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NCLA Warns U.S. Dept. of Education that Its Effort to Influence Curricular Priorities Is Unlawful

Proposed Priorities – American History and Civics Education

Washington, DC (May 19, 2021) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed a [comment](#) today objecting to the Department of Education’s (ED) “[Proposed Priorities – American History and Civics Education](#),” published April 19, 2021, which would change the way American history is taught in all public schools. The Proposed Priorities would fund “the development of culturally responsive teaching,” a phrase followed by references to Critical Race Theory, the 1619 Project, and the publication and views of Ibram X. Kendi. Regardless of any substantive objections to such curricula, the Proposed Priorities are impermissible because they exceed the agency’s statutory authority.

The Supreme Court, Congress, and the executive branch have each recognized that curriculum-setting authority lies exclusively with state and local authorities. Before the Department of Education was established, the Supreme Court observed, in *Wheeler v. Barrera*, that the language and legislative history 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 programs and curricula] to the local and state agencies.”

When the federal Department of Education was founded in 1979, Congress made explicit in the agency’s [organic statute](#) that it intended to leave control of school curricula to state and local authorities. In a similar spirit, Congress also [prohibited](#) the federal agencies from dictating curricula in public schools. Finally, Congress further [prohibited](#) soft coercion by tying [receipt of federal funds](#) to the teaching of programs or curricula specified by the Department. Thus, at least three statutes expressly prohibit the Department of Education from determining public school curricula. Congress has also expressly stated that localities maintain control over this aspect of education. The executive branch overtly adopted the same policy in its 2017 executive order, [Enforcing Statutory Prohibitions on Federal Control of Education](#), which remains in effect today.

NCLA argues that the Proposed Priorities conflict with both the policy and the language of the statutes governing the federal Department of Education’s relationship with local educational authorities, and thus they should be revoked. The Department of Education has the power to act only to the extent Congress has authorized it. Congress alone can expand an agency’s power. The Proposed Priorities exceed the Department of Education’s statutory grant of authority by attempting to exercise an authority and influence over curricula that was never conferred. In fact, Congress expressly withheld the ability to influence curricula from the agency’s powers.

NCLA released the following statements:

“The ‘Proposed Priorities’ are an attempt to pass a rule without calling itself that. Three federal laws explicitly prohibit ED from controlling curricula by adopting ‘priorities’ like this, which also advance a point of view that many Americans—of all races—feel sets back our nation’s hard-won Civil Rights Era accomplishments.”

— **Peggy Little, Senior Litigation Counsel, NCLA**

“The Department of Education’s ‘Proposed Priorities’ would pressure schools into propounding a specific, controversial social science theory in classrooms. In doing so, they conflict with longstanding federal law and policy forbidding ED from interfering with state and local authorities’ exclusive purview in setting school curricula.”

— **Jenin Younes, Litigation Counsel, NCLA**

For more information about this issue visit [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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