August 13, 2019

New Civil Liberties Alliance

Alex M. Azar II
Secretary of the Department of Health and Human Services
Office for Civil Rights
Attention: Section 1557 NPRM, RIN 0945-AA11
Hubert M. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, DC 20201

Re: *Nondiscrimination in Health and Health Education Programs or Activities*, Docket No.: HHS-OCR-2019-0007

Dear Secretary Azar:

The New Civil Liberties Alliance ("NCLA") submits the following commentary in response to the Department of Health and Human Services' ("HHS" or "Department") proposed rule, *Nondiscrimination in Health and Health Education Programs and Activities*, 84 Fed.Reg. 27846 (June 14, 2019) ("Proposed Rule"). NCLA sincerely appreciates this opportunity to provide comment on and to express concerns about the most recent Proposed Rule. As an initial matter, however, NCLA would like to commend the Department on its decision to revise the § 1557 regulation, thereby voiding previous agency efforts to "legislate through rulemaking" contrary to the plain language of the nondiscrimination statutes at issue.

I. STATEMENT OF INTEREST

NCLA is a nonprofit civil rights organization founded to defend civil liberties against unlawful administrative power through original litigation, amicus curiae briefs, the filing of regulatory comments, and other means. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the due process of law, the right to trial by jury, the right to

live under laws made by the nation's elected lawmakers rather than by prosecutors or bureaucrats, and the right to be tried in front of an impartial and independent judge whenever the government brings cases against private parties.

NCLA defends civil liberties by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different type of government—a type, in fact, that the Constitution's foundation and design sought to prevent. This unconstitutional and often unconstrained administrative state within the Constitution's United States violates more rights of more Americans than any other aspect of American law, and it is thus the focus of NCLA's efforts.

Even when NCLA has not yet brought a suit to challenge an agency's unconstitutional exercise of administrative power, it encourages agencies themselves to curb the unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to, comply with, and enforce the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance. NCLA therefore advises that all agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act ("APA") and with the Constitution.

II. COMMENTS ON PROPOSED RULE

According to the Executive Summary published in the Federal Register related to the Proposed Rule, "Section 1557 of the Patient Protection and Affordable Care Act ('PPACA') prohibits discrimination on the basis of race, color, national origin, sex, age, or disability under any health programs or activity that receives Federal financial assistance, or under any program or activity that is administered by an executive agency under Title I of the PPACA or by an entity established under such Title." 84 Fed.Reg. at 27847. NCLA abhors discrimination of any sort. For purposes of these comments, however, NCLA will focus upon the Title IX aspects of the PPACA and the Proposed Rule.

Title IX was enacted in 1972 and provides that "[n]o 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." 20 U.S.C. § 1681. The agency rulemaking authority associated with Title IX is found in 20 U.S.C. § 1682:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant [or] loan … is authorized and directed to effectuate the provisions of section 1681 of this title [Title IX] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. *No such rule, regulation, or order shall become effective unless and until approved by the President*. (Emphasis added).

Title IX has been in place for forty-seven (47) years and has been highly successful in ensuring that programs that receive federal financial assistance do not discriminate on the basis of sex. Women like myself have benefited greatly from Title IX.

There is nothing about Title IX that is ambiguous, that cries out to be "fixed" by the agencies that implement it, or that requires its terms to be redefined by regulatory fiat. It says what it means and means what it says. Several federal agencies, however, including HHS, have taken what can only be considered a highly aggressive approach to "fixing" what is not broken, thereby using their rulemaking authority to rewrite the plain language of the statute itself. These efforts (which largely culminated in HHS's 2016 regulation), are not only wrong, but also violate our constitutionally-mandated separation of powers and the APA, 5 U.S.C. §§ 701, e*t seq.* ("APA").

Perhaps one of the most controversial aspects of HHS's 2016 regulation to carry out § 1557 of the PPACA relates to its reinterpretation of the word "sex" for purposes of Title IX compliance. "In its Section 1557 Regulation, the Department defined discrimination 'on the basis of sex' to cover, among other things, discrimination on the basis of sex stereotyping, gender identity, and termination of pregnancy…." 84 Fed.Reg. at 27847. Lawsuits challenging this new definition were immediately filed, with the court in *Franciscan Alliance, Inc., et al. v. Burwell, et al.,* 227 F.Supp.3d 660 (N.D. Tex. 2016), soon thereafter issuing a nationwide preliminary injunction against the Department. 84 Fed.Reg. at 27848. That injunction barred HHS from enforcing the § 1557 Regulation's prohibition against discrimination on the basis of "gender identity" and "termination of pregnancy." *Id.* In summary, "[t]he district court held that the Department had adopted an erroneous interpretation of

'sex' under Title IX, and that the regulation was also arbitrary and capricious for failing to incorporate Title IX's religious and abortion exemptions." *Id.* Further, "[t]he district court concluded that the Department's interpretation was not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because 'the meaning of sex in Title IX unambiguously refers to the biological and anatomical differences between male and female students as determined at their birth.' 227 F.Supp.3d at 687 (citations omitted)." *Id.*

In the instant rulemaking (the subject of these comments) "[t]he Department proposes to repeal the novel definition of 'sex' in the § 1557 regulation in order to make the Department's regulations implementing Title IX through the § 1557 Regulation more consistent with the Title IX regulations of other Federal agencies. The Department further believes this proposed rule avoids different interpretations of the same statute by multiple agencies, and promotes consistent expectations and enforcement." 84 Fed.Reg. at 27856. HHS identified several other problems and deficiencies with its 2016 regulation, including the following:

- The 2016 rule interpreted the scope of § 1557 too broadly in terms of the covered entities.
- The 2016 rule "improperly blended" substantive requirements and enforcement mechanisms.
- The 2016 rule interpreted federal nondiscrimination laws differently from other federal agencies.
- The 2016 rule created new provisions concerning language access not adequately justified by law or policy.
- The 2016 rule's definition of discrimination "on the basis of sex" has been enjoined by the courts (as discussed above).

The proposed rule purports to address these problems as well.

NCLA appreciates the fact that HHS now recognizes that the 2016 rule "exceeded its authority under Section 1557, adopted erroneous and inconsistent interpretations of civil rights law, caused confusion, and imposed unjustified and unnecessary costs." *Id.* at 27849. NCLA also appreciates the Department's recognition that "the Rule's prohibitions of discrimination on the basis of gender identity and … termination of pregnancy are substantively unlawful under the APA." *Id.* (quoting the decision in *Franciscan Alliance,* internal quotation marks omitted).

NCLA also appreciates HHS' recognition that the meaning of the words used in Title IX must be interpreted with reference to what they meant when the statute was adopted. As recently stated by the United States Supreme Court in *New Prime Inc., v. Oliveria*, 139 S.Ct. 532, 539 (2019):

> In taking up this question, we bear an important caution in mind. [I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute. *Wisconsin Central Ltd. v. United States,* 585 U.S. ——, ——, 138 S.Ct. 2067, 2074, 201 L.Ed.2d 490 (2018) (quoting *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)). See also *Sandifer v. United States Steel Corp.,* 571 U.S. 220, 227, 134 S.Ct. 870, 187 L.Ed.2d 729 (2014). After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands. *INS v. Chadha,* 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). (Internal quotation marks omitted).

NCLA commends HHS in its efforts to provide more certainty and stability in relation to implementing the nondiscrimination aspects of the PPACA, and supports the clarity that the Department has provided in carrying out its responsibility to prohibit discrimination on the basis of sex under those health programs or activities that receive federal financial assistance. NCLA further commends the Department's recognition that it did not have the authority in 2016 to rewrite and reinterpret the meaning of the words used in Title IX. Only Congress has the authority to write the law, with agencies such as HHS tasked solely with carrying out those laws as written.

No agency has any inherent power to make law. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in the Congress, and "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). This is a constitutional barrier to an exercise of legislative power by an agency. Further, "an agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, even if an agency could constitutionally exercise legislative power, it cannot purport to bind anyone without congressional authorization.

In summary, HHS's authority is defined by Congress. It has no power to adopt regulations that are neither contemplated by the statutory provisions at issue, nor that contradict the plain language thereof. The Department violated both of these basic mandates in 2016 with the previous regulation, and it is important for the agency to return to its task of implementing the law rather than creating it.

HHS's authority to implement the mandates of Title IX is constrained by the language of the statute, with the scope of its jurisdiction defined by Congress by reference to the words that it used. Congress is the only body that is authorized to amend Title IX, and HHS is strictly forbidden from adopting regulations that contradict, expand upon, broaden, or nullify its strictures. If Congress chooses to adopt a new definition of any of the key terms, it has the authority to do so. HHS, however, does not enjoy that same power.

III. PRESIDENTIAL APPROVAL REQUIRED

Finally, as quoted above, Title IX states that no rules, regulations or orders of general applicability shall become effective unless and until they have been approved by the President. It does not appear that HHS's 2016 regulation was ever so approved, and it was improperly implemented as a result. NCLA encourages HHS to avoid this problem in the future by ensuring that the President approves any Title IX regulation that it adopts.

IV. CONCLUSION

Thank you again for this opportunity to provide NCLA's views on this important issue. Should you have any questions, please contact Harriet M. Hageman, Senior Litigation Counsel, at Harriet.Hageman@ncla.legal.

Sincerely,

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New Civil Liberties Alliance