Title IX’s Religious Exemption:
Agency Practice and Judicial Application

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Title IX of the Education Amendments of 1972 prohibits discrimination “on the basis of sex” in education programs that receive federal financial assistance. The law also contains nine statutory exceptions to that prohibition, including an exemption for religiously controlled educational institutions. The religious exemption does not operate as a blanket exemption foreclosing all Title IX claims against a religiously controlled school. Nor does it allow religious entities to use the exemption as a pretext for engaging in otherwise unlawful sex discrimination under Title IX. Rather, the exemption allows conduct by a religiously controlled school that would otherwise violate Title IX’s requirements if (1) its actions are motivated by a religious reason, and (2) the application of Title IX would conflict with a religious tenet.

Federal agencies including the Department of Education (ED) that distribute financial assistance to education programs are responsible for ensuring that those programs comply with Title IX; agencies also administer and enforce the statute’s religious exemption. According to ED’s Office for Civil Rights (OCR), when reviewing requests for an exemption assurance, it examines whether the requesting institution has (1) identified the religious organization that controls it; and (2) specified the provisions of the statute or regulations that conflict with religious tenets. With respect to the latter, OCR requests that an institution specify the requirements from which it seeks an exemption and the “religious tenets that conflict with those provisions.” A school may submit a statement of its religious tenets or “submit a statement of its practices, as based on its religious tenets.” As indicated above, even if a school qualifies for a religious exemption from a specific Title IX requirement, the exemption does not insulate a school from all other Title IX requirements. Instead, ED applies the exemption where a school’s compliance with a particular Title IX requirement would conflict with a religious tenet. For instance, while a religious school might claim an exemption allowing it to exclude women from ministry courses because of religious beliefs that only men may be ministers, the exemption would not justify barring women from other courses.

In addition to this administrative enforcement, individuals may bring private suits in federal court to enforce Title IX directly against federally funded schools. Courts thus also play a role in applying the religious exemption and make determinations on whether the exemption forecloses a Title IX claim. To date, it appears that few federal courts have reached questions addressing Title IX’s religious exemption. In the limited case law addressing it, courts have offered some discussion on which entities qualify for the religious exemption and the need to show a religious conflict for it to apply. In general, federal courts appear unlikely to probe into matters of religious interpretation when assessing the applicability of the religious exemption. Rather, if an entity identifies a religious tenet that conflicts with a Title IX requirement and meets the exemption’s other requirements, a federal court would likely apply the exemption without evaluating the religious tenet at issue. If a plaintiff presents evidence that a school’s challenged conduct was not in fact religiously motivated, however, at least one federal court has held that a Title IX claim may proceed for further fact-finding to establish the school’s actual motivation, without involving analysis of religious doctrine itself.

In light of a 2020 Supreme Court decision evaluating Title VII of the Civil Rights Act of 1964, Bostock v. Clayton County, some federal courts and federal agencies, including ED, have also concluded that Title IX’s prohibition of discrimination “on the basis of sex” bars sexual orientation and gender identity discrimination. This legal development could prompt new questions about the application of Title IX’s religious exemption. A number of religious educational institutions, for example, have sought and received exemptions from ED’s OCR concerning application of certain Title IX regulatory provisions that could conflict with religious tenets concerning sexual orientation and gender identity. Litigation has also raised questions concerning Title IX’s religious exemption, including a recent pending case challenging the constitutionality of the exemption and actions taken by religiously controlled schools concerning sexual orientation and gender identity.

To the extent there is legislative interest in amending Title IX’s religious exemption, one important consideration, apart from First Amendment issues, involves the constitutional authority that Congress relied upon when enacting Title IX. The Supreme Court has repeatedly interpreted Title IX as Spending Clause-based legislation. Under that framework, recipients of federal funding voluntarily agree to comply with civil rights requirements as a condition of receiving that assistance. For Congress to impose conditions on those funds, the Supreme Court has held that statutory requirements must be “clear” and “unambiguous[...]” so that recipients have “notice” of their obligations. Thus, any ambiguities in the law may have implications for how federal courts construe Title IX’s requirements.
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Title IX of the Education Amendments of 1972 prohibits discrimination “on the basis of sex” in education programs that receive federal financial assistance. The law contains several exceptions, including a religious exemption that permits conduct by a religiously controlled educational institution that might otherwise violate the statute’s requirements when (1) the institution acts for a religious reason, and (2) compliance with the statute would conflict with a religious tenet.

Though the religious exemption was enacted with Title IX’s other original provisions in 1972, it has received renewed attention in the past several years, particularly as questions have arisen concerning whether Title IX’s antidiscrimination mandate may be construed to prohibit discrimination based on sexual orientation and gender identity. These legal developments have already prompted litigation and may generate new questions about the application of Title IX’s religious exemption.

This report begins with a discussion of how federal agencies enforce Title IX, including determining whether Title IX’s religious exemption applies. As many Title IX religious exemption determinations are made at the federal agency level, this report examines Title IX regulations and guidance addressing the exemption, the Department of Education’s (ED’s) application of the exemption, and other federal agency practices. The report then examines case law analyzing Title IX’s religious exemption, including federal court decisions addressing certain features of the statutory text and when the exemption may apply. The report closes with potential considerations for Congress relating to Title IX’s religious exemption.

Title IX: Background and Context

As a general matter, federally funded education programs must comply with Title IX’s prohibition against discrimination “on the basis of sex.” All public school districts and most colleges and universities receive federal funding and are therefore subject to the statute’s requirements. For example, denying a qualified female applicant admission into a federally funded vocational school acts for a religious reason, and (2) compliance with the statute would conflict with a religious tenet.

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For more information, see CRS Legal Sidebar LSB10830, Education Department Proposes New Title IX Regulations: Sexual Orientation and Gender Identity, by Jared P. Cole (2022); CRS Report R46832, Potential Application of Bostock v. Clayton County to Other Civil Rights Statutes, by Christine J. Back and Jared P. Cole (2021).


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Discussion of Title IX’s religious exemption as it relates to Section 1557 of the Affordable Care Act of 2010 is beyond the scope of this report. For more information, see CRS Legal Sidebar LSB10813, Proposed HHS Rule Addressing Section 1557 of the ACA’s Incorporation of Title IX, by Christine J. Back (2022).

See 20 U.S.C. § 1681(a) (applying the statute’s requirements to “any education program or activity receiving Federal financial assistance”).

program because the school prefers male applicants would violate Title IX. The law can also impose requirements in cases of sexual harassment—schools must respond appropriately to allegations of sexual harassment, and can be held liable for a deliberately indifferent response to a teacher’s harassment or abuse of a student, as well as harassment between students. In addition, Title IX prohibits schools from retaliating against individuals for reporting sex discrimination.

Title IX has nine statutory exceptions to its antidiscrimination mandate. One exemption allows an educational institution “controlled by a religious organization” to act in ways that might otherwise violate the statute’s requirements if the institution’s actions are motivated by a religious reason and compliance with the statute would conflict with a religious tenet. For example, while Title IX generally requires that educational institutions provide equal access to courses for men and women, Title IX’s religious exemption might allow some religiously controlled institutions to limit ministry training courses to men, based on religious tenets that only men may be ministers.

In enforcing Title IX and its religious exemption, federal agencies and federal courts both play a role. Federal agencies that distribute federal financial assistance to educational programs are responsible for ensuring that their funding recipients comply with Title IX, agencies also make determinations of whether Title IX’s religious exemption applies. In addition to administrative enforcement, individuals may enforce Title IX through private suits in federal court. Thus, federal courts, as well as agencies, may evaluate whether Title IX’s religious exemption forecloses a particular Title IX claim against a religiously controlled educational institution.

10 See 20 U.S.C. § 1681(a)(1). Title IX’s requirements are discussed in more detail in other CRS products. For more information, see CRS Report R47109, Federal Financial Assistance and Civil Rights Requirements, by Christine J. Back and Jared P. Cole (2022).


12 See Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005) (holding that Title IX’s implied private right of action encompasses claims of retaliation against an individual for reporting or complaining about sex discrimination).

13 See 20 U.S.C. § 1681(a)(1)–(9). See generally Doe v. Mercy Cath. Med. Ctr., 850 F.3d 545, 555 (3d Cir. 2017) (“Congress expressly exempted specific kinds of programs from Title IX’s reach—like military academies, religious schools, and sororities, see 20 U.S.C. § 1681(a)(1)–(9)—so we’re hesitant to impose further restrictions without strong justifications from Title IX’s text.”).


15 See infra “ED OCR’s Application of the Religious Exemption.”


17 See, e.g., infra “Administrative Enforcement.”

18 See Cannon v. Univ. of Chi., 441 U.S. 677, 709, 717 (1979) (concluding that the text, history, and purpose of Title IX supported an implied cause of action for victims of sex discrimination and holding that the private plaintiff in the case could maintain her Title IX lawsuit).

19 See, e.g., Maxon v. Fuller Theological Seminary, No. 20-56156, 2021 WL 5882035, at *1–3 (9th Cir. Dec. 13, 2021) (analyzing whether Title IX’s religious exemption applied to foreclosure plaintiffs’ Title IX claim challenging the defendant seminary’s expulsion decisions). In 1988, Congress enacted the Civil Rights Restoration Act (CRRA), which among other things, amended Title IX to add a provision defining a covered program or activity subject to its requirements. The Civil Rights Restoration Act of 1987, § 3, Pub. L. No. 100-259, 102 Stat. 28, 28–29. The CRRA defines “program or activity” as “all the operations of” a state or local agency; a college, university, or other postsecondary institution, or a public system of higher education; an entire corporation, partnership, or other private organization, or an entire sole proprietorship, where certain conditions are met; among other covered entities. The CRRA further provides that a “program or activity” subject to Title IX “does not include any operation of an entity which is controlled by a religious organization” if the application of the statute “would not be consistent with the religious tenets of such organization.” See 20 U.S.C. § 1687.
One consideration relevant to how courts interpret and apply Title IX, including its religious exemption, concerns the constitutional authority Congress relied upon to enact the statute. The Supreme Court has interpreted Title IX to have been enacted under Congress’s Spending Clause authority. Under this framework, covered entities voluntarily agree to comply with civil rights requirements as a condition for receiving federal funding, much as if they had entered a contract. For Congress to impose conditions on those funds, the Court has held that statutory requirements must be “clear” and “unambiguous[]” so that recipients have “notice” of their obligations. Any ambiguity in Spending Clause statutes, then, can have implications for how federal courts analyze their requirements.

**Administrative Enforcement**

Federal agencies that distribute federal financial assistance to educational programs are responsible for enforcing Title IX. In cases of noncompliance, agencies may terminate assistance as long as they follow certain procedures. Title IX’s religious exemption, however, forecloses application of the statute if compliance would conflict with a recipient’s religious tenet. Federal agencies have played a significant role in administering the exemption as they enforce Title IX in education programs that they fund.

To shed light on agency enforcement, this section first discusses agencies’ Title IX regulations, including provisions implementing the religious exemption. This section continues by examining how federal agencies have applied the exemption, with a particular focus on ED’s Office for Civil Rights (OCR).

**Title IX Regulations**

Various federal agencies distribute assistance to education programs; those that do are required under Title IX to promulgate implementing regulations. Perhaps most prominently, ED distributes substantial financial assistance every year to educational institutions and has

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20 Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999). Congress’s Spending Clause power derives from Article I, Section 8, Clause 1 of the U.S. Constitution (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”).


22 Id. at 1568.

23 Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (“By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”); id. (“[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”); id. at 25 (“In this case, Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010.”).


26 Id.

27 Id. §§ 1681(a)(3), 1687.

promulgated Title IX regulations for federally funded schools of all levels, including public elementary and secondary schools as well as public and private institutions of higher education.²⁹

Until 2020, ED’s Title IX regulations addressed the religious exemption through a brief provision that stated the following:

An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.³⁰

According to that provision, a recipient that “wishe[d]” to claim a religious exemption “shall do so” through written application to ED. One reading of that provision might be that, for a recipient to invoke a religious exemption in response to an agency investigation, it must have claimed an exemption previously in writing. However, ED instead interpreted the regulation to simply offer recipients an avenue for receiving an assurance from OCR that it qualified for an exemption.³¹ In 2020, ED substantially amended its Title IX regulations, including the religious exemption provision mentioned above.³² The new regulations make clear that an educational institution “that seeks assurance of the exemption … may do so by submitting” a written request,³³ but an educational institution is “not required” to do so and may invoke the exemption even after notice that it is under investigation for noncompliance.³⁴

ED’s discussion accompanying the rule explained that the prior regulatory provision—providing that recipients “shall” submit a written statement—was unclear about whether recipients were required to do so in order to claim a religious exemption.³⁵ ED additionally acknowledged that the statute does not require recipients to seek an assurance letter and that OCR’s past practice had been consistent with that understanding of the law, permitting institutions to invoke a religious exemption without having first obtained an assurance letter.³⁶ According to ED, its new regulations, which clarify that seeking an assurance is voluntary,³⁷ essentially codify its past practices.³⁸ Thus, recipients who want assurance of an exemption from ED may continue, “as an

²⁹ See 34 C.F.R. § 106.2; DEP’T OF JUSTICE, CIVIL RIGHTS DIV., Title IX Legal Manual (2021), https://www.justice.gov/crt/title-ix [hereinafter DOI Title IX Legal Manual] (explaining that the document is not a guide for Title IX enforcement regarding “traditional educational institutions such as colleges, universities, and elementary and secondary schools [that] have been subject to the Department of Education’s Title IX regulations and guidance for 25 years,” but is instead intended for other federal agencies that fund educational programs such as “police academies, job training programs, vocational training for prison inmates, and other education programs”).


³³ See 34 C.F.R. § 106.12(b).

³⁴ See id.


³⁶ Id. at 30,475–76.

³⁷ See 34 C.F.R. § 106.12(b).

³⁸ 2020 Final Rule, supra note 31, at 30,475–76 (“The final regulations codify longstanding OCR practices, and are consistent with the Title IX statute.”).
option,” to submit a written statement that identifies the regulatory provisions that conflict with their religious tenet.\(^{39}\)

In a separate 2020 rulemaking focused more broadly on First Amendment issues, ED added further detail to its Title IX religious exemption regulation.\(^{40}\) This addition, according to ED, was intended to clarify which institutions may claim a religious exemption by defining what it means for an educational institution to be “controlled by a religious organization.”\(^{41}\) The regulations “codify existing factors” OCR had been using to evaluate religious exemption requests, many of which had long been included in nonbinding OCR guidance.\(^{42}\) The regulations include a range of nonexclusive factors, any of which is sufficient to establish control by a religious organization,\(^{43}\) including if an educational institution is a school of divinity;\(^{44}\) if it requires students or employees to espouse belief in a specific religion;\(^{45}\) or if it has a published institutional mission, approved by the governing body of the educational institution, that includes religious beliefs.\(^{46}\) A final factor operates as a catch-all, allowing for “[o]ther evidence sufficient to establish that an educational institution is controlled by a religious organization.”\(^{47}\)

Due in part to ED’s lead role with respect to enforcing Title IX against traditional education institutions,\(^{48}\) in 2000 numerous other federal agencies adopted Title IX regulations in a common rule essentially identical to ED’s regulations.\(^{49}\) Those regulations can apply when agencies other than ED fund education programs, such as job training programs, vocational training in prisons, or 4-H programs.\(^{50}\) Those regulations continue to mirror the pre-2020 ED regulations, although

\(^{39}\) See 34 C.F.R. § 106.12(b).


\(^{41}\) Id. at 59,918.


\(^{43}\) See 34 C.F.R. § 106.12(c)(1)–(6).

\(^{44}\) See id. § 106.12(c)(1).

\(^{45}\) Id. § 106.12(c)(2).

\(^{46}\) Id. § 106.12(c)(5) (“That the educational institution has a published institutional mission 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.”).

\(^{47}\) Id. § 106.12(c)(6).

\(^{48}\) According to an executive order, the Attorney General coordinates the implementation and enforcement of Title IX across the executive branch. Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72995 (Nov. 2, 1980). That authority was delegated to the Assistant Attorney General for the Civil Rights Division. 28 C.F.R. § 0.51(b)(2).

\(^{49}\) Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858 (2000) (incorporated throughout the Code of Federal Regulations). The Department of Justice has recognized the important role ED plays in Title IX enforcement for traditional educational institutions. See DOJ Title IX Legal Manual, supra note 29 (“For more specific information on Title IX as it relates to educational institutions, readers should consult the various documents written and published by the Department of Education, Office for Civil Rights that can be found on the Department of Education website.”).

\(^{50}\) See DOJ Title IX Legal Manual, supra note 29; Sex Segregation in Youth Rodeo Events Under Title IX Regulations, 45 O.L.C. slip op. (Jan. 13, 2021). A number of federal agencies distribute science, technology, engineering, and mathematics (STEM) research grants to universities. Those agencies are responsible for administering Title IX in those programs. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-187, SEXUAL HARASSMENT IN STEM RESEARCH (2020).
implementing agencies may nonetheless interpret the requirements consistent with ED’s practice of not requiring an exemption to be requested in advance.  

**ED OCR’s Application of the Religious Exemption**

According to ED, when reviewing requests for an exemption assurance, OCR examines whether the institution has (1) identified the religious organization that controls it; and (2) specified the provisions of the statute or regulations that conflict with a religious tenet. As mentioned above, any of the factors specified in the regulations are sufficient to satisfy (1).

With respect to (2), OCR requests that an institution specify the requirements from which it seeks an exemption and the “religious tenets that conflict with those provisions.” Alternatively, rather than submit a statement of its religious tenets, an institution may instead “submit a statement of its practices, as based on its religious tenets.” ED has stated that this policy allows OCR to avoid decisions that could be seen as government interpretation of an institution’s religious tenets, which could raise First Amendment concerns, while expediting OCR processing.

OCR memoranda, letters to schools, and documents discussing Title IX’s religious exemption provide examples of the kinds of requirements that may be subject to exemption requests. Some religious institutions are exempt from Title IX requirements prohibiting discriminatory treatment based on marital or parental status, for instance. Particular educational institutions have thus sometimes claimed conflict with requirements that would prevent them from disciplining students or employees for being pregnant and unmarried. In addition, some institutions have tenets that hold only men may be ministers, and thus might limit certain courses that train future ministers to men. Such institutions might claim an exemption for those courses from requirements concerning equal access to courses for men and women.

A recent Supreme Court decision construing Title VII of the Civil Rights Act, which prohibits sex discrimination in employment, may also have implications for Title IX’s religious exemption. In the 2020 decision, *Bostock v. Clayton County*, the Court ruled that Title VII’s prohibition of sex discrimination bars discrimination based on sexual orientation and gender identity. Some courts and federal agencies, including ED, have concluded that this reasoning applies to Title IX—i.e., that Title IX likewise bars discrimination based on sexual orientation and gender identity in education programs that receive federal financial assistance.

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51 See e.g., U.S. Dep’t of Agric., Food & Nutrition Serv., Memorandum on the Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5, 2022).

52 Dep’t of Educ., Office for Civil Rights, *Exemptions from Title IX*, Dep’t of Educ. (Mar. 8, 2021) [hereinafter *Title IX Exemptions*], https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html.

53 Id.

54 Id.

55 1989 Memorandum, supra note 31, at 3; *Title IX Exemptions*, supra note 52.

56 Id. at 4; see e.g., 34 C.F.R. §§ 106.21(c), 106.40, 106.57, 106.60.


58 Id. at 2.

59 Id. at 4.

60 140 S. Ct. 1731, 1737 (2020).

A number of institutions have sought and received Title IX religious exemptions based on religious tenets concerning sexual orientation and gender identity.\(^{62}\) For instance, some institutions have sought and obtained exemptions from Title IX requirements that could require allowing transgender students to participate in athletics consistent with their gender identity.\(^{63}\) In addition, in response to an OCR investigation that a university’s student group recognition process violated Title IX by refusing to treat “LGBTQ+” student groups similarly to other groups, the university successfully obtained a religious exemption for this practice.\(^{64}\)

Even if a school qualifies for a religious exemption from a specific Title IX requirement, however, that does not insulate a school from all other Title IX requirements. Instead, ED applies the exemption where there is a specific conflict between a religious tenet and a particular requirement. For instance, while a religious school might claim an exemption allowing it to exclude women from ministry courses because of beliefs that only men may be ministers, the exemption would not justify barring women from other courses.\(^{65}\)

**Application of Religious Exemption by Agencies Other Than ED**

As mentioned above, all agencies that distribute federal financial assistance to educational programs—not just ED—enforce Title IX.\(^{66}\) The statute’s religious exemption applies no matter the agency distributing funding. For example, the U.S. Department of Agriculture’s (USDA’s) Food and Nutrition Service (FNS) distributes federal financial assistance to certain educational programs, including through the National School Lunch Program.\(^{67}\) FNS recently announced that, consistent with the interpretations of Title IX issued by ED and the Department of Justice, it interprets Title IX to prohibit discrimination based on sexual orientation and gender identity.\(^{68}\) At least one private religious school that participates in the USDA National School Lunch program objected to compliance with this interpretation of Title IX.\(^{69}\) It then received confirmation that it qualifies for Title IX’s religious exemption.\(^{70}\)

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\(^{62}\) See, e.g., Letter from Catherine Lhamon, Ass’t Sec’y for Civil Rights, to Kevin Worthen, President, Brigham Young Univ. (Jan. 3, 2022), https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/brigham-young-university-response-01032022.pdf.

\(^{63}\) See, e.g., Letter from Kenneth Marcus, Ass’t Sec’y for Civil Rights, to Paul Haines, President, Taylor Univ. (Jan. 15, 2019), https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/taylor-university-response-01152019.pdf.

\(^{64}\) See, e.g., Letter from Catherine Lhamon, Ass’t Sec’y for C.R., to Adam Morris, President, Azusa Pac. Univ. (Nov. 21, 2022), https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/azusa-pacific-university-response-11192022.pdf.

\(^{65}\) 1989 Memorandum, supra note 311, at 4.

\(^{66}\) Congress has sometimes specifically directed agencies to conduct regular reviews to ensure compliance with Title IX. See, e.g., 51 U.S.C. § 40909 (directing the Administrator of the National Aeronautics and Space Administration to conduct Title IX compliance reviews of at least two grantees annually).

\(^{67}\) See CRS In Focus IF10266, *Child Nutrition Reauthorization (CNR): An Overview*, by Kara Clifford Billings and Randy Alison Aussenberg. USDA’s FNS also administers the School Breakfast Program, Special Milk Program, Child and Adult Care Food Program, and the Summer Food Service Program.


USDA subsequently issued guidance clarifying that Title IX’s religious exemption allows “an institution to be exempt on religious grounds if there is a conflict between Title IX and a school’s governing religious tenets.” That guidance indicated that while institutions have the option to seek recognition from USDA of an exemption, they are not required to first submit written requests in order to claim an exemption. Instead, institutions may invoke an exemption after a complaint is filed or USDA begins compliance efforts. This position appears consistent with ED’s practice regarding the religious exemption.

**Case Law Addressing Title IX’s Religious Exemption**

To date, it appears few federal courts have reached questions concerning the interpretation or application of Title IX’s religious exemption. In the limited case law that does exist, courts have offered some discussion of certain aspects of the provision, including which entities can qualify for the religious exemption and the need to show a religious conflict for it to apply. In addition, at least one federal court has held that when a religiously controlled educational institution asserts a religious reason for the challenged conduct, but the plaintiff presents evidence that the challenged conduct was not in fact religiously motivated, the case may proceed for further fact-finding to establish the actual motivation for the challenged conduct. More generally, recent changes interpreting Title IX to prohibit sexual orientation and gender identity discrimination may give rise to more Title IX litigation, including with respect to its religious exemption and certain provisions of the Constitution.

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71 USDA Religious Exemption Guidance, supra note 68.
72 See 7 C.F.R. § 15a.205 (USDA Title IX religious exemption regulations).
73 See USDA Religious Exemption Guidance, supra note 68.
74 See supra notes 32–39.
75 See, e.g., Goodman v. Archbishop Curley High School, Inc., 149 F.Supp.3d 577, 584 (D. Md. 2016) (“Few courts have addressed the breadth of Title IX’s religious exemption and none have addressed it in the context of employment discrimination or retaliation claims.”). Apart from Title IX’s statutory religious exemption, some federal district courts have dismissed Title IX claims alleging discrimination in employment against a religious educational institution on the basis of a First Amendment-derived doctrine called the ministerial exception. See, e.g., Koenke v. Saint Joseph’s Univ., No. 19-4731, 2021 WL 75778, at *3–4 (E.D. Pa. Jan. 8, 2021) (stating that “Title VII and Title IX are federal statutes governing, inter alia, employment relationships,” determining that “hostile work environment claims, particularly those brought pursuant to Title VII or Title IX, clearly fall within the scope of cases banned by the ministerial exception,” and holding that the ministerial exception barred all of plaintiff’s employment discrimination claims); Petruska v. Gannon Univ., No. 04-80, 2008 WL 2789260, at *5 (W.D. Pa. Mar. 31, 2008) (“In short, the ministerial exception acts as a constitutionally-mandated limitation upon the reach of Title VII—and Title IX—to the extent those laws as applied would infringe Gannon’s First Amendment right to choose its ‘ministers’ (as that term is defined by our circuit court of appeals).”). See also Clark v. Newman Univ., No. 19-1033, 2022 WL 4130828, at *13 (D. Kan. Sept. 12, 2022) (denying defendant’s motion for summary judgment and instead concluding that a jury would have to resolve whether the plaintiff was a ministerial employee within the meaning of the First Amendment’s ministerial exception). The application of the ministerial exception is beyond the scope of this report but is discussed in other CRS products. See CRS Legal Sidebar LSB10455, UPDATE: Our Lady of Guadalupe and the Ministerial Exception to Antidiscrimination Laws, by Valerie C. Brannon (2020).
76 See infra “Pretext Determinations.”
77 For more information, see CRS Report R46832, Potential Application of Bostock v. Clayton County to Other Civil Rights Statutes, by Christine J. Back and Jared P. Cole (2021).
78 See, e.g., Hunter v. U.S. Dep’t. of Educ., No. 21-00474, 2023 WL 172199, at *1–3 (D. Or. Jan. 12, 2023) (discussing plaintiffs’ various claims relating to Title IX’s religious exemption, including a motion for a preliminary injunction seeking to enjoin the Department of Education from applying Title IX’s religious exemption to private religious...
Religious Control

As discussed above, the statutory text of Title IX’s religious exemption limits its applicability to educational institutions “controlled by a religious organization.” More specifically, 20 U.S.C. § 1681(a)(3) provides that Title IX’s prohibition of discrimination “on the basis of sex” 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.”

Addressing the first clause of § 1681(a)(3), the U.S. Court of Appeals for the Ninth Circuit, in an unpublished decision, held that an educational institution need not be controlled by an external religious organization to qualify for the exemption. In *Maxon v. Fuller Theological Seminary*, the court rejected the plaintiffs’ argument that the statutory text requires “two entities,” an educational institution and a separate, controlling religious organization distinct from the school. The court reasoned that the “ordinary meaning of ‘organization’ is broad enough to encompass” an entity contained within the same educational institution such as an institution’s board of trustees or board of directors, and pointed to the Department of Education’s long-held interpretation that § 1681(a)(3) does not require that “the controlling religious organization be a separate legal entity than the educational institution.” To the extent that § 1681(a)(3) could be subject to multiple interpretations, the court deferred to ED’s interpretation to conclude that “Title IX’s religious exemption encompasses educational institutions, including divinity schools like Fuller, that are controlled by their own religiously affiliated boards of trustees.”

Conflict with a Religious Tenet

For Title IX’s religious exemption to apply, an educational institution must not only be controlled by a religious organization; compliance with Title IX must also conflict with a religious tenet. More specifically, the statutory text provides that the exemption applies “if the application of this subsection would not be consistent with the religious tenets of such organization.” Though case law addressing Title IX’s religious exemption is limited, federal courts appear unlikely to probe into matters of religious interpretation when assessing the applicability of the religious exemption, a reticence that might reflect First Amendment concerns. Rather, as long as the

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*See 20 U.S.C. § 1681(a)(3).*

*Id.*

*Maxon v. Fuller Theological Seminary*, No. 20-56156, 2021 WL 5882035, at *1 (9th Cir. Dec. 13, 2021). For purposes of brevity, references to a particular circuit in the body of this report (e.g., the D.C. Circuit, the Second Circuit, etc.) refer to the U.S. Court of Appeals for that particular circuit. Collectively, the federal appellate courts are termed “federal courts of appeals.”

*Id.*

*Id.* (citing Final Rule Regarding Dep’t of Educ. Rule Revisions of Higher Educ. Programs, 85 Fed. Reg. 59,916, 59,956 (2020) (to be codified at 34 C.F.R. pts. 75, 76, 106, 606–609). The court also added that this interpretation was formalized in ED’s 2020 regulations, “which said that if an ‘educational institution is a school or department of divinity,’ that is ‘sufficient to establish that [it] is controlled by a religious organization.’” *Id.* (alteration in original) (quoting 34 C.F.R. § 106.12(c)).

*Id.*

*See 20 U.S.C. § 1681(a)(3).*

*Id.*

institution plainly identifies a religious tenet that conflicts with a Title IX requirement, at least one federal court has held that Title IX’s religious exemption applies. In an unpublished decision in *Maxon v. Fuller Theological Seminary*, the Ninth Circuit addressed a Title IX claim alleging that a Christian seminary had discriminated based on sexual orientation when it expelled students married to same-sex partners. In its analysis, the court concluded that the seminary qualified as a religiously controlled institution within the meaning of Section 1681(a)(3) and that the institution’s religious tenets motivated the challenged decisions, thereby exempting the school from Title IX compliance with respect to the plaintiffs’ claims.

The plaintiffs had argued, among other things, that Title IX’s religious exemption did not apply because it was unclear whether there was “a legitimate conflict between the school’s religious tenets and Title IX’s prohibition on sex discrimination.” The court rejected the plaintiffs’ arguments, pointing to the school’s religious tenets, as expressed in the seminary’s Sexual Standards, that “sexual union must be reserved for marriage, which is the covenant union between one man and one woman.” The school’s Standards also “outline[d] the expectation that all members of the school community ‘abstain from what it holds to be unbiblical sexual practices.’” Thus, the court concluded, to the extent that Fuller had expelled the students “because their marriages were with spouses of the same sex, rather than the opposite sex,” Title IX’s religious exemption applied to permit “religiously motivated decisions that would otherwise violate Title IX’s prohibition on sex discrimination.”

Put another way, the court concluded that in the case of the seminary, because retaining students married to same-sex partners conflicted with a religious tenet concerning marriage, Title IX’s prohibition did not apply to the challenged expulsions. The court also rejected the plaintiffs’ argument that more fact-finding was necessary to determine if there was a religious conflict, determining that the lower court had not erred in resolving that question on a motion to dismiss. The court of appeals stated that “[t]o the extent that Plaintiffs ask us to second-guess Fuller’s interpretation of its own religious tenets, we cannot grant Plaintiffs any relief.”

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88 *Cf.* Maxon, 2021 WL 5882035, at *2–3 (discussing religious conflict between the seminary’s religious tenets concerning marriage and Title IX compliance and applying Title IX’s religious exemption); Stevens v. Brigham Young Univ. - Idaho, 588 F. Supp. 3d 1117, 1131 (D. Idaho 2022) (discussing absence of evidence of conflict between religious tenets and Title IX compliance and declining to apply Title IX’s religious exemption to plaintiff’s Title IX pre-assault claim).

89 Maxon, 2021 WL 5882035, at *1–2.

90 Id. at *1.

91 Id. at *2–3.

92 Id. at *2.

93 Id.

94 *Id.* See also Maxon v. Fuller Theological Seminary, 549 F.Supp.3d 1116, 1119 (C.D. Ca. 2020) (indicating that the seminary’s Sexual Standards Policy also states that the “seminary believes premarital, extramarital, and homosexual forms of explicit sexual conduct to be inconsistent with the teaching of Scripture”).

95 Maxon, 2021 WL 5882035, at *2.

96 *See id.*

97 Id. at *2–3.

98 *Id.* at *2 (citing Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion)). *See also id.* at *3 (addressing and (continued...)}
At a minimum, however, federal courts have required religious educational institutions to sufficiently identify an applicable religious tenet and explain how it conflicts with Title IX compliance in a particular circumstance to justify application of the religious exemption. In two recent decisions—one involving sexual abuse and harassment allegations and another concerning discrimination in athletics—federal district courts held that the Title IX exemption did *not* apply based on the entities’ failures to make this showing.

In one case, a district court rejected a university’s contention that Title IX’s religious exemption barred a plaintiff’s claim alleging that the school had a policy of deliberate indifference to the sexual harassment of students. The plaintiff in the case, a female student, alleged ongoing sexual harassment and abuse by her professor and brought a Title IX claim (among other things) that alleged the university’s combination of its Title IX and Honor Code offices into one entity demonstrated a policy of deliberate indifference to sexual harassment claims. That combined office could discipline students for violating the university’s Honor Code, including for sexual behavior violating religious rules, and no exception was made under the Honor Code for individuals reporting sexual misconduct. The university asserted Title IX’s religious exemption in response to the student’s claim, but the district court held the exemption did not apply. There was no evidence, the court stated, that “combining the Title IX and Honor Code offices . . . was necessary to comply with a religious tenet” or that “granting amnesty to those reporting sexual misconduct to the Title IX office would violate a religious tenet.”

In another case, a federal district court rejected a private religious high school’s assertion of Title IX’s religious exemption for also failing to identify how Title IX compliance conflicted with a religious tenet—this time in the athletics context. In that case, *Herrera ex rel. E.H. v. Valley Christian Academy*, a private high school refused to permit a female athlete on another school’s football team to play in games or extracurricular sports activities that occurred on its premises, or when its team was visiting her school to compete against that team. The high school contended that its refusal to permit the plaintiff to play in football games against its own football team was based on its code of conduct requiring that “[t]here is to be no physical contact between boys and girls at Valley Christian Academy.”

Declining to apply Title IX’s religious exemption, the *
district court concluded that the school’s policy was insufficient on its own for the exemption to apply in the absence of an explanation as to “how the banned contact is inconsistent with its religious teachings.”

Drawing a contrast between the seminary in Maxon and the private school at issue, the district court reasoned that while the seminary in Maxon had directly linked its policy banning same-sex unions to biblical teachings, “Valley Christian’s policy banning physical contact between members of the opposite sex does not provide an explicit link between the inappropriate conduct and Valley Christian’s religious teachings.” Accordingly, the district court denied the school’s motion to dismiss the plaintiff’s Title IX claim on the basis of the religious exemption, stating that “it would be inappropriate to apply . . . at this stage.”

**Pretext Determinations**

Title IX’s religious exemption does not allow religious entities to use a religious reason as a pretext for unlawful sex discrimination. At least one federal court, for example, has allowed a Title IX claim to proceed against a religious entity to determine whether a religious reason or a nonreligious reason—differential treatment based on sex disconnected from a religious belief—actually motivated the challenged alleged action. In other words, when a plaintiff offers evidence of different treatment based on sex unrelated to a religious tenet, but the institution at issue contends such differential treatment was motivated by a religious tenet, it is possible that a federal court may permit a factual inquiry into whether the institution’s actions were in fact motivated by a religious belief, or whether religion is being used as a pretext for unlawful sex discrimination under Title IX.

As a general matter, when analyzing intentional discrimination claims, federal courts assess whether evidence offered in a particular case would allow a jury to conclude that an action was taken against an individual for a discriminatory reason. Discriminatory intent can be shown in different ways, including with evidence of pretext—that is, evidence discrediting the defendant’s asserted explanation for its actions to support a showing that “a discriminatory reason more likely motivated the defendant’s decision.” In the context of a Title IX retaliation claim, for example,

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108 Id.
110 Herrera, 616 F. Supp. 3d at 1054.
113 See id. Cf. Geary v. Visitation of Blessed Virgin Mary Par. Sch., 7 F.3d 324, 325 (3d Cir. 1993) (stating that “when a religious employer contends that a religious tenet or practice—not illegal discrimination—motivated a challenged employment action, the [Age Discrimination in Employment Act] will apply only so long as the plaintiff does not challenge the validity of the doctrine or practice and asks no more than whether the proffered religious reason actually motivated the employment action.”).
114 See generally, e.g., Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 153 (2000) (“The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.”).
115 See, e.g., Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ., 245 F.3d 1172, 1177 (10th Cir. 2001) (in a Title IX analysis, stating that a “plaintiff demonstrates pretext either by showing that a discriminatory reason more likely motivated the defendant’s decision or that the employer’s proffered explanation is unworthy of belief”). See generally Reeves, 530 U.S. at 147 (stating that “[i]n appropriate circumstances, the trier of fact can reasonably infer (continued...)
changed or inconsistent explanations for a school’s conduct may support a finding that those explanations were not its actual reasons and that its conduct was instead retaliatory.116 Pretext can also be shown with evidence that an entity belatedly offered a rationale for its actions in a manner that suggests it is a post-hoc cover for discriminatory conduct,117 or in cases when an entity asserts it was applying a standard policy to the plaintiff, but there is evidence that it applied the same policy more leniently or differently to other individuals similar or comparable to the plaintiff.118

Of the few federal courts that have analyzed a Title IX claim against a religious educational institution, at least one has held that when a plaintiff alleges sufficient facts that the religious entity took a challenged action for nonreligious reasons—rather than for its asserted religious reasons—a Title IX claim may proceed for further fact-finding on the question of pretext and is not immediately foreclosed by the religious exemption. In a 2016 decision in Goodman v. Archbishop Curley High School, a federal district court denied a motion to dismiss a Title IX claim brought by a school librarian alleging that her religious employer fired her in retaliation for reporting suspected sexual abuse of a student by a teacher.119 The Catholic school that employed the plaintiff argued, among other things, that Title IX’s religious exemption barred her retaliation claim.120 The school contended that it fired her for belatedly (rather than immediately) reporting child sex abuse contrary to its own policies and Canon Law, and argued that allowing her claim to proceed would be inconsistent with those religious tenets.121 The plaintiff contended that her termination was not for violating religious school policies or Canon Law, but was rather in

from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party’s dishonesty about a material fact as “affirmative evidence of guilt” (citation omitted).

116 See, e.g., Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 868–70 (9th Cir. 2014) (stating with respect to a Title IX claim alleging that the school fired its softball coach and replaced him with a less competent coach in retaliation for complaints about sex discrimination in the school’s athletic program, that the school’s “shifting, inconsistent reasons for [the coach’s] termination are themselves evidence of pretext”).

117 See, e.g., Ollier, 768 F.3d at 870 (observing that “the timing of [plaintiff’s] termination suggests that [the school]’s allegedly nonretaliatory reason is merely a post hoc rationalization for what was actually an unlawful retaliatory firing”); Miller v. Bd. of Regents of Univ. of Minn., 402 F.Supp.3d 568, 576–77 (D. Minn. 2019) (discussing evidence supporting Title IX claim alleging that decision not to renew coaching contract was based on sex, including that the university had told the plaintiff its decision was not based on her performance but then “reversed course” at trial to contend that its decision was based on her poor performance). See generally Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 56 (1st Cir. 2000) (in the context of a Title VII analysis, stating that “[a]nother method of establishing pretext is to show that [the defendant]’s nondiscriminatory reasons were after-the-fact justifications, provided subsequent to the beginning of legal action”); DeMarco v. Holy Cross High Sch., 4 F.3d 166, 171 (2d Cir. 1993) (in the context of a Title VII analysis, stating that “[t]he pretext inquiry thus normally focuses upon factual questions such as . . . whether the putative non-discriminatory purpose was stated only after the allegation of discrimination”).

118 See, e.g., Gossett, 245 F.3d at 1177 (“Evidence sufficient to raise a fact issue on whether a defendant’s proffered explanation is pretextual may take a variety of forms, including evidence that the defendant treated the plaintiff differently from others who were similarly situated, which we have held is especially relevant to a showing of pretext.”); Chipman v. Grant Cnty. Sch. Dist., 30 F. Supp. 2d 975, 977, 979–80 (E.D. Ky. 1998) (in Title IX context, pointing to evidence that selection committee for local chapter of National Honors Society applied policy against premarital sex differently in refusing to admit female students who gave birth out of wedlock, as the “committee did not ask any other student offered admission—male or nonpregnant female—if they had engaged in premarital sexual activity). See generally, e.g., Miceli v. JetBlue Airways Corp., 914 F.3d 73, 84 (1st Cir. 2019) (in the context of a Title VII analysis, discussing ways of showing pretext with evidence that an employer disparately applied a standard policy).


120 Id. at 584, 586.

121 Id. at 583.
retaliation for reporting sexual abuse allegations in the first instance.\textsuperscript{122} To that end, the plaintiff alleged, among other things, that the school was already aware of sexual abuse allegations against the same teacher before her report\textsuperscript{123} and that school officials sought to dissuade her from discussing the sexual abuse.\textsuperscript{124} She also alleged that the first time school officials told her of any policies or procedures regarding requirements to follow after a report of sexual abuse was at the time the school suspended her.\textsuperscript{125}

In allowing the Title IX claim to go forward, the district court relied on a federal appellate court decision allowing an age discrimination claim against a religious employer. In that earlier case, \textit{DeMarco v. Holy Cross High School}, the U.S. Court of Appeals for the Second Circuit permitted the age discrimination claim to proceed in order to determine whether the religious employer’s asserted religious justifications for firing the plaintiff—his failure to attend Mass with students, for example—were its actual reasons, rather than his age.\textsuperscript{126} The Second Circuit in \textit{DeMarco} emphasized that such an inquiry “‘need not, and indeed should not, evaluate whether a defendant’s stated purpose is unwise or unreasonable,’” but should instead focus on “‘determining whether the articulated purpose is the actual purpose for the challenged employment-related action.’”\textsuperscript{127} Nor should that kind of pretext inquiry, the court of appeals reasoned in \textit{DeMarco}, typically involve “‘calling into question the value or truthfulness of religious doctrine.’”\textsuperscript{128}

Although the Second Circuit’s analysis in \textit{DeMarco} concerned whether the plaintiff’s age discrimination claim would implicate the Establishment Clause of the First Amendment, the district court in \textit{Goodman} found the analysis persuasive with respect to Title IX’s religious exemption.\textsuperscript{129} As such, the \textit{Goodman} court concluded that allowing the plaintiff’s Title IX claim to proceed in order to assess pretext would not be “inconsistent with [the school’s] religious tenets” nor “threaten [its] religious interests or freedoms” given the focus of the pretext inquiry.\textsuperscript{130} The district court thus denied the school’s motion to dismiss on the basis of Title IX’s religious exemption.\textsuperscript{131}

As described previously, another way of showing pretext in the Title IX context is through evidence that a school applied the same policy to individuals in a different way based on sex.\textsuperscript{132} Given the dearth of case law concerning Title IX’s religious exemption, however, it is an open question if and how federal courts might evaluate evidence of an entity’s disparate application of a religiously based standard, particularly when no other religious tenet accounts for the differential treatment.\textsuperscript{133} To date, at least one federal appellate court (in a nonprecedential

\textsuperscript{122} Id. at 581.
\textsuperscript{123} Id. at 580.
\textsuperscript{124} Id. at 580–81.
\textsuperscript{125} Id. at 581.
\textsuperscript{126} Id. at 585–86 (discussing and quoting the Second Circuit decision in \textit{DeMarco v. Holy Cross High School}, 4 F.3d 166 (2d Cir.1993), which addressed a claim brought under the Age Discrimination in Employment Act).
\textsuperscript{127} \textit{DeMarco}, 4 F.3d at 170–71.
\textsuperscript{128} Id. at 171.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 586, 589.
\textsuperscript{132} See supra “Pretext Determinations.”
\textsuperscript{133} In its unpublished decision in \textit{Maxon v. Fuller Theological Seminary}, the Ninth Circuit noted that the plaintiffs had alleged that the seminary “treated them more harshly because they violated the Sexual Standards policy by being in same-sex marriages as compared to students who violated the Sexual Standards policy by engaging in other forms of (continued...)
Constitutional Challenges

Federal government actions, including legislation, must comport with constitutional requirements. At least one federal district court has addressed a challenge to Title IX’s religious exemption on various constitutional grounds in a case involving its application to discrimination based on sexual orientation and gender identity. In Hunter v. U.S. Department of Education, the plaintiffs alleged, among other things, that Title IX’s religious exemption was unconstitutional on the basis that it violated their rights to equal protection and substantive due process under the Fifth Amendment and violated the Establishment Clause of the First Amendment.

The plaintiffs in Hunter—“sexual and gender minority students” who attended or applied to private religious colleges and universities receiving federal funding—alleged that Title IX’s religious exemption violated their right to equal protection under the Fifth Amendment by targeting them for stigmatic harm and unequal treatment, including in the form of discipline, expulsion, and the rejection or rescission of admissions because of their sexual orientation or gender identity. The court concluded that the plaintiffs had adequately alleged injury and standing to pursue their equal protection claim but had offered no allegations or evidence that Congress intended to discriminate when enacting the religious exemption—a necessary element for challenging a facially neutral law on equal protection grounds.

Relying on Ninth Circuit and federal district court decisions, the court went on to acknowledge that distinctions based on sexual orientation or gender identity may survive an equal protection challenge if the challenged law passes a constitutional test commonly referred to as “intermediate scrutiny.” A law can satisfy this standard if it serves an important government objective and

opinion) and one district court have issued decisions in cases alleging such differential treatment, but neither found it necessary to reach that issue.

See id. at *9 (concluding that plaintiffs had failed to state a claim for “violations of their rights to equal protection; substantive due process; the Establishment Clause; freedom of speech; freedom of assembly and association, and freedom of religion; or [the Religious Freedom Restoration Act].”).

See id. at *6.  
See id. at *10.  
See id. at *2.  
See id. at *6–7.  
See id. at *10.  
See id. at *9.  
See id. at *10.  
See id. at *6-7.  
See id. at *6.  
See id. at *10.  
See id. at *6.  
Id. at *3 (listing all of the plaintiffs’ various claims).

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prohibited sexual conduct.” No. 20-56156, 2021 WL 5882035, at *2 n. 1 (9th Cir. Dec. 13, 2021). The court of appeals concluded that it did not need to decide whether that could be a cognizable theory of liability in the absence of a religious tenet that otherwise explained the differential treatment, because the plaintiffs had offered insufficient factual allegations to show such differential treatment.  
Id. at *6.  
Id. at *10.  
Id. at *2.  
Id. at *6–7.  
Id. at *10.

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employs means that are substantially related to achieving that objective. The Hunter court concluded, however, that the plaintiffs had not alleged how the religious exemption failed this constitutional test. Rather, in the court’s view, the limited scope of the exemption—applying “only to the extent that a particular application of Title IX would not be consistent with a specific tenet of the controlling religious organization”—appeared to be substantially related to the important government objective of accommodating religious exercise.

The plaintiffs in Hunter also alleged that Title IX violated the Establishment Clause of the First Amendment by impermissibly promoting religion. The district court concluded that the plaintiffs had failed to plausibly allege such a violation, relying extensively on the Supreme Court’s 1987 decision in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos. In Amos, the Supreme Court upheld a religious exemption from Title VII’s prohibition of religious discrimination in employment against an Establishment Clause challenge, reasoning that the law had a “permissible legislative purpose,” the government was not itself advancing religion, and the law did not “impermissibly entangle church and state.” The district court in Hunter emphasized that the plaintiffs had not identified legal authority to distinguish the case from Amos, and thus the Establishment Clause claim failed.

An appeal of the decision in Hunter is pending before the Ninth Circuit.

Considerations for Congress

Rather than granting a blanket exemption from all the requirements of Title IX, the statute’s religious exemption applies only to situations in which a religiously controlled educational institution’s Title IX compliance would conflict with a religious tenet. To assert the exemption, religiously controlled educational institutions must at least identify the religious tenet (or practices based on tenets) and conflict at issue. When making determinations of whether the

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145 Id. at *11 (quoting Harrison v. Kernan, 971 F.3d 1069, 1076 (9th Cir. 2020)).
146 Id.
147 Id. Meanwhile, the court observed that neither the plaintiffs nor defendants had developed arguments for an as-applied equal protection challenge, and that the plaintiffs’ pleadings offered no explanation as to how the exemption was unconstitutional as applied to them specifically. Id. The district court further concluded that the plaintiffs’ substantive due process claim failed to satisfy pleading standards for its “vague, conclusory, and solitary reference to ‘substantive due process’” in the complaint, with no discussion addressing the elements of such a claim or factual allegations to support it. Id. at *11–12.
148 See id. at *12–13 (explaining that “[t]he Establishment Clause prohibits the Government from compelling an individual to participate in religion or its exercise, or otherwise from taking action that has the purpose or effect of promoting religion or a particular religious faith”) (citing Lee v. Weisman, 505 U.S. 577, 587 (1992)).
149 Id. at *13–15.
151 Id. at 329–30 (addressing whether application of the religious exemption in Section 702 of Title VII of the 1964 Civil Rights Act to the secular nonprofit activities of religious organizations violated the Establishment Clause and reversing the district court’s holding that it did).
152 Id. at 335–39.
153 Hunter v. U.S. Dep’t. of Educ., No. 21-cv-00474, 2023 WL 172199, at * 13 (D. Or. Jan. 12, 2023). See also id. at *14 (stating that the plaintiffs had “failed to demonstrate any impermissible purpose Congress had in enacting the religious exemption, especially in light the Supreme Court’s decision in Amos and other cases upholding religious exemptions”); id. at *15 (stating that Title IX’s religious exemption “is materially indistinguishable from that in Amos”).
156 Id.
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religious exemption applies, it appears that neither federal agencies such as ED nor federal courts are likely to question or probe the religious doctrine itself; rather, the focus of the inquiry is on whether a conflict with a Title IX requirement, for example, has been sufficiently identified.157 To date, federal case law does not reflect extensive analysis of Title IX’s religious exemption. Much of this analysis has occurred in district court decisions and unpublished court of appeals cases that, while perhaps having persuasive value in future cases, do not establish binding precedent. Instead, the application of the exemption has been largely administrative, with federal agencies like ED determining whether an educational institution is both religiously controlled and whether Title IX compliance conflicts with a religious tenet. In the administrative enforcement context, it appears that the majority of claims involving Title IX’s religious exemption have arisen in the higher education context, rather than in K–12 private schools.158 As litigants raise novel legal questions regarding Title IX, and federal agencies and some federal courts interpret Title IX to prohibit sexual orientation and gender identity-based discrimination,159 it may be that new applications of Title IX’s requirements will generate increased administrative activity and judicial analysis of Title IX’s religious exemption.

As a general matter, should it choose to do so, Congress has the authority to alter the scope of Title IX’s religious exemption and the considerations relevant to qualifying for the exemption, subject to First Amendment limitations. Congress could, for example, pass legislation that specifically addresses the mechanics of invoking the religious exemption. In addition, and as indicated earlier, the Supreme Court has interpreted Title IX as Spending Clause legislation.160 Thus, to the extent that there is legislative interest in amending Title IX’s religious exemption, one consideration unique to Spending Clause legislation might apply: in general, the Supreme Court requires that conditions or requirements in such legislation must be clear and unambiguous.161 As an alternative to amending the text of Title IX’s religious exemption, Congress could direct federal agencies like ED to promulgate new regulations addressing the exemption consistent with particular policy goals.

157 See supra “ED OCR’s Application of the Religious Exemption” and “Conflict with a Religious Tenet.”

158 See, e.g., See Dep’t of Educ., Office for Civil Rights, Correspondence (last visited June 21, 2023) (compiling Title IX religious exemption requests), https://www2.ed.gov/about/offices/list/ocr/correspondence/other.html.

159 For more information, see CRS Legal Sidebar LSB10830, Education Department Proposes New Title IX Regulations: Sexual Orientation and Gender Identity, by Jared P. Cole (2022); CRS Report R46832, Potential Application of Bostock v. Clayton County to Other Civil Rights Statutes, by Christine J. Back and Jared P. Cole (2021). Compare Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) (concluding that a school board policy barring a transgender student access to the bathroom consistent with their gender identity constituted discrimination based on sex under Title IX), with Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 812 (11th Cir. 2022) (ruling that “sex” under Title IX refers to “biological sex” and a school board policy barring transgender students from access to the bathroom consistent with their gender identity was permissible under the statutory and regulatory carve-outs for sex-segregated facilities).


161 See generally, e.g., Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (stating that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously,” and that Congress must “speak with a clear voice” to enable recipients to “exercise their choice knowingly, cognizant of the consequences of their participation.”). For more information, see CRS Report R46827, Funding Conditions: Constitutional Limits on Congress’s Spending Power, by Victoria L. Killion.
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