes-christian-college-s-policy-after-getting-kicked-out-n649381> (last visited Feb. 18, 2020).

¹¹ See, e.g., Sarah Warbelow & Remington Gregg, *Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk*, https://assets2.hrc.org/files/assets/resources/Title_IX_Exemptions_Report.pdf (2015).

¹² See, e.g., *Ducharme v. Crescent City Déjà Vu, LLC*, No. 18-4484 (E.D. La. May 13, 2019).

¹³ See, e.g., Dana Liebelson & Molly Redden, "A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time," *Mother Jones* (Feb. 10, 2014), <https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant/>; *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340 (E.D.N.Y. 1998).

¹⁴ For example, a pregnant employee at a religious school was denied a contract renewal because of the school's belief that mothers should stay at home with young children. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623 (1986). Another religious school denied married women health insurance because it believed that women should not be the "head of household." *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).

¹⁵ See Proposed Rule, 85 Fed. Reg. at 3206, n. 77.

¹⁶ See, e.g., *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁷ See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

First, the Department does not explain why it is expanding Title IX’s religious exemptions. For example, it does not provide any explanation or evidence to justify extending the religious exemption to schools with “moral beliefs or practices,” regardless of whether those beliefs or practices are grounded in religion. And the Department does not even attempt to—nor can it—explain how such an expansion would be justified under the plain language of Title IX, which narrowly circumscribes the religious exemption.

Second, the Department does not offer any evidence to show that expansion of the religious exemption is necessary or that existing policy is inadequate to meet the needs of religious schools. In fact, in the almost 50 years since Title IX’s enactment, hundreds of schools have requested exemptions and the Department has not denied a single request, a fact the Department’s proposed rule fails to even mention.¹⁸

Additionally, the Department does not acknowledge or address the impact the proposed rule would have on students and school employees, including the costs of increased discrimination. As discussed above, discrimination has many costs to students and employees: financial, educational, professional, and health-related. The fact that the Department does not mention these costs, let alone consider them when assessing the costs and benefits of the proposed rule, is alarming because the core purpose of Title IX is to protect persons from sex discrimination.

Indeed, the Department does not do a meaningful cost-benefit analysis at all. In its assessment of the proposed rule’s impact—totaling four sentences—the Department claims, without citing any evidence, that the rule would have “no quantifiable costs” because the rule would not “substantially change the number or composition of entities asserting the exemption.”

In short, the Department ignores important and widely available evidence of the proposed rule’s costs, provides no evidence to back up its assessment of the rule’s impact, and conducts no real cost-benefit analysis. This deprives the public of the ability to meaningfully comment on the rule. This renders the proposed rule “arbitrary and capricious,” in violation of the Administrative Procedure Act.¹⁹

IV. The Proposed Rule Undermines the Department’s Mission and a Core Purpose of Title IX: Protecting Students

A core mission of the Department is to protect students and ensure that they have meaningful access to quality education. In particular, the mission of OCR, the office charged with enforcing Title IX, is “to ensure equal access to education . . . through the vigorous enforcement of civil rights.”²⁰ The very purpose of Title IX is to eliminate sex discrimination in education. The proposed rule turns Title IX on its head, prioritizing schools over the rights and needs of

¹⁸ See, e.g., Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. Kan. L. Rev. 327 (2016). See also Office for Civil Rights, “Other Correspondence,”

<https://www2.ed.gov/about/offices/list/ocr/correspondence/other.html> (last modified Jan. 10, 2020).

¹⁹ 5 U.S.C. § 706.

²⁰ Office for Civil Rights, “About OCR,” U.S. Department of Education, <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last modified Jan. 10, 2020).

students. Instead of focusing on protecting students from sex discrimination, the proposed rule focuses on protecting schools from legal liability. Even though protecting students is supposed to be a fundamental priority of the Department, the Department does not even discuss the possible (albeit, probable) adverse consequences of the proposed rule on students.

V. Other Provisions in the Proposed Rule Are Harmful

Another harmful consequence of the proposed rule is that beneficiaries of religious freedom would lose protections when they access government services through faith-based organizations. The proposed rule would remove essential protections for beneficiaries and employees of faith-based organizations who receive Department funding to provide social services. Specifically, the rule would: (1) remove the requirement that providers take reasonable steps to refer beneficiaries to alternative providers upon request; (2) eliminate the requirement that providers give beneficiaries written notice of their religious freedom rights; and (3) expand the exemption that allows faith-based organizations to discriminate against their employees with taxpayer money.²¹

The proposed rule would likely make it harder for beneficiaries to access programs serving marginalized young people. This includes programs such as 21st Century Community Learning Centers, which serves two million low-income youth and is the only source of federal funding dedicated exclusively to out-of-school learning programs, and Upward Bound, which helps low-income and other marginalized youth to prepare for college.²²

The proposed rule would also give special rights to religious student groups by allowing them to opt out of Title IX's nondiscrimination requirements, contrary to clear legal precedent. Colleges can require student organizations to comply with policies, including nondiscrimination rules, as a condition of receiving school funding or recognition. In *Christian Legal Society v. Martinez*, the Supreme Court held that colleges may apply these requirements equally to religious and non-religious student groups.²³ The Court explained that schools may decline to officially recognize student organizations, including religious student organizations that do not comply with the school's nondiscrimination rules—such as when a student organization bars gay students from its membership.²⁴

The proposed rule disregards this clear legal precedent. Instead, it says that schools have to create a special exception for religious student organizations and cannot require those organizations to follow policies or membership standards that conflict with their religious beliefs.²⁵ For example, this would mean that if a religious student group excluded from its membership all female, LGBTQ, and unmarried pregnant students, a school could not take any disciplinary action against or refuse to fund the group.

²¹ Proposed Rule, 85 Fed. Reg. at 3199.

²² Afterschool Alliance, “21st Century Community Learning Centers,” AfterschoolAlliance.org, <http://www.afterschoolalliance.org/policy21stccclc.cfm> (last accessed Jan. 31, 2020); U.S. Department of Education, “Upward Bound Program,” U.S. Department of Education, <https://www2.ed.gov/programs/trioupbound/index.html> (last modified Dec. 20, 2019).

²³ *Christian Legal Society v. Martinez*, 561 U.S. 661, 688-89 (2010).

²⁴ *See id.*

²⁵ Proposed Rule, 85 Fed. Reg. 3200.

VI. Conclusion

The Department's proposed rule would establish a significant, unwarranted expansion of Title IX's religious exemption. It would give educational institutions a free pass to discriminate in the name of religious liberty—even when those institutions have little or no demonstrable tie to any religious organization. This is contrary to the statutory text and purpose of Title IX, and exceeds the Department's statutory authority. The proposed rule is also arbitrary and capricious, as it fails to consider the very real harms the rule would cause students—a core group that Title IX is designed to protect. The proposed rule would cause more students to suffer financial, educational, professional, and health-related costs resulting from sex discrimination. It would also harm students by stripping away religious freedom protections in grant programs and allowing religious student groups to engage in discriminatory exclusions. The Department should withdraw the proposed rule and focus its efforts on robustly enforcing Title IX's nondiscrimination protections, instead of finding ways to expand schools' protections from Title IX liability.

We appreciate your consideration of our comments. If you have any questions, please contact Adele Kimmel (akimmel@publicjustice.net) at Public Justice.

Sincerely,

Public Justice