

## U.S. Department of Education Fact Sheet

### Regarding a Proposed Rulemaking on Religious Liberty and Free Inquiry

#### **Background Facts**

- Federal law currently provides that Title IX “shall not apply” to educational institutions that are “controlled by a religious organization,” to the extent that application of Title IX “would not be consistent with the religious tenets of such organization.”
- Likewise, federal regulations echo the fact that Title IX does not apply to certain schools “controlled by a religious organization.”
- Neither Title IX nor its regulations define what it means for a school to be “controlled by a religious organization.” Over the years, the Department of Education’s Office for Civil Rights (OCR) has posted on its website several internal memoranda on this question.
- Because these OCR memoranda constitute only non-binding, non-regulatory guidance, the Department desires to engage in notice and comment rulemaking on this issue and to obtain the views of the public in crafting an appropriate regulation. Accordingly, one section of the Department’s Notice of Proposed Rulemaking on Religious Liberty and Free Inquiry proposes a non-exhaustive list of concrete factors to consider as to whether an educational institution is “controlled by a religious organization” for Title IX purposes.

#### **Guiding Principles of the Proposed Rule**

- **Religious Freedom:** The Department’s proposed regulation helps secure religious freedom for educational institutions while ensuring vigorous enforcement of the prohibition of discrimination on the basis of sex.
- **Rulemaking Process:** The Department is committed to the notice-and-comment process for rulemaking and to providing greater clarity to all stakeholders.
- **Fairness:** Merely referring stakeholders to factors articulated in internal memoranda issued decades ago—that were never offered to the public for comment and do not have the force and effect of law—does not fairly give stakeholders or the public notice of when the Title IX religious exemption applies.
- **Predictability:** The proposed regulations seek to ensure that stakeholders understand whether Title IX applies in specific instances, so as to increase predictability and consistency.
- **Building on existing practices:** The criteria in the proposed § 106.12(c) would partly codify existing factors that the Assistant Secretary for Civil Rights considers when evaluating a recipient’s invocation of a religious exemption under Title IX.

#### **When is a school “controlled by a religious institution” for Title IX purposes?**

- The proposed regulations offer a non-exhaustive list of criteria that an educational institution may use to satisfy the definition of “controlled by a religious institution.”
- The proposed regulation offers the following provisions to clarify what facts an educational institution may use to demonstrate that it is controlled by a religious organization:
  - (1) A statement that the educational institution is a school or department of divinity.
  - (2) A statement that the educational institution requires its faculty, students, or employees to be members of, or otherwise engage in religious practices of, or espouse a personal belief in, the religion of the organization by which it claims to be controlled.

(3) A statement that the educational institution, in its charter or catalog, or other official publication, contains an explicit statement that it is controlled by a religious organization or an organ thereof, or is committed to the doctrines or practices of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

(4) A statement that the educational institution has a doctrinal statement or a statement of religious practices, along with a statement that members of the institution community must engage in the religious practices of, or espouse a personal belief in, the religion, its practices, or the doctrinal statement or statement of religious practices.

(5) 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.

(6) 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.

- Additionally, because the six provisions above are non-exhaustive, the proposed regulation would reiterate the general rule that an educational institution may present other evidence to establish that it is controlled by a religious organization. A seventh provision thus states:

(7) Other evidence establishing that an educational institution is controlled by a religious organization.

- None of the proposed provisions above indicate that an educational institution cannot be “controlled” by itself. In other words, a recipient educational institution may itself be a religious organization that controls its own operations and functions.

#### **Public Comment**

- The Department looks forward to public comment on the proposed regulations.