

IRS Proposed Regulations on Racial Nondiscrimination in Private Schools

October 19, 2026

On September 4, 2026, the Internal Revenue Service (IRS) published [proposed regulations](#) that would [add](#) a rule to [provide](#) that “all forms of racial discrimination in education, regardless of the intent behind or the legality of such discrimination” are against “[fundamental public policy](#)” and, thus, grounds for a private school to lose federal tax exemption. The Notice of Proposed Rulemaking (NPRM)—published in the context of [public debate](#) and government [action](#) on “diversity, equity, and inclusion” (DEI)—discusses “[affirmative action](#)” and rejects “[remedial or diversity-related objectives](#)” as a defense to its bar on racial discrimination.

This Legal Sidebar discusses the legal authority and background of the proposed regulations—explaining the proposed changes and their legal justifications as asserted by the IRS and identifying potential legal challenges to the rulemaking. Finally, it presents considerations for Congress.

Tax Exemption Under IRC § 501(c)(3) and the Public Policy Doctrine

The Internal Revenue Code (IRC) exempts certain organizations from federal income taxes. Section [501\(c\)\(3\)](#) of the IRC specifically exempts those that are “organized and operated exclusively” for certain enumerated purposes, including “charitable” and “educational purposes.” [Many](#) private schools—including private universities—receive tax exemption under § 501(c)(3). Section 501(c)(3) organizations are subject to [several requirements](#) to obtain and maintain tax exemption. One of these requirements, sometimes referred to as the “[public policy doctrine](#),” provides that § 501(c)(3) organizations must not violate “[fundamental public policy](#).” The public policy doctrine is not explicitly stated in § 501(c)(3) but, as explained below, comes from IRS and judicial interpretation of the IRC.

In 1971, the IRS issued [guidance](#) ([Revenue Ruling 71-447](#)) that stated that a private school must have a “racially nondiscriminatory policy as to students” to qualify for exemption under § 501(c)(3). The guidance was based on case law [developments](#) from the preceding years. In 1975, the IRS issued additional guidance ([Revenue Procedure 75-50](#)) to clarify whether a tax-exempt private school under § 501(c)(3) would be considered to have racially discriminatory policies forbidden under [Revenue](#)

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Ruling 71-447. The Revenue Procedure—which remains in effect, as **modified** in 2019 “to reflect technological advances”—carves out from racial discrimination policies that “favor” racial minority groups if they are designed to promote nondiscrimination. It states that

[a] policy of a school that favors racial minority groups with respect to admissions, facilities and programs, and financial assistance will not constitute discrimination on the basis of race when the purpose and effect is to promote the establishment and maintenance of that school’s racially nondiscriminatory policy as to students.

and

scholarships and loans that are made pursuant to financial assistance programs favoring members of one or more racial minority groups that are designed to promote a school’s racially nondiscriminatory policy will not adversely affect the school’s exempt status. Financial assistance programs favoring members of one or more racial groups that do not significantly derogate from the school’s racially nondiscriminatory policy similarly will not adversely affect the school’s exempt status.

In 1983, the Supreme Court established the public policy doctrine as a requirement for § 501(c)(3) organizations in a pair of cases: *Bob Jones University v. United States* and *Goldsboro Christian Schools, Inc. v. United States* (considered collectively under the case name *Bob Jones University v. United States*). Bob Jones University had a **policy** of denying admission to and expelling those engaged in interracial dating and marriage. Goldsboro Christian Schools maintained a racially discriminatory **admissions policy**, for the most part accepting only White applicants, though, on occasion, accepting children from racially mixed marriages with one White parent. Based in part on these facts and relying on **Revenue Ruling 71-447**, the IRS **revoked** Bob Jones’s tax-exempt status and **required** Goldsboro to pay certain federal taxes after determining it ineligible for § 501(c)(3) tax exemption. Bob Jones and Goldsboro challenged the application of the guidance in the enforcement actions taken against them, each **arguing** that their racially discriminatory policies were based on their sincerely held religious beliefs and the IRS’s interpretation of the IRC to preclude them from tax exemption based on such policies violated the **Free Exercise** and **Establishment** Clauses of the First Amendment.

The Supreme Court **upheld** the IRS actions—**holding** that “an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.” The Court further explained that the public policy requirement is informed by “**common-law** standards of charity,” which provide necessary context for its interpretation of § 501(c)(3). The Court **limited** application of the public policy doctrine, though, to “where there can be no doubt that the activity involved is contrary to a *fundamental* public policy” (emphasis added). The Court found that there was a fundamental public policy against racial discrimination in education based on a **quarter of a century of actions** across all three branches of the federal government. As examples of such actions, the Court cited

- its own **cases** (including the 1954 case *Brown v. Board of Education of Topeka, Kansas* ruling racially segregated public schools unconstitutional),
- **acts** of Congress (including Titles IV and VI of the **Civil Rights Act of 1964**), and
- **executive orders** (including **one** to employ the military to enforce school desegregation).

The Court rejected the schools’ First Amendment challenges by **explaining** that “the Government has a fundamental, overriding interest in eradicating racial discrimination in education,” which “substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”

The IRS has **rarely** relied on the public policy doctrine as grounds for denying or revoking exemption. When the IRS has relied on the doctrine, it has done so **mostly** in the context of racially discriminatory schools. *Bob Jones University* remains the Supreme Court’s only decision finding a “fundamental public policy”; thus, the Court has not yet determined a public policy other than forbidding racial discrimination

in education to be “fundamental.” Lower courts have referred to the public policy doctrine in [other](#) contexts, for example, when an organization [prevents](#) IRS enforcement.

The IRS’s Proposed Regulations and Legal Justification

On September 4, 2026, the IRS published [proposed regulations](#) that would add a regulation to [provide](#) that “all forms of racial discrimination in education, regardless of the intent behind or the legality of such discrimination” are against “fundamental public policy.” Specifically, the IRS proposes [deleting](#) the aforementioned sentences in Revenue Procedure 75-50, which carve out from racial discrimination policies that “favor” racial minority groups. Additionally, the IRS would “[incorporat\[e\]](#) the long-standing holding” of Revenue Ruling 71-447 in regulatory text by adding a strict [nondiscrimination requirement](#) in its regulations governing § 501(c)(3) organizations to clarify that

[a] private school is not operated exclusively for exempt purposes if it adopts, maintains, or enforces any policy or practice that discriminates on the basis of race, color, or national or ethnic origin . . .
[D]iscrimination on the basis of race, color, or national or ethnic origin includes any discrimination on the basis of race, color, or national or ethnic origin *for any purpose*. [(emphasis added)]

While significant [portions](#) of the NPRM are devoted to explaining caselaw on racial discrimination in admissions policies with regard to “affirmative action,” the nondiscrimination requirement would apply not just to a private school’s admissions policy but also to “[any](#) educational policy, . . . scholarship or loan program, athletic program, or other school-administered or school-supported program.” The scope of affected policies mirrors [language](#) in Revenue Ruling 71-447. Under Tax Court [precedent](#), the IRS may also look beyond a school’s written policies to its actual practice to determine if a school discriminated based on race.

Unlike [other](#) executive branch actions requiring the elimination of DEI policies in education programs, which have been largely tied to federal funding, these proposed regulations would apply to all [private schools](#) receiving tax-exemption under § 501(c)(3). The NPRM explains that selecting students based on only [religious affiliation](#) does not constitute racial discrimination “merely because members of the relevant religious community may also share ancestry or ethnic characteristics.”

The NPRM justifies the proposed changes in the regulations by citing recent developments in the law, including

- [judicial decisions](#) evaluating affirmative action admissions policies (including *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* in which the Supreme Court [ruled](#) that race-based affirmative action admission policies violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the [Fourteenth Amendment](#)), and
- [executive orders](#) issued during the second Trump Administration targeting DEI in education.

The NPRM [situates](#) these within the development of antidiscrimination law invoked by the Supreme Court in *Bob Jones University*. In doing so, the IRS [asserts](#) that affirmative action in admissions and “remedial or diversity-related” programs “are against a fundamental public policy of the United States and thus preclude a school’s exemption from Federal income tax under section 501(c)(3).”

Written or electronic public comments on the proposed regulations are [due](#) by November 3, 2026. The IRS scheduled a [public hearing](#) for December 2, 2026. The proposed regulations would affect private schools in taxable years beginning after [May 31, 2027](#). For private schools with tax years corresponding with the calendar year, the proposed regulations would take effect for tax year 2028 beginning on January 1, 2028.

Potential Legal Challenges

The IRS states that the proposed regulations are needed to be “consistent with recent developments in the law.” The IRS is likely to provide further arguments in support of the rulemaking in response to comments in any final rule. Challenges to any finalized regulations could be brought under the [Administrative Procedure Act](#) (APA) arguing, for example, that the regulations are arbitrary and capricious, in excess of statutory authority, or contrary to law. Challenges could also be brought in response to a specific attempt by the IRS to revoke tax-exempt status based on such a final rule.

Some legal challenges might focus on the scope of the Supreme Court’s doctrine of “fundamental public policy” established through interpreting the IRC provisions involving charities. Challengers might argue that government actions against affirmative action and DEI are too recent and unsettled to be considered fundamental public policy and that neither the IRC nor *Bob Jones University* can be interpreted to grant the IRS an “open-ended power to define fundamental public policy.” The challengers might emphasize *Bob Jones University*’s [limitation](#) of the public policy doctrine to situations “where there can be no doubt that the activity involved is contrary to a fundamental public policy.” Challengers might characterize the more recent actions against affirmative action and DEI as distinct from the antidiscrimination law invoked by the Supreme Court *Bob Jones University* rather than, as the NPRM [does](#), a continuation of it. The challenges might then contend that, as a distinct public policy, actions against affirmative action and DEI must undergo a separate analysis by a court to determine whether they are a “fundamental” public policy. Under *Bob Jones University*, such analysis would involve determining the [duration](#) of such policy across all three branches of the federal government. Challengers might point to the NPRM’s failure to identify congressional action specifically against affirmative action or DEI. They might also argue that the scope of the NPRM is not supported by its justifications, which are focused on affirmative action in [admissions](#), so extending the nondiscrimination requirement beyond admissions policy to “any educational policy, . . . scholarship or loan program, athletic program, or other school-administered or school-supported program” is overbroad and not supported by caselaw.

In 2024, the Supreme Court issued a decision in [Loper Bright Enterprises v. Raimondo](#) overruling the *Chevron* doctrine. The *Chevron* doctrine—named for [the case](#) that articulated it—required federal courts to defer to a federal agency’s reasonable interpretation of ambiguous statutory provisions the agency administers. As a result, in judicial review under the APA, a federal court would likely not afford deference to any IRS interpretation of § 501(c)(3) in the regulations. As discussed herein, the public policy doctrine is derived from the Supreme Court’s application of [common-law](#) standards of charity to the tax exemption under § 501(c)(3); however, after *Loper Bright*, the IRS is unlikely to receive deference on any interpretation, regardless of whether it is derived from statute or caselaw.

Aside from potential challenges to the proposed regulations focused on the meaning of the public policy doctrine or the meaning of the statutory text, a [commentator](#) observed the broad scope of the proposed regulations and hypothesized that they might intrude on private schools’ ability to fashion their [curriculums](#) in violation of “First Amendment rights of academic freedom” and potentially be [selectively enforced](#).

The commentator added that requiring changes to loans and scholarships to comply with the proposed regulations might violate [existing arrangements](#) under which the loans and scholarships were gifted. In the NPRM’s economic analysis, the IRS [acknowledges](#) the potential impacts of legal and administrative costs in amending scholarship eligibility. The NPRM states that “only a [minority](#) of scholarship dollars are restricted by the donor’s intention.” The NPRM further states that “private schools may use a [different](#) mechanism for allocating scholarships and loans to recipients, for example, using geographic or income-based criteria in lieu of a racial or ethnic criterion to determine scholarship eligibility.”

Considerations for Congress

The Supreme Court in *Bob Jones University* [looked](#) in part to acts of Congress as indicators of “fundamental public policy.” This analysis shows how Congress’s legislative actions—for example, passing laws restricting or protecting affirmative action and DEI—could indirectly develop the scope of public policy that the IRS or a court might consider a fundamental public policy that § 501(c)(3) organizations are required to follow. Congress could also consider codifying the public policy doctrine by explicitly listing out fundamental public policies or providing criteria for determining them. Alternatively, Congress can do nothing and allow the IRS and the courts to continue developing the law on the public policy doctrine. If Congress disagrees with any finalized regulations, Congress can also consider overturning such rules under the [Congressional Review Act](#).

Congress could also consider providing specific procedural requirements for IRS actions against private schools, including potential enforcement actions against violations of the proposed regulations, if finalized. For example, Representatives Alma S. Adams and Jamie Raskin introduced [H.R. 10330](#)—the Higher Education Oversight for Nonprofits Ensuring Standards and Transparency Act. The bill would impose similar procedural requirements for IRS audits of universities as [exist](#) for [churches](#). The [press release](#) accompanying the bill’s introduction mentions the proposed regulations and potential enforcement under them. In assessing such procedural requirements, Congress could consider other sources of information from which the IRS might obtain information to justify enforcement actions against universities, for example, [reporting](#) and disclosure requirements related to the [Higher Education Act](#) and whether there should be restrictions on the IRS’s use of such information or whether such use should be explicitly authorized.

Author Information

Justin C. Chung
Legislative Attorney

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