

Courtney Bullar...: Welcome to The Law and Education Podcast, and this episode on religious exemptions to Title IX. My name is Courtney Bullard, and I am your host. I'm also the owner of Institutional Compliance Solutions. As I always say, you can go back to episode one to learn more about me or my team, and also you can go to our website at www.icslawyer.com, where there is a lot more information about myself, my team, and the services that we provide here at ICS.

I wanted to provide another informational episode, and this one on this particular topic, because of the increase in challenges to religious exemptions, but also because over 60% of our clients and community partners are faith-based institutions, and so we've been fielding a lot of questions in this area as challenges increase and we look ahead to potential changes in the Title IX 2020 regulations.

As you know, Title IX, the basic language of the actual law states that "no person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance," except... 34 CFR Section 106.2(a) states that schools may be exempt from Title IX if they are controlled by religious organization and if enforcing Title IX would be inconsistent with the religious tenets of the organization.

So what is the process for using the exemption? Prior to the 2020 Title IX regulations, schools had to seek a kind of preapproval to claim the exemption, but the 2020 Title IX regulations did away with any preapproval requirement to claim the exemption. To claim the exemption, the Department of Education stated that doing so brings 106.12(b) further in line with relevant statutory framework in this context, since no part of the statute requires recipients receive an assurance letter from OCR, or suggests an institution must be publicly on the record as a religious institution before it may invoke a religious exemption under Title IX.

So what does all of that mean? Well, first and foremost, you must note that the burden is on the school to establish its eligibility to qualify for the exemption. The burden is also on the school to demonstrate that they are controlled by a religious organization. A school can show this in six distinct ways.

First, that the institution is a school or a department of divinity. Second, faculty, staff, and students are required to engage in a personal belief or religion. Third, the institution's charter, catalog, or other official publication explicitly states that it is controlled by a religious organization or doctrine. Next, the institution has a statement of religious practices, and members of the institution must engage in the religious practices outlined in the statement. Fifth, this institution has a published institutional mission that refers to religious tenets or beliefs. And six is the catch-all provision, that there is sufficient evidence that the institution is controlled by a religious organization.

Before moving on, I do want to make a quick note. The Biden administration's proposed religious liberty and free inquiry rule is coming down the pipe and expected soon. The new rule has the potential to alter exemption requirements.

A key case on the issue of whether an institution is controlled by a religious organization, that catch-all provision I just went over with you, is the 2021 Ninth Circuit decision in *Maxon v. Fuller Theological Seminary*. Here, the plaintiffs appeal to district court judgment dismissing their claim, arguing that the district court erred in the dismissal because the institution does not fall within Title IX's religious exemption. Plaintiffs argued that the exemption did not apply because the school is controlled by its own board of trustees rather than by a distinct external organization. The Court of Appeals analyzed the meaning of organization, determining that Fuller's argument aligned with the DOE's interpretation, which is that the statute does not contain an independent requirement that the controlling religious organization be a separate legal entity than the educational institution. This interpretation was formalized in the 2020 Title IX regulations that provided the language that I just went over with you, that sufficient evidence.

Plaintiffs in this case also argued Fuller's discriminatory actions towards them did not fall under the religious exemption because it was not clear there was a legitimate conflict of interest between the religious tenets and Title IX's prohibition on sex discrimination. After discovering plaintiffs were both in a same-sex marriage, Fuller dismissed them for violating its sexual standards. Those standards state that a sexual union must be reserved for marriage, which is a covenant between one man and one woman. The court found that the plaintiffs' claims failed because the religious exemption applies to shield religiously motivated decisions that would otherwise violate Title IX's prohibition on sex discrimination.

It's important to note what has happened under the Biden administration in this area, which I've covered in other podcast episodes. But since the Biden administration's declaration through an executive order, and DOE's subsequent letter, stating that discrimination based on sex includes SOGI under Title IX, many LGBTQ+ students have sought to challenge the Department of Education and individual schools that claim Title IX's religious exemption, as we saw in Fuller.

On the ground, students are challenging a variety of policies implemented by religious schools that serve as the basis of several Title IX lawsuits or OCR complaints. In other words, in the past year, we've seen an uptick in LGBTQ complainants challenging their school status under their religious exemption. Generally, they allege that the Department of Education and the exemption allows schools to actively discriminate, punish, abuse, and retaliate against students on the basis of their SOGI.

One example is *Hunter v. Department of Education*, which is a major class action where plaintiffs alleged that the religious exemption allows taxpayer-funded religious colleges and universities to abuse and oppress LGBTQ+ students. They further allege that the Department of Education's inaction leaves students unprotected from harmful conversion therapy, sexual and physical abuse and harassment in schools.

The main plaintiff, Elizabeth Hunter, self-identified as a lesbian and was disciplined for reading a book that had lesbian characters. After the literature was discovered, she was told to disavow her support for LGBTQ rights and relationships. Thereafter, she was placed on disciplinary probation, she was charged a monetary fine, and she was terminated from her on-campus student life position in the school's media department. Since initially filing the suit, 33 other LGBTQ+ students have joined the class.

BYU, a Mormon private school in Utah, instituted a schoolwide dating ban that prohibited LGBTQ+ students from open displays of LGBTQ+ relationships. Under this rule, it was a violation of student conduct for students of the same sex to hold hands, kiss, or date. BYU alleged it qualified under the religious exemption, and the Department of Education formally announced an investigation. In February, the investigation was dismissed, upholding BYU's status under the exemption.

Clark Summit. Under the school's policy handbook, students were permitted to report and entrap students who were suspected to have engaged in "sinful behavior." The plaintiff claimed that he was entrapped and outed as a gay man. He attempted to finish his degree at Clark Summit in 2019, but after being admitted, received a call from the dean of men that someone reported that he was in a same-sex relationship and that he was not permitted to graduate. Last month, the Biden administration announced that it would initiate an investigation into this matter.

Lincoln Christian University. The plaintiff received an email from administration accusing her of choosing to identify and live as a transgender woman based on a search of her academic record. She was given the option to be disciplined or drop out. She decided to drop out, and thereafter filed a lawsuit.

As complainant litigation and challenges increase, both with OCR and in our court system, what are some things to consider for our religious and faith-based institutions? Our suggestions are to, first, clarify your religious tenets. If your school is a religious organization, what personal belief or religion must your community ascribe to in making that very clear? Second, to keep your policies narrowly tailored, to clarify in your code of conduct types of behaviors that conflict with your institution's tenets, and to be clear on what those tenets are, and then to widely disseminate them so that they are available for your students, staff, faculty, and the community, and to ensure that any prohibited conduct does not go beyond the scope of your tenets. Finally, be mindful of

retaliatory actions in navigating these matters, regardless of whether a complainant is a member of the LGBTQ community, if you have a matter that falls under the 2020 Title IX regulations.

Of course, always consult with your counsel. This is complicated stuff. Although the litigation is ongoing and no additional guidance is being provided right now, now is certainly the time to ensure your policies and procedures are clear, equitable, and fair. If you're a religious institution that foresees utilizing the religious exemption afforded under Title IX, carefully review the requirements for claiming the exemption against your policies and procedures to ensure that any prohibited conduct, such as violating sexual standards, are closely aligned with your stated religious tenets that I outlined in this podcast for you today.

If you want more information, we have a blog post on this topic. I would also refer you to REAP's website, which stands for the Religious Exemption Accountability Project. We'll put that website in our show notes.

We also have started a listserv for religious or faith-based institutions that we are allowing folks to join for free, that are not community partners, for six months. If that's something you'd be interested in joining in order to talk to other colleagues at faith-based institutions who are navigating Title IX and those unique challenges, then please reach out to us. We would be happy to add you to that list.

That is everything for this informational episode. More to come. Our courses for the summer and fall have been released, so please register today and grab that spot. We'd love to see you in there. We're also on the ground a lot more now that things are kind of changing with COVID, doing those tailored trainings for school districts and institutions, as well as serving in external roles as coordinators, decision-makers, investigators, appellate decision-makers, and advisors. If that is an area that we can assist for your institution or your district, we would love to partner with you and work with you.

Finally, which goes along a little bit with the topic for today, I mention reviewing your policies and procedures, and summer is the time to do that. We are ramping up our work with our schools in helping them with any policy revisions and drafting. Of course, some of that may come with the NPRM, although we don't expect much. Certainly, as we live the regs under policies, we've found areas that need to be tweaked or clarified for schools in navigating these pathways, and we would love to partner with your school to help you through that process as you ramp up for the next academic year this summer.

As always, thank you so much for tuning in to The Law and Education Podcast. Please rate, review, share. If you have any ideas or topics you would like to hear on the podcast, or you'd like to be a guest, please feel free to reach out to us.

We continue to record away, or I do. We're going to have a lot more great episodes coming your way throughout this summer, so you'll have something to listen to maybe while you're taking a walk or going on a road trip, maybe with family or friends. Thank you again for listening, and I will see you next episode.

Speaker 2:

Did you know that ICS offers on-demand e-learning Title IX training through Community Access? Title IX University provides coordinators with the unlimited ability to train their entire Title IX team in compliance with the 2020 regulations, with specific courses for investigators, decision-makers, advisors, and more.

Have a change in one of your team members? No need to wait until they can attend a training. Simply add them to Community Access, and they can get trained on their time. Coordinators can also run reports to track training, as well as run other metrics to aid in compliance efforts.

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