

The National Coalition ***School Diversity*** ***on***

September 20, 2017

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

RE: Docket ID: ED-2017-OS-0074

Dear Secretary DeVos,

The National Coalition on School Diversity (NCSD) is a network of civil rights organizations, university-based research centers, and state and local coalitions working together to expand support for policies that promote school diversity and the reduction of racial and socioeconomic isolation. An advisory panel of scholars and academic researchers whose work relates to equity, diversity, desegregation, and integration in our nation's public schools informs our work. See www.school-diversity.org for more information regarding how our organization supports diverse schools.

We write to you today in response to the Federal Register notice posted June 22, 2017, requesting input on regulations that should be repealed, replaced, or modified in accordance with Executive Order 13777 "Enforcing the Regulatory Reform Agenda." Executive Order 13777 focuses attention on those regulations that: (i) Eliminate jobs or inhibit job creation; (ii) Are outdated, unnecessary, or ineffective; (iii) Impose costs that exceed benefits; (iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; (v) Are inconsistent with Section 515 of the Treasury and General Government Appropriations Act of 2001; or (vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified. The Federal Register notice says the Department is particularly interested in regulatory provisions that are unduly costly or unnecessarily burdensome.

The U.S. Department of Education is, at its core, a civil rights agency, and through its Office for Civil Rights is responsible for ensuring the "vigorous enforcement of civil rights in our nation's schools."¹ Title VI of the Civil Rights Act of 1964 ("Title VI") requires the Department of Education to ensure that no program or activity funded by the Department, including programs and activities created under the Elementary and

¹ U.S. Department of Education, "Office for Civil Rights," *available at* <https://www2.ed.gov/about/offices/list/ocr/index.html>.

Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, results in discrimination against any individual in the United States on the basis of race, color, or national origin.² Furthermore, Title VI requires the Department to enforce the law in response to complaints.

Ultimately, the purpose and duty of the Department of Education is to effectuate and enforce civil rights protections and equal educational opportunities for all students, and to actively seek these ends through compliance reviews, policy guidance, data collection, and regulations. We believe all civil rights regulations and guidance documents issued by the Department of Education provide a clear framework that benefits all students when implemented by ensuring equal opportunities to learn regardless of a student's protected status. While all the Department's civil rights protections are important, we explicitly urge the Department to refrain from eliminating or otherwise altering the following regulatory protections: the Department's longstanding Title VI disparate impact regulations, the diversity priorities in the Department's competitive grant programs, and the Magnet Schools Assistance Program regulations.

Preserve the Title VI Disparate Impact Regulations

The Civil Rights Act of 1964 and subsequent civil rights statutes charge the Department of Education with the responsibility to prevent and combat discrimination on the basis of race, color, national origin, disability, and sex, and authorize the Department to issue rules and guidance detailing how the law will be enforced as well as clarifying what types of discrimination are subject to federal action. Under Title VI, over two-dozen federal agencies, including the Department of Education, have issued regulations and guidance to effectuate its prohibition of discrimination on the basis of race, color or national origin. The regulations and guidance issued under Title VI prohibit actions and policies that on their face treat individuals differently based on race, color, or national origin, as well as those actions and policies that have a discriminatory impact.³

Far from being unnecessarily burdensome or unduly costly, Title VI disparate impact regulations have been acknowledged and enforced by both Democratic and Republican administrations for approximately half a century,⁴ and are necessary tools to protect students from discrimination, resulting from direct discrimination as well as the disparate impact of facially "neutral" laws, policies, and practices. Given the critical importance of Title VI disparate impact regulations to the Office for Civil Rights' ability to enforce students' civil rights, we urge the Department of Education to preserve disparate impact regulations under Title VI with no changes.

² 42 U.S.C. § 200d.

³ See, for example, 34 C.F.R. § 100.3(b)(2).

⁴ See, U.S. Department of Justice, "Memorandum for Heads of Departments and Agencies, General Counsels, and Civil Rights Directors," (Oct. 26, 2001), available at <https://www.justice.gov/crt/federal-coordination-and-compliance-section-201>; and U.S. Department of Education, "Dear Colleague Letter: Resource Comparability," (Oct. 1, 2014), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

Preserve the Diversity Priority in Competitive Grant Programs

For decades, public schools in the United States have trended toward increasing student isolation by both race and class. Last year the Government Accountability Office issued a report that found a significant increase in the educational isolation of Black and Latino students from low-income backgrounds from 2001 to 2014.⁵

A vast body of research indicates that racially, culturally, and economically diverse schools supply both short- and long-term benefits for all students.⁶ Students in diverse schools perform better in the areas of math, science, reading, and critical thinking, and see improvements in graduation rates over segregated students.⁷ Furthermore, studies show that racially and economically diverse schools are better equipped than high-poverty schools to counteract the negative effects of poverty on student achievement.⁸ Research indicates that, over the long-term, students in diverse schools are more likely than students from segregated schools to attend diverse colleges, inhabit diverse neighborhoods, and choose diverse workplaces later in life.⁹ Students from diverse school settings also possess better critical thinking skills and analytical ability, and are more likely to form cross-racial friendships.¹⁰ Racial and economic diversity – both captured in the Department’s diversity priorities – have independent positive impacts on student short and long term outcomes.¹¹

The aforementioned benefits of racially and socioeconomically integrated schools are significant and far-reaching, and conversely, the damage wrought by increasing the isolation of students on our nation’s economy and social fabric is profound. In light of the trend of increasing segregation in our nation’s public schools and the benefits to all

⁵ U.S. Government Accountability Office, “K-12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination,” (April 2016), *available at* <http://www.gao.gov/assets/680/676745.pdf>

⁶ For a summary of this research, *see* Roslyn Mickelson, “School Integration and K-12 Educational Outcomes: A Quick Synthesis of Social Science Evidence,” (National Coalition on School Diversity, 2015), *available at* <http://www.school-diversity.org/pdf/DiversityResearchBriefNo5.pdf>; Genevieve Siegel-Hawley, “How Non-Minority Students Also Benefit from Racially Diverse Schools,” (National Coalition on School Diversity, 2012), *available at* <http://schooldiversity.org/pdf/DiversityResearchBriefNo8.pdf>.

⁷ For a summary of this research, *see* Susan Eaton, “School Racial and Economic Composition & Math and Science Achievement,” (National Coalition on School Diversity, 2011), *available at* <http://www.school-diversity.org/pdf/DiversityResearchBriefNo1.pdf>; Susan Eaton, “How the Racial and Socioeconomic Composition of Schools and Classrooms Contributes to Literacy, Behavioral Climate, Instructional Organization and High School Graduation Rates,” (National Coalition on School Diversity, 2011), *available at* <http://school-diversity.org/pdf/DiversityResearchBriefNo2.pdf>.

⁸ For a summary of this research, *see* Philip Tegeler, Roslyn Mickelson, and Martha Bottia, “What We Know about School Integration, College Attendance, and the Reduction of Poverty,” (National Coalition on School Diversity, 2011), *available at* <http://school-diversity.org/pdf/DiversityResearchBriefNo4.pdf>.

⁹ For a summary of this research, *see* Susan Eaton and Gina Chirichigno, “The Impact of Racially Diverse Schools in a Democratic Society,” (National Coalition on School Diversity, 2011), *available at* <http://www.school-diversity.org/pdf/DiversityResearchBriefNo3.pdf>.

¹⁰ *Supra* note 6. *See also* Genevieve Siegel-Hawley, “How Non-Minority Students Also Benefit from Racially Diverse Schools,” (National Coalition on School Diversity, 2012), *available at* <http://schooldiversity.org/pdf/DiversityResearchBriefNo8.pdf>.

¹¹ *See* Jennifer Ayscue, Erica Frankenberg, and Genevieve Siegel-Hawley, “The Complementary Benefits of Racial and Socioeconomic Diversity in Schools” (National Coalition on School Diversity, 2017), *available at* <http://school-diversity.org/pdf/DiversityResearchBriefNo10.pdf>.

students of a diverse learning environment, we urge the Department to maintain the current supplemental priorities for discretionary grant programs focused on student diversity. Furthermore, given that a preponderance of studies indicate unstructured school choice programs generally result in increased student isolation by race and socioeconomic background,¹² we also strongly encourage the Department to apply that priority to all existing and forthcoming grant competitions related to school choice.

Given the voluntary nature of the competitive grant programs to which the diversity priority can be applied, there is no reasonable case to be made that the diversity priority is either unduly costly or unnecessarily burdensome. Voluntary competitive grant program priorities focused on diversity by their nature cannot eliminate jobs, generate no excessive costs, and do not contradict or generate any inconsistencies with other federal priorities. Furthermore, the supplemental priority's recent revision indicates it is not outdated, and the research base regarding the educational benefits of diverse classrooms forestall any argument the priority is ineffective. Thus, the supplemental diversity priority for competitive grant programs should not be eliminated or modified under this regulatory review.

Preserve the Emphasis on Integration in the Magnet Schools Assistance Program

The Magnet Schools Assistance Program (“MSAP”) was originally developed to assist school districts operating under court-ordered or federally approved voluntary desegregation programs. The purpose of MSAP funds is to “assist in the desegregation of public schools by supporting the elimination, reduction, and prevention of minority group isolation in elementary and secondary schools with substantial numbers of minority group students.”¹³ The current structure of MSAP grant competitions adheres to the program’s purpose and places a significant emphasis on projects specifically designed to remedy racial and socioeconomic segregation, allotting 36 out of a possible 110 points to applications containing strategies to improve student diversity and implement equitable admissions policies.

Like the supplemental diversity priority, the voluntary nature of MSAP grant program competitions exempt them from this regulatory review as detailed under Executive order 13777. The current iteration of the MSAP grant program containing strong diversity priorities is consistent with the program’s purpose, is not outdated or unnecessary, does not inhibit job creation or eliminate jobs, is not inconsistent with any other federal program or priority, and should not be altered in any way by the Department during this review process.

¹² See Halley Potter, “Do Private School Vouchers Pose a Threat to Integration?” (The Century Foundation, 2017), available at <https://tcf.org/content/report/private-school-vouchers-pose-threat-integration/>; Erica Frankenberg, Genevieve Siegel-Hawley, and Jia Wang, “Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards,” (The Civil Rights Project at UCLA, 2010), available at <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenber-choices-without-equity-2010.pdf>.

¹³ U.S. Department of Education, “Programs: Magnet Schools Assistance,” available at <https://www2.ed.gov/programs/magnet/index.html>.

Executive Order 13771 and Proper Criteria for Regulatory Review, Modification, and Rescission

To the extent that the Department of Education engages in retrospective regulatory review, the agency should focus on ways it can *improve* its performance, including in advancing its civil rights mission. E.O. 13771 (which underlies E.O. 13777, and requires regulatory offsetting) poses a direct threat to the agency's ability to advance its Congressional directives. The application of an offsetting framework such as directed by E.O. 13771 raises clear and predictable conflicts with the Administrative Procedure Act and substantive statutory directives. The order does not allow for adequate consideration of agencies' substantive responsibilities or regulatory benefits, while applying arbitrary cross-cutting and off-setting criteria that lack any legislative basis. We urge the Department of Education to take great care with any implementation of that order, which we are also concerned will divert valuable agency resources.

Furthermore, as addressed above, the Department of Education's civil rights regulations do not meet the specific criteria of E.O. 13777 and this Federal Register notice, and instead advance important statutory interests, respond to strong current needs, and convey important benefits that outweigh their costs.

Maintaining the regulations described above will ensure the preservation of tools schools and districts can use to foster student diversity, which ultimately benefits all students and our society as a whole.

Sincerely,

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