State of California
Office of the Attorney General
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February 18, 2020

VIA Federal eRulemaking Portal & Mail
The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue S.W.
Washington D.C. 20202

RE: Comment on Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institution Programs, and Strengthening Institutions Program – Docket ID ED-2019-OPE-0080 (85 Fed. Reg. 3190) (Jan. 17, 2020)

Dear Secretary DeVos:

On behalf of California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, and the District of Columbia (States), we write to express our strong opposition to the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institution Programs, and Strengthening Institutions Program*, published by the Department of Education (Department) in the Federal Register on January 17, 2020. 85 Fed. Reg. 3190 (proposed Jan. 17, 2020) (NPRM). For purposes of this letter, "proposed rule" refers to the portion of the NPRM that would substantially expand the criteria for granting a religious exemption to the anti-discrimination requirements of Title IX of the Education Amendments of 1972 (Title IX).[1] 85 Fed. Reg. 3207.

Congress passed Title IX and similar civil rights laws "to eliminate discrimination from our society by ending federal subsidies of such discrimination . . . [and] to make certain, in the areas of Federal funding, that taxpayer's dollars were not used to initiate or perpetuate . . . bias and prejudice . . . ." Sen. Rep. 100-64 (1987), at 7, 9 (internal citation and quotation marks omitted). The Department is required to "effectuate" Title IX's anti-discrimination mandates by issuing "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute." 20 U.S.C. § 1682. By substantially expanding the

[1] 20 U.S.C. § 1681(a).

bases for which schools can receive an exemption from providing students with protection against discrimination on the basis of sex, the Department has issued a rule that is contrary to both the text and objectives of Title IX.

Moreover, the proposed rule fails to account for the harm it will inflict on students subjected to discrimination—including sexual harassment and violence—and fails to provide basic due process protections for students enrolling in or enrolled in a school that is exempt from Title IX. The States have an interest in protecting our students and residents from the short and long term detrimental effects that result from discrimination. We also have an interest in providing our students with a learning environment free from such harmful discrimination. Finally, the proposed rule represents arbitrary and capricious rulemaking as it lacks both evidentiary support and adequate and consistent justification.

I. STATES HAVE AN INTEREST IN MAINTAINING TITLE IX'S PROTECTIONS AGAINST THE DISCRIMINATION OF STUDENTS.

Title IX requires schools to provide educational programs and activities free from sex discrimination, sexual harassment, and sexual violence. Congress intended broad interpretation and enforcement of the statute to ensure all students, regardless of sex, are free from discrimination,[2] but provided an intentionally narrow statutory carve out for "an educational institution which is controlled by a religious organization if the application of [Title IX] would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3). The Supreme Court has already held that Title IX's prohibition on sex discrimination is a reasonable condition on disbursing federal funds, and "infringes no First Amendment rights of [a school] or its students." *Grove City Coll. v. Bell*, 465 U.S. 555, 576 (1984). Nevertheless, under the proposed rule, the Department drastically expands the types of educational institutions, programs, and activities permitted to receive federal funds to support unlawful discrimination on the basis of sex.[3]

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[2] *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988).

[3] The remainder of the NPRM is symptomatic of the federal Administration's radical expansion of religious exemptions and continued onslaught on the health and well-being of women and lesbian, gay, bisexual, transgender, and queer individuals. Indeed, the NPRM is one of eight total Notices of Proposed Rulemaking issued on January 17, 2020 that also seek to roll back the requirements that faith-based organizations that receive funding from various federal administrative agencies provide notice about and referral information to alternative secular service providers, including education providers. This is especially important, if, for example, the faith-based service provider is refusing based on religious belief to provide a service or protection required by another federal non-discrimination or equal access to education law. Some of the proposed requirements, among other things, would allow a faith-based organization to use federal funding to encourage, or even require, explicit religious activity, further degrading the mandate that federal funding not be used for explicit religious activity. Other aspects of the NPRM unlawfully advance religion by favoring religion at the expense of the rights, beliefs, and education of others. *Corp. of Presiding Bishop of Church of*

The Department proposes to exempt from Title IX's anti-discrimination mandate any school that can provide a statement that the school: (1) "subscribes to specific moral beliefs or practices" and may subject members of the institution community "to discipline for violating those beliefs or practices;" (2) "includes, refers to, or is predicated upon religious tenets, beliefs, or teachings;" (3) engages in "religious practices" that members of the community "must engage in" or "espouse a personal belief in;" or (4) "includes, refers to, or is predicated upon religious tenets, beliefs, or teachings." 85 Fed. Reg. 3226. On its face and in its application, the Department's proposed criteria eviscerates the statutory requirement that schools be "controlled" by a religious organization in order to receive an exemption. 85 Fed. Reg. 3207. Indeed, under this criteria, schools do not need to be even loosely-affiliated with a religious organization to receive an exemption. Any moral belief or practice, no matter how discriminatory, biased, prejudiced, or untethered to religion, would be sufficient to avoid Title IX's anti-discrimination mandate, so long as members of the school community can be disciplined for failing to follow the belief or practice.

Under the expanded criteria proposed for religious exemptions, by its own admission, the Department creates a potential unquantifiable "expansion" of schools that can claim religious exemptions. 85 Fed. Reg. 3219. This increases the likelihood that the States' students and residents will attend schools where discrimination on the basis of sex is permitted. In reviewing and rejecting an analogous attempt to expand the religious exemption exception in 1988, Congress recognized that "any loosening of the standard for application of the religious exemption could open a giant loophole and lead to widespread sex discrimination in education." S. Rep. 100-64 at 23. The consequences of the Department's proposed rule for the States' students and residents are potentially dire and long-lasting.

Under the proposed rule, schools that receive federal financial assistance need only assert a moral belief or practice as sufficient reason to unlawfully discriminate on the basis of sex. Accordingly, with permission from the federal government, schools can refuse admission to, deny housing and financial aid to, or expel students who do not adhere to specific gender stereotypes, students who are pregnant or parenting a child out of marriage, and lesbian, gay, bisexual, or transgender (LGBT) students. *See, e.g.*, S. Rep. 100-64 at 22-23 (discussing the various request letters regarding practices sought to be exempt from Title IX); Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk, Human Rights Campaign, 3, https://tinyurl.com/yx7xbv2q (finding that 33 schools enrolling 73,000 students had obtained waivers that allow them to discriminate against LGBT students in admissions, housing, athletics, financial aid, and more). Schools have also requested exemptions to permit them to fire or refuse to hire married women because of a belief that the "husband is the head of the wife," or to deny women the ability to participate in sports, such as gymnastics or swimming, because of a belief that women may only be dressed in modest attire. S. Rep. 100-64 at 22.

Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334-35 (1987) ("At some point, accommodation may devolve into 'an unlawful fostering of religion.'") (internal citation and quotation marks omitted).

A recent study shows that approximately forty percent of women have already faced gender discrimination.[4] In a 2011 National Transgender Discrimination Survey, one-fifth of transgender students reported that they were denied gender-appropriate housing, and five percent reported outright denial of campus housing.[5] Expanding the exemption only increases the likelihood and perpetuation of these discriminatory practices in more schools for more students.

Students who attend schools the Department deems exempt and are sexually harassed or assaulted could also face additional exposure to discrimination. Substantial and undisputed evidence shows that sexual harassment of students already occurs far too frequently—at all grade levels and to all types of students.[6] Moreover, LGBT students face harassment and assault at an alarming rate: according to a 2010 study on LGBT students in higher education, lesbian, gay, and bisexual college students are nearly twice as likely to experience harassment when compared with their non-LGBT peers, and are seven times more likely to indicate the harassment was based on their sexual orientation.[7] LGBT college students also suffer from higher rates of sexual assault and misconduct on campuses nationwide, and transgender and gender nonconforming students specifically report particularly high rates of sexual assault and misconduct.[8]

The harm to the States is compounded by another Notice of Proposed Rulemaking issued by the Department in November 2018 that would eliminate an educational institution's responsibility to submit a written request for religious exemption to the Assistant Secretary.[9]

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[4] Kim Parker and Cary Funk, *Gender Discrimination Comes in Many Forms for Today's Working Women*, Pew Research Center (Dec. 14, 2017), https://tinyurl.com/yydy9c32.

[5] Jaime M. Grant, et al., National Center for Transgender Equality and National Gay and Lesbian Task Force, *Injustice At Every Turn: A Report of The National Transgender Discrimination Survey* 39 (2011), https://tinyurl.com/yytzpbwl.

[6] Nat'l Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017), https://tinyurl.com/y453jp7q; Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005), https://tinyurl.com/y66hft2e; Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 11 (2011), https://tinyurl.com/y6lbacgd; David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, Association of American Universities 13-14 (Sept. 2015, reissued Oct. 2017), https://tinyurl.com/yyoach3m; Campus Climate Survey Validation Study, Final Technical Report (Jan. 2016), Appx. E, https://tinyurl.com/y5dbu6tr; *see also* Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995– 2013*, U.S. DOJ, Office of Justice Programs, Bureau of Justice Statistics (Dec. 2014), https://tinyurl.com/y2kmcugj.

[7] Sue Rankin, et al, *2010 State of Higher Education for LGBT People: Campus Pride, 2010 National College Climate Survey*, Q Research Institute for Higher Education 10 (2010), https://tinyurl.com/wwl6pyp.

[8] Cantor, *supra* at n. 6.

[9] The Department's Office for Civil Rights (OCR) has delineated a two-part test for exemptions, wherein the institution must submit a written request that: (1) names the religious organization

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (Nov. 29, 2018); 85 Fed. Reg. 3206, fn. 77. No student should learn that after becoming a victim of sex discrimination, the school he or she attends considered itself exempt from the relevant requirements of Title IX. Yet, when this proposed rule and the Department's November 2018 proposed rules are read in tandem, it is apparent this is exactly what will occur. Both proposed rules create the situation where students may unknowingly enroll in schools that believe themselves to be exempt from Title IX but do not publicly claim exemption, only to learn of their school's position *after* they have been discriminated against and seek to assert their Title IX rights. A student could also be disciplined or expelled for engaging in conduct that would otherwise be protected under Title IX, even if the student was not on notice that he or she violated the school's beliefs, or if the school only sometimes chose to exercise the belief. Students are entitled to know *before* they matriculate whether (and to what extent) their school intends to comply with Title IX. They should be able to assume that they will enjoy Title IX's full anti-discrimination protections, unless the school has informed them otherwise. The Department's decision to eliminate any transparency for students denies them basic notice of whether they will be subject to discriminatory application of discipline and other rules, thereby impacting a students' constitutionally protected right to due process. *E.g., Goss v. Lopez*, 419 U.S. 565, 583-84 (1975) (effective notice and opportunity for hearing is required prior to even short-term deprivation of education). Students must have the opportunity to make determinations about school attendance based on full information regarding a school's ability to legally discriminate against students, and whether they may be suspended or expelled for otherwise protected behavior, and the Department's proposed rules impermissibly deny students that opportunity.

The States have an interest in furthering Title IX's protections against discrimination and ensuring that students receive notice of whether the school in which they are enrolling can receive federal funding to not only support its education programs and activities, but also discriminate against students on the basis of sex. State students and residents who are subjected to discrimination and harassment on the basis of sex can suffer a number of harms, including lack of access to education[10] and long term psychological and other health related consequences.[11] Research confirms that gender discrimination negatively impacts mental and

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that controls the institution; (2) specifies the religious tenets of that organization; and (3) identifies the sections of the Title IX regulation that conflict with those tenets. U.S. Dep't. of Educ., Off. for Civ. Rights, Policy Guidance for Resolving Religious Exemption Requests 2 (Feb. 19, 1985) ("1985 Policy Memo"), https://tinyurl.com/wnzbnfk.

[10] *E.g.*, Cecilia Mengo and Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) JOURNAL OF COLL. STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 234, 244 (2016), https://tinyurl.com/y48qylq3; Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), https://tinyurl.com/usfnmrt.

[11] *See*, *e.g.*, Chu, *supra* at n. 10; Monica Bucci et al., *Toxic Stress in Children and Adolescents*, 63 Advances in Pediatrics 403 (Aug. 2016), https://tinyurl.com/uvgksls; Am. Acad. of Pediatrics, Comm. on Psychosocial Aspects of Child and Family Health, *Early Childhood Adversity, Toxic*

physical health[12] and directly leads to reduced lifetime wages.[13] Students who drop out can cost the States hundreds of thousands of dollars as a function of increased costs due to unemployment, health care, and other factors, and decreased income due to lower wages and capacity to pay taxes.[14] Harms to students resulting from discrimination in our States redound to our communities and state agencies tasked with providing services to those in need.

The States also have an interest in enforcing our own laws to effectively address and prevent sex-based discrimination, including sexual harassment and assault. The proposed rule makes it more difficult for the States to properly identify and prevent discrimination if there are widespread and unknown claims of exemptions to Title IX by schools. Proper enforcement of Title IX is an issue of vital importance to our States, our resident students and families, our teachers, and our communities. The ability to learn in a safe environment free from harassment, violence, and discrimination is critical and something our States prioritize and value.

II. THE DEPARTMENT OF EDUCATION'S SWEEPING EXPANSION OF THE INSTITUTIONS ELIGIBLE FOR A "RELIGIOUS EXEMPTION" IS CONTRARY TO THE TEXT AND PURPOSE OF TITLE IX.

The Department's proposed rule is a dramatic and unlawful departure from Title IX's narrow exception in its broad anti-discrimination mandate, and is likely to significantly expand without legal basis the number of schools no longer required to abide by Title IX's discrimination protections. This flouts Congressional intent and subverts the very purpose of the Title IX statute, and violates the Administrative Procedure Act (APA). *See* 5 U.S.C. §§ 706(2)(A) & (C); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984) (a court must reject agency constructions that are contrary to clear congressional intent or that frustrate the policy that Congress sought to implement).

Stress, and the Role of the Pediatrician: Translating Developmental Science into Lifelong Health (Dec. 2011), https://tinyurl.com/7rnxc6d; Vincent J. Felitti et al., *Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults. The Adverse Childhood Experiences (ACE) Study*, 14 Am. Journal Preventive Med. 245 (May 1998), https://tinyurl.com/wd9brtl (children and adolescents who have suffered trauma are more likely to suffer from mental health problems, acute and chronic medical conditions, and poor social development).

[12] Hope Landrine, et al., *Physical and Psychiatric Correlates of Gender Discrimination – an Application of the Schedule of Sexist Events,* 19 Psychology of Women Quarterly 4, 408-425 (1995).

[13] Jessica Schieder and Elise Gould, *"Women's Work" and the Gender Pay Gap: How Discrimination, Societal Norms, and Other Forces Affect Women's Occupational Choices – and Their Pay*, Economic Policy Institute (July 20, 2016), https://tinyurl.com/y7ds7q42.

[14] Russell Rumberger and Daniel J. Losen, *The High Cost of Harsh Discipline and Its Disparate Impact*, UCLA Civil Rights Project (June 1, 2016), https://tinyurl.com/hp5xblk.

A. Title IX anti-discrimination mandate is intended to be broadly enforced.

Congress passed Title IX to serve the compelling government interest of eradicating discrimination on the basis of sex in our schools. The Senate Report of the enactment of the Civil Rights Restoration Act of 1987 (CRRA) makes this clear:

> The inescapable conclusion is that Congress intended that Title VI as well as its progeny—Title IX, Section 504, and the ADA—be given the broadest interpretation. All four statutes were passed to assist in the struggle to eliminate discrimination from our society by ending federal subsidies of such discrimination. Congress understood that these goals could be achieved if the Federal government used its power and authority to end discrimination . . . Mr. Days was equally strong in his recollection of administration practice. . . . In his view, the "overall objective . . . [of these statutes] . . . was to make certain, in the areas of Federal funding, that taxpayer's dollars were not used to initiate or perpetuate . . . bias and prejudice . . . ." . . . According to Mr. Days, a narrow reading of the law denigrates the historic work of . . . [Representative Emmanuel] Celler and . . . [Senator Hubert] Humphrey, whose vision in promoting the passage of Title VI pointed the way for later leaders in the Congress to address forcefully the shameful treatment of women, the handicapped, and the aged by recipients of Federal money.

S. Rep. 100-64 at 7, 9 (internal citations omitted, brackets and quotation marks in original).

The Department can only interpret the statute to enforce Congress's intent, which was to create a robust law against anti-discrimination in schools and to prevent federal funds from subsidizing discrimination. By significantly expanding opportunity to receive an exemption, and therefore expanding the numbers of private, charter, and other schools legally permitted to not comply with Title IX's requirements, the proposed rule plainly undermines Congress's objective.

B. The religious exemption has, and should remain, narrowly circumscribed.

Since it was enacted in 1972, Title IX has included an exemption for educational institutions "*controlled* by a religious organization."[15] (Emphasis added.) The statute permits an education institution controlled by a religious organization to seek an exemption from Title IX's prohibition on sex discrimination where the application of Title IX "would not be consistent with the religious tenets of such organization."[16] Dating back decades, the Department (and its

[15] 20 U.S.C. § 1681(a)(3).
[16] *Id.*

predecessor agency U.S. Department of Health, Education, and Welfare or HEW) has issued tailored guidance on criteria by which institutions may qualify for religious exemptions consistent with the Constitution.

For example, in March 1977, HEW requested every educational institution receiving federal assistance complete an Assurance of Compliance with Title IX, which included instructions for claiming a religious exemption. The Assurance form defined what HEW considered to be "control" for purposes of obtaining a religious exemption:

> An application or recipient will normally be considered to be controlled by a religious organization if one or more of the following conditions prevail:
>
> (1) It is a school or department of divinity; or
>
> (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or
>
> (3) Its charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines 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 of an organ thereof.

See S. Rep. 100-64 at 23.

In discussions over the CRRA in 1987, the Committee considered and debated the issue of whether to broaden the religious tenet provision. Proponents of an expanded religious exemption urged that the language "controlled by a religious organization" be changed to include educational institutions "closely identified with the tenets of a religious organization." S. Rep. 100-64 at 27 (internal quotation marks omitted). But, concerned that such proposals would defeat Title IX's anti-discrimination purpose, Congress rejected the proposed changes stating that the existing exemption was an appropriately narrow provision. *See* 134 Cong. Rec. S209 (1988) (Sen. Danforth) (Senate's rejection of amendment to broaden exemption supports "a very narrow scope of the religious exemption"). Indeed, the Report states, "The committee is concerned that <u>any loosening of the standard for application of the religious exemption could open a giant loophole and lead to widespread sex discrimination in education</u>." *Id.* at 23 (emphasis added); *see also* 134 Cong. Rec. H589 (1988) (Rep. Fish) ("The key in the religious tenet exemption is the control test. A Government inquiring into the nature of a religious tenet asserted by an institution is fraught with difficulties. Therefore, the assurance that an institution is actually controlled by the religious organization whose tenets it relies upon is essential to keep

this exemption from becoming an escape hatch from Title IX."); *id*. at E499 (March 3, 1988) (Rep. Bonker) ("The bill would maintain stringent criteria to insure that this religious exemption is not used as a loophole for institutions to circumvent our antidiscrimination statutes."); *id.* at S205 (Jan. 28, 1988) (Sen. Kennedy) ("

a very narrow scope of the religious exemption").

With deference to Congress, the interpretation of "control" has remained largely consistent through decades of the Department's policy. *See* S. Rep. 100-64 at 21; *see also* 1985 Policy Memo at 26. Presently, OCR's website contains a virtually identical definition of "controlled by religious institution" as HEW's in 1977 and the Department's in 1985:[17]

> An institution will generally be considered to be controlled by a religious organization if one or more of the following conditions is true:
>
> (1) It is a school or department of divinity, defined as an institution or a department or branch of an institution whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation, or to prepare them to teach theological subjects; or
>
> (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or
>
> (3) Its charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines 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.
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> OCR evaluates a religious exemption claim consistent with the requirements of the First Amendment to the U.S. Constitution and the Religious Freedom Restoration Act.

Exemptions from Title IX, *supra* n. 17 (citing 1985 Policy Memo).

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[17] U.S. Dep't of Educ., Off. for Civil Rights, *Exemptions from Title IX*, https://tinyurl.com/y5fl2c4m. The Department relies on additions made in a 1989 internal Policy Memo that are ambiguous and not specifically tied to the prong-one religious organization control requirement, and therefore, inappropriate to be cited as evidence of consistent policy as to the issue here. *See* U.S. Dep't. of Educ., Off. for Civ. Rights, Title IX Religious Exemption Procedures and Instructions for Investigating Complaints at Institutions with Religious Exemptions Memorandum 1-2 (1989), https://tinyurl.com/shb3kvw.

The proposed rule is a significant departure from the established religious exemption test established in 1977, reiterated again in 1985, and currently used by the Department. As discussed in further detail below, proposed Section 106.12(c) inconsistently and inexplicably broadens the criteria for exempt institutions from previous guidance and puts students at increased risk of discrimination. Proposed subsections (c)(5) and (c)(6) would expand the means by which institutions could qualify for the religious exemption, and subsection (c)(7) would invite further expansion of such means. Moreover, the proposed rule's precatory language blurs or removes the statutory requirement for the Department to engage in a separate analysis to identify the specific religious tenets that create a conflict with Title IX. These exceptions swallow the rule and are contrary to the purpose of Title IX.

C. The proposed rule contains impermissibly large loopholes for schools to claim religious exemptions from Title IX.

In proposed 34 CFR § 106.12(c), the Department states that "any of the following [criteria] shall be sufficient to establish that an educational institution is eligible to assert an exemption to the extent application of this part would not be consistent with its religious tenets or practices," most notably adding subsections (c)(4)-(7). 85 Fed. Reg. 3226. The proposed rule makes any of the following sufficient for an educational institution to claim a religious exemption from Title IX:

> (c)(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.
>
> (c)(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 these beliefs or practices.
>
> (c)(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.
>
> (c)(7) Other evidence establishing that an educational institution is controlled by a religious organization.

Id.

The proposed rule rejects the two pillars of the statute's exemption – "controlled by" and "religious organization." Though the section is entitled "Educational institutions 'controlled' by religious organizations," the proposed rule fundamentally strips the word "control" of its intended meaning, and virtually adopts the expanded religious exemption for schools "closely

identified with the tenants of a religious organization" rejected by Congress as antithetical to Title IX thirty years ago. *See* S. Rep. 100-64 at 27.[18] Subsections 106.12(c)(1), (4), (5), and (6) all negate the critical statutory element that there must be a "religious organization." The plain text of the statute requires two entities: the religious organization (which holds tenets) and the educational institution (which is controlled by the organization). If Congress had intended to allow exemptions for educational institutions without regard to the existence of a religious organization, it had a ready model in Title VII of the Civil Rights Act of 1964.[19] Instead, Congress chose to restrict the exemption to schools "controlled by" a "religious organization."

Further, proposed Section 106.12(c) states that an educational institution is eligible to assert an exemption when application of Title IX "would not be consistent with its tenets or practices." 85 Fed. Reg. 3226 (emphasis added). The Department has no authority to rewrite the statute via regulation. Under Title IX, religious exemptions extend only to applications inconsistent with "tenets." The statute grants no exemption for applications inconsistent with religious "practices," which is vague, ambiguous, and broader than what is prescribed by Title IX. Further, the "moral beliefs and practices" language in subsection (c)(5) is also strikingly ambiguous and wholly unconnected to religion altogether. Moral beliefs are difficult to define and may not have grounding in religious practice; some may be indirectly inspired by religion but not tied to religion explicitly. By conflating moral beliefs with religion, the proposed rule opens the religious exemption to widespread abuse by institutions with no religious connection that want to limit their obligations and liability under Title IX.

Equally problematic is subsection (c)(6), which permits the claim of a religious exemption upon a statement that may be approved by a "governing body of an educational institution" itself, meaning, in the words of the Department, "the educational institution is asserting that the educational institution is itself the controlling religious organization," provided that the statement "includes, refers to, or is predicated on religious tenets, beliefs, teachings." 85 Fed. Reg. 3027. Proposed subsections 106.12(c)(5) and (6) render the phrase "controlled by a religious organization" utterly meaningless. Institutions no longer would be required to demonstrate any connection to a religious organization, let alone demonstrate that the religious organization exercises any control over the institution. Notably, none of these statements need to

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[18] Congress has provided for exemptions from non-discrimination for educational institutions requiring relationships that fall short of control in other statutes, *see, e.g.,* 20 U.S.C. § 1066c(d) ("No loan may be made to an institution under this part if the institution discriminates . . . except that the prohibition with respect to religion shall not apply to an institution which is controlled by or which is closely identified with the tenets of a particular religious organization.").

[19] Title VII does not provide a religious exemption for its prohibition on sex discrimination, but instead exempts some private schools from the prohibition on religious discrimination. It does so when the school "is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society" and also when "the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion." 42 U.S.C. § 2000e-2(e) (emphasis added).

be written, published, or otherwise made available to the institution's community, approved prior to a discriminatory act, or otherwise enforced by the school. As a result, with respect to subsection (c)(6), a single, post hoc board-approved statement referring to any religious beliefs would permit an institution to disregard Title IX's prohibitions against sex discrimination. With respect to subsection (c)(5), no governing body needs to approve the statement of moral beliefs or practices upon which federal authorization to discriminate is derived.

Subsection 106.12(c)(7) invites institutions to seek exemption even when they cannot meet the demonstrably low threshold of religious affiliation required by subsections (1)–(6) or identify religious tenets that conflict with Title IX. Specifically, proposed subsection 106.12(c)(7) is a catch-all provision, permitting institutions to establish religious control via "other evidence." By failing to define or otherwise delineate what this other evidence may be, the proposed rule provides an avenue by which institutions can incorporate any religious or moral belief to justify non-compliance with Title IX regulations. The proposed rule's end result would likely be that institutions with little to no connection to religion would be empowered to engage in federally unchecked sex discrimination, with no federal recourse for harmed individuals.

The Department's proposed interpretation of "controlling religious organization" has no basis in the text of the statute. The Department has no authority to rewrite the Title IX exemption to include language that Congress did not. By doing so, it has impermissibly broadened the ability of schools claiming practices tangentially related to moral beliefs to obtain permission to discriminate against students. This is precisely what Congress safeguarded against when enacting Title IX. *See Natural Res. Def. Council v. U.S. Dep't of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) (agency action expanding a statutory exception Congress intended to be "rare" contravened Congressional intent and was improper).

III. THE PROPOSED RULE IS ARBITRARY AND CAPRICIOUS BECAUSE ITS SWEEPING EXPANSION OF TITLE IX'S RELIGIOUS EXEMPTION ELIMINATES PROTECTIONS FOR STUDENTS WITHOUT ADEQUATE JUSTIFICATION AND CONSISTENT REASONING.

In promulgating the proposed rule, the Department also acted arbitrarily and capriciously, in violation of the APA, because it has offered explanations for its decisions that run counter to the evidence before it, issued a rule that is internally inconsistent, illogical and unsupported, and failed to consider important aspects of the problem it is addressing. *See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Pac. Coast Fed'n of Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001).

A. The proposed rule runs counter to the evidence before the Department.

The Department's stated justification for the proposed rule largely appears to be: (1) Title IX's supposed lack of clarity regarding the qualifications for exemption, including how educational institutions demonstrate they are controlled by a religious organization or whether

they themselves may be the religious entity controlling their own operations; (2) the need to codify existing factors OCR uses when evaluating a request for religious exemption; and (3) to "address concerns that there may be other means of establishing the necessary control." 85 Fed. Reg. 3206. The Department further states that the clarity the proposed rule purports to provide "would create more predictability, consistency in enforcement, and confidence for educational institutions asserting the exemption." *Id.*

These stated justifications belie the evidence, however, and the Department's reasoning for the changes from prior standards do not withstand even baseline scrutiny. The Department fails to present evidence that there was lack of clarity among institutions not sufficiently addressed by previous guidance. In fact, since Title IX's passage through December 2015, none of the 285 religious exemptions requested were denied.[20] According to OCR's own website detailing correspondence concerning religious exemptions requested and subsequent responses, only two of the 78 colleges or universities that received responses to their request for religious exemption from January 2016 through February 2020 were not granted exemptions. Therefore, more than 99% of the hundreds of schools that have requested religious exemptions in the nearly 50 years since Title IX's enactment have received them, and there is simply no evidence that there is any lack of clarity about what the current standards require amongst applying schools.

B. The Department's stated reasoning for the proposed rule is alternately illogical, inconsistent, and unsupported.

The Department also states as justification for the proposed rule that "its practices in the recent past regarding assertion of a religious exemption, including delays in responding to inquiries about the religious exemption, may have caused educational institutions to become reluctant to exercise their rights." 85 Fed. Reg. 3206. On the other hand, the Department states in its four sentence regulatory impact analysis that it does not believe that its proposed changes "would substantially change the number or composition of entities asserting the exemption." 85 Fed. Reg. 3219. It then goes on to acknowledge that there will, in fact, likely be an expansion of institutions seeking the exemption. *Id.* The Department has offered inconsistent and misleading reasoning for its actions.

The clearest criteria for a religious exemption in the proposed rule come from the HEW and previous OCR guidance. The added criteria in proposed subsections (c)(4)-(7) are overly broad and ambiguous, exacerbating the very confusion the proposed rule was meant to clarify. There is no justification provided for why a departure from decades-long policy was needed or even advisable. Because the Department has departed from prior policy, a more "detailed justification" is necessary because there are "serious reliance interests" at stake. *Fed. Commc'n Comm'n v. Fox Television Stations,* 556 U.S. 502, 515 (2009); *State Farm*, 463 U.S. at 47-51; *see also Immigration & Naturalization Serv. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (a department's actions are arbitrary and capricious and in violation of the APA if they consist of "an irrational departure from [settled] policy"). Our students have, for decades, relied upon the

[20] Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. Kan. L. Rev. 327 (Dec. 2016).

federal government to adhere to its goal of providing them a learning environment free from discrimination. The proposed rule upends that expectation without basis.

Furthermore, in June of 2017, Department Secretary Elisabeth DeVos testified in Congress that the private schools with religious affiliations receiving federal funding through a private school choice program serving roughly 450,000 of the nation's students would be required to follow federal civil rights laws.[21] Yet, now, in the proposed rule, the Department massively expands the narrow religious exemption exception, opening a giant loophole to permit any such private school entity to lawfully discriminate while taking federal funds.[22] This is the essence of arbitrary action. *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986) ("For an agency to say one thing . . . and do another . . . is the essence of arbitrary action.") (citation omitted).

In its NPRM, the Department states that it "must also take into account [Religious Freedom Restoration Act (RFRA)] in promulgating its regulations and must not substantially burden a person's exercise of religion through its regulations." 85 Fed. Reg. 3207. A private school could potentially invoke RFRA if it can demonstrate that compliance with Title IX "substantially burden[s]" its "exercise of religion." 42 U.S.C. § 2000bb-1(a). If it makes that showing, a court would then be required to determine whether prohibiting that school from discriminating is the least restrictive means of furthering the government's compelling interests in eliminating sex discrimination in education (and in not subsidizing sex discrimination with federal funds). *Id*. § 2000bb-1(b). In a number of decisions, including ones cited by the Department in support of the proposed rule, the Supreme Court has repeatedly held that the government has a "compelling interest in eradicating discrimination" on the basis of sex and other protected characteristics, and that it is not obligated to provide state support to discriminatory institutions. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (government has "compelling interest in eradicating discrimination against its female citizens"); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 591, 604 (1983) ("Government has a fundamental, overriding interest in eradicating racial discrimination in education," which warrants denial of tax exemptions to discriminatory private schools, because "[w]hen the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors'"); *Norwood v. Harrison*, 413 US. 455, 463 (1973) ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."); *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 733 (2014) ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are

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[21] Lauren Camera, *Devos Dodges Questions on Discrimination*, U.S. News & World Report (June 6, 2017), https://tinyurl.com/uwl53sn.

[22] *See* Maggie Garrett, *Private School Vouchers Are a Threat to Religious Freedom*, Religion News Service (Feb. 14, 2018), https://tinyurl.com/w3998sl (vouchers supported by federal funding primarily fund private religious schools some of which teach discriminatory curriculum and discriminate in admission and hiring).

precisely tailored to achieve that critical goal."). Thus, the Department's purported rationale for expanding the statute beyond the express statutory limits that Congress has placed on the exemption is unsupported. Any analysis is necessarily fact-based and can be properly analyzed within the existing statutory structure.

C. The Department has failed to consider all relevant factors and important aspects of the problem before it.

The Department has also acted arbitrarily and capriciously because it has intentionally disregarded the harm resulting from discrimination (including sexual harassment and assault) to student survivors, as well as to the States. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1117 (9th Cir. 2007) (an agency's decision is arbitrary and capricious if, among other things, the agency failed to consider "all relevant factors"); *State Farm*, 463 U.S. at 43-44 (1983) (arbitrary and capricious to fail to consider "an important aspect of the problem"). In loosening the standards for school to receive exemptions from Title IX's anti-discrimination mandate, the Department has failed to consider the costs of discrimination on individuals, communities, and States. Studies show that women who experience physical or psychological abuse (including on the basis of sex) utilize significantly more mental health services (2.5 and 2 times more, respectively) than non-abused women.[23] Also, women experiencing ongoing abuse have total annual health expenditures that are 42 percent higher than women who have never been abused.[24] In addition, victims of intimate partner violence, sexual violence, or stalking have been found to lose 741 million productive days (i.e., lost school or work days) and experience a $110 billion loss in short-term productivity.[25] These are the types of costs that would accrue if the rate of sex-based discrimination increases, as it will likely do under the proposed rule, as more schools will be exempt from Title IX's discrimination strictures. The States and its health care and public benefit systems will incur significant and immediate harms when students no longer protected by Title IX are subjected to discrimination and, as a result, reduce their attendance, drop out, and require additional State-provided counseling, health services, and other resources.

Moreover, while the Department claims that its changes protect schools seeking religious exemptions from "ridicule," the Department completely fails to consider the costs associated with humiliation and suffering for the student who has been subjected to sex discrimination, harassment, or assault on campus—the actual intended beneficiary of the statute—but who cannot receive Title IX's protections and any relief. 83 Fed. Reg. 61497.

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[23] A.E. Bonomi, et al., *Health Care Utilization and Costs Associated with Physical and Nonphysical-Only Intimate Partner Violence*, 3 Health Services Research 44, 1052-67 (2009), https://tinyurl.com/vrporlj.

[24] *Ibid*.

[25] Cora Peterson et al., *Short-term Lost Productivity per Victim: Intimate Partner Violence, Sexual Violence, or Stalking*, 1 American Journal of Preventive Medicine 55, 106–110 (2018), https://tinyurl.com/v8y3ha8.

IV. CONCLUSION

Title IX requires schools to provide an education that is free from sexual harassment, violence, and discrimination. Proper enforcement of Title IX has an immense impact on our States, our colleges and universities, our K-12 schools, and most importantly, our students. The proposed rule is a step backward in achieving Title IX's goals and is contrary to the statute. The increased number of schools that could potentially (and improperly) be granted religious exemptions from the mandates in Title IX under the vague and overbroad criteria of the proposed rule represents a devastating roll back of the protections against discrimination Congress so consistently and carefully guarded against. The proposed rule should be withdrawn.

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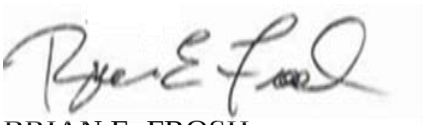

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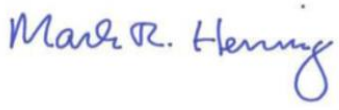

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