

U.S. Department of Education to Publish List of Institutions Requesting Title IX Waivers

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The U.S. Department of Education (the “Department of Education”) announced last week that it will publish a searchable database that lists the names of higher education institutions that have applied for and/or have received religious exemptions from Title IX. Assistant Secretary Catherine Lhamon specifically stated that “OCR is in the process of preparing . . . requests and responses [for religious exemptions] for posting on our website with a basic search tool so that applicants, students, parents, and others can be better informed about which educational institutions have sought and/or received a religious exemption.”

By way of brief background, it is well settled that Title IX prohibits discrimination on the basis of sex in any federally funded education program or activity. At the same time, Title IX allows religious exemptions to “any educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.” In seeking a religious exemption to Title IX, institutions must identify the provisions of Title IX that conflict with a “specific tenet of the religious organization.” Specifically, an eligible institution must submit a written request to the Assistant Secretary signed by the highest ranking official of the institution. The writing must demonstrate: (1) the religious organization that controls the institution; (2) the specific provisions of the Title IX regulations that conflict with its religious tenets; and (3) the religious tenets at issue.^[1]

In recent years, institutions have defended these types of religious exemptions, arguing that the exemptions allow them to abide by their religious beliefs in the midst of changing social and legal views on gender identity and sexual orientation. Moreover, as alleged by various institutions, this is especially true during a time where the Obama administration and the courts have significantly expanded Title IX’s nondiscrimination protections to include sexual orientation, gender identity, and gender nonconformity.

On the other hand, lesbian, gay, bisexual and transgender activists have criticized the religious exemptions, alleging that institutions are seeking to discriminate against gay and transgender students. To that end, the Department’s announcement came after eight U.S. senators sent a letter to the Department of Education urging it to publish religious waiver requests in order to help students make informed decisions about choosing which school to attend. In the letter, the senators wrote, “We are concerned these waivers allow for discrimination under the guise of religious freedom...Already, we have seen this same path used in our legal system to undermine benefits for women and used to facilitate discrimination on the basis of sexual orientation or gender identity.” The senators further argued that prospective students and their families are entitled to a greater level

of transparency on Title IX exemption requests and statuses.

The list of schools that were granted Title IX religious exemptions was published by The Column, a news outlet in Minnesota, and The Human Rights Campaign, an advocacy group which supports civil rights for LGBT communities. Both entities stated that they obtained the information through the Freedom of Information Act (“FOIA”). “Nearly three dozen religious institutions of higher learning have asked the federal government to waive laws that protect LGBT students, according to government documents obtained by The Column.” Specifically, “twenty-seven schools have been granted a waiver from Title IX by the department in the last year, many with the help of conservative religious organizations. Another nine have applications pending.” Thus, in total, nearly sixty institutions have submitted requests for Title IX waivers since 2014, the year in which the Department of Education expanded Title IX’s protections to transgender people.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

[1] See 34 C.F.R. § 106.12(b)