

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

THE RELIGIOUS SISTERS OF MERCY,
et al.,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary
of Health and Human Services, *et al.*,

Defendants.

No. 3:16-CV-386

CATHOLIC BENEFITS ASSOCIATION,
et al.,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary
of Health and Human Services, *et al.*,

Defendants.

No. 3:16-CV-432

STATUS REPORT

Pursuant to this Court's August 24, 2017 Order, ECF No. 56, Defendants hereby provide the following update on "all rulemaking proceedings initiated as to the challenged rule as well as any contemplated enforcement actions."¹ ECF No. 56. *See also* 45 C.F.R. § 92.

As Defendants previously informed the Court, the Department of Health and Human Services (HHS) issued a Notice of Proposed Rulemaking (NPRM) on June 14, 2019 that

¹ Defendants apologize to the Court for their failure to file a status report on August 30, 2019, which resulted from an oversight. Defendants will file status reports every ninety days going forward, in accordance with the Court's Order.

proposes to amend the HHS regulations implementing Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116, which are challenged in this litigation (hereafter, “current regulations”). *See* Nondiscrimination in Health and Education Programs or Activities, Proposed Rules, 84 Fed. Reg. 27,846 (June 14, 2019).

Among other things, HHS “proposes to repeal the definition of ‘on the basis of sex’ that had been adopted in [the current regulations].” *Id.* at 27,857. The proposed rule would not include a “definition of ‘sex’ for purposes of discrimination on the basis of sex in the regulation,” *id.*, and instead would merely cross-reference Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) and thus prohibit sex discrimination “as defined by Title IX,” *id.* at 27,861.² The proposed rule also would make clear that HHS’s “enforcement of Section 1557 (to the extent it incorporates Title IX), must be constrained by the statutory contours of Title IX, which include explicit abortion and religious exemptions.” *Id.* at 27,864. The NPRM proposes making those exemptions explicit in the regulations as well, by amending the regulations to provide that, “[i]nsofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by [a number of listed statutes, including Title IX] . . . or any related,

² Defendants note that, on April 22, 2019, the Supreme Court granted three petitions for writs of certiorari, raising the question whether Title VII’s prohibition on discrimination on the basis of sex also bars discrimination on the basis of gender identity or sexual orientation. *See Bostock v. Clayton Cty.*, 723 Fed. Appx. 964 (11th Cir. 2018), *cert granted*, No. 17-1618 (U.S. Apr. 22, 2019); *Altitude Express, Inc. v. Zarda*, 883 F.3d 100 (2d Cir. 2018), *cert granted*, No. 17-1623 (U.S. Apr. 22, 2019); *Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert granted*, No. 18-107 (U.S. Apr. 22, 2019). A decision by the Supreme Court on the definition of “sex” under Title VII will likely have significant ramifications for the definition of “sex” under Title IX. *See, e.g., Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992). The Supreme Court scheduled oral argument in these cases for October 8, 2019.

successor, or similar Federal laws or regulations, such application shall not be imposed or required.” *Id.* at 27,892.

The comment period for the NPRM closed on August 13, 2019. Commenters submitted over 155,000 public comment submissions on the NPRM, which HHS is currently reviewing.

Defendants request an opportunity to continue their ongoing efforts to amend the current regulations. Defendants will continue to abide by this Court’s preliminary injunction and will therefore not enforce the current regulations’ prohibition against discrimination on the basis of gender identity or termination of pregnancy.

Defendants therefore request that the Court maintain the stay in this case.

DATED: October 4, 2019

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