

ISSUE BULLETIN



THE CARDINAL
NEWMAN SOCIETY
Promoting and Defending
Faithful Catholic Education

CatholiclsOurCore.org

Examining Critical Issues in Faithful Catholic Education

January 9, 2014

Maintain Schools' Religious Character to Protect Religious Freedom

by Kevin Theriot and Jeremy Tedesco

Senior Legal Counsels, Alliance Defending Freedom

This is part of a series of research reports on the Common Core State
Standards Initiative and its potential impact on Catholic education.

Introduction

It is vital that religious educational institutions maintain their religious mission in all their programs—including standards, methods, and curriculum—if they want to avoid being subjected to federal civil rights laws and the federal control that comes with them. Civil rights laws threaten the ability of religious educational institutions, including primary and secondary schools, to preserve their religious character.¹ For instance, Title VII prohibits religious discrimination by employers, including educational institutions,² and Title IX prohibits discrimination on the basis of sex in educational programs.³ And in a concerning development for religious schools, both statutes have recently been interpreted to prohibit gender identity discrimination. In order to maintain their religious character, educational institutions must be able to employ faculty and recruit students who will faithfully promote the schools' religious educational missions, and comply with their doctrinal teachings.

To do so, religious schools must operate in a manner that affords them the protection of key exemptions from these federal civil rights statutes for religious organizations. But those exemptions do not apply if a school that was founded as a religious institution has become largely secular. A key factor, among many others, in a religious educational institution proving it has maintained its religious character is demonstrating that its curriculum includes instruction in the religious beliefs of the institution. Thus, religious educational institutions must resist governmental attempts to interfere with and control the content of their curriculum.

1 David E. Bernstien, *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).

2 Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. 2000e et seq.

3 Title IX of the Education Amendments of 1972, amending 20 U.S.C. § 1681 et. seq. (Title IX) says: "No person. . . shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance. . ."

I. THREATS TO THE RELIGIOUS IDENTITY OF RELIGIOUS SCHOOLS

A. Title VII's Prohibition on Employment Discrimination

Title VII bars certain employers from discriminating on the basis of religion and other protected characteristics.⁴ Unlike Title IX, discussed in Section I.B., below, Title VII's applicability does not depend on whether an employer receives federal funds. Also, Title VII includes a much broader exemption for religious organizations than does Title IX.

1. Title VII Applicability

Title VII 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.⁵ 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 negatively affect their status.⁶

2. Title VII Exemption

Title VII does not apply to religious discrimination by religious organizations.⁷ 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.⁸ 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 Catholic educational institutions, the Oklahoma Federal District Court found that St. Pius X School was entitled to make employment decisions on the basis of religion under Title VII's religious employer exemption. The Court stressed the following facts in arriving at its conclusion: (1) The school required participation in daily prayer and religious instruction for all students; (2) The pastor of the parish supervised some school decisions, including whether to renew teacher contracts; (3) The St. Pius student handbook described the school as "first and foremost a Catholic school [that] embraces the Catholic traditions of mass, personal prayer and stewardship" and required students to "actively show your faith by: respecting the Eucharist, participating in the prayer and social life of the church school community, and treating classmates, teachers and visitors with the respect they deserve"; and, (4) The school permitted students of any faith to enroll but

4 42 U.S.C. § 2000e-2(a)(1).

5 *Id.*

6 *Id. at (a)(2).*

7 42 U.S.C. § 2000e-1(a); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). The exemption does not apply to other categories such as race and age. *Ziv v. Valley of Beth Shalom*, 156 F.3d 1242 (Table), 1998 WL 482832 (9th Cir. Aug. 11, 1998) (unpublished) (national origin); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (age). But religious organizations may still be protected from suits under other doctrines such as the ministerial exception, which is based on the First Amendment Religion Clauses. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 701, 709 (2012) (Ministerial exception barred teacher's lawsuit claiming she had been fired by Lutheran church school in retaliation for threatening to file an ADA lawsuit); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 464-65 (D.C. Cir. 1996) (finding EEOC investigation into Catholic nun's Title VII gender discrimination claim was barred by Establishment Clause).

8 *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).

gave preference to members of the St. Pius X Parish and the Catholic faith.⁹

In another important case related to religious 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.¹⁰ Additional courts have also ruled that particular religious educational institutions were entitled to Title VII's religious employer exemption.¹¹

3. Title VII and Gender Identity Discrimination

In a concerning development for religious institutions, the federal EEOC and a number of courts have held that Title VII's ban on sex discrimination forbids discrimination on the basis of gender identity.¹² Accordingly, religious educational institutions ought to have written policies outlining their religious views on gender identity and explaining what they plan to do if confronted by an applicant, student, or employee who challenges those views. Such written policies will put religious institutions in the best position to avail themselves of Title VII's religious employer exemption and First Amendment defenses if the need should arise.¹³

B. Title IX's Prohibition on Sex Discrimination in Education

Although Title IX prohibits sex discrimination¹⁴ in schools that receive federal financial assis-

9 *Braun v. St. Pius X Parish*, 827 F. Supp. 2d 1312, 1317-1818 (N.D. Okla. 2011).

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

11 *See Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000); *Ginsburg v. Concordia Univ.*, 2011 WL 41891 (D. Neb. 2011); *Wirth v. College of the Ozarks*, 26 F. Supp. 2d 1185 (W.D. Mo. 1998).

12 *See* EEOC Decision No. 0120120821, *Macy v. Holder*, April 10, 2012, available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>. This EEOC decision also cites several federal court decisions that hold that Title VII prohibits discrimination on the basis of gender identity.

13 Title VII's religious employer exemption may not protect a religious institution from a charge of sex discrimination predicated upon its application of a written gender identity policy. Courts may construe the exemption narrowly and find that it does not cover an allegation of sex discrimination under such circumstances. Having a written policy expressing the institution's religious beliefs related to gender identity, however, will increase the likelihood that a court will view the allegation as relating to a matter of religious doctrine and find the exemption applicable. Moreover, the written policy will also play a critical role in asserting First Amendment free exercise, free speech, and free association defenses that may also be available in these types of situations. *See, e.g., Hosanna-Tabor*, 132 S. Ct. at 707-09 (teacher at Lutheran school "was a minister within the meaning of the [Ministerial] exception," thus barring the EEOC from "requiring the Church to accept a minister it did not want" by forcing it to reinstate the teacher pursuant to the ADA).

14 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)). It is important to note, however, that Title IX has been interpreted to prohibit gender identity discrimination. Recently, the federal Departments of Education and Justice (DOE and DOJ) settled a Title IX sex discrimination charge against the Arcadia School District in California. The school district wouldn't let a transgender boy stay with the boys on an overnight trip, use the boys' bathroom, or play on the boys' sports teams. The student complained to the DOE Office of Civil Rights, which pursued the matter along with the DOJ. Threatened with a loss of its federal funding, the school district settled the matter. Among other things, the school agreed to "provide the Student access to sex-specific facilities designated for male students at school consistent with his gender identity." *See* Resolution Agreement, OCR Case Number 09-12-1020, available at <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>. Accordingly, as noted above, religious institutions should have written policies that set out their religious beliefs concerning gender identity disorder as they relate to both students and employees.

tance, it has an exemption for religious organizations.¹⁵ 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.¹⁶ But it is clearly limited to differentiating on the basis of sex.¹⁷

1. Funding Trigger: Federal Financial Assistance under Title IX

Title IX only applies to schools that receive federal financial assistance. Most religious colleges and universities receive federal financial assistance in the form of Federal Student Aid,¹⁸ thereby subjecting them to Title IX’s mandates. But religious schools at the primary and secondary level are far less likely to receive federal funding in this or any other form. Thus, it is not very likely that Title IX will apply to such schools.

For educational institutions attempting to determine if they are receiving federal financial assistance, it is important to note the following: (1) it appears that tax exempt status does not constitute receiving federal funds,¹⁹ 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.²⁰ But at least one federal court has found that one Catholic high school’s receipt of federal financial assistance through the National School Lunch Program triggered the applicability of Title IX to all schools within the Diocese.²¹

Should a religious school cross Title IX’s federal financial assistance threshold, the entire institution will be subject to government regulation under Title IX. For example, Title IX applies to religious colleges and universities if their 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.²² If federal financial assistance is actually received, subjecting the school to Title IX, there are virtually no methods of institutional structuring which will allow it to maneuver

15 “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).

16 *Id.*

17 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.”).

18 The U.S. Department of Education and the Federal Student Aid Information Center describe three types of federal 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).

19 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).

20 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).

21 *Russo v. Diocese of Greensburg*, 2010 WL 3656579, No. 09-1169 (W.D. Penn., Sept. 15, 2010).

22 *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).

around these regulations.²³

2. Title IX's Religious Exemption

Title IX's exemption for religious organizations is far narrower than the Title VII exemption discussed earlier. It is found at 20 U.S.C. § 1681(a)(3), and is also referenced in similar language in § 1687(4). 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."²⁴ Thus, unlike the Title VII exemption, the Title IX exemption must actually be affirmatively pursued by the institution.

In order to qualify for this exemption, an educational institution must be "controlled by a religious organization."²⁵ An educational institution that could be classified as a religious institution itself would also meet this requirement.²⁶

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.²⁷ These are exactly the type of institutions this exemption benefits.²⁸ To the extent that an educational institution 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.

But it is important to understand that the Title IX exemption is quite narrow. A religious primary or secondary school, unlike the seminary above, faces a difficult task in establishing that it is a religious institution or controlled by a religious organization. And it faces an even more difficult challenge in establishing that it has a religious rationale for sex discrimination. A Supreme Court case involving Grove City College demonstrates this difficulty. Grove City

²³ *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994).

²⁴ 34 C.F.R. § 106.12 (2010).

²⁵ 20 U.S.C. § 1681(a)(3).

²⁶ 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).

²⁷ 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.").

²⁸ 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, 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).

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 responses to both past and future discrimination. The court found Grove City was not 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.²⁹ Nevertheless, religious schools which are institutionally connected to particular religious denominations and organizations, like Catholic parochial schools, stand the best chance of fulfilling this requirement.³⁰

Courts apply religious exemptions by weighing the facts carefully, not merely taking a school's assertion that it is religious at face value.³¹ 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.

C. Compelled Health Insurance Coverage Under the Patient Protection and Affordable Care Act

The Patient Protection and Affordable Care Act (ACA) poses some serious threats to conscience rights of religious schools. The ACA generally mandates that employers provide one of several options of health insurance to their employees. The ACA also grants sweeping powers to the Secretary of the Department of Health and Human Services (HHS) and other administration agencies, which they have used to adopt regulations mandating coverage of contraception, sterilization, and even abortion in an employer's coverage options. The regulations grant an exemption for religious employers, but it is extremely narrow. It is limited to "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order."³² Most religious schools likely do not qualify for this exemption.

The regulations do provide an "accommodation" for religious organizations that do not qualify for the exemption. Under the accommodation, religious employers must obtain an insurer or third-party claims administrator and submit a form that causes that insurer or third-party administrator to arrange payment for the health care items and services to which the employer objects. A religious organization may believe (and many do)³³ that the "accommodation" substantially burdens its religious beliefs because employees obtain access

to the objectionable items and services as a direct consequence of their employment with the religious organization and of their participation in the health insurance benefits it provides. Institutions that attempt to avoid the conscience-violating requirements of the ACA by not providing health coverage for their employees will face stiff financial penalties. Section II(B) below discusses religious schools' options for avoiding the requirements of the ACA as well as potential grounds for protecting religious freedom through litigation.

29 *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).

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

31 *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).

32 78 Fed. Reg. at 39874; 26 U.S.C.A. § 6033.

33 For example, Ave Maria University has filed a lawsuit alleging that the accommodation violates its rights under the Religious Freedom Restoration Act and the United States Constitution. *Ave Maria University v. Sebelius*, Ver. Compl., Dkt. No. 1, No. 2:13-cv-00630-JES-UAM (M.D. Fla., Aug 29, 2013).

II. STEPS TO PROTECT THE RELIGIOUS CHARACTER OF SECTARIAN SCHOOLS.

A. Demonstrating A School is Religious

In short, many religious educational institutions, particularly religious primary and secondary schools which were founded on purposes tied to goals of educating in conformity to religious teaching – especially when the ties are denominationally specific or specific 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.³⁴ It will therefore not be able to require that its staff, faculty, and student body agree with its religious mission and theology.

The cases indicate courts will consider ten factors when determining whether a school is a religious organization.³⁵ A primary or secondary school is much more likely to be able to qualify for an exemption if it satisfies all of them. They are:

1. Whether the entity operates for a profit

This factor is not an issue for most religious primary and secondary schools, as few if any operate for-profit. “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.”³⁶ Non-profit status definitely weighs in favor of being considered a religious organization.

2. Whether it produces a secular product

Many religious schools teach secular subject matters in addition to religious. This does not preclude them from being considered religious institutions (indeed, typically the “secular” subject matter is taught from the religious perspective of the school). For instance, Samford University offers a plethora of secular degrees, 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.”³⁷

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 religious even though no religious purpose was stated in its founding documents.³⁸ On the other hand,

34 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).

35 *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007). This multi-factor test is applicable not only to educational institutions, but is able to be adapted to many different contexts. *Spencer v. World Vision*, 633 F.3d 723, 724 (9th Cir. 2011) (“[A]n entity is eligible for the [religious employer] exemption, at least, if it is organized for a religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts”).

36 See George W. Dent, Jr., “Civil Rights for Whom? Gay Rights Versus Religious Freedom,” 95 KY. L. J. 553, 563 (2006-2007).

37 *Samford Univ.*, 113 F.3d at 200.

38 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

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.³⁹

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 7% of its annual budget from the Southern Baptist Convention.⁴⁰

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.⁴¹

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.⁴² 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.'"⁴³

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.⁴⁴ 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.⁴⁵

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 factor weighed against the Hawaii school that was found not to be religious because its curriculum

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).

39 *Samford Univ.*, 113 F.3d at 199.

40 *Id.* 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.

41 *LeBoon*, 503 F.3d at 227.

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

43 *Samford Univ.*, 113 F.3d at 199.

44 *Id.*

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

“consist[s] of minimal, largely comparative religious studies....”⁴⁶ 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.⁴⁷ 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.⁴⁸

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.⁴⁹ 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.”⁵⁰

This factor may be particularly significant for primary and secondary schools that are affiliated with a particular denomination that specifically proscribes religious tenants that must be followed. For instance, all Catholic educational institutions are bound by Canon Law. And universities in particular are also bound by the Church’s Apostolic Constitution *Ex Corde Ecclesiae*.⁵¹

B. Protection From the ACA

This section discusses religious schools’ options for avoiding the requirements of the ACA as well as potential grounds for protecting religious freedom through litigation. Schools should consult legal counsel to determine what their specific options are under the ACA regime. Some potential options are as follows:

1. Lobby for amendments addressing conscience protection issues

Members of Congress are aware of the deficiencies in the ACA, and several are proposing amendments to fix the shortcomings. Representative Joseph Pitts (R-PA) introduced H.R. 940, the Health Care Conscience Rights Act, which would prohibit the federal government from requiring employers to buy insurance coverage that includes items or services against which they have deeply held moral or religious objections. Institutions concerned about the formi-

46 *Id.* at 463.

47 *Samford Univ.*, 113 F.3d at 199.

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

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

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

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

dable new threats to their conscience rights must lobby for broad protection at both the federal and state levels.

2. Sue HHS under the Religious Freedom Restoration Act.

In a specific case where all of an institution's options for fulfilling the ACA's employee-coverage mandate substantially burden its religious beliefs by forcing it to cover objectionable practices, or arrange and facilitate that coverage through the accommodation, the institution may be able to file a lawsuit alleging that the ACA's mandate as applied to them violates the federal Religious Freedom Restoration Act ("RFRA").⁵² 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.⁵³ 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 or facilitating 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 primary and secondary schools are prohibited from discriminating on religion and sex by Title VII and Title IX.⁵⁴ 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 school 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. Federal regulations implementing this law require employers to provide coverage for items and services to which religious schools may object, such as contraception and abortion. 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.

52 Claims could also be brought alleging violations of the United States Constitution, including the Free Exercise and Free Speech Clauses of the First Amendment.

53 Numerous courts have ruled that the ACA substantially burdens the religious exercise of owners of for profit companies whose religious beliefs prevent them from covering abortifacients, contraceptives, or other objectionable items and services in their employee health insurance plans. See, e.g., *Tyndale House Publ'rs v. Sebelius*, 904 F. Supp. 2d 106, 122 (D.D.C. 2012) ("The contraceptive coverage mandate . . . places the plaintiffs in the untenable position of choosing either to violate their religious beliefs by providing coverage of the contraceptives at issue or to subject their business to the continual risk of the imposition of enormous penalties for its noncompliance. . . . [S]uch a Hobson's choice for the plaintiffs amply shows that the contraceptive coverage mandate substantially burdens the plaintiffs' religious exercise"); *Hobby Lobby Stores, Inc. v. Sebelius*, 2013 WL 3216103 (10th Cir. June 27, 2013) (en banc) (holding that Hobby Lobby "established a likelihood of success that their rights under [RFRA] are substantially burdened by the contraceptive-mandate coverage requirement"). Numerous nonprofit lawsuits challenging the contraceptive mandate have been filed, but no court has yet ruled on the whether the accommodation described in § I.C, supra, violates a nonprofit religious organization's rights under RFRA or the United States Constitution.

54 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).

Kevin Theriot serves as senior counsel with Alliance Defending Freedom at its Kansas City Regional Service Center in Kansas where he leads litigation efforts to restore the marketplace of ideas to university campuses nationwide.

Jeremy Tedesco serves as senior legal counsel with Alliance Defending Freedom Fund at its headquarters in Scottsdale, Arizona, where he currently leads litigation efforts to protect the rights of Christian students, faculty, and staff at public schools across the nation.