



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

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U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Disability NPRM, RIN 0945-AA27
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, D.C. 20201

Submitted Electronically via Regulations.gov

Re: Comment in support of Notice of Proposed Rulemaking: *Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance*, 90 Fed. Reg. 59478, submitted by States of Texas, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming

The Honorable Robert F. Kennedy, Jr.:

The Attorneys General of the States of Texas, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming appreciate the opportunity to comment on the Notice of Proposed Rulemaking issued by the Department clarifying that section 504 of the Rehabilitation Act of 1973 excludes “gender identity disorders not resulting from physical impairments” from its definition of disability. *See Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance* (Dec. 19, 2025), 90 Fed. Reg. 59478.

The changes the NPRM proposes would provide much needed clarification. The previous administration amended the regulations implementing section 504 to smuggle gender dysphoria and similar mental disorders into the scope of “disability” under section 504. *See Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance* (May 9, 2024), 89 Fed. Reg. 40066, 40069 (2024 Final Rule) (stating “Gender dysphoria . . . may be a disability . . . characterized by clinically significant distress”). However, by extending the definition of disability to encompass gender dysphoria the 2024 Final Rule contradicts federal law—which excludes “gender identity disorders not resulting from physical impairments” from the scope of “disability,” 29 U.S.C. 705(9); 42 U.S.C. 12211(b)—and unduly subjects the States to the risk of liability for failure or refusal to treat an individual’s discomfort with his sex as a legal disability.

The NPRM reaffirms the plain meaning of the statutory exclusions of subjective gender disorders found in the Rehabilitation Act and Americans with Disabilities Act (ADA). *See id.* “Distress” or perceived “incongruence” between an individual’s sex and his “experienced/expressed gender” do not constitute physical impairments covered by statute. 90 Fed. Reg. at 59479, 59581. By expressly restating the statutory bar on subjective gender identity disorders the NPRM curtails the potential for federal disability law to be misused to provide accommodations for gender dysphoria. Accordingly, the undersigned States strongly approve of the changes that the NPRM proposes.

I. The 2024 Final Rule is contrary to federal law.

Section 504 and the ADA prohibit discrimination on the basis of “disability” but carefully define that predicate term. Congress made the ADA’s definition broad enough to protect people with genuine physical impairments but explicitly excluded “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.” 42 U.S.C. § 12211(b)(1). Section 504’s definition is tethered to that same statutory choice, incorporating the ADA’s concept of disability and copying its express exclusions. *See* 29 U.S.C. § 705(9), (20).

The 2024 Final Rule disregards that statutory boundary. It asserts that “gender dysphoria . . . may be considered a physical or mental impairment,” and that it can satisfy the definition of disability, while simultaneously declaring that “gender dysphoria does not fall within the statutory exclusions for gender identity disorders.” 89 Fed. Reg. 40066, 40069. Because Section 504’s nondiscrimination obligations apply across a broad range of federally assisted programs and activities, the 2024 Final Rule’s attempt to redefine disability does not merely “clarify” Section 504; rather, it extends the statute’s scope to a new set of gender-related conditions.

The 2024 Final Rule attempts to justify this expansion by recasting Congress’s

terminology. It posits that when Congress used “gender identity disorders” in 1990, that phrase referred only to a person’s identification with a different gender, without clinically significant distress or impairment, and therefore that was not a disability. It then relies heavily on the Fourth Circuit’s decision in *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022), *cert. denied*, 600 U.S. (2023), which treated later revisions to the Diagnostic and Statistical Manual of Mental Disorders (DSM) as evidence that “gender dysphoria” is meaningfully distinct from the excluded category. *See* 89 Fed. Reg. at 40068-69 (discussing *Williams*). However, Congress did not incorporate the future evolution of the DSM’s diagnostic standards, and subsequent agency regulation cannot narrow or expand Congress’s exclusions by treating evolving medical labels as amendments to statutory text. *See Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021) (statutory terms are given their “ordinary meaning at the time Congress adopted them”). Further, *Williams* conveniently ignored the earlier DSM’s definition of “transsexualism,” which incorporated “incongruence between [] gender identity and [] assigned sex” and “significant distress” the same terminology that distinguishes “gender dysphoria” in the later DSM. Thus, at the time of enactment the then-current DSM defined one of the ADA’s excluded conditions in identical terms to the current DSM’s definition of gender dysphoria.

Nor is the 2024 Final Rule rescued by the notion that gender dysphoria is merely a “subset” of gender identity disorders rather than part of the excluded category itself. A subset cannot be both inside and outside the larger category simultaneously. If gender dysphoria is a subset of gender identity disorders, then it is included within gender identity disorders, and Congress’s exclusion still applies. The 2024 Final Rule also gestures toward a theory that gender dysphoria can “result[] from physical impairments.” 89 Fed. Reg. at 40068-69. Similarly, *Williams* reasoned that because gender dysphoria often correlates with irregularities in the endocrine system that dysphoric individuals sometimes treat with hormone therapy, gender dysphoria results from physical conditions and falls within the ADA’s “safe harbor.” 45 F.4th at 770. But gender dysphoria is diagnosed based on subjective, self-reported feelings and distress; it is not confirmed or denied by any physical test. Finally, the fact that mental conditions can produce physical distress or be treated with chemical interventions does not transform a mental impairment into an independent physical impairment. *See Kincaid v. Williams*, 143 S. Ct. 2414, 2417-18 (2023) (Alito, J., dissenting from the denial of certiorari).

The NPRM recognizes that “linguistic drift cannot alter the meaning of the words in the ADA when it was enacted.” 90 Fed. Reg. at 59481 (quoting *Williams*, 45 F.4th at 780 (Quattlebaum, J., concurring in part and dissenting in part)). When Congress excluded “transsexualism” and “gender identity disorders not resulting from physical impairments,” it did not legislate against a vacuum. The diagnostic criteria contemporaneous with enactment described persistent discomfort with one’s anatomical sex, a wish to live as a member of the other sex, and associated anxiety, depression, and functional impairment—features that the 2024 Final

Rule itself treats as the hallmarks of gender dysphoria. In any event, moving what earlier manuals described as “associated features” and “impairment and complications” into the formal diagnostic criteria—and then rebranding the diagnosis—does not create a materially different condition that can be pulled outside Congress’s exclusion by regulatory say-so. *See Williams*, 45 F.4th at 785 (Quattlebaum, J. concurring in part and dissenting in part) (indexing statutory meaning to changes in DSM criteria would “give organizations like the [American Psychological Association] power to effectively modify statutes passed by Congress and signed into law by the President. That cannot be right.”).

In short, the 2024 Final Rule contradicts the statutory definition of disability that Congress enacted. Since Congress excluded transsexualism and gender identity disorders not resulting from physical impairments, the Department may not “clarify” Section 504 by adopting a definition that nullifies those exclusions. The NPRM properly recognizes this problem and restores needed clarity by affirming statutory exclusions.

II. The 2024 Final Rule threatens the undersigned States.

Once gender dysphoria is treated as a covered disability under Section 504 and the ADA, States face immediate exposure to investigations, enforcement actions, and private litigation across wide swaths of their government operations, as well as the threat of withdrawal of federal funding.

The 2024 Final Rule treats “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” as potential Section 504 violations. 89 Fed. Reg. at 40069. That language invites challenges to state decisions in a broad range of federally assisted programs, including education and child welfare. For example, state child welfare agencies could face pressure to elevate the Rule’s requirements over governing state law standards in custody, placement, and termination decisions. This threatens to rob States of their authority over their child welfare programs or impose new compliance burdens. Section 504 applies generally to all programs that receive financial assistance, so the 2024 Final Rule’s requirement to accommodate gender dysphoria affects a broad array of state-administered programs.

In the employment context, the 2024 Final Rule places the undersigned States at risk of liability for their refusal to grant disability accommodations for gender dysphoria. Section 504’s regulations incorporate Title I of the ADA and, through it, Title VII’s remedial scheme. 42 U.S.C. §§ 12111 et seq.; C.F.R. § 84.16(b); 42 U.S.C. §§ 2000e-4. Expanding the definition of disability to include gender dysphoria invites claims that a State employer must provide “reasonable accommodations” tied to an employee’s asserted gender identity. Required accommodations may include compelled changes to workplace policies and practices that could conflict with existing state laws and policies.

Finalizing the NPRM will eliminate these harms imposed by the 2024 Final Rule. By restoring the statutory exclusions Congress enacted, it offers clear guidance for states and grantees, prevents opportunistic litigation, and preserves the integrity of state programs while keeping Section 504 focused on disabilities that federal law actually recognizes.

Respectfully Submitted,



Ken Paxton
Attorney General of Texas



Steve Marshall
Attorney General of Alabama



Lynn Fitch
Attorney General of Mississippi



Stephen J. Cox
Attorney General of Alaska



Austin Knudsen
Attorney General of Montana



Tim Griffin
Attorney General of Arkansas



Mike Hilgers
Attorney General of Nebraska



James Uthmeier
Attorney General of Florida



Drew H. Wrigley
Attorney General of North Dakota



Chris Carr
Attorney General of Georgia



Dave Yost
Attorney General of Ohio



Raúl R. Labrador
Attorney General of Idaho



Gentner Drummond
Attorney General of Oklahoma



Todd Rokita
Attorney General of Indiana



Alan Wilson
Attorney General of South Carolina



Brenna Bird
Attorney General of Iowa



Marty Jackley
Attorney General of South Dakota



Kris W. Kobach
Attorney General of Kansas



Derek Brown
Attorney General of Utah



Russell Coleman
Attorney General of Kentucky



John B. McCuskey
Attorney General of West Virginia



Liz Murrill
Attorney General of Louisiana



Keith G. Kautz
Attorney General of Wyoming