

August 12, 2022

The Honorable Miguel Cardona  
Secretary  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, D.C. 20202

**Re: Implementation of Title IX religious exemptions and necessary changes to the Trump Administration’s so-called “Free Inquiry Rule”**

Dear Secretary Miguel Cardona:

On behalf of the 32 undersigned national civil rights and religious equality organizations, we urge you to rescind the excessively broad changes to Title IX’s religious exemptions rules created by the Trump Administration and, further, to institute essential safeguards to protect students when their civil rights are impacted by religious exemptions. Specifically, we ask you to correct the extra-statutory definition of an “educational institution which is controlled by a religious organization,” require prior submission of religious exemption claims and appropriate notice to students and their families of religious exemptions, and rescind the *ultra vires* provisions requiring public colleges and universities to specially recognize and provide benefits to religious student organizations that fail to comply with basic nondiscrimination requirements that apply to other student groups. These changes are essential to protect student populations who are especially vulnerable to schools seeking to discriminate against them in the name of religion, including women and girls, LGBTQI+ students, and students accessing or attempting to access birth control or abortion.

E.O. 13864 (Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities) responded to an unfounded perception that institutions of higher education were systematically disadvantaging particular viewpoints.<sup>1</sup> In response, the Department of Education expanded educational institutions’ eligibility to claim religious exemptions,<sup>2</sup> clarified that religious schools may obtain waivers from the requirements of Title IX without prior submission of exemption claims—even after they are investigated for discrimination<sup>3</sup>—and required public universities to recognize and provide benefits to religious organizations that do not meet general

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<sup>1</sup> Exec. Order No. 13,864, 84 Fed. Reg. 11,401 (Mar. 26, 2019). Available at: <https://www.federalregister.gov/documents/2019/03/26/2019-05934/improving-free-inquiry-transparency-and-accountability-at-colleges-and-universities>.

<sup>2</sup> 34 C.F.R. 106.12(c).

<sup>3</sup> First proposed prior to the issuance of E.O. 13864 in Dept. of Ed., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (Nov. 29, 2018). Available at: <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

nondiscrimination requirements (hereinafter “2020 Free Inquiry Rule”).<sup>4</sup> Ironically, these policies undermined rather than expanded free inquiry, transparency, and accountability at colleges and universities. This controversial rule has been the subject of lawsuits,<sup>5</sup> and the Department has confirmed that it will, at least in part, be rescinded.<sup>6</sup>

We appreciate the recent steps the Department has taken to rectify the 2020 Free Inquiry Rule.<sup>7</sup> However, because of the lack of opportunity to provide meaningful feedback on this rule when it was proposed, we feel it is necessary to clarify our opposition to the changes made to Title IX’s religious exemptions as part of that rulemaking. The matters covered by the 2020 Free Inquiry Rule were originally proposed by the Trump Administration as part of a significantly larger rule package concerning faith-based social services, concurrently with similar rules published by seven other agencies.<sup>8</sup> Because the focus of this proposed rulemaking was on the substantial changes to the faith-based social services requirements, these secondary proposed rule changes addressing requirements for Title IX religious exemptions did not receive appropriately robust public comment prior to finalization, especially given their scope and potential impact. With this letter, we aim to ameliorate that lack of opportunity for feedback and to elucidate our best thinking on these important matters.

### **Bring eligibility requirements for Title IX exemption into conformance with the statute.**

When Congress passed Title IX, it provided that only “an educational institution which is controlled by a religious organization” would be eligible for religious exemption,<sup>9</sup> and the implementing regulation matched this eligibility requirement for 40 years.<sup>10</sup> However, the 2020 Free Inquiry Rule greatly distorted the statutory requirements by manufacturing six new criteria of eligibility, sweeping in a whole host of institutions that are not to any extent “controlled by a

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<sup>4</sup> Dept. of Ed., Direct Grant Programs, State-Administered Formula Grant Programs, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program, 85 Fed. Reg. 59,916 (Sept. 23, 2020). Available at: <https://www.federalregister.gov/documents/2020/09/23/2020-20152/direct-grant-programs-state-administered-formula-grant-programs-non-discrimination-on-the-basis-of>.

<sup>5</sup> *Secular Student Alliance v. U.S. Dept. of Ed.*, Case 1:21-cv-00169, Complaint (Jan. 19, 2021). Available at <https://www.atheists.org/2021/01/discrimination-religious-student-groups-lawsuit/>.

<sup>6</sup> Cooper, M.A., Update on the Free Inquiry Rule, Dept. of Ed. (Aug. 19, 2021). Available at <https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/>.

<sup>7</sup> Dept. of Ed., Religious Liberty and Free Inquiry Rule, Spring 2022 Rule Status Update, RIN 1840-AD72. Available at: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1840-AD72>.

<sup>8</sup> Dept. of Ed., 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, 85 Fed. Reg. 3,190 (Jan. 17, 2020), available at <https://www.federalregister.gov/documents/2020/01/17/2019-26937/uniform-administrative-requirements-cost-principles-and-audit-requirements-for-federal-awards-direct>. We note that the Trump Administration set a concurrent 30-day comment period for each of these substantial proposed rules, severely limiting the ability of stakeholders to respond.

<sup>9</sup> 20 U.S.C. § 1681(a)(3).

<sup>10</sup> 45 Fed. Reg. 30955, 30958 (May 9, 1980).

religious organization.”<sup>11,12</sup> This new interpretation means that even schools that are not run by religious organizations can seek exemption from Title IX by pointing to conflicting tenets, effectively allowing those institutions to elide critical civil rights protections. As a result, independent of a decision by any controlling religious entity, a school may decide to impose codes of conduct or educational requirements that discriminate on the basis of sex, limit health care options available to students, or discipline students and employees that are unmarried and pregnant, among many other possible discriminatory actions. Such an interpretation is atextual and unjustified. Congress has carefully considered the option of allowing Title IX religious exemptions for institutions closely identified with the tenets of a religious organization, language which mirrors the 2020 Rule,<sup>13</sup> and rejected that construction when passing the 1988 Civil Rights Restoration Act.<sup>14</sup> Congress also declined to expand religious exemptions in other contemporary legislation regulating federal funding for educational institutions.<sup>15</sup>

The Department claimed that the 2020 Free Inquiry Rule’s expansion of eligibility for a Title IX exemption was necessary because limiting exemptions to educational institutions that are controlled by a religious organization is unconstitutionally discriminatory to religious schools with different types of structures.<sup>16</sup> However, there was no legal precedent cited to support this novel argument. Congress may, and in fact is constitutionally required to, carefully consider other important factors, such as the burden on third parties, when creating religious exemptions.<sup>17</sup> The Religious Freedom Restoration Act, which the final rule refers to, requires a case-by-case evaluation of claims of substantial burden of religious exercise; not mandatory, expansive exemptions.<sup>18</sup>

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<sup>11</sup> 34 C.F.R. § 106.12(c). This expansion is breathtaking in its scope, sweeping in institutions that merely have a published institutional mission that includes or refers to religious tenets or beliefs, have a statement of religious practices even absent a relevant religious organization, or that claim to be controlled by a religious organization even without a formal relationship.

<sup>12</sup> There is some indication that the Department administered the exemption more broadly than the statute permitted prior to the 2020 Free Inquiry Rule. *See, e.g.*, Memorandum from Harry M. Singleton, Assistant Secretary for Civil Rights, to Regional Civil Rights Director re Policy Guidance for Resolving Religious Exemption Requests (Feb. 19, 1985); Memorandum from William L. Smith, Acting Assistant Secretary for Civil Rights, Title IX Religious Exemption Procedures and Instructions for Investigating Complaints at Institutions with Religious Exemptions (Oct. 11, 1989). Available at: <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html>. To the extent that the exemption was applied contrary to statutory requirements, that practice was also impermissible. The Department should use this opportunity to bring this eligibility requirement into compliance with Title IX.

<sup>13</sup> Legislative history shows only that the law was not meant to apply to “parochial schools where they have nuns as teachers.” Cong. Rec., Feb. 28, 1972, at 5813. Available at <https://guides.loc.gov/title-IX-law-library-resources/legislative-path>.

<sup>14</sup> *See* 20 U.S.C. § 1687; *see also* 134 Cong. Rec. H565, E499, S205 (1988).

<sup>15</sup> *See* 42 U.S.C. § 295m; *see also* 42 U.S.C. § 296g.

<sup>16</sup> 2020 Free Inquiry Rule, 85 Fed. Reg. 59,916, 59945-6.

<sup>17</sup> *See* note 21, below.

<sup>18</sup> 42 U.S.C. 2000bb-1 (If a person’s religious exercise is substantially burdened, the government must demonstrate the policy or law is the least restrictive means of furthering its compelling interest with regard to *those particular circumstances.*) (emphasis added); *see also, e.g., Holt v. Hobbs*, 574 U.S. 352, 369 (2015) (proper to investigate whether inmate is using religious claim to “cloak illicit conduct.”); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018), *aff’d by Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (RFRA claims

Title IX’s existing exemption allows a school controlled by religious organizations to comply with the religious tenets of the denomination under which it operates. As a result of the eligibility expansion in the 2020 Free Inquiry Rule, the Department turned that exemption into a broad and vague carve-out potentially open to any private college or university. Suddenly, any university president, dean, or governing board could unilaterally determine the religious tenets and practices espoused by the school—gerrymandered to fit the exact exemption from Title IX they are seeking—rather than being required to adhere to the teachings of an external, recognizable religious community.

We urge the Department to rescind the Trump Administration’s expansion of eligibility for religious exemptions under Title IX. Congress struck a balance with its original language, and that balance must be restored.

**Protect students by requiring prior submission of religious exemptions claims and requiring educational institutions to publish claimed exemptions.**

Unfortunately, the 2020 Free Inquiry Rule prioritized the ability of religious educational institutions to engage in sex-based discrimination over the basic rights of students. Prior to the implementation of this rule, religious institutions could claim an exemption from Title IX by providing a written notification to the Department regarding which portions of Title IX and the accompanying regulations conflict with the specific tenets of its controlling religious organization. Because these waivers were regularly subject to Freedom of Information Act (FOIA) requests, the Department clearly displayed institutional waivers on its website, which greatly benefited students seeking essential information about colleges they were considering attending as to whether they could expect schools to claim exemptions to enforcing their civil rights protections.

However, the 2020 Rule clarified that there was explicitly no prior notification requirement and that religious schools may choose to claim exemption at any time, even retroactively after they are subject to investigation for Title IX violation. By encouraging retroactive exemption claims, the 2020 Rule allows unfair bait-and-switch tactics that harm current and potential students in an attempt to protect religious schools from any possible liability for discrimination.

Students who are vulnerable to discrimination have a strong interest in knowing whether a religious institution claims exemptions to Title IX enforcement *before* enrolling and making an investment of time and tens of thousands of dollars in that institution. Most students believe that they will be protected from discrimination and harassment when they attend college, and they

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were not at issue in Supreme Court case) (“[A] party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged.”).

rely on institutions to have policies in place to protect them.<sup>19</sup> It is not reasonable to assume that students who attend religious institutions of higher education know that they may not be protected by Title IX.<sup>20</sup>

Moreover, many institutions are not transparent about their exemption from Title IX, and this can have a devastating effect on students. The complaint in *Hunter v. Dept. of Education* details several instances of this discrimination impacting students at religious institutions.<sup>21</sup> Alex Duron’s admission to Union University was rescinded *after* he paid deposits and went to great lengths to move closer to the university, due to the university’s restrictions regarding homosexuality—a situation that may have been avoided had Alex known that Union had waived Title IX obligations and had this blanket ban during the application process. Zayn Silva had his admission to Nyack College rescinded “after being told by multiple university representatives that there would be no issue with him being trans.” The college later rejected Zayn’s application due to his gender identity. Again, this is a result that may have been avoided if the waivers claimed by Nyack were made available to Zayn.

The Department can and should require prior submission of religious exemption claims as an independent procedural requirement. This would impose negligible burdens on institutions compared with the potential for fundamentally unfair surprises and harms to students who may be disciplined, expelled, or denied a degree on the basis of sex, sexual orientation, or gender identity. Legally, the Department may require prior submission and publication of exemption claims to protect the reliance interests of students and to help prevent third party harm as a result of religious accommodations.<sup>22</sup>

Reliance interests are a well-established tenet of contract law, which has frequently been applied to higher education by the courts. Individuals associated with or attending universities are entitled to some degree of protection against actions inconsistent with a university’s own policy.<sup>23</sup> In the same way, the Department should hold educational institutions accountable to their published nondiscrimination policies by requiring preclearance of exemption claims.

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<sup>19</sup> See, e.g., Caspani, Maria. “Americans’ perception of LGBTQ rights under federal law largely incorrect.” Reuters/Ipsos, June 12, 2019. Available at <https://www.reuters.com/article/us-usa-lgbt-stonewall-equality/americans-perception-of-lgbtq-rights-under-federal-law-largely-incorrect-reuters-ipsos-idUSKCN1TC120>.

<sup>20</sup> Just as it is not reasonable to assume students are aware of a school’s claimed religious exemptions merely because it is religious, knowledge of a school’s denominational affiliation does not by itself inform current and prospective students which specific tenets a school may ascribe to. Therefore, this information is not sufficient notice to put a student on alert that a school discriminates on the basis of sex.

<sup>21</sup> *Hunter v. Dept. of Education*, Case No. 6:21-cv-474, Complaint (March 29, 2021).

<sup>22</sup> The Establishment Clause requires agencies to consider any impact an accommodation or religious exemption would have on third parties. *Cutter v. Wilkinson*, 554 U.S. 709, 720, 722, 726 (2005). It is extraordinarily inequitable to allow religious institutions to, without warning, strip away protections that students would otherwise have under federal law. Therefore, the Department should constrain the operation of this exemption to constitutional boundaries and, to the extent possible, mitigate any harm that is done to students as a result of this exemption.

<sup>23</sup> *Doe v. Univ. of Sciences*, 961 F.3d 203 (3rd Cir. 2020); *McAdams v. Marquette*, 914 N.W.2d 708 (Wisc. 2018).

Even if the Department does not require prior submission of religious exemption claims, it should, at a minimum, protect students by requiring educational institutions to disseminate claimed exemptions as part of the requirement for institutions to notify students of Title IX policies and prominently display such policies.<sup>24</sup> It is inconsistent with the dissemination requirement and the intent of Title IX to allow a religious institution to publish a statement to its school community that it does not discriminate based on sex without also disclosing that it claims an exemption that allows it to discriminate based on sex in certain circumstances. All students deserve fair notice in order to make informed decisions about their education.

### **Rescind the *ultra vires* rule requiring preferential treatment of religious student groups.**

The 2020 Free Inquiry Rule requires public colleges and universities to both recognize and provide benefits to religious student organizations, regardless of whether those organizations meet nondiscrimination policies applicable to other recognized student groups, or risk losing federal funding.<sup>25</sup> This rule is outside the authority of the Department, it undermines critical civil rights protections, and it unconstitutionally favors religious organizations and religious speech. It must be rescinded.

The Department has long recognized that it lacks authority to regulate, interpret, or enforce grant recipients' compliance with the First Amendment without an express delegation by Congress. Because Congress has never done so, the Department has acknowledged its own lack of authority to enforce the First Amendment and statutory rights relating to the First Amendment.<sup>26</sup> The President can only confer powers that he himself possesses, independently or by statute.<sup>27</sup> Therefore, the Department's actions in promulgating the religious student groups requirement in the 2020 Rule are *ultra vires* and violate the Administrative Procedures Act.

Furthermore, the 2020 Rule's religious student groups requirement is unconstitutional and unsupported by case law. The Department justified its creation of an enforceable right to expressive association by pointing to *Rosenberger v. Rector*.<sup>28</sup> While *Rosenberger* establishes that institutions may not discriminate based on viewpoint, the 2020 Rule *requires* that universities treat religious student organizations differently and unequally by granting special exemptions only to them, thus unconstitutionally favoring their viewpoints above those of all other student organizations. The Department's position is also not supported by the other case it referenced in its justification, *Business Leaders in Christ v. University of Iowa*,<sup>29</sup> in which the Court held that the university's unequal application of its all-comers policy was not allowable.

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<sup>24</sup> 34 C.F.R. § 106.8(b).

<sup>25</sup> 34 C.F.R. § 75.500(d); 35 C.F.R. § 76.500(d).

<sup>26</sup> See, e.g., *Dear Colleague Letter* at 2 n.7 (Oct. 26, 2010). Available at: <https://files.eric.ed.gov/fulltext/ED512473.pdf>.

<sup>27</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

<sup>28</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

<sup>29</sup> *Bus. Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885 (S.D. Iowa 2019).

Moreover, this requirement directly contradicts the decision in *Christian Legal Society v. Martinez*, which clarifies that educational institutions may impose content-neutral requirements—such as nondiscrimination policies—on all student groups.<sup>30</sup> The *Martinez* Court made clear that public colleges and universities may have such policies and refuse to recognize student groups that do not conform to them.

For all these reasons, we urge the Department to rescind the portions of the 2020 Free Inquiry Rule that require public colleges and universities to recognize and grant special privileges to religious student organizations that fail to comply with general nondiscrimination requirements.

## **Conclusion**

While 50 years have passed since Title IX was enacted, sex discrimination in education remains a persistent problem. Under the Trump Administration the Department, relying on Executive Order 13864, broadened eligibility for religious exemptions in ways that are atextual and weakened critical civil rights protections, exposing many more students and school employees to discrimination. We urge the Department to bring these regulations into compliance with statute, rescind *ultra vires* requirements, and enact critical protections for students relying on Title IX civil rights protections.

Sincerely,

Advocates for Youth  
American Atheists  
American Humanist Association  
Campus Pride  
Catholics for Choice  
Center for Biological Diversity  
Center for LGBTQ Economic Advancement & Research (CLEAR)  
Clearinghouse on Women's Issues  
Equality California  
Equality Federation  
Feminist Majority Foundation  
Freedom from Religion Foundation  
Genders & Sexualities Alliance Network  
GLMA: Health Professionals Advancing LGBTQ Equality  
GLSEN  
Human Rights Campaign  
Los Angeles LGBT Center  
Minority Veterans of America

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<sup>30</sup> *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 130 S. Ct. 2971 (2010).

Modern Military Association of America  
National Alliance for Partnerships in Equity  
National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)  
National Center for Transgender Equality  
National Council of Jewish Women  
National LGBTQ Task Force  
National Women's Law Center  
PFLAG National  
Religious Coalition for Reproductive Choice  
Religious Exemption Accountability Project  
Secular Coalition for America  
Secular Student Alliance  
The Center for Inquiry and the Richard Dawkins Foundation for Reason & Science  
URGE: Unite for Reproductive & Gender Equity