Interim Policy on COCA “Non-Discrimination” Standards
Impacting Standards 2.8, 4.3, 5.3.2

DRAFT Version April 17, 2016

Intent: (1) COCA respects the religious mission of faith based schools; and
(2) Cultural competency is an essential component in osteopathic medical education. Students’ education must include development of knowledge and understanding of how their patients’ backgrounds may impact the manner in which they seek and receive care and their colleagues’ backgrounds may impact their approach to providing healthcare. Accordingly, diversity in medical education is essential for academic excellence and graduates’ long term success as healthcare professionals. Cultural competence cannot be acquired in a homogenous environment. Respect for and understanding of diversity must be reflected in the policies for recruitment, retention, and development of faculty, staff, and students. The educational environment must ensure an exchange of ideas and beliefs across gender, racial, ethnic, cultural, and socioeconomic groups.

Standard 2.8 (current)

The selection of administrative personnel must not discriminate on the basis of race, ethnicity, color, sex, gender, religion, national origin, age or disabilities.

Guideline: A diverse administrative staff provides the richness necessary for medical education. A COM should make every effort to hire administrative staff from a diverse background to foster that richness while meeting its mission and objectives.

Standard 4.3 (current)

The selection of faculty must not discriminate on the basis of race, ethnicity, color, sex, gender, religion, national origin, age or disabilities.

Guideline: A diverse faculty provides a richness necessary for medical education. A COM should make every effort to hire faculty from a diverse background to foster that richness while meeting its mission and objectives.

Standard 5.3.2 (current)

Recruitment and selection of students for admission to a COM must not discriminate on the basis of race, ethnicity, color, sex, gender, religion, national origin, age or disabilities.
*Guideline:* A diverse student body provides the richness necessary for osteopathic medical education. A COM should make every effort to recruit students from a diverse background to foster that richness while meeting its mission and objectives.

**Proposed Wording**

**Standard 2.8**

The selection of administrative personnel, faculty and staff, and students must not discriminate on the basis of race, ethnicity, color, sex, gender, religion, national origin, age or disabilities.

*Guideline:* A diverse administrative staff provides the richness necessary for medical education. A COM should make every effort to hire administrative staff from a diverse background to foster that richness while meeting its mission and objectives.

**NEW STANDARD 2.8.1**

COCA respects the religious mission of faith-based schools. Accordingly, COCA does not regard it as discrimination for a faith-based COM to give preference in the hiring and retention of administrative personnel, faculty and staff, and students to persons who share the religious values of the school, provided that the school demonstrates that: (a) its hiring, recruitment, and admissions policies are consistent with and necessary to support its mission as set forth in the COM’s mission statement; and (b) such preference does not result in a failure to discharge the administrative and educational functions of the school in a timely and efficient manner.

A COM wishing to invoke this standard must be able to document that is deemed exempt from the prohibition against religious discrimination of the Civil Rights Act of 1964 and the appropriate provisions within Title IX of the Education Amendments of 1972. COMs’ eligibility compliance with this standard will be analyzed following the principles identified in Executive Order 11246 (applicable to federal contractors) providing for the allowance of hiring preference in order to maintain a faith based identity. 

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1. **What kinds of organizations are covered by the religious exemption of Executive Order 11246?**

Under section 204(c) of Executive Order 11246 and 41 CFR 60–1.5(a)(5), the Executive Order does not apply to a government contractor or subcontractor that is a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of the organization's activities. This language mirrors the religious exemption of Title VII of the Civil Rights Act of 1964, and OFCCP will follow EEOC and courts’ interpretations of Title VII when determining which organizations can claim the exemption and how it applies. Under established case law, this exemption applies only to those institutions whose purpose and character are primarily religious. In determining whether a contractor qualifies for this exemption, OFCCP will consider all significant religious and secular characteristics of the organization, with each case turning on its own facts. Although no one factor is dispositive, significant factors that courts have considered to determine whether an employer is a religious organization for purposes of Title VII include: whether the contractor is not for profit, whether its day-to-day operations are religious (e.g., are the services the
Standard 4.3

The selection of faculty must not discriminate on the basis of race, ethnicity, color, sex, gender, religion, national origin, age or disabilities.

Guideline: A diverse faculty provides a richness necessary for medical education. A COM should make every effort to hire faculty from a diverse background to foster that richness while meeting its mission and objectives.

Standard 5.3.2 (current)

Recruitment and selection of students for admission to a COM must not discriminate on the basis of race, ethnicity, color, sex, gender, religion, national origin, age or disabilities.

Guideline: A diverse student body provides the richness necessary for osteopathic medical education. A COM should make every effort to recruit students from a diverse background to foster that richness while meeting its mission and objectives.

contractor performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion?); whether the contractor’s articles of incorporation or other pertinent documents state a religious purpose; whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or other religious organization; whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; whether the contractor holds itself out to the public as secular or sectarian; whether the contractor regularly includes prayer or other forms of worship in its activities; whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and whether its membership is made up of coreligionists.

How does EO 11246’s exemption for religious organizations operate in light of the addition of the new protected categories?

In general, this exemption allows religious organizations to prefer to employ only members of a particular faith, but it does not allow religious organizations to discriminate in employment on the basis of race, color, sex, sexual orientation, gender identity, or national origin.
### Public Commentary re: Non-Discrimination Standards

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<tr>
<th>Name</th>
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<tr>
<td><strong>#1</strong> Theresa Lester, OU-HCOM</td>
<td><strong>STANDARD 2.8</strong> My only comment is that the language should also specify &quot;sexual orientation&quot; and &quot;gender identity&quot; in the list of issues that COCA does not discriminate against. I'd also love to see a preferred pronoun policy—or a stance in support of it. These topics are very important and we have seen them arise at our own school. Moving forward, it would be great for COCA to be a strong voice in supporting non-discrimination of these issues.</td>
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<td><strong>#2</strong> Jacqueline H. Wolf, Professor, Ohio University Heritage College of Osteopathic Medicine</td>
<td>I would like to comment, as requested, on the proposed wording of ACOM's new &quot;non-discrimination&quot; policy. The new policy strikes me, ironically, as discriminatory. First, you have not included sexual orientation and gender identity among the protected classes. I trust that is simply an oversight. Physicians should be taking a national leadership role in advocating for the right of all their patients to live without fear of harassment and discrimination. The negative health effects of discrimination are well-documented. Second, in recognizing the “right” of faith-based institutions to discriminate in hiring and student selection, you are contradicting a tenet of the osteopathic philosophy of tolerance and inclusion. If a faith-based medical school elects to be an osteopathic one, surely it is they who should adhere to osteopathic tenets, not the majority of osteopathic schools who should compromise their values to a particular religious faith. Federal law does not allow for discrimination based on religious belief. While we can all appreciate that certain students and faculty will be attracted to study/work at certain osteopathic medical schools, that does not mean that ACOM should be codifying discrimination. Thank you for the opportunity to provide feedback on this proposed policy.</td>
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<td><strong>#3</strong> Sage Arbor, MU-COM Faculty</td>
<td>I think the proposed changes should include the inclusion of sexual orientation and gender identity in the “non-discrimination” standards.</td>
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<td><strong>#4</strong> Garren P. Gebhardt, DO, MU-COM Faculty</td>
<td>I strongly urge you to include the categories of sexual orientation and gender identity in the COCA standard 2.8. This will ensure that the competencies and the standards match. The AOA has urged that the physician be non-discriminatory towards patients, it would do the COMs well to be non-discriminatory as well.</td>
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<td><strong>#5</strong> Allison Chatterjee, MU-Com Faculty</td>
<td>With recent events highlighting the importance of this issue, I would encourage COCA to include sexual orientation and gender identity to all non-discrimination standards. It is the moral and ethical thing to do. Also, the COCA standards will then coincide with the AOA Competencies.</td>
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<td><strong>#6</strong> Robin Newburn, D.O., OU-HCOM</td>
<td>I have reviewed the proposed changes and believe it sounds appropriate. However, I did notice that there is no mention of non-discrimination on the basis of sexual orientation. I think in today’s world it is important to include that language in addition to everything else you have outlined.</td>
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Thank you for sending us the proposed changes to COCA's non-discrimination policy and for inviting us to publicly comment. As an immigrant and a minority who was not raised in the Christian faith, I just wanted to share that I feel that this updated policy is a step in the wrong direction. I do not think it is fair to deny admission to a qualified student because they aren't of the same faith, or to allow religion to be a factor when hiring someone for an administrative position particularly if their duties do not directly involve religion. I love that I am in DO school because of the open-mindedness, inclusivity and the sense of community it provides. This proposed policy goes completely against that. I definitely support faith based schools wanting to cultivate a religious community and I think they absolutely should with clubs and interest groups and Bible studies and spaces where they can congregate and express that part of their identity. But for an academic institution to openly say that they give preference to a particular religion for job postings and for admission into medical school is discriminatory and does not foster an accepting or inclusive environment. Not to mention I believe it does a disservice to students because we are training to be doctors practicing in an increasingly multicultural society. I am glad that I attend a wonderful osteopathic school that welcomes all religions and people from different backgrounds and it saddens me that other osteopathic schools want to move away from that. I know tonight there was a lot of discussion because many of the peers in my class are very upset and saddened by this policy because to many of us, it appears very exclusionary. When I applied to DO schools I applied to faith-based institutions and had I not gotten into OU, I would have loved to attend one and become a part of that community. But to realize now that I would not be welcome because of the religion I was born into is a very sad feeling. I hope you will consider working with the faith based schools who want to implement this policy to perhaps open up more spaces and opportunities for students to express the faith of their school on campus. I feel as if that is a more positive way to cultivate a religious community without excluding qualified, respectful students and staff of other backgrounds. This policy does not paint the DO community as the open-minded and welcoming individuals that we are, and being professionally associated with a policy that can be interpreted as discriminatory would be a step backwards for everyone who is proud to call themselves an osteopathic physician, or in my case a future osteopathic physician! Thank you again for allowing us to publicly comment! I appreciate you taking the time to read my thoughts.

"I am in favor of the proposed changes to the COCA standards. I believe the changes better reflect the osteopathic profession’s diversity and its commitment to anti-discrimination without an over emphasis on any particular aspect of human identity."
The purpose of this message is to express my opposition to the adoption of proposed Standard 2.8.1., which would permit certain colleges of osteopathic medicine to discriminate on the basis of religion in the selection and retention of administrative personnel, faculty, and staff; and in the admission and retention of students. Please note that this comment reflects only my personal opinion and does not represent an official communication on behalf of my employer, the Lake Erie College of Osteopathic Medicine.

I note that while the AOA Code of Ethics, at Section 3, provides that the physician must have complete freedom to choose the patients whom she or he will serve, it also includes an important restraint, as follows: “However, the physician should not refuse to accept patients for reasons of discrimination, including, but not limited to, the patient’s race, creed, color, sex, national origin, sexual orientation, gender identity or handicap.”

Colleges of osteopathic medicine are responsible to prepare their students for the ethical practice of osteopathic medicine. It is not clear how the ethical practice of osteopathic medicine, including its emphasis of nondiscrimination toward patients, can be taught in an explicitly discriminatory environment in which faculty and students alike are selected based on their adherence to a particular creed and in which there is, by design, no religious diversity.

In addition, the manner via which the COCA proposes to authorize discrimination – i.e. “COCA does not regard it as discrimination for a faith-based COM to give preference . . . to persons who share the religious values of the school” – is ludicrous. If you wish to permit discrimination, just say that you are permitting discrimination, don’t pretend that it is not what it plainly is. Imagine if a similar exception were to be made for any other category of prohibited discrimination. For example, imagine that the Ku Klux Klan or some other white supremacist group wished to form a COM open only to white students. The KKK could meet the two conditions imposed by COCA (i.e. that the racial discrimination is consistent with and necessary to support its racist mission, and that the discrimination will not impact its ability to fulfill its functions in a timely and efficient manner). Would COCA then say that it does not regard it as discrimination for a race-based COM to give preference to persons who share the racist views of the school?

Standard 2.8, as written, has it right – COM’s must not discriminate on the basis of race, ethnicity color, sex, gender, religion, national origin, age or disabilities. To disingenuously decide that certain prohibited discrimination is not “regarded as” discrimination, because it is practiced by an institution whose mission mandates such discrimination, is problematic. The Standards should function as what they purport to be – “Standards” to which accredited COM’s must adhere. If an institution’s preferences cause it to be unable to comply with a Standard, the institution must come up to the Standard to be accredited, the Standard should not be lowered, or evaded, or “regarded” as not to apply. All patients deserve osteopathic physicians who were trained in nondiscriminatory environments (and all osteopathic physicians deserve to train in such environments).

Thank you for this opportunity to comment on the proposed adoption of Standard 2.8.1. and for taking these comments into consideration in the final decision by COCA.
I disagree with the proposed changes to Standards 2.8, 4.3 and 5.3.2 allowing some osteopathic schools to practice discriminatory hiring practices based on religious and sexual orientation/gender identity. It is an affront to a fundamental concept of osteopathy as valuing the whole person. Valuing the whole person means, in fact, valuing EVERY whole person. Singling out any group for disparate/discriminatory treatment is ethically wrong and should not be tolerated. Anything less is an open door to the bad old days of bigotry. Not to mention the fact that a student should get the same type of diverse educational experience regardless of which osteopathic school they attend.
By Electronic Mail

July 9, 2016

Alissa Craft, DO
Vice President, Accreditation
Commission on Osteopathic College Accreditation
American Osteopathic Association
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Chicago, IL 60611
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RE: 2016 Standards Comments

Dear Dr. Craft:

The American Association of Colleges of Osteopathic Medicine (“AACOM”) welcomes the opportunity to comment on the “Interim Policy on COCA ‘Non-Discrimination’ Standards Impacting Standards 2.8, 4.3, 5.3.2” (Draft Version April 17, 2016) (“Interim Policy”) and related new Standard 2.8 for the Accreditation of Colleges of Osteopathic Medicine: COM Accreditation Standards and Procedures (the “Standards”), both of which you sent to me on May 25. AACOM appreciates the efforts of the Commission on Osteopathic College Accreditation (“COCA”) to improve the Standards.

In brief, AACOM does not object to the consolidation of Standards 2.8, 4.3, and 5.3.2 into one new proposed Standard 2.8 addressing discrimination. However, AACOM urges the COCA (1) to add sexual orientation and gender identity to the list of protected categories; (2) to amend the combined standard to clarify that it requires a COM to adopt and follow antidiscrimination policies and procedures, not to require the COCA to adjudicate individual discrimination complaints; and (3) to restore the Guideline encouraging COMs to pursue diversity. AACOM agrees with the goal of Standard 2.8.1—to respect religious affiliated COMs’ missions. However, AACOM respectfully urges the COCA to simplify proposed Standard 2.8.1 both to assure adequate protection for religious-affiliated COMs’ missions and to avoid miring the COCA in complicated matters of religious doctrine. AACOM’s comments are described in greater detail below.

I. Revisions to Standards 2.8, 4.3, and 5.3.2

Current Standards 2.8, 4.3, and 5.3.2 prohibit discrimination on the basis of certain enumerated categories in the selection of administrative personnel, faculty and staff, and students,
respectively. Each standard includes a Guideline that encourages COMs to make “every effort” to create a learning community comprised of administrators, faculty, and students from “diverse background[s] to foster that richness while meeting its mission and objectives.”

As in the Interim Policy, the COCA proposes to consolidate the three current standards into one new Standard 2.8. The new standard would provide that the “selection of administrative personnel, faculty and staff, and students must not discriminate on the basis of race, ethnicity, color, sex, gender, religion, national origin, age or disabilities.” As there is no mention of a Guideline, it also appears the COCA intends to eliminate altogether the Guideline’s exhortation that COMs should make “every effort” to achieve diversity.

AACOM does not oppose the consolidation of the three discrimination and diversity standards into one. However, AACOM urges the COCA to revise the proposed standard in three ways: (1) add sexual orientation and gender identity to the list of protected categories; (2) amend the standard to make clear that a COM’s obligation is to publish and follow policies and procedures and that the COCA will not adjudicate particular cases; and (3) retain the current Guideline that COMs should strive for diversity.

1. Just last year the Standards Review Committee (“SRC”) proposed amending Standards 2.8, 4.3, and 5.3.2 to add sexual orientation” to the list of protected categories. AACOM cheered that proposal, citing concerns from students.1 AACOM also urged the addition of “gender identity,” which would align (as it still would today) the COCA’s approach with that of the Liaison Committee on Medical Education (“LCME”), the American Psychological Association Commission on Accreditation (“APA”), and the Council on Education for Public Health (“CEPH”).2 At the last minute, however, the SRC expressed concern about adding sexual orientation to the list because it supposedly would add “language that exceeds that of the regional accreditors and federal government for employment practices.” The SRC explained that “[a]fter discussion, the SRC opted to await the Ad Hoc Committee suggestions.” That step apparently resulted in the COCA’s adoption of the Interim Policy, which proposed Standard 2.8 would codify.

For the same reasons as articulated last year, AACOM urges the COCA to add sexual orientation and gender identity to the list of protected categories. In addition, the SRC’s concern about adding “language that exceeds that of the . . . federal government for employment practices” is now essentially moot. The Equal Employment Opportunity

1 Letter from S. Shannon to A. Puzan, 2 (July 14, 2015) (“AACOM has heard from student representatives that adding sexual orientation to the list of protected categories will give comfort that COMs will not allow such discrimination and will take seriously complaints of such discrimination.”).
2 Id. at 2-4. LCME, APA, and CEPH continue to prohibit gender identity discrimination. See LCME, Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the M.D. Degree, 4 (March 2016) (“A medical school does not discriminate on the basis of age, creed, gender identity, national origin, race, sex, or sexual orientation.”); APA, Guidelines and Principles for Accreditation of Programs in Professional Psychology, 5 (2013) (defining the phrase “cultural and individual diversity” to include without limitation “age, disability, ethnicity, gender, gender identity, language, national origin, race, religion, culture, sexual orientation, and social economic status” and prohibiting discrimination on the basis of such categories); CEPH, Accreditation Criteria: Schools of Public Health, 11–12 (Amended June 2011) (defining diversity to include “age, country of birth, disability, ethnicity, gender, gender identity, language, national origin, race, refugee status, religion, culture, sexual orientation, health status, community affiliation and socioeconomic status” and prohibiting discrimination on the basis of such categories).
Commission (“EEOC”) is clear that it “interprets and enforces Title VII’s prohibition of
sex discrimination as forbiding any employment discrimination based on gender identity
or sexual orientation.” \(^3\) It has ruled that “sexual orientation is inherently a ‘sex-based
consideration,’ and an allegation of discrimination based on sexual orientation is
necessarily an allegation of sex discrimination under Title VII.” \(^4\) The U.S. Department of
Education (“ED”) Office for Civil Rights (“OCR”) has relied on somewhat similar
reasoning with respect to its enforcement of Title IX, which prohibits sex discrimination. \(^5\)
In May 2016 ED and the U.S. Department of Justice issued a Dear Colleague Letter
interpreting Title IX to prohibit discrimination on the basis of gender identity. \(^6\)

Accordingly, to add sexual orientation and gender identity to the list of protected
categories would be anything but radical or in the SRC’s words add “language that
exceeds that of the . . . federal government for employment practices.” To add sexual
orientation and gender identity would better align the COCA’s policy with applicable
Title VII and Title IX requirements as interpreted by Federal government agencies.
Accordingly, regardless of where regional accreditors may be in their standards revision
process, the COCA is considering amendments to its standards on discrimination and
should add sexual orientation and gender identity. In AACOM’s view, it is the right
thing to do.

2. AACOM also recommends that the COCA clarify that the Standard requires only that
COMs “publish and follow policies” against discrimination, rather than categorically
prohibit discrimination on various grounds. The proposed language could lead the
COCA into the business of adjudicating particular complaints of discrimination, which
would not be a good use of its time and which it is not well-equipped to handle. Other
decision makers, such as government agencies, courts, and arbitrators, are better suited to
decide individual discrimination claims. The COCA could consider a COM’s record
with respect to such proceedings in determining compliance with an accreditation
standard that requires a COM to publish and follow policies against discrimination.

3. AACOM urges the COCA to retain the existing Guidelines’ substance, which encourages
diversity. The COCA’s “intent” for the new Standard 2.8 recognizes that “[c]ultural
competency is an essential component in osteopathic medical education.” It also
recognizes that “diversity in medical education is essential for academic excellence and

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\(^3\) https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.
\(^4\) Baldwin v. Foxx, EEOC Appeal No. 0120133080 (July 15 2015), available at
https://www.eeoc.gov/decisions/0120133080.pdf.
\(^5\) E.g., Dear Colleague Letter: Harassment and Bullying, U.S. Department Of Education, 8 (October 26, 2010) (“When
students are subjected to harassment on the basis of their LGBT status, they may also, as this example illustrates, be subjected to
forms of sex discrimination prohibited under Title IX . . . . In this example, the harassing conduct was based in part on the
student’s failure to act as some of his peers believed a boy should act.”), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf; Questions and Answers on Title IX and Sexual Violence, U.S. Department Of Education, 5 (April 29, 2014) (“Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender
identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for
investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school’s
obligations.”), available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (noting that the Office for Civil
Rights “accepts such claims for investigation”).
\(^6\) http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
graduates’ long term success as healthcare professionals. Cultural competence cannot be acquired in a homogenous environment.” AACOM completely agrees. However, as drafted, the new Standard 2.8 would appear only to prohibit discrimination and to eliminate the Guideline that encourages COMs to seek a diverse learning community. AACOM recommends that if the COCA adopts Standard 2.8, it should also adopt a new Guideline that encourages COMs to “make every effort” to achieve diversity. Such a Guideline would be consistent with the COCA’s longstanding approach and would capture a key component of the “intent” for the new Standard 2.8.

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<td><strong>Standard 2.8</strong> The selection of administrative personnel, faculty and staff, and students must not discriminate on the basis of race, ethnicity, color, sex, gender, religion, national origin, age or disabilities. [If adopted, the proposal would replace current Standard 2.8 and replace current Standards 4.3 and 5.3.2.]</td>
<td><strong>Standard 2.8</strong> A COM must publish and follow policies providing that the selection of administrative personnel, faculty and staff, and students must not discriminate on the basis of race, ethnicity, color, sex, sexual orientation, gender, gender identity, religion, national origin, age or disabilities. <strong>Guideline:</strong> A diverse administration, faculty and staff, and students provide the richness necessary for osteopathic medical education. A COM should make every effort to recruit administrators, faculty and staff, and students from diverse backgrounds to foster that richness while meeting its mission and objectives.</td>
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II. **Proposed New Standard 2.8.1**

Proposed new Standard 2.8.1 would affirm that the COCA respects the religious mission of faith-based COMs and would permit a COM to use a preference for applicants who share its faith (“co-religionists”), subject to certain legalistic terms and conditions. AACOM agrees with the apparent goal of Standard 2.8.1—to respect a religious-affiliated institution’s mission in light of the COCA’s ordinary antidiscrimination standards—but disagrees with the way Standard 2.8.1 seeks to achieve that goal. Proposed Standard 2.8.1 both is too narrow and would mire the COCA in unnecessary and intrusive inquiries about an institution’s religious tenets and mission.

Proposed Standard 2.8.1 is too narrow because it permits only a preference for co-religionists in hiring/admissions. An institution’s religious mission may require more than just a preference for co-religionists. For example, an institution’s religious beliefs or practices may require it to condition hiring or admission on a requirement that a prospective applicant agree to a certain code of conduct. Indeed, the exemption Congress created for Title IX of the Education Amendments of 1972, which prohibits sex discrimination by recipients of federal financial assistance, is broader than a preference for co-religionists.\(^7\) It permits a religiously-controlled

\(^7\) 20 U.S.C. § 1681(a)(3).
institution to obtain an exemption for any Title IX requirement that conflicts with its religious tenets or religious-based practices.

Proposed Standard 2.8.1 is also problematic because it would require an institution to demonstrate to the COCA’s satisfaction that its policies are “necessary to support its mission” and to provide documentation that the institution is “deemed exempt from the prohibition against religious discrimination of the Civil Rights Act of 1964” and “Title IX of the Education Amendments of 1972.” The COCA proposes to analyze a COM’s eligibility to invoke the exemption using the analysis set out in connection with Executive Order 11246, which permits government contractors and subcontractors that are religious organizations to favor co-religionists in employment. Such an inquiry includes an analysis whether the institution’s purpose and character is “primarily religious,” which entails consideration of all “significant religious and secular characteristics of the organization, with each case turning on its own facts.”

This approach presents a number of problems. Foremost among them is that the COCA is not qualified to decide matters of religious doctrine or determine an institution’s religious identity. Such inquiries are messy and may open the COCA to disputes with faith-based COMs or to findings by ED that it has failed to respect adequately a COM or prospective COM’s religious mission. Diversity in all its forms includes religious diversity among COMs. The COCA need not and should not engage in such legalistic inquiries.

Instead, similar to the approaches of the APA and the American Bar Association, Proposed Standard 2.8.1 should be simplified to read: “Nothing in Standard 2.8 prohibits a COM from having a religious affiliation or purpose and applying selection criteria and/or policies that directly relate to that affiliation or purpose so long as any such criteria and/or policies are made known to applicants and the public and do not contravene any standard other than 2.8.”

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8 See APA Office of Program Consultation & Accreditation, GUIDELINES AND PRINCIPLES FOR ACCREDITATION OF PROGRAMS IN PROFESSIONAL PSYCHOLOGY, 10, n.4 (2013); ABA, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 11-12 (2014-2015).
COM wishing to invoke this standard must be able to document that is deemed exempt from the prohibition against religious discrimination of the Civil Rights Act of 1964 and the appropriate provisions within Title IX of the Education Amendments of 1972. COMs’ eligibility compliance with this standard will be analyzed following the principles identified in Executive Order 11246 (applicable to federal contractors) providing for the allowance of hiring preference in order to maintain a faith based identity.⁹

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⁹What kinds of organizations are covered by the religious exemption of Executive Order 11246? Under section 204(c) of Executive Order 11246 and 41 CFR 60–1.5(a)(5), the Executive Order does not apply to a government contractor or subcontractor that is a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of the organization’s activities. This language mirrors the religious exemption of Title VII of the Civil Rights Act of 1964, and OFCCP will follow EEOC and courts’ interpretations of Title VII when determining which organizations can claim the exemption and how it applies. Under established case law, this exemption applies only to those institutions whose purpose and character are primarily religious. In determining whether a contractor qualifies for this exemption, OFCCP will consider all significant religious and secular characteristics of the organization, with each case turning on its own facts. Although no one factor is dispositive, significant factors that courts have considered to determine whether an employer is a religious organization for purposes of Title VII include: whether the contractor is not for profit, whether its day-to-day operations are religious (e.g., are the services the contractor performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion?); whether the contractor’s articles of incorporation or other pertinent documents state a religious purpose; whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or other religious organization; whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; whether the contractor holds itself out to the public as secular or sectarian; whether the contractor regularly includes prayer or other forms of worship in its activities; whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and whether its membership is made up of coreligionists. How does EO 11246’s exemption for religious organizations operate in light of the addition of the new protected categories? In general, this exemption allows religious organizations to prefer to employ only members of a particular faith, but it does not allow religious organizations to discriminate in employment on the basis of race, color, sex, sexual orientation, gender identity, or national origin.
Thank you for the opportunity to comment and for your consideration.

Sincerely,

Stephen C. Shannon, D.O., M.P.H.
President

cc: Thomas Cavalieri, DO, Chair, AACOM Board of Deans
    Michael Clearfield, DO, Immediate-Past Chair, AACOM Board of Deans
    Kenneth H. Johnson, DO, FAAO: Chair, Commission on Osteopathic College Accreditation
    Elizabeth B. Meers, J.D., Hogan Lovells US LLP
July 8, 2016

Alissa Craft, DO
Secretary, Commission on Osteopathic College Accreditation
American Osteopathic Association
142 E. Ontario St.
Chicago, IL 60611

Dear Dr. Craft:

The Standards Review Coalition (SRC) represents the broad medical education community with representatives from the Association of Osteopathic Directors and Medical Educators (AODME), the American Association of Colleges of Osteopathic Medicine (AACOM), and the American Osteopathic Association (AOA), as well as a student representative and a resident representative.

On Tuesday, July 5, 2016, the SRC reviewed COCA’s proposed standards 2.8 and 2.8.1. The SRC supports the following revisions to the proposed standards (additions are underlined; deletions are struckthrough):

Standard 2.8 A COM must publish and follow policies providing that the selection of administrative personnel, faculty and staff, and students must not discriminate on the basis of race, ethnicity, color, sex, sexual orientation, gender, gender identity, religion, national origin, age or disabilities.

Guideline: A diverse administration, faculty and staff, and students provide the richness necessary for osteopathic medical education. A COM should make every effort to recruit administrators, faculty and staff, and students from diverse backgrounds to foster that richness while meeting its mission and objectives.

Standard 2.8.1 COCA respects the religious mission of faith-based schools. Nothing in Standard 2.8 prohibits a COM from having a religious affiliation or purpose and applying selection criteria and/or policies that directly relate to that affiliation or purpose so long as any such criteria and/or policies are made known to applicants and the public and do not contravene any standard other than 2.8. Accordingly, COCA does not regard it as discrimination for a faith-based COM to give preference in hiring and retention of administrative personnel, faculty and staff, and students to persons who share the religious values of the school, provided that the school demonstrates that: (a) it's hiring, recruitment, and admissions policies are consistent with an necessary to support its mission as set forth in the COM’s mission statement; and (b) such preference does not result in a failure to discharge the administrative and educational functions of the school in a timely and efficient manner.

A COM wishing to invoke this standard must be able to document that is deemed exempt from the prohibition against religious discrimination of the Civil Rights Act of 1964 and the appropriate
revisions within Title IX of the Education Amendments of 1972. COM's eligibility compliance with this standard will be analyzed following the principles identified in executive order 11246 (applicable to federal contractors) providing for the allowance of hiring preference in order to maintain a faith based identity.

I would be pleased to discuss this with you if you have questions.

Sincerely,

Teresa Hubka, DO

Teresa Hubka, DO
Chair
Standards Review Coalition

CC: John W. Becher, DO, AOA President
    Boyd R. Buser, DO, AOA President-elect
    Adrienne White-Faines, AOA Chief Executive Officer
    Steven C. Shannon, DO, AACOM President
    Harald Lausen, DO, AODME
Alissa Craft, DO  
Vice President, Accreditation  
Commission on Osteopathic College Accreditation  
American Osteopathic Association  
142 E. Ontario Street, 6th floor  
Chicago, IL 60611  
acraftdo@osteopathic.org  
predoc@osteopathic.org

Dear Dr. Craft and Members of COCA:

Thank you for communicating the opportunity to comment on the Interim Policy on COCA Non-Discrimination Standards. I appreciate the opportunity and note that I am commenting as a member of the public and not as an employee of AACOM. I am a concerned member of the public – concerned with health care equity and quality and policies and processes in health care and health care education that impact equity and quality. Any data or facts that I cite in this message are readily available to the public through internet searches.

First I am both surprised and concerned that sexual orientation is not included in the interim standard 2.8. As the nation is moving toward a more general acceptance of such non-discrimination standards including sexual orientation it is difficult for me to understand that a change in COCA standards on non-discrimination would not include sexual orientation as a named form of discrimination.

My second comment is on the removal of the guideline attached to the non-discrimination standard. The statement “A COM should make every effort to (various language relating to faculty, staff, and students) from a diverse background to foster that richness...” can be an important message to the COMs and their leadership, to current and prospective students, and to the public that osteopathic medical education is committed to producing a representative cohort of osteopathic physicians who will provide equitable and quality care to the nation. In fact, I think that COCA should go beyond a guideline and add an affirmative standard on seeking diversity in students, faculty, and staff. For example, I cite Standard 3.3 of the LCME Functions and Structure of a Medical School (2016-17 standards):

<table>
<thead>
<tr>
<th>3.3 Diversity/Pipeline Programs and Partnerships</th>
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<tr>
<td>A medical school has effective policies and practices in place, and engages in ongoing, systematic, and focused recruitment and retention activities, to achieve mission-appropriate diversity outcomes among its students, faculty, senior administrative staff, and other relevant members of its academic community. These activities include the use of programs and/or partnerships aimed at achieving diversity among qualified applicants for medical school admission and the evaluation of program and partnership outcomes.</td>
</tr>
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</table>
The absence of a strong standard may be reflected in the representation of members of underrepresented minority populations in osteopathic medical schools as students, faculty members, or administrators and staff members. This is demonstrated for students in a recent AACOM report, Diversity in Osteopathic Medical School Applicants, Matriculants, and Enrollment (http://www.aacom.org/docs/default-source/data-and-trends/diversity-apps-matrics-enroll.pdf). Similar data are available for faculty (http://www.aacom.org/reports-programs-initiatives/aacom-reports/faculty).

A standard calling for COM policies and practices to foster diversity would require colleges to pay attention and not just lip-service to developing a cohort of osteopathic physicians who represent and are prepared to treat the increasingly diverse U.S. population.

Again, thank you for the opportunity to comment.

Sincerely,

(signed and transmitted electronically)

Thomas Levitan
July 8, 2016

Alissa Craft, DO
Secretary, Commission on Osteopathic College Accreditation
American Osteopathic Association
142 E. Ontario St.
Chicago, IL 60611

Dear Dr. Craft:

The College Accreditation Standards Task Force (CASTF), a committee of the AOA Board of Trustees, has the role of reviewing proposed college of osteopathic medicine standards.

On Monday, June 27, 2016, CASTF reviewed the proposed new standards 2.8 and 2.8.1 and voted to support the new standards as proposed by COCA.

I would be pleased to discuss this with you if you have questions.

Sincerely,

William S. Mayo, DO
Chair
AOA College Accreditation Standards Task Force

CC: John W. Becher, DO, AOA President
Boyd R. Buser, DO, AOA President-elect
Adrienne White-Faines, AOA Chief Executive Officer
June 24, 2016

Alisa Craft, DO, MBA
Secretary, Commission on Osteopathic College Accreditation
American Osteopathic Association
142 E. Ontario Street
Chicago, IL 60611-2864

Re: Proposed Religious Exemption to COCA Non-Discrimination Standards

Dear Dr. Craft:

This letter responds to the April 17 draft of the “Interim Policy on COCA ‘Non-Discrimination’ Standards Impacting Standards 2.8, 4.3 and 5.3.2,” a document recently provided to me for comment by the dean of Liberty University College of Osteopathic Medicine (LUCOM), Dr. Ronnie Martin. I will address particularly the proposed new Standard 2.8.1 and (presumably) similar standards that COCA apparently intends to add or consider adding to Standards 4.3 and 5.3.2.

On behalf of Liberty University and LUCOM, let me first express our appreciation for the Committee’s good-faith efforts to find an appropriate accommodation between COCA’s non-discrimination standards and the religious missions of the faith-based institutions COCA accredits. Just as colleges of osteopathic medicine contribute substantially to the richness and diversity of medical education and practice in general, so also we believe that faith-based colleges of osteopathic medicine contribute to the richness and diversity of education and practice in that field. We appreciate COCA’s recognition of that reality, and its efforts to ensure that faith-based institutions can remain part of the COCA family and remain faith-based.

Although this letter will propose significant changes to proposed Standard 2.8.1, let me also emphasize that we believe LUCOM would satisfy that proposed standard as currently written. Accordingly, our main concerns about that standard are directed not to whether LUCOM could meet it, but to the nature of the inquiry that COCA would have to undertake to reach that determination.
Legal Principle of Non-Entanglement and Institutional Autonomy

The central legal principle we believe is violated by the draft of Standard 2.8.1 is what is sometimes called the principle of "non-entanglement" or, alternatively, "institutional autonomy." That principle is usually applied to government actors. But it applies with equal force to non-governmental or quasi-governmental bodies like accrediting agencies—that is, entities acting under the auspices of, in concert with, and/or pursuant to a statute or regulation issued by a governmental body.

One among many examples of a government agency violating that principle is described in a decision we have cited to you before, namely, NLRB v. Catholic Bishop of Chicago, in which the Supreme Court "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school."1 The Court observed that, in a religious educational institution, inevitably "religious doctrine will become intertwined with secular instruction" "whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading.'"2 Because of this "intertwining" of religious and secular learning, the Court concluded that any exercise of jurisdiction by the National Labor Relations Board (NLRB), and with it the possibility of forcing the school to recognize a teacher's union, would risk impermissible "entanglement" by the NLRB and the union with the "religious mission of the school."3 A denial of NLRB jurisdiction was necessary, the Court held, because "[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school."4

These same non-entanglement concerns have led to other court decisions—including an opinion by Justice Breyer when he was a court of appeals judge—applying Catholic Bishop in the higher education setting.5 In one such decision that we have also cited to you before, University of Great Falls v. NLRB, the U.S. Court of Appeals for the D.C. Circuit had to determine whether the NLRB had properly exercised jurisdiction over a Catholic university that was, by all accounts, mostly "secular."6 As in Catholic Bishop, the NLRB's jurisdiction had been invoked by a private teacher's union that wished to organize the university's faculty.7 In analyzing the pertinent precedents of the Supreme Court, the Court in Great Falls

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2 Id. at 501-502.
3 Id.
4 Id. at 504.
5 See, e.g., Universidad Cent. de Bayamon v. NLRB, 793 F.2d 383, 402 (1st Cir. 1985) (en banc) (Breyer, J., for half of an equally divided court)
6 278 F.3d 1335, 1345 (D.C. Cir. 2002).
7 Id.
summarized seven distinct ways in which an agency can transgress the non-entanglement or institutional autonomy principle. And the Court said that each of these seven defects—what we might call the "Seven Deadly Sins of Entanglement"—gives rise to a "constitutional infirmity"8:

- attempting an independent "inquiry into the 'religious mission' of the University"9;
- attempting an independent "inquiry into the good faith" of a University policy and/or "its relationship to the school's religious mission"10;
- attempting to assess "the plausibility of a religious claim"11;
- attempting to "determine the place of a particular belief in a religion," such as its overall "centrality" to religious practice;12
- any inquiry into "which activities of a religious organization [a]re religious and which [a]re secular"13
- any "case-by-case determination" as to whether the institution's overall "nature is religious or secular"14
- any other "intrusive inquiries into religious beliefs" and religious "views"15.

The Great Falls Court then concluded that, in attempting to determine whether the university there was entitled to a religious exemption, the NLRB had violated—and would violate in the future if it had jurisdiction—one or more of these prohibitions. Specifically, Great Falls found that the NLRB had done as the Supreme Court had "feared" in Catholic Bishop by improperly "engag[ing] in inquiry into the 'religious mission' of the University."16 Drawing on Catholic Bishop and several other Supreme Court decisions, the D.C. Circuit held that the NLRB's "case-by-case" test for determining whether a university had a "substantial religious character" necessarily entailed improper entanglement between the government and the religious university.17

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8 Id. at 1344.
9 Id. at 1341 (quoting Catholic Bishop, 440 U.S. at 502).
10 Id. (quoting Catholic Bishop, 440 U.S. at 502).
11 Id. at 1343 (quoting Employment Div. v. Smith, 494 U.S. 872, 887 (1990)).
12 Id. (quoting Smith, 494 U.S. at 887).
13 Id. at 1342 (citing Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987)).
14 Id. (citing Amos, 483 U.S. at 340, 345) (Brennan, J., concurring).
15 Id. at 1341-1342.
16 Id.
17 Id. at 1339, 1347.
The Court thus concluded that the NLRB's test improperly intruded into the school's constitutionally protected autonomy as a religious institution.\textsuperscript{18} In other words, the Court concluded that the NLRB's case-by-case test for determining the University's entitlement to a religious exemption did not sufficiently respect the school's religious mission.

The Court then went on to establish an alternative test or standard for determining the availability of the religious exemption. The Court held that all a university need establish to be entitled to the religious exemption there was that the university "(a) 'holds itself out to students, faculty and community' as providing a religious educational environment ..., (b) is organized as a 'nonprofit' ... and (c) is 'affiliated with ... a recognized religious organization."\textsuperscript{19} The Court held that this three-pronged approach avoided the entanglement problems inherent in the NLRB's "substantial religious character" test. And applying that three-pronged approach, the Court concluded that the university there was entitled to a blanket religious exemption from NLRB jurisdiction.

\textit{Application to Accrediting Agencies Like COCA}

But what about entities like COCA that are not (or at least not fully) part of a governmental body? Here again, both Catholic Bishop and Great Falls are instructive. The Supreme Court made clear in Catholic Bishop that it was concerned, not just about "entanglement" by the NLRB in religious functions and issues, but also about "entanglement" by the union that was seeking to have the NLRB assert jurisdiction there. The Court's concern, in other words, was not merely "entanglement" in religious issues by the government agency, the NLRB, but also by the NLRB-sanctioned union—which the Court euphemistically referred to as the involved "third party."\textsuperscript{20}

Thus, the Court made clear there—as did the D.C. Circuit in Great Falls—that the principle of non-entanglement or institutional autonomy applies to private entities, like the union there\textsuperscript{21} and COCA here, that derive part of their power from some involvement with the government. Indeed, because accrediting bodies serve as "gatekeepers" for government-provided education funds and professional licenses, among other things, courts have often recognized that "accreditors wield enormous power over institutions—life and death power, some might say"—even though they, like the unions in Catholic Bishop and Great Falls, are

\textsuperscript{18} Id. at 1347.
\textsuperscript{19} Id. at 1343.
\textsuperscript{20} Catholic Bishop, 440 U.S. at 502. The same was also true in Great Falls. There the Court noted that the dispute in that case had been triggered, not by the NLRB itself, but by a petition from the teachers' union asking "the NLRB to recognize the Union as the collective bargaining agent for the faculty." 278 F.3d at 1337.
\textsuperscript{21} See Catholic Bishop, 440 U.S. at 502.
not technically governmental entities. *Prof'l Massage Training Ctr. v. Accreditation Alliance of Career Sch. & Colls.*, 781 F.3d 161, 170 (4th Cir. 2015).

Indeed, it was on this basis that the Fourth Circuit—which has responsibility for Virginia—recently joined other circuits in holding that accreditation agencies have a “federal common law duty” “to employ fair procedures when making decisions affecting their members.” *Prof'l Massage Training Ctr.*, 781 F.3d at 169 (quoting *McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 534-35 (3d Cir. 1994)). Such “fair procedures” necessarily include adherence to the principle of non-entanglement that ordinarily governs government agencies’ dealings with religious institutions.

That conclusion finds further confirmation in the general principle that private parties may be liable for actions they take on behalf of a governmental body. For example, the Supreme Court has explained that a “private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government,” can be held liable under 42 U.S.C. § 1983, the US Code section providing a cause of action for persons whose constitutional rights are violated. *Richardson v. McKnight*, 521 U.S. 399, 413 (1997). And in another line of cases, the courts of appeal have uniformly held that if a private party acts under the color of state law and deprives individuals of constitutional rights, they can be held liable under § 1983.\footnote{See *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012)} That principle would logically apply as much to accrediting bodies as to other nominally private entities whose power, in one way or another, depends on their connection to government.

Finally, the Higher Education Opportunity Act of 2008 makes even more clear that this principle of non-entanglement applies to accrediting bodies. That Act, which reauthorized and amended the 1965 Higher Education Act,\footnote{Public Law 110-315.} states: “No accrediting agency or association may be determined by the Secretary [of Education] to be a reliable authority as to the quality of education or training offered” unless “such agency or association consistently applies and enforces standards that respect the stated mission of the institution of higher education, including religious missions.”\footnote{20 U.S.C. § 1099b(a)(4)(A), (c) (emphasis added).} Regulations subsequently promulgated by the Department of Education also speak directly to accrediting bodies, requiring that they “consistently apply and enforce standards that respect the stated mission of the institution, including religious missions.”\footnote{See 34 CFR 602, Subpart B—The Criteria for Recognition, § 602.18 – Ensuring consistency in decision-making (emphasis added).}
There can thus be no doubt that, as a matter of federal law, the non-entanglement principle—including the specific prohibitions articulated in *Great Falls*—applies to accrediting agencies.

**Application to Standard 2.8.1**

COCA’s proposed Standard 2.8.1 violates that general principle as well as several of the specific prohibitions summarized in *Great Falls*.

To be sure, we are grateful for that Standard’s express statements that COCA “respects the religious mission of faith-based schools,” and that COCA “does not regard it as discrimination for a faith-based COM to give preference in the hiring and retention” of COM personnel “who share the religious values of the school.” These statements are essential to ensure the respect for religious missions that COCA obviously wishes to provide. We applaud you for them. We also believe the second criterion in that paragraph for invoking the religious exemption—that such a preference not prevent the school from discharging its “administrative and educational functions in a timely and efficient manner”—is reasonable and appropriate.

**Demonstration of consistency and necessity.** The other criterion in the first paragraph, however—criterion (a)—requires a faith-based school to “demonstrate” that ... its hiring, recruitment and admissions policies are consistent with and necessary to support its [religious] mission ...” In application, this criterion runs afoul of at least two of the non-entanglement prohibitions articulated in *Great Falls*.

First, it is difficult to see how COCA could assess compliance with this criterion without attempting an independent inquiry—indeed, multiple inquiries—into a religion-related university policy “and its relationship to the schools’ religious mission.” Indeed, this criterion seems tailor-made to violate that prohibition, requiring as it does that the school establish a particular “relationship” between its policies and its religious mission—specifically, that those policies are “consistent with” and “necessary” to further that mission. If this is not a violation of *Great Falls*’ prohibition on an inquiry into a policy’s “relationship to the school’s mission,” it is difficult to see what would be.

The same is true of *Great Falls*’ prohibition on attempting to “determine the place of a particular belief in a religion,” including its overall “centrality.” In asking a religious school to establish that a particular policy is “necessary” to the achievement of the school’s religious mission, criterion (a) is effectively asking the school to establish that the policy is

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26 *Great Falls*, 278 F.3d at 1341 (quoting *Catholic Bishop*, 440 U.S. at 502).

27 *Id.* at 1343 (quoting *Smith*, 494 U.S. at 887).
in some sense sufficiently "central" to the school's ability to carry out that mission. Once again, this is a flat violation of the non-entanglement/institutional autonomy principle.

"Deemed exempt" requirement. The requirement that a school claiming a religious exemption under Standard 2.8.1 "document" that it is "deemed exempt" from Title VII and Title IX is also problematic. For one thing, aside from a court acting in the course of litigation, there is no governmental body to which a school can apply for a recognized "exemption" from Title VII's employment standards. So it would generally not even be possible for a school to "document" that it has been "deemed exempt."

In any event, by its terms, Title VII extends only to discrimination on the basis of race, national origin, sex and religion,\(^{28}\) not to discrimination on the basis of sexual orientation or gender identity. A religious school's mission may not require it to make distinctions on the basis of any of the categories actually listed in Title VII. But that religious mission may require it to make distinctions that (some will claim) are based on sexual orientation or gender identity—for example, requiring unmarried biological men and women to sleep in separate rooms or to use separate showers. In such cases, a school could well need to seek an exemption from a COCA non-discrimination standard without ever having occasion to assert an exemption under Title VII. This possible mismatch between the reasons for a Title VII exemption and the reasons for an exemption from a COCA standard makes this part of the proposed Standard nonsensical.

The reference to Title IX poses similar problems. Although it is possible to seek and obtain a determination from the Department of Education that a school is exempt from Title IX's sex discrimination standards,\(^{29}\) there is no requirement that a school actually seek such an exemption from the Department in order to assert the Title IX exemption as a defense in litigation.\(^{30}\) Moreover, groups like the Human Rights Campaign have recently begun a nationwide effort to criticize and even ostracize schools that seek an express Title IX

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\(^{29}\) See 34 C.F.R. § 106.12 (outlining procedure for such an exemption).

\(^{30}\) See, e.g., 20 U.S.C. § 1681(a)(3) (providing Title IX's religious exemption without mentioning a timing constraint or administrative pre-approval requirement); 34 C.F.R. § 106.12(a) (regulation concerning exception has no timing constraint); Memorandum, November 22, 1985, from Harry M. Singleton to Regional Civil Rights Directors of the Department of Education (noting "under 34 C.F.R. § 106.12, a recipient may assert a religious tenet as a defense to an allegation of sex discrimination, even though a religious exemption has not been previously granted"); Letter, August 6, 2014 re: OCR Docket #15-14-2006 (granting exemption and closing pending investigation even though exemption had not been sought previously).
exemption. COCA should not put itself in the position of facilitating such attacks on its member schools by forcing them to "document" that they are "deemed" exempt from Title IX by the Department.

As with Title VII, moreover, some religious schools might have no problem complying with the non-discrimination requirements of Title IX (which by its terms covers the same general areas as Title VII), but would have a problem complying with COCA's rules regarding, say, sexual orientation or gender identity. Thus, in one or both of those circumstances, it could well be impossible for such a school to demonstrate entitlement to an exemption under Title IX as a prelude to seeking an exemption from the pertinent COCA standard. Here again, the "deemed exempt" requirement makes no sense.

**Use of the "primarily religious" standard of Executive Order 11246.** The reliance by proposed Standard 2.8.1 on a "Frequently Asked Question" or FAQ document issued in connection with Executive Order 11246—which deals with the very different context of government contractors—is also seriously misguided.

First, the legal standard employed in that document—whether the institution's "purpose and character are primarily religious"—is virtually identical to the "substantial religious character" standard that the NLRB had attempted to apply in *Great Falls*, and which the D.C. Circuit firmly rejected there, based on Supreme Court precedent.

Second, not surprisingly, any attempt to apply the legal standard in the FAQ document would run afoul of several of the specific prohibitions identified in that decision. Indeed, the FAQ document itself states that, "[i]n determining whether a contractor qualifies for this

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32 We recognize, of course, that the Department of Education has recently taken the position that Title IX does extend to discrimination on the basis of gender identity, and that the Fourth Circuit has held that this position is entitled to deference. See *Department of Education, Dear Colleague Letter on Transgender Students* (May 13, 2016), available at: http://1.usa.gov/25aBJLM (claiming that Title IX applies to gender identity); *G.G. v. Gloucester County, ___ F.3d ___, 2016 U.S. App. LEXIS 7026* (4th Cir. Apr. 19, 2016). However, the Department's interpretation of Title IX does not extend to sexual orientation discrimination except with respect to bullying. See *Department of Education, Dear Colleague Letter on Harassment and Bullying* (Oct. 26, 2010), available at: http://1.usa.gov/28InAVd (highlighting that Title IX applies to bullying based on sexual orientation but not asserting its application to any other form of sexual orientation discrimination). And in any event, the Department's interpretation is being hotly contested by school boards and states around the country. See, e.g., *Texas v. United States*, No. 16-cv-00054 (May 25, 2016) (suit by school boards and public officials in 11 states).

exemption, [the agency] will consider all significant religious and secular characteristics of the organization, with each case turning on its own facts."34 That is almost identical to the procedure that Great Falls expressly condemned, that is, a "case-by-case determination" as to whether the institution's overall "nature is religious or secular"35

Any determination as to whether a religious organization is "primarily religious," moreover, would necessarily include an analysis of "which activities ... [a]re religious and which [a]re secular"—another inquiry that Great Falls expressly condemns. 36 And a "primarily religious" standard would almost certainly entail an assessment of which religious beliefs and practices are "central" to the religion and which are not37—lest the decision-maker be forced to treat all beliefs and practices as entitled to equal weight.

Third, the suggestion in the FAQ document that "under established case law, this exemption [the Title VII exemption] applies only to those institutions whose purpose and character are primarily religious" is grossly inaccurate. While the assertion may be true in some jurisdictions, it is not true in the D.C. Circuit, as shown above. See also Carroll College, Inc. v. NLRB, 558 F.3d 568, 572 (D.C. Cir. 2009) (applying the Great Falls analysis). Nor is it true in most other jurisdictions around the country.38

Indeed, the FAQ document's assertion about the scope of the Title VII exemption cannot be reconciled with the Supreme Court's decision in Corporation of Presiding Bishop v. Amos.39 There the Court explained that "it is a significant burden on a religious organization

35 Great Falls, 278 F.3d. at 1342 (citing Amos, 483 U.S. at 340, 345) (Brennan, J., concurring).
36 Id. (citing Amos, 483 U.S. at 336).
37 Id. at 1343-1344 (quoting Smith, 494 U.S. at 887).
38 See Hall v. Baptist Mem'1 Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000) (evaluating Title VII claim based in part on the evidence that a college held itself out as religious to the public); Killinger v. Samford Univ., 113 F.3d 196, 199 (11th Cir. 1997) (rejecting idea that "some kind of rigid sectarianism" is required for a university to be considered a religious organization under Title VII); Ginsburg v. Concordia Univ., No. 4:10-cv-3064, 2011 U.S. Dist. LEXIS 1098, at *10 (D. Neb. Jan. 5, 2011) (looking to the ownership and religious statements of a University to determine if it is religious). A number of courts and judges have also indicated that they would reject the "primarily religious" rule if it was presented to them. See Universidad Cent. de Bayamon v. NLRB, 793 F.2d 383, 399-400, 403 (1st Cir. 1985) (en banc) (Breyer, J., for half of an equally divided court) (applying deferential test to whether a school is religious in the context of National Labor Relations Act); Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 192 (4th Cir. 2011) (noting that secular activities of a religious organization are protected by Title VII); Korte v. Sebelius, 735 F.3d 654, 676 (7th Cir. 2013) (noting religious organizations have additional protections under federal law beyond what Title VII provides); Spencer v. World Vision, Inc., 633 F.3d 723, 730 (9th Cir. 2011) (O'Scannlain J., concurring) (rejecting "primarily religious" test).
to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." \(^{40}\) But obviously, one cannot determine whether a school is "primarily religious" without determining which of the school's activities are religious and which are secular. And that analysis is especially problematic in light of the observation by both the majority and the principal concurrence in that case that the distinction between religious activities and secular activities is not self-evident.\(^{41}\) It was no surprise, then, that the decision in *Amos* allowed a church-owned gym—hardly a "primarily religious" institution—to invoke the Title VII exemption.

If a religiously oriented gym can invoke the Title VII exemption, so too can a college that has a significant religious component—whether or not the school is deemed "primarily religious." And the case law since *Amos* regarding religious schools confirms that conclusion: As far as we have been able to ascertain, since that decision no school that has claimed a religious mission or component has been denied a Title VII exemption, whether or not the school considered itself "primarily" religious or not.

**Specific Requests and Suggestions**

For all these reasons, we respectfully suggest and request that proposed Standard 2.8.1 be amended to be consistent with the non-entanglement/autonomy principle discussed above. Specifically:

1. Criterion (a) in the first paragraph should be removed because it is flatly inconsistent with the non-entanglement principle.

2. The first sentence of the second paragraph should also be deleted, in light of the possible mismatch between an institution's need to invoke the religious exemptions under Titles VII and IX and its possible need to invoke the religious exemption contemplated by Standard 2.8.1.

At a minimum, if COCA insists on keeping this sentence, the phrase "document that [it] is deemed exempt" should be revised to read simply, "show that it qualifies for an exemption, if applicable." This will allow the institution, if it chooses, to invoke the exemption in new Standard 2.8.1 without having to go through the unnecessary expense and uncertainty of applying for an express exemption under Titles VII and IX—assuming those exemptions even address the concern a particular school may have regarding a standard imposed by COCA.

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\(^{40}\) *Amos*, 483 U.S. at 336.

\(^{41}\) Id. at 336 (majority opinion by White, J.); id. at 340, 345 (Brennan, J., concurring).
3. The last sentence of the second paragraph and the associated footnote should also be deleted as inconsistent with the non-entanglement principle. Alternatively, if COCA desires more assurance that a school is claiming the exemption in good faith, COCA could do one of two things.

First, COCA could adopt a standard similar to that adopted by the D.C. Circuit in *Great Falls*, namely, creating a safe harbor for schools that are (a) non-profit, (b) hold themselves out to the public as religious, and (c) are affiliated with a recognized religious body or group.42 Here, as in *Great Falls*, this kind of standard would avoid the obvious and serious entanglement problems inherent in the second paragraph of new Standard 2.8.1.

Second, COCA could adopt another objective test for determining the applicability of the religious exemption contemplated by that Standard. One possibility is the test under Title IX, which merely requires a showing (a) that the institution “is controlled by a religious organization” and (b) that “the application of” a particular Title IX standard “would not be consistent with the religious tenets of such organization.” 20 U.S.C. § 1681(a)(3). Consistent with the non-entanglement principle discussed above, the latter requirement has long been interpreted to give wide latitude to the institution’s view of whether the application of some portion of Title IX “would not be consistent” with the institution’s “religious tenets.”43 Thus, the Title IX exemption could be used as a model for a religious school seeking an exemption from a particular COCA standard.44

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42 *Great Falls*, 278 F.3d. at 1343.

43 *See, e.g.*, 24 C.F.R. § 3.205 (suggesting that school can claim an exemption by submitting a letter to the Department of Education, but not any procedure for investigating that letter); Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Department of Education to Gregg Chenoweth, President, Bethel College, available at: http://bit.ly/1Zsz8pA (accepting school’s claims of exemption without modification or investigation).

44 The religious exemption under the Americans with Disabilities Act is even broader, and could also be used here. That law provides an exemption not only to religious organizations that are exempt under Title VII, but also to any other “religious organizations or entities controlled by religious organizations, including places of worship.” 42 U.S.C. 12187. Here again, this is an objective standard, one that easily satisfies the non-entanglement principle discussed above.
Thank you again for your efforts to find a reasonable accommodation for faith-based schools. We will be happy to answer any questions you may have, and to continue working with you toward that end.

Sincerely,

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