



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2020-13

December 3, 2020

The Honorable Joy Hofmeister
Oklahoma State Superintendent of Public Instruction
2500 N. Lincoln Blvd.
Oklahoma City, OK 73105-4599

Dear Superintendent Hofmeister,

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

In 2019, the State Department of Education promulgated a rule that, among other things, required that schools seeking to participate in the Lindsey Nicole Henry Scholarship program not discriminate on the basis of several categories, in addition to the categories listed in 42 U.S.C. § 2000d.

- (1) Was this rule promulgated in accordance with the requirements of the Oklahoma Administrative Procedures Act?**
- (2) If not, is this rule binding upon and legally enforceable by the Department, and what nondiscrimination criteria must the Department use to determine eligibility to participate in the Lindsay Nicole Henry Scholarship Program?**

I.
BACKGROUND

In 2010, the Legislature created the Lindsey Nicole Henry Scholarships for Students with Disabilities Program (the “Henry Program”). *See* 70 O.S.Supp.2020, § 13-101.2. Named after former Governor Brad Henry’s daughter, the Henry Program “provide[s] a scholarship to a private school of choice for students with disabilities” in certain circumstances. *Id.* § 13-101.2(A).¹

¹ In 2016, the Oklahoma Supreme Court rejected claims that Henry Program scholarships paid to private religious schools would violate Article II, Section 5 of the Oklahoma Constitution, the so-called “no aid” clause that prohibits the use of public funds for the benefit sectarian institutions. *See Oliver v. Hofmeister*, 2016 OK 15, 368 P.3d 1270. The Court reasoned that because parents, not the State, determine “which private school offers the best learning environment for their child, the circuit between government and religion is broken.” *Id.* ¶ 13, 368 P.3d at 1274.

To be eligible for participation in the Henry Program, a private school must notify the State Department of Education (the “Department”) of its intent to participate, meet certain statutory requirements, and receive the Department’s approval. *See id.* § 13-101.2(H). Among these requirements is that “the private school . . . complies with the antidiscrimination provisions of 42 U.S.C., Section 2000d.” *Id.* § 13-101.2(H)(1)(c). Section 2000d, also known as Section 601 of Title VI of the federal Civil Rights Act of 1964, provides as follows:

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.

42 U.S.C. § 2000d (emphasis added). In essence, Section 2000d “condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (citations omitted).

Soon after enactment of the Henry Program, the Department promulgated rules to govern its eligibility determinations. *See generally* OAC 210:15-13-7. Until 2019, the eligibility requirements for private schools simply incorporated by reference the eligibility criteria from the Henry Program statute. *See id.* 210:15-13-7(c) (amended 2019). (“In order to be eligible to accept students on the scholarship, private schools must be accredited . . . and meet all other requirements for participating private schools as listed in 70 O.S. § 13-101.2.”). In 2019, however, the Department proposed, among other things, to add the following language to this rule:

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.

36 Okla. Reg. 827 (July 15, 2019).²

² Executive Order 13,160 (“EO 13160”), referenced in the Department’s amended rule, was issued by President Bill Clinton in 2000, with the stated purpose of prohibiting discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent in federally conducted education and

For the authority to make this change, the proposed rule cited the general powers of the State Board of Education set forth in Title 70, Section 3-104 and the Department's authority to administer the Henry Program, as set forth in Title 70, Section 13-101.2. *See* 36 Okla. Reg. 827. No public comments on the proposed rulemaking were received and the rule was ultimately approved by the Legislature and the Governor in an omnibus joint resolution. *See* H.J. Res. 1022, 57th Leg., 1st Reg. Sess. (2019).

To summarize, in 2019 the Department by rule imposed new eligibility requirements for private schools wishing to participate in the Henry Program. This included a new requirement that participating schools must not discriminate against six protected classes (sex, disability, religion, age, sexual orientation, and parental status)—in addition to the three classes expressly mentioned in Section 2000d (race, color, and national origin). In doing so, the Department asserted that Section 2000d's antidiscrimination provisions incorporated EO 13160 and thus were extended to the additional protected classes.

II. DISCUSSION

You have asked whether the Department's rulemaking described above is lawful under the Oklahoma Administrative Procedures Act. For the reasons that follow, the rule misinterprets both federal law and the statute authorizing the Henry Program, and was therefore beyond the authority of the Department to promulgate under the Administrative Procedures Act. Accordingly, the rule is not enforceable to the extent it adds to the requirements set forth in statute.

A. The Department's amended rule is not in accordance with state statute.

When interpreting a state statute, we start with the statutory text. *Liddell v. Heavner*, 2008 OK 6, ¶ 16, 180 P.3d 1191, 1200; *see also Signature Leasing v. Buyer's Grp.*, 2020 OK 50, ¶ 18, 466 P.3d 544, 549 (“We presume the legislative intent is expressed in the text of the statute and that the legislature ‘intended that which it expressed.’” (citation omitted)). When the statutory text is unambiguous, the inquiry ends there—we “may not look for a meaning outside its bounds.” *Liddell*, 2008 OK 6, ¶ 16, 180 P.3d at 1200.

Here, the text is clear. The Henry Program statute requires participating schools to comply with the antidiscrimination provisions of Section 2000d. *See* 70 O.S.Supp.2020, § 13-101.2(H)(1)(c). Section 2000d, in turn, prohibits recipients of federal financial assistance from discriminating on the basis of “race, color, or national origin.” 42 U.S.C. § 2000d. No other protected classes are mentioned and the text has remained unchanged since the creation of the Henry Program. Thus, as

training programs. Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (June 23, 2000). According to guidance from the Department of Justice, the Order “is premised on the notion that the federal government should hold itself to at least the same principles of nondiscrimination in educational opportunities as it applies to the educational programs and activities of recipients of federal financial assistance.” Exec. Order 13160 Guidance Document, 66 Fed. Reg. 5398 (Jan. 18, 2001). Thus, EO 13160 “is *intended to supplement existing laws and regulations* that already prohibit many forms of discrimination in both federally conducted and federally assisted educational programs.” *Id.* (emphasis added). Such laws include Section 2000d, but also several other federal laws that prohibit discrimination against a broader set of protected classes. *See id.*

a straightforward textual matter, private schools that seek to participate in the Henry Program must not discriminate on the basis of “race, color, or national origin.” Nothing else is required by Section 2000d with respect to nondiscrimination.

Nevertheless, in the 2019 rule change described above, the Department asserts that the antidiscrimination provisions of Section 2000d “incorporate Executive Order 13160” and its prohibition of discrimination on the basis of sex, disability, religion, age, sexual orientation, and parental status. *See* OAC 210:15-13-7(c). This is incorrect. Section 2000d was enacted by Congress 36 years *before* President Clinton’s issuance of EO 13160. Section 2000d cannot be said to have “incorporate[d]” EO 13160 unless Congress amended Section 2000d *after* EO 13160 was issued in 2000 and expressly incorporated the EO. *See Incorporate*, MERRIAM-WEBSTER, www.merriam-webster.com (defining “incorporate” as “to unite or work into something *already existent* so as to form an indistinguishable whole” (emphasis added)). However, Section 2000d has not been amended since 1964.

More fundamentally, federal statutes cannot be amended or expanded by Executive Order. *See* U.S. CONST. art. II, § 3 (President “shall take Care that the Laws be faithfully executed”); *Anthony List v. Driehaus*, 779 F.3d 628, 630 (6th Cir. 2015) (“The parties . . . acknowledge that executive orders do not amend statutes.”); *Doe H. v. Haskell Indian Nations Univ.*, 266 F. Supp. 3d 1277, 1286 (D. Kan. 2017) (“Of course, Executive Order 13160 is not an act of Congress.”). And consistent with this principle, EO 13160 did not even purport to interpret or expand Section 2000d to cover all the protected classes now found in the Department’s regulation. Rather, it acknowledged explicitly that each of several federal anti-discrimination statutes applied to different—although sometimes overlapping—protected classes. *See* Exec. Order No. 13,160, 65 Fed. Reg. 39,775. In essence, EO 13160 referenced the full gamut of protected classes from several federal laws—not just Section 2000d—as a guide for creating a broader executive branch standard for the operation of education and training programs *conducted by the federal government*. But it did not—and indeed cannot—alter the meaning of Section 2000d. *Cf. Marshall v. Webster Bank, N.A.*, No. 3:10-CV-908 JCH, 2011 WL 219693, at *7, n.4 (D. Conn. Jan. 21, 2011) (“Executive Order [13160] cites Title VI as one of a number of ‘[e]xisting laws and regulations [that] prohibit certain forms of discrimination in Federally conducted education and training programs and activities.’ It does not suggest that Title VI’s application is limited to education and training programs.”).³

Finally, since the issuance of EO 13160, courts have repeatedly indicated that Section 2000d covers only the classes expressly listed in the statute. *See, e.g., Doe v. Galster*, 768 F.3d 611, 617 (7th Cir. 2014) (“Title VI protects students from discrimination *only* if it is based on race, color, or national origin, and Title IX only if based on sex.” (emphasis added)), *Sanders v. Anotubby*, 631 F. App’x 618, 622 (10th Cir. 2015) (unpublished) (Section 2000d “prohibits intentional

³ It is worth noting that EO 13160, in an apparent scrivener’s error, states mistakenly that Section 2000d prohibits discrimination on the basis of religion as well as race, color, and national origin. *See* Exec. Order No. 13,160, 65 Fed. Reg. 39,775. But regardless of intent, that statement does not change the text or meaning of the statute. Moreover, in 2019 President Trump issued Executive Order 13,899—titled Combating Anti-Semitism—which explicitly affirms that Title VI “prohibits discrimination on the basis of race, color, and national origin” and “does not cover discrimination based on religion.” Exec. Order 13,899, 84 Fed. Reg. 68799 (Dec. 16, 2019). Accordingly, discrimination “against Jews may give rise to a Title VI violation,” but *only* “when the discrimination is based on an individual’s race, color, or national origin.” *Id.*

discrimination of individuals based on their race, color, or national origin”), *Foster v. Michigan*, 573 F. App’x 377, 388 (6th Cir. 2014) (unpublished) (“Because Title VI *only* applies to discrimination on the basis of race, color, or national origin, the district court properly dismissed Appellants’ gender-based Title VI claims.” (emphasis added)). *See also Rosario de Leon v. Nat’l College of Bus. & Tech.*, 663 F.Supp.2d 25, 35 (D. Puerto Rico 2009) (A “private plaintiff may not bring a [] suit [under Executive Order No. 13160] against a defendant for acts not prohibited by the text of [Title VI].” (brackets in original)).

In the end, Section 2000d prohibits discrimination only based on race, color, or national origin, and it is plain that the Legislature intended the Henry Program’s requirements incorporate only the text of that provision. If the Legislature had wanted to incorporate all of the protected classes found in EO 13160, it could have referenced EO 13160 expressly or included additional protected classes. Instead, the Legislature referenced only Section 2000d and that is how the statute must be read.

B. Because it lacked the statutory authority to impose additional requirements on participating schools, the Department amended the rule in violation of the Administrative Procedures Act.

In Oklahoma, state agencies may only exercise the powers “expressly given by statute,” as well as those “necessary for the due and efficient exercise of the powers expressly granted, or such as may be fairly implied from the statute granting the express powers.” *Marley v. Cannon*, 1980 OK 147, ¶ 10, 618 P.2d 401, 405. An agency “cannot expand those powers by its own authority.” *Id.* Similarly, under the Administrative Procedures Act, agencies bear the burden of proving “that the agency possessed the authority to promulgate the rule” and “that the rule is consistent with any statute authorizing or controlling its issuance and does not exceed statutory authority.” 75 O.S.2011, § 306(C)(1)-(2). Thus, “[a]n administrative agency may not under the guise of its rule making power exceed the scope of its authority and act contrary to the statute which is the source of its authority. Its authority to make rules for its various procedures does not include authority to make rules which extend their powers beyond those granted by statutes.” *Adams v. Prof’l Practices Comm’n*, 1974 OK 88, ¶ 11, 524 P.2d 932, 934. This remains true regardless of whether or not the Legislature later generally approved a rule. *See Henderson v. Maley*, 1991 OK 8, ¶ 24 n.7, 806 P.2d 626, 633 n.7.

In promulgating the rule in question, the Department did not point to any particular grant of authority from the Legislature. Rather, it cited Title 70, Section 3-104, which generally outlines the “powers and duties” of the State Board of Education. Nothing in Section 3-104, however, references the Henry Program, nor does it expressly or implicitly authorize the actions taken here.

Next, the Department cites the Henry Program statute itself—Title 70, Section 13-101.2. But importantly, that statute *explicitly prohibits* regulations that exceed the express statutory criteria for schools to participate in the Henry Program:

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.

70 O.S.Supp.2020, § 13-101.2(M) (emphases added). Only the protected classes of Section 2000d—race, color, and national origin—were “expressly set forth” in the Henry Program statute. And the inclusion of six new protected classes is not “reasonably necessary to enforce” the anti-discrimination protections of Section 2000d. As such, not only do the statutes cited by the Department *not* authorize it to amend the rule as it did, but Title 70, Section 13-101.2 explicitly precluded the Department from doing so. Accordingly, that portion of amended rule is invalid.⁴

C. The Department may not enforce the amended rule to the extent that it imposes additional requirements on participating schools that are not set forth in statute.

All “rules made by [an agency] must conform with the statutes to be valid.” *Adams*, 1974 OK 88, ¶ 15, 524 P.2d at 935. Thus, governmental “acts which exceed their authority may not bind a public entity” and instead such entities “are bound by mandatory law.” *Strong v. State ex rel. The Oklahoma Police Pension & Ret. Bd.*, 2005 OK 45, ¶ 9, 115 P.3d 889, 893. Regulations promulgated in excess of statutory authority are void, cannot be placed into effect, and cannot be enforced. *See* 2017 OK AG 11, ¶ 15; 1979 OK AG 213, ¶ 18.

Here, because the amended rule is in excess of the Department’s statutory authority, it is not binding and legally enforceable by the Department against schools applying to participate in the Henry Program to the extent it adds nondiscrimination requirements beyond those set forth in Section 2000d. Accordingly, in determining a school’s eligibility to participate in the Henry Program, the Department must ensure the school does not discriminate on the grounds of race, color, or national origin, but the Department cannot exclude the school from the Henry Program solely because the school makes distinctions on other grounds.

While an agency rule is “presumed to be valid until declared otherwise by a district court of this state or the Supreme Court,” 75 O.S.2011, § 306(C), that presumption “refers to the burden of establishing its invalidity that is placed upon the complaining party.” *Sw. Bell Tel. Co. v. Oklahoma Corp. Comm’n*, 1994 OK 142, ¶¶ 11-13, 897 P.2d 1116, 1119-20. It does not allow an agency to enforce a rule it knows to be invalid, nor does it “elevate administrative rules above statutes,” merely because a court has yet to officially declare it invalid. *See id.* For the same reasons, by following the statute instead of an invalid rule, the Department does not violate Section 308.2 of Title 75, which generally provides that “[r]ules shall be valid and binding on persons they affect,

⁴ While not necessary to the conclusion reached here, it is worth noting that amending the eligibility rules for participation in Henry Program in this manner may also be constitutionally problematic. For instance, many private schools in Oklahoma are affiliated with particular religions and may select their teachers, administrators, and other leaders on religious grounds, and/or limit their student body on such grounds. Excluding those schools from participation in the Henry Program based on their religion-based policies would seem contrary to the First Amendment to the U.S. Constitution, based on several recent decisions of the U.S. Supreme Court. *See, e.g., Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2262 (2020) (holding that the U.S. Constitution “condemns discrimination against religious schools and the families whose children attend them” and that “their exclusion from the scholarship program here is ‘odious to our Constitution’ and ‘cannot stand’” (citations omitted)).

and shall have the force of law unless amended or revised.” *See id.* Moreover, the Administrative Procedures Act’s presumption of validity “shall not be construed to impair the power and duty of the Attorney General to review such rules and regulations and issue advisory opinions thereon.” 75 O.S.2011, § 306(C). And except where it declares a state statute unconstitutional, an Attorney General opinion such as this “is binding upon the state official affected by it and it is their duty to follow and not disregard those opinions.” *State ex rel. York v. Turpen*, 1984 OK 26, ¶ 5, 681 P.2d 763, 765.

It is, therefore, the official Opinion of the Attorney General that:

The Department of Education did not have the authority to amend OAC 210:15-13-7(c) to exclude from participation in the Lindsey Nicole Henry Scholarship Program private schools based on discrimination against classes not included in 42 U.S.C. § 2000d (i.e., race, color, and national origin). Accordingly, the Department may only enforce the nondiscrimination provisions of OAC 210:15-13-7(c) with respect to race, color, and national origin. *See Adams v. Prof'l Practices Comm'n*, 1974 OK 88, ¶ 11, 524 P.2d 932, 934.



MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA



ZACH WEST
ASSISTANT SOLICITOR GENERAL

