



March 29, 2022

EO 12866 Meeting  
U.S. Office of Information and Regulatory Affairs (OIRA)

**Re: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance—RIN: 1870-AA16**

First Liberty Institute (“First Liberty”) appreciates this opportunity to provide comments on OIRA’s review of the U.S. Department of Education’s (ED’s) proposed rule on Title IX.

We are a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans through pro bono legal representation of individuals and institutions of diverse faiths—Catholic, Protestant, Islamic, Jewish, the Falun Gong, Native American religious practitioners, and others. For over thirty years, First Liberty attorneys have worked to defend religious freedom before the courts, including the Supreme Court.

Current and former First Liberty clients include educational institutions, instructors, and students who have sought to exercise a religious faith while running, teaching, or participating in an education program or activity under Title IX.

First Liberty wishes to raise the following three points:

- 1. To justify issuing this regulatory action, ED’s new rule must consider the costs the new rule will impose on religious institutions, teachers, and students.**
  - a. EO 12866 requires the government to assess all costs and benefits of available regulatory alternatives, including not regulating.
  - b. EO 12866 specifies that “costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are *difficult to quantify*, but nevertheless *essential to consider*.”
  - c. Given that the 2020 Rule already prohibits sexual harassment for persons of any gender identity, this regulatory action is not needed at this time.
    - i. The 2020 Rule already states that “every person, regardless of demographic or personal characteristic or identity, is entitled to the same protections against sexual harassment under these final regulations.” Recipients of Federal funds must treat “every individual” with “equal dignity and respect.”
  - d. On the other hand, repealing the 2020 Rule will impose unnecessary costs and burdens on religious educational institutions.
    - i. If the new rule rolls back the 2020 Rule’s cost-saving clarification regarding Title IX’s religious exemption, it will impose significant burdens on religious institutions’ finances and time.

- ii. ED's new, unnecessary rule will cause waves of litigation across the nation, which will impose significant costs in legal fees for both educational institutions and the Federal government.
- iii. Intentionally creating uncertainty about whether an educational institution is entitled to Title IX's religious exemption would impose costs on religious institutions and the Federal government while producing no discernable benefit for anyone.
- e. Repealing the 2020 Rule will also impose significant costs on religious instructors and students by encouraging recipients to discriminate against them because of their religious beliefs.
  - i. Expanding the definition of sex to include gender identity will encourage schools to target as discrimination longstanding, mainstream religious beliefs and practices about biological sex.

**2. ED must not vilify religious exercise in its effort to expand protections for other classes of people.**

- a. The First Amendment and the Religious Freedom Restoration Act (RFRA) constrain every action and regulation the Federal government makes, including this new rule.
- b. ED cannot lawfully promulgate regulations that direct a recipient of Federal funds to restrict rights that would otherwise be protected religious exercise under the First Amendment and RFRA.
- c. ED has acknowledged that "No OCR policy should be construed to permit, much less require, any form of religious discrimination or any encroachment upon the free exercise of religion."<sup>1</sup>
- d. First Liberty requests that ED makes explicit in this new rule its legal obligations<sup>2</sup> to protect religious freedom.
- e. If ED fails to honor its legal obligations under the First Amendment and RFRA, it will expend significant legal costs in lawsuits.
- f. Numerous instructors and students still face religious discrimination in schools. First Liberty has represented religious instructors and students who were punished or censored because of their religious beliefs for:
  - i. Referencing their religious beliefs in a public ceremony such as a graduation speech,
  - ii. Referencing their religious beliefs in class assignments,
  - iii. Wearing nondisruptive jewelry that displayed a religious symbol,
  - iv. Engaging in private, student-initiated, student-led prayer during a non-instructional time at school,
  - v. Handing out notes or trinkets that school officials deemed to contain religious messages during non-instructional times,
  - vi. Seeking to form religious clubs just like other students were permitted to form similarly situated secular clubs, and

---

<sup>1</sup> See *Dear Colleague Letter*, U.S. DEP'T OF EDUC. (September 13, 2004), <https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

<sup>2</sup> See, e.g., 20 U.S.C. § 1681(a)(3); 42 U.S.C. §§ 2000d, 2000bb-1(b).

- vii. Seeking to meet in religious clubs during times that secular clubs were allowed to meet.
- g. We are also aware of instances where schools punished students for wearing religious clothing,<sup>3</sup> sacred items,<sup>4</sup> or hairstyles.<sup>5</sup>
- h. We have repeatedly seen schools single out religious instructors and students and characterize religious exercise and speech as sexual harassment under Title IX.
- i. First Liberty has represented religious instructors and students who were punished and/or branded as harassers by schools for:
  - i. Engaging in religious speech about biological sex in the classroom,
  - ii. Objecting to school policies requiring students to read explicit material as part of a school assignment,
  - iii. Declining to pledge to strongly consider and adopt a school's views on gender and sexuality as a condition of graduation.
- j. In some of the above examples, school officials tragically punished religious people when they attempted to forcibly create a positive and inclusive learning environment.
- k. We have witnessed school officials and local educational agencies attempt to create culturally homogenous learning environments that quickly become hostile to diverse cultures, beliefs, or practices—including religious cultures, beliefs, and practices.
- l. ED's regulatory action must clarify that a "positive" or "safe" school climate should not become hostile towards an instructor or student whose religious exercise causes that instructor or student to exhibit a different culture, or to think or speak according to different, sincerely held beliefs about biological sex or human sexuality.
- m. ED must not repeat its vilification of religious exercise in recent guidance documents.
  - i. An ED factsheet from June 2021 mischaracterizes as harassment the belief that "there are only boys and girls."<sup>6</sup> Instead of offering guidance that encourages respectful and inclusive behaviors, ED instead singles out a belief about biological sex that is held by numerous religions. Such irresponsible guidance encourages schools to implement punitive policies against religious instructors and students.

### **3. The new rule should affirm the 2020 Rule's clarification regarding the Title IX religious exemption.**

---

<sup>3</sup> *ACLU-DE Protects Students' Rights to Religious Freedom*, AM. CIV. LIBERTIES UNION (January 9, 2018), <https://www.aclu-de.org/en/news/aclu-de-protects-students-rights-religious-freedom>.

<sup>4</sup> *ACLU Urges Dysart Unified School District to Allow Graduation Dress Accommodations for Native American Religious Beliefs*, AM. CIV. LIBERTIES UNION, (May 15, 2019), <https://www.aclu.org/letter/aclu-urges-dysart-unified-school-district-allow-graduation-dress-accommodations-native>.

<sup>5</sup> *ACLU Says Louisiana Dress Code Denies Rastafarian Children the Right to an Education*, AM. CIV. LIBERTIES UNION (September 18, 2000), <https://www.aclu.org/press-releases/aclu-says-louisiana-dress-code-denies-rastafarian-children-right-education?redirect=free-speech/aclu-says-louisiana-dress-code-denies-rastafarian-children-right-education>.

<sup>6</sup> *See Confronting Anti-LGBTQI+ Harassment in Schools*, (last visited March 28, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>.

- a. Title IX states that educational institutions that are controlled by a religious organization are automatically exempted from Title IX when their religious tenets conflict with Title IX.<sup>7</sup>
- b. Affirming the 2020 Rule's clarification will protect fundamental and civil liberties, in keeping with the religious freedoms protected by the First Amendment and RFRA.
- c. Many educational institutions operate schools as part of their religious exercise. These institutions provide valuable educational programs for Americans from all walks of life. They frequently preserve diverse cultural and religious practices and teachings, and often commit resources towards humanitarian work.
- d. Affirming the 2020 Rule's clarification will preserve the regulatory cost savings that the clarification produced for religious educational institutions.
- e. By clarifying their duties under the religious exemption, the 2020 Rule alleviated the financial resources religious educational institutions would have needed to devote to asking ED to issue letter of assurance or defending legal challenges asserting incorrectly that the institution waived its entitlement to the exemption by failing to request it in writing.
- f. The 2020 Rule also saved religious institutions the time they would otherwise expend to wait to receive ED's letter of assurance or a court's judgement.
- g. The text of Title IX mentions no time limits in its broadly worded religious exemption.
- h. The 2020 Rule merely codified ED's already longstanding practice of declining to require institutions to request the exemption in writing. In the past 45 years, ED has never denied a religious exemption claim to Title IX.<sup>8</sup>

## **Conclusion**

We ask OIRA to assess all relevant costs that this regulatory action will impose, particularly on religious institutions, instructors, and students. We also ask that OIRA ensures that ED refrains from vilifying religious exercise, and that ED affirms in its new rulemaking the clarification regarding the religious exemption from the 2020 Title IX Rule. Thank you for considering these important matters.

Sincerely,

Christine Pratt  
Counsel  
First Liberty Institute

---

<sup>7</sup> See 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12

<sup>8</sup> Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 Kan. L. Rev. 327 (2016) ("In more than forty years, the federal government has never denied a religious exemption claim to Title IX, not once.").