

From: Steve Sandberg
Sent: Fri, 11 Jun 2021 19:23:07 +0000
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (Religious Exemption, Title IX Procedures, Sex Discrimination)
Attachments: 2021-06-11 BYU Comment to OCR re Title IX Regulations.pdf

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear OCR official,

Here is Brigham Young University's written comment, provided in the text below and also in the attached.pdf document:

Submitted by email
T9PublicHearing@ed.gov

Re: Written Comment: Title IX Public Hearing (Religious Exemption, Title IX Procedures, Sex Discrimination)

June 11, 2021

Brigham Young University (BYU) is grateful for the invitation from the U.S. Department of Education's (ED) Office for Civil Rights (OCR) to comment on ways to improve enforcement of Title IX of the Education Amendments of 1972 (Title IX). We welcome OCR's efforts to consider possible changes to the regulatory burden on educational institutions as they strive to ensure students and employees are protected from the sex discrimination prohibited by Title IX.

BYU is a religious institution of higher education in Provo, Utah, that is founded, supported, and guided by The Church of Jesus Christ of Latter-day Saints (the Church of Jesus Christ). BYU aims to provide an education that is spiritually strengthening, intellectually enlarging, and character building, leading to lifelong learning and service. See Brigham Young University, *Aims of a BYU Education*, <https://aims.byu.edu/aims-of-a-byu-education>. With an on-campus enrollment of over 30,000 students, BYU is one of the largest religious universities in the country.

Title IX compliance and enforcement are of great importance to BYU and our students. We are committed to the objective of eliminating sexual harassment on campus, and we believe our religious mission and practices and help us prevent and address many of the most damaging consequences of sexual harassment. Our unique religious mission is “to assist individuals in their quest for perfection and eternal life” by providing an environment “sustained by those moral virtues which characterize the life and teachings of the Son of God” where “the full realization of human potential is pursued.” Brigham Young University, *BYU Mission Statement*,

<https://aims.byu.edu/byu-mission-statement>. We believe that every person is a child of God and is created in God's image. Each individual possesses free will and is endowed with eternal potential through God's infinite justice, mercy, and grace. For this reason, our care for students at BYU extends beyond their physical well-being and academic success; it includes their spiritual welfare and eternal progress and happiness.

BYU affirms that the freedom of religion guaranteed by the Constitution and federal law includes the freedom to operate a university without sacrificing distinctive religious beliefs. Given our doctrinal belief that the body is sacred, we also believe that sexual assault and other forms of sexual harassment are abhorrent sins that violate the free will and dignity of another person. We teach and expect our campus community to live specific religious standards of morality that are reflected in our code of conduct, which is an important tool for keeping our campus safe. We are concerned not only with the physical, emotional, and mental safety of our students and employees but also with their spiritual safety and welfare.

When our students act in ways that are inconsistent with our religious teachings, we do not inevitably assume that an adversarial process is the appropriate response. Rather, we recognize an educational obligation to teach them better ways of interacting and to understand the dignity and autonomy of those they have harmed. We help them return to a path of spiritual safety through the Atonement of Jesus Christ. We care deeply about all our students as children of God and feel a Christian commitment to help victims heal and those who engage in misconduct change.

As we continue our efforts to create a campus environment that is edifying, secure, and safe, we appreciate OCR's work to help calibrate the institutional and individual rights and obligations required by Title IX. OCR has specifically requested comment on how ED can ensure school environments are free from sexual harassment; ensure fair, prompt, and equitable resolution of reports of sexual harassment; and address discrimination based on sexual orientation and gender identity. BYU offers the following comments:

- 1. Ensuring school environments are free from sexual harassment includes safeguarding the religious exemption that allows religiously affiliated institutions to maintain a safe environment through the tenets of their faiths.**
 - a. The statutory Title IX exemption should be respected and can be further clarified in the regulations.**

The Title IX regulations are derived from 20 U.S.C. § 1681. The statute, as enacted by Congress, expressly provides that the prohibition on sex discrimination in section 1681(a) "shall not apply to an educational institution which is controlled by a religious organization if the application . . . would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3).

In 2020, ED clarified the application of Title IX to religious educational institutions in an implementing regulation found at 34 C.F.R. § 106.12. This regulation explains that religiously affiliated institutions like BYU may—but are not required to—seek assurance of their religious exemption by submitting a written request to ED. It also provides that religious organizations,

regardless of whether they have previously sought assurance, may invoke their religious exemption at any time. This revision helped align the regulation with the statutory text, and these provisions should be maintained if future regulatory changes are made. Religious institutions' rights to exercise their religious tenets should not be limited by their ability to anticipate interpretations of Title IX.

In addition, we believe a further refinement would be helpful. Under section 106.12(b), a religious educational institution requests an assurance of exemption by identifying the provisions of part 106 that conflict with one of the institution's religious tenets. To make clear that future claims of institutional religious exemption are not predetermined by the scope or nature of any prior claims submitted in writing to ED, we propose the following minor revision to the end of section 106.12(b) (in bold and underlined below):

"(b) Assurance of exemption. . . . In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary **as to that provision or any other provision of this part."**

b. The specific missions of religiously affiliated institutions should be respected.

Religiously affiliated institutions comprise a wide variety of colleges and universities in the United States, each of which has its own unique mission. More than one in five two-year and four-year institutions of higher education is religiously affiliated. See National Center for Education Statistics, *IPEDS: Integrated Postsecondary Education Data System*, <https://nces.ed.gov/ipeds/use-the-data> (review of data available as of June 11, 2021). In the pluralistic environment of higher education, religiously affiliated institutions occupy a significant and distinct space along with a variety of other secular private and public institutions. The diversity of educational institutions in America is critical to providing students with options for a tailored educational experience of their choice that best allows them to develop their own distinct talents and abilities within the context of their personal values. We believe that the public good is best served when all institutions provide educational experiences consistent with their published missions and values, even when they differ from those provided by other institutions.

Therefore, if other revisions to the Title IX regulations are requested or considered by ED, these revisions should generally account for and respect the unique missions and identities of all institutions—including private religious institutions—and the students who choose to attend them. Any developments in the regulations should continue to allow for this diversity of options for students.

2. Regulatory changes over the last decade have led to more fair, prompt, and equitable resolutions of sexual harassment reports, and positive developments should be retained with a few adjustments to further improve processes.

In 2020, ED implemented a regulation that defined an “education program or activity” to include “locations, events, or circumstances over which the [postsecondary institution] exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.” 34 C.F.R. § 106.44(a). This definition was a welcome clarification to the scope of matters universities must address under Title IX while allowing institutions the ability to continue addressing non-Title IX matters under other university policies and procedures. The clarification appropriately narrows and confines Title IX matters to those areas over which the institution has meaningful control. Future changes to the regulations, if any, should retain this principled approach.

a. Institutions should have greater flexibility to determine under what circumstances they must conduct a live hearing.

The regulations include a requirement for educational institutions to provide for a live hearing if a formal complaint falls under Title IX. *See* 34 C.F.R. § 106.45(b)(6)(i). This requirement is fundamentally inconsistent with the role of a private institution of higher education, which is not a law enforcement agency or a court. It may be particularly inconsistent with the role of a private or religious institution that seeks to encourage conflict resolution through mediation or other alternative dispute resolution processes rather than through adversarial means. Even though institutions may have processes available that are reasonable and fair and would protect the parties involved without the necessity of a live hearing, this regulation requires institutions to establish quasi-judicial hearing systems based on an adversarial model applying legal standards of relevance, presumptions, and burdens of proof to adjudicate issues involving student or employee conduct.

In addition, the live hearing requirement, which seeks to impose a “due process” standard applicable only to public schools, *see* 85 Fed. Reg. 97, 30,311 (May 19, 2020), is a substantial burden for private institutions, which must divert valuable and often scarce resources away from the education and support of students to this administrative process. Moreover, the process may actually dissuade participation if the complainant is unwilling or unable to testify and submit to cross-examination due to concerns about being re-traumatized. The regulations provide that a complainant’s testimony may not be considered if she or he does not submit to cross-examination, *see* 34 C.F.R. § 106.45(b)(6)(i), which can reduce the chances of achieving a fair and accurate outcome.

In our experience, many, if not most, of these matters can be resolved fairly and consistently without a live hearing process, whether through an informal resolution or a non-live investigative hearing panel, and therefore BYU recommends institutions be granted greater flexibility to determine when a formal hearing is necessary and appropriate.

b. Institutions should have greater flexibility to determine under what circumstances they should pursue sexual harassment investigations when a complainant (formal complaint) requests that there be no investigation.

Institutions are required to respond to a formal complaint by following a prescribed grievance process, which in many cases requires an investigation. *See* 34 C.F.R. §§ 106.44(b);

106.45(b)(3). In our experience, some survivors of sexual assault are hesitant to file formal complaints because, although they need and seek supportive measures, they prefer to avoid the potential trauma of an investigation. BYU is concerned with the chilling effect the regulation has had on the willingness of sexual assault survivors to make formal complaints, especially if they feel that doing so is the only avenue for them to seek supportive measures.

Additionally, it can be difficult even for a large institution like BYU to conduct an investigation requiring an investigator, advisors to each party, decision maker(s) for a live hearing, decision maker(s) for an appeal, as well as alternate personnel to serve in the event of a conflict of interest, all of whom must be trained to understand the subtleties of Title IX and its regulations. For smaller institutions—including many religiously affiliated institutions—this burden can be overwhelming. We suggest that institutions be given the necessary flexibility, perhaps guided by a list of factors to consider, to determine whether an investigation is appropriate under the circumstances of a particular formal complaint.

3. ED should not legislate on discrimination and instead facilitate dialogue between educational institutions and impacted communities.

a. Congress determines the contours of how Title IX addresses discrimination on the basis of sexual orientation and gender identity.

The Biden administration has determined that Title IX’s prohibition on discrimination on the basis of sex includes a prohibition on discrimination on the basis of sexual orientation and gender identity. In part, this administrative position derives from the U.S. Supreme Court’s decision in *Bostock v. Clayton County*, which held that Title VII’s prohibition of employment discrimination because of sex also included prohibitions on employment discrimination because of sexual orientation and gender identity.

BYU participated in an *amicus curiae* brief in *Bostock v. Clayton County* in which we pointed out some differences in statutory text between Title VII and Title IX. Unlike Title VII, Title IX’s text anticipates, in many situations, that an individual’s biological sex must be taken into account in providing sex-specific activities or accommodations. For example, Title IX states that if certain activities are provided for students of “one sex,” then comparable activities must be provided for students of “the other sex.” 20 U.S.C. § 1681(a)(8). It also provides that schools may transition from admitting students of “only one sex” to admitting students of “both sexes.” *Id.* § 1681(a)(2). Likewise, Title IX authorizes covered institutions to provide “separate living facilities for the different sexes.” *Id.* § 1686. Neither the Supreme Court’s decision in *Bostock* nor the statutory text of Title IX compels the Biden administration’s conclusion that Title IX encompasses sexual orientation and gender identity. However, as reflected in Utah law and in proposed Fairness for All legislation, BYU supports LGBTQ rights in employment, housing, and other areas, provided that freedom of religious institutions to pursue their independent religious missions is also protected.

Further, as mentioned above, the text of Title IX—which cannot and should not be overridden by executive branch orders, regulations, or sub-regulatory guidance—explicitly provides that Title IX “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.” 20 U.S.C. § 1681(a)(3). To the extent that ED or OCR is inclined to impose Title IX requirements on religious institutions that contradict the institution’s religious tenets, Congress has already spoken to and foreclosed that approach. Title IX does not apply in those situations unless and until Congress amends the statute.

b. ED should foster meaningful dialogue between educational institutions and the LGBTQ community to promote understanding and respect.

BYU welcomes and supports LGBTQ employees and students who agree to abide by the tenets of the Church of Jesus Christ. We acknowledge the challenging realities that some of our LGBTQ campus community members experience as they navigate their sexual orientation and gender identity in connection with the teachings and doctrine of the restored gospel of Jesus Christ. We understand that, for many, there are no easy solutions.

BYU is able to focus on the love and respect that every person deserves—including LGBTQ campus community members—precisely *because* of our religious mission. BYU’s president began his tenure by reminding our campus community that “[t]he BYU mission statement indicates that this is a place where ‘the full realization of human potential is pursued.’ And that potential is greater than many in the world imagine, because all human beings are ‘beloved spirit [children] of heavenly parents, and, as such, each has a divine nature and destiny.’” *Kevin J Worthen, Commemorating Your Divine Potential*, BYU Speeches (Aug. 14, 2014), <https://speeches.byu.edu/talks/kevin-j-worthen/commemorating-divine-potential/>. Because of the divine nature of all human beings, BYU affirms that any form of sexual harassment, including sexual assault, dating violence, domestic violence, and stalking, on the basis of sex, sexual orientation, or gender identity is contrary to the teachings of the Church of Jesus Christ. BYU is committed to protecting all students, regardless of sexual orientation or gender identity, from sexual harassment.

The intersection of religious identity and LGBTQ identity—both at the institutional and the individual level—is complex and nuanced, particularly at BYU where its religious mission is shaped in part by firmly established faith tenets related to chastity, marriage, and the eternal nature of gender. We applaud the efforts of organizations like the NCAA that encourage dialogue, understanding, and respect in these areas. The NCAA has hosted events and panels with “[this] goal: establish inclusive and respectful athletics environments for participants of all sexual orientations, gender identities and faith perspectives.” NCAA, *Common Ground*, <https://www.ncaa.org/about/resources/inclusion/common-ground> (“Appropriately titled ‘Common Ground,’ the discussion began the dialogue between athletics and university officials by offering practical solutions and initiatives on how to break down barriers of fear, lack of trust, misunderstanding and judgment between these communities and individuals.”) The NCAA has published two articles in its Champion magazine about how its Common Ground initiative has enhanced understanding, dialogue, and practical approaches to areas at the intersection of religion, sexual orientation, and gender identity:

<https://www.ncaa.org/static/champion/breaking-ground/>

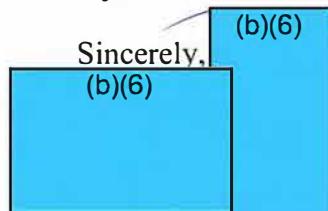
<https://www.ncaa.org/static/champion/an-uncommon-conversation/>

Particularly in the area of Title IX, which has specific athletics-related application, the NCAA model is a good one. We encourage OCR and ED to find ways to encourage and promote these types of collaborative and mutually respectful initiatives.

We appreciate the opportunity to comment on this important undertaking. We stand ready to provide additional assistance as needed in order to advance our shared goal of educating and inspiring students in an environment where they can reach their fullest potential.

Sincerely,
(b)(6)

Steven M. Sandberg
General Counsel

A large rectangular redaction box covers the signature area. A smaller rectangular redaction box is positioned above the signature line, with a curved arrow pointing from the word "Sincerely" to it.

(b)(6)

Best,
Steve

STEVE SANDBERG
General Counsel
BRIGHAM YOUNG UNIVERSITY
A357 ASB | Provo, UT 84602
801-422-2235 | ogc@byu.edu

Submitted by email
T9PublicHearing@ed.gov

Re: Written Comment: Title IX Public Hearing (Religious Exemption, Title IX Procedures, Sex Discrimination)

June 11, 2021

Brigham Young University (BYU) is grateful for the invitation from the U.S. Department of Education's (ED) Office for Civil Rights (OCR) to comment on ways to improve enforcement of Title IX of the Education Amendments of 1972 (Title IX). We welcome OCR's efforts to consider possible changes to the regulatory burden on educational institutions as they strive to ensure students and employees are protected from the sex discrimination prohibited by Title IX.

BYU is a religious institution of higher education in Provo, Utah, that is founded, supported, and guided by The Church of Jesus Christ of Latter-day Saints (the Church of Jesus Christ). BYU aims to provide an education that is spiritually strengthening, intellectually enlarging, and character building, leading to lifelong learning and service. See Brigham Young University, *Aims of a BYU Education*, <https://aims.byu.edu/aims-of-a-byu-education>. With an on-campus enrollment of over 30,000 students, BYU is one of the largest religious universities in the country.

Title IX compliance and enforcement are of great importance to BYU and our students. We are committed to the objective of eliminating sexual harassment on campus, and we believe our religious mission and practices help us prevent and address many of the most damaging consequences of sexual harassment. Our unique religious mission is “to assist individuals in their quest for perfection and eternal life” by providing an environment “sustained by those moral virtues which characterize the life and teachings of the Son of God” where “the full realization of human potential is pursued.” Brigham Young University, *BYU Mission Statement*, <https://aims.byu.edu/byu-mission-statement>. We believe that every person is a child of God and is created in God’s image. Each individual possesses free will and is endowed with eternal potential through God’s infinite justice, mercy, and grace. For this reason, our care for students at BYU extends beyond their physical well-being and academic success; it includes their spiritual welfare and eternal progress and happiness.

BYU affirms that the freedom of religion guaranteed by the Constitution and federal law includes the freedom to operate a university without sacrificing distinctive religious beliefs. Given our doctrinal belief that the body is sacred, we also believe that sexual assault and other forms of sexual harassment are abhorrent sins that violate the free will and dignity of another person. We teach and expect our campus community to live specific religious standards of morality that are reflected in our code of conduct, which is an important tool for keeping our campus safe. We are concerned not only with the physical, emotional, and mental safety of our students and employees but also with their spiritual safety and welfare.

When our students act in ways that are inconsistent with our religious teachings, we do not inevitably assume that an adversarial process is the appropriate response. Rather, we recognize an educational obligation to teach them better ways of interacting and to understand

the dignity and autonomy of those they have harmed. We help them return to a path of spiritual safety through the Atonement of Jesus Christ. We care deeply about all our students as children of God and feel a Christian commitment to help victims heal and those who engage in misconduct change.

As we continue our efforts to create a campus environment that is edifying, secure, and safe, we appreciate OCR's work to help calibrate the institutional and individual rights and obligations required by Title IX. OCR has specifically requested comment on how ED can ensure school environments are free from sexual harassment; ensure fair, prompt, and equitable resolution of reports of sexual harassment; and address discrimination based on sexual orientation and gender identity. BYU offers the following comments:

- 1. Ensuring school environments are free from sexual harassment includes safeguarding the religious exemption that allows religiously affiliated institutions to maintain a safe environment through the tenets of their faiths.**
 - a. The statutory Title IX exemption should be respected and can be further clarified in the regulations.**

The Title IX regulations are derived from 20 U.S.C. § 1681. The statute, as enacted by Congress, expressly provides that the prohibition on sex discrimination in section 1681(a) “shall not apply to an educational institution which is controlled by a religious organization if the application . . . would not be consistent with the religious tenets of such organization.” 20 U.S.C. § 1681(a)(3).

In 2020, ED clarified the application of Title IX to religious educational institutions in an implementing regulation found at 34 C.F.R. § 106.12. This regulation explains that religiously affiliated institutions like BYU may—but are not required to—seek assurance of their religious exemption by submitting a written request to ED. It also provides that religious organizations, regardless of whether they have previously sought assurance, may invoke their religious exemption at any time. This revision helped align the regulation with the statutory text, and these provisions should be maintained if future regulatory changes are made. Religious institutions’ rights to exercise their religious tenets should not be limited by their ability to anticipate interpretations of Title IX.

In addition, we believe a further refinement would be helpful. Under section 106.12(b), a religious educational institution requests an assurance of exemption by identifying the provisions of part 106 that conflict with one of the institution’s religious tenets. To make clear that future claims of institutional religious exemption are not predetermined by the scope or nature of any prior claims submitted in writing to ED, we propose the following minor revision to the end of section 106.12(b) (in bold and underlined below):

“(b) Assurance of exemption. . . . In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which

conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary as to that provision or any other provision of this part.”

b. The specific missions of religiously affiliated institutions should be respected.

Religiously affiliated institutions comprise a wide variety of colleges and universities in the United States, each of which has its own unique mission. More than one in five two-year and four-year institutions of higher education is religiously affiliated. See National Center for Education Statistics, *IPEDS: Integrated Postsecondary Education Data System*, <https://nces.ed.gov/ipeds/use-the-data> (review of data available as of June 11, 2021). In the pluralistic environment of higher education, religiously affiliated institutions occupy a significant and distinct space along with a variety of other secular private and public institutions. The diversity of educational institutions in America is critical to providing students with options for a tailored educational experience of their choice that best allows them to develop their own distinct talents and abilities within the context of their personal values. We believe that the public good is best served when all institutions provide educational experiences consistent with their published missions and values, even when they differ from those provided by other institutions.

Therefore, if other revisions to the Title IX regulations are requested or considered by ED, these revisions should generally account for and respect the unique missions and identities of all institutions—including private religious institutions—and the students who choose to attend them. Any developments in the regulations should continue to allow for this diversity of options for students.

2. Regulatory changes over the last decade have led to more fair, prompt, and equitable resolutions of sexual harassment reports, and positive developments should be retained with a few adjustments to further improve processes.

In 2020, ED implemented a regulation that defined an “education program or activity” to include “locations, events, or circumstances over which the [postsecondary institution] exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.” 34 C.F.R. § 106.44(a). This definition was a welcome clarification to the scope of matters universities must address under Title IX while allowing institutions the ability to continue addressing non-Title IX matters under other university policies and procedures. The clarification appropriately narrows and confines Title IX matters to those areas over which the institution has meaningful control. Future changes to the regulations, if any, should retain this principled approach.

a. Institutions should have greater flexibility to determine under what circumstances they must conduct a live hearing.

The regulations include a requirement for educational institutions to provide for a live hearing if a formal complaint falls under Title IX. See 34 C.F.R. § 106.45(b)(6)(i). This requirement is fundamentally inconsistent with the role of a private institution of higher

education, which is not a law enforcement agency or a court. It may be particularly inconsistent with the role of a private or religious institution that seeks to encourage conflict resolution through mediation or other alternative dispute resolution processes rather than through adversarial means. Even though institutions may have processes available that are reasonable and fair and would protect the parties involved without the necessity of a live hearing, this regulation requires institutions to establish quasi-judicial hearing systems based on an adversarial model applying legal standards of relevance, presumptions, and burdens of proof to adjudicate issues involving student or employee conduct.

In addition, the live hearing requirement, which seeks to impose a “due process” standard applicable only to public schools, *see* 85 Fed. Reg. 97, 30,311 (May 19, 2020), is a substantial burden for private institutions, which must divert valuable and often scarce resources away from the education and support of students to this administrative process. Moreover, the process may actually dissuade participation if the complainant is unwilling or unable to testify and submit to cross-examination due to concerns about being re-traumatized. The regulations provide that a complainant’s testimony may not be considered if she or he does not submit to cross-examination, *see* 34 C.F.R. § 106.45(b)(6)(i), which can reduce the chances of achieving a fair and accurate outcome.

In our experience, many, if not most, of these matters can be resolved fairly and consistently without a live hearing process, whether through an informal resolution or a non-live investigative hearing panel, and therefore BYU recommends institutions be granted greater flexibility to determine when a formal hearing is necessary and appropriate.

b. Institutions should have greater flexibility to determine under what circumstances they should pursue sexual harassment investigations when a complainant (formal complaint) requests that there be no investigation.

Institutions are required to respond to a formal complaint by following a prescribed grievance process, which in many cases requires an investigation. *See* 34 C.F.R. §§ 106.44(b); 106.45(b)(3). In our experience, some survivors of sexual assault are hesitant to file formal complaints because, although they need and seek supportive measures, they prefer to avoid the potential trauma of an investigation. BYU is concerned with the chilling effect the regulation has had on the willingness of sexual assault survivors to make formal complaints, especially if they feel that doing so is the only avenue for them to seek supportive measures.

Additionally, it can be difficult even for a large institution like BYU to conduct an investigation requiring an investigator, advisors to each party, decision maker(s) for a live hearing, decision maker(s) for an appeal, as well as alternate personnel to serve in the event of a conflict of interest, all of whom must be trained to understand the subtleties of Title IX and its regulations. For smaller institutions—including many religiously affiliated institutions—this burden can be overwhelming. We suggest that institutions be given the necessary flexibility, perhaps guided by a list of factors to consider, to determine whether an investigation is appropriate under the circumstances of a particular formal complaint.

3. ED should not legislate on discrimination and instead facilitate dialogue between educational institutions and impacted communities.

a. Congress determines the contours of how Title IX addresses discrimination on the basis of sexual orientation and gender identity.

The Biden administration has determined that Title IX’s prohibition on discrimination on the basis of sex includes a prohibition on discrimination on the basis of sexual orientation and gender identity. In part, this administrative position derives from the U.S. Supreme Court’s decision in *Bostock v. Clayton County*, which held that Title VII’s prohibition of employment discrimination because of sex also included prohibitions on employment discrimination because of sexual orientation and gender identity.

BYU participated in an *amicus curiae* brief in *Bostock v. Clayton County* in which we pointed out some differences in statutory text between Title VII and Title IX. Unlike Title VII, Title IX’s text anticipates, in many situations, that an individual’s biological sex must be taken into account in providing sex-specific activities or accommodations. For example, Title IX states that if certain activities are provided for students of “one sex,” then comparable activities must be provided for students of “the other sex.” 20 U.S.C. § 1681(a)(8). It also provides that schools may transition from admitting students of “only one sex” to admitting students of “both sexes.” *Id.* § 1681(a)(2). Likewise, Title IX authorizes covered institutions to provide “separate living facilities for the different sexes.” *Id.* § 1686. Neither the Supreme Court’s decision in *Bostock* nor the statutory text of Title IX compels the Biden administration’s conclusion that Title IX encompasses sexual orientation and gender identity. However, as reflected in Utah law and in proposed Fairness for All legislation, BYU supports LGBTQ rights in employment, housing, and other areas, provided that freedom of religious institutions to pursue their independent religious missions is also protected.

Further, as mentioned above, the text of Title IX—which cannot and should not be overridden by executive branch orders, regulations, or sub-regulatory guidance—explicitly provides that Title IX “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.” 20 U.S.C. § 1681(a)(3). To the extent that ED or OCR is inclined to impose Title IX requirements on religious institutions that contradict the institution’s religious tenets, Congress has already spoken to and foreclosed that approach. Title IX does not apply in those situations unless and until Congress amends the statute.

b. ED should foster meaningful dialogue between educational institutions and the LGBTQ community to promote understanding and respect.

BYU welcomes and supports LGBTQ employees and students who agree to abide by the tenets of the Church of Jesus Christ. We acknowledge the challenging realities that some of our LGBTQ campus community members experience as they navigate their sexual orientation and gender identity in connection with the teachings and doctrine of the restored gospel of Jesus Christ. We understand that, for many, there are no easy solutions.

BYU is able to focus on the love and respect that every person deserves—including LGBTQ campus community members—precisely *because* of our religious mission. BYU’s president began his tenure by reminding our campus community that “[t]he BYU mission statement indicates that this is a place where ‘the full realization of human potential is pursued.’ And that potential is greater than many in the world imagine, because all human beings are ‘beloved spirit [children] of heavenly parents, and, as such, each has a divine nature and destiny.’” Kevin J Worthen, *Commemorating Your Divine Potential*, BYU Speeches (Aug. 14, 2014), <https://speeches.byu.edu/talks/kevin-j-worthen/commemorating-divine-potential/>. Because of the divine nature of all human beings, BYU affirms that any form of sexual harassment, including sexual assault, dating violence, domestic violence, and stalking, on the basis of sex, sexual orientation, or gender identity is contrary to the teachings of the Church of Jesus Christ. BYU is committed to protecting all students, regardless of sexual orientation or gender identity, from sexual harassment.

The intersection of religious identity and LGBTQ identity—both at the institutional and the individual level—is complex and nuanced, particularly at BYU where its religious mission is shaped in part by firmly established faith tenets related to chastity, marriage, and the eternal nature of gender. We applaud the efforts of organizations like the NCAA that encourage dialogue, understanding, and respect in these areas. The NCAA has hosted events and panels with “[this] goal: establish inclusive and respectful athletics environments for participants of all sexual orientations, gender identities and faith perspectives.” NCAA, *Common Ground*, <https://www.ncaa.org/about/resources/inclusion/common-ground> (“Appropriately titled ‘Common Ground,’ the discussion began the dialogue between athletics and university officials by offering practical solutions and initiatives on how to break down barriers of fear, lack of trust, misunderstanding and judgment between these communities and individuals.”) The NCAA has published two articles in its Champion magazine about how its Common Ground initiative has enhanced understanding, dialogue, and practical approaches to areas at the intersection of religion, sexual orientation, and gender identity:

<https://www.ncaa.org/static/champion/breaking-ground/>
<https://www.ncaa.org/static/champion/an-uncommon-conversation/>

Particularly in the area of Title IX, which has specific athletics-related application, the NCAA model is a good one. We encourage OCR and ED to find ways to encourage and promote these types of collaborative and mutually respectful initiatives.

We appreciate the opportunity to comment on this important undertaking. We stand ready to provide additional assistance as needed in order to advance our shared goal of educating and inspiring students in an environment where they can reach their fullest potential.

(b)(6)
Sincerely,
(b)(6)
Steven M. Sandberg
General Counsel