



Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.12(b): Assurance of Exemption and Faith-Based Institutions

June 12, 2020

Note: This document focuses on a summary analysis of Section 106.12(b) of the 2020 Final Title IX Regulations,¹ specifically discussing the Assurance of Exemption and issues for Faith-Based Institutions. For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Final Comparison* and *Title IX Summary Proposed to Final Comparison*, available at system.suny.edu/sci/tix2020

§ 106.12(b): Assurance of Exemption

Title IX generally prohibits a recipient institution from excluding, separating, denying benefits to, or otherwise discriminating against students or employees on the basis of sex in its educational programs or activities. Title IX has long included several exemptions and exceptions from its coverage, including for the membership practices of certain organizations and admissions to private undergraduate colleges. The new regulations have generally not changed those exceptions.

One such exemption was the exemption for educational institutions controlled by religious institutions. According to the preamble of the regulations, “the final regulations bring § 106.12(b) further in-line with the relevant statutory framework in this context, which states that Title IX “shall not apply to an 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.” 85 Fed. Reg. 30026, 30475 (May 19, 2020).

Many faith-based institutions who believe compliance with Title IX poses a conflict with any specific tenet(s) of their faith may request an exemption. The ability to seek an exemption does not apply to all faith-based institutions however, but instead only to those controlled by a religious organization, and only to the extent that application of Title IX would be inconsistent with the religious tenets of the organization. *See* 20 U.S.C. § 1681(a)(3); Final Rule 34 C.F.R. § 106.12. An institution will generally be considered to be controlled by a religious organization if one or more of the following conditions is true:

- (1) It is a school or department of divinity, defined as an institution or a department or branch of an institution whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation, or to prepare them to teach theological subjects; or

¹ The effective date for these regulations will be August 14, 2020 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

- (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or
- (3) Its charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

For faith-based institutions, questions about the compatibility of adherence to Title IX and to specific tenets of their beliefs have long existed. For example, some institutions have viewed Title IX pregnant and parenting provisions as incompatible with certain tenets of their organization. Some institutions faced a heightened challenge when the Department of Education announced, in 2015, that it would interpret sex to include gender identity as a protected category. This interpretation has since been rescinded, thus potentially reducing the likelihood some faith-based institutions would determine that compliance with Title IX would be incompatible with any specific tenet(s) of the school's beliefs.

Claiming an Exemption

In the past, a request for an exemption needed to be made in advance of any complaint filed with OCR against the school. This has now changed, as the Final Rule provides "additional flexibility to religious educational institutions." Under the Rule, the request for an extension can be made at any time, including *after* OCR's receipt of a Title IX complaint against that school.

In order to claim an exemption, the highest ranking official of the institution must submit a written statement to the Assistant Secretary for Civil Rights, identifying the provisions of Title IX that conflict with a specific tenet of the religious organization. A claim for a religious exemption may be mailed to the Assistant Secretary for Civil Rights at 400 Maryland Ave., SW, Washington, DC 20202, or emailed to OCR@ed.gov. See Final Rule, [34 C.F.R. § 106.12](#).

Generally, the request must identify the religious organization that controls the educational institution. OCR, in "granting" an exemption, primarily ensures that the institution has cited the correct sections of the regulation in its request. Otherwise, OCR clarifies which sections of the regulation are applicable to an institution's exemption request. A school claiming an exemption may refer to scripture, doctrinal statements, catalogs, statements of faith, or other documents reflecting religious tenets. To avoid possible constitutional entanglements and expedite OCR's processing of these requests, an institution may submit a statement of its practices, as based on its religious tenets, rather than a statement of its tenets.

Sanctioning

Finally, regardless of whether an institution has or claims a religious exemption, the Final Rule does not appear to conflict with how faith-based institutions seek to sanction community members found responsible for "sexual harassment." The Final Rule acknowledges that institutions should be afforded flexibility to mete out discipline through sanctions that are

appropriate for their communities. The Final Rule permits institutions to make the disciplinary decisions that they believe “are in the best interests of their education environment,” as long as they describe or list the possible range of sanctions for a finding of responsibility. 85 Fed. Reg. 30274; Final Rule 106.45(b)(1)(vi).

The Joint Guidance on the 2020 Title IX Regulations is prepared as a service by in-house and firm attorneys, but does not represent legal advice. The Joint Guidance is compliance advice and no attorney/client relationship is formed with any contributor or their organization. Legal advice for specific situations may depend upon state law and federal and state case law and readers are advised to seek the advice of counsel. The Joint Guidance is available absolutely free pursuant to a [Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International license](#) (meaning that all educational institutions are free to use, customize, adapt, and re-share the content, with proper attribution, for non-commercial purposes, but the content may not be sold).