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Public Comment on Proposed Agency Rule: *Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance*

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TO: U.S. Department of Health and Human Services

RIN: 0945-AA27

January 20, 2026

Defending Education (DE) is a national grassroots organization dedicated to securing a high quality, value neutral education for every American student. Our organization consists of parents and students in K-12 and higher education programs across the country, all of whom have a vested interest in the outcome of the Department of Health and Human Services' (HHS) proposed rule regarding nondiscrimination on the basis of disability in programs or activities receiving federal financial assistance ("proposed rule" or "NPRM"). Among our many members and executive leadership are parents of children with disabilities who need the specialized services granted to them by federal civil rights law. We write in strong support of the proposed rule, which will restore fidelity to the plain text and legislative history of the applicable statute, provide much-needed clarity to recipients of federal financial assistance, and prevent the unauthorized expansion of covered disabilities from diluting resources for those whom Congress intended to protect.

Statutory History and Application

Section 504 of the Rehabilitation Act of 1973 ("section 504"), codified at 29 U.S.C. § 794, prohibits discrimination on the basis of disability in federally assisted and federally conducted programs and activities. Specifically, § 794(a) provides: "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 his or her 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 or under any program or activity conducted by any Executive agency[.]"

Although the Rehabilitation Act predates the Americans with Disabilities Act of 1990 (ADA) (which guarantees equal opportunity for individuals with disabilities in the areas of employment, government services, public transportation and places of accommodation), Congress subsequently amended the Rehabilitation Act, through the Rehabilitation Act Amendments of 1992, to align key definitions in the Act with key definitions in the ADA. *See* Pub. L. 102-569, sec. 102, 106 Stat 4344. Under these

amendments, the term "individual with a disability" **explicitly excludes** "an individual on the basis of… transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders." 29 U.S.C. 705(20)(F)(i).

Congress amended the Rehabilitation Act again, in the ADA Amendments Act of 2008, to further align the Rehabilitation Act definitions with the ADA. *See* Pub. L. 110-325, sec. 7, 122 Stat 3553. Specifically, 29 U.S.C. § 705(9)(B) states: "The term `disability' means . . . for purposes of [section 504], the meaning given it in section 12102 of [the ADA]." In addition, the definition of "individual with a disability" at § 705(20)(B) was revised for purposes of section 504 to mean "any person who has a disability as defined in section 12102 of [the ADA]." Under the ADA, 42 U.S.C. § 12102(1), "disability" means: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

The ADA explicitly excludes certain conditions from the definition of "disability." 42 U.S.C. § 12211(b.) Specifically, § 12211(b)(1) states that, "under this Chapter," on Equal Opportunity for Individuals with Disabilities,"[t]he term 'disability' **shall not include** (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders[.]"

Any regulatory interpretation of section 504 by HHS must adhere to the plain text of the statute and its subsequent amendments and abide by these identical statutory exclusions relative to the definitions of "individual with a disability" and "disability." The Rehabilitation Act and the ADA expressly exclude "gender identity disorders not resulting from physical impairments" from the definition of "disability." As noted above, this exclusion was enacted in the ADA in 1990 and *has never been amended by Congress* to provide otherwise.

The relevant legislative history underscores this exclusion. During the ADA's passage, Congress sought to distinguish between physical and mental impairments warranting protection and conditions viewed as behavioral or identity-based, such as those listed above. Gender dysphoria, however, a condition characterized by distress arising from incongruence between one's asserted gender identity and biological sex, *see* Diagnostic and Statistical Manual of Mental Disorders, 5th ed. (2013), falls squarely within the category of "gender identity disorders" as understood at the time of enactment. The exclusion's qualifier—"not resulting from physical impairments"—further emphasizes that only disorders with a demonstrable physical etiology might escape § 12211(b)(1)'s bar. Yet gender dysphoria typically does not meet this threshold absent rare, case-specific evidence of physical causation.

The Biden administration's 2024 final rule (89 FR 40066) introduced ambiguity by suggesting in its preamble that gender dysphoria could qualify as a disability under federal law, relying on a strained interpretation that diverges from this statutory framework. The proposed rule correctly rectifies that error by aligning the regulation with the statute's clear text and history.

The Need for Clarity for Recipients of Federal Funding

Recipients of federal financial assistance, including schools, hospitals, and other entities, need unambiguous guidance on their obligations under Section 504 to ensure compliance and avoid litigation. The preamble to the 2024 rule created confusion, implying that accommodations for gender dysphoria—

such as access to facilities or medical treatments—might be mandated as disability protections. This lack of clarity burdens recipients, who must navigate conflicting interpretations while risking enforcement actions or lawsuits.

By clarifying that gender dysphoria is excluded from the definition of a covered "disability" unless it results from a physical impairment, the proposed rule provides the precision necessary for effective implementation. It also aligns with the principle that agencies must adhere to statutory boundaries, ensuring that obligations are predictable and grounded in law rather than evolving administrative interpretations.

Violation of the Major Questions Doctrine in the 2024 Rule

The 2024 rule's inclusion of gender dysphoria as a potential disability violates the Supreme Court's major questions doctrine, as articulated in *West Virginia v. EPA*, 597 U.S. 697 (2022). Under this doctrine, agencies may not resolve issues of "vast economic and political significance" without clear congressional authorization. *Id.* at 723. Expanding Section 504 to cover gender dysphoria represents such a major question: it would impose sweeping obligations on federally funded entities, including in education and health care, potentially requiring accommodations like hormone therapy, facility access, or curriculum changes, with significant fiscal and societal impacts. As the Court noted in *West Virginia*:

> [G]iven the various circumstances, "common sense as to the manner in which Congress would have been likely to delegate" such power to the agency at issue, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle devices." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme.

Id. (cleaned up).

Congress did not authorize an expansion of section 504. The express exclusions in the statute demonstrate the opposite intent. The 2024 rule's preamble, while not altering the regulatory text, effectively invited enforcement on this basis, exceeding HHS's authority. As the Court emphasized in *West Virginia*, agencies cannot "discover in a long-extant statute an unheralded power" to transform regulatory schemes without explicit statutory warrant. *Id.* at 724). The proposed rule properly rescinds that overreach.

Congress' definition of disability must be interpreted according to its plain meaning. Doing so does not reflect a political judgment about people suffering from gender dysphoria; it shows the proper respect for Congress and the limited role of federal agencies under the Constitution.

The 2024 Rule's Faulty Reliance on *Williams v. Kincaid*

Despite the obvious statutory exclusions in the ADA and section 504, the Biden-era 2024 rule improperly relied on the Fourth Circuit's decision in *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022), which held that gender dysphoria is distinct from "gender identity disorders" and thus not excluded under § 12211(b)(1). The Fourth Circuit's interpretation is an outlier, its holding is faulty, and it is non-binding outside the Fourth Circuit. The court distinguished the terms based on post-enactment changes in the Diagnostic and Statistical Manual of Mental Disorders (from "gender identity disorder" in the third edition (1987) to

"gender dysphoria" in the fifth edition (2013)). The majority interpreted the ADA in light of what it viewed as evolving medical concepts. But statutory interpretation must focus on the meaning at the time of enactment. *See Bostock v. Clayton Cty.*, 590 U.S. 644, 654 (2020) (emphasizing original public meaning).

When Congress enacted of § 12211(b)(1), "gender identity disorders" broadly encompassed conditions like gender dysphoria, as evidenced by contemporary medical understanding. The Fourth Circuit's narrow reading ignores the plain language of § 12211(b)(1)'s exclusion and risks expanding coverage beyond congressional intent. Moreover, the court suggested that gender dysphoria might result "from physical impairments" based on allegations of distress from untreated hormone therapy, but that assertion conflates treatment needs with etiology. *Id.* at 770-72. Such reasoning invites value-based expansions of the statute, undermining its clear limits. The proposed rule is correct to prioritize the statute's plain text over the Fourth Circuit's outlier decision.

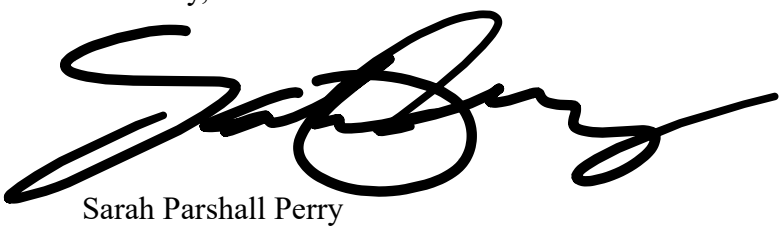
Preventing Dilution of Special Education Services

Finally, including gender dysphoria under Section 504 risks diluting resources for the students with disabilities whom Congress intended to protect. In education, Section 504 plans and the Individuals with Disabilities Education Act, *see* 20 U.S.C. § 1400 et seq., provide tailored supports for impairments that substantially limit major life activities. Expanding coverage to gender dysphoria would flood systems with demands for accommodations that are unrelated to traditional disabilities, straining budgets and diverting services from students with learning disabilities, autism, physical impairments, and other conditions. The risk of these harms is particularly acute because section 504 prohibits discrimination against all persons with disabilities, including school children, regardless of whether those students also require specialized educational instruction.

For instance, schools might face mandates for gender-affirming facilities or counseling, potentially at the expense of core special education needs. This dilution contravenes Congress's purpose in enacting Section 504 and the ADA: to protect those with genuine impairments, not to encompass every form of distress or identity-based condition. The proposed rule safeguards these priorities by maintaining statutory boundaries.

We at Defending Education urge HHS to finalize the proposed rule without delay. It restores statutory integrity, provides essential clarity on the required terms for receipt of federal funding, adheres to well-established Supreme Court precedent, rejects flawed judicial interpretations, and protects resources for truly disabled individuals.

Sincerely,



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