November 13, 2023

Secretary Xavier Becerra
U.S. Department of Health and Human Services
200 Independence Ave., SW
Washington, DC 20201
VIA REGULATIONS.GOV

RE: Discrimination on the Basis of Disability in Health and Human Service Programs or Activities
RIN 0945-AA15
Docket ID HHS-OCR-2023-0013

Dear Secretary Becerra:

Alliance Defending Freedom (ADF) submits these comments on the Notice of Proposed Rulemaking (NPRM) on Discrimination on the Basis of Disability in Health and Human Service Programs or Activities, Docket ID HHS-OCR-0013. ADF is a non-profit alliance-building legal organization that advances the God-given right to live and speak the Truth. We contend for the Truth in law, policy, and the public square, and equip the alliance to do the same. Since its launch in 1994, ADF has handled many legal matters involving the First Amendment, gender identity non-discrimination rules, athletic fairness, student privacy, the conscience rights of health care providers, the Religious Freedom Restoration Act, and other issues raised by the Notice of Proposed Rulemaking.

In addition, ADF serves a large number of non-profit organizations covered (or potentially covered) by Section 504 of the Rehabilitation Act. Many have belief-based policies and practices that might be deemed inconsistent with the Department's view that "gender dysphoria" is *not* a "gender identity disorder" and thus might be a protected disability under Section 504. Accordingly, the Department's incorrect interpretation of the Rehabilitation Act will impose substantial burdens on large numbers of dissenting organizations, raising significant issues under the First Amendment and the Religious Freedom Restoration Act. And given that the Americans with Disabilities is interpreted to be consistent with the Rehabilitation Act, the consequences of the Department's position could extend much farther, reaching countless entities not subject to Section 504.

We strongly urge the Department to reconsider and rescind its conclusion that "gender dysphoria" can be a covered disability under the Rehabilitation Act. In the

alternative, we ask that the Department provide significantly more detail regarding how it intends to interpret and enforce Section 504, especially given the restraints imposed by the First Amendment and the Religious Freedom Restoration Act.

I. BACKGROUND

The preamble contains a discussion of proposed Section 84.4(g), entitled "Exclusions." 88 Fed. Reg. at 63463-63464. The preamble notes that proposed Section 84.4(g) is simply a verbatim recapitulation of a particular provision of the Rehabilitation Act, 20 U.S.C. § 705(20)(F), that applies in Section 504 cases. 88 Fed. Reg. at 63463.

The preamble quotes the statutory text, which states that the term "disability" does not include, among other things, "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders." *Id*. at 63463-63464.

The preamble then discusses the Fourth Circuit's decision in *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022), *cert. denied*, 600 U.S. ___ (U.S. June 30, 2023)(No. 22-633). 88 Fed. Reg. at 63464. The preamble notes that the court held that the plaintiff had "plausibly alleged that gender dysphoria does not fall within section 504's and the ADA's exclusion for 'gender identity disorders not resulting from physical impairments.'" *Id*.

After discussing the Fourth Circuit's reasoning, the preamble states:

> The Department agrees that restrictions that prevent, limit, or interfere with otherwise qualified individuals' access to care due to their gender dysphoria, gender dysphoria diagnosis, or perception of gender dysphoria may violate section 504.

88 Fed. Reg. at 63464.

ADF respectfully urges the Department:

1. to declare that tax-exempt status is not "federal financial assistance" and thus does not trigger the application of Section 504;
2. to explain why it simply repeated the statutory text in the proposed regulation;
3. to reconsider its conclusion that "gender dysphoria" is not a "gender identity disorder" for purposes of the Rehabilitation Act's exclusion from the definition of "disability;"
4. to clarify the circumstances in which "gender dysphoria" is a "disability;"

5. to explain what Section 504 requires if "gender dysphoria" is a "disability;" and
6. to describe how the Department will manage the probable consequences of its interpretation on constitutionally and statutorily protected expression and religious exercise.

II. THE DEPARTMENT SHOULD DECLARE THAT TAX-EXEMPT STATUS IS NOT FEDERAL FINANCIAL ASSISTANCE AND THUS DOES NOT TRIGGER SECTION 504.

The Department should clarify whether Section 504 applies to non-profit organizations—ones that do not receive federal financial assistance (conventionally understood)—on the ground that they are tax-exempt. If it elects to provide such clarification, we urge the Department to declare that such organizations are *not* recipients of federal financial assistance and are thus *not* subject to Section 504.

Section 504 states in pertinent part as follows:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794(a).

The statute does not define the term "federal financial assistance." However, an HHS regulation implementing Section 504 states as follows:

> Federal financial assistance means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:
>
> (1) Funds;
>
> (2) Services of federal personnel; or
>
> (3) Real and personal property or any interest in the use of such property, including:
>
> (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
>
> (ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

45 C.F.R. § 84.3(h).

In the proposed rule's only treatment of "federal financial assistance," it proposes to add the words "direct Federal" prior to "procurement contract." 88 Fed. Reg. at 63464. The preamble states that "[n]o substantive change is intended." *Id*.

Last year, two courts held that tax-exempt status is "federal financial assistance." *See Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n*, 2022 WL 2869041 (D. Md. Jul. 21, 2022); and *E.H. v. Valley Christian Acad.*, 616 F.Supp.3d 1040 (C.D. Cal. 2022). Although they were Title IX cases, nothing in the courts' reasoning suggests that their conclusion about the meaning of "federal financial assistance" is limited to Title IX. The definition of "federal financial assistance" in the Title IX context is essentially identical to that in the Section 504 context. *See* 20 U.S.C. § 1682 (referring to federal financial assistance in Title IX as a "grant, loan, or contract other than a contract of insurance or guaranty"); 31 C.F.R. § 28.105 (Treasury Department definition of "federal financial assistance" in Title IX context).

Other cases have addressed whether tax-exempt status constitutes federal financial assistance for purposes of statutes triggered by the receipt of such aid. Most of them have held that tax-exempt status is not federal financial assistance and thus does not trigger coverage of the statute in question. *See Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Ill., Inc.*, 134 F.Supp.2d 965, 971-72 (N.D. Ill. 2001)(Title IX); *Chaplin v. Consol. Edison Co.*, 628 F. Supp. 143, 145, 146 (S.D.N.Y. 1986)(Section 504); and *Bachman v. Am. Soc. of Clinical Pathologists*, 577 F. Supp. 1257, 1264 (D.N.J. 1983)(Section 504). *But see McGlotten v. Connally*, 338 F. Supp. 448, 462 (D.D.C. 1972)(Title VI); *Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185, 1192 (S.D.N.Y. 1988)(Title VI and Title IX).

In the wake of *Buettner-Hartsoe* and *Valley Christian Academy*, litigants are beginning to argue that tax-exempt status is federal financial assistance and thus triggers laws like Title IX and Section 504. *See, e.g., Doe v. Horne*, No. 4:23-cv-00185 (D. Ariz. Jun. 1, 2023); *Chen v. Hillsdale Coll.*, No. 1:23-cv-01129 (W.D. Mich., filed Oct. 25, 2023). Given this, it is imperative that the Department reveal its position on this issue.

The Department's view that gender dysphoria may be a disability under Section 504 further warrants that it address whether tax-exempt status is federal financial assistance and thus triggers Section 504. There are easily tens of thousands of non-profit, tax-exempt organizations that do not receive federal financial assistance, conventionally understood. Among these are many private educational institutions that have been operating for years, even decades, under the very reasonable conclusion that they are not subject to Section 504. Moreover, religious private schools and other religious organizations are not already subject to the similar requirements of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq*., as there is a categorical religious exemption from that title of the Act. *See* 42 U.S.C. § 12187. Therefore, the new

imposition of Section 504 would be a particularly burdensome departure from the status quo.

As discussed in more detail below, a rule forbidding gender dysphoria discrimination could have significant consequences for private educational institutions. It is possible, even likely, that the Department and other federal agencies under the current administration will interpret Section 504 to require covered schools (1) to permit female-identifying males to participate in girls' and women's sports; (2) to give female-identifying males access to sex-separated private spaces set aside for women, such as locker rooms; (3) to use trans-identifying individuals' self-selected pronouns; and (4) to cover puberty blockers, cross-sex hormones, and various surgeries in their employee and student health plans. Many educational institutions and other non-profit organizations object to complying with such requirements, often for religious and conscientious reasons.

Non-profit organizations that do not receive "conventional" federal financial assistance need to know whether the Department believes they must comply with Section 504. We encourage the Department to follow its regulatory definition of "federal financial assistance" and the majority of relevant judicial decisions to conclude and publicly declare that tax-exempt status is *not* federal financial assistance and thus does *not* trigger the application of Section 504 to organizations whose only connection (if you can even call it that) with the federal government is their tax-exempt status.

III. REPEATING THE STATUTORY TEXT IN A REGULATION

As the Department admits, proposed Section 84.4(g) simply repeats the Rehabilitation Act provision excluding certain conditions from the definition of "disability." 88 Fed. Reg. at 63463. The Department should explain why it has taken this approach.

Earlier this year, the Department's Office for Civil Rights proposed eliminating certain regulatory provisions on the ground that they were "redundant and unnecessary, because they simply repeated the language of the underlying statute." "Safeguarding the Rights of Conscience as Protected by Federal Statutes," 88 Fed. Reg. 802, 825 (Jan. 5, 2023). That approach appears inconsistent with the Department's proposal here to repeat verbatim a Rehabilitation Act provision in an implementing regulation.

It is rather obvious that the Department proposed adding the statutory text to the existing regulation to manufacture an opportunity for it to press its tendentious interpretation of the statute, *i.e.*, that gender dysphoria can be a disability under Section 504. This is a suspect use of the rulemaking process. Indeed, in the context of the HHS Conscience rule mentioned in the previous paragraph, the Department said as much in justifying its elimination of repeated statutory language in a previous version

of the rule. At the very least, HHS should explain why it proposes to repeat the statutory text in a regulatory provision.

The Department may be attempting to elevate the level of deference courts might afford its interpretation of the statute by transforming that interpretation into one of a regulation instead. The Department should explain whether it expects courts to defer to its understanding of the issue, even though it did not codify that understanding in the regulatory text. We further request that the Department describe the degree of deference, if any, it expects its interpretation to receive.

It should also explain why it elected not to undertake such codification in the regulatory text. Did it do so to impose an expectation on the regulated community while hoping to avoid a legal challenge? If so, that seems a somewhat suspect approach. More generally, it would be helpful if the Department could share its views on how the regulated community should respond to the inclusion of an interpretation of the "gender identity disorders" exclusion in the preamble without a corresponding inclusion in the regulatory text.

IV. THE DEPARTMENT SHOULD DECLARE THAT GENDER DYSPHORIA IS EXCLUDED FROM THE REHABILITATION ACT'S DEFINITION OF "DISABILITY."

The Department should reconsider its conclusion that "gender dysphoria" can be a disability for at least two reasons. First, the arguments in the *Williams v. Kincaid* dissent are persuasive. Second, the ramifications of the Department's reasoning for other conditions listed in the DSM potentially could cause a significant rewriting of the statute and potentially generate detrimental outcomes.

At the very least, the Department should explain (1) why it failed to discuss the significant body of case law disagreeing with the *Williams* majority; and (2) what consequences it believes its decision will have on the interpretation of other exclusions from the definition of disability.

A. Gender Dysphoria is a "Gender Identity Disorder" and Thus Cannot Be a "Disability".

In the preamble, the Department briefly discusses *Williams v. Kincaid* and then expresses agreement with the Fourth Circuit's conclusion that gender dysphoria is not excluded from the Rehabilitation Act's definition of disability.

In our view, Judge Quattlebaum's *Williams* dissent has the better of the argument, demonstrating that the term "gender identity disorders" includes gender dysphoria and that the plaintiff failed to adequately allege that gender dysphoria results from a physical impairment. 45 F.4th at 780-90. The Department is familiar with these arguments and has rejected them; we are skeptical that the repetition of the dissent's

arguments, despite their compellingness, will persuade the Department to reverse course, so we will refrain from doing so.

That said, we do think it would be appropriate for the Department to explain why it appeared to ignore a significant collection of contrary decisions. In the years following the publication of the DSM-5 in 2013, multiple federal courts considered whether gender dysphoria could be a disability given the exclusion of "gender identity disorders not resulting from physical impairments." Many of these courts held that it could not. *See, e.g., Duncan v. Jack Henry & Associates, Inc.*, 617 F.Supp.3d 1011, 1055-57 (W.D. Mo. 2022); *Lange v. Houston Cty.,* 608 F.Supp.3d 1340, 1362 (M.D. Ga. 2022); *Doe v. Northrop Grumman Systems Corp.*, 418 F.Supp.3d 921 (N.D. Ala. 2019); *Parker v. Strawser Constr. Inc.*, 307 F.Supp.3d 744, 754-55 (S.D. Ohio 2018); *Gulley-Fernandez v. Wis. Dep't of Corrections*, 2015 WL 7777997, at *3 (E.D. Wis. Dec. 1, 2015); *but see Doe v. Mass. Dep't of Correction*, 2018 WL 2994403 (D. Mass. Jun. 14, 2018); *Blatt's v. Cabela's Retail, Inc.*, 2017 WL 2178123 (E.D. Pa. May 18, 2017).

In light of the significant disagreement in the cases—and of the substantial consequences of its conclusion—the Department should conduct a closer examination and, at the very least, provide a much more robust explanation of its reasoning and explain how far that reasoning reaches.

B. Impact of Interpretation on Other Exclusions from the Definition of "Disability"

The Rehabilitation Act excludes conditions other than "gender identity disorders" from the definition of "disability." These include "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, . . . or other sexual behavior disorders." 29 U.S.C. § 705(F)(i).

The Fourth Circuit's analysis in *Williams* rested in large measure on the revisions the American Psychological Association (APA) made to the DSM-IV in the DSM-5, specifically, the elimination of the term "gender identity disorder," the addition of the term "gender dysphoria," and modifications to the diagnostic criteria for the condition in question. *See* 45 F.4th at 767-69. The court noted that the DSM-5 stated that "gender dysphoria" was the psychological distress associated with gender incongruity, and that gender incongruity in itself was not a disorder. *Id.*

It is appropriate to ask whether this approach to the exclusion of "gender identity disorders" in the Rehabilitation Act, with its emphasis on the changes to the DSM, has ramifications for other exclusions from the definition of disability, such as exhibitionism and voyeurism.

In the DSM-IV, the broader category of "paraphilias" included exhibitionism, fetishism, frotteurism, pedophilia, sexual masochism, sexual sadism, transvestic fetishism, and voyeurism. In a discussion of how paraphilic disorders are described in the DSM-5, the APA notes that its Sexual and Gender Identity Disorders Working

Group "sought to draw a line between atypical human behavior and behavior that causes mental distress to a person or makes the person a serious threat to the psychological and physical well-being of other individuals." "Paraphilic Disorders," American Psychological Association, https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Paraphilic-Disorders.pdf (last visited Nov. 12, 2023).

The DSM-5's revision to the earlier edition's treatment of "voyeurism" is conceptually identical to its handling of "gender identity disorders." It replaced the term "voyeurism" with "voyeuristic disorder" and focused on the *distress* that can accompany a person's experience of voyeuristic desires. An explanatory document states:

> Not everyone who has voyeuristic tendencies suffers from Voyeuristic Disorder. The diagnosis of Voyeuristic Disorder is made if the behavior, fantasies and the intense sexual urges cause significant distress or hindrance to social, occupational and other significant areas of normal functioning.

"Voyeuristic Disorder DSM-5 302.82 (F65.3)," https://www.theravive.com/therapedia/voyeuristic-disorder-dsm--5-302.82-(f65.3) (last visited Nov. 12, 2023).

The DSM-5's treatment of exhibitionism is similar. It changed the name of the condition to "exhibitionistic disorder" and stressed the impact of the behavioral tendency on the individual's mental well-being. An explanatory document states:

> The DSM-5 does indicate that although all people with exhibitionistic disorder have a pattern of sexual conduct called exhibitionism, not all exhibitionists qualify for this diagnosis. The DSM-5 clarifies and emphasizes that the definition for exhibitionistic disorder is separate from the definition for exhibitionism as a general pattern of behavior. . . . Exhibitionistic Disorder results in significant clinical distress.

"Exhibitionistic Disorder DSM-5 302.4 (F 65.3)," https://www.theravive.com/therapedia/exhibitionistic-disorder-dsm--5-302.4-(f-65.3) (last visited Nov. 12, 2023).

It is reasonable to ask whether the Department's conclusion that gender dysphoria is not a "gender identity disorder"—and the reasoning behind it—will affect its interpretation of the existing statutory exclusions of other paraphilias, including transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, or other sexual behavior disorders (a term that includes fetishism, frotteurism, sexual masochism, and sexual sadism).

Given the DSM-5's changes to the names of these disorders and its emphasis on the distress that can accompany these behavioral tendencies and desires, it is reasonable to inquire whether all the other definitional exclusions refer to disorders that "no longer exist," *Williams*, 45 F.4th at 769, thereby rendering those exclusions meaningless. If that is not the Department's view, we respectfully request that it explain how the respective scenarios can be distinguished, given the virtually identical conceptual shift embodied in the DSM-5's treatment of gender identity disorder/gender dysphoria and these other disorders.

V. IF GENDER DYSPHORIA IS NOT EXCLUDED FROM THE DEFINITION OF "DISABILITY," WHAT DOES SECTION 504 REQUIRE?

If gender dysphoria is neither a "gender identity disorder" nor an "other sexual behavior disorder," at least two questions arise. First, in what circumstances, if ever, will gender dysphoria be a disability? Second, in circumstances in which gender dysphoria has been deemed a disability, what precisely does Section 504 prohibit? What does it require?

A. In What Circumstances Is Gender Dysphoria a Disability?

Assuming for argument's sake that gender dysphoria is not excluded from the definition of disability, in what circumstances does the Department believe gender dysphoria will be a disability for purposes of Section 504? To state the obvious, just because something is not a "gender identity disorder" does not necessarily mean it is a "disability" under the Act. Similarly, just because something is deemed to be a diagnosable and treatable condition under the DSM-5 does not necessarily mean it is a disability.

The court in *Williams v. Kincaid* never addressed this issue, as the defendants conceded it. *See* 45 F.4th at 766. Surely the Department is not taking the position that because one litigant conceded the issue, it is settled for all time and for all cases.

The Act generally defines "disability" as "a physical or mental impairment that constitutes or results in a substantial impediment to employment." 29 U.S.C. § 705(9)(A); *see also id.* at § 705(20). The Act also incorporates by reference the definition found in the Americans with Disabilities Act, *see* 29 U.S.C. § 705(9)(B), which generally defines disability as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A).

Conceding for the sake of discussion that "gender dysphoria" is "a physical or mental impairment," it would be helpful for the Department to clarify the circumstances in which it "substantially limits one or more major life activities." Incorporating language from the ADA, the Act states that "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking,

standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A).

The Act further states that "a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id*. at § 12102(2)(B). It would be useful to the regulated community for the Department to identify the major bodily functions that gender dysphoria substantially limits.

B. <u>If Gender Dysphoria is a Disability, What Does Section 504 Prohibit and Require</u>?

The preamble states:

> The Department agrees that restrictions that prevent, limit, or interfere with otherwise qualified individuals' access to care due to their gender dysphoria, gender dysphoria diagnosis, or perception of gender dysphoria may violate section 504.

88 Fed. Reg. at 63464.

Does the Department mean to suggest that preventing, limiting, or interfering with "access to care" is the *only* way a regulated entity can commit gender dysphoria discrimination in violation of Section 504? The preamble's limitation to "access to care" is somewhat surprising, especially given that the plaintiff in *Williams* challenged the defendants' actions regarding not only access to medical interventions, but also placement in men's housing, "harassment by other inmates, and persistent and intentional misgendering and harassment by prison deputies." 45 F.4th at 763.

As you know, the Department and other agencies under this administration have asserted that bans on sex discrimination (interpreted to reach gender identity) impose requirements well beyond mere "access to care." Given that, it is necessary to ask at the outset whether the Department agrees that discrimination on the basis of gender identity is not always the same thing as discrimination on the basis of gender dysphoria. It is reasonable to assume that the answer is yes since the Department's interpretation of the Rehabilitation Act's exclusion of gender identity disorders rests on an alleged distinction between gender dysphoria and gender identity disorder.

The question can be explored through a hypothetical. Suppose that a covered faith-based institution of higher education has a student conduct code under which: (1) students may not identify or present as the opposite sex; (2) students are assigned to sex-separated sports on the basis of sex, not gender identity; (3) access to single-sex dorms and sex-separated private spaces like locker rooms is based on sex rather than gender identity; and (4) school representatives will use pronouns consistent with each

student's sex rather than their gender identity. These community standards apply to all students, whether or not they suffer from gender dysphoria. To the extent such standards can be deemed "discriminatory," they draw distinctions based on gender identity per se, not based on the presence of gender dysphoria. Does the Department believe that the hypothetical school in this scenario has discriminated on the basis of gender dysphoria in violation of Section 504?

In any event, it is easy to imagine gender dysphoric individuals arguing that Section 504 requires accommodations beyond "access to care." In the related sex/gender identity discrimination context, this administration has asserted that a variety of other actions constitute gender identity discrimination illegal under other laws.

For example, President Biden issued an "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." 86 Fed. Reg. 7023 (Jan. 21, 2021). It asserts that bans on gender identity discrimination are germane to sex-separated private spaces and to participation in sex-separated athletics. *Id*. at 7023.

Further, the EEOC has indicated that "intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment" in violation of Title VII. "Sexual Orientation and Gender Identity Discrimination (SOGI) Discrimination," U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination (last visited Nov. 11, 2023). The Commission has also taken the position that, under Title VII, "employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity." *Id*.

The Department of Education has issued a proposed Title IX regulation that would forbid covered educational institutions from always assigning students to sex-separated sports teams by sex (rather than the student's professed gender identity). "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Criteria for Male and Female Athletic Teams," 88 Fed. Reg. 22860 (Apr. 13, 2023).

Finally, as you know, your Office for Civil Rights issued a Notice of Proposed Rulemaking entitled, "Nondiscrimination in Health Programs and Activities," 87 Fed. Reg. 47824 (Aug. 4, 2022), interpreting Section 1557 of the Affordable Care Act, which has been construed to forbid discrimination on the basis of gender identity, among other things. The proposed rule seeks to coerce health care providers to alter a person's appearance as a male or as a female in order to resemble a person of the opposite sex.

Given the previous declarations of both your Department and others, we respectfully request that the Department clarify what actions or inactions you believe constitute illegal discrimination on the basis of gender dysphoria under Section 504. We

also urge the Department to delay publication of the Section 1557 final rule until it has resolved the questions raised on this proposal and is prepared to finalize this rule, since the questions and issues raised so clearly overlap.

VI. HOW WILL THE DEPARTMENT OBEY THE FIRST AMENDMENT AND THE RELIGIOUS FREEDOM RESTORATION ACT?

If the Department retains the understanding of "gender identity disorders" articulated in the preamble, there can be no doubt that Section 504 will adversely impact religious liberty and freedom of conscience. Those consequences should prompt the Department to reconsider its interpretation.

Barring that, the Department must explain how it will obey the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*., and manage the negative effects its interpretation will have on conscience and religious exercise (and, potentially, freedom of speech).

A. The Department's Interpretation Will Adversely Impact Religious Liberty and Freedom of Conscience.

In section V.B. of this comment, we asked the Department what actions might violate Section 504 if gender dysphoria is deemed a disability. As noted above, the preamble focuses exclusively on "access to care," not specifically mentioning other ways covered entities might commit gender dysphoria discrimination. The Department's answer to this question will determine the extent to which its interpretation will impact religious exercise, freedom of conscience, and freedom of speech.

If its interpretation is limited to "access to care," the Department should explain how covered entities might violate Section 504 in their interactions with gender dysphoric individuals. For example, in what circumstances might covered healthcare practitioners be required to prescribe or administer puberty blockers and/or cross-sex hormones? When might they be required to perform surgeries intended to alter a person's appearance as a male or as a female in order to resemble a person of the opposite sex? When, if ever, would sponsors of employee or student health insurance plans be required to include puberty blockers, cross-sex hormones, and surgeries in their plans?

In section V.B. of this comment, we also asked how the Department views the relationship between bans on gender identity discrimination and bans on gender dysphoria discrimination, especially where the latter includes a duty reasonably to accommodate disabilities. Its answer to that question will also determine the extent to which its interpretation of the Rehabilitation Act will burden religious exercise, free speech, and freedom of conscience.

If the Department believes that Section 504 goes beyond "access to care," its interpretation will have other negative consequences for religious liberty, freedom of conscience, and freedom of speech. Such an interpretation potentially implicates covered entities' policies and practices regarding (1) access to sex-separated private spaces (such as locker rooms, restrooms, and college dormitories); (2) participation in sex-separated athletics; (3) medical and mental health care responses to gender dysphoria; and (4) compelled use of particular pronouns referring to transgender-identifying individuals. A sizable number of organizations covered by Section 504 object to complying with such requirements, often on religious and conscientious grounds.

B. The Department Should Address How It Will Respect Religious Liberty and Freedom of Conscience.

Multiple courts have already indicated that forcing objecting organizations to comply with the sort of requirements discussed in the previous subsection violates the First Amendment and the Religious Freedom Restoration Act. For example, in *Franciscan Alliance, Inc. v. Azar,* 414 F.Supp.3d 928 (N.D. Tex. 2019), a federal district court held that forcing objecting health care practitioners to perform so-called "gender transition procedures" violates RFRA.

Similarly, in *Christian Employers Alliance v. EEOC*, 2022 WL 1573689 (D.N.D. May 16, 2022), the court held that forcing dissenting employers to include puberty blockers, cross-sex hormones, and surgeries in their health plans likely violates RFRA. *See also Braidwood Management Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023); *Religious Sisters of Mercy v. Azar*, 513 F.Supp.3d 1113 (D.N.D. 2021).

Given these decisions, how does the Department intend to satisfy its obligations under the First Amendment and the Religious Freedom Restoration Act? Neither the proposed rule nor the preamble gives any indication that the Department even recognizes these limits on its power, much less has any plan for respecting those limits.

Finally, Title IX has an exemption for religious institutions that would prevent them from needing to comply with a ban on gender identity discrimination imposed under Title IX to the extent such a ban violates their religious tenets. 20 U.S.C. § 1681(a)(3). Section 504 does not have a parallel exemption. In order to estimate the regulatory and economic impacts of this proposed rule, the Department should specify whether the Department's position on Section 504's application to gender dysphoria discrimination will apply to educational institutions even to the extent they are protected by Title IX's exemption. If the Department takes the position that Section 504's purported gender dysphoria discrimination ban applies to those institutions even to the extent they are exempt under Title IX, the Department should discuss whether it has ever purported to impose Section 504 to this extent rather than deferring to the institutions' Title IX exemption, and it should estimate the economic impact of imposing Section 504 against those institutions in this way.

VII. CONCLUSION

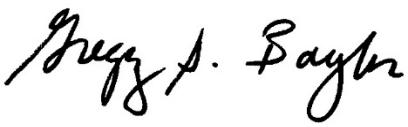
ADF urges the Department to reverse course and declare that "gender dysphoria" cannot be a "disability" under Section 504 because it is an excluded "gender identity disorder." Doing so would eliminate the prospect that the Department's interpretation will violate the fundamental rights of countless organizations with dissenting views on gender-related issues.

In the alternative, the Department should:

1. declare that tax-exempt status is not "federal financial assistance" and thus does not trigger the application of Section 504;
2. explain why it simply repeated the statutory text in the proposed regulation;
3. clarify the circumstances in which "gender dysphoria" is a "disability;"
4. explain what Section 504 requires if "gender dysphoria" is a "disability;" and
5. describe how the Department will manage the probable consequences of its interpretation on constitutionally and statutorily protected expression and religious exercise.

Thank you in advance for your consideration of this comment.

Very truly yours,



Gregory S. Baylor