

May 30, 2023

VIA CERTIFIED U.S. MAIL

Catherine E. Lhamon Assistant Secretary for Civil Rights United States Department of Education Office for Civil Rights 400 Maryland Avenue, SW Washington, D.C. 20202-1100

Re: Westmont College

OCR Case No. 09-21-2316

Assertion of Religious Exemption to Title IX

Dear Ms. Lhamon:

As the "highest ranking official" (34 C.F.R. §106.12(b)) of Westmont College ("Westmont" or the "College"), I am reaching out to you regarding the above-referenced OCR case (the "Case"). Pursuant to 34 C.F.R. §106.12, this letter serves as a written notice that Westmont is formally asserting a religious exemption to the anti-discrimination provisions of Title IX of the Civil Rights Act of 1964 ("Title IX") concerning discrimination based on sexual orientation. As a result, Westmont respectfully requests that the Case be dismissed.

This letter is submitted in response to the Department of Education's ("DOE") Office of Civil Right's ("OCR") April 17, 2023 letter (**Exhibit A**) providing notice of a complaint dated July 27, 2021, by an unidentified individual alleging the College discriminates against LGBTQ+ students based on sexual orientation because, e.g., its "policies condone sexual activity, sexual relations and intimate physical conduct only in the context of a heterosexual marriage."

Title IX provides as follows: "No 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 any education program or activity receiving Federal financial assistance, except that: ... (3) 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).)

The College understands that the DOE's interpretation of Title IX has changed in various ways since its inception and that the DOE's current interpretation is that Title IX's prohibition



against sex-based discrimination extends to bar discrimination based on sexual orientation, subject to certain exceptions.

Westmont is somewhat at a disadvantage in responding to the complaint because the person who allegedly complained is unidentified and the allegations at issue are vague. The OCR letter does not include a copy of the complaint and merely states that OCR "understands the allegations to be" that the college discriminates based on sexual orientation. It is unclear why there has been a delay of over two years between the filing of the complaint and the notice of the complaint provided by OCR.

In any event, and without opining on the validity of the allegations in the Case or the DOE's current interpretation of Title IX, the College hereby asserts that it is exempt from Title IX's prohibition against discrimination on the basis of sexual orientation because the College qualifies for the religious exemption to Title IX.

Specifically, Westmont is exempt from Title IX's prohibition against sex-based discrimination under 20 U.S.C. §1681(a)(3), which provides that "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." As discussed in more detail below, Westmont is controlled by a religious organization and its religious tenets include, with respect to sexual activity, "not condoning practices that Scripture forbids, including sexual relations outside of marriage," and that members of the Westmont "community who choose to marry are expected to abide by the commitment to lifelong heterosexual marriage."

Although the College does not necessarily discriminate on the basis of sexual orientation as alleged by the unidentified person in the complaint, the College would be permitted to adhere to its religious tenets as stated herein, and is therefore asserting the religious exemption in response to the complaint.

Westmont College is Controlled by a Religious Organization

Westmont College is a nonprofit liberal arts college committed to Jesus Christ and belonging to the worldwide evangelical Protestant tradition. The College is "controlled by a religious organization" as defined in the Title IX statute and its implementing regulations.

The regulations interpreting Title IX, including 34 C.F.R. §106.12(c), provide criteria that are each independently sufficient to establish that Westmont is an educational institution controlled by a religious organization for the religious exemption to apply. In Westmont's case, the four most relevant criteria of 35 C.F.R. §106.12(c) are as follows:

(2) That the educational institution requires its faculty, students, or employees to be members of, or otherwise engage in religious practices of,

or espouse a personal belief in, the religion of the organization by which it claims to be controlled.

. . .

- (4) That the educational institution has a doctrinal statement or a statement of religious practices, along with a statement that members of the institution community must engage in the religious practices of, or espouse a personal belief in, the religion, its practices, or the doctrinal statement or statement of religious practices.
- (5) That the educational institution has a published institutional mission that is approved by the governing body of an education institution and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings.
- (6) Other evidence sufficient to establish that an education institution is controlled by a religious organization, pursuant to 20 U.S.C. 1681(a)(3).

Under each of these criteria, Westmont should be recognized as an institution controlled by a religious organization. With regarding to Criteria #2 and #4, Westmont requires all of its faculty and employees to espouse a personal belief in the evangelical Christian faith. Every applicant for any employment position at the College must sign an acknowledgment agreeing to abide by Westmont's Statement of Faith, Community Life Statement and Behavioral Expectations and agree to adhere to traditional biblical values. (Exhibit B [Statement of Faith]; Exhibit C [Community Life Statement and Behavioral Expectations]; Exhibit D [Faculty Handbook excerpts re Articles of Faith, Community Life Statement and Behavioral Expectations]; Exhibit E [Employee Handbook excerpts including Statement of Faith].) If a student enrolls at Westmont, he or she must agree to abide by the Community Life Statement, Behavioral Expectations and related Policies too. (Exhibit F [Academic Catalogue excerpts with Community Life Statement and Behavioral Expectations, and Policy on Sexual Activity Outside of Marriage].)

Regarding Criterion #5, pursuant to various cases including, without limitation, *United States v. Sealy, Inc.*, 388 U.S. 350, 352 (1967); *Name.Space, Inc. Internet Corp. for Assigned names & Nos.*, 795 F.3d 1124, 1128 (9th Cir. 2015); *Maxon v. Fuller Theological Seminary*, 2021 WL 5882035 at *1 (9th Cir. December 13, 2021), the Board of Trustees/Directors of an entity is generally considered by the courts to be the organization that controls the entity. In Westmont's case, its governing organization is its Board of Trustees ("Board"). The Board has published a mission for Westmont that openly references and relies on religious tenets, and the Board has specifically approved the various statements regarding those tenets referred to above. Specifically, Westmont's mission, as determined and published by its Board, is included in the

College's Statement of Faith (**Exhibit B**), Community Life Student and Behavioral Expectations (**Exhibit C**), Faculty Handbook (**Exhibit D**), Academic Catalogue (**Exhibit F**), Statement on the Biblical and Theological Foundations of Diversity (**Exhibit G**), and Statement of Key Terms and Identity (**Exhibit H**).

Finally, with regard to Criterion #6, all members of Westmont's Board – including any non-Trustee members of Board committees – must ascribe to the Statement of Faith, Community Life Statement, and Behavioral Expectations as a condition of their appointment. As a result of this requirement, Westmont's Board exclusively admits qualified individuals of a particular religious belief in furtherance of the College's religious mission. Thus, the institution that wholly controls the College is deeply religious.

Ultimately, because the College satisfies multiple independent criteria for a religiously controlled institution, I respectfully request that OCR affirm that Westmont is controlled by a religious institution for purposes of Title IX.

Westmont's Religious Tenets Prohibit Sexual Activity Outside of Marriage and Require Those Who Choose to Marry Abide by the Commitment to Lifelong Heterosexual Marriage

The religious tenets of Westmont bar sexual activity outside of marriage and set the expectation that those who choose to marry abide by the commitment to lifelong heterosexual marriage. Attached as **Exhibits C**, **D**, **E**, and **F** are relevant pages from Westmont's Community Life Statement and Behavioral Expectations, Faculty Handbook, Employee Handbook and Academic Catalog and Sexual Activity outside of Marriage Policy, respectively, that address the topic of sexual activity outside of marriage and same-sex sexual activity.

As noted in the Behavioral Expectations, the College does not condone sexual activity outside of marriage and requires those who choose to marry abide by the commitment to lifelong heterosexual marriage. Westmont's position on the issue is based on passages of the Bible, including but not limited to Genesis 1:26-28, Mark 10:4-12,1 Corinthians 6:9-10, and Romans 1:26-27.

In *Maxon v. Fuller Theological Seminary*, which is cited above, the court deferred to the institution's determination that the claims at issue violated its religious tenets, determined that it could not "second-guess" that interpretation, and confirmed that the institution was not required to provide any prior written notice to assert the religious exemption in response to the claim, stating that "the exemption is mandatory and automatic." (*Maxon*, 2021 WL 5882035 at *1-3 (9th Cir. Dec. 13, 2021).)

In light of Westmont's sincere, biblically-based religious convictions, if OCR were to compel Westmont under 20 U.S.C. §1681(a) to encourage or permit same-sex sexual practices among its students and employees, OCR would force the College to either violate sincerely held

tenets of its Christian faith or would subject the College to severe penalties for its refusal to violate its sincerely held beliefs. In the words of Title IX, "the application of this subsection would not be consistent with the religious tenets of such organization" and therefore "this section shall not apply to [such] educational institution."

Assertion of Exemption

In light of the foregoing, Westmont College formally and respectfully asserts that it is exempt from 20 U.S.C. §1681(a) as a religiously controlled institution pursuant to 20 U.S.C. §1681(a)(3) and 34 C.F.R. Part 106.12(b). Specifically, insofar as they are interpreted to reach discrimination on the basis of sexual orientation, Westmont requests that it be exempted from the following regulatory provisions and, therefore requests that the Case be dismissed:

- 34 C.F.R. §106.21 (admission);
- 34 C.F.R. §106.22 (preference in admission);
- 34 C.F.R. §106.23 (recruitment of students);
- 34 C.F.R. §106.31 (education programs or activities);
- 34 C.F.R. §106.32 (housing);
- 34 C.F.R. §106.33 (comparable facilities such as restrooms and locker rooms);
- 34 C.F.R. §106.34 (access to classes and schools);
- 34 C.F.R. §106.35 (access to institutions of vocational education);
- 34 C.F.R. §106.36 (counseling);
- 34 C.F.R. §106.37 (financial assistance);
- 34 C.F.R. §106.38 (employment assistance to students);
- 34 C.F.R. §106.39 (health insurance benefits and services);
- 34 C.F.R. §106.40 (different rules based on marital or parental status of students);
- 34 C.F.R. §106.41 (athletics);
- 34 C.F.R. §106.42 (textbooks and curriculum material);
- 34 C.F.R. §106.43 (standards for measuring skill or progress in physical education classes); and
- 34 C.F.R. §§106.51-106.61 (employment).

In light of the asserted exemption to Title IX, Westmont College respectfully requests that OCR dismiss the above Case.

Thank you in advance for your time and consideration of this request. If you require any additional information, please do not hesitate to contact me.

Very truly yours,

Gayle D. Beebe, Ph.D.

President

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