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Poverty & Race Research Action Council

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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 Poverty & Race Research Action Council submits the following comments in response to the Federal Register notice posted June 22, 2017, requesting input on regulations that should be repealed, replaced, or modified in accordance with Executive Order 13777 “Enforcing the Regulatory Reform Agenda.” Executive Order 13777 focuses attention on those regulations that: (i) Eliminate jobs or inhibit job creation; (ii) Are outdated, unnecessary, or ineffective; (iii) Impose costs that exceed benefits; (iv) Create a serious inconsistency or otherwise interfere with regulatory reform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of 2001; or (vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.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 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.

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

² 42 U.S.C. § 200d.

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 2014 Nondiscriminatory Administration of School Discipline Guidance.³

Preserve the 2014 Nondiscriminatory Administration of School Discipline Guidance

In 2014 the Department of Education, alongside the Department of Justice, issued guidance, pursuant to the Civil Rights Act of 1964 disparate impact regulations, prohibiting the discriminatory administration of school discipline policies on the basis of race, color, or national origin. In general, disparate impact guidance is an important policy tools for use in preventing intentional discrimination that may otherwise go unchallenged, as well as education policies that create unequal educational opportunities for no good reason.

Disparate impact is a particularly significant concern in the context of school discipline, and the concrete application of the disparate impact regulation in the context of school discipline makes the 2014 guidance a critical tool for ensuring students have equitable educational opportunities. First, suspensions as a disciplinary tool make little sense to begin with. The overwhelming weight of research shows no academic benefits of suspension and expulsion, which may in fact have negative impacts on bystander students,⁴ and that other disciplinary tools are more effective in improving student behavior and academic outcomes.⁵ Yet, schools in the United States hand out over three million school suspensions each year, with the vast majority of suspensions being administered for non-drug and non-weapon misbehavior.

³ U.S. Departments of Education, Justice, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline Guidance," available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

⁴ Brea L. Perry and Edward W. Morris, "Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools," (American Sociological Review, 2014), available at <http://journals.sagepub.com/doi/abs/10.1177/0003122414556308>.

⁵ Jenni Owens, Jane Wettach, and Katie Hoffman, "Instead of Suspension: Alternative Strategies for Effective School Discipline," (Duke Center for Child and Family Policy and Duke Law School, 2015), available at https://law.duke.edu/chilledlaw/schooldiscipline/downloads/instead_of_suspension.pdf.

Second, African American students are inequitably targeted by school discipline policies, making up a dramatically disproportionate share of these school exclusions.⁶ In fact, in some schools, African American students are five and six times as likely to be suspended or expelled as white students.⁷ The harmful effects of school exclusion, combined with its disparate impositions, play no small part in exacerbating achievement gaps.

To be clear, the extent of these disparities cannot be explained by students' behavior, and research indicates the most likely explanation is implicit racial bias and differential treatment.⁸ For instance, Russ Skiba's research finds that when engaging in the same types of misbehavior, African American students are more likely to be punished harshly.⁹ A recent controlled study by Stanford is even more compelling. Researchers presented school administrators written files of student misbehavior, making only superficial alterations so that they could present them with the exact same misbehavior. The study revealed that administrators punished African American students more harshly for the same infractions.¹⁰

Disparate impact regulations play a central role in identifying racial disparate practices in discipline and requiring schools to explain them. When the disparities can be justified as necessary to achieve an educational objective or a result of differential behavior, a district may not be required to make any changes to their discipline policies. But when those disparities cannot be justified, they are likely the result of racial bias and create unjustifiable inequities. The 2014 school discipline guidance is simply an appropriate explanation of this process and analysis, putting districts on clear notice of their obligations under the law, and should not be altered by the Department during this review.

⁶ U.S. Department of Education Office for Civil Rights, "Civil Rights Data Collection Data Snapshot: School Discipline" (U.S. Department of Education, 2014), available at <https://ocrdata.ed.gov/downloads/crde-school-discipline-snapshot.pdf>.

⁷ Edward Smith and Sean Harper, "Disproportionate impact of K-12 school suspension and expulsion on Black students in southern states," (University of Pennsylvania, Center for the Study of Race and Equity in Education, 2015), available at https://static1.squarespace.com/static/56675bc2b204d55efa34e5c5/t/56a920bfbe7b96cea166e04c/1453924545162/Smith_Harper_Report.pdf.

⁸ Cheryl Staats "Implicit Racial Bias and School Discipline Disparities: Exploring the Connection," (Kirwan Institute, 2014), available at <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/05/ki-ib-argument-piece03.pdf>.

⁹ Russell J. Skiba, Suzanne E. Eckes, and Kevin Brown, "African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy," (New York Law School Law Review, 2009), available at <http://www.indiana.edu/~equity/docs/Skiba%20et%20al%2054%204.pdf>.

¹⁰ Jason A. Okonofua and Jennifer L. Eberhardt, "Two Strikes: Race and the Disciplining of Young Students," (Psychological Science, 2015), available at <http://journals.sagepub.com/doi/abs/10.1177/0956797615570365?journalCode=pssa>.

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 guidance described above will ensure the preservation of a tool schools and districts can use to foster classroom diversity, which ultimately benefits all students and our society as a whole.