

February 18, 2020

Lynn Mahaffie  
Deputy Assistant Secretary for Policy, Planning, and Innovation  
Office of Postsecondary Education  
Department of Education  
400 Maryland Avenue SW  
Washington DC, 20202

**Re: Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program (RIN 1840-AD45)**

Dear Ms. Mahaffie,

I write on behalf of the Union for Reform Judaism, whose nearly 850 congregations across North America encompass 1.5 million Reform Jews, and the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis, in response to the proposed rule entitled “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program” (RIN 1840-AD45). This proposed rule is an attack on religious freedom and will harm marginalized communities – including LGBTQ people, women, and religious minorities – at the elementary, secondary, and postsecondary levels. Accordingly, we urge the Department to withdraw the proposed rule.

We also object to the unusually short 30-day period provided for public comment. The administration issued eight interconnected but distinct proposed regulations on the same day. Given the complexity and wide-ranging impact of these proposed rules, 30 days does not allow organizations such as ours a meaningful opportunity to comment.

The proposed rule includes several harmful changes that would authorize discrimination against marginalized communities at all educational levels. At the postsecondary level, the proposed rule would expand the religious exemption in Title IX of the Education Amendment Act of 1972 and authorize discrimination by religious student groups. We

are also concerned that the rule would strip the rights of beneficiaries and employees of faith-based organizations that provide government-funded social services. The proposal would also eliminate the alternative provider and written notice requirements, expand exemptions allowing religious organizations to discriminate in employment, broaden religious exemptions permitting providers to discriminate against beneficiaries, and eliminate voucher program safeguards. The proposed rule would negatively impact a variety of government-funded educational programs, including 21<sup>st</sup> Century Community Learning Centers (a program serving two million low-income youth), Upward Bound (a program which helps low-income and marginalized youth prepare for college), and other services provided by grantees partnering with public school districts.

### Impact of Expanding the Title IX Religious Exemption

The proposed rule represents an unwarranted expansion of Title IX's religious exemption. Currently, colleges and universities may be eligible for exemptions when "controlled by a religious organization" or when a particular aspect of Title IX would conflict with the tenets of the religious organization that controls the school.<sup>1</sup> For more than 30 years, the Department has used a specific test to determine whether a school is "controlled by a religious organization." The proposed rule would expand the exemption by adding a wide range of grounds under which the school can meet this test.<sup>2</sup> For example, schools would only need to "subscribe to specific moral beliefs or practices" in order to claim a religious exemption, yet these beliefs need not be connected to any religious organization and may even be entirely secular in nature. Accordingly, many non-religious colleges and universities would be allowed to claim an exemption and could discriminate against students, faculty, and staff.

We fear that the proposed rule would place LGBTQ individuals and people seeking reproductive care (including those who have had an abortion or are unmarried and pregnant) at risk. Over 75 institutions have already claimed exemptions from Title IX's guidance on sexual orientation and/or gender identity on the grounds that it violates their institution's religious faith, and more schools could continue to do so if the

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<sup>1</sup> 20 U.S.C. § 1681.

<sup>2</sup> Under its long-standing policy, the Department of Education would typically find that a school is controlled by a religious organization when one of the following is true:

- (1) it is a divinity school; *or*
- (2) it requires employees or students to subscribe to the religion of the controlling organization; *or*
- (3) its official documents say it is controlled by a religious organization or is committed to the doctrines of a religion, and the members of its governing board are appointed by the controlling religious organization, and it gets "a significant amount of financial support" from the controlling religious organization.

See, e.g., Office for Civil Rights, "Exemptions from Title IX," U.S. DEPARTMENT OF EDUCATION, <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html> (last modified Jan. 15, 2020).

exemption is expanded.<sup>3</sup> Furthermore, given that one in four women will have an abortion in their lifetime, this rule could allow colleges and universities to discriminate against a significant portion of the population.<sup>4</sup> The proposed rule could impose a variety of harms on these groups, including direct financial losses (such as lost tuition for students who are expelled or employees who are fired), a loss of educational and professional opportunities, and negative impact on physical and mental health from experiencing discrimination.

### **Impact of Expanding Religious Exemption for Student Groups**

The proposed rule would also harm students by allowing religious student groups to engage in discriminatory conduct. Currently, colleges and universities can require all recognized student organizations – both religious and non-religious – to comply with school nondiscrimination policies as a condition of receiving school funding and benefits (including benefits such as meeting space, inclusion in student organization fairs, and use of school communication or advertising platforms). Schools are allowed to take disciplinary action against or decline to officially recognize student groups that fail to comply with requirements, such as if they exclude students based on their religion, sex, sexual orientation, gender identity, or disability. The proposed rule would allow public colleges and universities receiving federal grant funding to exempt religious groups from these nondiscrimination requirements. We fear that this rule would authorize discrimination against a variety of marginalized communities, such as members of minority faiths, LGBTQ students, and women.

### **Impact of Eliminating the Alternative Provider and Written Notice Requirements**

This proposed rule would eliminate an existing requirement that providers refer beneficiaries who are uncomfortable accessing services at a religious provider to an alternative provider. Although religious social service organizations receiving government funding must offer only secular content, individuals may still feel uncomfortable obtaining services at certain providers and may wish to be referred elsewhere. By removing the alternative provider requirement, the proposed rule places a burden upon beneficiaries to identify alternative providers, which might result in beneficiaries being unable to access services at all. In light of other provisions within the proposed rule expanding religious exemptions and eliminating the requirement for secular alternatives, the alternative provider requirement is even more critical.

The proposed rule would also eliminate the requirement that social service providers inform beneficiaries of their religious freedom rights. Current regulations stipulate that a provider may not discriminate against beneficiaries based on their religion or coerce

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<sup>3</sup> Movement Advancement Project. October 2018. *Title IX, Religious Exemptions and Campus Climate: LGBT Protections in Higher Education*. [www.lgbtmap.org/Title-IX-Religious-Exemptions-Higher-Education](http://www.lgbtmap.org/Title-IX-Religious-Exemptions-Higher-Education)

<sup>4</sup> <https://doi.org/10.2105/AJPH.2017.304042>

beneficiaries to participate in religious activities. Without appropriate notice, beneficiaries may not understand or be able to exercise their rights and may be vulnerable to proselytization, coercion, or discrimination without recourse. The written notice requirement imposes minimal administrative burden for providers; it should be preserved. Providers must prioritize the rights and well-being of their beneficiaries.

### **Impact of Allowing Taxpayer-Funded Employment Discrimination**

Title VII of the Civil Rights Act of 1964 allows religiously affiliated employers to prefer co-religionists in employment, and existing regulations extend this exemption to government-funded social service providers. The proposed rule would expand this exemption even further, allowing religious social service providers to “select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization.”<sup>5</sup> Not only would the proposed rule allow educational service providers to discriminate against employees from different faiths, but it would also open the door to allowing providers to refuse to hire LGBTQ people, someone who uses birth control or had an abortion, someone who is pregnant and unmarried, or anyone else whom the provider believes violates its religious tenets.

### **Impact of Expanding Religious Exemptions and Discrimination Against Beneficiaries**

In addition to allowing faith-based providers to discriminate in employment practices, the proposed rule would allow discrimination against beneficiaries through multiple provisions expanding religious exemptions and creating new accommodations for religious providers. The proposed rule would also add special notices to grant announcements and awards informing faith-based organizations that they can seek additional religious exemptions from federal laws and regulations governing the program. Such notices actively encourage discrimination against religious minorities, LGBTQ people, and women, whom providers may consider to be in violation of their religious beliefs. For example, an unmarried pregnant student might be refused services by a government-funded social service agency partnering with a public school to provide health care screening, transportation, or other services.

### **Impact of Eliminating Voucher Safeguards**

Finally, the proposed rule eliminates critical safeguards within voucher programs. Even while people may use vouchers for religious programs, current regulations stipulate that a secular alternative must always exist. Yet by redefining “indirect federal financial assistance,” the proposed rule would eliminate the requirement that beneficiaries have the option of a secular provider. The proposed rule would also allow religious providers to require that beneficiaries participate in religious activities and eliminate

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<sup>5</sup> ED, 85 Fed. Reg. at 3221, 322, 3225 (to be codified at 2 CFR pt. 3474.15(g); 34 CFR pts. 75.52(g), 76.52(g)).

nondiscrimination protections, thereby allowing providers to discriminate on the basis of religion. As a result, a Jewish or Muslim student might be turned away from a 21<sup>st</sup> Century Community Learning Center but might not be aware of alternative providers. Similarly, an LGBTQ student participating in an Upward Bound college preparation program may be forced to select a faith-based provider which forces the student to participate in religious programming that is hostile to the LGBTQ community.

Jewish text and tradition compel our beliefs in the principles of nondiscrimination and the separation of church and state. Judaism teaches that all people are created *b'tzelem Elohim* (in the image of God) and deserve dignity and respect regardless of their religion, sex, sexual orientation, or gender identity. As it says in Genesis, "And God created human in God's own image, in the image of God, God created them" (Genesis 1:27). Furthermore, throughout our history, the Jewish people have experienced religious persecution and discrimination. We understand the devastating effects and know that state-backed discrimination quickly becomes a stain on the nation. As we live conscious of this history and of being created in God's image, we must work to ensure that nobody faces discrimination due to their religious beliefs or any other protected characteristic.

Furthermore, Judaism emphasizes the importance of education, teaching that it has the power to shape lives. We are commanded to "train a youth in the way he ought to go; he will not swerve from it even in old age" (Proverbs 22:6). A quality education promotes intergenerational mobility and has a positive impact on future generations. Similarly, the Talmud states, "By the breath of children God sustains the world" (Talmud Bavli, Shabbat 119b). It is humanity's obligation to protect and nurture the divine spark in every child, enabling them to reach their fullest potential. Allowing educational service providers and public colleges and universities to discriminate against students violates this sacred mandate.

The proposed rule will make it possible for government-funded social service agencies to deny services to already marginalized communities. The well-being and quality education of beneficiaries must come first, and taxpayer-funded social service providers should never be allowed to choose whom to serve. Allowing discrimination to supersede provision of services will endanger students, faculty, and staff and harm the most vulnerable among us. People should not be denied educational opportunities or be subject to discrimination simply because of who they are.

I urge the Department to rescind this proposed rule and instead work to ensure that all people can receive a high-quality education without facing discrimination.

Sincerely,  
Rabbi Jonah Dov Pesner