



September 12, 2022

ED-2021-OCR-0166  
U.S. Department of Education  
400 Maryland Ave. SW,  
PCP-6125  
Washington, DC 20202

**Re: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance—Docket ID ED-2021-OCR-0166**

To Whom It May Concern:

First Liberty Institute (“First Liberty”) submits this comment regarding the proposed rulemaking, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” promulgated by the U.S. Department of Education’s (“The Department’s”) Office for Civil Rights (“OCR”).

First Liberty is a nonprofit, public interest law firm. Our mission is to defend religious liberty for all Americans through pro bono legal representation of individuals and institutions of diverse faiths—Catholic, Protestant, Islamic, Jewish, Buddhist, the Falun Gong, Native American religious practitioners, and others. For over thirty years, First Liberty attorneys have worked to defend religious freedom before the courts, including the U.S. Supreme Court, as well as testifying before Congress, and advising federal, state, and local officials about constitutional and statutory protections for religious liberty.

First Liberty opposes several of the Department’s proposed revisions to its Title IX regulations because the rulemaking encourages, and in some cases requires, recipients of Federal funds to shame, silence, refute, investigate, and/or punish its students and staff because of their longstanding, sincerely held religious beliefs about human sexuality and life. Certain provisions of the Department’s proposed rulemaking will encourage recipients to attack many good people of faith—students, instructors, and administrators—at K-12 and secondary schools nationwide by: defining sexual harassment so broadly as to include religious exercise and speech; requiring religious students, instructors, and administrators to give unequivocal support for certain expressions of human sexuality; applying Title IX requirements to include private conduct, including conduct occurring outside recipient program and activities; and mandating that religious teachers and administrators deliver students to Title IX Coordinators who will encourage students to engage in conduct that the instructor or administrator may believe, because of his or her religious beliefs, to be harmful to the student, such as obtaining an abortion, engaging in sexual activity outside of marriage, or altering the student’s body by undergoing certain medical interventions—many of which are irreversible—because of the student’s gender identity.

## The Department Should Correct Certain Proposed Revisions to Protect Religious Exercise

To protect the religious freedoms of students and staff, the Department should revise the following provisions:

- A. § 106.2 Definition of Sex-Based Harassment: (2) Hostile Environment Harassment<sup>1</sup> and,
- B. § 106.10 Scope<sup>2</sup>

In proposed § 106.2, “Definition of Prohibited ‘Sex-Based Harassment,’” and § 106.10, “Scope,” the Department announces a new definition of sexual harassment and sex discrimination with unprecedented vagueness and reach. The Department must correct these provisions to regulate conduct that is clearly defined and limited to behaviors that the Department has regulatory authority to control (that is, behaviors that constitute sex discrimination within the meaning of Title IX).

In proposed § 106.2, “Definition of Prohibited ‘Sex-Based Harassment,’” the Department establishes a hostile environment framework that will require recipients to perform a fact-intensive balancing test to determine whether to investigate and punish a student or staff member whose words or actions may have created a “hostile environment” for another person.<sup>3</sup> Recipients must examine factors such as the degree to which the conduct in question affects the complainant’s access to the education program; the type, frequency, or duration of the conduct; previous interactions between the parties; any factors about each party that may be relevant to evaluating the effects of the unwelcome conduct; the context in which the conduct occurred; the level of control the recipient has over the respondent; and the occurrence of other sexual harassment incidents in the recipient’s education program.

To understand what constitutes sex discrimination under the 2022 proposed rule, recipients must apply the definition of sex-based harassment to proposed § 106.10, “Scope.” In this provision, the Department introduces several new categories of prohibited conduct: discrimination based on sex stereotypes, sex characteristics, sexual orientation, gender identity, and pregnancy or related conditions. The Department states that it does not intend the list of categories in proposed § 106.10 to be exhaustive,<sup>4</sup> and the Department declines to define the term “sex” in its Title IX rulemaking.<sup>5</sup>

In addition, proposed § 106.2 and § 106.10 are unclear as to what actions constitute a hostile environment. Because the recipient must perform a balancing test, no one can know until

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<sup>1</sup> “Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and *evaluated subjectively and objectively*, denies or *limits* a person’s ability to participate in or benefit from the recipient’s education program or activity (i.e., creates a hostile environment).” 87 FR 41569 (July 12, 2022) (emphasis added).

<sup>2</sup> “Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”

<sup>3</sup> 87 FR 41569 (July 12, 2022).

<sup>4</sup> 87 FR 41532 (July 12, 2022).

<sup>5</sup> 87 FR 41528 (July 12, 2022).

after the conduct has already taken place and the recipient has completed the subjective balancing test. Moreover, no one can know exactly what factors the recipient will consider, because the Department declines to provide an exhaustive list of relevant factors.<sup>6</sup> Recipients can consider “additional relevant factors,” unknown to students and staff and dependent entirely on the recipient’s own judgment.<sup>7</sup>

Moreover, the Department offers numerous conflicting examples of conduct that may create a hostile environment: a complainant’s grades might go down, or they might not.<sup>8</sup> A complainant may stop attending class, or not.<sup>9</sup> A complainant may quit a sport’s team, or not.<sup>10</sup> Conduct might be more threatening if it occurred in private, or conduct might be more humiliating if it occurred in a public space.<sup>11</sup> A person can create a hostile environment “even if the harassment is *not targeted specifically at the individual complainant*.”<sup>12</sup> “[R]epeated hostile comments” about sex stereotypes, sex characteristics, pregnancy or related conditions, a person’s sexual orientation, or gender identity would likely establish a hostile environment, although not if a statement is merely a “one-off comment.”<sup>13</sup> Recipients do not need to consider some factors if other factors are present. For example, the more severe the conduct, as determined by the recipient, the less necessary it is to show that the conduct occurred repetitively.<sup>14</sup>

Do comments expressing the belief that God created each person with a specific biological sex create a hostile environment under § 106.2 and § 106.10? What about comments that God loves unborn children and desires them to have life? Can a person decline to use pronouns because of his or her religious beliefs under § 106.2 and § 106.10, or would such a declination create a hostile environment? Such discretion will foreseeably harm numerous religious students and staff , as we explain in more detail below.

### C. § 106.11 Application<sup>15</sup>

In proposed § 106.11, the Department is broadening its scope to apply on campus, off campus, inside the United States, outside the United States, and even outside school-sponsored activities. In light of the new vague definitions of sexual harassment and sex discrimination, the Department is creating even greater potential for recipients to use § 106.11 to punish students, staff, and administrators for expressing religious beliefs that a recipient might mistakenly characterize as “hostile” to a person who received an abortion or identifies as transgender,

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<sup>6</sup> 87 FR 41416 (July 12, 2022).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> 87 FR 41417 (July 12, 2022).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> “For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority. A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.” 87 FR 41571.

among others. The Department must define with more clarity when a person is not under threat of investigation or punishment under the recipient's new, expanded Title IX powers. May a teacher express pro-life beliefs in an online forum? May a student express his or her religious beliefs about human sexuality at a school football game?

#### D. § 106.31(a)(2) Education Programs or Activities<sup>16</sup>

In proposed § 106.31(a)(2), the Department prohibits recipients from adopting a policy or engaging in a practice that separates students by biological sex in its education programs and activities. This provision violates the text of Title IX itself, which permits separation by biological sex in living facilities. Title IX provides, in relevant part, that, “[n]otwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the *different sexes*.”<sup>17</sup>

The Department's proposed changes will fundamentally alter longstanding Title IX regulations that permits schools to separate the sexes in multiple circumstances. Schools may separate males and females in housing, toilets, locker rooms, and shower facilities, as long as the provision is both “proportionate” and “comparable.”<sup>18</sup> The Department permits recipients to operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.<sup>19</sup>

Courts have discussed the important privacy interest students possess in physical separation from the opposite sex when an individual is unclothed or partially clothed.<sup>20</sup> Some separations on the basis of biological sex are not only permissible under Title IX, but also protect

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<sup>16</sup> “Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex.” 87 FR 41571

<sup>17</sup> 34 C.F.R. § 1686 (emphasis added).

<sup>18</sup> 34 C.F.R. §§ 106.32(b), 106.33.

<sup>19</sup> *Id.* at § 106.41(b).

<sup>20</sup> *See G.G. ex rel. Grimm v. Gloucester County School Bd.*, 822 F.3d 709 (4th Cir. 2016) (Niemeyer, J., dissenting) (“An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind. *See, e.g., Doe v. Luzerne Cnty.*, 660 F.3d 169, 176–77 (3d Cir. 2011) (recognizing that an individual has “a constitutionally protected privacy interest in his or her partially clothed body” and that this “reasonable expectation of privacy” exists “particularly while in the presence of members of the opposite sex”); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (explaining that “the constitutional right to privacy ... includes the right to shield one’s body from exposure to viewing by the opposite sex”); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) (“Students of course have a significant privacy interest in their unclothed bodies”); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (explaining that “[t]he right to bodily privacy is fundamental” and that “common sense, decency, and [state] regulations” require recognizing it in a parolee’s right not to be observed by an officer of the opposite sex while producing a urine sample); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981) (recognizing that, even though inmates in prison “surrender many rights of privacy,” their “special sense of privacy in their genitals” should not be violated through exposure unless “reasonably necessary” and explaining that the “involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating”).

important interests, like privacy or the safety of women in contact sports. In athletic programs, this is especially true, as the biological differences between males and females demonstrate.<sup>21</sup>

Correcting past errors of judgment that overemphasized the differences between men and women should not result in a present failure to acknowledge the real differences that exist between the two sexes. The Supreme Court noted this problem in *Tuan Anh Nguyen v. INS*, in which the Court upheld, against an equal protection challenge, a federal immigration standard that made it easier to establish citizenship if a person had an unwed citizen mother than if a person had an unwed citizen father.<sup>22</sup> The Court stated:

To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. ... The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.”<sup>23</sup>

Thus, the Department should continue to allow recipients to separate students by biological sex in certain circumstances.

#### E. § 106.44(c)(1)–(2) Notification Requirements<sup>24</sup>

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<sup>21</sup> See, e.g., *Brief filed by the American Civil Liberties Union, American Civil Liberties Union of Northern California, and Association for Gender Equity Leadership in Education in support of Appellants at 19, Mansourian v. Regents of the Univ. of California*, No. 08-16330, 602 F.3d 957 (9th Cir. 2010) (“Athletic competition is unique in that it is both the only educational activity that regularly separates males and females and the only educational activity in which *segregation may be necessary* to provide equal opportunities to males and females.”) (emphasis added).

<sup>22</sup> *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001).

<sup>23</sup> *Id.* at 73.

<sup>24</sup> “An elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that *may* constitute sex discrimination under Title IX.” 87 FR 41572 (emphasis added).

“All other recipients must, at a minimum, require... [a]ny employee who is not a confidential employee and who has authority to institute corrective measures... to notify the Title IX Coordinator when the employee has information about conduct that *may* constitute sex discrimination under Title IX.” *Id.* (emphasis added)

“Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising ... to notify the Title IX Coordinator when the employee has information about **a student** being subjected to conduct that *may* constitute sex discrimination under Title IX.” *Id.* (emphasis added)

“Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising ... and has information about an **employee** being subjected to conduct that *may* constitute sex discrimination under Title IX” must either (A) notify the Title IX Coordinator, or (B) provide the contact information of the Title IX Coordinator and information about how to report sex discrimination...” *Id.* (emphasis added)

Under proposed § 106.44(c)(1)–(2), teachers and administrators must report to the recipient all possible conduct that might create a hostile environment, despite that person’s professional judgement or personal beliefs about what constitutes a hostile comment under §106.2 and § 106.10 and despite the fact that many religious instructors or administrators may not wish to refer students for counseling that will encourage them to obtain an abortion or puberty blocking medications.

Proposed § 106.44(c)(1)–(2) is another example of an overbroad, overreaching, and coercive regulation that will result in a hostile environment for school staff who, because the Department defined so broadly Title IX’s “hostile environment” and scope, must report any possible statement or conduct that the teacher observes. If a student does not wish to inform the recipient, this provision will chill students’ willingness to discuss these issues with their instructors, and will control how instructors give advice or offer support to students.

In addition, many religious teachers and administrators cannot in good conscience support the approach the Department requires Title IX Coordinators to take under Title IX regarding affirming a student’s decision to get an abortion, choosing to engage in sexual activity outside of marriage, or changing his or her body—often through irreversible medical interventions—to conform to a preferred gender identity. While instructors and administrators will not generally attempt to convince others, including students, to share their religious convictions about human sexuality, there should be space for honest dialogue about such important matters, and the Department should not force teachers to deliver students to school officials who will counsel students to harm themselves, according to the teacher’s sincerely held religious beliefs. Thus, the Department should change § 106.44(c)(1)-(2) to permit teachers and administrators to decline to report conduct to the Title IX Coordinator in certain circumstances.

### Numerous Religions Teach a View of Sex and Gender That Will Conflict with the Definition and Scope of Sexual Harassment as the Department Defines It

Research on religious beliefs shows that religions from diverse cultures and geographic regions assert—and have asserted for millennia—that sex is an objective, binary category that cannot be changed by self-perception or medical intervention.<sup>25</sup> If the proposed regulations discussed above are implemented, the Department will be inviting recipients to attack the faith of

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<sup>25</sup> See, e.g., Christopher Yuan, *Gender Identity and Sexual Orientation*, THE GOSPEL COALITION, <https://www.thegospelcoalition.org/essay/gender-identity-and-sexual-orientation/>

individuals from numerous religions, including: Confucianism,<sup>26</sup> Buddhism,<sup>27</sup> Sikhism,<sup>28</sup> Falun Gong,<sup>29</sup> Orthodox Judaism,<sup>30</sup> Shi'ah and Sunni Muslims,<sup>31</sup> Baha'i,<sup>32</sup> Church of Jesus Christ of

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<sup>26</sup>Ersheng Gao. *How does Traditional Confucian Culture Influence Adolescence in Three Asian Cities?*, NATIONAL LIBRARY OF MEDICINE, Nov. 18, 2014, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4235616/#:~:text=Confucianism%20sees%20sexuality%20as%20a%20boo.of%20marriage%20is%20not%20condoned> (“Traditional Confucian culture, the common base of social culture in the mainland of China, Taiwan and Vietnam, is a complex system of moral, social, political, and religious thought with regard to individual’s relationships with others and appropriate conduct. Its core concepts advocate filial devotion to family and priority of collective interests, self-cultivation of virtue and *unequal gender roles*.”) (emphasis added); see also Megan Pellouchoud, *Women’s Biological Threat to Confucian Social Order: An Examination of Gender Constructs through an Analysis of Pre-Modern Chinese Literature*, OREGON UNDERGROUND RESEARCH JOURNAL, 2018, [https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/23514/OURJ\\_spring\\_2018\\_MPellouchoud.pdf?sequence=1&isAllowed=y](https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/23514/OURJ_spring_2018_MPellouchoud.pdf?sequence=1&isAllowed=y) (“[T]he biological processes associated with female reproduction are ranked on a hierarchical scale reflecting women’s social position that conforms with Confucian gender hierarchies and social mores.”)

<sup>27</sup> Rita M. Gross, *Why Go Beyond Gender?*, SHAMBHALIA PUBLICATIONS, March 27, 2018, <https://www.shambhala.com/go-beyond-gender-excerpt-buddhism-beyond-gender/> (“Clinging to gender identity and letting conventional ideas about gender dictate one’s life thus contradicts all central Buddhist teachings. One would then also have to contend that egolessness is gendered, which would be a self-contradictory, illogical proposition.”); Peter A. Jackson, *Male Homosexuality and Transgenderism in the Thai Buddhist Tradition*, (1993) <http://buddhism.lib.ntu.edu.tw/museum/TAIWAN/md/md08-52.htm>. (“*Pandaka* refers to male tranvestites and [effeminate] homosexuals... The scriptures describe the Buddha as expressing a compassionate attitude towards people who began to show cross-gender characteristics after ordination and to those who, while attracted to members of the same sex, were regarded as being physiologically and behaviourally true to the then prevailing cultural notions of masculinity. However, the Buddha opposed accepting into the *sangha* those who openly expressed cross-gender features at the time they presented for ordination. Volume Four of the *Vinaya* recounts a story of a *pandaka* who violated the clerical vow of celibacy and whose bad example led to a comprehensive ban on the ordination of *pandaka*.”)

<sup>28</sup> Jung Nihang, *The Manipulation of Gurbani and the Sikh Gurus for Gender Politics*, May 13, 2021, <https://jodhsingh.medium.com/the-manipulation-of-gurbani-and-the-sikh-gurus-for-gender-politics-77225b1c9cb7> (“Although it is true that the “idea of gender” has changed wildly throughout different times and different cultures, we don’t see any specific examples of that type of deconstruction within the span of Sikh history. In fact, as mentioned earlier via the Manji-Pir system and Singh-Kaur, the solidification and acknowledgement of male and female genders is socially built into Sikh institutions. Norms of masculinity and femininity have indeed evolved, but *this does not mean that such norms did not exist* — in fact, traditional Sikh canon conveys the exact opposite.”)

<sup>29</sup> Falun Dafa InfoCenter, “*Intolerant*”?, <https://faluninfo.net/misconceptions-intolerant/> (“With regards to sexual ethics, Falun Gong holds traditional views similar to the teachings of Buddhism or Christianity. In short, Falun Gong aims at taking attachments and desires lightly, including sexual desire, and stipulates that sexual relations should only occur in the context of monogamous, heterosexual marriage. However, we make no attempt to impose these views on others, certainly not to non-practitioners. And, in keeping with our values of compassion and tolerance, we believe that we should treat all people equally and with kindness, even if we might not agree with what they choose to do in their personal lives.”)

<sup>30</sup> Aaron H. Devor, *Transgender People and Jewish Law*, DE GRUYTER, 2016, <https://www.degruyter.com/document/doi/10.1515/9783110434392-022/pdf> (“Orthodox Judaism generally does not accept that a person can change gender/sex. However, for purposes of public order and propriety, Orthodox rabbis will sometimes accommodate trans people’s gender expressions in limited ways.”)

<sup>31</sup> Ani Amelia Zainuddin, et al, *The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development*, NATIONAL LIBRARY OF MEDICINE, April 21, 2016, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5272885/> (“There are fatwas from different Islamic countries which give rulings regarding sex change surgery or gender reconstruction surgery with regard to both the khunsa and the mukhannath (the transsexual). These fatwas generally agree that gender reconstruction surgery for the khunsa is permissible in Islam but prohibited in the case of the mukhannath.”)

<sup>32</sup> Baha’is of the United States, *What is the Baha’i View Pertaining to Identity?* <https://www.bahai.us/bahai-teachings-homosexuality/> (“Baha’u’llah teaches that the soul has no gender, race, or other physically ascribed

Latter-Day Saints,<sup>33</sup> Roman Catholicism,<sup>34</sup> Orthodox Church in America,<sup>35</sup> Jehovah's Witnesses,<sup>36</sup> Seventh-day Adventists,<sup>37</sup> Presbyterian Church in America,<sup>38</sup> Southern Baptists,<sup>39</sup>

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identities. It is a spiritual reality that transcends all such distinctions. From this vantage point, Baha'is understand that the autonomy and welfare of human beings are not only determined by the laws and constraints of the natural world, but also by an objective spiritual existence that is integrally related to it.”)

<sup>33</sup> The Church of Jesus Christ of Latter-Day Saints, *What is the Church's Position on Transitioning?* <https://www.churchofjesuschrist.org/topics/transgender/understanding?lang=eng> (“Church leaders counsel against elective medical or surgical intervention for the purpose of attempting to transition to the opposite gender of a person’s birth sex (“sex reassignment”). Leaders advise that taking these actions will be cause for Church membership restrictions. Leaders also counsel against social transitioning. ... Transgender individuals who do not pursue medical, surgical, or social transition to the opposite gender and are worthy may receive Church callings, temple recommends, and temple ordinances.”)

<sup>34</sup> U.S Counsel of Catholic Bishops, *Gender Theory/Gender Ideology—Select Teaching Resources*, Updated Aug. 7, 2019, [https://www.usccb.org/resources/Gender-Ideology-Select-Teaching-Resources\\_0.pdf](https://www.usccb.org/resources/Gender-Ideology-Select-Teaching-Resources_0.pdf) (“Catechism of the Catholic Church, Sexual Identity (No. 2333) “Everyone, man and woman, should acknowledge and accept his sexual identity. Physical, moral, and spiritual difference and complementarity are oriented toward the goods of marriage and the flourishing of family life. The harmony of the couple and of society depends in part on the way in which the complementarity, needs, and mutual support between the sexes are lived out.”)

<sup>35</sup> Orthodox Church of America, *“In the Beginning...” Healing our Misconceptions*, <https://www.oca.org/the-hub/two-become-one/session-2-in-the-beginning-.-.-healing-our-misconceptions> (“The Bible says ‘Male and female He Created them’ (Gen. 1:27). Our sexuality began with our creation. Since the Fall, however, we have become confused about what it means to be male and female. On one level there are clear biological differences such as reproductive organs, hormones, etc.. On the level of social interaction, though, there is a variety of ways of distinguishing males from females, men from women, and vice versa.”)

<sup>36</sup> Watch Tower Bible And Tract Society of Pennsylvania, *The Bible's Viewpoint: Alternative Life-Styles—Does God Approve?* 2022 <https://wol.jw.org/en/wol/d/r1/lp-e/102003726> (“Are sexual practices and gender really a matter of personal choice? What does God’s Word have to say on these issues? ... According to the Bible book of Genesis, God himself created the differences between males and females.”)

<sup>37</sup> Seventh-day Adventist Church, *Statement on Transgenderism*, <https://www.adventist.org/official-statements/statement-on-transgenderism/> (“[T]he desire to change or live as a person of another gender may result in biblically inappropriate lifestyle choices. Gender dysphoria may, for instance, result in cross-dressing, sex reassignment surgery, and the desire to have a marital relationship with a person of the same biological sex. On the other hand, transgender people may suffer silently, living a celibate life or being married to a spouse of the opposite sex.”)

<sup>38</sup> Forty-Seventh General Assembly of the Presbyterian Church in America Ad Interim Committee on Human Sexuality, May 2020, <https://pcaga.org/wp-content/uploads/2020/05/AIC-Report-to-48th-GA-5-28-20.pdf> (“Statement 2: Image of God. We affirm that God created human beings in his image as male and female (Gen. 1:26-27). Likewise, we recognize the goodness of the human body (Gen. 1:31; John 1:14) and the call to glorify God with our bodies (1 Cor. 6:12-20). As a God of order and design, God opposes the confusion of man as woman and woman as man (1 Cor. 11:14-15). While situations involving such confusion can be heartbreaking and complex, men and women should be helped to live in accordance with their biological sex.”)

<sup>39</sup> Southern Baptist Convention, *On Transgender Identity*, June 1, 2014, <https://www.sbc.net/resource-library/resolutions/on-transgender-identity/> (“RESOLVED, That the messengers to the Southern Baptist Convention meeting in Baltimore, Maryland, June 10–11, 2014, affirm God’s good design that gender identity is determined by biological sex and not by one’s self-perception—a perception which is often influenced by fallen human nature in ways contrary to God’s design (Ephesians 4:17–18).”)



the Anglican Church in North America,<sup>40</sup> the Lutheran Church,<sup>41</sup> and the Assemblies of God Church,<sup>42</sup> among others.

### First Liberty Represented Students and Instructors Punished By Educational Institutions Because of Their Religious Beliefs

We have seen many recipients display a willingness to punish people with religious beliefs that those recipients regard to be incorrect, archaic, or simply distasteful. First Liberty has represented K-12 students who were punished, censored, shamed, expelled or threatened with expulsion, or denied access to school facilities by their schools for:

- Referencing their religious beliefs in a public ceremony such as a graduation speech,
- Referencing their religious beliefs in class assignments,
- Wearing nondisruptive jewelry that displayed a religious symbol,
- Engaging in private, student-initiated, student-led prayer during non-instructional time at school,
- Handing out, during non-instructional times, notes or trinkets that school officials deemed to contain religious messages,
- Objecting to school requirements that they read explicit material as part of a school assignment,
- Objecting to a requirement that all students participate in a public-school program requiring students to pledge to consider a school's views on gender and sexuality,
- Refusing to obey an instructor's orders to stomp on a piece of paper displaying the name of Jesus Christ as part of a class assignment,
- Seeking to form religious clubs just like other students were permitted to form similarly situated secular clubs, and
- Seeking to meet in religious clubs during times that secular clubs were allowed to meet.

In the K-12 setting, the administration of school discipline against children causes these children particular stress and social anxiety, often leading to ostracization from peers at a time when

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<sup>40</sup> Anglican Church in North America, *Sexuality and Identity: A Pastoral Statement from the College of Bishops*, Jan. 2021, <https://anglicanchurch.net/sexuality-and-identity-a-pastoral-statement-from-the-college-of-bishops/> (“Our foundation is the Scriptural truth that God made us male and female in His image—a profound unity with distinction (Genesis 1:27). God established marriage between male and female to fill the earth through procreation (Genesis 1:28).”)

<sup>41</sup> The Council on Biblical Manhood and Womanhood, *A Lutheran View of Transgenderism*, Nov. 21, 2021, <https://cbmw.org/2021/11/21/a-lutheran-view-of-transgenderism/> (“[T]ransgenderism cannot be reconciled with Luther’s explanation of the first article of the Creed. When Lutherans confess that God has made us and all creatures, that he’s made our bodies and souls, and that it is our duty to thank and praise him for this, we are not merely confessing God as our creator. We’re also confessing him as our Lord, the one who is both responsible for making the universe and who has divine ownership over every atom of his creation, including our flesh.”)

<sup>42</sup> Assemblies of God, *Homosexuality, Marriage, and Sexual Identity*, Aug. 4-5, 2014, <https://ag.org/Beliefs/Position-Papers/Homosexuality-Marriage-and-Sexual-Identity> (“It should be noted at the outset that there is absolutely no affirmation of homosexual activity, same-sex marriage, or changes in sexual identity found anywhere in Scripture. Male and female genders are carefully defined and unconfused. The consistent ideal for sexual experience in the Bible is chastity<sup>4</sup> for those outside a monogamous heterosexual marriage and fidelity<sup>5</sup> for those inside such a marriage.”)

social bonds are developmentally most important to students.<sup>43</sup> In addition, students who are ostracized from their own schools frequently suffer a diminished capacity to learn, to remember and retain information, to organize and manage time, and to solve problems.<sup>44</sup> Students' social connection to their schools is also important for their mental and physical wellbeing, because students with poor social connections are more vulnerable to bullying, depression, anxiety, and substance abuse.<sup>45</sup>

First Liberty also represented instructors and school administrators who were shamed, censored, denied a reasonable religious accommodation, investigated, or punished for:

- Speaking about biological sex in the classroom,
- Saying to a fellow teacher in a private conversation that she would pray for that teacher,
- Using students' names for all students in a class instead of pronouns,
- Giving a Bible to a student who said he wanted to read it but did not own one,
- Displaying Christmas cards on a bulletin board,
- Displaying a religious saying on a computer screen saver or in an email signature,
- Volunteering at a pregnancy resource center during a teacher's free time, and
- Praying a brief, silent prayer after football games.<sup>46</sup>

More recently, an increasing number of recipients have punished students and instructors whose religious beliefs do not comport with those recipients' preferred view of sex and gender. Many of those recipients, ironically intending to create a "positive" or "safe" school climate, instead forcibly create an intellectually homogenous learning environment that becomes hostile towards anyone who thinks or speaks differently from the recipient about human sexuality.

For example, a public high school required students to complete a gender and sexuality program as a condition of graduation. The program required students to agree to "experience discomfort," and taught that anyone who believes that homosexual acts are immoral are bigoted. First Liberty represented a student who could not participate in the program because it required

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<sup>43</sup> The Education Hub, *The Importance of Social Connection in Schools*, Jan. 20, 2020, <https://theeducationhub.org.nz/social-connection/> ("Social connection is a sense of trust and belonging in one's community. It is a feeling of being accepted and appreciated for one's best qualities, rather than tolerated or ignored. Common themes associated with social connection include an ability to be one's authentic self and a comfortable sense of peace. Because cognitive processes are inextricably linked in the brain to emotional ones, social connection is a necessary precondition for learning and wellbeing.")

<sup>44</sup> *School Belonging: The Importance of Student and Teacher Relationships*, [https://link.springer.com/chapter/10.1007/978-3-030-64537-3\\_21](https://link.springer.com/chapter/10.1007/978-3-030-64537-3_21), ("School belonging is associated with a range of positive educational and developmental outcomes, including psychosocial health and wellbeing, prosocial behavior and academic achievement, and transition into adulthood."); see also Richard F. Catalano, et al, *The Importance of Bonding to School for Healthy Development: Findings from the Social Development Research Group*, JOURNAL OF SCHOOL HEALTH, Sept. 2004, <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.464.4284&rep=rep1&type=pdf> ("[S]chool bonding during the middle and high school years, measured from age 10 to 18, was significantly and negatively associated with substance use, delinquency, gang membership, violence, academic problems, and sexual activity in adolescence and young adulthood (up to age 21).")

<sup>45</sup> *Id.*

<sup>46</sup> See *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407 (2022).

her to make promises and assertions that violated her religious beliefs about human sexuality. The school repeatedly refused to accommodate the student. A school official informed the student in an email that if she did not complete the program, “disciplinary action would be taken.” Later, the school held a disciplinary hearing with the student, attempting to force her to participate in the gender and sexuality program. After First Liberty wrote the school a demand letter, the school finally agreed to stop pressuring the student to violate her religious beliefs and allowed her to complete an alternative assignment.

In another instance, First Liberty represented a community college instructor whose religious beliefs would not permit him to use pronouns that affirms that a person was born with the wrong biological sex. The college told the instructor that Title IX required him to use preferred pronouns, regardless of his religious beliefs. The instructor asked to use the student’s name instead of the student’s preferred pronouns, as using the student’s name did not violate his religious beliefs. Without legal counsel to defend the instructor, the school officials would have found the instructor guilty of sexual harassment under Title IX.

### **Conclusion**

For every student and instructor that First Liberty represents, we know there are thousands more who are unjustly punished for their religious convictions.

For the forgoing reasons, the Department should revise relevant portions of proposed § 106.2, § 106.10, § 106.11, § 106.31(a)(2), and § 106.44(c)(1)-(2) to ensure that the Department neither encourages nor requires recipients to punish religious exercise and speech.

Sincerely,

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First Liberty Institute