



May 15, 2023

**BY ELECTRONIC SUBMISSION**

U.S. Department of Education  
Office of Civil Rights  
400 Maryland Avenue, SW  
4th Floor  
Washington, D.C. 20202

Re: Request for Public Comment Concerning Proposed Rule on 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; RIN 1870-AA19

Dear Sir or Madam:

The Ethics & Religious Liberty Commission (ERLC) of the Southern Baptist Convention (SBC) respectfully submits the following comments regarding our concerns with the proposed rule “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.”

The ERLC is the public policy and ethics entity for the SBC, which has over 13 million members in roughly 50,000 churches and congregations in the United States. We are charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and human dignity. The Constitution’s guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The stated intention of this NPRM is to “amend its regulations implementing Title IX of the Education Amendments of 1972 (Title IX) to set out a standard that would govern a recipient’s adoption or application of sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female athletic team consistent with their gender identity.” The agency claims that the NPRM will provide clarity to recipients (i.e. schools and universities that receive federal funding) on what policies are permissible regarding sex and gender criteria for sports teams.

**The ERLC is concerned that the NPRM violates the intended purpose of Title IX to provide equal opportunities for women and girls.**

Fifty years ago, [Title IX Education Amendments of 1972](#), a landmark policy for women and girls, was enacted. Title



IX states that “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.” This important policy was intended to provide equal opportunities for men and women seeking to participate in activities and educational institutions receiving funding from the U.S. government.

The Department’s proposed change would have sweeping effects that would significantly undermine the original intent and purpose of Title IX, as organizations and schools under the jurisdiction of Title IX would no longer be able to define sex as a person’s biological sex from birth, but instead would be forced to adopt gender identity as the student’s sex for purposes of athletic competition. In other words, if a biological male or biological female student “identifies” as the opposite sex, then for almost all purposes, public schools and colleges must treat them as such, with limited, very vague exceptions.

A refusal to account for biological, sex-dependent differences will legally enshrine inequality in sports by changing the very law that sought to achieve equality in the first place. If the proposed change is accepted, the law created to protect women from discrimination and provide them equality would discriminate against them and make them more unequal than ever before, as they would now be forced to compete and share facilities with biological males, who have distinct physical differences than females.

Not only would this proposal completely blur the distinctions between men and women, the corresponding team sports they participate in, and the facilities they utilize, it will have the effect of rolling back all the good that has been done to ensure that women have the same opportunity to participate in educational institutions and activities as men.

**The ERLC is deeply concerned with the Department’s proposed rule as it fundamentally hinders the good and flourishing of our neighbors in expanding beyond the biblical truth of binary sexes and biological realities, such as primary and secondary sex characteristics, and conflates “sex” with “gender.”**

The Bible teaches that God created two distinct and complementary sexes, male and female, and Christians believe that these were an intentional act of God’s creative will and not an arbitrary assignment that human beings can change (Gen. 1:26–27). The fall of man into sin has introduced brokenness into God’s good and perfect creation. We yearn for the good of all our neighbors, and we lament the nature of the conflict that some experience between their biological sex and gender identity. Even so, we trust that embracing God’s intentional design is what will ultimately bring about their flourishing.

The proposed rule fundamentally hinders the good and flourishing of our neighbors in expanding beyond the biblical truth of binary sexes and biological realities, such as primary and secondary sex characteristics. The Department of Education’s proposed rule ultimately discounts the human dignity of our fellow citizens. It places school administrators in an impossible position, by forcing them to deny the realities of biological sex and discriminate against women or lose vital federal funding.



**Although the agency claims the NPRM will lead to greater clarity for schools and organizations, the ERLC believes the NPRM will have the opposite effect, leading to greater confusion surrounding gender and sports for institutions attempting to navigate federal regulations.**

In an attempt to recognize that in some settings and particular sports the physical differences between males and females would lead to injuries or issues of fairness when biological males are permitted to play against females, the NPRM proposed a framework for schools to evaluate exceptions to the rule. It asks schools to consider (a) sport, (b) level of competition, and (c) the grade or education level of the students. Yet the Department goes on to state that any decisions that “categorically exclude all transgender girls and women from participating on any female athletic teams” would rely on “overbroad generalizations” and thus, be illegitimate exceptions. It stated that “few, if any, sex-related eligibility criteria applicable to students in elementary school,” or even “immediately following elementary school,” meaning that sex-specific bans for younger children are not permitted but may be allowed for older children in very limited circumstances.

The exceptions articulated by the Department are as vague as they are hollow. The three factors enumerated are broad and highly subjective, open to vast interpretations from school to school. Yet, the Department’s subsequent commentary about the use of these factors renders the exception virtually useless. Any school or institution seeking to ensure that girls are physically protected as well as have equal access to fair athletic competition enshrined in Title IX, will undoubtedly face criticism and massive litigation costs for any exception they employ. It will be untenable for most schools to protect girls.

Additionally, students themselves will be bounced around from team to team as school administrators, forced to comply with these untenable regulations and contend with impending lawsuits, do their best to navigate the subjective murkiness of this guidance.

We urge the Agency to retract the NPRM so that the original intent of Title IX may be realized through the protection of women and girls in athletic endeavors.

Thank you for the opportunity to comment.

Respectfully submitted,

Frederick Brent Leatherwood  
President  
Ethics & Religious Liberty Commission  
of the Southern Baptist Convention