



May 15, 2023

ED-2022-OCR-0143
U.S. Department of Education
400 Maryland Ave. SW
Room 2C185
Washington, DC 20202

Submitted Electronically

Re: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams—Docket ID ED-2022-OCR-0143

Dear Secretary Cardona:

First Liberty Institute submits this comment on behalf of Houston Christian University (“HCU”) regarding the proposed rulemaking, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams” (“Athletics Rule”) promulgated by the U.S. Department of Education’s (“The Department’s”) Office for Civil Rights. 88 Fed. Reg. 22,860 (April 13, 2023).

HCU is a nonprofit, religious institution of higher education that opposes the Athletics Rule. If finalized, the proposed rule will confuse schools and administrators, disproportionately burden religious schools, and prevent schools from providing equal opportunity in their athletic programs. The Department should rescind the Athletics Rule and leave 34 C.F.R. § 106.41 unchanged. Alternatively, HCU proposes an approach to sex-related eligibility criteria that serves a sufficiently important educational goal and minimizes harm to students who want to play on opposite sex teams.

I. Houston Christian University

The Baptist General Convention of Texas created HCU in 1960.¹ The Convention is a consolidated body of cooperating Baptist churches that establishes and supports faith-based schools, hospitals, churches, and other organizations.² In the same year that it created HCU, the Baptist General Convention of Texas elected HCU’s first board of trustees, which approved and signed HCU’s charter.³ The board of trustees controls, in

¹ “Houston Christian University’s History,” <https://hc.edu/about-hcu/history/>.

² *Baptist General Convention of Texas History*, Texas Baptists, <https://www.texasbaptists.org/about/history> (last visited May 5, 2023).

³ *Id.*

consultation with HCU’s executive council, HCU’s policies and practices.⁴ The board requires that a supermajority of its trustees must be active members of a Baptist church, and all trustees must be professing Christians who agree to adhere to the statement of faith set forth in the preamble to HCU’s bylaws and foundational documents.⁵ At its inception, HCU was known as Houston Baptist College, but in 1973, it became known as, Houston Baptist University. The Department conveyed a letter of assurance to HCU on December 17, 2017, recognizing that HCU qualifies for Title IX’s religious exemption.⁶ In 2022, the University name changed to Houston Christian University (HCU).

HCU’s mission is to “provide a learning experience that instills in students a passion for academic, spiritual, and professional excellence as a result of [its] central confession, ‘Jesus is Lord.’”⁷ As a Christian university, HCU considers itself an arm of the church.⁸ Accordingly, HCU preserves and retains the traditional arts of freedom—the liberal arts—to seek to understand humankind’s purpose, to build social structures of civility and justice, and to experience the liberty that enables each person to be agents of order and peace.⁹ HCU aims to perform these tasks in an environment of faithful tolerance, respect for the conscience of others, and intellectual freedom.¹⁰ Since its creation, HCU has welcomed students of diverse faiths or no faith at all, and it continually aims to demonstrate Christian charity and hospitality by creating a welcoming and supportive atmosphere for students of diverse beliefs.¹¹ In addition, HCU is ethnically diverse; this year, U.S. News & World Report¹² ranked it eighth for campus ethnic diversity at regional universities.¹³

HCU shares the Department’s goal of combatting discrimination in education programs or activities, including in its athletic programs. Indeed, discrimination and harassment are incompatible with HCU’s mission.¹⁴ In its athletic programs, HCU is committed to providing an environment that provides equal opportunity and is free from discrimination “based on gender, race, ethnicity, national origin, religion, age, or marital status.”¹⁵ Accordingly, HCU provides athletes and staff with information on programs,

⁴ *HCU Executive Council*, Houston Christian University, <https://hc.edu/about-hcu/university-leadership/executive-council/> (last visited May 15, 2023).

⁵ *Position Statement*, Houston Christian University, <https://hc.edu/university-policies/position-statement/> (last visited May 15, 2023).

⁶ Letter from Candice Jackson, Acting Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., Office for Civil Rights, to HCU (Dec. 21, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/houston-baptist-university-response-12212017.pdf>.

⁷ *Statement of Mission and Vision*, Houston Christian University, <https://hc.edu/university-policies/statement-of-mission-and-vision/> (last visited May 15, 2023).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *HBU to become Houston Christian University*, Houston Christian University, <https://hc.edu/hc/>.

¹² *Campus Ethnic Diversity*, U.S. News (2023), <https://www.usnews.com/best-colleges/rankings/regional-universities-west/campus-ethnic-diversity>.

¹³ *Rankings and Awards*, Houston Christian University, <https://hc.edu/admissions/why-hcu/rankings/> (last visited May 15, 2023).

¹⁴ HCU Title IX Policy, Houston Christian University, <https://hc.edu/university-policies/title-ix/title-ix-policy/> (last visited May 15, 2023).

¹⁵ *HBU Intercollegiate Athletics Diversity Statement*, Houston Christian University Athletics, https://hcuhuskies.com/sports/2014/6/6/GEN_0606144203.aspx (last visited May 15, 2023).

events, discussions, and resources related to diversity, equal opportunity, and respect for inclusiveness, so that both students and staff may grow spiritually, feel welcome on campus, and be able to learn from and educate others of various backgrounds and perspectives. HCU believes this will lead to a better academic and athletic experience for all. At the same time, because HCU holds to the enduring truth that each person is immutably created in the image of God as either male or female, and because HCU has a duty to ensure that its female athletes have access to HCU's athletic programs, HCU cannot support the Department's proposed rule on sex-related eligibility criteria for male and female athletic teams.

II. The proposed rule lacks clarity and creates greater confusion for schools.

The Department claims the proposed Athletics Rule is necessary to clarify the current regulation, which “permits a recipient to offer ‘teams for members of each sex’ without defining that term.” A separate definition is unnecessary, because Congress unambiguously drafted Title IX “sex” to have a binary meaning. The text of Title IX refers multiple times to two sexes: “one sex” and “the other sex,” “both sexes,” “men” and “women,” “father-son,” “mother-daughter,” “boys” and “girls,” and “fraternity” and “sorority”.¹⁶ As such “each sex” should be understood as each of the two sexes. Furthermore, the term “sex” has always been a biological term.¹⁷

The proper way to understand the questions raised by stakeholders is: what accommodations are permissible or required for students who want to play on opposite sex teams because of their alleged gender identity? *Id.* at 22862, 22867. Instead of answering this question, the Department proposes a rule that deliberately ignores the Javits Amendments' recognition that sex-separated sports are appropriate and that lacks criteria to determine the appropriate team for a student. *Id.* at 22861-63. The proposed rule would require schools seeking to maintain athletic teams separated by sex to show, for each sport, level of competition, and grade or education level, that its sex-related criteria:

- (i) is substantially related to the achievement of an important educational objective, and
- (ii) minimizes harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

Id. at 22,860. This language is an underhanded attempt to replace sex-separated teams with gender-identity-based teams. Notably, rather than provide guidance, the Department continues to put the onus on recipients to devise acceptable criteria for determining the makeup of sports teams.

¹⁶ 42 U.S.C. §§ 1681(a)(2), (2)(6), (6)(B), (7)(A), (7)(B)(i)(I), (a)(8).

¹⁷ *See, e.g., Bostock v. Clayton County*, 140 S. Ct. 1731, 1756 (2020) (Alito, J., dissenting) (acknowledging that unabridged dictionaries in use in the 1960s defined “sex” according to biology and the Court did not dispute such definition).

A. The proposed rule injects confusion and uncertainty into student athletics.

It is unclear how recipients may satisfy the rule's requirements. The rule does not prohibit a recipient from using all sex-related criteria altogether. In certain narrow circumstances, the rule purports to allow a recipient to require student athletes to participate on the sports team that corresponds to that student's sex rather than gender identity. *Id.* But the rule will not permit a school to maintain criteria that assume that *all* male athletes who identify as female possess an unfair physical advantage over females. *Id.* at 22,873. Such criteria, according to the Department, would rest on "overly broad generalizations about the talents, capacities, or preferences of male and female students." *Id.* The rule's preamble also warns that males who identify as females ought to play on the team corresponding to their gender identity because they have, "no viable opportunity to participate in athletics" if the school does not allow such students to participate on the team corresponding to their gender identity. *Id.* While some schools might assume that male students could play on the team for males, the Department makes the preposterous suggestion that requiring a student to play on the team that conflicts with that student's gender identity would be "equivalent to medically harmful gender identity conversion efforts." *Id.* at 22,877 (quoting *Hecox v. Little*, 479 F. Supp. 3d 930, 977 (D. Idaho 2020)).

Thus, the Department claims it permits schools to maintain sex-separated sports teams, but at the same time, the Department erects numerous regulatory barriers and warnings to its general rule. No school, including HCU, could envision how it can meet the requirements of the rule under the Department's confusing and contradictory statements.

The proposed rule also does not help schools like HCU understand how they can comply with the rule. For example, to help schools who want to allow biological males to play on female teams, but who are also worried about the physical advantages males possess over females, the Department suggests general "strategies"—without offering examples—for suppressing a male's biological advantage. *Id.* at 22,873. Such strategies include appropriate coaching and training, requiring the use of protective equipment, and specifying the rules of play for a particular sport.¹⁸ *Id.* In addition, the Department fails to provide any examples of a sport at which a male can play and not maintain an advantage over a female, although the rule suggests that such sports exist. HCU cannot think of an example of a physical competition in which biological sex does not matter.

The Department does not address how it would address conflicting state and local law. In 2020, the Department of Justice took a position consistent with state law that offered biological girls and women equal opportunity to participate in interscholastic athletics.¹⁹ However, this proposed rule reverses that legal position. Texas passed and

¹⁸ The Department lacks any authority for changing or even suggesting changing the rules of how a sport is played.

¹⁹ *The Department of Justice Files Brief Defending the Constitutionality of Idaho's Fairness in Women's Sports Act*, U.S. Department of Justice (Nov. 19, 2020), <https://www.justice.gov/opa/pr/department-justice-files-brief-defending-constitutionality-idahos-fairness-womens-sports-act>.

created pending rules on women's athletics that conflict with the current rule.²⁰ If the Department finalizes this proposed rule, schools are in an impossible situation where compliance with one regulator would put it in noncompliance with another. A university cannot plan and run its athletics programs without clear and consistent regulatory requirements.

B. The proposed rule fails to account for fairness and safety in women's sports.

The proposed rule encourages schools to remove sex-related eligibility criteria for playing a sport by specifying that schools that maintain an all-comers athletics policy need not justify their criteria to either the Department or any concerned students or parents. *Id.* at 22,871 (“[T]he proposed regulation would apply only to those sex-related criteria that would ‘limit or deny’ students’ eligibility to participate consistent with their gender identity.”). The Department never suggests that a school *should* consider fairness or safety concerns where the athletes are college-aged, competing at elite levels, or playing a contact sport—it says only that a school *may* consider fairness and safety in such circumstances, and only after the school has justified, for *each* student seeking to participate according to that student’s gender identity, the school’s concerns for each sport, level of competition, and grade. The Department dismisses the idea that permitting males to compete with females endangers females’ athletic opportunities and will cause numerous females to withdraw from all athletic programs altogether. *Id.* at 22,873. The Department equivocates the existence of physical differences among women to the greater biological differences between men and women. The proposal repeatedly acknowledges that the nonrecipient sports associations and schools (including those controlled by religious organizations) will be affected by the regulation because they will not be able to associate with or play against recipients without changes in the rules of the associations and sports. *Id.* at 22,882-85.

C. The proposed rule raises numerous unanswered questions.

The proposed rule raises numerous questions. Does the rule offer flexibility for schools to maintain, in certain circumstances, sex-separated athletics teams? Or would requiring someone to play on the team that corresponds to that student’s biological sex be “equivalent to gender identity conversion therapy?” *Id.* at 22,877. What does it mean to minimize harms? Are such harms objective or subjective? Can an especially fearful or stressed student successfully assert harms even after a school has made numerous accommodations? What about the need to minimize harms to women who may have to risk their health or educational opportunities competing against or alongside biological males? How should schools balance the competing harms of female athletes against the harms the rule attributes to the individual student seeking to join the female team? What are some examples of sex-based classifications that are acceptable, and what types of classifications are “more broad[] than necessary”? *Id.* As most athletic rules apply to both team eligibility and locker room / travel logistics, does the rule’s requirements apply to locker rooms and overnight accommodations as well? Under what circumstances can

²⁰ See Tex. H.B. 25 (2021), S.B. 15 (2023).

schools require biological males to use the male locker room or to share a hotel room with biological males? And how does the Department suggest that schools navigate the inevitable harassment and hostile environment claims and complaints against recipient schools? Is the Department prepared to be hauled into court as a necessary defendant in these lawsuits due to its conflicting and confusing rule?

Much of the confusion stems from the fact that the proposed rule contains the term, “gender identity,” which interferes with its clarity. *Id.* at 22888. Furthermore, the answer to the Department’s Directed Question (f), about whether regulatory text is needed to provide recipients with sufficient clarity, is yes. Not only does the Department need to define gender identity, but it must provide guidance regarding how to deal with the complications presented by the nebulous nature of the concept of gender identity. What is required of recipients that do not have teams that are consistent with the gender identity, like gender nonbinary (a concern raised by stakeholders)? *Id.* at 22865. What is required of recipients that do not have teams that are consistent with other gender identities?²¹ On different federal government websites, the number of possible gender identities differ.²² At what point must a student’s gender identity be recognized and accommodated, upon the student’s first articulation? Are there any limitations on how often and when a student can switch teams to participate in accordance with their gender identity?

III. The proposed rule disproportionately burdens religious schools.

The proposed Athletics Rule disproportionately burdens religious schools who cannot permit males to play with, or compete against, females, due to the schools’ religious beliefs and practices. Some religious schools, including HCU, hold traditional religious beliefs about sexuality and are religiously motivated to protect equal opportunity for women in athletics.²³ HCU sees “male and female genders as a gift of God reflected biologically in the genetic differences” and acknowledges “emotional confusion in individuals,” but believes “gender identity is not self-determined or discontinuous with the bodies with which we were conceived and born.”²⁴ It therefore promotes “positive culture and identity for the University through the Christ-centered development of student-athletes and teams.”²⁵

²¹ *LGBTQ Glossary*, Johns Hopkins University, <https://studentaffairs.jhu.edu/lgbtq/education/glossary/> (last visited May 10, 2023) (listing at least thirteen gender identities).

²² *See e.g.*, Census.gov (3 identities and “none of these”) HealthIt.gov (5 identities and “other”); dol.gov (7 identities); Youth.gov (8 identities); nih.gov (11 identities).

²³ Activists may be motivated by their deeply held religious beliefs to pursue social justice. *See, e.g.*, Martin Luther King, Jr., *Letter from a Birmingham Jail*, Jack Miller Center, 1963, https://jackmillercenter.org/martin-luther-kings-letter-birmingham-jail/?gclid=CjwKCAjwo7iiBhAEiWAsIxQEbZxDqGBt-qRyN29YDBv2ZAhsZRvCTpU531-Cob38K-doAszVPySrhcCKWgQAvD_BwE (last visited April 30, 2023).

²⁴ *Pillar VII: Life, Humanness, Gender and Marriage*, Houston Christian University, <https://hc.edu/about-hcu/ten-pillars/pillars/#seven> (last visited May 3, 2023).

²⁵ *Athletics Department Mission Statement*, Houston Christian University, <https://hcuhuskies.com/sports/2020/1/30/mission-statement.aspx> (last visited May 3, 2023).

At the same time, because the Department’s regulations carry the force of law, the Department rightly predicts that a multitude of schools, local educational agencies, state educational agencies, and athletic associations will respond to the rule’s directives by opening student eligibility to all students according to their gender identity. *Id.* at 22,882-85. Soon, religious schools who have always maintained successful athletic programs will be forced to pit their women’s teams against teams composed of males and females. These schools will have to choose between forfeiting the game or violating their religious beliefs. Soon, religious schools will no longer be permitted to forfeit a single game. The Department foresees that athletic associations will claim that the Department’s rule compels them to require all schools to permit students to play according to their gender identity, or athletic associations will claim that sex separate teams, while technically permitted under Title IX, are rarely workable under the rule. *Id.*

Although the Title IX religious exemption protects the religious exercise of many religious schools, no such exemption exists for member schools in athletic associations. Thus, when athletic associations across the nation import the Department’s unworkable and convoluted balancing test into their requirements, religious schools who maintain athletic programs will suddenly face the dreadful choice of giving up their religious beliefs or giving up their athletics programs. Before the Department published its Athletics Rule, religious schools already faced immense pressure to give up their deeply held religious beliefs by athletic associations.²⁶ Now, the pressure will intensify.

The Department’s rule adds to the pressure on religious schools by failing to recognize that “many good and decent people,” including those operating schools like HCU, will need to create sex-related criteria for their athletic teams. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting). Instead, the Department maligns a school’s motivation to maintain sex-separated teams as “for the purpose of excluding transgender students from sports . . . to require adherence to sex stereotypes . . . for the purpose of administrative convenience . . . [or] a pretext for an impermissible interest in singling out transgender students for disapproval or harm.” *Id.* at 22,872.

HCU is not alone in having religious beliefs pertaining to the relationship between gender ideology and biological sex. 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.²⁷ Consequently, many faith traditions believe in the differences between males and females and the value of sex-separated activities, including athletic competitions.

- **Amish Communities:** “In the Bible, marriage is a divinely ordered institution designed to form a permanent union between one man and one woman for one purpose (among others) of procreating or propagating the human race. That was

²⁶ Nikolas Lanum, *Vermont Democrat scolds Christian school over trans controversy, says they deserve sports ban*, Fox News (Mar. 21, 2023), <https://www.foxnews.com/media/vermont-democrat-scolds-christian-school-trans-controversy-deserve-sports-ban> (last visited April 30, 2023).

²⁷ See, e.g., Christopher Yuan, *Gender Identity and Sexual Orientation*, The Gospel Coalition, <https://www.thegospelcoalition.org/essay/gender-identity-and-sexual-orientation/> (last visited May 15, 2023).

God's order in the first of such unions (Genesis 1:27–28; 2:24; Matthew 19:5). If, in His original creation of humans, God had created two persons of the same sex, there would not be a human race in existence today. . . . The Christian point of view is based solely upon the Bible, the divinely inspired Word of God. A truly Christian standard of ethics is the conduct of divine revelation, not of statistical research nor of public opinion.”²⁸

- **Anglican Church in North America:** “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).”²⁹
- **Assemblies of God:** “Genesis 1:26–31 is the record of God creating, blessing, and commanding humanity as male and female. Humans are created in the ‘image of God’ as male and female. . . . The biblical recognition of two distinct human sexes, female and male, from the creation of humanity as male and female in Genesis 1:26–27, is affirmed by Jesus in Matthew 19:4 and Mark 10:6 True human identity is what is being realized in relationship with Christ, body and an immaterial nature, which will culminate in the Resurrection. No account of humanity that asserts the interior life as the true self over against the body is a biblical understanding of humanity.”³⁰ “It should be noted at the outset that there is absolutely no affirmation of . . . changes in sexual identity found anywhere in Scripture. Male and female genders are carefully defined and unconfused.”³¹
- **Baha’i:** “Baha’u’llah teaches that the soul has no gender, race, or other physically ascribed 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.”³²
- **Buddhism:** “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.”³³

²⁸ Lehman Strauss, *Homosexuality: The Christian Perspective*, Mission to Amish People (Nov. 1, 2019), <https://www.mapministry.org/articles/2019/11/01/homosexuality-the-christian-perspective>.

²⁹ *Sexuality and Identity: A Pastoral Statement from the College of Bishops*, Anglican Church in North America, (Jan. 2021), <https://anglicanchurch.net/sexuality-and-identity-a-pastoral-statement-from-the-college-of-bishops/>.

³⁰ *Transgenderism, Transsexuality, and Gender Identity* (Adopted by the General Presbytery in Session August 5-7, 2017), Assemblies of God, <https://ag.org/Beliefs/Position-Papers/Transgenderism-Transsexuality-and-Gender-Identity> (last visited May 15, 2023).

³¹ *Homosexuality, Marriage, and Sexual Identity* (Aug. 4-5, 2014), Assemblies of God, <https://ag.org/Beliefs/Position-Papers/Homosexuality-Marriage-and-Sexual-Identity>.

³² *What is the Baha’i View Pertaining to Identity?*, Baha’is of the United States, <https://www.bahai.us/bahai-teachings-homosexuality/> (last visited May 15, 2023).

³³ Rita M. Gross, *Why Go Beyond Gender?*, Shambhalia Publications (March 27, 2018), <https://www.shambhala.com/go-beyond-gender-excerpt-buddhism-beyond-gender/>.

- **Church of God in Christ:** “The opening book of the Bible tells us: ‘A man will leave his father and his mother and he must cleave to his wife and they must become one flesh’ (Genesis 2:24). The Hebrew word ‘wife’ connotes one who is a female human being. Jesus confirmed that those yoked together in marriage should be ‘male and female’ (Matthew 19:4). Therefore, God intended marriage to be a permanent and an intimate bond between a man and a woman. Men and women are designed to complement each other so they may be capable of satisfying each other’s emotional, spiritual, and sexual needs and desires.”³⁴
- **Church of Jesus Christ of Latter-day Saints:** “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.”³⁵
- **Confucianism:** “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*.”³⁶ “[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.”³⁷
- **Daoism:** “Daoist philosophy . . . advocated for gender equality. This idea was reinforced in the symbolism of yin-yang by illustrating the complementary, dualistic, interdependent, and equal natures of the male (yang) female (yin) elements. One would not exist without the other and both have been equally

³⁴ *Marriage: A Proclamation to COGIC Worldwide*, General Assembly of the Church of God in Christ, Inc., <https://www.cogic.org/publicpolicy/2014/11/11/general-assembly-passes-resolution-on-same-sex-marriage/> (last visited May 15, 2023).

³⁵ *What is the Church’s Position on Transitioning?*, The Church of Jesus Christ of Latter-Day Saints, <https://www.churchofjesuschrist.org/topics/transgender/understanding?lang=eng> (last visited May 15, 2023).

³⁶ 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%20taboo,of%20marriage%20is%20not%20condoned.>

³⁷ 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.

important in creating and sustaining life. If one of the components were missing, reality would not be complete.”³⁸

- **Falun Gong:** “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.”³⁹
- **Jehovah’s Witnesses:** “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.”⁴⁰
- **Lutheran Church:** “[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.”⁴¹
- **Orthodox Church of America:** “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.”⁴²
- **Orthodox Judaism:** “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.”⁴³

³⁸ Dessie Miller, *Celebrating the Feminine: Daoist Connections to Contemporary Feminism in China*, Master’s Projects and Capstones, University of San Francisco (2017), at 3, <https://repository.usfca.edu/cgi/viewcontent.cgi?article=1607&context=capstone#:~:text=Daoism%20emphasizes%20gender%20equality%20by,be%20understood%20without%20the%20other.>

³⁹ “Intolerant?”, Falun Dafa InfoCenter, <https://faluninfo.net/misconceptions-intolerant/> (last visited May 15, 2023).

⁴⁰ *The Bible’s Viewpoint: Alternative Life-Styles—Does God Approve?*, Watch Tower Bible And Tract Society of Pennsylvania, <https://wol.jw.org/en/wol/d/r1/lp-e/102003726> (last visited May 15, 2023).

⁴¹ *A Lutheran View of Transgenderism*, The Council on Biblical Manhood and Womanhood, (Nov. 21, 2021), <https://cbmw.org/2021/11/21/a-lutheran-view-of-transgenderism/>.

⁴² “In the Beginning...” *Healing our Misconceptions*, Orthodox Church of America, <https://www.oca.org/the-hub/two-become-one/session-2-in-the-beginning-.-.-healing-our-misconceptions> (last visited May 15, 2023).

⁴³ Aaron H. Devor, *Transgender People and Jewish Law*, De Gruyter (2016), <https://www.degruyter.com/document/doi/10.1515/9783110434392-022/pdf>.

- **Presbyterian Church in America:** “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.”⁴⁴
- **Roman Catholicism:** According to 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.”⁴⁵ “Sexuality, by means of which man and woman give themselves to one another through the acts which are proper and exclusive to spouses, is not something simply biological, but concerns the innermost being of the human person as such.”⁴⁶
- **Seventh-day Adventist Church:** “[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.”⁴⁷
- **Shi’ah and Sunni Muslims:** “Prophet Mohammad (pbuh) has stated that: ‘men and women are twin halves of each other’ (Bukhari). This narration also brings home the fact that men and women are created from a single source. Furthermore, by using the analogy of twin half, the Prophet (pbuh) has underlined the reciprocal and interdependent nature of men and women’s relationships.”⁴⁸ “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

⁴⁴ *Forty-Seventh General Assembly of the Presbyterian Church in America Ad Interim Committee on Human Sexuality*, Presbyterian Church in America General Assembly (May 2020), <https://pcaga.org/wp-content/uploads/2020/05/AIC-Report-to-48th-GA-5-28-20.pdf>.

⁴⁵ *Gender Theory/Gender Ideology—Select Teaching Resources*, U.S. Counsel of Catholic Bishops, (Aug. 7, 2019), https://www.usccb.org/resources/Gender-Ideology-Select-Teaching-Resources_0.pdf.

⁴⁶ Catholic Catechism, No. 2361, <https://www.usccb.org/sites/default/files/flipbooks/catechism/569/#zoom=z> (last visited May 15, 2023).

⁴⁷ *Statement on Transgenderism*, Seventh-day Adventist Church, <https://www.adventist.org/official-statements/statement-on-transgenderism/>.

⁴⁸ *Marriage in Islam*, Why Islam? Facts about Islam, <https://www.whyislam.org/social-issues/marriage-in-islam/> (last visited May 15 2023).

reconstruction surgery for the khunsa is permissible in Islam but prohibited in the case of the mukhannath.”⁴⁹

- **Sikhism:** “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.”⁵⁰
- **Southern Baptists:** “Man is the special creation of God, made in His own image. He created them male and female as the crowning work of His creation. The gift of gender is thus part of the goodness of God’s creation.”⁵¹ “God’s design was the creation of two distinct and complementary sexes, male and female (Genesis 1:27; Matthew 19:4; Mark 10:6) which designate the fundamental distinction that God has embedded in the very biology of the human race. . . . [G]ender 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) [W]e extend love and compassion to those whose sexual self-understanding is shaped by a distressing conflict between their biological sex and their gender identity [W]e regard our transgender neighbors as image-bearers of Almighty God and therefore condemn acts of abuse or bullying committed against them . . . [W]e oppose efforts to alter one’s bodily identity (e.g., cross-sex hormone therapy, gender reassignment surgery) to refashion it to conform with one’s perceived gender identity.”⁵²

The Department’s proposed rule will force recipients controlled by religious organizations such as the ones described above either to do away with their athletics programs or create new religious sports associations. The potential costs of doing so are not evaluated in the proposed rule.

⁴⁹ 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/>.

⁵⁰ 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>.

⁵¹ Baptist Faith & Message 2000, <https://bfm.sbc.net/bfm2000/#xviii> (last visited May 15, 2023).

⁵² *On Transgender Identity*, Southern Baptist Convention, (June 1, 2014), <https://www.sbc.net/resource-library/resolutions/on-transgender-identity/>.

IV. The regulatory analysis needs to assess the costs and benefits of single-sex education, particularly for universities and students of faith.

Because the proposed rule fails to address the burdens on Americans of faith, the Department will fail to comply with President Biden's Executive Order 13985, which directs the federal government to engage in consistent, systematic, fair, just, and impartial treatment of all individuals, including members of religious groups. Religious believers of a variety of faiths support single-sex education (interpreting sex as binary and biological) as part of their sincerely held religious beliefs. Those believers include Catholics, Christians, Jews,⁵³ Orthodox believers,⁵⁴ and minority faiths. In a North Carolina public elementary school, 6% surveyed said they had religious beliefs precluding public schools teaching students about sexuality, because parents preferred that they or their church educate their own children in accordance with their religious beliefs.⁵⁵ A research study found Muslims sought single-sex learning on the basis of religious beliefs and respect female adherents who sought such environments.⁵⁶ A literacy teaching and learning of a boys-only weekend class in a mosque of a midwestern city demonstrated that Muslims, on the basis of religious beliefs, were motivated to pursue single-sex education on the basis of their love for God, piety, strong ties to their cultural background, and the perpetuation of both faith and cultural identity.⁵⁷ A 2018 UCLA study of nearly 6,000 incoming female university students found that graduates of all-girl schools are more likely to show higher levels of science self-confidence, consider themselves critical thinkers, score higher on measures of academic habits of mind, and demonstrate stronger study habits.⁵⁸

These sincerely held beliefs in single-sex education also demonstrate benefits of single-sex education and education consistent with beliefs about sex as binary and

⁵³ Rabbi Dov Fischer, *Controversial gender ideology*, Ed Source (May 10, 2022), <https://edsources.org/2022/controversial-gender-ideology-in-public-education-undermines-families-of-faith/671790>.

⁵⁴ Brenda Lebsack, *Public School Unsafe for People of Orthodox Faith*, Interfaith Statewide Coalition (Oct 7, 2020), <https://interfaith4kids.com/index.php/our-media/public-school-unsafe-for-people-of-orthodox-faith-brenda-s-speech-10-20-20>.

⁵⁵ Kristen Ito et al., *Parent Opinion of Sexuality Education in a State with Mandated Abstinence Education: Does Policy Match Parental Preference?*, 39 *Journal of Adolescent Health* 634-41 (Nov. 2006), [https://www.jahonline.org/article/S1054-139X\(06\)00173-X/fulltext](https://www.jahonline.org/article/S1054-139X(06)00173-X/fulltext).

⁵⁶ See Saeeda Shah & Catherine Conchar, *Why single-sex schools? Discourses of culture/faith and achievement*, 39 *Cambridge Journal of Education* 191-204 (2009), <https://www.tandfonline.com/doi/full/10.1080/03057640902903722>.

⁵⁷ I. Rifai & F. Sandy, *Faith, love, and literacy practices: The teaching and learning of Qur'an and Arabic language of multicultural Muslims in a single sex class*, 1 *International Journal of Education, Language, and Religion* 32-42, (2019), <http://doi.org/10.35308/ijelr.v1i1.1769>.

⁵⁸ Tiffany Riggers-Piehl, et. al, *Fostering Academic and Social Engagement: An Investigation into the Effects of All-Girls Education in the Transition to University*, at 6, (2018), https://heri.ucla.edu/pub/NCGS-ResearchReport_final.pdf.

biological, particularly to female students. Christian believers⁵⁹ have been leaders in the education of women in the United States, precisely because of their beliefs about the dignity of every person, as created male and female by God.

A research study found Muslims sought single-sex learning in part to respect female adherents who sought such environments.⁶⁰ Respecting religious involvement of students remains significantly linked with desirable outcomes for academic progress by acknowledging the benefits of connections to family and community social capital.⁶¹

Congress drafted Title IX with exemptions in a variety of school contexts, and the Department's longstanding Title IX regulations recognize such exemptions, precisely to respect specific religious beliefs in education which demonstrate differences between men and women with regards to bodily contact (including during sport activities),⁶² human sexuality,⁶³ separate intimate⁶⁴ and living⁶⁵ facilities, and artistic expression through chorus or choruses.⁶⁶ This is why Congress also exempted religious organizations,⁶⁷ non-vocational elementary and secondary school admissions,⁶⁸ and private elementary and secondary schools.⁶⁹ The Department also recognizes that certain Americans specifically seek out single-sex education,⁷⁰ and researchers at Harvard University also recognized that preference.⁷¹ The proposed rule fails to account for these considerations in single-sex education.

V. A sex-consistent rule is an alternative approach that better aligns with Title IX's requirements.

A sex-consistent rule is an alternative approach that better aligns with Title IX's requirements. This will enable the Department to affirm the appropriateness and necessity of sex-separated athletic categories and spaces while providing sought after clarity and guidance on how recipients may accommodate gender identity. Recipients can maintain and establish sex-segregated teams under the currently understood standard. Sex-segregated teams may only use sex to determine participation and may not allow

⁵⁹ *How Religion May Affect Educational Attainment*, Pew Research (Dec. 13, 2016), <https://www.pewresearch.org/religion/2016/12/13/how-religion-may-affect-educational-attainment-scholarly-theories-and-historical-background/>.

⁶⁰ See Shah, *supra* n. 56.

⁶¹ Chandra Muller & Christopher G. Ellison, *Religious Involvement, Social Capital, And Adolescents' Academic Progress: Evidence From The National Education Longitudinal Study Of 1988*, 34 *Sociological Focus*, 155–83 (May 2001) <http://www.jstor.org/stable/20832111>.

⁶² 34 C.F.R. § 106.34(c).

⁶³ 34 C.F.R. § 106.34(e).

⁶⁴ 34 C.F.R. § 106.33 (“toilet, locker room, and shower facilities”).

⁶⁵ 20 U.S.C. § 1686.

⁶⁶ 34 C.F.R. § 106.34(f).

⁶⁷ 20 U.S.C. § 1681(a)(3).

⁶⁸ 34 C.F.R. § 106.15(d).

⁶⁹ 20 U.S.C. § 1681(a)(1).

⁷⁰ *Single-Sex Versus Coeducational Schooling: A Systematic Review*, U.S. Department of Education, (2005), <https://www2.ed.gov/rschstat/eval/other/single-sex/single-sex.pdf>.

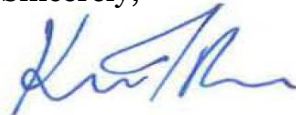
⁷¹ *The 2008 Education Next-PEPG Survey of Public Opinion*, Education Next (2008), <https://www.educationnext.org/the-2008-education-nextpepg-survey-of-public-opinion/>.

students to participate on opposite sex teams. But a recipient may accommodate a student's gender identity when they participate on the team consistent with their sex. For example, a recipient may allow the student to use clothing and equipment consistent with their gender identity while participating on the team consistent with their sex, if safe, fair, and not likely to lead to indecent exposure. Recipients may also allow a student to compete in an opposite-sex event when (a) it will not affect the number of women that can participate in the event; (b) there will be absolutely no physical contact; and (c) the result can be assessed according to sex without excessive administrative burden. The sex-consistent approach also meets the standards articulated in the proposed rule because the Department's proposed rules fails to recognize that sex-separated athletics inherently serve a sufficiently important educational goal and minimize harm to students whose gender identity causes them to seek participation on opposite sex teams.

VI. Conclusion

For the foregoing reasons, the Department should not revise 34 CFR § 106.41.

Sincerely,



Keisha Russell
Tabitha Harrington
Maya Noronha
First Liberty Institute