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May 19, 2021

United States Department of Education
Department of Education Building
400 Maryland Ave, SW
Washington, DC 20202

*Re: Comments on Proposed Priorities – American History and Civics Education Docket
ID ED-202100ESE-0033*

Dear Secretary Cardona:

As the chief legal officers of our respective states, we write to express our deep concerns with the proposed priorities recently issued by the United States Department of Education (“Department”). The proposed priorities are a thinly veiled attempt at bringing into our states’ classrooms the deeply flawed and controversial teachings of Critical Race Theory and the 1619 Project. Critical Race Theory (“CRT”) is an ideological construct that analyzes and interprets American history and government primarily through the narrow prism of race. Similarly, the 1619 Project seeks to “reframe the country’s history.”¹ As such, it distorts, rather than illuminates, a proper and accurate understanding of our nation’s history and governmental institutions and, therefore, is fundamentally at odds with federal and state law.

Accordingly, the Department should not adopt the proposed rule or, at a minimum, should make clear that grants may not fund projects that are based on CRT, including any projects that characterize the United States as irredeemably racist or founded on principles of racism (as opposed to principles of equality) or that purport to ascribe character traits, values, privileges, status, or beliefs, or that assign fault, blame, or bias, to a particular race or to an individual because of his or her race.

Background

On April 19, 2021, the United States Department of Education (“Department”) issued two proposed priorities for the American History and Civics Education programs. The first priority is for projects that incorporate racially, ethnically, culturally, and linguistically diverse perspectives into teaching and learning. The second is for projects that promote information literacy. The

¹ <https://www.wsj.com/articles/the-1619-project-gets-schooled-11576540494>

purpose of these priorities is “to support the development of culturally responsive teaching and learning and the promotion of information literacy skills in grants under the programs.”

Though the Department does not overtly refer to CRT in its priorities, it is prioritizing teaching this highly controversial ideology through the vehicle of this grant program. This is hardly what Congress intended when it authorized this program. CRT focuses how our current government mechanisms are irretrievably *flawed*. Its theorists posit that our Nation’s values, ideals, foundations and institutions – the things Congress intended to *promote* – instead produce “inequity” demanding actions to modify this result. This appears to be a view shared by Professor Ibram X. Kendi and advanced through the 1619 Project. It is fair to assume this view would be advanced by a curriculum built from its project.

The proposed rule establishing the priorities cites as the program authority the Elementary and Secondary Education Act of 1965 as amended by the Every Student Succeeds Act of 2015 (“ESSA”).² In the ESSA, Congress removed burdens on schools and teachers and replaced the No Child Left Behind Act. This was called the “largest devolution of federal control to the states in a quarter century.”³ The goal was to give states more flexibility in education, flexibility which had previously been removed by the No Child Left Behind Act. Such flexibility empowers states to best design policies that meet the unique needs of their own students and communities.

In passing the ESSA, Congress created the Presidential Academy, Congressional Academies, and National Activities programs to improve the quality of instruction in American history and civics by educating students and teachers in “traditional American history” and the principles of the Constitution and the Bill of Rights.⁴ Shortly after signing the ESSA, President Obama’s Department of Education began issuing a raft of proposed regulations to implement its provisions. However, these actions spurred a bi-partisan effort in Congress to ask President Obama to rein in the Department of Education.⁵ As these legislators noted, the proposed regulations did not comply with Congress’s intent in the ESSA. Ultimately, Congress passed, and President Trump signed, a rollback of those regulations under the Congressional Review Act. Undeterred, the current administration seems to be repeating the errors of the Obama administration in issuing regulations that are contrary to the ESSA.

Section 6661 provides that the Secretary of Education “is authorized to carry out an American history and civics education program to improve – 1) the quality of American history, civics, and government education by educating students about the history and principles of the Constitution of the United States, including the Bill of Rights; and 2) the quality of teaching of American history, civics, and government in elementary and secondary schools, including the teaching of traditional American history.”⁶

² 20 U.S.C. §§ 6662 and 6663

³ <https://www.wsj.com/articles/no-child-left-behinds-successor-1448838727>.

⁴ See 20 U.S.C. § 6661(a)

⁵ <https://www.washingtonpost.com/news/education/wp/2016/11/03/senators-from-both-parties-ask-obama-to-rein-in-education-department-proposals>.

⁶ 20 U.S.C.A. § 6661.

Section 6662 establishes two grant programs. One is called the Presidential Academies for the Teaching of American History and Civics, which provides grants for seminars or institutes for teachers of American history and civics. The other is called the Congressional Academies for Students of American History and Civics, which provides grant funds to offer seminars or institutes for high school students of American history and civics.

Section 6663 provides grant funding for the purpose of developing, implementing, and disseminating evidenced-based approaches or professional development programs in American history, civics, or geography. The purpose of the grants is “to promote new and existing evidence-based strategies to encourage innovative American history, civics, and government, geography instruction”⁷

The Proposed Priorities Are Contrary to the Governing Statute

Congress made clear that the purpose of the programs is to advance a traditional understanding of American history, civics, and government. The proposed priorities would do little to advance that goal and, based on the proposal’s support for the “1619 Project,” would endorse teaching factually deficient history. Moreover, the implementation of these priorities will, in practice, lead to racial and ethnic division and indeed more discrimination. These issues will be addressed in turn.

Proposed Priority 1 – Projects that Incorporate Racially, Ethnically, Culturally, and Linguistically Diverse Perspectives into Teaching and Learning

Proposed Priority 1 would encourage applicants to “[t]ake into account systemic marginalization, biases, inequities, and discriminatory policy and practice in American history.” The plain language of the authorizing sections was to provide better instruction in American history and civics. The Department goes well outside the bounds of reasonable interpretation by basing in part Priority 1 on the debunked “1619 Project.”⁸ In fact, the founder of the 1619 Project admitted that it “is not about history.”⁹ Additionally, the Proposed Priority would focus not on American history and civics as expressly provided for in Section 6661. Section 6661 authorizes programs to do two things: first, promote the improvement of the quality of American history by educating students about history and principles of the Constitution of the United States, including the Bill of Rights; second, improve the quality of the teaching of American history, civics, and government in elementary schools and secondary schools, including the teaching of *traditional* American history. Clearly Congress enacted programs that would focus on the founding documents and anticipated that proponents of a radical view of American history might one day

⁷ 20 U.S.C. § 6663(a).

⁸ <https://www.wsj.com/articles/the-1619-project-gets-schooled-11576540494> and <https://www.heritage.org/american-founders/impact/new-york-times-quietly-edits-1619-project-after-conservative-pushback>

⁹ <https://www.washingtonexaminer.com/opinion/1619-project-founder-claims-her-project-is-simply-an-origin-story-not-history>

try to corrupt the program because Congress used the adjective “traditional” when describing American history in Section 6661.

The Department’s Proposed Priority 1 does not address how the projects would meet the goals provided for in Section 6661. The Department might argue that the priority would in fact give a better view of American history. While the Department might have an interest in changing perspectives on American history to take a more radicalized view solely through the prism of race, Congress enacted programs to encourage a better grasp and understanding of American history, founding documents, civics, and government. Congress was clear in the authorizing statute, and Proposed Priority 1 goes well outside the scope of teaching American history, government, and civics.

Applying the proposed priority as drafted would do little to promote civics instruction and instead promote an agenda that runs counter to the authorization of the programs as provided in Section 6661 which is to improve the quality of teaching of American history and civics in schools particularly as applied to the teaching of “traditional American history.” Instead of teaching American history grounded in facts, Proposed Priority 1 would prioritize an ideology that distorts American history. CRT supports the idea that America is a fundamentally racist country and that our institutions are inherently systemically racist. Promoting this warped view of American history does not support the teaching of American history as required by the statute, but instead props up an idea based not in fact, but on the idea that “the United States is a nation founded on white supremacy, patriarchy, and oppression and that these forces are still at the root of our society.”¹⁰

Section 6662 requires the entities that receive funds to offer seminars that “provide intensive professional development opportunities for teachers of American history and civics to strengthen teachers’ knowledge of the subjects of American history and civics.”¹¹ Additionally, Section 6662 requires that the secretary give priority to “eligible entities that coordinate or align their activities with the National Park Service National Centennial Parks initiative.”¹² The first priority does not mention the national parks and would run afoul of Section 6662 if an applicant was given priority for meeting the requirements of the draft priority over an applicant who did not comply with the draft priority, but instead coordinated or aligned its activities with the National Park Service as provided for in Section 6662.

Section 6663 provides no better justification for Priority 1. The purpose of the section “is to promote new and existing evidence-based strategies to encourage innovative . . . learning strategies . . .” Programs shall show potential to improve the quality for student achievement in, and teaching of, American history, civics and government, or geography and demonstrate innovation. However, Priority 1 would require applicants to incorporate into projects “teaching and learning practices that – (a) [t]ake into account systemic marginalization, biases, inequities, and discriminatory policy and practice in American history . . .” This has nothing to do with the

¹⁰ <https://www.heritage.org/progressivism/report/critical-race-theory-would-not-solve-racial-inequality-it-would-deepen-it>

¹¹ 20 U.S.C. § 6662(e)(1)(a).

¹² 20 U.S. C. § 6662(e)(4).

teaching of American history grounded in facts. Instead, it treats as truth the ahistorical concepts of CRT and the 1619 Project to inject those notions into classrooms through the grant programs. Nor does it promote any type of innovative learning strategy. It is a shameless attempt to twist a federal program designed and clearly intended by Congress to promote American history and civics education into a program to promote other concepts and Marxism.

Proposed Priority 2 – Promoting Information Literacy Skills

Proposed Priority 2 ostensibly seeks to foster critical thinking and promote student engagement in civics. To do this, it encourages supporting students in “[u]nderstanding their own biases . . . as well as recognizing bias in primary and secondary sources.” This priority suffers from the same deficiencies as Priority 1. Regardless of whether it is a Presidential Academy or Congressional Academies priority, it cannot be prioritized under the statute over an applicant who coordinates or aligns with the National Park Service. Moreover, the plain language of the statutes lay out the purpose of the law which is to improve American history and civics education. It is not an authorization to take federal money to then implement programs to “develop[] information literacy.”¹³

Neither the Presidential Academies nor the Congressional Academies are designed to “develop information literacy.”. The Presidential Academies funds must “provide[] intensive development opportunities . . . to strengthen teachers’ knowledge of the subjects of American history and civics.” The Congressional Academies must “broaden[] and deepen[] . . . students’ understanding of American history and civics.” While improving critical thinking in civics and American history classrooms is something we all can support, the simple reality is that pointing out ones’ own biases and the *perceived* biases of others will lead less to critical thinking and more to revisionist history as we have already seen with the 1619 Project. This is contrary to Section 6661 which authorizes Sections 6662 and 6663. Taken together with the enacting language in Section 6661, it is clear that the grants were created for students to understand American history and government and for teachers to gain a better grasp of how to teach American history and civics.

The Proposed Priorities Disadvantage Teachers

Additionally, teachers in states that have broad non-discrimination protections would be at a disadvantage for attending and utilizing the programs that implement programs encouraged under the priority guidance. For example, in Indiana, the General Assembly has provided that the policy of the State is to provide equal and nondiscriminatory education opportunities to students.¹⁴ CRT and the 1619 Project work to discriminate against students who are inappropriately defined as having “privilege” or being “oppressors” based solely on their race. Teaching this in a classroom clearly runs afoul of broad non-discrimination provisions adopted by many states to prevent the same sort of separatist teaching that the guidance attempts to integrate into schools through teachers and students. A teacher that attends a program that teaches him or her to indoctrinate

¹³ Proposed Priority 2

¹⁴ Ind. Code § 20-33-1-1.

students in a discriminatory manner would violate Indiana law if brought back into the classroom. Because Indiana teachers could not bring back what they learned, they would not be able to take part in “intensive professional development opportunities . . . to strengthen [their] knowledge of American history and civics” as provided in Section 6662. Nor could a radical new program that disregards historical fact for an agenda comply with Section 6662. Additionally, states across the country have passed or are considering passing laws that prohibit that type of discrimination that is at the heart of CRT and other concepts.¹⁵ Teachers in these states would also be disadvantaged in terms of being able to learn new skills and concepts to bring into the classroom. And, ultimately, students would be harmed. The programs are designed to increase an understanding of American history. Implementing these priorities, because of their discriminatory nature, would limit who could take advantage of the programs.

It is difficult if not impossible to reconcile teaching our youth the principles advanced by CRT with the intent of Congress in creating this grant program. Educators have already expressed concern with the proposed priorities and how they would affect curriculum.¹⁶

The Proposed Priorities Harm Students

Finally, and most importantly, is the impact of these priorities on students. The proposed priorities specifically cite the work of Kendi as a basis for their implementation, contending that they will reduce discrimination and racist behavior: “Antiracist ideas argue that racist policies are the cause of racist inequalities.” As recently noted by Frederick Hess, “upon closer scrutiny, it quickly becomes apparent just how wholly Kendi’s doctrine is at odds with American traditions of equality, free inquiry, and ordered liberty. Kendi holds that every single thing in the world—every action, idea, thought, and policy—is either ‘racist’ or ‘anti-racist.’”¹⁷ However, Kendi’s own record in implementing what are described as these “anti-racist practices” rather than reduce discrimination, instead actually increase discrimination. For example, Kendi helped lead the opposition against the selection process for the elite Boston Latin School, the Boston Latin Academy, and the John D. O’Bryant School of Math & Science. Relying heavily on a merit-based testing regime, Asian applicants received a disproportionately high number of the scarce 205 available seats. “With COVID as a pretext, equity advocates set up a new system to fill the spots based on zip codes and grades, a plan that will result in a 24 percent reduction in Asians, an 18 percent reduction in whites, a 50 percent increase in blacks, and a 14 percent increase in Hispanics.”¹⁸

Thus, the implementation of Kendi’s teachings in Boston, rather than reduce discrimination, instead increased discrimination, especially against Asian Americans, a group that has been recently targeted with particularly vicious hate crimes.

¹⁵ <https://www.newsweek.com/texas-could-ban-critical-race-theory-next-several-states-look-follow-idaho-1589502>

¹⁶ https://helenair.com/news/state-and-regional/govt-and-politics/arntzen-requests-ags-opinion-on-critical-race-theory-in-education/article_2c0436d3-29ce-5657-ba38-9ccd095141fa.html

¹⁷ https://www.aei.org/op-eds/how-anti-racism-is-derailing-efforts-to-improve-education/?mkt_tok=NDc1LVBCUS05NzEAAAF8_v5T6a5KfZsi3if2TiYJ5AocUTW393RUAB92ceyFvav0VqARdV_IoDiP-F-IWoSJma3KaOVFMo60Rw_qKi_KpuqWFJchP7xGLHzQV6hjBg

¹⁸ <https://www.nationalreview.com/magazine/2021/05/17/inequality-of-equity>.

The hypocrisy inherent in the teaching of CRT is not limited to Kendi's work. For example, Harvard University has been accused, repeatedly, of discriminating against Asian Americans by modifying a merit-based application process to reduce the number of successful Asian American applicants in favor of other races, precisely as Kendi advocated for in Boston. Harvard recently underwent a lengthy trial in federal district court during which the plaintiffs, a group of Asian American students whose applications for admission were denied, presented volumes of evidence in support of their allegation that Harvard effectively operated a quota system designed to keep the number of Asian American students artificially low. The Supreme Court has repeatedly said that such quota systems are illegal. Moreover, such a system does violence to the Reverend Martin Luther King Jr.'s vision of a nation where individuals "will not be judged by the color of their skin but by the content of their character."

Similarly, based on a complaint filed by another group of Asian American students, the Department of Justice during the prior administration conducted a lengthy and thorough investigation of Yale University's admissions practices. At the end of that investigation, the Department of Justice issued a findings letter concluding that Yale University had discriminated against Asian American applicants in violation of Title VI of the Civil Rights Act of 1964. When Yale refused to voluntarily change its policies, the Justice Department filed suit seeking to remedy this discrimination. The highly qualified Asian American applicants Yale rejected in favor of less-qualified applicants of other races surely deserved better, but under the application of CRT, they suffered their own discrimination.

Issues of race and discrimination are complex, but instead of teaching American history and civics, as plainly spelled out in the statute, the proposed priorities would dilute the quality of American history and civics education in America in favor of a hyper-racialized and ahistorical doctrine. They are not focused on promoting truth or a holistic understanding of American history and the ideals that the Founders used to establish our country as required by statute, but instead are being used to promote revisionist American history and principles that lead to more discrimination, not less.

These actions clearly demonstrate the real world disconnect between the stated goals of CRT and its effects.¹⁹ Thus the intended remedy for our civic illiteracy is indeed more virulent than the disease.

It is also curious that Proposed Priority 1, like Kendi in Boston, cites "COVID-19—with its disproportionate impact on communities of color"—as support. There is no doubt that, as the Department has noted in several releases, COVID-19 and the inept response by some large urban

¹⁹ As Christopher Rufo has pointed out, even though benign sounding, when put into practice, CRT curriculum often comes out as discriminatory and results in further discrimination and harassment. <https://www.city-journal.org/the-left-wont-debate-critical-race-theory>.

schools had disproportionate impact on “students of color” as the priority commentary and others note.²⁰

A study from Brown University found that the shutdowns last spring likely set the average student back roughly 35 percent in reading and more than 50 percent in math compared to a typical year.²¹ These disruptions are impacting vulnerable student populations, especially low-income students, children in foster care, students of color, as well as children with disabilities. A study by McKinsey & Company found that school shutdowns deprived lower-income students of vital support and engagement, likely resulting in significant learning losses.²² It estimates, for example, that while the average loss of learning due to the pandemic is nearly seven months, black students could fall behind by 10.3 months, Hispanic students by 9.2 months, and low-income students by more than a year. This would exacerbate existing achievement gaps by 15 to 20 percent.

The United States has been combatting these achievement gaps for many years, and the increase caused by COVID-19 has been disheartening. Given this alarming increase, it is disturbing that the Department has chosen to prioritize advancing this flawed CRT curriculum instead of focusing on reducing the COVID-19 enhanced achievement gap. The adoption of these priorities would cause lower performing schools to continue to fail students of color, students with disabilities, and students in poverty through teaching revisionist history, instead of focusing their resources to make sure their students can “read and write at basic proficiency by the time they graduate middle school.” They are taking on a façade that requires a shift to attacking “abstract societal problems.”²³

Conclusion

As Ronald Reagan once said, “Freedom is a fragile thing and it's never more than one generation away from extinction. It is not ours by way of inheritance; it must be fought for and defended constantly by each generation, for it comes only once to a people. And those in world history who have known freedom and then lost it have never known it again.”²⁴

The ESSA was a bipartisan success. The relevant programs were included to promote the learning and teaching of civics for the benefit of America’s students. These priorities do precisely the opposite while increasing discrimination and failing to address crucial issues like the COVID-19 increase in the achievement gap for students of color, students with disabilities, and students in poverty. The proposed priorities should be rejected. At the very least, the Department should make it clear that it will not fund projects that promote CRT or any projects that characterize the United

²⁰ <https://apnews.com/article/denise-juneau-education-coronavirus-pandemic-seattle-b86968e4a65e90bc2312c66868238bf9>; <https://www.disabilityscoop.com/2021/01/15/school-districts-special-ed-covid-19-investigation/29151>; <https://www.disabilityscoop.com/2021/01/29/ed-department-investigating-special-ed-failures-during-covid-19/29171>.

²¹ <https://www.edworkingpapers.com/sites/default/files/ai20-226-v2.pdf>.

²² <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime#>.

²³ <https://www.dailysignal.com/2021/05/04/how-critical-race-theory-is-taught-in-public-schools>.

²⁴ <https://www.reaganlibrary.gov/archives/speech/january-5-1967-inaugural-address-public-ceremony>.

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States as irredeemably racist or founded on principles of racism (as opposed to principles of equality) or that purport to ascribe character traits, values, privileges, status, or beliefs, or that assign fault, blame, or bias, to a particular race or to an individual because of his or her race.

Sincerely,



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