WASHINGTON
LEGISLATIVE OFFICE

September 19, 2017

VIA ELECTRONIC SUBMISSION

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Ave. SW
Washington, D.C. 20202

Re: Evaluation of Existing Regulations, Docket No.ED-2017-OS-00-74, 82 Fed. Reg. 28431

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Dear Secretary DeVos,

On behalf of the American Civil Liberties Union ("ACLU"), we write to offer comments in response to the above-docketed notice ("Notice") concerning the "Evaluation of Existing Regulations" of the Department of Education ("ED").

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to everyone in this country. The ACLU advances equality through litigation and policy advocacy, including by challenging education discrimination experienced by students on the basis of race, color, or national origin, gender, sexual orientation, religion, and disability status.

The ACLU has staunchly supported laws that protect the rights of students and promote equal educational opportunities for all, including Title VI of the Civil Rights Act of 1964,[1] Title IX of the Education Amendments of 1972,[2] Section 504 of the Rehabilitation Act,[3] the Individuals with Disabilities Education Act ("IDEA"),[4] and Title II of the Americans with Disabilities Act ("ADA").[5] We write to emphasize that in considering whether to repeal, replace, or modify any ED regulation, ED must continue to fulfill its unaltered obligations under each of these laws to ensure that access to education, the "very foundation of good citizenship" and essential to success in life,[6] is available to all. Moreover, any analysis of the costs and benefits of

[1] 42 U.S.C. § 2000d *et seq.*
[2] 20 U.S.C. § 1681 *et seq.*
[3] 29 U.S.C. § 701 et seq.
[4] 20 U.S.C. § 1400 *et seq.*
[5] 42 U.S.C. §12131 *et seq.*
[6] *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 493 (1954).

regulations aimed at "ensuring access to equal educational opportunity for every individual"[7] must take into account those benefits that are "difficult or impossible to quantify, including equity, human dignity, [and] fairness."[8]

I. ED's Regulatory Reform Agenda Cannot Compromise Its Civil Rights Obligations

The Notice seeks public input on how ED ought to implement the directives of two recent executive orders, Nos. 13777 and 13771, by identifying regulations that warrant repeal, replacement, or modification.[9] The ACLU reminds ED that its statutory obligations under Title VI, Title IX, Section 504, the IDEA, Title II of the ADA, and the Administrative Procedure Act ("APA") remain paramount. It should be noted that E.O. 13771, by purporting to apply arbitrary cross-cutting and offsetting criteria for evaluating regulations that lack any legislative basis, raises clear and predictable conflicts with the APA and substantive statutory obligations of ED and other agencies. The Supreme Court has held that an agency may not make regulatory decisions based on "reasoning divorced from the statutory text."[10] The recent executive orders do not alter that analysis. In fact, the text of each executive order makes explicit that it "shall be implemented consistent with applicable law."[11] Accordingly, any regulatory action that ED takes must not derogate from its duties under the law. Congress not only "authorizes" but also "directs" that ED effectuate Title VI,[12] Title IX,[13] and Title II of the ADA.[14]

ED implementing regulations are vital to fulfilling the agency's statutory obligations to effectuate civil rights laws. None of ED's civil rights implementing regulations is outdated, ineffective, or excessively burdensome. Should ED seek to rescind or amend an existing regulation, the Supreme Court has held that it must "supply a reasoned analysis for the change" beyond that which would be required in the absence of the existing regulation,[15] and those reasons must be consistent with the goal of promoting and protecting equal educational opportunities.[16]

Regulations constitute legislative rules, issued pursuant to the APA notice-and-comment process. Any "new rules that work substantive changes in prior regulations" must similarly be enacted with notice and the opportunity for public comment.[17] The opportunity for notice and comment is particularly important in the area of civil rights, where advocates and impacted communities have fought for decades for the right to educational opportunities on equal and non-discriminatory basis. At present, ED seeks only general input on any ED regulations that "may

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[7] 20 U.S.C. § 3402.
[8] Exec. Order No. 13563 § 1(c), 76 Fed. Reg. 3821 (Jan. 18, 2011).
[9] Exec. Order No. 13777, 82 Fed Reg. 12285 (Feb. 24, 2017); Exec. No. Order 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).
[10] *Massachusetts v. E.P.A.*, 549 U.S. 497, 532 (2007); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . .").
[11] 82 Fed. Reg. 12285, 12287; 82 Fed. Reg. 9339, 9340.
[12] 42 U.S.C. §2000d-1.
[13] 20 U.S.C. §1682.
[14] *See* 42 U.S.C. § 12101 ("It is the purpose of this chapter . . . to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities").
[15] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42-43.
[16] *Massachusetts*, 549 U.S. at 532.
[17] *Sprint Corp. v. F.C.C.*, 315 F.3d 369, 374 (D.C. Cir. 2003).

be appropriate for repeal, replacement, or modification."[18] ED has not specified—either through its notice or in its Regulatory Reform Task Force Progress Report[19]—whether it intends to keep, modify, or rescind any civil rights implementing regulations enforced by the Department of Education Office of Civil Rights. Nor has it identified any parties likely to have an interest in these regulations or other notes of review. Should ED seek to rescind or amend its civil rights implementing regulations, it must provide adequate notice of the terms or substance of a proposed rule[20] that "affords exposure to diverse public comment, fairness to affected parties, and an opportunity to develop evidence in the record."[21]

Similarly, if it seeks to alter subregulatory guidance, ED must acknowledge the change and "provide a reasoned explanation."[22] Without such an explanation, which must include reasons for "'disregarding facts and circumstances that underlay or were endangered by the prior policy,'" a court will declare the changed policy to be arbitrary, capricious, and unlawful under the APA.[23]

Given the critical importance of education to free and equal participation in all aspects of our country's democratic society, we ask that ED also provide an opportunity for public comment should it opt to rescind or amend any piece of subregulatory guidance affecting equal educational opportunities.

II. ED Should Preserve Its Nondiscrimination Rules and Corresponding Guidance Documents

Consistent with its statutory obligations, ED has adopted regulations and guidance to effectuate Title VI,[24] Title IX,[25] Section 504,[26] and the IDEA.[27] The importance of implementing civil rights statutes in the education context was central to the creation of the Department of Education and the Office for Civil Rights. In establishing the Department of Education, Congress recognized that "education is fundamental to the development of individual citizens and the progress of the Nation" and that "there is a continuing need to ensure equal access for all Americans to educational opportunities of a high quality, and such educational opportunities should not be denied because of race, creed, color, national origin, or sex."[28] Similarly, Congress has found that "Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society[,]" and that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[29] Accordingly, the first purpose of the Department of Education is

[18] *Docket No.ED-2017-OS-00-74, 82 Fed. Reg. 28431.*
[19] *U.S. Dep't of Educ., Regulatory Reform Task Force Progress Report (May 2017), https://www2.ed.gov/documents/press-releases/regulatory-reform-task-force-progress-report.pdf.*
[20] *Am. Radio Relay League, Inc. v. FCC,* 524 F.3d 227, 236 (D.C.Cir.2008) (citing 5 U.S.C. § 553(b)-(c)).
[21] *Nat'l Mining Ass'n v. Mine Safety & Health Admin.,*116 F.3d 520, 530–31 (D.C.Cir.1997) (internal quotations and citations omitted).
[22] *Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117, 2125 (2016).
[23] *Id.* at 2125–26 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009)).
[24] 34 C.F.R. § 100.1 *et seq.*
[25] 34 C.F.R. § 106.1 *et seq.*
[26] 34 C.F.R. § 104.1 *et seq.*
[27] 34 C.F.R. § 300.1 *et seq.*
[28] 20 U.S.C. § 3401.
[29] 20 U.S.C. § 1400(c)(1).

"to strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual."[30]

In creating the Office for Civil Rights ("OCR"), Congress was specifically concerned with improving the process for civil rights enforcement and ensuring that the Department of Education had adequate authority and capacity to "give its civil rights responsibilities high priority."[31] The Department of Education's implementing regulations and corresponding guidance are a critical component of the Department's ability to meet its responsibility and provide OCR and federally-funded schools, colleges, and education agencies across the country tools to move increasingly toward the promise of equal educational opportunities for all.

III. Title VI and Title IX

A. Title VI

The ACLU strongly supports ED's Title VI implementing regulations and would oppose any effort to repeal, replace, or modify it in order to meet deregulatory goals—that is, based upon "reasoning divorced from [Title VI's] text."[32]

B. Title IX

Title IX was enacted as part of the Education Amendments of 1972 after multiple Congressional hearings detailing discrimination against women and girls in the country's public schools, universities, and professional schools, including their exclusion from vocational programs preparing students for lucrative trades. Designed to eliminate sex discrimination in federally-funded educational programs, the statute is widely acknowledged as having vastly expanded girls' participation in every realm of academic life, and ultimately, leveled the playing field for their entry into the workplace.[33] It has increased participation in athletics, which improves participants' health, academic success rates and career possibilities. It has led to a marked increase in the entry and success rates for girls and women in STEM fields. It has ensured that educational opportunities are offered on an evenhanded basis to boys and girls alike, and that sex stereotypes do not form the basis for educational programming in schools. It has played a crucial role in securing the rights of pregnant and parenting students to equal treatment while at school and to the opportunity to fulfill their educational goals. And it has provided important recourse for students who report experiencing sexual harassment and sexual violence.

The Department's current Title IX regulations, which touch on many of the areas above, have remained largely unchanged since they were first set before Congress for approval in 1975. Those regulations have contributed significantly to Title IX's huge successes. But these successes do not mean that either Title IX itself or the Department's regulations are obsolete. Rather, they stand as a bulwark against discrimination that all too easily rears its head. While

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[30] 20 U.S.C. § 3402.
[31] S. Rep. No. 96-49, at 35-38 (1979) *as reprinted in* 1979 U.S.C.C.A.N. 1549-1552.
[32] *Massachusetts v. E.P.A.*, 549 U.S. at 532.
[33] *See generally* National Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 2017, http://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf.

eliminating these long-standing Title IX regulations would not eliminate schools' obligations to comply with the statute itself, or with the independent obligation of public schools to comply with the Equal Protection Clause of the United States Constitution, it would sow confusion and potentially result in loss of the valuable progress that has been made since Title IX's enactment. Indeed, rescission could lead some schools to revert to many of the practices that made the passage of Title IX necessary.[34] It would also increase costs to schools, as they would be more likely to face costly private litigation should the route of filing a complaint with OCR be foreclosed.

Existing ED regulations and many guidance documents have played an important role in securing civil rights enforcement, and do not implicate the concerns of efficiency, currency, or administrative burden underlying the EO. Their rescission risks disrupting longstanding interpretations of law and undermining important enforcement goals.

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In conclusion, the ACLU staunchly opposes the rescission of ED's existing civil rights regulations implementing Title IV, Title IX, Section 504, the IDEA, and Title II of the ADA pursuant to generalized concerns related to cost or administrative burden, and unconnected with the underlying statutory goals, and reminds ED that a deregulatory agenda does not alter its statutory obligations under these laws. Moreover, any move to rescind sub-regulatory guidance should be accompanied with adequate notice and opportunity for public comment. Please contact Jennifer Bellamy, Legislative Counsel, with any questions. She can be reached at jbellamy@aclu.org or 202-715-0828. Thank you for this opportunity to comment.

Sincerely,

Faiz Shakir
National Political Director

Jennifer Bellamy
Legislative Counsel

[34] The rescission in 2006 of the previously existing regulation governing single-sex classrooms and activities, which the ACLU opposed, provides a clear illustration of the ease with which sex discrimination can reassert itself in schools in the absence of adequate regulatory oversight; that change led to a dramatic increase in single-sex classrooms based on impermissible stereotypes about boys' and girls' brains and learning styles, and the widespread use of intentionally different teaching methods based on sex in the classroom. *See* Galen Sherwin and Christina Brandt-Young, ACLU, Preliminary Findings of ACLU Teach Kids, Not Stereotypes 2012, https://www.aclu.org/files/assets/doe_ocr_report2_0.pdf. However, in light of the proliferation of unlawful single-sex programming in the wake of that regulatory change, the Department issued a guidance in 2014 that addressed many of these concerns and brought clarity as to what the regulation, properly interpreted, requires consistent with the statute. *See Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (2014), https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf. Because the guidance has brought about significant progress in proper enforcement of the law, and because its rescission could erect a roadblock to this important recent progress, neither the regulation nor the guidance should be rescinded at this time.