To: Brad Clark

From: Zach West, Mithun Mansinghani

Date: October 21, 2020

Re: Lindsey Nicole Henry Scholarship Exclusions

I. Background

In 2010, the Oklahoma Legislature created the Lindsey Nicole Henry Scholarships for Students with Disabilities Program ("the Program"). *See* 70 Okla. Stat. § 13-101.2. Named after former Governor Brad Henry's daughter, the Program was intended "to provide a scholarship to a private school of choice for students with disabilities" in certain circumstances. Over 1,000 students and 62 schools participated in the fall of 2019, and the average scholarship voucher value in 2018-19 was just over $7,000, according to EdChoice. The Oklahoma Supreme Court unanimously upheld the Program against a legal challenge in 2016, finding that parents' choice of sending their scholarship dollars to religious private schools did not violate the "no aid" to "sectarian" institutions clause of the Oklahoma Constitution. *See Oliver v. Hofmeister*, 2016 OK 15 (citing Okla. Const. Art. II, § 5) ("When the parents and not the government are the ones determining which private school offers the best learning environment for their child, the circuit between government and religion is broken.").

For a school to be eligible to participate in the Program, it has to meet a number of requirements. Relevant here, the State Department of Education must determine "that the private school … complies with the antidiscrimination provisions of 42 U.S.C., Section 2000d." 70 Okla. Stat. §13-101(H)(1)(c). Section 2000d of 42 U.S.C., in turn, states that:

> No person in the United States shall, on the ground of **race, color, or national origin**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Nine years after the Program was created, however, the State Department of Education proposed adding the following language to its Program regulation in the Oklahoma Administrative Code (OAC):

> Schools that wish to participate in the Lindsey Nicole Henry Scholarship Program should note that the antidiscrimination provisions of 42 U.S.C. § 2000d, which a school must comply with in order to participate in the program, incorporate Executive Order 13160 (2000) and prohibit discrimination on the following bases:
>
> (1) Race;

(2) Sex;
(3) Color;
(4) National origin;
(5) Disability;
(6) Religion;
(7) Age (except as appropriate in a common education context);
(8) Sexual orientation; and
(9) Status as a parent.

See Oklahoma Register Vol. 36, No. 6 (Dec. 3, 2018) (Notice of Rulemaking Intent); *see also* OAC § 210: 13-15-7. For the authority to make these regulatory changes, the Board of Education cited only to the general statutes detailing the Board's powers (70 Okla. Stat. § 3-104) and creating the Program (70 O.S. § 13-101.2). *Id.* No more specific citations were provided, nor were any public comments on the proposed rulemaking received. Eventually, alongside numerous other regulatory proposals, the proposed rulemaking was approved by the Legislature and the Governor. *See* House Joint Resolution 1022 (2019). It became effective on July 25, 2019.

A little over a year later, during the Board's September 2020 meeting, Altus Christian Academy and Christian Heritage Academy applied to the Board to participate in the Program. *See* Ray Carter, State may face lawsuit for anti-Christian discrimination, OCPA (Sept. 24, 2020), https://www.ocpathink.org/post/state-may-face-lawsuit-for-anti-christian-discrimination. According to public reports, the Board voted to reject the applications because the schools did not adequately guarantee that they would not discriminate based on religion or sexual orientation in hiring, although some board members suggested the issue should be revisited soon. *Id.*

The applications signed and submitted by Altus Christian Academy and Christian Heritage Academy apparently both stated that the schools comply with *all* of the criteria listed above, including that the schools do not discriminate on the basis of race, sex, color, national origin, disability, religion, age (except as appropriate in a common education context), sexual orientation and status as a parent. But attached to the applications were policies providing only that the schools do not discriminate on the basis of race, color, national origin or disability.

On its website and in its application, Altus Christian Academy explicitly declares that it "does not discriminate on the basis of race, color, national origin, or disability in administration of its educational and admissions policies, scholarship and loan programs, and athletic and other school-administered programs." The school says it does reserve the right "to select students on the basis of academic performance, religious commitment, lifestyle choices, and personal qualifications including a willingness to cooperate with ACA's administration and staff and to abide by its policies." *See* Carter, *supra.* The website of Christian Heritage Academy says that a "symptom of humanity's fallen state is strife along lines of differences, including gender, ethnicity, and culture. Through Christ, and by the outpouring of the Holy Spirit, God's people are enabled to display God's redemptive power by simultaneously embracing and transcending the differences that enrich the tapestry of the Kingdom. Christian Heritage Academy seeks to equip our students to fulfill this God-given commission of reconciliation and love (2 Corinthians 5:18, John 13:34-35)." The school's listed goals include efforts "to raise historically underrepresented voices on campus by working to grow a culturally and ethnically diverse faculty, staff, and student body."

II. Analysis

You have asked us to analyze whether, in light of the state law, the 2019 rulemaking, the facts, and the Constitution, the Oklahoma Department of Education's recent actions in relation to Altus Christian Academy and Christian Heritage Academy are legally sound. In our opinion, they are not.[1]

A. The schools complied with the Lindsey Nicole Henry Program statute.

The Program statute (70 Okla. Stat. § 13-101(H)(1)(c)) requires compliance "with the antidiscrimination provisions of 42 U.S.C. [§] 2000d" (Title VI), which protects federal program participants from "race, color, or national origin" discrimination. No other protected classes are mentioned in the referenced federal statute. Both schools in question expressly prohibit discrimination on the three listed grounds. Thus, the schools complied with the Program Statute.

Nevertheless, it has been argued that a 2000 Executive Order from President Clinton (EO 13160) effectively expanded Section 2000d to cover sexual orientation and religion. *See* Carter, *supra*. But EO 13160 did no such thing. To be sure, that EO did prohibit discrimination on a number of grounds (race, sex, color, national origin, disability, religion, age, sexual orientation, and parental status) in federally conducted education and training programs and activities. And it did reference Section 2000d. But it did not purport to interpret or expand Section 2000d to cover all of these categories. Rather, it just stated the following:

> Existing laws and regulations prohibit certain forms of discrimination in Federally conducted education and training programs and activities--including discrimination against people with disabilities, prohibited by the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq., as amended, employment discrimination on the basis of race, color, national origin, sex, or religion, prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-17, as amended, **discrimination on the basis of race, color, national origin, or religion in educational programs receiving Federal assistance, under Title VI of the Civil Rights Acts of 1964, 42 U.S.C. 2000d**, and sex-based discrimination in education programs receiving Federal assistance under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. Through this Executive Order, discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent will be prohibited in Federally conducted education and training programs and activities.

The EO does not disguise the fact that it is pulling expressly protected categories from several federal laws—not just Section 2000d—and creating a broader executive branch standard for the operation of federal government programs. Presidents are within their right to do so, but they have no right to rewrite statutes. Here, President Clinton did not even claim to rewrite or expand anything, although he did wrongly (and perhaps inadvertently) claim that Section 2000d prohibited distinctions on the basis of "religion" as well as race, color, and national origin. But even if this seeming slip-up was intentional, it would not be binding on State interpretations of Section 2000d itself, because it would not be legitimate as a textual matter—religion is not a subset of race, color, or national origin.

[1] This letter represents only the views of the authors and does not constitute an official Attorney General Opinion.

B. The Board's 2019 regulation is likely invalid.

While the Department's 2019 regulation purports to expand the classes listed in the federal and state statute, for the following reasons, it did so impermissibly.

First, the regulation does not have a sound legal basis. As currently constituted, the regulation states that "the antidiscrimination provisions of 42 U.S.C. § 2000d … incorporate Executive Order 13160 (2000)." OAC 210:15-13-7(c). This is incorrect. As explained above, Section 2000d does not incorporate EO 13160's list of protected classes. Thus, the regulation's legal justification for expanding the protected categories for the Program is unsound. Regulations based on incorrect legal premises cannot supersede the plain requirements of a statute.

Second, it does not appear that the Board of Education has been given the authority to expand the list of protected classes for the Program. In promulgating the regulation, the Board did not pinpoint any particular grant of authority from the Legislature. Rather, it first cited 70 Okla. Stat. § 3-104 in its entirety, which explains the Board's "powers and duties." Nothing in Section 3-104, however, references the Program, nor does it expressly authorize the action here. Next, the regulation cites the Program statute itself—70 Okla. Stat. § 13-101.2. But that statute expressly prohibits this type of expansion. Specifically, Section 13-101.2(M) states:

> The inclusion of private schools within options available to public school students in Oklahoma **shall not expand the regulatory authority of the state** or any school district to impose any additional regulation of private schools beyond those reasonably necessary to enforce the requirements **expressly** set forth in this section.

Only race, color, and national origin protections were "expressly" set forth in the statute, through its express incorporation of Section 2000d. And it is not "reasonably necessary" for the enforcement of these express protections to add a half dozen other protected classes to the statute. As such, the Board was explicitly barred by the Program's statute itself from "expand[ing] the regulatory authority of the state" in the manner that it did by promulgating this regulation in 2019.

C. The Board's actions potentially violate the schools' free speech and free exercise rights.

At the Board Meeting, the only evidence reportedly pointed to in order to demonstrate non-compliance was a provision in one of the schools' applications that required teachers to be "spiritually mature Christians" and the fact that both schools have rules that emphasize traditional Christian teachings on sexuality. *See* Carter, *supra.* But if that is the basis for rejecting the applications, then the Board is in grave danger of violating the U.S. Constitution's Free Speech and Free Exercise protections, as well as the Oklahoma Constitution and the Oklahoma Religious Freedom Act.

Although a comprehensive explanation of why is beyond the scope of this letter, the U.S. Supreme Court has recognized repeatedly over the last several years that religious institutions are free to choose their own ministers and teachers without government interference. *See, e.g., Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (First Amendment's "ministerial exception" prohibits courts from intervening in employment disputes involving ministers at religious institutions); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) ("the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission" is "undoubtedly important" and "[t]he church must be free to choose whose who will guide it on its way"). And in the *Espinoza v. Montana Department of*

Revenue decision this last summer, the Supreme Court held that states could not discriminate against religious institutions in administering a school choice program similar to the Program here. Thus, the fact that a Christian school requires its teachers to be Christian cannot be a basis for denying it participation in an otherwise generally available school choice program.

Nor is it the case that excluding a school because it has rules that emphasize traditional Christian teachings on sexuality would be appropriate, either. Such an exclusion would obviously implicate free speech and free exercise concerns, under federal and state law. Indeed, to countenance such an approach would potentially undermine the protections just recognized in *Espinoza*. States, having been told they could not exclude religious participants from school choice programs, could simply turn around and start discriminating on the basis of certain religious schools' "traditional" teachings and rules. But nothing in *Espinoza* indicates that its protections can be made contingent on the schools embracing a state's current orthodoxy and eschewing their religious beliefs and practices.

In any event, as explained above, the Oklahoma Legislature made clear that to participate in the scholarship program schools must only pledge to avoid discrimination on the basis of race, color, or national origin, and nothing we have seen from the school's submissions indicate that they fail to meet this requirement.