

January 9, 2017

Senator Lamar Alexander
Chairman
U.S. Senate Committee on Health, Education, Labor & Pensions
455 Dirksen Senate Office Building
Washington, DC 20510

Senator Patty Murray
Ranking Member
U.S. Senate Committee on Health, Education, Labor & Pensions
154 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Alexander and Ranking Member Murray:

On behalf of the Civil Rights Roundtable, a coalition of national organizations and individuals working to prevent inappropriate and discriminatory school discipline of students of color and students with disabilities, we write to express serious concerns about the nomination of Elizabeth “Betsy” DeVos to be Secretary of Education, and to ask that her Senate nomination proceedings provide a thorough review of her record. A thorough vetting of the nominee, who has no experience as an educator or administrator, by the Committee is critical: depending on her answers to written and oral questions, we are prepared to oppose her confirmation, because the mission of the Department of Education must be to advance a national system of quality public education and protect the rights of all children within that system. Ms. DeVos’s record, including longstanding support for sending public tax dollars to private, for-profit schools and parochial schools, indicates that she would be a Secretary who would undermine that critical mission – and raises a host of concerns regarding civil rights protections for students, including but not limited to protections against discriminatory discipline.

Ms. DeVos is well-known for her generous support for federal and state legislative efforts to steer taxpayer dollars away from public schools and toward vouchers that families use to pay for lightly (if at all) regulated private and parochial schools. Discipline policies at these “voucher schools” are often not monitored for discriminatory effect. Students may be routinely separated from instruction – through suspensions, expulsions, law enforcement referrals and arrests, the use of seclusion or restraint, or after being “counseled out” by school staff – without the federal and state law protections enjoyed by public school students. Indeed, the American Federation for Children, chaired until recently by DeVos, has championed voucher programs for students with disabilities in Florida, Oklahoma, and Georgia that require parents

using the voucher to relinquish their rights under the Individuals with Disabilities Education Act (IDEA), including protections from discipline for conduct related to a student's disability.¹

Voucher schools also often use inordinately harsh discipline to punish students of color and students with disabilities. In Florida, private schools participating in the billion-dollar McKay Scholarships for Students with Disabilities Program used paddling or other forms of corporal punishment to control the behavior of students.² Parents had no recourse against these ineffective and traumatizing practices, which can cause significant harmful health and academic outcomes for students.³ We worry whether, in an environment in which corporal punishment is permitted, restraint and seclusion will also be used.⁴ These two practices, which are traumatizing to children, have been increasingly replaced by evidence-based practices, including positive behavior supports. In all publicly funded settings, including voucher schools, regulations preventing the use of these practices must apply and be enforced, and data on incidents of their use must be collected and analyzed to prevent abuse.

Ms. DeVos is also an architect of the charter school system in Michigan, and has provided significant financial support to efforts to block state oversight of that system. Some Michigan charter schools have engaged in excessive use of discipline to punish students. For example, in the 2011-2012 school year at West Michigan Aviation Academy (WMAA), the charter school

¹ Council of Parent Attorneys and Advocates, Inc., *School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice* 10 (June 2016), http://c.ymcdn.com/sites/www.copaa.org/resource/resmgr/2016_Conference/COPAA_Voucher_paper_final_R6.pdf; cf. American Federation for Children (AFC), *State Legislators Fight for Children with Special Needs* (May 19, 2011) (quoting DeVos in support of Florida's McKay Scholarships for Students with Disabilities), <http://www.federationforchildren.org/state-legislators-fight-children-special-needs/>; AFC, *Victory for Oklahoma Kids as Governor Henry Signs School Voucher Bill* (June 9, 2010) (quoting DeVos in support of Lindsey Nicole Henry Scholarships for Students with Disabilities), <http://www.federationforchildren.org/victory-oklahoma-kids-governor-henry-signs-school-voucher-bill/>; AFC, *School Choice Makes History: More U.S. States Enact, Expand School Choice in 2011 than Ever Before* (Jul. 1, 2011) (quoting DeVos in support of scholarship programs in 11 states, including Georgia), <http://www.federationforchildren.org/school-choice-makes-history-u-s-states-enact-expand-school-choice-2011-ever/>.

² Gus Garcia-Roberts, *McKay Scholarship Program Sparks a Cottage Industry of Fraud and Chaos*, Miami New Times, June 23, 2011, <http://www.miaminewtimes.com/news/mckay-scholarship-program-sparks-a-cottage-industry-of-fraud-and-chaos-6381391>.

³ See Letter from John B. King, Jr., U.S. Secretary of Educ., to Governors and Chief State School Officers (Nov. 22, 2016) (urging states to eliminate "harmful, ineffective" use of corporal punishment), <https://www2.ed.gov/policy/gen/guid/school-discipline/files/corporal-punishment-dcl-11-22-2016.pdf>.

⁴ See U.S. Dep't of Educ., *Fact Sheet: Restraint and Seclusion of Students with Disabilities* (Dec. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201612-504-restraint-seclusion-ps.pdf>.

founded by DeVos' husband, approximately 8 out of 13, or 62%, of all the enrolled students with disabilities were suspended at least once, according to data reported by the school.⁵ In the 2013-2014 school year, all six of the school's six Black students with disabilities – 100% – were suspended at least once.⁶ Because WMAA only enrolled students beginning in 2010, it is quite possible that the high suspension rates of children with disabilities discouraged the enrollment of these students: as the school more than doubled its enrollment, the proportion of students with disabilities shrunk from 9.4% to just 6.4%.⁷

A recent independent analysis of discipline in charter schools, confirmed by the Department of Education, found that charter schools suspend students with disabilities at higher rates than do non-charter schools, even though they enroll a lower percentage of such students.⁸ Similarly, students of color are more likely to be suspended in charter schools than in non-charter public schools.⁹ Although students of color and students with disabilities and their families should have opportunities equal to those of others to benefit from the innovative practices taking place in many charter schools today, they should also be equally free of discriminatory discipline. We have grave concerns that as Secretary, Ms. DeVos, with a record of supporting charter schools but preventing efforts to improve their transparency and make them accountable, will make it more likely that discriminatory discipline goes unchecked.

⁵ U.S. Dep't of Educ., Civil Rights Data Collection, Discipline Report (Survey Year: 2011-2012), West Michigan Aviation Academy (last visited Jan. 9, 2017), <http://ocrdata.ed.gov/Page?t=s&eid=533461&syk=6&pid=2000&sr=1&Report=6>.

⁶ U.S. Dep't of Educ., Civil Rights Data Collection, Discipline Report (Survey Year: 2013-2014), West Michigan Aviation Academy (last visited Jan. 3, 2017), <http://ocrdata.ed.gov/Page?t=d&eid=53512&syk=7&pid=2269>. Black male students with disabilities accounted for all of the 23 out-of-school suspensions received by WMAA students with disabilities in the 2013-2014 school year. *Id.*

⁷ See *supra* notes 5, 6. Another explanation for this trend is that WMAA has been designated as one of Michigan's "priority" schools, one of the lowest performing 5% of charter schools in the state, for the past two school years. See Letter from Patrick J. Cwayna, Sr., CEO, West Michigan Aviation Academy, to Parents and Community Members (Mar. 20, 2016).

⁸ Center for Civil Rights Remedies, Charter Schools, Civil Rights and School Discipline: A Comprehensive Review 17-21 (Mar. 2016), <https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/charter-schools-civil-rights-and-school-discipline-a-comprehensive-review/losen-et-al-charter-school-discipline-review-2016.pdf>; Emma Brown, Education Secretary Calls On Charters to Rethink Discipline, Reduce Suspensions, Wash. Post, June 28, 2016, https://www.washingtonpost.com/news/education/wp/2016/06/28/education-secretary-calls-on-charters-to-rethink-discipline-reduce-suspensions/?utm_term=.b2ae975415a2.

⁹ *Id.*

Under the current administration, the Department has undertaken a significant initiative to help schools and other stakeholders in our education system rethink discipline.¹⁰ Under the leadership of President Obama and Secretaries Duncan and King, the Department has, among other things:

- With the Department of Justice, issued significant guidance to assist schools in administering student discipline without discriminating on the basis of race, color, or national origin;¹¹
- Required every school and school district in the country to report on the numbers of students of color and students with disabilities who were suspended, expelled, referred to law enforcement, arrested, transferred for disciplinary reasons to an alternative school, restrained or secluded, or subjected to corporal punishment;¹²
- Resolved 3,875 discipline-related complaints from students of color and students with disabilities, and 223 restraint and seclusion-related complaints from students with disabilities;¹³
- Just last month, issued significant guidance to school districts as to how the use of restraint and seclusion can result in discrimination against students with disabilities, following guidance from earlier this year explaining that schools must provide positive behavior supports for students with disabilities who need them;¹⁴ and

¹⁰ U.S. Dep't of Educ., Rethinking Discipline (last visited Jan. 3, 2017), <https://www2.ed.gov/policy/gen/guid/school-discipline/index.html>; Executive Office of the President, Report: The Continuing Need to Rethink Discipline (Dec. 2016), https://www.whitehouse.gov/sites/default/files/docs/school_discipline_report_-_120916.pdf.

¹¹ U.S. Dep't of Justice & U.S. Dep't of Educ., Joint Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline (Jan. 8 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi-sp.pdf>.

¹² U.S. Dep't of Educ., Office for Civil Rights, 2015-16 Civil Rights Data Collection: General Overview, Changes, and List of Data Elements 6-8 (Sep. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2015-16-crdc-overview-changes-data-elements.pdf>.

¹³ U.S. Dep't of Educ., Office for Civil Rights, Achieving Simple Justice: Highlights of Activities, Office for Civil Rights 2009-2016 7 (Dec. 8, 2016) <https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf>.

¹⁴ U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities (Dec. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf>.

- Also last month, published new regulations requiring states to report and take effective action to address significant disproportionality in the identification, placement, and discipline of students of color with disabilities.¹⁵

We expect that, during her confirmation proceedings, Ms. DeVos will have to answer whether she supports and, as Secretary of Education, will further these advances in federal school discipline policy, enforcement, and data collection – or whether she will seek to roll them back.

We urge the Committee to thoroughly review Ms. DeVos’s record and ask her questions to learn whether she has a commitment to public schools – where the vast majority of our children are educated. Ask her whether she is committed to ensuring fairness in school discipline for students of color and students with disabilities. If you have concerns about her commitment to public education, we urge you to oppose her nomination.¹⁶

Thank you for your consideration of our views.

Sincerely,

The Judge David L. Bazelon Center for Mental Health Law

Center for Civil Rights Remedies at the Civil Rights Project at UCLA

Center for Public Representation

Disability Rights and Education Fund

Education Law Center – PA

Juvenile Law Center

Public Interest Law Center

¹⁵ U.S. Dep’t of Educ., Office of Special Educ. and Rehabilitative Servs., Final Regulations (Dec. 12, 2016), <https://www2.ed.gov/policy/speced/reg/idea/part-b/idea-part-b-significant-disproportionality-final-regs-unofficial-copy.pdf>.

¹⁶ We are very concerned about recent reports that Ms. DeVos has consulted with a Senator, not a Committee member, about “reining in” the Department’s Office of Civil Rights, given all of the Office’s recent work to enforce civil rights laws that protect students of color and students with disabilities from discriminatory school discipline, among other things. See Caitlin Emma, DeVos Talks With Langford About Reining In Office for Civil Rights, Politico (Jan. 5, 2017), <https://www.politicopro.com/education/whiteboard/2017/01/devos-talks-with-lankford-about-reining-in-office-for-civil-rights-081665>.

