



# Religious Schools & Colleges Guidance for Same-Sex Issues

- 2 Introduction**
- 3 What Do Organizational Leaders Need to Know**
  - Obergefell
  - RFRA
  - SOGI Protections
    - Public Accommodation
    - Employment
    - Housing
    - Education
    - Federal Financial Assistance
- 11 Practical Applications Overview**
- 12 Specific Steps**
  - 12 Check the Corporate Charter and Bylaws
  - 15 Develop a Facility Use Policy
  - 16 Update Employment Policies and Practices
  - 17 Develop a School Admissions Policy
  - 20 Handbook and Disciplinary Procedures
  - 20 Provide Religious Instruction
  - 22 Housing
  - 22 Tax Exempt Status
  - 22 Consider Political Involvement
  - 23 Seek Legal Counsel

# *Practical legal steps to address same-sex marriage issues and related nondiscrimination laws for Christian schools and colleges*

## **A. Introduction**

Christian schools and colleges are under tremendous societal pressure these days to acquiesce to changing cultural standards regarding human sexuality, including same-sex marriage, claims of lesbian/gay/bisexual/transgender (LGBT) discrimination, and other sexual orientation/gender identity (SOGI) issues. As believers, we are called to live under God’s authority and with a consistent understanding of Biblical truths about human sexuality. The traditional Christian position on these truths, however, increasingly collides with expanded sexual and marriage legal rights.<sup>1</sup>

Recently, by a narrow majority, the United States Supreme Court ruled that the fundamental right to marry extends to same-sex couples. As a result, religious educational institutions are likely to face conflicts between this newly created constitutional right and their religious freedom and free speech. Some Christian schools and colleges may need to educate their students, families, and faculty on the Biblical and practical reasons for upholding marriage between one man and one woman. All Christian schools and colleges will need to prepare for potential new laws at the local, state, and federal levels that may not provide adequate protections for religious institutions, as well as for “test” cases that seek to expand the scope of existing laws.

Christian schools face potential legal issues on a variety of different fronts, including facility usage, admissions, and employment. How schools fare in a lawsuit will depend, in large part, on what precautions they have taken before an incident occurs. School and

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<sup>1</sup> This paper is one of three written in the Summer/Fall of 2015 by members and friends of the Christian Legal Society. The other two provide guidance for churches and Christian non-profit organizations. Because schools generally have more in common with colleges than churches or religious non-profits, we have combined these education categories. We fully recognize, however, the differing laws and circumstances that affect Christian elementary/high schools on the one hand, and Christian colleges and universities on the other. These differences are primarily due to the differences in the level of federal and state regulation of colleges and universities based on funding available to college students. This funding puts colleges and universities under more scrutiny for compliance with laws and regulations such as Title IX, FERPA, Violence Against Women Act, the Jeanne Clery Act, and a host of other governmental requirements, some of which are discussed in this paper.

college leaders need to learn about current legal issues and encourage their boards to address these issues by, among other things, adjusting current governance documents and practices as necessary. In short, the message to school leaders is preemptive actions now can pay dividends later.

The following materials are intended to help Christian educational leaders navigate through the legal minefields of sexuality and gender identity-related issues, particularly in light of rapidly shifting cultural norms and accompanying legal changes. CLS has already provided separate guidance materials for churches, for which related but distinctly different legal considerations may apply. Those materials are available at [religiouslibertyguidance.org](http://religiouslibertyguidance.org).

While legal and factual variations preclude more than general guidance, CLS's materials are intended to help in the following ways: (1) to educate religious educational leaders on current legal issues; (2) to suggest trustworthy and practical recommendations for addressing these issues responsibly; (3) to provide additional resources, such as sample language and related information as found at the end of this document; and (4) to do all these things with integrity and winsomeness for Christ. (See, e.g., *Colossians* 3:12: "Put on then, as God's chosen ones, holy and beloved, compassionate hearts, kindness, humility, meekness, and patience.").

**Because applicable federal, state, and local laws vary widely, this guidance is not intended to substitute for legal counsel specific to a Christian educational institution's own circumstances and geographic location. Consequently, it is highly recommended that knowledgeable nonprofit legal counsel be sought for specific questions and particular issues. CLS may provide referrals at [www.christianlawyer.org](http://www.christianlawyer.org).**

## **B. What Do Organizational Leaders Need to Know?**

America's legal heritage highly values religious liberty and free speech -- particularly so when an institution's religious beliefs are sincerely held, reflected in written governing documents, and lived out consistently. For religious liberty protections, a religious institution's doctrine matters, as reflected in both its words (what is contained in the organization's charter documents and policies) and deeds (what the organization actually *does*). Here's why words and actions matter from a legal standpoint.

## ***1. Changing Legal Protections for Same-Sex Marriage: Windsor, then Obergefell***

Twice in the past two years, the United States Supreme Court has addressed whether American governments must recognize marriage between persons of the same sex. In 2013, in *United States v. Windsor*,<sup>2</sup> the Supreme Court narrowly ruled (5-4) that it was unconstitutional for the *federal* government to define marriage as only existing between a man and a woman. While the definition of marriage had normally been left to the States, the federal government had passed a law defining marriage as existing only between a man and a woman, for purposes of over 1000 federal laws that allocated benefits and responsibilities based on marital status. Writing for the majority in *Windsor*, Justice Kennedy emphasized that marriage had always been a matter of definition by the States rather than the federal government, and therefore, since New York had legislatively approved of same sex marriage, the federal government's law treated unfairly different sets of married couples in New York. Justice Kennedy asserted that Congress's only reason for the law had been to demean persons who engaged in same-sex conduct. Essentially, in Justice Kennedy's view, the traditional definition of marriage was based on animus, or hostility toward homosexual persons.

But the *Windsor* decision did not address whether the *States* could define marriage as only between a man and a woman. In the wake of the *Windsor* decision, however, many lower federal courts applied *Windsor*'s "animus" rationale to strike down about half of the States' laws that defined marriage as between only a man and a woman.

On June 26, 2015, in *Obergefell v. Hodges*,<sup>3</sup> the Supreme Court narrowly ruled (5-4) that it was unconstitutional for any state government to define marriage as only existing between a man and a woman. Writing for the majority, Justice Kennedy relied on two provisions of the Constitution, the Fourteenth Amendment's Due Process Clause and its Equal Protection Clause, to rule that States cannot have laws that define marriage as only between a man and a woman. Justice Kennedy specifically claimed that the right to marry is a fundamental right that cannot be denied to same-sex couples for four reasons:

1. Personal choice regarding marriage is inherent in the concept of individual autonomy;

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<sup>2</sup> 133 S. Ct. 2675 (2013).

<sup>3</sup> 135 S. Ct. 2584 (2015).

2. Marriage is a two-person union unlike any other in its importance to the committed individuals;
3. Marriage safeguards children and families; and
4. Marriage is a keystone of our social order.

These four descriptions of marriage, of course, do not address whether the United States Constitution prohibits all fifty States from defining marriage as only existing between a man and a woman, as marriage has been defined in all societies for millennia.

Emphasizing this historical understanding of marriage, the four dissenting justices wrote powerful opinions. Their many potent arguments centered on the fact that the federal Constitution left the definition of marriage to the States and to the People, and should not be dictated by five unelected judges. The dissenters urged that the democratic process be permitted to work, as it had been doing for the past twenty years in the state legislatures, state courts, and public debate.

In addition, several dissenting justices expressed concern for the religious freedom of persons holding the traditional definition of marriage. In the majority opinion, Justice Kennedy acknowledged that “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.”<sup>4</sup> But none of the dissenting justices thought the majority had gone far enough to assuage religious believers’ legitimate concerns about practicing their faith under a constitutional regime requiring all States to recognize same-sex marriage.

The dissenters’ religious liberty concerns were fueled by answers given to their questions at the *Obergefell* oral argument by the United States’ top attorney, Solicitor General Verrilli. In response to Justice Alito’s question, General Verrilli had agreed that religious colleges’ tax-exempt status would likely become an issue for colleges that prohibited same-sex conduct by their students.<sup>5</sup> In response to Chief Justice Roberts’ question, General Verrilli avoided answering whether religious

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<sup>4</sup> *Id.* at 2607.

<sup>5</sup> Transcript of Oral Argument in *Obergefell v. Hodges*, No. 14-556, U.S. Supreme Court (April 28, 2015), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-556q1\\_3j4a.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_3j4a.pdf) at 36 (last visited May 24, 2015).

colleges would be allowed to prohibit same-sex couples in their married housing facilities. As Justice Thomas observed in his dissent, it is “all but inevitable” that the new definition of marriage and the religious definition of marriage “will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.”<sup>6</sup>

## **2. RFRA Legislation to Protect Religious Liberty**

As a result of the Court’s decision, federal and state laws that protect religious liberty are crucial. Because twenty-five years ago, in *Employment Division v. Smith*,<sup>7</sup> the Supreme Court greatly diminished the First Amendment’s protections for religious liberty, the primary protection for religious liberty at the federal level is the Religious Freedom Restoration Act (“RFRA”).<sup>8</sup> Enacted in 1993 by nearly unanimous bipartisan votes in Congress, RFRA recently has been attacked by organizations that support same-sex marriage. Keeping RFRA strong is crucial to preserving religious liberty in this country.

Similarly, where they exist, state RFRAs may provide critical protection for religious liberty at the state and local levels. To date, 21 States have enacted their own RFRAs, but each State should have its own RFRA. Separately, state nondiscrimination laws should contain explicit and expansive protections for religious liberty. While nondiscrimination laws traditionally contain some protection for religious liberty, organizations that support amending nondiscrimination laws to include sexual orientation and gender identity increasingly seem hostile to including any protection for religious liberty.

The federal RFRA and state RFRAs, as well as other laws aimed at protecting religious liberty, have never been more necessary, or more under attack. As Christian schools brace for further attacks on their religious liberties, RFRA and similar state laws offer essential protections.

At least thus far, a key element of legal protection has been for religious organizations to clearly demonstrate both that they hold specific sincere religious beliefs and how those beliefs are reflected in the actions they take. Accordingly, as described below, Christian schools seeking religious liberty protections must seriously consider making their doctrine on human sexuality more express in their governing documents,

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<sup>6</sup> 135 S. Ct. at 2638 (Thomas, J., dissenting).

<sup>7</sup> 494 U.S. 872 (1990).

<sup>8</sup> 42 U.S.C. §2000bb-1.

as well as developing or upgrading facility usage, student, employee, and housing policies.

### ***3. Increasing SOGI Protection in Public Accommodations, Housing, and Employment***

#### **Overview**

While sexual orientation and gender identity (“SOGI”) are not protected classes under most federal laws,<sup>9</sup> 22 states and many local jurisdictions have passed laws making sexual orientation and/or gender identity protected classifications. Generally speaking, such laws make discrimination on the basis of sexual orientation or gender identity illegal with respect to: 1) public accommodations;<sup>10</sup> 2) housing; and 3) employment. Sometimes these laws include narrow exceptions for religious schools (as well as for smaller-sized employers) and other religious institutions and individuals, but the protections are highly dependent on the specific language of the different laws.

As of June 2015, 28 states and many local jurisdictions do not have laws that recognize sexual orientation or gender identity as protected classifications. Whether such laws exist in a school's state or local jurisdiction is very important in determining what schools are legally required to do. *Note that a school may be in a state that does not have a SOGI law but may still be in a city or county that does have a SOGI law.* Regardless of whether the school is in a state or local jurisdiction with a SOGI law, it is wise for every Christian school to take the steps outlined below in case such laws are adopted.

#### **Specific contexts**

a. **Public Accommodation:** The term “public accommodation” generally means property that is open to the public, such as stores, restaurants, hotels, community centers, camps, museums, and parks. Regarding facility usage, Christian

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<sup>9</sup> Notably, the federal Equal Employment Opportunity Commission ruled on July 15, 2015 that a complaint based on sexual orientation falls within Title VII’s protection against sex discrimination. *See* EEOC Agency NO. 2012-24738-FAA-03; Appeal No. 0120133080. This decision, however, is completely contrary to numerous federal courts that have uniformly ruled against such an unwarranted extension of Title VII’s legal protections.

<sup>10</sup> 45 states have a public accommodation statute. All prohibit discrimination on the grounds of race, gender, ancestry and religion. In addition, 18 jurisdictions prohibit discrimination based on marital status, 22 prohibit discrimination based on sexual orientation and 18 prohibit discrimination based on gender identity.

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schools are not public buildings, and therefore there are no "equal access" rights that are often required for public schools. However, many states and local governments have "public accommodation" laws that require all public accommodations (typically such things as theaters, hotels, restaurants, retail stores, etc.) to serve the public without discrimination. Thus far, no court has ruled that a Christian college or school as a whole is a public accommodation, although two California courts have considered this possibility. In one case, two former students dismissed for lesbian conduct from a California Christian school unsuccessfully tried to convince an appellate court that selling football tickets, concessions, and school T-shirts made the school a public accommodation.<sup>11</sup> In a second case, a "male to female pre-operative transgendered person" sued California Baptist University when the school dismissed the student for lying on the admission application that he was female.<sup>12</sup> The threshold issue in the case was whether the University was a "business establishment" for purposes of the California civil rights act. The trial court noted that although certain portions of Cal Baptist's "off campus operations such as restaurants, theaters, and libraries" are "business establishments" within the meaning of the civil rights law, the University itself was a private nonprofit religious corporation that was not subject to the California civil rights act.<sup>13</sup> Therefore, according to this California trial court, Cal Baptist could not restrict access to transgendered persons to its food courts, theaters, sporting events and libraries, but it could restrict admission to its educational programs (and presumably to classrooms and dormitories).

b. Employment: Employment issues are more developed for religious organizations, including religious schools. These schools have at least two basic federal protections for their employment decisions. First, the federal law known as Title VII allows religious schools to require all employees to conform to their religious doctrine,<sup>14</sup> which includes conduct based on Biblical beliefs. In other words, religious schools may act on the basis of religion in their employment practices as to all employees. Notably, however, this federal protection applies only to federal discrimination claims; it does not protect against claims brought

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<sup>11</sup> Doe v. California Lutheran High School Ass'n, 170 Cal.App.4th 828 (2009).

<sup>12</sup> Cabading v. California Baptist University, Case No. RIC 1302245 (Cal. Sup. Ct., Co. of Riverside, July 11, 2014).

<sup>13</sup> *Id.* at 1-2.

<sup>14</sup> 42 U.S.C. §§2000e-1(a), 2000e-2(e)(2).



under state or local discrimination laws, for which similar protections may or may not exist.

Second, with respect to other potential discrimination claims, such as sex, disability, or age, religious schools may make whatever employment decisions they want as to employees who are “ministers” in the school. The U.S. Supreme Court affirmed religious schools’ religious freedom protections under the “ministerial exception,” in *Hosanna-Tabor Evangelical Lutheran School & School v. EEOC*.<sup>15</sup> In that 2012 decision, the Court ruled that the First Amendment barred a claim by a teacher at a church school, thereby recognizing that churches and religious schools must be left alone with respect to employment matters of their ministers. Consequently, defining staff members (such as the teachers who regularly give devotions in class, teach Bible and participate in chapel as in *Hosanna-Tabor*) as “ministers” may significantly increase a school's protection against legal liability if its belief or conduct policies are challenged.

Please recognize, however, that declaring a position as ministerial is not enough. The Supreme Court in *Hosanna-Tabor* found important the fact that the teacher played a formative role in the spiritual lives of the students by leading class devotions and at times chapel. Although a school can rather easily classify chaplains and those teaching religion as ministers, the school can extend this classification to other teachers who similarly play a formative role in the spiritual lives of students. To increase the strength of this classification, include the daily devotions/chapel leading in teachers' job descriptions, actually use the teachers for chapel and devotions, and evaluate these teachers in part on the performance of these religious duties.

c. Housing. Although Congress has passed no law prohibiting sexual orientation or gender identity discrimination in housing, the Department of Housing and Urban Development in 2012 issued a final regulation that HUD’s Office of Fair Housing and Equal Opportunity would ensure that HUD’s core programs (e.g., federally assisted housing) would be “open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status.”<sup>16</sup> In addition to this federal action, 21 states and the District of Columbia have laws prohibiting discrimination in housing on the basis of sexual orientation,

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<sup>15</sup> 132 S. Ct. 694 (2012).

<sup>16</sup> 77 Fed. Reg. 5662 (Feb. 3, 2012).

and 16 states and the District have laws prohibiting discrimination on the basis of sexual “identity” and/or “expression.”<sup>17</sup>

Although these laws do not affect the vast majority of Christian elementary, middle, and high schools where students live with parents/guardians, they affect Christian schools and colleges that receive federal funds and house students in dormitories and/or provide faculty housing. Two students claiming to be a different gender than their anatomy have filed complaints against CCCU schools alleging that these schools violated state and federal law in not allowing them to live in dormitories of their choice.<sup>18</sup> These schools both requested and received a letter from the U.S. Department of Education exempting them on religious grounds from Title IX’s sex discrimination provisions, but this exemption does not relieve the colleges from compliance with state and local laws. Moreover, because of the language in Title IX, it is uncertain whether independent institutions that are not “controlled by” a specific religious denomination or other religious order are eligible for this exemption.

d. Education. Title IX of the Education Amendments of 1972<sup>19</sup> states: “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.” Many state athletic associations, relying on Title IX, have implemented gender identity rules. Christian schools participating in athletic leagues governed by these state athletic associations face several unique issues. For example, will they be required to play a team with a transgendered student? How will they accommodate locker room facilities? ACSI has been able to influence some of these athletic associations to include a religious exemption in their rules.

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<sup>17</sup> See [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/LGBT\\_Housing\\_Discrimination](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination) .

<sup>18</sup> See <http://www.nytimes.com/2014/07/25/us/transgender-student-fights-for-housing-rights-at-george-fox-university.html> .

<sup>19</sup> 20 U.S.C. §§ 1681–1688.

## C. Practical Applications

### Overview

To optimize their religious liberty protections, Christian schools and colleges need to take at least the following five basic actions:

1. **Adopt** thoughtful, detailed theological statements regarding the following basic religious doctrines:
  - a. **Theological beliefs** – what the school believes regarding marriage, human sexuality (sexual conduct outside of marriage, including but certainly not limited to homosexual conduct), and gender identity;
  - b. **Where spiritual authority resides** -- the person or entity within the school or college (or the church with which it is affiliated) who has the ultimate say as to what the school’s doctrine is on these issues and how the doctrine is applied in specific contexts (employment, student conduct, housing, etc.);
  - c. **Christian dispute resolution** -- the school’s belief that Christians should not take one another to court and what alternative dispute resolution mechanism is to be used; and
  - d. **Explaining grace** -- the concepts of sin, grace, repentance, and restoration are essential Christian doctrines and practices, but they are increasingly foreign concepts to judges, political leaders, and reporters who may mistake the extension of grace in one instance as evidence of inconsistency in applying doctrine or even of discrimination among employees or students;
2. **State** clearly in organizational documents the religious nature of the school, including a concise statement of the school’s biblical philosophy of Christian education that emphasizes the integration of biblical principles and Scripture into every subject;
3. **Train** staff and volunteers, so that those who apply the policies are trained in the school’s theological understanding of its governing documents, policies and philosophy of Christian education, and the proper application of those policies, including who makes the final decisions to determine how the policies apply in particular contexts;

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4. **Apply** the policies consistently, because even solid policies will appear weak if they are not applied consistently, with their specific applications documented in writing, particularly if an application involves the extension of grace or acknowledgement of repentance; and
5. **Get** legal counsel's advice from a lawyer who is familiar with the applicable laws in the state and local jurisdiction in which the school operates. As was stated earlier, state and local laws vary widely, which is why any guidance must by nature be very general and not sufficiently specific to an individual school's or college's situation. Good legal counsel is a wise investment.

While nothing can guarantee that a school or college will not be sued regarding its stance on human sexuality or marriage, the practical steps outlined below may help avoid a lawsuit or at least better position a school or college in the event that it is sued. The above basic actions translate into the following checklist for upgrading a school's documentation and educational practices. Schools need to not only have board-approved documents and policies, but school administrators need to make sure that they are actively following those policies in actual practice. No lip service.

### **Specific steps**

1. ***Check the corporate charter and bylaws, and modify as needed.***

A key starting place is a school's governing documents: its articles of incorporation, constitution, bylaws, and written policies.<sup>20</sup> A Christian school's articles of incorporation should contain not only an educational purpose, but also integrate that purpose into an overall religious purpose statement, such as to educate the student academically and spiritually so that the student develops a biblical world view and reflects Jesus Christ in his/her life (or similar statement).

A Christian school's bylaws and/or constitution should contain the purpose statement, as well as several detailed statements of faith that contain doctrinal language regarding at least four main doctrinal issues.

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<sup>20</sup> Some schools operate as an integrated auxiliary of a church. In these cases, the school leadership should examine the church documents to ensure that they adequately address the school's religious character and operational standards.

**First**, a school should adopt a detailed, thoughtful statement reflecting Biblical standards for human sexuality in all of its dimensions, including not just homosexual conduct, but also marriage, sexual conduct outside of marriage, and gender identity. The theological statement should be rooted in the Bible with specific Scripture references. The statement should also incorporate historical Church documents on these topics, including specific denominational documents if the school or college is affiliated with a specific denomination. Several contemporary books and documents outlining basic Christian doctrine on these matters have also become available in recent years. If a school or college is not affiliated with a particular denomination, it should use historical Church documents and also feel free to incorporate other denominations' materials that reflect its beliefs. If a Christian school does nothing else to guard itself against religious liberty encroachment, this fundamental measure may provide significant legal protection. *See sample doctrinal language on marriage and sexuality.*

**Second**, the governing documents should also be clear as to where the spiritual authority to make decisions on different issues resides. A well written statement about where the spiritual authority to determine *what* the school's doctrine is and *how* that doctrine applies in specific contexts should be adopted. Again, the statement should draw on denominational or historical materials that explain why the spiritual authority resides in a particular person (e.g., the church pastor or the school headmaster) or in a governing body (e.g., the church board or school board). Even if such materials are inapplicable, a statement as to the school's religious beliefs as to where authority to make spiritual determinations for the school on various matters is necessary. As a general rule, courts are not supposed to second-guess religious institutions' spiritual decision-making, so it is important to make clear who has the spiritual authority on an issue. For example, the minister or the governing board may be the spiritual authority in deciding whether a family has the spiritual commitment for the admission of their child into the school. Similarly, a minister or the governing board may be the spiritual authority for deciding whether a particular use of church property (for example, showing a particular movie) comports with church doctrine. The spiritual authority for making decisions may vary within the same school depending on the particular issue. But the policies should be clear as to where the final spiritual authority on a particular issue is within the school.

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**Third**, the governing documents or policy manual should contain a clear exposition of the religious doctrine of Christian dispute

resolution, if the school sincerely holds such a doctrine.<sup>21</sup> The religious basis for the belief that Christians should not go to court against one another, based on *Matthew 18* and *I Corinthians 6*, should be explained. Historical and current documents, as well as denominational documents, that explain the doctrine should be incorporated into the statement. It is important that this be more than a requirement that alternative dispute resolution be used; the theological basis for the requirement must be explained and followed. This was an important factor in a church's and its school's defense against a claim of discrimination in the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,<sup>22</sup> and this will become even more important as Christian schools and colleges seek to keep sensitive and complex religious issues from being decided by secular judges increasingly unfamiliar with Christian worldview.

**Fourth**, the governing documents should explain the doctrines of sin, grace, repentance, and restoration. While these doctrines are at the heart of the Christian faith and govern Christian actions, they are increasingly foreign concepts in our society. Here is the reason why a clear explanation of these beliefs is particularly necessary in this context. If a lawsuit alleging discrimination on the basis of sexual orientation, gender identity, sex, or marital status were filed against a school by, for example, an employee, a judge or jury is much more likely to find that a school engaged in unlawful discrimination if the school applies its policies inconsistently. First, the inconsistency will be used to argue that the school is not sincere in its claims as to what its sincerely held religious beliefs are regarding marriage and sexuality. Second, the school's actions will look discriminatory if it seems to punish a female employee for a particular action (pregnancy outside of marriage) but does not punish a male employee for the same action. The same would be true if a homosexual employee was dismissed for sexual conduct in violation of the school's policies but a heterosexual employee was not dismissed for sexual conduct that violates the school's policies. The inconsistency may actually reflect the fact that the male employee or the heterosexual employee was repentant, whereas the female employee or the homosexual employee was not repentant. The school must explain its beliefs regarding sin, grace, repentance, and restoration in its written documents if it hopes to explain to a judge or jury that what looks like inconsistency is actually the legitimate application of basic Christian doctrine. The school must also carefully document in writing each case involving these issues and specifically how the school's religious

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<sup>21</sup> ACSI has developed a sample Christian mediation/arbitration statement available on its website or in its personnel forms packet available for purchase.

<sup>22</sup> 132 S. Ct. 694 (2012).

doctrine was applied in each case. Balancing the need to avoid legalism with the need for consistency is a delicate, but crucial, goal.

**Finally**, many Christian schools do not have members, or where they do, parents who have children enrolled in the school are designated as members. In the case of a school owned or operated by a church, the church's bylaws should have strong membership provisions. In the case of an independent or separately incorporated school, where there are provisions for members of the corporation, the bylaws should require members to either subscribe to the Statement of Faith or state that they understand and agree that their children will be educated in accordance with the Statement of Faith and philosophy of Christian education. Schools should also consider including a signature requirement in the admission application that requires parents to agree to abide by the conduct requirements for students and to have their child educated in accordance with the beliefs and philosophy of the school. *See sample language at the end of this document.*

## ***2. Develop a facility use policy, along with written use agreements.***

To protect against a “public accommodation” legal challenge, a school should have a written facility use policy that includes a requirement that its facility may be used **only** for purposes and in ways **consistent** with its doctrinal beliefs as reflected in the Bible and the school's governing documents, particularly with respect to human sexuality and other conduct. A school's permitted uses need not necessarily all be religious instruction or related activity, but they should at least be in furtherance of the school's educational and religious mission. A statement that the facility uses will be in accordance with the Bible is better than no statement, and a statement that precludes facility use for an event contrary to the school's religious beliefs is better still. But the best approach is to augment these general statements with specific statements about how the school understands the Bible's teachings on specific issues that might arise, with references to the Bible and specific school governing documents. *See sample facility use policy at the end of this document.*

In addition, a Christian school should have written agreements with each user of its facility (whether long-term or short-term, whether paid or unpaid). Such agreement should include language reflecting how such facility use ties into the school's mission and understanding of Biblical teachings. In addition, the agreement may include other key considerations, such as allocation of responsibilities, fees charged (if



any), and other typical provisions for any space usage agreement (as may be developed by qualified legal counsel). In particular, a practice of charging fees may have resulting implications regarding “public accommodation” and property tax exemption issues, both of which should be carefully evaluated by experienced legal counsel.

**3. *Update employment policies and practices to clearly reflect the Christian school’s religious identity, especially on marriage and sexual issues.***

Christian schools should reflect their religious nature in their employment documents and practice. Potential options include identifying religious aspects in written job descriptions, inserting statements of faith or other doctrinal language in employee handbooks, using written codes of conduct requiring all staff to serve as a Christian role model and defining what this means biblically, and emphasizing regular prayer time at staff meetings, prayer with and spiritual mentoring of students, class prayer, Bible teaching, integration of faith and learning, and other religious expressions on a daily basis. Contracts, where used with staff, should require agreement with the Statement of Faith and serving as a Christian role model. *See sample contract and employee handbook language at the end of this document.*

Specifically, written explanations of each position’s religious significance, the religious requirements of the job, and the religious standards of conduct for the employee should be written into job notices, applications, job descriptions, employee contracts, employee handbooks, employee reviews, and termination documents. Employees should be required to sign documents on an annual basis indicating that they agree with the school’s beliefs, standards of conduct, and all religious requirements of their position, and understand that violation of such standards constitutes cause for termination of their employment. Finally, schools should include spiritual mentorship of students, integration of faith and learning, and Christian role modeling in faculty performance evaluations.

Biblical standards regarding sexual behavior (not just related to homosexual behavior) should be expected and followed for all employees, with appropriate accompanying staff training regarding the expectation that employees will live according to these biblical standards of conduct. In addition, employees should be required to submit to the school’s disciplinary protocols as a condition of employment, such as using Christian mediation and arbitration for all disputes. *See sample Christian conciliation/arbitration statement at the end of this document.*

Staff should be identified as "ministers" to the degree appropriate.<sup>23</sup> Employment documents and other Christian school documents should describe in detail the substantial religious dimensions of their job duties (e.g., daily class devotions, occasional chapel devotions, Bible teaching, prayer, spiritual discipleship of students, incorporation of biblical teaching into the curriculum, etc.) and should provide the biblical basis for the school's understanding of the ministerial role the employee performs. The religious training required to be a teacher/staff member should be described and met by employees and evaluated by employers.

The above safeguards may be particularly helpful because a "ministerial" position is generally exempt from federal and state anti-discrimination prohibitions. Further lessons from the Supreme Court's *Hosanna-Tabor* decision for qualifying a position as "ministerial" are as follows: (1) include an objective rationale (e.g., per Scripture and/or church history) in written job descriptions; (2) use job titles that incorporate "ministerial" aspects; (3) use job descriptions and performance criteria that support a "ministerial" designation; (4) reflect ministerial criteria in job evaluations and disciplinary standards; (5) require a school employee to affirm in writing (e.g., in contract, annually) his or her agreement with the school's religious doctrine and willingness to abide by the school's standards of conduct as a condition of employment; and (6) require such employee (as well as all other employees), to affirm in writing his or her agreement to abide by the alternative dispute resolution mechanism that the school requires and the biblical basis for the requirement. *See sample employment contract language at the end of this document.*

**4. *Develop a school admissions policy that articulates a clear biblical philosophy of education and requires families to agree to students being educated in light of the biblical principles.***<sup>24</sup>

A Christian school is a private, religious organization to which courts have traditionally given great latitude to make admission

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<sup>23</sup> Some school leaders may be reluctant to identify staff positions as "ministers," but the term has an important legal meaning that should not be lightly forfeited. All positions that legitimately fit the ministerial exception's legal definition of "minister" should be thoughtfully and carefully identified as such.

<sup>24</sup> This section is primarily directed to elementary/secondary schools since colleges and universities deal directly with the admission of students who are usually adults. Also, many Christian colleges do not require a faith commitment from students, which creates a different dynamic from those that require a faith commitment of all members of the community.

decisions. Once admitted, however, it is more difficult to expel a student than to deny admission in the first place. Therefore, K-12 schools should have a variety of checkpoints where the commitment of parents to the school's mission and religious values can be ascertained. Best admission practices include: (1) an information packet that describes the school and clearly explains the school's mission and fundamental beliefs; (2) an application that includes information on the prospective student's father and mother, and the status of their marital relationship, and also includes a section saying that both parents and student<sup>25</sup> have read the student handbook and agree to abide by the policies and conduct code in the student handbook; and (3) a personal interview of all new students and parents, where questions on family background, behavior, church membership, and beliefs can be explored. Those colleges and universities that admit only Christian students can require a statement of spiritual beliefs as part of the application, and then follow up with a conversation during an admissions interview.

Three phrases that must be etched in the admission policy of a Christian school are "full disclosure," "routine standard of practice," and "clarity of commitment." If the Christian school focuses on these three elements, it strengthens its chances of defending its admission decisions.

The first element ("full disclosure") means that at the various junctures of the admission process, the Christian school fully discloses to the applicant/parent that it has a religious purpose, that it is a religious school that adheres to biblical standards in teaching and conduct, and that a breach of this standard can lead to dismissal. The clear message to convey in an information packet, application, student handbook, and interview is that the Christian school takes its faith seriously.

The second element ("routine standard of practice") means that the school follows the same routine for new applicants. A routine standard allows the school's representatives to say, very honestly, that the same procedure applies for all new applicants (or at least for applicants who are not members in good standing of one of the school's supporting churches). The same practice, of course, inherently means that the school is not treating anyone differently than someone else, and it adds great authority to the process.

The third element ("clarity of commitment") underscores the importance of obtaining the applicant's knowing commitment to the values of the school. Although a Christian school has great evidence to

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<sup>25</sup> Depending on grade level.

support its position if it points to the regularity of its application process, not surprisingly the most powerful evidence to have is the parent's signature that s/he read the information packet, application, and student handbook, and that s/he fully understands the importance of the school's religious values and conduct code.

Keeping these three principles in mind, every information packet sent to prospective applicants/parents should describe the school, include an explanation of the school's religious mission, beliefs, and philosophy of Christian education, and should also include the student handbook. The packet should describe the admissions process, and the various elements the school evaluates in determining admission, including spiritual and conduct criteria. Finally, the packet should refer the applicants/parents to the student handbook, and ask the parents to read it, and to proceed with the application process only if they agree to abide by the student handbook.

The application should also refer to the student handbook, and ask the college applicants or K-12 parents to sign it in order to acknowledge that they have read it, understand it and, in the case of K-12 parents, have spoken to their child about it. The signed copy of this page should be kept in the student's school records. In addition, for K-12 schools, the application should ask about the student's biological father and biological mother, and should ask about the status of the relationship of the parent submitting the application (married, divorced, never married, deceased). Ask if the child lives with the biological parents and, if not, ask the family to explain.

An interview is another great opportunity to explain the religious mission of the school, its values, and what it expects of students. This is another chance to ask the parents about their spiritual commitment as well as their child's, and their commitment to adhere to the school's mission and student handbook code. The interview process, as well as the application and information packet, should clearly put parents on notice as to the importance of religion and conduct at the school, giving them little room to claim that they were misled in the application process. The interview process should only be handled by the headmaster or the admissions director, in order to insure that the interview is handled by someone highly qualified and trained to handle this sensitive process. This centralized process, together with a common list of questions, also helps standardize these interviews to ensure that all of the relevant information is covered and to guard against charges of different treatment of applicants.

## **5. *Handbooks and disciplinary procedures***

All Christian schools should have student and employee handbooks, and all student and employee handbooks should emphasize and explain the school's religious mission, its statement of faith, and its philosophy of Christian education. The handbooks should also detail all prohibited conduct and the discipline for the conduct, all supported by scriptural references. All employees should annually sign the employee handbook. All high school-aged and college students and their parents, as well as the parents of all minors, should sign a statement that they have received the student handbook, have read it, and agree to abide by the conduct provisions. These signed pages should be kept in the student's records for safekeeping and ease of finding them should they be needed.

## **6. *Provide religious instruction, worship services and teaching on biblical sexuality.***

The legal implications of *not* including strong religious elements in a school's governance and operations are illustrated by a case involving two prominent Hawaiian schools.<sup>26</sup> In 1884, a member of the Hawaiian royal family created a trust to build and maintain forever two schools, one for boys and the other for girls, and directed that the teachers for these schools "shall forever be persons of the Protestant religion." A little over 100 years later, the federal government challenged this provision, and the schools defended on the grounds that this is what the donor wanted, and that as a religious school, Congress under Title VII of the Civil Rights Act had permitted it to hire on the basis of religion. In examining the Civil Rights Act defense, the appellate court examined:

- whether there was an affiliation between the school and a church (there was none)
- the school's purpose ("equipping students with ethical principles that will enable them to make their own moral judgments" does NOT equal religious instruction)
- whether there was a requirement that teachers remain in good standing with a Protestant church after initial hiring (there was none)
- whether the teachers integrated faith and learning (there was none)
- how many teachers taught religion classes (only three out of 250)

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<sup>26</sup> *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir.).

- whether students were admitted without being asked about religious affiliation (yes, they were)
- whether the curriculum was taught from a religious perspective (the court found that math, science, English, languages and social studies were all taught from a secular perspective)
- whether there was any instruction in Protestant doctrine (there was none)
- the level of required worship service attendance (15-30 minutes per week of Bible studies in elementary school, and comparative religion in high school, but also weekly mandatory chapels were not enough)
- the presence of prayer (which was often -- before meals, athletic events, prayer and hymn singing at mandatory events)

The court concluded that the schools were "an essentially secular institution operating within an historical tradition that includes Protestantism, and that the Schools' purpose and character were primarily secular, not primarily religious."<sup>27</sup> The schools could not, therefore, hire only Protestants.

If this circuit court similarly examined your school, how would your school fare? How religious is your school? Does the school integrate faith and learning so that even mathematics is taught from a Christian perspective by showing how God is the creator of order? Is the school's stated purpose expressly religious? Does the school have daily (or weekly) devotions? Is prayer said before the school day (or before each class)? Does the school require teachers to sign and remain faithful to a statement of faith, or does it require teachers to remain in good standing in their churches? Does the school examine the religious affiliations and convictions of new students and their parents? Obviously, the more religious the school is, the better its defense will be if challenged in court.

The Bible is full of teachings about God's intent for human sexuality, including the creation story, Old Testament stories about consequences of sexual sin, the Church as the bride of Christ, divorce, admonitions against sexual immorality, and the joys and limitations of Biblically-ordained marriage. Through such teachings, believers have much to learn about our loving God, His plans for our lives, and our role in serving Him with our whole bodies, minds, and hearts. Of course, it is critical that such teachings be done with thoughtfulness, compassion, humility (with due regard for our fallen human condition), hopefulness,

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<sup>27</sup> *Id.* at 463–64.

love, and above all – the Gospel message of salvation through faith in Jesus Christ.

### ***7. Housing***

As reflected above, the recurrent theme for all these practical steps is to become more religiously focused and biblically based in word and deed. This is also true with respect to student and faculty housing provided by the school or college. The Department of Education has issued letters to at least 12 CCCU schools exempting them from the provisions of Title IX, and hopefully will continue to do so in the future. The job of the Department in granting these exemption requests is easier if the college is intentionally religious in word (policies) and action. Some state statutes and local ordinances also have religious exemption provisions. Generally, the burden of proof falls upon the school that is claiming the exemption, so the more religious the school is, the easier it is to overcome this burden of proof.

### ***8. Tax-exempt status***

At the *Obergefell* oral argument, Justice Alito asked Solicitor General Verrilli about whether religious schools might lose their tax exempt status if they prohibit same-sex conduct among their students. Senator Verrilli responded that might well be an issue. While the IRS Commissioner recently claimed that religious schools' tax exempt status would not be questioned for at least 2-3 years, it is nevertheless important for schools to monitor legislation because (a) as we have seen, the law can change, and (b) tax exemption at the state and local levels is not necessarily dependent on federal tax-exempt status.

### ***9. Consider political involvement***

Our elected leaders are people, too, and they need to hear from their constituents. Consequently, administrators, parents of Christian school students, and Christian college students should consider contacting their legislators about moral aspects of pending laws or other legislative matters. In addition, when voting for political candidates, believers should seriously consider those candidates who affirm and protect religious liberties. One important caveat for Christian schools and other nonprofits: be careful about political campaign prohibitions and lobbying restrictions for nonprofits. Political campaign activity may be done in a personal capacity, but is absolutely prohibited when done as a paid employee on duty on behalf of a specific school or other nonprofit. Lobbying may be done corporately but only to a limited extent.



## ***10. Seek legal counsel***

This legal guidance can only be provided on a general level. Accordingly, Christian schools are encouraged to seek out attorneys who are knowledgeable and experienced in these legal areas, for specific application within their own jurisdictions and suited to their own organizational structure, programs, and concerns. The Christian Legal Society maintains a list of attorney members, with specified areas of legal practice in specific jurisdictions, including those who practice in the areas of nonprofit organizations, constitutional law (religious liberty and free speech), and employment. *See [www.christianlawyer.com](http://www.christianlawyer.com) for further information.*<sup>28</sup>

### **D. Concluding Remarks**

The legal landscape continues to evolve, but God is unchanging. So stay tuned to the news, and keep living out your faith. Remember that nothing is too hard for the Lord. (Gen. 18:14) Regardless of what a Christian school may or may not do to protect its religious liberty interests, God can provide a hedge of protection for believers. Correspondingly, however, as Christians we are to expect persecution for our beliefs and actions, and such times give us yet further opportunities to evidence the grace, love, and hope that we derive from our belief in Christ. So we need to remain prayerful, act prudently, and continue seeking Godly guidance.

#### **DISCLAIMER**

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*For specific legal advice, which will be needed, please see attorney referrals at [www.christianlawyer.org](http://www.christianlawyer.org).*

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<sup>28</sup> ACSI members should check their membership benefits for information on legal services.