

December 2, 2020

Kimberly M. Richey
Acting Assistant Secretary
US Department of Education
Office for Civil Rights
Lyndon Baines Johnson Dept. of Education Bldg.
400 Maryland Av., SW
Washington, DC 20202-1100

Re: Request for Title IX Exemption Pursuant to 34 C.F.R. § 106.12

Dear Acting Assistant Secretary Richey:

On behalf of Saint Francis University (“Saint Francis”), a recipient of federal funds, I am writing pursuant to 34 C.F.R. § 106.12 to request an exemption for Saint Francis from certain aspects of Title IX of the Education Amendments of 1972 (“Title IX”), specifically from any Department of Education interpretation of Title IX to encompass a prohibition of disparate treatment on the basis of gender identity or gender expression, as more fully discussed below.

Saint Francis University is a Catholic academic community of higher learning located in Loretto, Pennsylvania, dedicated to providing its students with both a liberal arts education and career-oriented studies. As a Catholic university founded and animated by the Third Order Regular Franciscans, one of its distinctive goals is to enable Franciscan values and the Catholic tradition to shape intellectual inquiry and decision-making, both on a personal and institutional level.

Brother Giles Carroll along with five of his friar brothers from the Archdiocese of Tuam in Ireland requested permission from the bishop of the Pittsburgh diocese to bring their dream, rooted in sharing the teachings of Saint Francis of Assisi, to fruition in the Americas. In 1847, nearly fifteen years before the start of the Civil War, they began to clear land in the forests of Loretto, Pennsylvania, to build "...a college, seminary, and all that is required for an episcopal establishment" that would one day become Saint Francis University.

According to the *Final Rule on Free Exercise and Religious Liberty*¹, Saint Francis is controlled by a religious organization, and attests that it meets the following definitional requirements:

¹ <https://www2.ed.gov/about/offices/list/ope/freeinquiryfinalruleunofficialversion09092020.pdf> (p. 240-242).

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(3) That the educational institution, in its charter or catalog, or other official publication, contains an explicit statement that it is controlled by a religious organization or an organ thereof, or is committed to the doctrines or practices of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

(5) That the educational institution has a published institutional mission that is approved by the governing body of an educational institution and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings.

(6) Other evidence sufficient to establish that an educational institution is controlled by a religious organization, pursuant to 20 U.S.C. 1681(a)(3).

Saint Francis is a passionately Catholic co-educational institution which follows the example of St. Francis of Assisi in finding its identity at the heart of the Catholic Church. Saint Francis embraces the teachings of Sacred Scripture, Sacred Tradition, and the Teaching Magisterium of the Catholic Church with a spirit of Christian humanism that relates all learning to Jesus Christ.

As you know, Title IX prohibits sex discrimination in federally-funded education programs. Title IX, as written, does not prohibit discrimination on the basis of gender identity or gender expression. Rather, the language of Title IX provides in relevant part that “[n]o person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under” federally-funded educational programs or activities. 20 U.S.C. § 1681(a).

The Bostock Decision

While Title IX does not mention discrimination on the basis of gender identity or expression, the U.S. Supreme Court recently held that discrimination on the basis of an individual's status as transgender constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020) (“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

The Department of Education does not enforce Title VII. Indeed, Congress specifically designed Title VII to apply only to workplaces. *Bostock*, 140 S. Ct. at 1737 (“[I]n Title VII, Congress outlawed discrimination in the workplace.”). By contrast, in cases addressing educational environments under Title IX, the U.S. Supreme Court has recognized the significant differences between workplaces and schools.

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It has held that courts “must bear in mind that schools are unlike the adult workplace.” *Davis v. Monroe*, 526 U.S. 629, 651 (1999).

In *Bostock* itself, the Court firmly rejected the idea that its holding would sweep across all statutory or regulatory provisions that prohibit sex discrimination. *Bostock*, 140 S. Ct. at 1753 (“[N]one of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudice any such question today.”). Thus, *Bostock* does not control the Department’s interpretation of Title IX.

The Shelby County Resolution Agreement

However, the Department of Education has recently taken the position in its *Shelby County Resolution Agreement* (OCR Complaint No. 04-20-1409)² that with respect to complaints that a school’s action or policy excludes a person from participation in, denies a person the benefits of, or subjects a person to discrimination under an education program or activity, on the basis of sex, the *Bostock* opinion guides OCR’s understanding that discriminating against a person based on their identification as transgender generally involves discrimination on the basis of their biological sex.

Conflict with Saint Francis University’s Franciscan Catholic Mission and Identity

The interpretation of Title IX embodied in the *Shelby County* document referenced above is diametrically opposed to Saint Francis University’s Catholic mission and identity and to the tenets of the Catholic Church, including deeply-held Catholic religious teachings and beliefs on human sexuality.

Pursuant to fundamental Catholic theology, each person is a unity of body and soul made in the image and likeness of God. Because of this, man is obliged to regard his body as good and to hold it in honor since God has created it and will raise it up on the last day. Likewise, human beings are created male or female and every person’s body reveals his or her God-given sex/gender. These tenets of the Catholic Church are violated by manipulating one’s God-given sex or gender and/or by attempting to identify as the sex or gender opposite to one’s God-given sex/gender.

² https://www2.ed.gov/about/offices/list/ocr/letters/20200831-letter-of-notification.pdf?fbclid=IwAR0RLC8MwhJFW0A1OUrRmXqxE4MGkzeLKW1_yhw1IzyVTIGj2t4o2bfXQQ

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Requiring Saint Francis to comply with the doctrine embodied in the documents referenced above would be contrary to and inconsistent with these fundamental tenets of the Catholic Church and Catholic faith. It would also infringe on Saint Francis' right to carry out its religious mission and severely impair its ability to express its distinctly Catholic message on sexuality.

Request for Exemption

Saint Francis is aware that although it seeks an assurance of exemption by submitting a request to the Assistant Secretary, an institution is not required to seek an assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with Title IX and the institution wishes to assert an exemption, it may do so at that time by submitting a statement in writing to the Assistant Secretary. *See* 34 C.F.R. 106.12(b).

However, in light of the *Bostock* decision, the *Shelby County Resolution Agreement*, previous OCR resolutions such as the *Arcadia School District Letter*,³ and the pending and as yet unresolved *CIAC Revised Letter of Impending Enforcement Action*⁴ (the status of which as a statement of official OCR policy may be in question), Saint Francis has determined that seeking a written assurance of exemption is its most prudent course of action, regardless of its right to assert such an exemption without written assurance from the Department.

Saint Francis, therefore, respectfully seeks an exemption from Title IX (specifically and only to 34 C.F.R. §§106.32, 106.33, and 106.41) to the extent they conflict with tenets of the Catholic faith and/or to the extent that Title IX is or may be interpreted as embodied in the documents cited above. If you should have any questions or need any further information or documentation in order to process this request expediently on behalf of Saint Francis University, please do not hesitate to contact me. Thank you.

In Christ and St. Francis,



Very Rev. Malachi Van Tassell, T.O.R., Ph.D.
President

³ <https://www.clearinghouse.net/chDocs/public/ED-CA-0023-0002.pdf>

⁴ <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf>