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Re: *Comment to the Proposed Priorities for American History and Civics Education programs, including the Presidential and Congressional Academies for American History and Civics (Academies) and National Activities programs*

Dear Ms. Howerton:

Thank you for the opportunity to comment on the proposed Department of Education (Department) priorities regarding American History and Civics Education programs. Recently, I served in the Department as Deputy Assistant Secretary for Policy and Development in the Office for Civil Rights, and then subsequently as Senior Counsel to the Office for Civil Rights. I have fond memories of my time in the LBJ building, as well as a great deal of respect for many of the employees at the Department.

Now, as Associate General Counsel to Mountain States Legal Foundation (MSLF), in Lakewood, Colorado, I write on behalf of the Foundation in opposition to the proposed priorities. Given the uncertain legal landscape surrounding Critical Race Theory, as well as the unfortunate potential to implement the proposed priorities in a manner that would discriminate based on viewpoint under the First Amendment, the proposed priorities ought to be reconsidered.

I. The Department Ought to Reconsider Prioritizing Grant "Projects That Incorporate Racially, Ethnically, Culturally, and Linguistically Diverse Perspectives into Teaching and Learning."

In Justice Harlan's famous dissent in *Plessy v. Ferguson*, he noted that "Our Constitution is color-blind." 163 U.S. 537, 560 (1896) (Harlan, J., dissenting). Justice Harlan stated: "In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Id.* at 560.

If the proposed priority were put in a place, a significant number of projects would focus not just on anti-discrimination principles, which are of course laudable. Instead, they will focus on alleged racial power, and assigning racial characteristics to whole swaths of individual members of demographic groups. The federal government should play no part in encouraging such divisive messages, much less prioritizing such messages as part of a federal grant program. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

Now is an especially poor time to embrace the proposed priority, given that the Department's Office for Civil Rights recently withdrew statements contained in a prominent Webinar, such as the following, due to a perceived conflict with President Biden's Executive Order No. 13985:

- Since the Supreme Court's landmark 1954 decision in *Brown v. Board of Education*, schools have been barred from segregating students according to race in classes, seminars, lectures, trainings, athletics, clubs, orientations, award ceremonies, graduations, or other meetings. This includes, of course, segregation that occurs in a virtual or online format as well.

- One example that might violate Title VI is advocating a position that a particular race is collectively guilty of misconduct, or advocating a position that a particular race or something about that race is negative or evil.

- Title VI might also be violated if part of a curriculum instructs students that members of a particular race or racial identity pose specific dangers to other individuals, or if it advocates or forces members of certain races to deconstruct or confront their racial identities.

- A school may not advocate that students adopt specific beliefs based on their race, such as urging that white students be white without signing on to whiteness.

- It is impermissible to assign students and individuals specific characteristics based solely on their race, and insist that members of specific racial groups act in accordance with those characteristics.

See OCR Webinar on Racially Exclusive Practices and Title VI (Jan. 19, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-tvi-webinar-reptvi.pdf (withdrawn and watermarked: "This document expresses policy that is inconsistent in many respects with Executive Order 13985 on Advancing Racial Equity and Support for Underserved Communities through the Federal Government.").[1]

[1] The watermark also states that the Webinar "was issued without the review required under the Department's Rulemaking and Guidance Procedures, 85 Fed. Reg. 62597 (Oct. 5, 2020)," although

Of course, it is unfortunate that President Biden issued an Executive Order that the Department has deemed to be inconsistent in many respects with the Webinar's uncontroversial statements about *Brown* and basic propositions regarding race discrimination. That speaks poorly of the President's Executive Order, of course. But more so, it means that schools may think that they may properly engage in race discrimination so long as it is done in the name of so-called "diverse perspectives" and in furtherance of a project blessed by a federal grant.

Worse, the Department's messaging on protecting students from race discrimination has been so troubling that it may actually encourage schools to engage in violations of Title VI, in order to satisfy the grant priority. Recently, the Department confirmed that it was taking the unprecedented step of pausing an investigation after a Letter of Finding was already issued to the Evanston School District. *See* Carl Campanile, *US Dept. of Education curbs decision on race-based 'affinity groups'*, (Mar. 7, 2021) at https://nypost.com/2021/03/07/education-dept-curbs-decision-on-race-based-affinity-groups/. In the Letter of Finding, the following violations of Title VI committed by Evanston were reported by media sources, and confirmed by the Department:

- Separating administrators in a professional development training program in August, 2019 into two groups based on race — white and non-white.

- Offering various "racially exclusive affinity groups" that separated students, parents and community members by race.

- Implementing a disciplinary policy that included "explicit direction" to staffers to consider a student's race when meting out discipline.

- Carried out a "Colorism Privilege Walk" that separated seventh and eight grade students into different groups based on race.

Now that the Department has sent the message that it is considering whether to deem this conduct consistent with Title VI, it is anyone's guess how aggressive a school district may try to be when satisfying the proposed grant priority.

Additionally, MSLF recently filed an *Amici Curiae* brief on behalf of former officials who worked in the Office for Civil Rights, in the case of *Students for Fair Admission v. Harvard*. *See Brief of Amici Curiae Former Federal Officials of the Department of Education's Office for Civil Rights*, at https://www.supremecourt.gov/DocketPDF/20/20-1199/173598/20210331160446484_2021.03.31%20SFFA%20Amicus.pdf. In the brief, we urge the Court to grant a writ of certiorari, and note the confusion that schools and stakeholders have recently experienced based on the changing presidential administrations.

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that is erroneous, since the Webinar is neither a Rulemaking nor a Guidance document. For instance, it has never, to this day, been posted in OCR's formal guidance policy portal. In any event, the watermark concedes that the Webinar "is inconsistent in many respects" with EO 13985.

> It is one thing to see shifts in legislative or regulatory changes, depending on who holds office. It is quite another for Executive Branch agencies to interpret the same cases to have wildly different results in the context of race discrimination. Students and schools can be forgiven for experiencing such policy "whiplash," but only the Court can address this problem.

The proposed priority would unfortunately exacerbate this situation, by causing schools to engage in guesswork as to the permissible scope of their race-conscious conduct. For that reason, the proposed grant priority ought to be reconsidered, at least until the Supreme Court has decided whether to grant the petition for certiorari in *SFFA v. Harvard*.

II. The Department Ought to Reconsider Prioritizing Grant Projects Related to "Promoting Information Literacy Skills."

Under the proposed priority, MSLF fears that grants are more likely to be given to projects that emphasize "Information Literacy" only from a left-wing perspective. In other words, we are concerned that schools will not receive grants for proposing to analyze inaccurate information regarding any of the following subjects:

- The claim that the Russia Federation colluded with the Trump campaign in order to influence the 2016 presidential election.
- How media wrongly portrayed Nicholas Sandmann, then a student at Covington Catholic High School, as harassing a Native American man in Washington, D.C.
- The veracity of questionable claims made by Dr. Christine Blasey Ford regarding Justice Brett Kavanaugh.
- Disparate media coverage surrounding large public gatherings involving anti-lockdown protestors, Black Lives Matter protestors, and celebratory gatherings after President Biden's election.
- How social media platforms like Twitter and Facebook may filter out certain news items based on the political preferences of their owners or content editors.
- How public figures associated with the 1619 Project inaccurately stated that they had not previously claimed that 1619 was the year of America's true founding.

My concern that projects like these would never seriously be considered as a part of successful federal grant projects—whereas, for instance, a project regarding the circumstances leading up to January 6, 2021, could be—leads me to believe that the priorities present serious constitutional concerns regarding viewpoint discrimination.

"A law found to discriminate based on viewpoint is an egregious form of content discrimination, which is presumptively unconstitutional." *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) (internal quotation marks omitted). And it is no defense to say that federal grants are merely a benefit offered to some qualifying speech, but not a prohibition on other forms of speech. *See Matal*, 137 S. Ct. at 1763 (opinion of the Court) ("[T]he disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.").

To be clear, any grant application that is rejected on the basis of the political views underlying it will give rise to these First Amendment questions, and may even force courts to address viewpoint discrimination issues. It would be regrettable and confusing to schools for the proposed priorities to be adopted, only to be enjoined by courts under the First Amendment.

Conclusion

The proposed priorities to the Regulations ought to be reconsidered. The Department has already left schools confused regarding the state of Title VI. Now is not the time to encourage them to engage in more race conscious policies, as opposed to reminding schools about the applicable scope of Title VI. Moreover, the second priority poses serious concerns regarding viewpoint discrimination, given that the Department is unlikely to look favorably on specific instances of "information literacy" that cut against the interests of its current political appointees and the White House and in the Department.

Sincerely,

/s William E. Trachman

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