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Room 5503, Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20004

RE: Comments to the Internal Revenue Service on the "Racial Nondiscrimination in Private Schools" notice of proposed rulemaking REG-119986-25.

To Whom it May Concern:

Thank you for the opportunity to comment on the Department of the Treasury and Internal Revenue Service's (the Agencies) Notice of Proposed Rulemaking (NPRM), "Racial Nondiscrimination in Private Schools," Reg-119986-25.[1] New America's PreK-12 and Higher Education programs include researchers, writers, policy experts, and advocates working to ensure everyone has access to a high quality education from the earliest years through college, career, and work. We study how public policy can shape students' paths and outcomes and have long focused on ensuring that federal policy expands opportunity rather than contracts it.

The proposed rule would have far-reaching effects on and across our entire educational system. By the Agencies' own estimates, it would apply to roughly 18,000 private elementary, secondary, and postsecondary schools, including professional trade schools, and to about 750,000 students who may qualify for scholarships that consider race, ethnicity, or national origin.[2] It would apply to every "educational policy, admissions policy, scholarship or loan program, athletic program, or other school-administered or school-supported program" at those institutions, and it would treat any consideration of race "for any purpose" as a disqualifying discrimination.[3]

We unequivocally oppose illegal racial discrimination in education. Federal laws protecting students against racial discrimination are critical student protections. But this NPRM does not

[1] Internal Revenue Service, "Racial Nondiscrimination in Private Schools," Notice of Proposed Rulemaking, 91 Fed. Reg. 56811 (September 4, 2026), REG-119986-25, RIN 1545-BS05, FR Doc. 2026-18127.
[2] 91 Fed. Reg. at 56816 (Special Analyses, Part D, "Affected Entities and Taxpayers").
[3] Proposed 26 C.F.R. § 1.501(c)(3)-2(b), 91 Fed. Reg. at 56819.

enforce those protections. It deviates beyond current case law and statute on the issue, and instead tries to enact, through regulation, the Administration's preferred policy. It then illegally uses the threat of losing tax-exempt status to force private institutions to comply. The Agencies are attempting the same illegal move the U.S. Department of Education tried with its February 2025 Dear Colleague Letter: stretching the Supreme Court's 2023 admissions decision far past what it held. A federal court found that letter unlawful and vacated it.[4] This rule rests on the same flawed reading and is unlawful for the same reasons.

Our concerns fall into four areas:

1. **The rule misrepresents what the Supreme Court decided.** *Students for Fair Admissions v. Harvard (SFFA)* addressed race-conscious admissions at two universities bound by the Equal Protection Clause and Title VI. It did not hold that every race conscious program, at every private school, for any purpose, is unlawful. A federal court rejected that same overbroad reading when the Department of Education attempted it in 2025.
2. **The rule weaponizes tax-exempt status.** It lets the IRS revoke a school's 501(c)(3) status for entirely legal conduct, based on the Administration's view of "public policy." That puts a political tool in the hands of the agency that is supposed to administer the tax code neutrally.
3. **The rule is anti-student.** It puts lawful scholarships, financial aid, and support programs at risk for students from prekindergarten all the way through trade and graduate schools. The Agencies concede the rule will change who receives aid, but they make no attempt to measure what students will lose.
4. **The rule is overly intrusive into private organizations.** It reaches private schools that receive no federal funds. It extends into every "school-supported" program, and it overrides the intent of donors who gave support to students.

For these reasons, **New America urges the Agencies to withdraw the illegal proposed rule in its entirety.** If the Agencies proceed in any form, they should, at minimum:

- Limit the rule to conduct that is already unlawful under federal civil rights statutes as interpreted by the courts;
- Retain the provisions of Rev. Proc. 75-50 that recognize programs designed to promote a school's racially nondiscriminatory policy;
- Exclude programs other than admissions, including mentoring, outreach, pipeline, and student support programs, and clearly protect what SFFA expressly permits;

[4] *American Federation of Teachers v. U.S. Department of Education*, No. 1:25-cv-00628 (D. Md. Aug. 14, 2025) (vacating U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter, February 14, 2025, and the associated certification requirement).

- Complete a more thorough analysis of the rule's costs to students and institutions before finalizing any regulation.

1. The rule goes beyond what the Supreme Court decided, repeating a strategy a federal court has already found unlawful

What SFFA does and does not allow. The Supreme Court's decision in SFFA was about admissions. The Court held that the race-conscious admissions programs at Harvard and the University of North Carolina violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.[5] Harvard is bound by Title VI because it accepts federal funds; UNC is a public university bound by the Constitution. The decision applies to the institutions and the conduct those laws cover.

Just as important is what SFFA did not do. It did not address scholarships, mentoring and outreach programs, student organizations, or support services. It did not address private K-12 schools, and the Agencies themselves acknowledge that "[p]rivate primary and secondary schools were not directly affected by SFFA."[6] This misapplication of SFFA to K-12 schools is particularly worrisome in light of the fact that the new Federal Scholarship Tax Credit will soon funnel substantial amounts of new federal funds to private elementary and secondary schools. The Court also went out of its way to say that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[7]

The court drew a line, but did not erase every consideration of race from American education. And yet the NPRM seeks to do just that. The preamble states that the rule covers "all forms of racial discrimination in education, **regardless of** the intent behind or **the legality** of such discrimination, [our emphasis added]" and the proposed regulatory text defines discrimination to include any consideration of race "for any purpose."[8] In their own words, the Agencies say, the rule covers conduct the Agencies concede may be legal. Its standard comes from the Administration's policy preferences, not from SFFA or any statute Congress has passed.

The Department of Education tried this approach, and a federal court struck it down. This is not the first time this Administration has tried to stretch SFFA past its holding. On February 14, 2025, the Department of Education's Office for Civil Rights issued a Dear Colleague Letter asserting that SFFA barred schools from using race in virtually any decision, including

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[5] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).
[6] 91 Fed. Reg. at 56816 n.6.
[7] *SFFA*, 600 U.S. at 230.
[8] 91 Fed. Reg. at 56815; proposed § 1.501(c)(3)-2(b).

scholarships, programming, and so-called "DEI" initiatives, and threatening schools' federal funding. Three federal courts in Maryland, New Hampshire, and the District of Columbia blocked the letter and its accompanying certification requirement.[9]

In August 2025, the U.S. District Court for the District of Maryland vacated the letter entirely. The court found that the Department had not followed required procedures, that the letter was unconstitutionally vague about what conduct was prohibited, and that it chilled lawful speech.[10] Critically, the court rejected the letter's premise that "race-conscious" means "discriminatory," explaining that SFFA is not a per se bar on all race-conscious activity.[11] The court described the Department's action as having "initiated a sea change" in how the government regulates education, one that left educators to "reasonably fear that their lawful, and even beneficial, speech" could be punished.[12] The Department appealed, then abandoned its appeal in January 2026, leaving that ruling in place.[13]

The NPRM is the Dear Colleague Letter on new letterhead. It relies on the same overly expansive reading of SFFA, now pointed at tax-exempt status rather than federal funding. Running the policy through notice-and-comment rulemaking may address one of the procedural flaws the court identified. It does not cure the substantive one: no agency can rewrite what the Supreme Court held. And it does not cure the vagueness. A rule that covers every "school-supported program" and any consideration of race "for any purpose" gives schools even less guidance than the letter did.

The rule abandons a decades-old standard without justification. For more than 50 years, IRS guidance has made clear that programs that favor racial minority groups do not threaten a school's exemption when their purpose and effect is to promote the school's racially nondiscriminatory policy.[14] The IRS revisited that same guidance as recently as 2019 and left these provisions untouched.[15] The NPRM would delete them, but it identifies no change in any statute that requires doing so.

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[9] *American Federation of Teachers*, supra note 4; *National Education Association v. U.S. Department of Education*, No. 1:25-cv-00091 (D.N.H. Apr. 24, 2025) (preliminary injunction); *NAACP v. U.S. Department of Education,* 1:25-cv-01120 (D.D.C. Apr. 24, 2025) (preliminary injunction).

[10] *American Federation of Teachers*, supra note 4. See also Hunton Andrews Kurth, "Federal Court Vacates U.S. Department of Education Guidance on Title VI."

[11] *American Federation of Teachers*, supra note 4. See Pillsbury Winthrop Shaw Pittman, "Federal Court Vacates Education Department Dear Colleague Letter on DEI."

[12] *American Federation of Teachers*, supra note 4.

[13] American Federation of Teachers, "Press release" (government's appeal withdrawn January 21, 2026).

[14] Rev. Rul. 71-447, 1971-2 C.B. 230; Rev. Proc. 75-50, 1975-2 C.B. 587, §§ 3.02, 4.05.

[15] Rev. Proc. 2019-22, 2019-22 I.R.B. 1260.

The NPRM's own legal foundation also cuts against it. The Supreme Court decision on which the IRS relies, *Bob Jones University v. United States*, cautioned that tax exemption should be denied on public policy grounds "only where there can be no doubt that the activity involved is contrary to a fundamental public policy."[16] Conduct that federal law permits, and that the Agencies concede may be legal, cannot meet that standard.

Recommendation: The Agencies should withdraw the rule. If they proceed, they should limit any nondiscrimination standard only to conduct that courts have found unlawful under existing federal civil rights statutes, and they should expressly protect the consideration of an applicant's experiences that SFFA allows.

2. The rule weaponizes tax-exempt status.

Tax exemption is not a reward for agreeing with the government. It recognizes that schools, colleges, and training providers serve the public. The IRS is supposed to administer that recognition neutrally, according to the law. This rule would instead turn the IRS into an enforcer of the Administration's policy agenda.

The NPRM's reasoning makes this plain. To establish what counts as the "fundamental public policy of the United States," the Agencies cite, among other things, executive orders issued by this Administration in 2025.[17] Under that logic, the Administration announces a policy by executive order, and the IRS then treats that policy as grounds to revoke tax-exempt status, which unlawfully consolidates policy power to the executive, and not with Congress and the courts.

This context matters. Senior officials, including the President, have publicly called for revoking the tax-exempt status of specific universities they disagree with.[18] Congress anticipated this danger could one day occur. Federal law prohibits the President, the Vice President, and other executive branch officials from directing the IRS to audit or investigate particular taxpayers.[19] A rule this broad and this vague invites exactly the kind of selective, politically motivated enforcement that Congress sought to prevent. When nearly any race-conscious activity can be grounds for revocation, the question of which schools actually face scrutiny becomes a matter of which school is on the bad side, politically, of the administration.

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[16] *Bob Jones University v. United States*, 461 U.S. 574, 592 (1983).
[17] 91 Fed. Reg. at 56815 n.3 (citing Executive Order 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025), and Executive Order 14280, 90 Fed. Reg. 17533 (Apr. 23, 2025)).
[18] Bianca Quilantan, "Trump Says He's Yanking Harvard's Tax-Exempt Status," *Politico*, May 2, 2025, https://www.politico.com/news/2025/05/02/trump-harvard-tax-exempt-status-00323192.
[19] 26 U.S.C. § 7217.

The damage would not stop with schools. In the near term, it could also apply to the 501(c)(3) scholarship-granting organizations that will soon serve as an important conduit of federal funding for private K-12 education providers under the Federal Scholarship Tax Credit, leading to politically and ideologically biased administration of that program. And even outside education, if the IRS can define "public policy" by reference to the current administration's priorities, every 501(c)(3) organization, from food banks to hospitals to research organizations such as our own, has reason to worry about its own exemption the next time priorities change. That holds whichever party is in power.

Recommendation: The Agencies should withdraw the rule. Any standard for revoking exemption on public policy grounds should rest on federal statutes and settled judicial interpretations, not executive orders or agency preferences, and should include clear, objective criteria that prevent selective enforcement.

3. The rule is anti-student.

The Agencies concede students will lose aid, and they decline to measure that harm. The NPRM acknowledges that the rule would "affect the distribution of private school scholarship and loan funds" and "result in a change in the composition of the pool of scholarship and loan recipients."[20] The Agencies suggest this does not matter because the total dollars awarded will stay the same. But a scholarship that goes to a different student is no help to the student who lost it or to other students who need it. Even on its face, this statement does not make sense because there is no assurance that donors and organizations would readily and easily pivot to award scholarships on some other basis.

The Agencies estimate that 750,000 students may qualify for scholarships that consider race, ethnicity, or national origin. That figure rests on a Government Accountability Office survey published in 1994, more than 30 years ago.[21] Beyond that, the NPRM repeatedly states that the Agencies lack the data to estimate the rule's effects. They do not know how many private K-12 schools would need to change their admissions practices, cannot model compliance costs, and cannot assess how donor behavior would change.[22]

Executive Order 12866, under which the Agencies submitted this rule for review, requires agencies to base regulatory decisions on “the best reasonably obtainable scientific, technical, economic, and other information” and to adopt a rule “only upon a reasoned determination that the benefits of the intended regulation justify its costs.”[23] A 30-year-old survey is not the

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[20] 91 Fed. Reg. at 56817.
[21] 91 Fed. Reg. at 56816 n.5 (citing U.S. General Accounting Office, "Higher Education: Information on Minority-Targeted Scholarships," HEHS-94-77, January 14, 1994).
[22] 91 Fed. Reg. at 56816–18.
[23] Exec. Order No. 12866, §§ 1(b)(6)–(7), 58 Fed. Reg. 51735 (Oct. 4, 1993); see also Exec. Order No. 13563, § 1(c), 76 Fed. Reg. 3821 (Jan. 21, 2011).

best reasonably obtainable information, and an agency that says it cannot estimate a rule's costs cannot reasonably determine that its benefits justify them.

The NPRM's own evidence shows that these policies matter to students. The Agencies cite research finding that, in the year after SFFA, the shares of Black, Native American, Hispanic, Native Hawaiian, and Pacific Islander students at the most selective colleges fell, and they describe this as the "anticipated effect" of the decision "borne out in empirical data."[24] SFFA required that change for admissions at institutions bound by the Equal Protection Clause and Title VI. No court has required it for scholarships, mentoring, or student support, or for private K-12 schools. Extending the same restrictions to those programs would be the Agencies' choice, and the Agencies acknowledge it would change which students receive aid. They should be required to measure that harm before imposing it.

Race-neutral alternatives are weaker, and the rule chills them too. The Agencies suggest that schools and donors can use income, geography, or first-generation status instead. The NPRM itself concedes that these criteria have "a weaker relationship with race and ethnicity" and will reach a population that does "not precisely coincide" with the students who would have been served.[25] New America supports aid targeted by income and first-generation status. But such criteria are a supplement to, not a replacement for, the programs this rule would eliminate.

The rule also casts doubt on those alternatives. By sweeping in any consideration of race "for any purpose," it invites the question of whether a race-neutral program adopted to expand opportunity for underrepresented students is itself suspect. The vacated Dear Colleague Letter made exactly that argument about race-neutral alternatives.[26] Schools facing the loss of their tax exemption will not wait for clarity. They will cut programs.

The harm reaches every stage of the education-to-work pipeline. Because the rule covers private schools of every kind, its effects reach far beyond selective colleges. That includes:

- **Private K-12 schools**, including schools that serve low-income communities and rely on donor-funded scholarships, which SFFA never addressed;
- **Colleges and universities**, where scholarships, summer bridge programs, mentoring, and cultural and affinity organizations support student persistence and completion;

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[24] 91 Fed. Reg. at 56817 n.7 (citing Emily Snider, "The Impact of the 2023 *Students for Fair Admissions v. Harvard* Decision on Undergraduate Demographics," EdWorkingPaper No. 26-1471, Annenberg Institute at Brown University (2026), https://doi.org/10.26300/98fw-8558; and Michael D. Bloem et al., "College Enrollment Patterns After *SFFA v. Harvard*," EdWorkingPaper No. 26-1392, Annenberg Institute at Brown University (2026), https://doi.org/10.26300/6a7w-bq06).
[25] 91 Fed. Reg. at 56817.
[26] U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter, February 14, 2025.

- **Professional and trade schools**, whose outreach and pipeline programs help connect underrepresented students to careers in fields like health care and the skilled trades; and
- **Educator pipeline programs**, such as "Grow Your Own" teacher preparation efforts, that help schools recruit and prepare teachers who reflect the communities they serve.

The proposed effective date of taxable years beginning after May 31, 2027, also leaves students who are mid-way through a multi-year scholarship with no assurance that their aid will continue.

Recommendation: The Agencies should withdraw the rule. If they proceed, they should exclude scholarship, mentoring, outreach, and student support programs from its scope; preserve aid already awarded to current students for the duration of their programs; and conduct and publish a genuine analysis of the rule's effects on students, including at the K-12 level, before finalizing.

4. The rule is overly intrusive into private organizations.

It goes beyond the limits Congress set for private institutions. Federal law already prohibits private schools from intentionally discriminating against students because of their race, and New America supports vigorous enforcement of those protections.[27] But Congress has been deliberate about how far federal requirements extend into private institutions. Title VI applies only to institutions that receive federal financial assistance, and many private K-12 schools, along with some private colleges and training providers, accept none. The NPRM would impose a standard broader than Title VI itself, one that reaches conduct no court has found unlawful, as a condition of tax exemption for every private school in the country. Expanding federal control over private education in this way is a decision for Congress, not the IRS.

Its scope is boundless and undefined. The rule would apply to any "school-administered or school-supported program." The NPRM never defines what "school-supported" means. Schools cannot tell whether it covers student-run organizations that receive school funding, cultural centers, heritage month events, alumni networks, or partnerships with outside nonprofits. The Agencies dismiss these effects as relating to a "relatively narrow, miscellaneous group of activities" whose economic effects "would be insignificant."[28] In reality, these activities could include vital programs like community schools that provide health and social services, work-based learning opportunities for students with local business, and after-school programs that both enrich students' educations and provide child care that aids working parents.

[27] 91 Fed. Reg. at 56817.
[28] 91 Fed. Reg. at 56817.

The rule's treatment of national and ethnic origin raises similar problems. Many private schools have missions rooted in a particular heritage, language, or community. The NPRM protects selection based "solely on religion," but offers no comparable assurance to schools whose missions are cultural or linguistic.[29] Under the rule, those schools would have to guess whether their core identity puts their exemption at risk.

It overrides the intent of donors who gave support to students. The Agencies acknowledge that schools holding donor-restricted scholarship funds "may need to work with the donors, or the donors' heirs" to change eligibility criteria, at legal and administrative cost the Agencies do not estimate.[30] For many such funds, changing a restriction may require going to state court. Some funds may be returned to donors or left unspent, which means money given to help students will never reach them. The federal government should not be forcing private institutions to break faith with donors who acted lawfully and in good faith.

The compliance burden would also fall hardest on small institutions. Nearly every private school would need legal review of its admissions, aid, and programming, yet the Agencies certify that the rule will not significantly affect a substantial number of small entities.[31] That certification is difficult to square with a rule that touches 18,000 schools, many of them small.

Recommendation: The Agencies should withdraw the rule. If they proceed, they should limit its scope to admissions, define every term that determines a school's eligibility for exemption, explicitly protect schools with heritage-based missions, and exempt existing donor-restricted funds.

Conclusion

The fundamental public policy of the United States against racial discrimination in education is vital. But that policy is defined by the Constitution, by statutes Congress has enacted, and by what the courts have actually held. It is not defined by the preferences of whichever administration controls the IRS. The Supreme Court’s decision in SFFA addressed race-conscious admissions at public colleges and universities and at private institutions that receive federal funds. It did not authorize the federal government to police every scholarship, mentoring program, and student organization at every private school in America. When the Department of Education tried to stretch SFFA that far, a federal court found its effort unlawful.

This rule would weaponize the tax code against private institutions, take aid and support away from students who need it most, and excessively interfere with the missions of private schools, colleges, and training providers. The Agencies have not measured those harms and

[29] 91 Fed. Reg. at 56815.
[30] 91 Fed. Reg. at 56817.
[31] 91 Fed. Reg. at 56818 (Regulatory Flexibility Act certification).

cannot justify them. For these reasons, New America urges the Treasury Department and the IRS to withdraw the proposed rule in its entirety. If you have any follow-up questions, please contact Rachel Fishman, Director of the Higher Education Program at fishmanr@newamerica.org.

Sincerely,
New America's PreK-12 and Higher Education Programs