From: Alison Gill
Sent: Fri, 11 Jun 2021 15:23:57 -0400
To: T9PublicHearing
Cc: Alison Gill
Subject: Written Comment: Title IX Public Hearing - Religious Exemptions & LGBTQ Inclusion
Attachments: ED Title IX Comment - American Atheists - June2021 - FINAL.pdf

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Dear Madam or Sir,
Please find attached written comments submitted by American Atheists pursuant to the public hearings regarding Title IX. Here is the additional requested information:
Name of Submitter - Alison Gill
Occupation - Lawyer
City/State - Washington, DC
Organization - American Atheists
Email Address - agill@atheists.org
Please confirm timely receipt of these comments. Thank you for your time and consideration.
Very truly yours,
-Alison Gill

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AMERICAN ATHEISTS is a national 501(c)(3) organization that defends civil rights for atheists, freethinkers, and other nonbelievers; works for the total separation of religion and government; and addresses issues of First Amendment public policy. Follow our updates on Twitter and Facebook.

AMERICAN ATHEISTS

June 11, 2021

Suzanne B. Goldberg,
Acting Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW
Room 6E310
Washington, DC 20202

Re: Comments from American Atheists regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Doc. No. 2021-10629)

Dear Assistant Secretary Goldberg:

American Atheists submits these written comments in response to the announcement of a public hearing[1] pursuant Executive Order 14201 regarding the Department of Education's ("Department") final rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," ("2020 rule") published May 19, 2020,[2] and additional matters concerning Title IX implementation. We strongly recommend that the Department take steps to clarify the implementation of statutory religious exemptions to Title IX nondiscrimination protections, include explicit protections for LGBTQ students pursuant to the recent US Supreme Court precedent, and revise the 2020 rule to remove various procedural deficiencies that limit enforcement and put victims of sexual harassment at risk. The 2020 rule is legally tenuous, based on misinformation about sexual harassment, and it undermines both the spirit and practical implementation of Title IX. By revising the 2020 rule, the Department will restore proper regulatory functioning of Title IX protections and more effectively work to eradicate discrimination on the basis of sex in education.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. As

[1] Dept. of Education, Office for Civil Rights, Announcement of Public Hearing; Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27429, Doc. No. 2021-10629 (May 20, 2021), available at https://www.federalregister.gov/documents/2021/05/20/2021-10629/announcement-of-public-hearing-title-ix-of-the-education-amendments-of-1972.

[2] Dept. of Education, Office for Civil Rights, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, Docket ID ED-2018-OCR-0064, Doc. No. 2020-10512, RIN 1870-AA14 (May 19, 2020), available at https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

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advocates for religious liberty and equality, American Atheists opposes laws and policies which would allow discrimination against vulnerable individuals and communities based on religious beliefs.

The Obama Administration promulgated two guidance documents pertaining to Title IX implementation concerning sexual harassment: a 2011 Dear Colleague Letter[3] and a 2014 Questions and Answers document.[4] The 2011 Dear Colleague Letter clarified certain requirements for universities in order to ensure compliance with Title IX, and the 2014 Q&A provided guidance as to a number of questions about Title IX, including institutional responsibilities and what constitutes a "prompt" response under the law, in the Department's view. The Trump Administration rescinded this guidance in 2017, and, later, the Department finalized the 2020 rule, which addresses many of the same areas as the previous guidance documents. The Obama Administration also issued guidance on the application of Title IX to trans students through a 2016 Dear Colleague Letter.[5] This guidance was also rescinded by the Trump Administration in 2017, and, subsequently, the Department's Office of General Counsel issued a memo that discusses the *Bostock v. Clayton City*[6] decision and applicability of Title IX to trans students.[7] The Department later retracted this memo because it was not issued in accordance with the Department's rulemaking and guidance procedures and because it is inconsistent with Executive Order 13988. Through the present hearings, the Department is seeking public comment on how best to revise existing Title IX rules, restore proper enforcement and functioning of the law, and ensure that LGBTQ students receive appropriate protection under the law, as required by the *Bostock* decision.

Continuing Need for Robust Title IX Enforcement

Statistics show that there continues to be a pressing need for robust Title IX enforcement in higher education. Approximately 19% of women in college will be sexually assaulted,[8] more than two in five (43%) women dating in college will experience some form of violent or abusive dating behavior,[9] and only 12% of all student survivors report their assaults.[10] LGBTQ students also experience significantly higher rates of harassment and assault, with gay and bisexual men being over 10 times as likely to be

[3] Dept. of Education, Office for Civil Rights, Dear Colleague Letter, April 4, 2011, available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
[4] Dept. of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, April 29, 2014, available at https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[5] Dept. of Education, Dept. of Justice, Dear Colleague Letter on Transgender Students, May 13, 2016, available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
[6] 140 S. Ct. 1731 (2020).
[7] Dept. of Education, Office of the General Counsel, Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights, Jan. 8, 2021, available at https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf.
[8] Krebs, C. P. et al., (2007). *The Campus Sexual Assault (CSA) Study*. National Institute of Justice. Available at https://www.ojp.gov/pdffiles1/nij/grants/221153.pdf
[9] Peugh, J., Glauber, A. (2011). *2011 College Dating Violence and Abuse Poll*. Knowledge Networks. Available at http://www.loveisrespect.org/pdf/College_Dating_And_Abuse_Final_Study.pdf
[10] Kilpatrick, D. G., et al. (2007). *Drug-facilitated, Incapacitated, and Forcible Rape: A National Study*. Med. Univ.of S. Carolina. Available at https://www.ojp.gov/pdffiles1/nij/grants/219181.pdf.

assaulted as other men,[11] nearly half (46%) of bisexual women reporting being assaulted,[12] and nearly one quarter (23%) of transgender people reporting being assaulted.[13]

The consequences of this sexual assault reach further than just physical harm. One third of survivors suffer from PTSD (34%) or depression (33%), and survivors are significantly more likely to abuse drugs and alcohol.[14] There are also severe economic impacts, with sexual assault costing tens to hundreds of thousands of dollars per incident, in addition to the acute physical and mental trauma.[15] Many victims are forced to drop out of school or are expelled due to dips in their academic performance.[16]

With regard to harassment and discrimination against LGBTQ students, a 2019 national survey of LGBTQ students in K-12 schools found that an overwhelming majority (81.0%) were verbally harassed because of their sexual orientation, gender expression, or gender identity, and over a third (35.1%) reported that they were verbally harassed often or frequently.[17] More than one in three (34.2%) LGBTQ students were physically harassed (e.g., shoved or pushed) because of their sexual orientation, gender expression, or gender. One in seven (14.8%) LGBTQ students were physically assaulted (e.g., punched or kicked) because of their sexual orientation, gender expression, or gender. Studies show that bias-motivated harassment and bullying can have an especially severe negative impact on student well-being and success.[18]

Notably, research conducted by American Atheists has also shown that nonreligious young people face significant discrimination because of their beliefs, particularly in very religious communities. Of the more than 3,400 nonreligious 18-24 year olds surveyed, one third (33.6%) experienced discrimination in education, increasing to nearly half (48.9%) in very religious communities.[19] This is especially relevant to discrimination that may take place at religious institutions of higher education. Nearly half (47%) of LGBTQ people are religiously unaffiliated,[20] and so they may face intersectional discrimination based on multiple factors.

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[11] Balsam, K. F., Beauchaine, T. P., & Rothblum, E. D. (2005). Victimization over the life span: A comparison of lesbian, gay, bisexual, and heterosexual siblings. *Journal of Consulting and Clinical Psychology*, 73(3), 477-487.
[12] Walters, M.L., Chen, J., & Breiding, M.J. (2013). The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation. National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.
[13] Testa, R. J., Sciacca, L. M., Wang, F., Hendricks, M. L., Goldblum, P., Bradford, J., & Bongar, B. (2012). Effects of Violence on Transgender People. *Professional Psychology: Research and Practice*, 43(5), 452-459.
[14] Kilpatrick, D. G., et al., *supra at* 10.
[15] *Rape and Sexual Assault: A Renewed Call to Action*. The White House Council on Women and Girls, January 2014. Available at https://www.knowyourix.org/wp-content/uploads/2017/01/sexual_assault_report_1-21-14.pdf.
[16] Bolger, D. (2016). Gender Violence Costs: Schools' Financial Obligations Under Title IX. *Yale L. J.*, 125(7).
[17] Kosciw, J. G., Clark, C. M., Truong, N. L., & Zongrone, A. D. (2020). The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools, p. 28. New York: GLSEN. Available at https://www.glsen.org/research/2019-national-school-climate-survey.
[18] Russell, S.T., Sinclair, K.O., Poteat, V.P., & Koenig, B.W. (2012). Adolescent health and harassment based on discriminatory bias. *American Journal of Public Health*, 102(3): 493–495; Birkett, M., Newcomb, M.E., & Mustanski, B. (2015). Does it get better? A longitudinal analysis of psychological distress and victimization in lesbian, gay, bisexual, transgender, and questioning youth. *Journal of Adolescent Health*, 56(3):280–285.
[19] Frazer, S, El-Shafei, A., Gill, A.M. (2020). *The Tipping Point Generation: America's Nonreligious Youth.* American Atheists and Secular Student Alliance. Available at www.secularsurvey.org.
[20] PRRI, Broad Support for LGBT Rights Across all 50 States: Findings from the 2019 American Values Atlas, April 14, 2020, available at https://www.prri.org/research/broad-support-for-lgbt-rights/.

Religious Exemptions Under Title IX

Our nation has a long history of fostering diverse educational opportunities in higher education, including both religious and secular institutions. Unfortunately, the 2020 rule has directly harmed this education system by prioritizing the ability of religious educational institutions to engage in sex-based discrimination over the basic rights of students. Prior to the implementation of this rule, religious institutions could claim an exemption from Title IX by providing a written notification to the Department regarding which portions of Title IX and the accompanying regulations conflict with the specific tenets of their faith. Because these waivers were regularly subject to Freedom of Information Act (FOIA) requests, the Department clearly displayed institutional waivers on its website, and this greatly benefited students seeking information about colleges they are considering attending.

However, the 2020 rule eliminated this requirement, instead allowing religious institutions to claim exemptions to Title IX at any time, even after the discrimination had occurred. While we strongly disagree that religious educational institutions should be able to exempt themselves from essential nondiscrimination protections, the previous system met the requirements of Title IX adequately. For example, more than six dozen colleges and universities notified the Department of Education of their intent to be exempt from Title IX with respect to their treatment of LGBTQ students since 2013. Therefore, we urge the Department to return to its previous waiver procedures because they better provide fair notice to students and balance the rights of institutions with the religious freedom and other rights of students. Specifically, we urge the Department to:

1. Explicitly create regulations that set out procedures for religious institutions of higher education that seek waivers from various portions of Title IX that conflict with the institution's religious tenets;
2. Clarify that waivers to Title IX must be granted before exemption can be asserted by an institution;
3. Make prominently available on its website all Title IX waivers granted to religious institutions, with clear indications for students about what these waivers mean for them; and
4. To the extent possible, require that accurate information about waivers be included in any relevant institution's Title IX policy, on their website, and in the materials provided to prospective students.

Students who are more likely to experience discrimination have a strong interest in knowing whether a religious institution claims exemptions to Title IX enforcement *before* enrolling and making an investment of time and tens of thousands of dollars in that institution. Most student believe that they will be protected from discrimination and harassment when they attend college, and they rely on institutions to have policies in place to protect them. For example, when it comes to LGBTQ students, almost half of all Americans believe that federal law explicitly protects LGBTQ people from discrimination on the basis of sexual orientation.[21] Even as the Department correctly considers how the *Bostock* ruling applies to students through Title IX, news regarding this decision, as well as President Biden's executive order

[21] Caspani, Maria. "Americans' perception of LGBTQ rights under federal law largely incorrect." Reuters/Ipsos, June 12, 2019. Available at https://www.reuters.com/article/us-usa-lgbt-stonewall-equality/americans-perception-of-lgbtq-rights-under-federal-law-largely-incorrect-reuters-ipsos-idUSKCN1TC120.

extending protections, reinforces the idea that LGBTQ students should expect to be protected while in college. Finally, it is significant that a substantial portion (if not a majority) of religious institutions of higher education *do not* claim exemptions to Title IX. Therefore, it is not reasonable to assume that students who attend religious institutions of higher education know that they may not be protected by Title IX.

However, far too frequently, institutions are not transparent about their exemption from Title IX, and this can have a devastating effect on students. The complaint in *Hunter v. Dep't of Education* details several instances of this discrimination impacting students at religious institutions.[22] Alex Duron's admission to Union College was rescinded *after* he paid deposits and went to great lengths to move closer to the college, due to a blanket ban on homosexuality—a situation that may have been avoided had Alex known that Union had waived Title IX obligations and had this blanket ban during the application process. Zayn Silva had his admission to Nyack College rescinded "after being told by multiple university representatives that there would be no issue with him being trans." The college later rejected Zayn's application due to his gender identity, and it has refused to give a reason for his rejection or acknowledgement of prior statements in writing. Again, this is a result that may have been avoided if the waivers claimed by Nyack were made available to Zayn.

Legally, the Department is on solid ground to enforce transparency of waivers to protect the reliance interests of students and to prevent third party harm as a result of religious accommodations, as required by the Establishment Clause.

Reliance interests are a well-established tenet of contract law, which has frequently been applied to higher education by the courts. In *Doe v. Univ. of Sci.*, a student successfully argued breach of contract when the University failed to provide its guarantees of fairness to students accused of sexual misconduct, pursuant its own policy.[23] *McAdams v. Marquette Univ.* involves a professor successfully arguing breach of contract caused by the university taking disciplinary actions that conflicted with guarantees of academic freedom.[24] Both of these cases demonstrate that individuals associated with or attending universities are entitled to some degree of protection against actions inconsistent with a university's own policy. The steps taken in the 2020 rule serve to muddle the Title IX obligations of religious institutions by allowing them to claim waivers *post hoc*, essentially rendering students unable to rely on guarantees that would be present at any public or nonreligious education institution.

Moreover, the Establishment Clause requires agencies to consider any impact an accommodation or religious exemption would have on third parties. The First Amendment bars the government from crafting "affirmative" accommodations within its programs if the accommodations would harm any program beneficiaries.[25] The Constitution commands that "an accommodation must be measured so that it does not

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[22] *Hunter v. Dept. of Education*, Case No. 6:21-cv-474, Complaint (March 29, 2021).
[23] *Doe v. Univ. of Sciences*, 961 F.3d 203 (3rd Cir. 2020).
[24] *McAdams v. Marquette*, 914 N.W.2d 708 (Wisc. 2018).
[25] U.S. Const. Amend. I; *Cutter v. Wilkinson*. 554 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and must ensure that the accommodation is "measured so that it does not override other significant interests") (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

override other significant interests;"[26] "impose unjustified burdens on other[s];"[27] or have a "detrimental effect on any third party."[28] It is extraordinarily inequitable to allow religious institutions to, without warning, strip away protections that students would otherwise have under federal law. Therefore, the Department has a duty to constrain the operation of this exemption to constitutional boundaries and, to the extent possible, mitigate any harm that is done to students as a result of this exemption.

We understand that the Department is obligated to comply with Title IX, which, sadly, has an extremely broad religious exemption that allows discrimination at religious educational institutions.[29] Unfortunately, this situation is demonstrative of the dangers of broad religious exemptions in law and the significant negative impact that they have on third parties such as students. However, the Department can and should take critical steps to mitigate the burden that this broad religious exemption has on students and potential students.

Title IX and the Application of *Bostock v. Clayton County*

American Atheists fully supports the Department of Justice's ("DOJ") interpretation that the holding in *Bostock v. Clayton County*[30] applies to institutions of higher education subject to Title IX.[31] The memoranda issued by DOJ affirms the history of Title VII and its applicability to Title IX interpretation, and it clarifies that the definition of "sex" found to be dispositive in *Bostock* aligns with the definition used in Title IX. This definition of sex is inclusive of gender identity and sexual orientation, because, as Justice Gorsuch explained, these statutes establish a but-for test to determine whether sex plays any part in the discriminatory conduct in question. American Atheists strongly suggests that the Department take additional steps to incorporate *Bostock* into existing Title IX requirements:

1. Make an explicit statement in the implementing regulations for Title IX that discrimination based on sexual orientation and gender identity are prohibited by Title IX;
2. Require modifications of institutional Title IX policies to clarify this prohibition;
3. Provide guidance to educational institutions about how they may comply with these requirements, including guidance on the applicable definition of sex as well as sex-based discrimination, as clarified by *Bostock*;
4. Recommend training for the Title IX staff at various institutions on this issue; and

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[26] *Cutter v. Wilkinson*, 544 U.S. at 722.
[27] *Id.* at 726.
[28] *Id.* at 720, 722; *See also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2781; *Estate of Thornton v. Caldor*, 472 U.S. at 710 ("unyielding weighting" of religious exercise "over all other interests…contravenes a fundamental principle" by having "a primary effect that impermissibly advances a particular religious practice."); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries"); *United States v. Lee*, 455 U.S. 252 (1982) ("the limits [followers of a particular sect] accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").
[29] *See* 20 U.S.C. § 1681(a)(3).
[30] 140 S. Ct. 1731 (2020).
[31] U.S. Dep. Of Justice, Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972 (2020), available at https://www.justice.gov/crt/page/file/1383026/download.

5. Take enforcement action to challenge the various laws based in several states that conflict with Title IX requirements by allowing or requiring discrimination against trans students.[32]

Procedural Deficiencies

In addition to clarifying the procedures relating to religious exemption under Title IX and including nondiscrimination protections required by *Bostock*, the Department should also correct the significant procedural deficiencies found in the 2020 rule. The definition of sexual harassment in the 2020 rule is unnecessarily restrictive, capturing only the most severe instances of harassment. Moreover, important protections were stripped from survivors of sexual harassment and assault seeking remedy under the law. Further, the 2020 rule allowed institutions to shirk any responsibility for conduct that occurs off campus, even if it has significant repercussions for student learning and participation. Lastly, the 2020 rule dramatically decreased the number of responsible parties who could receive reports under Title IX and raised the standard of liability for institutions to "actual knowledge" of discriminatory behavior, incentivizing institutions to discourage reporting and to ignore their responsibilities under the law. The 2020 rule should be amended with an eye towards actually enforcing Title IX and protecting students from harassment and discrimination, rather than allowing institutions to refrain from acting and shielding them from liability. American Atheists fully supports the comments and recommendations made by the National Women's Law Center, which provide a more detailed account of the procedural and legal deficiencies in the 2020 rules.

Conclusion

We urge the Department to swiftly review and revise the 2020 rule, which undermines, rather than implements, the primary purpose of Title IX, to protect students from sex-based discrimination in education. In particular, the 2020 rule fails to protect individuals who face sexual harassment, fails to offer adequate protections for students who attend religious institutions of higher education, and it fails to provide legally required protections for LGBTQ people. We appreciate that the Department is taking steps to implement the *Bostock* decision and clarify how it applies to Title IX. If you should have any questions regarding American Atheists' position on Title IX, the 2020 rule, or other relevant matters, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Sincerely,

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Alison Gill, Esq.
Vice President, Legal & Policy
American Atheists

[32] *See, e.g.,* AL HB 391 (2021); AR SB 354 (2021); AR SB 450 (2021); FL SB 1028 (2021); MS SB 2536 (2021); MT HB 112 (2021); TN HB 3/SB 228 (2021); WV HB 3293 (2021).