

STATE OF TENNESSEE

Office of the Attorney General



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June 14, 2022

Joseph R. Biden, Jr.
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Re: USDA Administrative Action Applying *Bostock v. Clayton County* to FNS Program
Discrimination Complaints

Dear Mr. President,

The USDA Food and Nutrition Services Civil Rights Division (“FNS”) enforces Title IX and the Food and Nutrition Act’s respective prohibitions on sex discrimination. On May 5, 2022, it issued a memorandum purporting to be a “policy update.” See *Application of Bostock v. Clayton County to Program Discrimination Complaint Processing – Policy Update*, CRD 01-2022 (“Guidance”). The Guidance states that it is intended to “provide direction to state agencies and program operators regarding processing program complaints that allege discrimination on the basis of gender identity and sexual orientation in programs or activities receiving federal financial assistance.” *Id.*

But by vastly expanding the concept of “discrimination on the basis of sex” to include gender identity and sexual orientation, the Guidance does much more than offer direction. It imposes new—and unlawful—regulatory measures on state agencies and operators receiving federal financial assistance from the USDA. And the inevitable result is regulatory chaos that would threaten the effective provision of essential nutritional services to some of our most vulnerable citizens.

As the chief legal officers of our respective States, the undersigned Attorneys General have an obligation to uphold the rule of law and to represent the best interests of our citizens and their institutions. We are, therefore, writing to you to explain why this Guidance is unlawful and to request that you direct the USDA to withdraw it.

First, the Guidance is unlawful because it was issued without providing the States and other stakeholders the opportunity for input as required by the Administrative Procedures Act (“APA”). Second, the Guidance is unlawful because the USDA has premised it on an obvious misreading and misapplication of the Supreme Court’s holding in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).¹

The Guidance must be withdrawn because it should have been—but was not—issued in compliance with the APA. The APA requires that the public be given notice and afforded the opportunity to comment when a government agency engages in substantive law- or policymaking. While bona fide administrative guidance, non-legislative rules, and interpretative rules are generally exempt from the notice-and-comment requirements of the APA, 5 U.S.C. § 553(b)(A), an administrative agency may not invoke those exemptions by labeling its lawmaking or policymaking actions as “clarification” or “guidance.” See *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (the label an agency attaches to its actions is not dispositive).

But that is how the USDA has tried to circumvent the requirements of the APA here. It has passed off as a “clarification” what is actually a re-write of the law in Title IX and the Food and Nutrition Act. Far from providing clarification as to Title IX law, the Guidance substantially and substantively expands the law. It broadens the basis for challenging a certification of applicant households and imposes additional burdens on state agencies—including state and local governments—that facilitate various USDA nutritional programs. See Guidance at 3. It also creates new legal claims for liability and orders States to take concrete steps towards compliance by August 3, 2022. And it is clear that USDA intends to issue further “guidance” in the same vein. See *Questions and Answers Related to CRD 01-2022 Application of Bostock v. Clayton County to Program Discrimination Complaint Processing – Policy Update*, CRD 02-2022 (May 5, 2022).

The Guidance must be withdrawn, too, because its purported “clarification” is premised on a misreading and unwarranted extension of *Bostock*. The USDA cannot point to *Bostock* to justify its interpretation of Title IX because *Bostock* concerned only Title VII; *Bostock* expressly disclaimed application to “other federal or state laws that prohibit sex discrimination”—like Title IX and the Food and Nutrition Act—and expressly did not “prejudge any such questions.” 140 S. Ct. at 1753. And since “Title VII differs from Title IX in important respects,” “it does not follow that principles announced in the Title VII context automatically apply in the Title IX context.” *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021); see also U.S. Dep’t of Educ., *Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), at 1-4 (Jan. 8, 2021) (acknowledging that *Bostock*

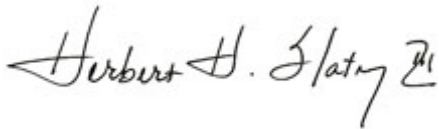
¹ The Guidance fails to acknowledge that the very same interpretation of *Bostock* on which it is premised is the subject of legal challenges currently being litigated by various States in the federal courts. The cases are *Tennessee et al. v. U.S. Dept. of Educ., et al.*, No. 3:21-cv-00308 (E.D. Tenn.) and *Texas v. EEOC, et al.*, No. 2:21-CV-194-Z (N.D. Tex.) (federal government’s motion to dismiss was denied on May 26, 2022).

did not construe Title IX and “does not affect the meaning of ‘sex’ as that term is used in Title IX”).

We have long had a productive relationship with the federal government, managing various food and nutrition programs guided by the principles of cooperative federalism. We would like to continue this cooperative relationship. But the Guidance flouts the rule of law, relies on patently incorrect legal analysis that is currently under scrutiny in the federal courts, and was issued without giving the States the requisite opportunity to be heard. While we are always open to working with your Administration to resolve these matters, under the present circumstances we are constrained to ask that you direct Secretary Vilsack and the Department of Agriculture to rescind this Guidance.

We appreciate your attention to the concerns presented here.

Sincerely,



Herbert H. Slatery III
Tennessee Attorney General and Reporter



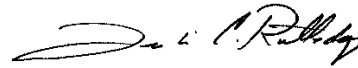
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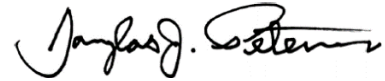



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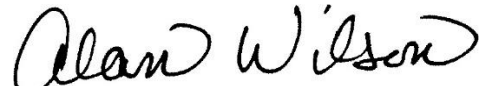



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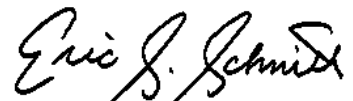

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