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**Re: Docket ID ED-2017-OS-0078, Secretary's Proposed  
Supplemental Priorities and Definitions for Discretionary  
Grant Programs**

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Dear Ms. Bell-Ellwanger:

The American Civil Liberties Union (“ACLU”) submits these comments on the Secretary’s Proposed Supplemental Priorities and Definitions for Discretionary Grant Programs (“Supplemental Priorities” or “proposed priorities”).

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. With more than two million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the right of every individual—regardless of race, religion, gender, sexual orientation, disability, or national origin—to equal protection under the law. These comments are consistent with ACLU’s mission to protect these principles.

Although the notice states that the Department of Education (“the Department”) will “place a renewed focus on our core mission” when it comes to federal grant funding, the ACLU is concerned that several proposed priorities and definitions will, in fact, undermine this goal. When Congress established the Department, it intended to “strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual.”<sup>1</sup> The Department does so, in part, by enforcing five civil rights statutes in “all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries and museums, and other

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<sup>1</sup> Pub. L. No. 96-88, 93 Stat. 670.

entities that receive U.S. Department of Education funds.”<sup>2</sup> As explained further below, the proposed priorities are likely to interfere with the Department’s mandate to ensure equal educational access.

## **I. Proposed Priority 1—Empowering Families to Choose a High-Quality Education that Meets Their Child’s Unique Needs.**

The Secretary’s first priority—maximizing “educational choice” for students—includes increasing access to private educational programs. In other words, the Secretary seeks to grow school voucher programs across the country. Prioritizing access to private school vouchers, however, would run counter to the Department’s repeatedly professed respect for “evidence-based” educational approaches and harm, not help, the most vulnerable students identified throughout the Proposed Priorities.

As defined by the Every Student Succeeds Act “evidence-based” activities, strategies and interventions are those that demonstrate “a statistically significant effect on improving student outcomes or other relevant outcomes based on strong . . . , moderate . . . , or promising evidence” from at least one well-designed and well-implemented experimental or quasi-experimental study, or a rationale based on high-quality research findings or a positive evaluation that suggests the intervention is likely to improve outcomes.<sup>3</sup>

This definition is used as a reference point in the Supplemental Priorities, but the evidence relating to school vouchers does not meet this standard. On the contrary, there is a growing body of evidence demonstrating that private school vouchers fail to improve educational outcomes. Instead, access to private school voucher programs leads to declines in student achievement. Recent studies of the Louisiana,<sup>4</sup> Indiana,<sup>5</sup> Ohio,<sup>6</sup> and the District of Columbia<sup>7</sup> voucher programs have revealed that students in voucher programs perform worse academically than their peers. In addition, studies of long-standing voucher programs in Milwaukee<sup>8</sup> and

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<sup>2</sup> U.S. DEP’T OF EDUC, *An Overview of the U.S. Department of Education*, 2 (Sept. 2010), [https://www2.ed.gov/about/overview/focus/what\\_pg2.html](https://www2.ed.gov/about/overview/focus/what_pg2.html)

<sup>3</sup> U.S. DEP’T OF EDUC, *Non-Regulatory Guidance: Using Evidence to Strengthen Education Investments*, 7 (Sept. 2016), <https://www2.ed.gov/policy/elsec/leg/essa/guidanceeuseinvestment.pdf>.

<sup>4</sup> Morgan Winsor, *Louisiana’s Controversial Voucher Program Harms Poor Students, Lowers Grades, New Study Finds*, INT’L BUS. TIMES (Jan. 10, 2016), <http://www.ibtimes.com/louisianas-controversial-voucher-program-harms-poor-students-lowers-grades-new-study-2258417>.

<sup>5</sup> R. Joseph Waddington and Mark Berends, NOTRE DAME’S CTR. FOR RESEARCH AND EDUC. OPPORTUNITY, *Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School*, 24 (June 2017).

<sup>6</sup> David Figlio & Krzysztof Karbownik, FORDHAM INSTITUTE, *Evaluation of Ohio’s EdChoice Scholarship Program: Selection, Competition, and Performance Effects*, 32 (July 2016), [http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/FORDHAM%20Ed%20Choice%20Evaluation%20Report\\_online%20edition.pdf](http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/FORDHAM%20Ed%20Choice%20Evaluation%20Report_online%20edition.pdf).

<sup>7</sup> NAT’L CTR. FOR EDUC. EVALUATION AND REG’L ASSISTANCE, U.S. DEP’T OF EDUC., *Evaluation of the D.C. Scholarship Program: Impacts After One Year*, 11 (Apr. 2017), <https://ies.ed.gov/ncee/pubs/20174022/pdf/20174022.pdf>.

<sup>8</sup> E.g., Patrick J. Wolf, SCHOOL CHOICE DEMONSTRATION PROJECT, UNIV. OF ARK, *The Comprehensive Longitudinal Evaluation of the Milwaukee Parental Choice Program: Summary of Final Reports* (Apr. 2010), <http://www.uaedreform.org/downloads/2012/02/report-36-the-comprehensive-longitudinal-evaluation-of-the-milwaukee-parental-choice-program.pdf>. (Overall, there are no significant achievement gains of voucher students

Cleveland<sup>9</sup> found that students offered vouchers showed no improvement in reading or math over those not in the program.

The evidence also demonstrates that private school voucher programs do not serve the “most vulnerable students” as enumerated in Proposed Priority 1: students living in rural communities, students with disabilities, students in poverty, students attending schools identified for comprehensive or targeted support, students who are academically far below grade level, English language learners, students from military-connected families, students experiencing homelessness, students who have been or are incarcerated, low-skilled adults, and American Indian students. It is a major oversight that students of color are not included as a category, given persistent racial gaps in educational equity.<sup>10</sup>

Despite receiving federal resources many voucher programs take the position that they are not bound by civil rights laws. Unlike public schools, private schools participating in voucher program can reject students for any reason, including that a student has disabilities, is an English Learner (EL), is not academically performing at grade-level, identifies as LGBT, practices a different religion, needs transportation due to large distances between home and school, or even because of race..

A 2016 report conducted by the Government Accountability Office found that of all the voucher programs across the country, only four required private schools to accept all students using vouchers, space permitting.<sup>11</sup> The other programs allowed private schools to deny students admission or grant preference to certain students for many reasons including disciplinary history, academic achievement, and religious affiliation. This is clearly not equal access.

Moreover, even if private schools participating in voucher programs were to nominally accept all students, they often fail to adequately serve those who are most vulnerable, including students with disabilities and students of color. These schools may not provide students participating in voucher programs with the same quality and quantity of services available to students in public schools, including those mandated under each student's individualized education program (IEP). Additionally, students with disabilities and students of color are often subjected to inappropriate or excessive suspensions or expulsions. As a result, these students are systematically and disproportionately excluded from, and underserved by, voucher programs.

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compared to public school students. “When similar MPCP and MPS students are matched and tracked over four years, the achievement growth of MPCP students compared to MPS students is higher in reading but similar in math. The MPCP achievement advantage in reading is only conclusive in 2010-11, the year a high-stakes testing policy was added to the MPCP.”)

<sup>9</sup> E.g., Jonathan Plucker et al., CTR. FOR EVALUATION & EDUC. POLICY, UNIV. OF IND., *Evaluation of the Cleveland Scholarship and Tutoring Program, Technical Report 1998-2004*, 166 (Feb. 2006), <http://schottfoundation.org/resources/evaluation-cleveland-scholarship-and-tutoring-program-technical-report-1998-2004>.

<sup>10</sup> Lauren Camera, U.S. NEWS, *Achievement Gap Between White and Black Students Still Gaping* (Jan. 13, 2016), <https://www.usnews.com/news/blogs/data-mine/2016/01/13/achievement-gap-between-white-and-black-students-still-gaping>.

<sup>11</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-712, *Private School Choice Programs Are Growing and Can Complicate Providing Certain Federally Funded Services to Eligible Students*, 27 (2016), <http://www.gao.gov/assets/680/678994.pdf>.

For example, most private schools in the Milwaukee voucher program have been found to “lack the full complement of educational programs that students with disabilities are entitled to if they receive their education in the public sector,”<sup>12</sup> and as a result, students with disabilities have been discouraged or excluded from participating.<sup>13</sup> Additionally, a 2010 US Department of Education report on the Washington, DC voucher program showed that a main reason why students didn’t participate in a voucher program when offered an opportunity to do so was that they were unable to find a participating school which provided needed services for their learning or physical disability or other special needs.<sup>14</sup>

Private school vouchers can also exacerbate racial segregation.<sup>15</sup> Studies from across the country find that racial segregation is higher in private schools that accept vouchers than in the public schools. In addition, white students use taxpayer-funded vouchers more often than students of color. In Milwaukee in 2013-2014, more than 77 percent of African American students in the public schools attended “intensely segregated” schools,<sup>16</sup> but for African American students in the voucher program, that number rose to more than 85 percent. A 2010 study of Georgia’s tuition tax credit program revealed that while only 10 percent of white students in public schools attended “virtually segregated” schools, within the program at private schools, this rose dramatically to 53 percent.<sup>17</sup> Furthermore, in Cleveland’s voucher program, minority students were much more likely than their peers to have never entered a voucher program<sup>18</sup> or left their voucher program and returned to public schools.<sup>19</sup>

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<sup>12</sup> Patrick J. Wolf et al., SCHOOL CHOICE DEMONSTRATION PROJECT, UNIV. OF ARK., *Special Education and the Milwaukee Parental Choice Program*, 17 (Feb. 2012), <http://files.eric.ed.gov/fulltext/ED530070.pdf>.

<sup>13</sup> Ultimately, the Department of Justice had to act, requiring Wisconsin to implement policies and practices to eliminate discrimination against students with disabilities in its administration of the Milwaukee program. Letter to Tony Evers, State Superintendent, Wisc. Dep’t of Pub. Instruction, from U.S. Dep’t of Justice, Civil Rights Div., Educ. Opportunities Section (Apr. 9, 2013), [https://www.aclu.org/files/assets/04\\_09\\_13\\_letter\\_to\\_wisconsin\\_dpi\\_0.pdf](https://www.aclu.org/files/assets/04_09_13_letter_to_wisconsin_dpi_0.pdf).

<sup>14</sup> NAT’L CTR. FOR EDUC. EVALUATION AND REG’L ASSISTANCE, U.S. DEP’T OF EDUC., *Evaluation of the D.C. Opportunity Scholarship Program: Final Report*, 24-26 (June 2010), <https://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf>. According to the report, 21.6% of parents who rejected a voucher that their child was offered did so because the school lacked the special needs services that their child needed, and 12.3% of the parents who accepted a voucher for their child but then left the program cited a lack of special needs services at the school they had chosen.

<sup>15</sup> See Halley Potter, THE CENTURY FOUNDATION, *Do Private School Vouchers Pose a Threat to Integration?* (Mar. 2017), <https://tcf.org/content/report/private-school-vouchers-pose-threat-integration/>.

<sup>16</sup> Lisa Kaiser, SHEPHERD EXPRESS, *Still Separate, Still Unequal* (May 14, 2014), <https://shepherdexpress.com/news/features/still-separate-still-unequal/#/questions>.

<sup>17</sup> Alex Morris, ROLLING STONE, *The Hidden War Against Gay Teens* (Oct. 10, 2013), <http://www.rollingstone.com/culture/news/the-hidden-war-against-gay-teens-20131010>.

<sup>18</sup> Jonathan Plucker et al., CTR. FOR EVALUATION & EDUC. POLICY, UNIV. OF IND., *Evaluation of the Cleveland Scholarship and Tutoring Program, Technical Report 1998-2004*, 31, 38, 45-46, 165 (Feb. 9, 2006), <http://schottfoundation.org/resources/evaluation-cleveland-scholarship-and-tutoring-program-technical-report-1998-2004>; Kim K. Metcalf et al., CTR. FOR EVALUATION & EDUC. POLICY, UNIV. OF IND., *Evaluation of the Cleveland Scholarship and Tutoring Program, Technical Report 1998-2001*, 52-53 (Mar. 2003), <https://eric.ed.gov/?id=ED479162>.

<sup>19</sup> William G. Howell, J. OF POLICY ANALYSIS & MGMT., *Dynamic Selection Effects in Means-Tested, Urban School Voucher Programs*, 236 (Spring 2004); Kim K. Metcalf et al., CTR. FOR EVALUATION & EDUC. POLICY, UNIV. OF IND., *Evaluation of the Cleveland Scholarship and Tutoring Program, Technical Report 1998-2001*, 126 (Mar. 2003), <https://eric.ed.gov/?id=ED479162>.

The Department should not reward states for adopting voucher programs that do not serve all students, fail to improve academic achievement, undermine public education funding, harm religious freedom and lack critical accountability for taxpayers. Instead, the Department of Education's first priority should be funding, supporting, and strengthening public schools, which serve 90 percent of students.

## **II. Proposed Priority 10—Encouraging Improved School Climate and Safer and More Respectful Interactions in a Positive and Safe Educational Environment.**

The Secretary's proposed tenth priority lacks a sufficient civil rights focus and is, therefore, inadequate to advance educational equity. While it is laudable that the Department intends to focus on projects designed to create "positive and safe learning environments, including by providing school personnel with effective strategies," this goal cannot be reached if the Department fails to recognize and address the ways teachers and school personnel support and interact with vulnerable student populations.

Specifically, the proposed priority fails to recognize that our country's most vulnerable students—most often low-income students, students with disabilities, and students of color—are increasingly pushed out of schools through counterproductive and excessively harsh punishments, including corporal punishment, restraint and seclusion, suspensions, expulsions, mandatory transfers or referrals to disciplinary alternative programs, and referrals to law enforcement or the juvenile justice system. To use one example, most children subject to restraint and seclusion are students with disabilities enrolled in special education. According to the 2013-4 U.S. Department of Education's Civil Rights Data Collection, students with disabilities made up 14 percent of enrolled students, but more than 80 percent of the cases where restraint and seclusion are involved.

"Push-outs" result in devastating consequences for students, drastically increasing the likelihood that the child will drop out of school altogether and impacting chances for success later in life. This trend can be attributed to a confluence of factors related to school climate, including overcrowded classrooms, a failure to identify and provide adequate services for children with disabilities, insufficient support for teachers on classroom management, tolerance of bullying, harassment and discrimination, a failure to engage students and parents in the educational environment, and an overall lack of educational resources.

And, while the proposed priority cites a May 2017 National Center for Education Statistics study on school crime and safety in asserting that "[e]lementary and secondary schools have made strides in fostering safer environments," it ignores other key conclusions of the study. That study also found, for instance, that self-identified LGBTQ students experienced bullying at almost twice the rate as self-identified heterosexual students and that black students were more likely to receive out-of-school suspensions than any other racial or ethnic group.<sup>20</sup>

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<sup>20</sup> Musu-Gillette, L., Zhang, A., Wang, K., Zhang, J., and Oudekerk, B.A. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC. AND BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, *Indicators of School Crime and Safety: 2016*, NCES 2017-064/NCJ 250650 (May 2017), <https://nces.ed.gov/pubs2017/2017064.pdf>.

Creating positive and safe learning environments for all students must, thus, go far beyond fostering “thoughtful debate and meaningful discussion.”<sup>21</sup> Grants related to this priority area should be made with an understanding of the ways in which our most vulnerable students are disciplined, pushed out of school, and subjected to biased interactions with peers, teachers, and school personnel. It requires addressing the specific ways that these vulnerable groups of students are denied a positive school climate, using evidence-based approaches, to achieve true equity.

To address these concerns, we offer the following recommendations for grants related to this priority area:

- Encourage the development and use of School-wide Positive Behavioral Interventions and Supports (SWPBIS), which have demonstrated effectiveness in combating discipline problems while supporting a safe and productive learning environment.
- Fund projects designed to reduce the use of harmful disciplinary practices such as corporal punishment and restraint and seclusion, as well as zero-tolerance policies — particularly projects designed to reduce the disproportionate use of such policies and practices on students of color and students with disabilities.
- Fund projects designed to reduce reliance on law enforcement to handle student misbehavior by using non-punitive alternatives.
- Incorporate robust monitoring and oversight measures into the grant-making process with respect to discipline and push-outs.

If the Department is to fulfill its mandate to ensure equal access to education for every student, it should revise its approach to these proposed priorities in alignment with the above comments. If you have any questions, please do not hesitate to contact Jennifer Bellamy, Legislative Counsel, at [jbellamy@aclu.org](mailto:jbellamy@aclu.org) or 202-715-0828.

Sincerely,



Faiz Shakir  
National Political Director



Jennifer Bellamy  
Legislative Counsel

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<sup>21</sup> We note that this Proposed Priority includes projects designed to “[protect] free speech in order to allow for the discussion of diverse ideas or viewpoints.” It is important that the department’s evaluations of proposals or grantees do not amount to the government distributing benefits based on the applicant’s ideology or political beliefs. While the protection of free speech is vital to an open society and students’ free exercise of the First Amendment, it is just as vital that the government not use its power or purse in a manner that penalizes disfavored views. The Department additionally should not use grants to promote environments that are hostile to the exercise of individuals’ First Amendment rights, and should also require grantees to react promptly and firmly to counter acts of discriminatory harassment, intimidation, or invasion of privacy.