

November 3, 2026

Hon. Scott Bessent
Secretary of the U.S. Treasury and Acting IRS Commissioner
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

In re: Racial nondiscrimination in private schools (RIN 1545-BS05)

Secretary Bessent,

This letter responds to the Department of the Treasury and the Internal Revenue Service's request for public comment on the above referenced proposed rule under section 501(c)(3) of the Internal Revenue Code. This rule would require every tax-exempt private school, from K–12 through college, whether or not it receives federal funds, to cease discrimination "for any purpose" in its educational, admissions, scholarship, athletic, or other programs, under threat of losing its non-profit status.

The PARENTS Initiative of the Liberty Justice Center exists to ensure that parents, not the government, direct the education and upbringing of their children. Many parents who choose a private school often select a religious one, because they want their children educated in a community that shares their values. Of course, these families want their children's schools held to a firm rule against discrimination. But that rule must also be clear enough that a school acting in good faith does not lose its tax exempt status through unintentional action.

Based on its experience, the PARENTS Initiative submits this comment encouraging you to revise the proposed rule in two ways. First, the proposed rule

never states with sufficient specificity what it means to "discriminate." That leaves open the possibility that a neutral policy with uneven racial results could cost a school its exemption. Second, the protections for religious schools in the preamble do not appear in the regulation itself, which is where enforcement bodies and courts will look for clarification on the scope of protection.

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I. The rule should define "discriminates" as intentional action.

The proposed rule denies exemption to any school with a policy or practice that "discriminates on the basis of race, color, or national or ethnic origin," including discrimination "for any purpose." But it never specifically defines what "discriminates" means. The preamble states that the rule applies "regardless of intent behind" the discrimination. We read that to mean a good motive is no excuse, and we agree. But someone reading only the regulation could conclude that a school can lose its exemption over a neutral policy with uneven results, even if no one meant to treat anyone differently.

The Trump Administration and the courts have rejected such "disparate impact" theories.

In April 2025, the President declared that it is "the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible."[1] The Department of Justice, which coordinates Title VI enforcement across the federal government, then rescinded the disparate-impact provisions of its own Title VI regulations, making clear that those regulations "prohibit only intentional discrimination."[2] DOJ's guidance to federal-funding recipients takes the same approach to facially neutral criteria.[3] In fact, your Department removed its own the disparate-impact provisions from its Title VI regulations so that they "prohibit only intentional discrimination, not conduct or activities that have a disparate impact.[4]

Courts have also agreed with that treatment of disparate-impact theory. The Supreme Court has held that Title VI "prohibits only intentional discrimination."[5] It

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[1] Exec. Order No. 14281, 90 F.R. 17537.
[2] 2025-22448, 28 C.F.R. 42.
[3] Memorandum from Pamela Bondi, Att'y Gen., to All Fed. Agencies, *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination* 5 (July 29, 2025), https://www.justice.gov/ag/media/1409486/dl?inline=&utm_medium=email&utm_source=govdelivery.
[4] 91 F.R. 58766, 58767 (Aug. 3, 2026).
[5] *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

has also held that Section 1981—the law that reaches private schools regardless of whether they take federal funds—"can be violated only by purposeful discrimination."[6] The same is true of the Equal Protection Clause, which the preamble itself cites as evidence of the public policy at stake. And under *Bob Jones University v. United States,* the IRS may deny charitable status on public-policy grounds "only where there can be no doubt" that the conduct violates a fundamental public policy.[7]

Recommended Revision. Replace the second sentence of proposed §1.501(c)(3)-2(b) with:

> *Discrimination defined.* A private school discriminates on the basis of race, color, or national or ethnic origin if it intentionally treats any individual differently because of race, color, or national or ethnic origin, including through a facially neutral policy or practice adopted or applied because of, and not merely in spite of, its effect on individuals of a particular race, color, or national or ethnic origin. Such discrimination is prohibited regardless of motive, including a remedial, diversity-related, or other assertedly benign motive. A policy or practice does not discriminate solely because it has a disproportionate effect, although such evidence may be considered in determining whether discrimination is intentional.

II. The rule should protect against religious discrimination.

The preamble of the proposed rule tells religious schools that the rule "would not preclude a private school from maintaining a religious mission, curriculum, or program of observance, or from selecting students on the basis of religious affiliation or membership." It adds that this holds even when members of a faith community "may also share ancestry or ethnic characteristics." That is the correct policy, but the regulation itself never mentions these protections.

Courts have held that "language in the preamble of a regulation is not controlling over the language of the regulation itself."[8] While Congress already protects tax-exempt social clubs that "in good faith limits its membership to the members of a particular religion in order to further the teachings or principles of

[6] *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982).
[7] 461 U.S. 574, 592 (1983).
[8] *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43, 53 (D.C. Cir. 1999).

that religion," so long as they don't "exclude individuals of a particular race or color, "[9] "race" under Section 1981 includes ancestry and ethnic characteristics.[10]

Thus, a Catholic, Jewish, Greek Orthodox, or Coptic school that gives preference to members of its faith could see that preference recast as ancestral discrimination under the language of the proposed rule. The preamble's own wording makes the risk worse. It protects selection only when based solely on religion and "not on shared ancestry," yet many faiths define membership partly by descent while also welcoming converts. Under that test, examiners would have to decide whether a faith's membership rules are "really" religious, which is not a question the government should be asking.

Recommended Revision. Add a new paragraph (d) and redesignate current paragraph (d) as (e):

> (d) *Religious mission and selection.* (1) A private school does not discriminate within the meaning of paragraph (b) of this section by maintaining a religious mission, curriculum, or program of religious instruction or observance, including instruction in the languages, history, and traditions associated with its faith, or by admitting, selecting, or preferring students on the basis of religious affiliation, membership, belief, or observance, as determined in good faith under the tenets of the faith with which the school is affiliated. (2) Such a policy or practice is not discrimination merely because members of the religious community share, or are perceived to share, a common ancestry or ethnic characteristics, or because the faith's membership criteria take account of descent, provided that membership is available on religious terms without regard to race, color, or national or ethnic origin. (3) This paragraph (d) does not apply to any policy or practice adopted, maintained, or applied to exclude or disfavor individuals of a particular race, color, or national or ethnic origin.

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The changes proposed above would give schools and the IRS the clear, lasting standard for which the Treasury is aiming. First, define "discriminates" as intentional discrimination, consistent with Title VI, Section 1981, and the Treasury's

[9] 26 U.S.C. § 501(i)(2).
[10] *Saint Francis College v. Al-Kharaji*, 481 U.S. 604, 613 (1987).

updated guidelines. Second, move the preamble's religious protections into the regulation itself providing clarity to covered schools and future enforcement.

Respectfully submitted,

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