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Protecting Catholic Colleges from External Threats to Their Religious Liberty

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Executive Summary

Catholic colleges and universities and other Catholic organizations are not immune from emerging threats to their religious liberty and Catholic identity, but they can take steps to minimize the danger.

This paper briefly outlines some of the major forms of these threats related to acceptance of federal student aid and grants, Title VII, the Patient Protection and Affordable Care Act, and various state-level laws and regulations. The paper then identifies ten factors that federal courts may consider when determining whether a school is exempt from certain laws as a religious organization. The paper proposes steps each institution may take to protect its religious freedom.

Any available exemptions for religious institutions will not apply if a college that was founded as a religious institution has become largely secular. Catholic colleges and universities have an advantage over other religious institutions in that the Catholic Church's Canon Law and the Apostolic Constitution *Ex corde Ecclesiae* lay out the requirements for a college to be considered Catholic. But a college that does not faithfully adhere to and apply the Catholic Church's own law might find it difficult if not impossible to convince a secular court that it is a Catholic institution deserving protection. It is therefore vital that Catholic colleges and universities maintain their Catholic identity in all of their programs in order to best protect their religious character and mission.

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About The Center

The Center for the Advancement of Catholic Higher Education (CACHE), a division of the nonprofit Cardinal Newman Society, advises and assists academic and religious leaders in efforts to strengthen the Catholic identity and academic quality of Catholic colleges and universities.

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Protecting Catholic Colleges from External Threats to Their Religious Liberty

Federal and state laws are increasingly being used to coerce religious institutions into actions and commitments that violate deeply held religious convictions and moral principles.¹ Some of these laws require employee and student health insurance that covers contraception, and mandate employee benefits for same sex couples.

Catholic colleges and universities and other Catholic organizations are not immune from emerging threats to their religious liberty and Catholic identity, but can take steps to minimize the danger.

This paper will briefly outline some of the major forms of these threats related to:

- acceptance of federal student aid and grants, thus triggering federal Title IX's sex discrimination prohibitions and federal research grant conditions;
- Title VII's prohibitions on employment discrimination;
- the recently enacted Patient Protection and Affordable Care Act healthcare overhaul; and
- various state-level laws and regulations.

After explaining the ways the application of these laws and regulations can threaten a Catholic college or university's Catholic identity, the paper will propose steps each institution may take to mitigate the danger.

It must be noted, however, that any available exemptions for religious institutions will not apply if a college that was founded as a religious institution has become largely secular. It is therefore vital that Catholic colleges and universities maintain their Catholic identity in all of their programs in order to best protect their religious character and mission.

Catholic colleges and universities have an advantage over other religious institutions in that the Catholic Church's Canon Law and the Apostolic Constitution *Ex corde Ecclesiae* lay out the requirements for a college to be considered Catholic. While Church law is beyond the purview of this paper, it should be noted that a college that does not faithfully adhere to and apply the Catholic Church's own law might find it difficult if not impossible to convince a secular court that it is a Catholic institution deserving protection.

THREATS TO THE RELIGIOUS IDENTITY OF CATHOLIC HIGHER EDUCATION

Accepting Federal Funding

Federal funding generally takes the form of research grants or student financial aid. The laws and regulations governing these funds prohibit discrimination based on sex, which may require insurance plans to cover prescription contraception. But there is an exemption for religious organizations.

1. David E. Bernstein, *The Law of Sex Discrimination*, 1999 U. CHI. LEGAL F. 133, 133-34 (1999) (discussing the tension between government protection of civil liberties, necessary to maintaining our heritage of freedom, and government intervention in society, attempting to eliminate discrimination).

Research Grant Conditions

Religious discrimination is conspicuously absent from a list of prohibitions on discrimination that circumscribes the actions of grantees of direct grant programs from the Department of Education. Religious institutions' ability to receive such grants is conditioned on their compliance with the following: Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act. Thus, grantees cannot discriminate on the basis of: race, color, national origin, sex, handicap, or age.² A direct grant is broadly conceived, and eligibility for each individual grant is governed by its particular authorizing statute and implementing regulations.³

Faith-based organizations are eligible to receive the direct grants, and the Code clearly establishes that the Department of Education awarding these grants will not discriminate against faith-based organizations. These organizations are not forced to abandon their religious character, expression, or autonomy in order to receive these funds.⁴ To the extent that a religious educational institution seeks to provide a program or service for which a direct grant is available, the Department extends this opportunity to receive aid without compromising the school's distinctively religious mission. But religious educational institutions must carefully examine the procurement criteria for any particular research grant in order to determine whether accepting the federal funds will adversely affect their particular religious mission.

Federal Title IX's Prohibition on Sex Discrimination in Education

Although Title IX prohibits sex discrimination⁵ in schools that receive federal financial assistance, it has an exemption for religious organizations.⁶ If an educational institution is both "controlled by a religious organization" and if prohibiting sex discrimination would "not be consistent with the religious tenets of such organization," then the school may be able to discriminate.⁷ But it is clearly limited to differentiating on the basis of sex.⁸ Title IX only applies to schools that receive federal financial assistance. Most Catholic colleges and universities receive federal financial assistance in the form of Federal Student Aid,⁹ which

2. 34 C.F.R. § 75.500. There is currently an effort under way to amend Title VI to include discrimination based on religion. <http://religionclause.blogspot.com/2010/09/bill-would-amend-title-vi-to-include.html>. Schools should watch this bill carefully.

3. 34 C.F.R. § 75.50.

4. 34 C.F.R. § 75.52 ("A faith-based organization that applies for or receives a grant under a program of the Department may retain its independence, autonomy, right of expression, religious character, and authority over its governance.").

5. 34 C.F.R. § 106.4 (2010). Currently, sex discrimination is *not* defined to include discrimination against homosexuals, at least in the context of employment discrimination. See George W. Dent, Jr., *Civil Rights for Whom? Gay Rights Versus Religious Freedom*, 95 Ky. L. J. 553, 569 (2006-2007) (citing *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 330-31 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978)).

6. "Educational institutions of religious organizations with contrary religious tenets: 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." 20 U.S.C. § 1681(a)(3).

7. *Id.*

8. 34 C.F.R. § 106.12 (2010) ("This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.").

9. The U.S. Department of Education and the Federal Student Aid Information Center describe three types of fed-

enables students¹⁰ to afford expensive post-secondary education. Students apply for this aid by completing the Free Application for Federal Student Aid (FAFSA). Formerly, student loans were offered under both the Federal Family Education Loan (FFEL) Program and the William D. Ford Federal Direct Loan (Direct Loan) Program. FFEL loans involved the federal government guaranteeing the loans of private lenders, but with Direct Loans, students borrow directly from the U.S. Department of Education. In 2010, among other changes,¹¹ the Health Care and Education Reconciliation Act (“Reconciliation Act”)¹² eliminated the FFEL Program, and now these loans¹³ will all be funded by the Direct Loan Program.

The Code of Federal Regulations, which governs the interpretation of Title IX, defines federal financial assistance in the context of student loans broadly.¹⁴ The Supreme Court has likewise concluded that the definition of federal financial assistance includes both direct and indirect student loans.¹⁵

An institution’s receipt of federal funds actually subjects the entire institution to government regulation under Title IX.¹⁶ If federal financial assistance is actually received, subjecting the school to Title IX, there are virtually no methods of institutional structuring which

eral student aid: grants, work study, and loans. Eligible students receive this aid to attend eligible postsecondary schools, which include college, vocational school, and graduate school. U.S. DEPARTMENT OF EDUCATION, FEDERAL STUDENT AID, STUDENT AID AWARENESS AND APPLICANT SERVICES, FUNDING EDUCATION BEYOND HIGH SCHOOL: THE GUIDE TO FEDERAL STUDENT AID 2 (2010).

10. Various factors determine eligibility for federal student aid: financial need (loans may be obtained without demonstrating financial need); U.S. citizenship (also, for eligible noncitizens); working toward a degree or certificate in an eligible program; for males between 18 and 25, registration with the Selective Service; satisfactory academic progress; and, qualification to obtain postsecondary education. *Id.*

11. This health care and education reform bill affects students not only by changing the way in which students borrow money from the government, but also by diverting funds saved from these changes to fund the Pell Grants program, and, additionally, by capping student loan repayments of the federal loans at 10% of the borrower’s income. Kyle Gaffaney, Note, *Health Care Reform Impacts Student Lending and Pell Grant Programs*, 22 LOY. CONSUMER L. REV. 540, 541 (2010).

12. Health Care and Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029.

13. The types of loans available are: Federal Perkins Loans, Stafford Loans, PLUS Loans, and Consolidation Loans. U.S. DEPARTMENT OF EDUCATION, FEDERAL STUDENT AID, STUDENT AID AWARENESS AND APPLICANT SERVICES, *supra* note 11, at 16.

14. “(g) Federal financial assistance means any of the following . . . (1) A grant or loan of Federal financial assistance, including funds made available for . . . (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity or extended directly to such students for payment to that entity.” 34 C.F.R. § 106.2 (2010).

15. “[W]e have little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to Grove City’s students rather than directly to one of the College’s educational programs.” *Grove City Coll. v. Bell*, 465 U.S. 555, 569-70 (1984), *superseded in part by statute*, 20 U.S.C. § 1687 (not superseding the Court’s definition of federal financial assistance, but only defining “program or activity” more broadly.) Although the Supreme Court originally decided that Title IX’s language prohibiting “discrimination under any education program or activity” should be interpreted to limit the application of Title IX, Congress amended Title IX, providing a broad interpretation of the statutory language. 20 U.S.C. § 1687.

16. Title IX applies if students are receiving federal loans to pay for their education. But they must actually receive federal financial assistance rather than merely benefit from another entity’s receipt of federal funds. *National Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459, 468-69 (1999) (NCAA was not subject to Title IX because member institutions, who did receive federal funds, merely paid dues to the NCAA: “Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not.”); *U.S. Dep’t. of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 611-12 (1986) (holding that federally conducted program beneficiaries are not recipients of federal financial assistance).

will allow it to maneuver around these regulations.¹⁷

Two additional notes for educational institutions attempting to determine if they are receiving federal financial assistance: (1) it appears that tax exempt status does not constitute receiving federal funds;¹⁸ and (2) use of small amounts of federal funds has been held to not be enough to classify the school as a recipient of federal financial assistance under Title IX.¹⁹

But if an institution does receive federal funds, Title IX has an exemption for religious organizations.²⁰ The procedure for obtaining this exemption requires the highest ranking official of the educational institution seeking the exemption to submit a written statement to the Director of the Department of Education “identifying the provisions of this part [Title IX] which conflict with a specific tenet of the religious organization.”²¹

In order to qualify for this exemption, an educational institution must be “controlled by a religious organization.” An educational institution that could be classified as a religious institution itself would also meet this requirement.²²

On one end of the spectrum, a religious educational institution which is in fact a seminary will generally be considered controlled by a religious organization (or actually may be a religious organization) for the purposes of Title IX exemption. Such a school would then need to establish that, according to its religious tenets, sex discrimination was necessary. Many religious faiths believe in either differing vocational roles for men and women generally or at least, reserve ministerial ordination for men only. These faiths can establish their beliefs based on their interpretation of their sacred texts and foundational documents.²³ These clearly qualify for the exemption.²⁴ To the extent that an educational institution

17. *Horner v. Kentucky High Sch. Athletic Ass’n*, 43 F.3d 265, 272 (6th Cir. 1994).

18. *See, e.g., Marshall v. Sisters of the Holy Family of Nazareth*, 399 F. Supp. 2d 597, 599-603 (E.D. Pa. 2005) (clearly recognizing that the Nazareth Academy was tax exempt and also that the school was not a recipient of federal funds under the ADA); *Family Forum v. Archdiocese of Detroit*, 347 F. Supp. 1167, 1170 (E.D. Mich. 1972) (“[W]e do not find the grant of tax exempt status by the state to parochial schools to be sufficient state action to confer jurisdiction [within the Civil Rights Act] on this Court.”). *But see M.H.D. v. Westminster Sch.*, 172 F.3d 797, 802 n.12 (11th Cir. 1999).

19. *See Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 152 (1st Cir. 1998) (questioning whether a small purchase with federal funds was actually federal financial assistance); *Marshall*, 399 F. Supp. 2d at 603 (holding that the school did not receive federal financial assistance even though a small amount of resources were purchased with federal funds); *Buckley v. Archdiocese of Rockville Ctr.*, 992 F. Supp. 586, 589 n.5 (E.D.N.Y. 1998) (holding that a small amount of money spent on instructional materials did not subject the school to Title IX).

20. The exemption is found at 20 U.S.C. § 1681(a)(3), and is also referenced in similar language in § 1687(4).

21. 34 C.F.R. § 106.12 (2010).

22. Judicial interpretation provides a lens for applying Title IX’s broad language. Courts often interpret civil rights legislation by drawing analogies between the various anti-discrimination titles, which are drafted in similar language. *See, e.g., Grove City Coll.*, 465 U.S. at 566 (“Title IX was patterned after Title VI of the Civil Rights Act of 1964.”); *Petruska v. Gannon Univ.*, No. 1:04-cv-80, 2008 WL 2789260, at *3 & n.4 (W.D. Pa. Mar. 31, 2008). For this qualification of Title IX exemption, courts’ interpretation of similar language in Title VII and Title III of the Americans with Disabilities Act (ADA) proves useful. *See, e.g., Spann v. Word of Faith Christian Ctr. Church*, 589 F. Supp. 2d 759, 765-66 (basing interpretation of language in Title III on Title IX decisions interpreting similar language).

23. *See also* U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, TITLE IX MANUAL § I. (2001), available at <http://www.justice.gov/crt/cor/coord/ixlegal.php> (“For example, Title IX would not require a religiously controlled organization that trains students for the ministry to offer such training to women if the organization’s religious tenets holds that all ministers must be men.”).

24. *See, e.g., White v. Denver Seminary*, 157 F. Supp. 2d 1171, 1173-74 (D. Colo. 2001) (holding that the Seminary was not merely an institution of higher learning, but was actually a religious institution, and offering the following facts in support of this conclusion: education was founded on biblical teachings, mission was the training of ministers,

which trains religious leaders can establish that its faith does differentiate in particular ways based on sex, it should be able to allow its students to receive federal financial assistance without coming under the sway of government regulations prohibiting the type of role differentiation it practices.

Catholic schools that do not train priests and other ministers should also be concerned about Title IX's prohibition on sex discrimination. For instance, schools that provide medical insurance for students may violate Title IX if they fail to provide coverage for prescription contraception coverage. Failure to do so has been ruled sex discrimination.²⁵ Schools could also face complaints about single-sex residence halls and related activities restricted to hall residents of the same gender.

So qualifying for the religious exemption to Title IX is important for all Catholic colleges and universities. Although this exemption is narrow,²⁶ Catholic schools stand the best chance of qualifying because they are institutionally connected to a particular religious denomination.²⁷

Courts apply religious exemptions by weighing the facts carefully, not merely taking a school's assertion that it is religious at face value.²⁸ Importantly, a religious past does not speak for a religious present. Straying from an historic religious character cuts decisively against being regarded as religious or controlled by a religious organization.

Prohibition on Discrimination in Employment Pursuant to Federal Title VII

Catholic colleges and universities, regardless of whether they receive federal funds, may be subject to federal laws prohibiting discrimination in the workplace. Despite the law's broad exemption for religious organizations, the Equal Employment Opportunity Commission ("EEOC") is increasingly inclined toward regulating Catholic employers without due consideration for religious liberty, especially with regard to health insurance mandates that conflict with Catholic morality. For instance, Belmont Abbey College in North Carolina is currently being investigated by the EEOC because its health insurance does not cover prescription contraception for its female employees.

Title VII of the Civil Rights Act of 1964 prohibits employers of 15 or more employees from discriminating in hiring and firing employees on the grounds of race, color, religion, sex, or national origin.²⁹ Unlike Title IX, the application of Title VII does not depend on whether

teachings were grounded in historic faith, Seminary was founded by a particular religious denomination, Board of Trustees also composed of members of that denomination, faith requirements for faculty members, and students were required to attend religious services).

25. See *Catholic Charities of Sacramento, Inc. v. Superior Ct. Cal. S.Ct.*, 85 P.3d 67 (Cal. 2004).

26. A Supreme Court case involving Grove City College indicates that this may be more difficult to establish than it sounds. Grove City objected to signing an Assurance and Compliance form required by the Department of Education, which would have subjected the school to continual governmental oversight, potentially requiring response to both past and future discrimination. The court did not specifically address whether Grove City was exempted as a religious institution, even though it was committed to the Christian faith since its founding in 1876 and its religious beliefs clearly permeated its educational programs. *Grove City Coll.*, 465 U.S. at 558 n.1 (offering no other discussion of exemption other than that Title IX included nine statutory exemptions which were not relevant to the case).

27. *Marshall*, 399 F. Supp. 2d at 599 (private co-educational Catholic school was a religious organization).

28. *Doe v. Abington Friends Sch.*, 480 F.3d 252, 254-58 (3d Cir. 2007) (concluding that this is a question of fact and law and that a mere statement by the school that it is religious was not sufficient for a summary judgment conclusion which required such a classification).

29. 42 U.S.C. § 2000e-2(a)(1). These employers may not "limit, segregate, or classify" employees or applicants (again, on the bases of race, color, religion, sex, or national origin) in such a way as to deprive them of opportunities or

or not an employer receives federal funds. But Title VII includes a broader exemption for religious organizations.³⁰

Title VII does not statutorily define what constitutes a religious educational institution or religious organization, but the exemption is broad: all of a religious organization's activities are exempt, *not* just those activities that are specifically religious. General principles of interpretation of the exemption caution that it is fact specific.³¹ Because of the sparse nature of the statute, courts have varied not only in their decisions about whether certain organizations are religious but also in the factors they apply.

In a case particularly relevant to the religious nature of educational institutions, the Eleventh Circuit Court of Appeals concluded that Samford, a Baptist university, was a religious educational institution which can consider religion when making employment decisions. The court described the following as relevant to its conclusion: (1) Samford was originally founded as a theological institution by the Alabama Baptist State Convention; (2) The vast majority of its trustees had been Baptist; (3) The Baptist convention contributed over four million dollars to Samford; (4) All Samford's faculty who taught religion were required to subscribe to a particular Baptist statement of faith; and, (5) Samford's charter described its purpose in explicitly religious terms.³²

If a Catholic college or university qualifies for the religious exemption, it may require its employees to all be Catholic and live a life consistent with Catholic teaching. If the school does not qualify for a religious exemption, it can still consider religion for certain positions that require someone of a particular faith, often referred to as a bona fide occupational qualification. For instance, being Jesuit was considered a bona fide occupational qualification for a full-time faculty position at Loyola University of Chicago.³³

The Pregnancy Discrimination Act

Title VII was amended in 1978 to prohibit discrimination against pregnant women – often referred to as the Pregnancy Discrimination Act.³⁴ This was interpreted by the EEOC in 2000 as requiring employers to provide prescription contraception coverage in health insurance plans that include prescriptions.³⁵ This mandate neglects the First Amendment rights of Catholic employers who must be faithful to Catholic teaching on the immorality of artificial contraception.

In 2009, the EEOC District Office in Charlotte, N.C., charged Belmont Abbey College in North Carolina with discrimination for not covering birth control pills in its employee health plan, which would compromise the college's Catholic mission. The college has filed an appeal with the EEOC national office in Washington, D.C., but has not received a reply.

negatively affect their status. *Id.* at (a)(2).

30. "This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a) (Section 702).

31. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 617-18 (9th Cir. 1988) (exemption primarily designed to exempt churches and closely affiliated organizations and required the consideration of the particular characteristics of each organization).

32. *Killinger v. Samford Univ.*, 113 F.3d 196, 199 (11th Cir. 1997).

33. *Pime v. Loyola Univ. of Chicago*, 585 F. Supp. 435 (ND Ill. 1985), *aff'd*, 803 F.2d 351 (7th Cir. 1986).

34. 42 U.S.C. § 2000 3(k).

35. See EEOC, *Decision on Coverage of Contraceptives*, available at <http://www.eeoc.gov/policy/docs/decision-contraception.html>.

The EEOC appears to be headed toward additional conflicts with religious employers. Newly appointed EEOC commissioner Chai Feldblum, a former professor at Georgetown University Law Center and advocate for same-sex marriage, has argued that “sexual rights” should trump First Amendment religious rights when the two conflict.

The EEOC action against Belmont Abbey College indicates the extent to which Title VII can be used to impose personnel policies that may conflict with Catholic identity. Contraception mandates could lead to abortion mandates in employee health insurance. Antidiscrimination measures regarding sexual orientation could force benefits for same-sex couples and recognition of same-sex unions. Catholic colleges and universities must be careful to require their employees to subscribe to the Catholic teaching on contraception if they do not want to be forced to provide similar coverage to their employees.

Employment Non-Discrimination Act

Another potential threat to Catholic colleges and universities is the continued effort in Congress to amend Title VII by passing some form of the Employment Non-Discrimination Act (ENDA). By designating “sexual orientation” a protected class under Title VII, ENDA could pose problems for Catholic institutions when hiring or firing employees by limiting employers’ ability to consider homosexual activity or activism that is opposed to Catholic doctrine. It may also limit employers’ ability to enforce dress codes, and could require employers to provide benefits to same-sex couples. Some observers also note that ENDA may be a first step toward federal redefinition of marriage to include same-sex unions, which could further pose conflicts with personnel policies at Catholic colleges and universities. As with sex discrimination, the best defense against this is to qualify for the religious organization exemption and require all employees to subscribe to Catholic teaching.

Patient Protection and Affordable Care Act

The recently passed Patient Protection and Affordable Care Act (PPACA) may pose a serious threat to conscience rights of Catholic colleges and universities. But the manner in which PPACA will be implemented is confusing and indeterminate. PPACA generally mandates that employers provide one of several options of health insurance to their employees. But PPACA also grants sweeping powers to the Secretary of the Department of Health and Human Services (HHS) and other administration agencies, making it distinctly possible that they may mandate coverage of contraception, in vitro fertilization, and even abortion in an employer’s coverage options. Institutions opting to simply not provide health coverage for their employees will face stiff tax consequences. This paper below discusses religious schools’ options for avoiding the requirements of the PPACA as well as potential grounds for protecting religious freedom through litigation.

General State-Level Threats

Some states such as Wisconsin have begun mandating contraception coverage in employee health insurance plans. Not all of them have exceptions for religious organizations and when they do, it is sometimes unclear how to qualify as a religious organization. A thorough analysis of the various and differing state laws is beyond the limited scope of this paper. The Becket Fund for Religious Liberty has an excellent analysis of this issue with proposals for protecting Catholic institutions from this threat titled, *Implications of Mandatory Insurance Coverage of Contraceptives for Catholic Colleges and Universities*. It is available at www.CatholicHigherEd.org. A summary of state contraception mandates titled *Contraceptive Mandates and Immoral Cooperation* can also be found at the same site.

Some states also have constitutional provisions called “Blaine Amendments” that pro-

hibit any state funds from being used by pervasively religious organizations. At least four Supreme Court Justices have opined that Blaine Amendments – originally enacted as a result of anti-Catholic bigotry – are unconstitutional and the use of “pervasively sectarian” is outdated.³⁶ Moreover, the Tenth Circuit Court of Appeals in Denver ruled that making distinctions between schools for purpose of state scholarship funding based on whether they are “pervasively sectarian” or merely “sectarian” actually violates the First Amendment Establishment Clause due to excessive entanglement of government with religion.³⁷ This case may be the beginning of a successful effort to eliminate Blaine Amendments. Nevertheless, Catholic schools should be aware that emphasizing their religious mission and theology may result in disqualification for some state funding programs until provisions that discriminate against pervasively sectarian organizations can be successfully challenged in court.

Potential Threats on the Horizon

The future may bring additional government threats to the religious liberty of Catholic colleges and universities. While their scope and impact are yet uncertain, recent developments suggest the added importance of protecting against potential threats as well as current realities.

On October 29, 2010, the U.S. Department of Education issued new regulations on student aid that encourage tighter state controls over higher education. The Higher Education Act requires state authorization of colleges and universities that participate in federal student aid programs, which until this year was often assumed absent an adverse ruling by a state agency. The Education Department now expects state approval of institutions “by name” and a state process “to review and appropriately act on” complaints about any approved institution.

Associations concerned with religious higher education – including The Cardinal Newman Society, the Association of Jesuit Colleges and Universities, and the Council of Christian Colleges and Universities – have raised concerns about expanded state oversight which could be politicized and could erect barriers to religious colleges seeking state charters and access to federal student aid. The Education Department acknowledged that it had received complaints from college leaders that “a State’s role may extend into defining, for example, curriculum, teaching methods, subject matter content, faculty qualifications, and learning outcomes.” Others feared that states might “impose homogeneity upon institutions that would compromise their unique missions.” In response, federal officials agreed that the new regulations do “not limit a State’s oversight of institutions.”

In a July 30, 2010, letter to the Education Department, William Armstrong, former U.S. Senator from Colorado and now President of Colorado Christian University, warned that the new rules would “almost guarantee that states will have to cope with noisy arguments over teaching methods, degree requirements and culture wars over textbooks, evolution versus Intelligent Design, phonics versus whole language, campus ROTC, climate change, family policy, abortion, race, gender, sexual orientation, etc.”

It should be noted that the law does not prevent the federal government from also imposing restrictions on Catholic colleges and universities that participate in federal student aid programs. Regulations that could be tied to federal aid might affect employee benefits, hiring policies, accreditation practices, and other unforeseen areas that potentially conflict with religious identity. Thus far the federal government has been notably restrained in interfering with higher education.

36. *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality opinion).

37. *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).

STEPS TO PROTECT CATHOLIC COLLEGES AND UNIVERSITIES

Demonstrating a College is Religious

In short, many religious educational institutions, particularly colleges and universities which were founded on purposes tied to goals of educating in conformity to religious teaching –especially when the ties are denominationally specific or to an individual church – should be exempted from federal prohibitions on sex and religious discrimination. But an educational institution that veers from a religious founding will probably not be able to demonstrate it is a religious organization.³⁸ It will therefore not be able to require that its staff, faculty, and student body agree with, and abide by, its religious mission and theology.

Some Catholic schools have purposely minimized their religious ties for fear of being considered “pervasively sectarian,” and being disqualified for state funding by Blaine Amendments as indicated above. Emphasizing their religious mission and theology is helpful for avoiding federal regulation, but it may adversely affect the school’s ability to participate in state scholarship programs – at least until those discriminatory provisions can be eliminated.

The cases indicate courts will consider 10 factors when determining whether a school is a religious organization.³⁹ A college or university is much more likely to be able to qualify for an exemption to anti-discrimination laws if it satisfies all of them. They are:

1. Whether the entity operates for a profit

This factor is not an issue for most secondary schools, but there are some for-profit colleges and universities. “Nothing in the statute or case law says a for-profit corporation can not [sic] be a ‘religious corporation,’ but every reported claim for that status by a for-profit corporation has been denied.” Dent, *supra* note 25, at 563. Non-profit status definitely weighs in favor of being considered a religious organization.

2. Whether it produces a secular product

Many religious schools offer secular degrees in addition to religious. This does not preclude them from being considered religious institutions. For instance, Samford University offers a plethora of secular degrees,⁴⁰ but was still considered a religious institution because, among other things, its chief purpose was “the promotion of the Christian Religion throughout the world by maintaining and operating ... institutions dedicated to the development of Christian character in high scholastic standing.”⁴¹

3. Whether the entity’s articles of incorporation or other pertinent documents state a religious purpose

All indications are that the governing documents of an organization are important to it being considered religious. No cases were found where an organization was deemed re-

38. See *EEOC v. Kamehameha Sch.*, 990 F.2d 458, 461-63 (9th Cir. 1993) (schools of a largely secular nature were not religious even though their original benefactor had set forth a religious purpose when they were established).

39. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007) (summarizing and cataloguing numerous cases). This multi-factor test is applicable educational institutions and in other contexts. *Spencer v. World Vision, Inc.*, 570 F. Supp. 2d 1270, 1285 (W.D. Wash. 2008), *aff’d* No. 08-35532, 2010 WL 3293706, *4 (9th Cir. Aug. 23, 2010) (application to ministry dedicated to fighting poverty).

40. <http://www.samford.edu/majors.aspx>.

41. 113 F.3d at 200.

ligious even though no religious purpose was stated in its founding documents.⁴² On the other hand, Samford's charter reflected its chief purpose of promoting the Christian Religion throughout the world, and that was a significant factor in the court's determination that the university was religious.⁴³

4. *Whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue*

Though not determinative, this factor certainly figures strongly into the calculation when assessing whether a school is religious. The Court found it significant that Samford University received seven percent of its annual budget from the Southern Baptist Convention.⁴⁴

5. *Whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees*

This factor is very helpful for determining a school is religious if it is not directly affiliated with a church or other religious body. For instance, in *LeBoon*, a Jewish Community Center was considered a religious organization even though it was not directly affiliated with any synagogue, because several rabbis were advisory, non-voting members of its board.⁴⁵

6. *Whether the entity holds itself out to the public as secular or sectarian*

This is one of the most important factors. A school in Hawaii that required its teachers to be Protestant was not religious, due in part to the fact that the school's introductory pamphlet and course catalogue did not list any religious purpose of the school.⁴⁶ Conversely, another court found it significant that "Samford's student handbook describes Samford's purpose this way: 'to foster Christianity through the development of Christian character, scholastic attainment, and a sense of personal responsibility,'"⁴⁷

7. *Whether the entity regularly includes prayer or other forms of worship in its activities*

Students at Samford University are required to attend chapel – which figured favorably in the court's determination that it is a religious organization.⁴⁸ But this factor did not help a school in Hawaii due in large part to the fact that most of the religious activities were optional for students.⁴⁹

8. *Whether it includes religious instruction in its curriculum, to the extent it is an educational institution*

Sectarian schools must be careful to ensure that religious courses do something more than just teach *about* religion – which is allowed even in public schools. For instance, this

42. See *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d at 619 (not a religious organization because, among other things, it did not mention any specific religious purpose in its articles of incorporation); *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d at 461 n.8 (a school was not religious due in part to the fact that it was not chartered as a religious organization, but the court did note that Congress intended this to be a minor factor).

43. 113 F.3d at 199.

44. 113 F.3d at 199. And the court in *Kamehameha* said that the fact that the school was not owned, affiliated, or supported by a church indicated it was not a religious organization. 990 F.2d at 461 n.7.

45. 503 F.3d at 227.

46. *Kamehameha*, 990 F.2d at 462.

47. 113 F.3d at 199.

48. *Id.*

49. *Kamehameha*, 990 F.2d at 462-63.

factor weighed against the Hawaii school that was found not to be religious because its curriculum “consist[s] of minimal, largely comparative religious studies....”⁵⁰ Whereas, Samford University actually has a divinity school that trains clergy.

9. Whether its membership is made up by coreligionists

In the school context, this factor obviously has to do with the composition of the student body and faculty. It is not necessary that students and teachers be limited to individuals of a particular religion. Although Samford students are required to attend chapel, the court made no mention of a requirement that they be Southern Baptist, and determined the school was religious anyway. And only instructors who taught religion courses were required to subscribe to a particular statement of faith.⁵¹ The court did favorably mention another case where the fact that 88% of the student body and 95% of the faculty were Baptist was significant in determining the school was religious.⁵²

10. Consistent compliance with religious beliefs

Courts have held that a school or entity is no longer religious, even though it once was, because of lack of effort to comply with its original religious teachings. For instance a court found that a home for troubled youth originally established with a religious purpose and governed by church-member trustees was presently secular because it no longer included religion in its programming and attendance at religious services was optional.⁵³ Likewise, a school in Hawaii originally established as a Protestant institution was not religious because “the record reveals the purpose and emphasis of the School[] have shifted over the years from providing religious instruction to equipping students with ethical principles that will enable them to make their own moral judgments.”⁵⁴

This factor may be particularly significant for universities and colleges that are affiliated with a particular denomination that specifically proscribes religious tenants that must be followed. For instance, Catholic schools should adhere to the Canon Law requirements for their institutions, including the Church’s Apostolic Constitution *Ex corde Ecclesiae*, which applies directly to Catholic universities.⁵⁵

Protection from PPACA

This section discusses religious schools’ options for avoiding the requirements of the Patient Protection and Affordable care Act (“PPACA”) as well as potential grounds for protecting religious freedom through litigation. Schools should consult legal counsel to determine what their specific options will be under the PPACA regime. Some potential options are as follows:

Lobby for amendments addressing conscience protection issues

Members of Congress are aware of the deficiencies in the PPACA, and several are proposing amendments to fix the shortcomings. Representative Joseph Pitts (R-PA) introduced H.R. 5111, which would close the loopholes threatening to make abortion coverage manda-

50. *Id.* at 463.

51. 113 F.3d at 199.

52. *Id.* at 198 (citing *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir.1980)).

53. *Fike v. United Methodist Children’s Home*, 547 F. Supp. 286 (E.D. Va. 1982).

54. *Kamehameha*, 990 F.2d at 462.

55. http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae_en.html

tory. Various proposed amendments would protect against requisite coverage of objectionable services in general. Institutions concerned about the formidable new threats to their conscience rights must lobby for broad protection at both the federal and state levels.

Sue HHS under the Religious Freedom Restoration Act

In a specific case where all of an institution's options for fulfilling PPACA's employee-coverage mandate substantially burden its religious beliefs by forcing it to cover objectionable practices, the institution may be able to file a lawsuit alleging that PPACA's mandate as applied to them violates the federal Religious Freedom Restoration Act ("RFRA"). The act prohibits the government from "substantially burden[ing] religious exercise without compelling justification." Health coverage is an important employee recruiting and retention tool for employers. Having to choose between not providing health coverage and compromising religious values is likely the type of burden RFRA was meant to protect against. The success of any such claim will depend on the specific facts of an institution's circumstances. The institution should be able to assert that it actually has a sincere religious belief against providing coverage for certain objectionable practices, and that forcing it to do so will substantially burden its belief because it would select non-objectionable health coverage if it could.

Conclusion

Religious colleges and universities are prohibited from discriminating on sex and religion by Title IX and Title VII.⁵⁶ There are exemptions for religious organizations in both of these statutes, but schools can only take advantage of these exemptions if they satisfy multi-factored tests that require them to consistently follow their religious convictions. To the extent that a religious college departs from its historic religious ties, it may be in danger of losing its ability to claim that it is a religious employer exempted from civil rights legislation disallowing even religious discrimination. To minimize regulation, such institutions should firmly maintain their religious identities and should exercise caution when accepting federal funds or allowing their students to accept federal financial assistance.

Religious schools are also subject to new requirements for providing health insurance to employees. It is unclear how this new law will affect schools and other religious organizations that object to certain types of healthcare, such as abortion and *in vitro* fertilization. But school officials should begin consulting with counsel as soon as possible to determine if there will be any conflict between this law and the school's religious teachings.

Finally, direct funding from the federal government may contain some prohibitions on a school's ability to hire faculty and recruit students that agree with its religious teachings. The procurement criteria for each direct grant should be examined closely to be sure the school is not foregoing its ability to maintain its religious character.

56. Sometimes an educational institution receiving federal funds may be exempt from Title VII but not from Title IX. See, e.g., *EEOC v. Mississippi Coll.*, 626 F.2d 477 (5th Cir. 1980) (Southern Baptist university was a religious organization and was not subject to prohibitions on religious discrimination under Title VII but was not allowed to discriminate on other bases, such as race or sex).