



To: Catholic school, college, and diocesan leaders
From: Patrick J. Reilly, President
Re: Challenges to religious exemption in Title IX

The Cardinal Newman Society hosted a webinar on April 29, 2021, for selected Catholic college leaders, in which Gregory Baylor, senior counsel and director of the Center for Religious Schools at Alliance Defending Freedom, provided an update on challenges to the religious exemption in Title IX of the Education Amendments of 1972.

The following summarizes the Newman Society's understanding of what we learned from this webinar and other sources. Educators should consult their attorneys for professional legal advice.

Title IX and Religious Exemption

Title IX is a federal civil rights law that bans sex discrimination in “any education program or activity receiving Federal financial assistance,” including aid to students. The law exempts religious organizations, to the extent that the “application” of the law conflicts with their religious beliefs.

The exemption states, “this section 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.”

Equality Act

The Equality Act (H.R.5) was approved by the U.S. House and has been sent to the Senate. In his speech to Congress on April 28, President Biden urged passage. The bill would effectively bypass the religious exemption in Title IX by allowing students and employees to file sex discrimination lawsuits against Catholic schools and colleges under Title VI, which regulates all recipients of federal funding and has no religious exemption. The bill would also:

- amend several civil rights laws including Titles II, III, IV, VI, VII, and IX, the Fair Housing Act, and others to include protection for “sexual orientation” and “gender identity;”
- expand the definition of “public accommodations” to include schools and colleges; and
- prevent any appeal to the Religious Freedom Restoration Act (RFRA) with regard to the Equality Act's provisions.

Hunter v. U.S. Department of Education

Current and former students from 25 Christian and Mormon colleges (none Catholic) have sued the U.S. Education Department in federal court, claiming that the religious exemption in Title IX is unconstitutional. 1) It violates the Establishment Clause by giving preference to religious institutions. 2) It violates the Equal Protection Clause of the 14th Amendment by allowing federal

funding for institutions that discriminate based on “sexual orientation and gender identity.” The second claim rests on precedent barring funds for institutions that practice racial discrimination.

Alliance Defending Freedom is representing three Christian colleges that have moved to intervene in the case to ensure a strong defense of Title IX. The concern is that the Biden administration will provide a weak defense, readily agree to a settlement, or even decline to defend the law.

Maxon v. Fuller Theological Seminary

Fuller Theological Seminary is a multidenominational Christian seminary with campuses in Pasadena, Houston, and Phoenix. Two students who were expelled for violating the seminary’s rules against same-sex marriage and extramarital sexual activity sued the seminary, but in October 2020 a U.S. district court dismissed the case. It has been appealed to the U.S. Court of Appeals for the Ninth Circuit. Among other claims, the plaintiffs are asking the court to rule that the religious exemption in Title IX does not apply to independent and nondenominational institutions that are not legally controlled by an established church. The Cardinal Newman Society and several Catholic colleges will be joining an *amicus brief* that argues for the exemption.

Challenges to Religious Exemption in Title IX

Efforts to dismantle or undermine the Title IX exemption focus on three key areas:

- **Control:** The exemption can be interpreted to exclude nondenominational and independent religious colleges (the latter includes most Catholic colleges) that have no legal ownership by established churches. This, however, raises constitutional concerns, since the interpretation would discriminate against religions based on their ecclesiology.
- **Beliefs:** A plaintiff could argue that certain activities related to “sexual orientation and gender identity” are not, in fact, violations of the institution’s religious tenets. This too raises constitutional concerns if a court is asked to determine an institution’s beliefs.
- **Timing:** The Education Department could refuse to apply the religious exemption if an institution has not previously applied to the Department for a determination of religious status—a procedure that some religious institutions completed in recent years.

Recommendations:

- **Strengthen Catholic identity:** Firmly ground policies in Catholic teaching and explain in writing why they are necessary according to Catholic teaching. Clearly state expectations for employees and what will happen if violated. This allows a strong appeal to religious freedom.
- **Sexuality policies:** Be explicit about the institution’s religious beliefs and policies regarding “sexual orientation and gender identity.” Avoid listing “sexual orientation,” “gender identity,” or religion in nondiscrimination statements, and declare your legal right to base decisions on religion. No employee benefits for “gender reassignment” or same-sex unions.

Catholic Identity Standards Project: The Newman Society is working on policy standards to help Catholic schools and colleges stay firmly grounded in Catholic identity while establishing the best protection against legal threats. This work depends on the assistance of a large number of expert reviewers. If you would like to assist, please contact the Newman Society.