

AN AGENDA FOR RESTORING CIVIL RIGHTS IN K-12 FEDERAL EDUCATION POLICY



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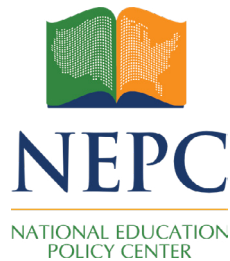
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The American voters have spoken, and the country will inaugurate a Biden-Harris Administration in January. In his first speech as President-Elect on November 7, 2020, Joe Biden said that, “the battle to achieve racial justice and root out systemic racism in this country” was a pillar of the Biden-Harris transition plan.¹ This important goal will, however, face significant challenges. Below, we review key educational civil rights rollbacks under Trump and offer six concrete suggestions for steps that the new administration can and should take to move forward in this crucial area.

The Trump Administration’s rollbacks to civil rights protections in schools and federal education policies have made redressing racial inequality systemically more difficult. One of the cornerstones of Secretary Betsy DeVos’ leadership in the Education Department was to expand market-oriented school choice policies by allocating significant resources to the charter school sector² and attempting to fund religious and private schools.³ At the same time, she eradicated Obama-era civil rights policies.⁴ While charter schools and private schools have their place in the educational landscape, the fact remains that most school-aged children in the United States attend traditional public schools. And traditional public schools are too often underfunded, segregated, and unequal. The Trump Administration and the Education Department’s stalled and ineffective response to the COVID-19 pandemic has devastated schools, many of which remain physically closed, harming all students and their families, but especially minoritized youth, students with disabilities, unhoused children, and students in families living in poverty. School systems and communities also face long-term

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challenges meeting students' mental health needs given the disproportionate toll COVID-19 has taken on Black, Latinx, Asian, and Indigenous communities, and the economic precarity it has caused families due to the lack of robust Congressional action to mitigate the effects of job loss and reduction in employment and health care. Moreover, providing services for students with disabilities in remote and hybrid formats continues to be a challenge. As the door closes on the Trump Administration, there is much to be done to reimagine a broad civil-rights approach to K-12 education. The nation's schools need a restoration of civil rights protections, a retreat from harmful Trump-DeVos policies, and a reimagining of a broad civil rights approach informed by evidence.

Proposal #1: Voluntary School Integration Guidance.

There is typically only a short period of time for advancing priorities at the start of a new administration. As a first step, the Biden-Harris Administration should restore key Obama-era civil rights provisions related to voluntary school integration. The Obama administration issued a number of guidance documents to help students, families, and schools understand how to further students' civil rights and to aid renewed enforcement efforts.⁵ Many of those have been rescinded or withdrawn in the last four years.

In particular, one of the first guidance documents rescinded by Trump's Office of Civil Rights (OCR) head, Ken Marcus, concerned voluntary school integration. The Obama-era guidance did not *require* districts to integrate students; it merely set forth the strategies that would be effective and permissible and provided the clarity needed by districts across the country that are seeking to mitigate rising segregation.⁶ In 2016, Secretary of Education John King with the Departments of Transportation and Housing and Urban Development also issued an inter-agency memorandum to suggest that communities work collaboratively, across agencies to affirmatively advance racial and socioeconomic integration.⁷ This memorandum must also be reinstated.

Reinstating Obama-era guidance as an initial step, while offering more substantive changes and/or additional guidance, is essential for a Biden-Harris Department of Education.

Proposal #2: Civil Rights Incentives Concerning School Choice.

The Obama Administration missed a key opportunity to insert school diversity as a priority in the Race to the Top program that offered competitive funding to states based on their adoption of policies favored by the administration. Voluntary incentives should be provided to create racially diverse and equitable schools, and school choice policies should be aligned with civil rights goals. For example, Secretary John King created the Opening Doors, Expanding Opportunities competitive grant program for districts seeking funding to plan and/or implement voluntary integration efforts after attempts to get Congress to pass such a program failed.⁸ Despite several dozen districts' applications, Secretary DeVos shut down the Opening Doors program in March 2017. Reinstating this program, either through legislation or through the Education Department's discretionary budget, could immediately signal renewed interest in supporting voluntary local efforts to combat segregation as part

of a larger racial justice in education agenda.

Likewise, President-Elect Biden's Department of Education must work quickly on a civil rights agenda for school choice, one that recognizes that public education is not just a private good but, in fact, a public one. The federal charter school and magnet school programs should contain specific diversity priorities, incentivize regional cooperation, encourage free transportation through provision of federal dollars and be subject to regular, rigorous oversight. More transparency and accountability in both sectors is needed and should begin with new federal evaluations of each program and its impact on segregation, accompanied by enforcement of violations. The Secretary of Education should further emphasize the importance of establishing systems of equitable school choice, with magnets and charters working in concert with traditional public systems to meet diversity goals.

Proposal #3: Anti-Discrimination Enforcement.

During the Obama Administration, individuals' complaints generally led to an OCR investigation not only of the incident being complained about, but also of whether the complaint fit into a larger statistical pattern of discrimination known as disparate impact.⁹ The Trump Administration narrowed the scope of OCR investigations of discrimination complaints, excluding the consideration of whether discrimination alleged by individual students fits into a larger pattern of disparate impact.¹⁰ There was an increased rate of closing or dismissing cases by OCR during the first two years of the Trump Administration.¹¹

The federal government should return to the Obama Administration's practice of examining districtwide statistics and practices when individual students file discrimination complaints. In 2014, the U.S. Department of Education issued guidance that called on districts to ensure that their discipline policies did not have a disparate impact.¹² There is extensive evidence that Black students face disproportionately harsh discipline.¹³ In 2016, the Obama Administration completed work on a regulation that would set a clear definition of disparate impact related to discipline, among other equity-related policies, for students with disabilities.¹⁴ The Trump Administration rescinded the guidance in 2018 after the Parkland school shooting, and it also attempted to keep the regulation from taking effect. A 2019 federal court ruling required the regulation to remain in place.¹⁵

In response to this summer's Black Lives Matter protests, which demanded an end to disproportionate targeting of Black people by police, the Biden Administration should return to the Obama policy of ending disproportionate discipline of Black students and other students of color, and it should promptly reinstate the 2014 discipline guidance.

A more systemic approach to rooting out discrimination will require Congress to appropriate additional funding for OCR. Even under President Obama, OCR funding levels were woefully inadequate given the array of civil rights challenges students face in schools, and the lengthy timeline to resolve investigations offered the Trump Administration an excuse to justify process changes to investigations.¹⁶

Additionally, the Civil Rights Data Collection has been essential to aid in OCR's enforcement

of civil rights, and Secretary DeVos proposed changes to it that would limit its effectiveness for monitoring disparities in opportunities and outcomes by student race/ethnicity.¹⁷ This was a key tool in the Obama-era OCR efforts, and it should be fully restored, funded, and enhanced to monitor inequity that might grow during the COVID-19 pandemic.¹⁸

Proposal #4: Restore Individual Rights to File Disparate Impact Lawsuits.

Although it came long before the Trump administration took office, the 2001 *Sandoval* decision limiting an individual student's right to litigate disparate impact claims under Title VI made the Trump administration's agency rollbacks in this area all the more harmful.¹⁹ This fall, the House of Representatives passed the Equity and Inclusion Enforcement Act (EIEA) in an effort to create a proactive, progressive legislative fix for a judicial wrench in the fight against discrimination. The bill, which restores the individual (including student) right to file civil lawsuits claiming disparate impact under Title VI of the Civil Rights Act of 1964, was and is, as of November 2020, fully supported by the Democratic caucus.²⁰ The Biden-Harris Administration should support its passage.

Proposal #5: Provide Necessary Resources for Underfunded Schools.

President-Elect Biden has proposed tripling the appropriations for Title I schools, which is equivalent to a \$32 billion increase in the annual budget.²¹ This is a needed step. Equitable funding for other compensatory programs in the *Every Student Succeeds Act* is also vital to maintain. This is especially important at a time when local and state governments are facing substantially lowered revenue – and increased expenditures – due to COVID-19 and, unlike the federal government, are unable to run a deficit. States and school districts should also heed the calls of Black Lives Matter activists and abolitionist organizations to repurpose funds that they might have used on school resource officers and police officers. This funding would shift to approaches that provide support for students, including social workers, extra-curricular activities, school psychologists, and guidance counselors.

Proposal #6: A Federal Title for Health.

The pandemic and inadequate federal response has left schools and school districts to figure out on their own how to serve children remotely and in hybrid forms, and whether and how to provide in-person school. States and districts need the federal government to support equitable, safe, quality schooling, during COVID-19 and in its eventual aftermath. Families, school systems, and communities will face long-term challenges meeting students' mental health needs and providing services for students with disabilities. While some education advocates call for the furthering of decentralization, school choice, and technological innovation, this is far too narrow an education agenda for the current crisis. COVID-19-related disruptions to schools will likely continue well into 2021, with potentially lingering effects.²² Even under the best-case scenarios for COVID-19, children will still feel the effects of indi-

vidual and community trauma and many will need academic support. Schools also need to be better prepared to protect student health in the long term.

Schools would reap benefits of a prospective federal title for health (in ESEA and/or other health and human services legislation). This title would ensure a stable funding source to hire nurses and health workers in communities who could be deployed in schools, particularly since nurses have not been affordable in many schools even prior to the budget cuts of the pandemic. It would specify the needed cooperation between the Education Department and others (for instance, the Centers for Disease Control) to jointly administer the programs through school districts and/or community health departments. This title would also provide for the hiring of more mental health and guidance counselors to help address the mental and emotional fallout of the COVID-related trauma, as well as the legion developmental and adjustment issues resulting from the disruption to students' lives. There is currently not enough flexibility in Title I to achieve these goals because of the *Supplement not Supplement* provisions. A nurse in a school building is associated with higher student attendance and academic performance, reduced dropout rates, and also "saves principals, teachers, and clerical staff a considerable amount of time that they would have spent addressing health concerns of students."²³ Further, in 2018-19, the national student-to-school-counselor ratio was 430 to 1, well above the American School Counselor Association's recommended 250 to 1.²⁴

Despite potential exit to private schools offering in-person instruction or homeschooling because of COVID-19, most children attend public schools and need the nation's support in finding systemic solutions – not a rush to further privatization. Public education ultimately serves the broader public and civic good. Indeed, the exigencies working families are facing serve to highlight the various facets that public schools play in communities beyond academics, from nutritional aid, to interventions that can prevent learning disabilities, to the development of social skills and learning democratic habits.

None of us can deny the pressing need to reinstate strong civil rights policies, roll back harmful practices, and reimagine just and equitable schooling.

It's worth noting in this period of divisive partisanship in Congress that from 1965 through the 1990s – and even, one might argue, through the passage of *No Child Left Behind* – bipartisan cooperation on K12 federal education policy stood as an impressive achievement. And even during the Trump administration, bipartisan agreement in Congress, along with

key judicial decisions, prevented further civil rights rollbacks. If ever there were a time to respond to deep educational needs, it is this moment. A broad coalition of civil rights organizations exists to help the Biden-Harris Department of Education support and sustain a robust civil rights agenda for our nation's schools. Additionally, Biden's Education Transition Team has members with deep expertise in civil rights, which is encouraging.²⁵ The adoption of our recommendations will help undo the effects of a regime that was neglectful at best, and malevolent at worst, in its protection of students of color. Indeed, given the racist rhetoric of the Trump Administration since 2016, none of us can deny the pressing need to reinstate strong civil rights policies, roll back harmful practices, and reimagine just and equitable schooling.

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