New Civil Liberties Alliance

May 19, 2021

VIA REGULATIONS.GOV

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

Mr. Levi Bohanan
Department of Education
Office of Elementary and Secondary Education
400 Maryland Avenue, SW
Washington, DC 20202

Ms. Diana Schneider, Program Contact
American History and Civics Academies
U.S. Department of Education
Office of Elementary and Secondary Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: *Proposed Priorities – American History and Civics Education*
Docket ID ED-2021-OESE-0033

Dear Hon. Cardona, Mr. Bohanan, and Ms. Schneider:

The New Civil Liberties Alliance (NCLA) submits the following commentary in response to the Department of Education's *Proposed Priorities – American History and Civics Education,* 86 Fed. Reg. 20348 (Apr. 19, 2021).[1]

NCLA sincerely appreciates this opportunity to comment and express its concerns about the Proposed Priorities. Black Americans have suffered extreme injustices throughout this country's history, from enslavement to Jim Crow to institutional discrimination, up to and including the present day. Unquestionably, these topics, along with many other race-related subjects, warrant significant coverage in any American history class. NCLA firmly believes, however, that the Proposed Priorities are an impermissible response to this concern, as a matter of law. The Department of Education (ED) lacks the statutory authority to promulgate the priorities, as Congress has expressly provided

[1] The "Proposed Priorities" are not called a Rule. They were published in the Federal Register and put out for notice and comment with a due date of May 19, 2021.

that state and local educational authorities are responsible for developing educational policies, programs, and curricula. Adopting the Proposed Priorities would fly in the face of both the policy and the language of the statutes governing ED's relationship with local educational authorities, and thus they must be rejected.

## I. Statement of Interest

The New Civil Liberties Alliance is a nonpartisan, nonprofit civil rights organization founded to protect constitutional freedoms from violations by the administrative state. NCLA's original litigation, amicus curiae briefs, regulatory comments, and other means of advocacy strive to tame the unlawful power of federal agencies. NCLA defends civil liberties by asserting constitutional constraints on the administrative state. Although Americans still enjoy a shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution's design sought to prevent.

Not only does the administrative state evade constitutional limits through administrative rulemaking, adjudication, and enforcement, but increasingly, agencies coerce state and local actors by conditioning receipt of federal funds upon acquiescence to certain policies. Frequently, this coercion directly conflicts with the vesting of authority to set such policies elsewhere, as in this case where Congress has legislated that curricular authority must be left to state and local governments. Such unconstitutional administrative state actions violate more rights of more Americans than any other aspect of American law, and they are thus the focus of NCLA's efforts.

Where agencies are poised to act beyond their lawful powers, NCLA encourages them to curb the illegitimate exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act (APA), laws of Congress, and the Constitution. The Department of Education should do so here.

## II. The Department of Education's Relationship with State and Local Authorities

Even before there was a Department of Education, the Supreme Court recognized in *Wheeler v. Barrera*, 417 U.S. 402, 416 (1974) that curriculum-setting authority lies with state and local authorities. The respondents in that case were parents of children enrolled in private schools. They claimed that remedial programs offered at those schools were inferior to the public-school counterparts. In declining to determine whether this was so, the Court observed that the language and legislative history of Title I of the 1965 Elementary and Secondary Education Act demonstrated "a pronounced aversion in Congress to 'federalization' of local educational decisions" and a "clear intent … to leave decisions [about various pedagogical methods] to the local and state agencies." The Court cited 20 U.S.C. § 1232a to support its conclusion, which states that:

> No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of

> any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system.

When founding the Department of Education, Congress made clear that it intended to leave control of school curricula to state and local authorities. ED's organic statute, 20 U.S.C. § 3403(a), which was enacted on October 17, 1979, and took effect May 4, 1980, explains that:

> [I]t is the intention of the Congress in the establishment of the Department to protect the rights of the State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States.

The following section, (b), likewise stipulates that:

> No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.

*See also Borger by Borger v. Bisciglia*, 888 F. Supp. 97, 99 (E.D. Wisconsin 1995) ("school officials have abundant discretion to construct curriculum").

In a similar spirit, Congress later prohibited tying receipt of federal funds to teaching of certain material. 20 U.S.C. § 7906a, states that:

> No officer or employee of the Federal Government shall, through grants, contracts, or other cooperative agreements, mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic standards and assessments, curricula, or program or instruction developed and implemented to meet the requirements of this chapter.

In short, Congress never meant for the ED to determine public-school curricula. To the contrary, it intended—as expressly stated—for state and local authorities to maintain control over this

aspect of education. And it is beyond evident that Congress has not allowed the ED to circumvent local control of school curricula by predicating federal funding upon adoption of specific programs or theories.

The Executive has also expressly adopted the same policy when it comes to the relationship between the ED and school districts. A 2017 Executive Order reads: "It shall be the policy of the executive branch to protect and preserve State and local control over the curriculum, program of instruction, administration, and personnel of educational institutions, schools, and school systems, consistent with applicable law." Exec. Order 13791, 82 Fed. Reg. 20427 (April 26, 2017) (EO or Order). The Secretary of Education has the authority to rescind or revise any regulations that are inconsistent with statutory prohibitions. *Id.* At § 2(c). This Order carries the force of law and may only be overturned by a subsequent Executive Order. *See U.S. v. Rhode Island Dept. of Corr.*, 81 F.Supp.3d 182 (D. Rhode Island 2015) ("[i]f an executive order has a specific statutory foundation it is given the effect of a congressional statute"); *Southern Illinois Builders Ass'n v. Ogilvie*, 327 F. Supp. 1154, 1161 (S.D. Illinois 1971) (Executive Order has force and effect of law); *American Bar Association*, "What Is An Executive Order" (January 25, 2021), *available at* https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order-/.

ED is accordingly acting in defiance of an express EO that President Biden has not rescinded. But even if the President were to rescind the Order, because the EO simply requires executive agencies to comply with duly enacted laws of Congress, specifically 20 U.S.C. § 1232a, 20 U.S.C. § 3403(a) and (b) and 20 U.S. § 7906a, the rescission of the EO would not relieve ED of its obligation to comply with these laws which govern its conduct and constrain its powers.

## III. The Proposed Priorities Conflict with Congress's Policy of Allowing State and Local Authorities to Determine Educational Programs and Curricula

A federal agency has the power to act only to the extent it has been authorized by Congress, including limitations on its power enshrined in the words of statutory text. *NLRB v. Cmty. Health Servs.*, 812 F.3d 768, 780 (10th Cir. 2016) (Gorsuch, J., dissenting) ("[I]n our legal order federal agencies must take care to respect the boundaries of their congressional charters.") An agency's suggested interpretations of its mandates which have the effect of expanding its authority must be carefully scrutinized. Only *Congress*, not agencies, can expand an agency's power. "And when … [Congress] has said 'Thus far and no farther,' … [it is time] to blow the whistle and call the out of bounds." *FTC v. Hornbeam Special Situations, LLC*, No. 17-cv-03094, Dkt. 219 (N.D. Ga. Oct 15, 2018) (citing *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013)).

The APA requires close review of "whether an agency action is 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'" *See N.J. Bd. Of Pub. Utilities v. F.E.R.C.*, 744 F.3d 74, 95 (3d Cir. 2014) (quoting 5 U.S.C. § 706(2)(c))). A rule that exceeds an agency's statutory grant of authority is without legal basis, and therefore, is unlawful. *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 307 (2013) (admonishing to "tak[e] seriously, and apply[] rigorously, in all cases, statutory limits on agencies' authority"); *cf.* Peter L. Strauss, *In Search of Skidmore*, 84 FORDHAM L. REV. 789, 795 (2014).

Here, ED's "Proposed Priorities" exceed its statutory authority. The Priorities purport to "support the development of culturally responsive teaching and learning and the promotion of information literacy skills in grants" through American History and Civics Education. *Proposed Priorities*, 86 Fed. Reg. at 20348. The Priorities are ostensibly based upon:

> a growing acknowledgment of the importance of including, in the teaching and learning of our country's history, both the consequences of slavery, and the significant contributions of Black Americans to our society. This acknowledgment is reflected, for example, in the New York Times' landmark '1619 Project' and in the resources of the Smithsonian's National Museum of African American History. Accordingly, schools across the country are working to incorporate anti-racist practices into teaching and learning.

*Id.* at 20349. The Priorities then quote Ibram X. Kendi, author of the book *How to Be an Anti-Racist*. Both Kendi and the authors of the 1619 Project (the validity of which has been questioned from a historical perspective) are proponents of Critical Race Theory (CRT).

The Proposed Priorities next state that "[i]t is critical that the teaching of American history and civics creates learning experiences that validate and reflect the diversity, identities, histories, contributions, and experiences of all students" which mandates an "identity-safe learning environment," defined as classrooms in which teachers "strive to assure students that their social identities are an asset rather than a barrier to success in the classroom …. The proposed priority would support projects that incorporate culturally and linguistically responsive learning environments." *Id.*

Applicants will be given priority if their projects:

> (a) Take into account systemic marginalization, biases, inequities, and discriminatory policy and practice in American history;
> (b) Incorporate racially, ethnically, culturally, and linguistically diverse perspectives and perspectives on the experience of individuals with disabilities;
> (c) Encourage students to critically analyze the diverse perspectives of historical and contemporary media and its impacts;
> (d) Support the creation of learning environments that validate and reflect diversity, identities, and experiences of all students; and
> (e) Contribute to inclusive, supportive, and identity-safe learning environments.

*Id.*

While the ED attempts to portray the Priorities as content neutral, they are not. By citing the 1619 Project, and quoting Ibram X. Kendi, the ED betrays that it seeks to promote CRT—which is only one theory and view of the world and one to which many do not subscribe—in public schools.

Indeed, many Black Americans overtly reject CRT, believing that it infantilizes them and furthers and deepens racial divides.[2]

The Proposed Priorities are also objectionable because they encourage separating students based upon race. The Priorities state: "[i]t is critical that the teaching of American history and civics creates learning experiences that validate and reflect the diversity, identities, histories, contributions, and experiences of all students" and therefore create an "'identity-safe' learning environment" which is defined as classrooms in which teachers "strive to assure students that their social identities are an asset rather than a barrier to success in the classroom . . . . The proposed priority would support projects that incorporate culturally and linguistically responsive learning environments." *Id.* As one teacher has observed, classrooms organized around this principle in fact encourage racial division. *See* Paul Rossi, "I Refuse to Stand By While My Students Are Indoctrinated," (Apr. 13, 2021), *Common Sense with Bari Weiss*, *available at* https://bariweiss.substack.com/p/i-refuse-to-stand-by-while-my-students

NCLA opposes any segregation in teaching or even categorizing of children in classrooms along racial lines.[3] This has been unlawful since at least 1954. *See Brown v. Board of Education,* 347 U.S. 483 (rejecting "separate but equal" doctrine from *Plessy v. Ferguson*, 163 U.S. 537 [1896]). This approach surely should not be favored by deeming it among the Priorities. In short, the Proposed Priorities appear to be a surreptitious effort to influence programs and curricula, an obvious violation of the language and intent underlying the aforementioned statutes. *See* 20 U.S.C. §§ 3403(a), (b); 1232a.

But even if the Proposed Priorities did not promote controversial and widely critiqued material, they still would be unlawful. A federal agency cannot advance *any* curricular agenda. That is a power that not only was never conferred on ED—it was explicitly withheld in ED's organic statute, and by federal statutes in force since before its founding (20 U.S.C. § 1232a), statutes enacted thereafter, and a currently operative EO.

That ED proposes the rule under the guise of "Priorities" (in other words, awarding funds to schools or teachers who advance CRT), as opposed to mandating teaching certain content, does not render it any less unlawful. As discussed, Congress has not allowed ED to evade the policy of leaving the development of school curricula to state and local authorities by funding schools or classrooms that promote certain ideas or theories over others. *See* 20 U.S.C. § 7906a.[4] Further, for all intents and

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[2] Linguist John McWhorter delivers a compelling critique of CRT on *Real Time with Bill Maher*, https://www.youtube.com/watch?v=-tjgXQDyqno; a parent vigorously protests the adoption of CRT into school curriculum, https://twitter.com/iandprior/status/1392292044975087617?s=21

[3] An Illinois teacher has reportedly filed a complaint that a school was using "affinity groupings" which divided students by color and taught different academic content based on their race. *See* Carl Campanile, "U.S. Dept. of Education curbs decision on race-based 'affinity groups,'" *The New York Post* (Mar. 7, 2021), *available at* https://bit.ly/2RosPuY

[4] Notably, a theory in social sciences differs qualitatively from a theory in the hard sciences. The former is akin to a philosophy or even speculation, whereas the latter is defined by the National

purposes, this is a "rule" noticed in the Federal Register, for which ED has asked for comment. Renaming this "Priorities" to evade the impression of compulsion that attaches to a "rule" does not cure the impermissible content regulation. Indeed, calling this rule "Priorities" not only *de facto* regulates content, it elevates these theories as holding a place of priority in the curriculum. For all these reasons, the Proposed Priorities unquestionably exceed ED's statutory authority and must be resoundingly rejected.

## IV. The Proposed Priorities Violate the Spending Clause

The Spending Clause permits Congress to "pay the Debts and provide for the … general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1. The Spending Clause limits Congress' authority to condition payment of federal funds on state and local actors' engaging or refusing to engage in certain behavior. For example, Congress, and by extension an administrative surrogate, must speak "unambiguously" if it "intends to impose a condition on the grant of federal moneys." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

Here, Congress did speak "unambiguously," *Pennhurst State,* 451 U.S. at 17, and it was in direct opposition to the course of action upon which ED now seeks to embark. As explained at length *supra*, Congress expressly prohibited the dissemination of federal funds in order to "mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic standards and assessments, curricula." 20 U.S.C. § 7906a.

Congress could not have spoken more unmistakably to the issue raised by the Proposed Priorities. Not only that, it has done so multiple times, in several different statutes, across a long span of time. Accordingly, NCLA urges ED to retract the unlawful Proposed Priorities in their entirety.

Very truly yours,

Jenin Younes
Litigation Counsel

Margaret Little
Senior Litigation Counsel

Mark Chenoweth
General Counsel

New Civil Liberties Alliance

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Academy of Sciences as "a well-substantiated explanation of some aspect of the natural world, based on a body of facts that have been repeatedly confirmed through observation and experimentation." Even in the hard sciences, the Department is prohibited from setting curricular agendas that, say, favor one math methodology over another—even when both are valid and non-controversial. Such decisions are solely up to state and local education authorities.