

There has been a lot of confusion over the past several months regarding Title IX and the national school lunch program. This is intended to summarize some of the key events that have occurred, and then concludes with some guidance from WILL on how schools should proceed.

Update:

DPI sent updated guidance out to schools participating in the National School Lunch Program on September 13, 2022. DPI now states that all religious educational institutions must continue using the 2022 nondiscrimination statement and displaying the 2022 updated “and justice for all” posters unless those institutions claim a Title IX religious exemption. If such an exemption is sought, those schools should instead display the 2019 “and justice for all” posters and use the 2015 nondiscrimination statement.

The 2015 nondiscrimination statement and the 2019 poster do not contain USDA’s expanded definition of “sex” to include “gender identity and sexual orientation.”

It is not required for private, religious schools to submit any paperwork for a religious exemption.

Background

On May 24, 2022, DPI issued School Nutrition Bulletin 2122-45. That bulletin contained various updates from the United States Department of Agriculture (“USDA”), including an update to the Nondiscrimination Statement and the And Justice for All posters.

Specifically, in the May 24 Bulletin, DPI informed schools that USDA’s new Nondiscrimination Statement updated the definition of “sex” to include “gender identity and sexual orientation.” The Bulletin then linked to several documents from the USDA which explained this policy change. The Bulletin included a separate section entitled “Of importance for SFAs [School Food Authorities] with a religious affiliation.” That section explained the process for requesting a religious exemption from the provisions of Title IX. That section also included a statement that:

If an SFA applies for an exemption, they will need to follow the existing policy until the exemption has been approved; this means the 2022 Nondiscrimination Statement would need to be posted until the exemption is approved.

On August 12, 2022, USDA published a document entitled “RELIGIOUS EXEMPTIONS UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972.” This new USDA publication contained “two basic questions and answers about Title IX Religious Exemptions.” The publication explicitly states that “USDA regulations do not require a religious educational institution to submit a written request for a Title IX exemption in order to claim that exemption.”

USDA’s position, consistent with the text of Title IX itself, is that an entity does not need to apply for and receive an exemption. The exemption exists as a matter of law. See 20 U.S.C. § 1681(a)(3) (stating that Title IX “shall not apply to an educational institution which is controlled

by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.”).

As a result, DPI sent updated guidance out to schools on September 13, 2022, which incorporates USDA’s updated position.

Recommendations:

Based on the above, WILL continues to advise schools that they *do not* have to seek and obtain a Title IX religious exemption from USDA in order to claim it. Private, religious schools should also hang the older posters to meet the requirement of the program.

There are still important steps that schools can and should take to be as prepared as possible.

First, schools with a religious objection to USDA’s Title IX changes to include “sexual orientation and gender identity” within the definition of “sex” should not use the 2022 nondiscrimination statement and should not display the 2022 updated “and justice for all” poster. Consistent with USDA and DPI guidance, to the extent those schools do not object to the 2015 nondiscrimination statement they should use that, and to the extent the schools do not object to the 2019 “and justice for all” poster, they should display those.

In any event, schools should clearly adopt policies within their student, family and staff handbook(s)/manual(s) addressing these issues. Specifically, a private, religious schools should have language about the school’s mission, your religious identity and how it informs the administrative of policies.

Please reach out to WILL with any questions.

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