



November 13, 2023

Re: Discrimination on the Basis of Disability in Health and Human Services Programs or Activities

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We submit these public comments on behalf of the American Association of Christian Schools (AACCS) to the Department of Health and Human Services (Department) regarding the Notice of Proposed Rulemaking, “Discrimination on the Basis of Disability in Health and Human Services Programs or Activities” (NPRM). The AACCS is a national organization comprised of over 700 member schools across the country, employing more than 13,000 teachers and staff who serve approximately 118,000 students nationwide. Like other religious and Christian institutions, our schools and ministries follow a faith-based mission that cultivates a supportive environment providing care for their employees and students.

We appreciate that the NPRM is motivated by a desire to support and affirm the dignity of the human person, regardless of disability. We believe each person is an image-bearer of God our Creator, and, therefore, should be treated with dignity and respect. However, we note with concern that the NPRM interprets Section 504 of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act of 1990 (ADA) to include gender dysphoria as a covered disability. This inclusion will create many conflicts and burdensome requirements for religious organizations, including our Christian schools, that provide services that offer help and aid to those with legitimate disabilities. We offer the following explanations as to the problems this inclusion will create, as well as questions that must be clarified by the Department.

**First, the inclusion of gender dysphoria as a covered disability violates established law.** In the NPRM, the Department recognizes that Congress, in 29 U.S.C. 705(20)(F), defined “disability” in the Rehabilitation Act **to exclude** “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders” (p. 63463). Despite this statutory exclusion, the Department claims that gender dysphoria is “not excluded from coverage under the ADA or section 504” (p. 63464). The Department claims its inclusion of gender dysphoria as a covered disability under the ADA and Section 504 rests on the Fourth Circuit’s decision in *Williams v. Kincaid* (p. 63464). However, the Department of Justice had already issued a letter claiming Section 504 prohibited

“discrimination” based on gender dysphoria.<sup>1</sup> The Department of Justice had also released a statement in *Blatt v. Cabela’s Retail Inc.* saying gender dysphoria fell outside the gender identity disorder exclusion<sup>2</sup> and a statement of interest in *Doe v. Arrisi* saying that a person’s gender dysphoria resulted from a physical impairment and thus was a covered disability.<sup>3</sup> However, the Department seems to have failed to consider cases such as *Parker v. Strawser Constr., Inc.*<sup>4</sup> and *Lange v. Houston Cty., Georgia*,<sup>5</sup> which both reject the argument that gender dysphoria is a covered disability. As Chief Judge Marc Treadwell of the U.S. District Court in Georgia put it in his opinion for *Lange v. Houston Cty., Georgia*, the idea that gender dysphoria is covered under the ADA is built on a “false premise.”<sup>6</sup>

Despite the statutory exclusion of gender identity disorders not resulting from physical impairments, the Fourth Circuit, in a convoluted twist of reasoning, decided that gender dysphoria is distinct from gender identity disorders, and, therefore, recognized as a covered disability. However, as federal appellate Judge Marvin Quattlebaum explained in his dissent, “From 1990 to today, gender identity disorder has been understood to include distress and discomfort from identifying as a gender different from the gender assigned at birth”—which is the very understanding of gender dysphoria.<sup>7</sup> Supreme Court Justices Alito and Thomas also took issue with the faulty reasoning in *Kincaid* in their dissent against the Supreme Court’s decision to decline to review the *Kincaid* case: “If the Fourth Circuit’s decision is wrong—and there is certainly a reasonable argument to that effect—then the 32 million residents of the Fourth Circuit should not have to bear the consequences while other courts wrestle with the same legal issue.”<sup>8</sup> By the intent of Congress and the reading of the ADA as it was understood at the time of passage, gender dysphoria falls under the definition of gender identity disorders. Yet, the Department seems to be pushing an agenda and selectively deferring only when a case supports its desired policy goals. Consequently, the Department will thrust this faulty reasoning on not only the 32 million residents of the Fourth Circuit but also on the rest of the nation.

To align with statutory law and to avoid confusion, the Department should remove the inclusion of gender dysphoria as a protected disability and the corresponding explanation regarding *Williams v. Kincaid* in Section § 84.4(g) of the NPRM.

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<sup>1</sup> Department of Justice, “Justice Department Reinforces Federal Nondiscrimination Obligations in Letter to State Officials Regarding Transgender Youth,” March 31, 2022, <https://www.justice.gov/opa/press-release/file/1489066/download>.

<sup>2</sup> *Blatt v. Cabela’s Retail Inc.*, November 16, 2015, p. 2, <https://www.glad.org/wp-content/uploads/2015/02/blatt-v-cabelas-doj-soi-11-16-15.pdf>.

<sup>3</sup> *Doe v. Arrisi*, July 17, 2017, p. 3, <https://images.law.com/contrib/content/uploads/sites/292/2017/07/transgender-2.pdf>.

<sup>4</sup> *Parker v. Strawser Constr., Inc.*, April 25, 2018, <https://casetext.com/case/parker-v-strawser-constr-inc>.

<sup>5</sup> *Lange v. Houston Cty., Georgia*, June 2, 2022, p. 28-33, [https://transgenderlegal.org/documents/89/Case\\_519-cv-00392-MTT\\_-\\_Lange\\_v.\\_Houston\\_County.pdf](https://transgenderlegal.org/documents/89/Case_519-cv-00392-MTT_-_Lange_v._Houston_County.pdf).

<sup>6</sup> *Lange v. Houston Cty., Georgia*, June 2, 2022, p. 30, [https://transgenderlegal.org/documents/89/Case\\_519-cv-00392-MTT\\_-\\_Lange\\_v.\\_Houston\\_County.pdf](https://transgenderlegal.org/documents/89/Case_519-cv-00392-MTT_-_Lange_v._Houston_County.pdf).

<sup>7</sup> (slip op. at 38-47) <https://www.ca4.uscourts.gov/opinions/212030R1.P.pdf>.

<sup>8</sup> Supreme Court, *Williams v. Kincaid*, p. 2, [https://www.supremecourt.gov/opinions/22pdf/22-633\\_1cok.pdf](https://www.supremecourt.gov/opinions/22pdf/22-633_1cok.pdf).

**Second, the inclusion of gender dysphoria denies reality which leads to confusion and harm to those it purports to protect.** Biologically, ontologically, and morally, humans are and have always been sexually dimorphic. Only two sexes exist—male and female—and these remain fixed despite any desire or attempt to change this truth. The Scriptures confirm this reality, and, like many other faith-based institutions, our schools’ policies operate according to this conviction and the reality of the distinctives of maleness and femaleness. However, in purporting to protect those suffering from gender dysphoria, this NPRM ignores reality. Consequently, teachers and schools that affirm biological reality will face claims of discrimination for speaking the truth.

Many have offered untested recommendations for those suffering from gender dysphoria that, instead of helping heal individuals, would actually render the individual disabled under the NPRM’s definition of disability. In proposed Section § 84.4, the definition of disability includes “a physical or mental impairment that substantially limits one or more of the major life activities of such individual” (p. 63496). In the same section, the definition of “physical and mental impairments” includes “anatomical loss,” and the definition of a “major life activity” includes “the operation of a major bodily function, such as the functions of . . . reproductive systems (p. 63496). Puberty blockers and cross-sex hormones, which some have claimed will help individuals suffering from gender dysphoria, can permanently disable the reproductive system. In addition, surgical procedures such as mastectomies on otherwise perfectly healthy females for the purpose of treating a person’s gender dysphoria would also render the individual disabled because of anatomical loss.

To put the issue in context, if an underweight, anorexic girl believes she is overweight and requests a liposuction, a kind and humane person would help the girl understand the reality that she is actually underweight. A doctor offering a surgical solution like liposuction would be committing medical malpractice to engage in such a treatment. In other words, a doctor or counselor treating this condition would help the girl be at peace with her physical body by helping align her mind to the biological reality of her body. However, if this same girl came to her teacher believing she was a boy trapped in a girl’s body, the NPRM would potentially force the teacher to affirm her disturbed thoughts. Like many other faith-based institutions, our schools care deeply about the dignity of their students and employees; we are motivated by the love and tenets of our faith to care for our students. However, the NPRM would require schools to act contrary to these tenets by requiring them to affirm and act upon that which is false and not a true reflection of reality.

The removal of gender dysphoria as a protected disability in the proposed regulations would ensure that the NPRM affirms reality and the level of care that is needed for those suffering from a gender identity disorder.

**Third, the inclusion of gender dysphoria threatens the religious liberty of religious schools and institutions that have clear, deeply held beliefs regarding gender dysphoria.** As explained in the previous point, the gender ideology that supports the idea of gender dysphoria as a disability is contrary to deeply held convictions and beliefs of religious institutions of all faiths,

including our schools and ministries. Yet, the NPRM does not address the religious liberty that is guaranteed to religious organizations, institutions, and individuals through the First Amendment and the Religious Freedom Restoration Act (RFRA). The First Amendment clearly protects against the government prohibiting religious exercise or practice. Additionally, the First Amendment also protects the freedom of speech. RFRA protects the religious freedom of individuals and organizations against a government action that would substantially hinder their religious expression.<sup>9</sup> This would include the right of a religious institution or individual to live in accordance with their beliefs on how to care for and treat those suffering from gender dysphoria.

Like many religious organizations, some AACS K-12 schools are recipients of FFA through programs intended to assist teachers and schools and services that are offered to students and families. The AACS also represents colleges that receive FFA. For these schools, it is unclear how the NPRM would affect their policies and procedures. Clarification is needed regarding an organization's and individual's lawful and constitutional religious liberty. Because we are concerned about the recent trend whereby courts have found that an organization's tax-exempt status constitutes FFA, triggering laws like Title IX and Section 504, we ask: does the Department consider an organization's tax-exempt status equivalent to receiving FFA?

Furthermore, the NPRM does not address what actions count as gender dysphoria discrimination, including in the areas of admissions, athletics, dress codes, student conduct codes, employee conduct codes, hiring standards, private spaces, pronoun usage, and employee health plans. Would a religious school be forced to use a student's or employee's gender self-perception in any or all policy considerations?

Further questions arise for our AACS schools with the NPRM's recognition of IDEA requirements for a school to identify students with disabilities. Under the equitable service provisions for private school students through IDEA, the burden for identifying students with disabilities is placed on the LEA as private schools with participating students are not considered recipients of FFA. This process recognizes the autonomy of the private schools while providing a way for students to receive the appropriate services under the statutory mandates of IDEA. However, without a clarification of the religious liberty implications that arise with the inclusion of gender dysphoria as a disability, the NPRM raises questions as to the burden and requirements that would be imposed on religious schools.

- Will private schools that are recipients of FFA now have an affirmative obligation to determine each student's disabilities, including if a student has gender dysphoria?
- Would a religious school have to comply with recommended accommodations for a student identified as having gender dysphoria such as bathroom access and pronoun usage?
- Who would determine what treatment was necessary for accommodations?

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<sup>9</sup> Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.

- Does the Department hold the position that tax-exempt status is FFA for the purposes of Section 504?
- Again, what actions would constitute gender dysphoria discrimination?
- Does the Department agree that religious organizations and individuals are protected from complying with the Department's interpretation of Section 504 because of the First Amendment and RFRA?

Without clarification regarding an organization's and individual's lawful and constitutional religious liberty, the Department is putting faith-based institutions and religious organizations in an untenable position by forcing them to either live by a humane, caring biblical worldview while disobeying these guidelines, or to follow this regulation at the expense of foregoing sincere religious convictions on how to care for those affected by gender dysphoria. The lack of recognition of religious liberty opens the door for religious organizations and individuals to be accused of discrimination when adhering to religious beliefs on how to best care for those suffering from gender dysphoria. This will inevitably lead to litigation.

In conclusion, our concerns regarding the omission of any explanation and clarity regarding the reality of human sexual dimorphism, religious liberty, and religious expression are of paramount importance. Without recognizing the importance of truth and religious freedom, this NPRM pits a government-supported ideology against Constitutionally secured religious liberty and reality. We respectfully urge the Commission to reevaluate and revise the NPRM, given the preeminence of the Constitution and the other federal laws, and remove gender dysphoria as a recognized disability in the final rule.

Thank you for your consideration of our concerns.

Sincerely,

A handwritten signature in black ink that reads "Jam Coppola". The signature is written in a cursive, flowing style.

Jamison Coppola  
AACCS Government Affairs  
Director