National Center for Youth Law

Submitted electronically via Regulations.gov

U.S. Treasury Secretary Scott Bessent
Acting Commissioner
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Proposed Regulations, *Racial Nondiscrimination in Private Schools* (REG-119986-25)

Dear Secretary Bessent,

The National Center for Youth Law ("NCYL") submits this comment to strongly oppose the proposed rule from the Internal Revenue Service ("IRS") and the U.S. Department of Treasury, *Racial Nondiscrimination in Private Schools* (REG-119986-25) ("Proposed Rule"), which would expand the IRS's power to revoke or deny the tax-exempt status of private educational institutions.[1] NCYL is a national advocacy organization that is committed to building a future where every child thrives and is supported by families and communities. Through our work with children and youth, we have seen how important it is for schools to reach and support all their students, including students of color who are too often left behind.

NCYL fully supports the principle that no school should discriminate against any student because of race. That principle is settled law, and it has long been enforced through the tax code, as the U.S. Supreme Court recognized in *Bob Jones University v. United States*.[2] But the Proposed Rule does not simply restate that principle. It would strip tax-exempt status from any private school that "adopts, maintains, or enforces" a policy or practice that discriminates on the basis of race, color, or national or ethnic origin, "regardless of the intent behind or the legality of" the practice, with no materiality threshold and no opportunity to correct a problem. Reaching lawful practices, including practices intended to include and support students, turns a civil rights safeguard into a cudgel that can be used against the very children it was designed to protect. And the impacts of the Proposed Rule cannot be understated: by the agencies' own estimate, the rule would reach more than 18,000 private schools and as many as 750,000 students who may qualify for scholarships allocated on the basis of racial, ethnic, or national identity. For the reasons below, NCYL urges the Treasury Department and the IRS to withdraw the Proposed Rule.

I. The Proposed Rule is Inconsistent with the Supreme Court's Holding in *Bob Jones* and the Public Policy Doctrine

In *Bob Jones University v. United States*, the Supreme Court held that an organization qualifies as "charitable" under section 501(c)(3) only if it serves a public purpose and is not contrary to

[1] Racial Nondiscrimination in Private Schools, 91 Fed. Reg. 56811 (Sept. 4, 2026), https://www.federalregister.gov/documents/2026/09/04/2026-18127/racial-nondiscrimination-in-private-schools ("Proposed Rule").
[2] 461 U.S. 574, 598 (1983)

established public policy. Applying that principle, the Court upheld the IRS's denial of exemption to two private schools whose official policies excluded Black students or prohibited interracial dating and marriage. The Court emphasized that the policy against racial discrimination in education was rooted in decisions across all three branches of government, including the Supreme Court's decisions in *Brown v. Board of Education* and related cases, Congress's passage of the Civil Rights Act of 1964, and in decades of action by the Executive Branch. The public policy doctrine, as the Court explained, is therefore a narrow one, and is only properly invoked when there is universal agreement across the federal government and where an organization's conduct plainly contradicts that consensus.

The Proposed Rule departs from that understanding of the public policy doctrine in two basic and fundamental ways. First, it declares that practices are contrary to public policy "regardless of the[ir] legality." However, a practice that has been deemed lawful by Congress and/or federal courts cannot be contrary to an *established* public policy. It certainly does not represent the consensus of all three branches of government. The IRS cannot create public policy through a tax regulation and then cite it as the basis for denying exemption. That is the exact opposite of the Supreme Court's holding in *Bob Jones*.

Second, the Proposed Rule inverts the purpose and rationale of our nation's established public policy against racial discrimination. *Bob Jones* involved schools that excluded, demeaned, and degraded Black students simply because of their race. The national commitment against racial discrimination, the Court recognized, was a commitment to protect students from exclusion and to open the doors of educational opportunity. The Proposed Rule would instead penalize schools for their efforts to include and support students, to counter historic exclusions and inequities, and to develop and maintain diverse and inclusive educational environments.

The Proposed Rule relies heavily on *Students for Fair Admissions v. Harvard* [3] ("*SFFA*") to support its analysis. But that decision addressed the use of race as a factor in higher education admissions decisions in the context of the U.S. Constitution's Equal Protection Clause and Title VI of the Civil Rights Act of 1964. It did not address tax-exempt status. It did not hold that every race-related program, support, or outreach effort at every private school is unlawful or contrary to public policy. In fact, the Court itself acknowledged that schools may consider an applicant's own account of how race has affected their life. Nothing in *SFFA* justifies the rationale in the Proposed Rule.

II. The Proposed Rule Undermines Lawful Efforts for Advancing Diversity and Ensuring All Students Have the Supports They Need to Succeed

The Proposed Rule applies to "any policy or practice" that discriminates on the basis of race, color, or national or ethnic origin, and it does so regardless of purpose. It does not distinguish between a policy that excludes a child because of race and a practice that is designed to ensure that children of every background can enroll, participate, and succeed. A school reviewing discipline data by

[3] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

race to find and address disparities, including violations of the law that a school must address, recruiting from neighborhoods or feeder programs that serve predominantly students of color, offering culturally responsive curricula, or funding mentoring and tutoring for students identified as underserved could each be characterized as a race-conscious "practice." So could an affinity group or a restricted scholarship established by a donor decades ago.

These practices are not only lawful, but central to providing a quality education for all students. Many are race-neutral on their face and fully lawful after *SFFA*. The Supreme Court has never suggested that schools must be blind to the barriers their students face. Indeed, Justice Kavanaugh's concurrence in *SFFA* recognized that governments and universities "can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race."[4] Evidence and experience show that diverse learning environments and well-designed supports improve outcomes for all students. Stripping tax exempt status from private schools that undertake such work will not make those schools more equitable. Instead, fear of government intervention will lead schools to abandon the work altogether, or to stop collecting the data needed to see whether students are being treated fairly. Students who already face the greatest obstacles will bear the cost.

The preamble of the Proposed Rule asserts that the final promulgated rule would not prohibit private schools from adopting policies intended to eliminate prejudice and discrimination. However, that assurance does not appear in the regulatory text, and it does not provide any guidance to private schools about which activities fall on which side of the line. A school leader deciding whether to continue a program is unlikely to rely on preamble text when the penalty for guessing wrong is loss of tax-exempt status. The practical effect will be to chill lawful, beneficial programs that help all students. A rule that claims to protect students from discrimination should not discourage schools from supporting them.

III. The Proposed Rule Is Inconsistent with Longstanding IRS Precedent and Practice

For more than fifty years, the IRS's approach to race and private schools has focused on whether a school maintains a racially discriminatory policy, meaning one that excludes students or denies them the privileges and benefits the school offers because of their race. That approach is reflected in Rev. Rul. 71-447, which first stated the nondiscrimination requirement, and in Rev. Proc. 75-50, which has guided schools and examiners ever since. Those authorities ask schools to adopt a nondiscrimination policy, to publicize it, and to keep records showing that students are treated equally without regard to race. They are aimed at preventing the exclusion of students. Without explanation or justification, this proposed rule would purport to modify well-established prior IRS guidance that allowed certain race-conscious programs to continue. The government has not even tried to show that those programs caused harm, and has not identified a problem in current practice that the rule is needed to fix.

---

[4] *Id*., at 317 (Kavanaugh, J., concurring)(quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring)).

That is a significant departure from established policies that schools have properly relied upon, and the Administrative Procedure Act requires more than the agencies have offered. When an agency changes position, it must acknowledge the change, give a reasoned explanation, and take account of the serious reliance interests that its earlier approach created.[5] Thousands of schools have structured scholarships, outreach, restricted funds, and governance around the guidance they were given. Families have enrolled children, and donors have made gifts, in reliance on that framework. The proposal says little about those reliance interests, and it offers no transition plan beyond a delayed effective date.

The Proposed Rule is also inconsistent with the IRS's own practice of calibrating consequences to the seriousness of a violation. Revocation of tax exemption has historically been reserved for cases of substantial noncompliance, and the IRS has generally used examination, correction, and closing agreements in other contexts to bring organizations into compliance. The Proposed Rule contains no materiality threshold, no knowledge requirement, no exception for minor or inadvertent noncompliance, and no notice-and-cure period. It would treat a single mistake the same as a deliberate policy of exclusion. That all-or-nothing design is out of step with how the IRS administers section 501(c)(3) in virtually every other area.

IV. The Proposed Rule Is Too Vague

A rule that can cost an organization its tax-exempt status must tell that organization, in clear and unambiguous terms, what is prohibited. The Proposed Rule fails to do so. Its central operative phrase, a "policy or practice that discriminates on the basis of race, color, or national or ethnic origin," is not defined. The Proposed Rule does not say whether it covers only practices that treat students differently because of race, or also practices that are race-neutral on their face but have a different effect on different groups. It does not say whether a program that is open to all students but designed to serve a particular community is covered. It does not say whether collecting and analyzing data by race, recruiting from particular communities, teaching a curriculum that reflects the history of a particular group, or hosting a student affinity group counts as a "practice" at all. And because the rule applies "regardless of the intent behind" a practice, it provides no way for a school to distinguish a practice meant to include students from one meant to exclude them.

The gaps between the regulatory text and the Proposed Rule's preamble text make matters only more confusing. The preamble says that the Proposed Rule will not prohibit anti-bias efforts or interfere with a school's religious mission, curriculum, or observance, yet the regulatory text contains no such limits. Schools are therefore asked to rely on a preamble that the IRS, a future administration, or a federal court may read differently. In addition, the Proposed Rule does not specify how it will apply to restricted gifts and endowments that donors conditioned on racial or ethnic criteria long ago, or what a school should do when state law or a donor's instrument constrains its ability to change them.

---

[5] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016).

Vagueness is especially harmful when it is paired with a severe sanction. Loss of tax-exempt status affects a school's ability to receive deductible contributions, to qualify for many grants, and to keep its doors open. Without a materiality threshold, a knowledge requirement, or a chance to cure, a school cannot take comfort in good-faith compliance. While large institutions with tax counsel may be able to manage this uncertainty, mid-sized and small schools certainly will not. Faced with unclear lines and high stakes, schools may eliminate programs that carry any risk, including programs that are lawful and valuable. Fair notice is a basic feature of any workable regulatory regime, and it is especially important when an agency seeks to apply a standard to conduct that the agency itself acknowledges is lawful.

V. The Proposed Rule Inappropriately Weaponizes the IRS 501(c)(3) Process

The IRS's role in administering section 501(c)(3) is to determine whether organizations meet the statutory requirements for tax exemption. It is not the federal government's civil rights enforcement agency for educational institutions. Those responsibilities fall to the Department of Education's Office for Civil Rights, the Department of Justice's Civil Rights Division, and the federal courts, which are charged with interpreting federal antidiscrimination protections, such as the Civil Rights Act of 1964 and similar laws. Through those processes, educational institutions are afforded notice of what the law requires, an opportunity to respond when there are alleged violations, and an ability to cure any deficiencies. The Proposed Rule bypasses all of that. It would use the single most severe sanction available in the tax code to enforce a standard that is broader than the civil rights laws themselves, and it would do so without the procedures that make civil rights enforcement fair.

That design invites selective and politically motivated enforcement. Because the Proposed Rule's key terms are undefined and its text has no materiality threshold or cure period, the IRS would have broad discretion to decide which schools to examine and which practices to treat as disqualifying. It is no accident that the Proposed Rule arrives as part of a broader federal effort to discourage race-conscious policies in education and to deny equal educational opportunities to students of color. Whatever one thinks of those policies, tax-exempt status should not be used as leverage to press schools to adopt a particular position on contested questions of educational practice, or to penalize politically disfavored programs through unpredictable enforcement discretion. Congress has repeatedly sought to insulate tax administration from political direction precisely because the power to revoke exemption is so consequential. The Treasury Department and the IRS should not create a regulation that makes such abuse easy.

The costs of weaponizing the exemption process would fall on children. When a school loses its exemption, its students lose the programs, staff, and stability that the school provides. Those costs would be hardest on students who depend on small or specialized schools, including students with disabilities and children placed by public agencies in nonpublic schools, and on the low-income families who rely on scholarship aid. The prospect of revocation will also deter schools from enrolling and supporting students whose needs are greatest. The public policy doctrine which has

long been interpreted to protect students from discrimination should not be weaponized to put the educational stability of those very same students at risk.

VI. Conclusion

NCYL shares the agencies' stated goal of ensuring that no child is excluded from a quality education because of their race. But the Proposed Rule does not advance that goal. It is wholly inconsistent with *Bob Jones* and the public policy doctrine, it would deter lawful efforts to include and support students, it departs from the IRS's own precedent without adequate explanation, it is far too vague to give schools fair notice, and it would convert the tax-exemption process into a tool for pressuring schools. NCYL urges the Treasury Department and the IRS to withdraw the Proposed Rule.

Thank you for considering these comments.

Respectfully submitted,

Johnathan Smith
Managing Director, Education and Federal Strategic Advocacy
National Center for Youth Law