

United States Senate

WASHINGTON, DC 20510

February 19, 2020

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Secretary DeVos:

We write to strongly oppose the U.S. Department of Education's (the Department) proposed regulation, "Uniform Administrative Requirements, Costs Principles, Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program," which was published in the Federal Register on January 17, 2020. The proposed regulation—developed under the guise of religious liberty—is actually an attack on religious freedom and would open the door to federally-funded discrimination. The proposed rule drastically expands religious exemptions that could provide federally-funded faith-based institutions and student organizations a license to discriminate against students, employees, and beneficiaries who are LGBTQIA+, as well as women. In addition, it would lift protections designed to ensure beneficiaries of programs funded by the Department are not forced to participate in a religion not their own. We demand the Department immediately withdraw this proposed rule.

1. The Proposed Rule Undermines Title IX

The proposed rule would grant a significant expansion of the limited exemption for education institutions in Title IX of the Education Amendments Act of 1972 (Title IX). Title IX creates an exemption for educational institutions "controlled by a religious organization." In the proposed rule, the Department proposes the Office of Civil Rights use a series of seven factors to evaluate requests from educational institutions for a religious exemption. Several of these factors are overbroad, including: a statement that the educational institution subscribes to specific moral beliefs or practices, and a statement that members of the institution community may be subjected to discipline for violating those beliefs or practices; a statement that is approved by the governing body of an educational institution and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings; or other evidence establishing that an educational institution is controlled.¹

The Department's proposed factors are so broad that religious exemptions could be given not just to educational institutions controlled by religious institutions—as is provided for by the statute—but also colleges and universities with a tenuous relationship to religion. Enforcing the proposed factors as written would allow virtually any college or university to claim an exemption. If an

¹ <https://www.govinfo.gov/content/pkg/FR-2020-01-17/pdf/2019-26937.pdf>

educational institution simply subscribes to a certain set of “moral beliefs or practices,” even if those beliefs and practices have no connection with religion, and “members of the institution may be subjected to discipline for violating those beliefs,” the college or university could claim an exemption.² Similarly, educational institutions that submit a statement “predicated upon religious tenets, beliefs, or teachings,” or statements based on “other evidence” that do not even mention religion, could establish other harmful carve-outs to non-discrimination laws.³ The Department should not propose a regulation that is contrary to the statutory language of Title IX and would provide colleges and universities with a blanket license to discriminate at the expense of students.

2. The Proposed Rule Fails to Protect Students from Discrimination

We are deeply concerned that expanding the religious exemption for educational institutions controlled by religious organizations would allow faith-based organizations to discriminate against employees and beneficiaries because of their sex, sexual orientation, or gender identity. The proposed rule would allow employers to make decisions based on the “acceptance of or adherence to the religious tenets of the organization,” which is an expansion of the religious exemption rule under Title VII.⁴ This means individuals could be fired or not provided resources on the basis of their sex, including sexual orientation, gender identity, pregnancy, childbirth or related medical conditions, all based on an organization’s self-defined religious tenets. Accordingly, the proposed rule effectively allows entities that receive federal support to discriminate. This is particularly discouraging given the high rates of discrimination and barriers faced by women and LGBTQIA+ students on college campuses.

LGBTQIA+ students often feel unsafe during their first year on college campuses. According to a survey taken in 2019 of first-year students, 38 percent of first-year LGBQ students felt unsafe compared to 22 percent of their heterosexual classmates.⁵ Around 52 percent of transgender students felt unsafe compared to 23 percent their non-transgender classmates.⁶ The survey also found 24 percent of LGBQ students reported being verbally threatened between 2018 and 2019 compared to 16 percent of their heterosexual classmates.⁷ Twenty-six percent of transgender students reported being verbally threatened between 2018 and 2019 compared to 17 percent of non-transgender students.⁸

Women also face a number of additional barriers to equity and inclusion at school. While Title IX has made it easier for women to participate in education programs, discrimination and harassment still make it harder for women seeking to get an education. Studies have shown women are less likely to enter fields of study that are perceived to discriminate against women,⁹ and in a recent campus climate survey, over one quarter of undergraduate women reported

² *Id.*

³ <https://www.govinfo.gov/content/pkg/FR-2020-01-17/pdf/2019-26937.pdf>

⁴ *Id.*

⁵ https://tcc-j2made.s3.amazonaws.com/uploads/2019/04/Campus_Climate-FINAL-1.pdf

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ <https://www.brookings.edu/blog/brown-center-chalkboard/2018/04/23/how-our-education-system-undermines-gender-equity/>

experiencing nonconsensual sexual contact during college.¹⁰ Among students enrolled in a community college, two-thirds of women who have children after they enroll do not end up finishing their degree.¹¹

By creating carve-outs for religious educational institutions to avoid creating equitable environments for LGBTQIA+ students and women, the Department is effectively encouraging institutions to turn away from their legal obligations to serve all students. Rather than expand the ability of colleges and universities to discriminate against women and LGBTQIA+ students, the Department should encourage and work with religious educational institutions to combat discrimination, while also preserving their faith-based educational missions.

3. The Proposed Language Undermines Institutions' Ability to Enforce Non-Discrimination Protections

The proposed rule prevents educational institutions from ensuring that religious student groups are subject to the same expectations of inclusivity and non-discrimination as other student groups on their campus. Some colleges and universities across the country have sought to ensure students are not required to fund student groups that actively discriminate against them. For example, these schools have determined that student groups funded with activity fees should not have restrictive membership requirements that would prevent students from joining because of the color of their skin, their sexual orientation, gender identity, sex, religion, or other factors.

The proposed rule undermines this goal by requiring that “[a] public institution shall not deny to a religious student organization at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including full access to the facilities of the public institution and official recognition of the organization by the public institution) *because of the beliefs, practices, policies, speech, membership standards, or leadership standards of the religious student organization.*”¹² On its face, this language would require LGBTQIA+ students, women, and educational institutions to continue to support and fund religious student organizations that refuse to allow LGBTQIA+ students or women who access reproductive health care to become members.

Such a proposal flies in the face of the Supreme Court case *Christian Legal Society v. Martinez*¹³ in which the Court affirmed the right of public universities to require student clubs seeking official recognition and funding to be open to all registered students. In affirming this right, the Court rejected the student organization’s claim that it could restrict the membership of LGBTQIA+ students.¹⁴

¹⁰ [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_\(01-16-2020_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf)

¹¹ <http://powertodecide.org/sites/default/files/resources/primary-download/make-it-personal.pdf>

¹² <https://www.govinfo.gov/content/pkg/FR-2020-01-17/pdf/2019-26937.pdf>. Emphasis added.

¹³ In this case, the Court held “Hastings’ all-comers requirement draws no distinction between groups based on their message or perspective. An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.” 561 U.S. 661, 694-95 (2010).

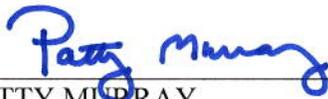
¹⁴ *Id.* at 697.

4. The Proposed Rule Eliminates Requirements to Protect the Religious Liberty of Beneficiaries

The proposed rule eliminates the requirement that religious providers receiving direct grant program funding from the Department must explain peoples' religious liberty and other rights in writing. Currently, these religious providers must provide prior written notice to any beneficiaries of their Department-funded programs explaining they are not required to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) or participate in activities that are voluntary.¹⁵ Similarly, the proposed regulation eliminates protections for people who may be uncomfortable or unable to receive services from religious providers, implicating the religious liberty of these beneficiaries. In the Department's existing regulation, if a beneficiary objects to the religious nature of an organization, "that organization must promptly undertake reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no objection."¹⁶ The Department's proposal abandons the referral requirement and provides no substitute to protect beneficiaries' ability to go to a non-religious provider.

Eliminating these requirements from the current rule will create unnecessary, harmful barriers for beneficiaries seeking access to important services. For example, a student who identifies as LGBTQIA+ or who is a child of LGBTQIA+ parents could experience open anti-LGBTQIA+ hostility from a Department-funded program partnering with their public school to provide healthcare screening, transportation, shelter, clothing, or new immigrant services. Additionally, a low-income LGBTQIA+ student participating in an Upward Bound program for college readiness preparation could be forced to participate in additional religious activities against their personal beliefs. The Obama administration promulgated this rule, in part, to ensure those seeking aid from federally-funded programs in the Department could be aware of their religious liberty rights and not experience taxpayer-funded discrimination. No one should have to choose between their beliefs and accessing the services they need. We urge you to withdraw this proposed rule.

Sincerely,



PATTY MURRAY
United States Senator



TAMMY BALDWIN
United States Senator

¹⁵ 34 CFR § 75.712

¹⁶ 34 CFR § 75.713



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