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November 18, 2024

The Honorable Charles Schumer
Majority Leader
U.S. Senate

The Honorable Mike Johnson
Speaker
U.S. House of Representatives

The Honorable Jack Reed
Chair
U.S. Senate Committee on
Armed Services

The Honorable Mike Rogers
Chair
U.S. House Committee
on Armed Services

The Honorable Mitch McConnell
Minority Leader
U.S. Senate

The Honorable Hakeem Jefferies
Minority Leader
U.S. House of Representatives

The Honorable Roger Wicker
Ranking Member
U.S. Senate Committee on
Armed Services

The Honorable Adam Smith
Ranking Member
U.S. House Committee
on Armed Services

Dear Leader Schumer, Leader McConnell, Speaker Johnson, Leader Jefferies, Chair Rogers,
Ranking Member Smith, Chair Reed, and Ranking Member Wicker,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 240 national organizations to promote and protect the civil and human rights of all persons in the United States, Asian Americans Advancing Justice | AAJC, NAACP Legal Defense and Educational Fund, Inc., and Southern Poverty Law Center Action Fund, we urge you to protect the enforcement of Title VI of the Civil Rights Act of 1964 and remove Section 220 from S. 4638, the National Defense Authorization Act for Fiscal Year 2025 (NDAA).¹ As we celebrate the 60th anniversary of the Civil Rights Act, we must do all that we can to ensure that no person experiences discrimination based on race, color, or national origin by any recipient of federal financial assistance. Unfortunately, Section 220 detracts from that goal.

¹ “Reed and Wicker File Fiscal Year 2025 National Defense Authorization Act.” United States Senate Committee on Armed Services. July 8, 2024. <https://www.armed-services.senate.gov/press-releases/reed-and-wicker-file-fiscal-year-2025-national-defense-authorization-act> Section 220 begins on page 76 of the FY25 NDAA Bill Text available here: <https://www.armed-services.senate.gov/download/fy25-ndaa-bill-text>.

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As you know, all recipients of funding from the Department of Defense (DOD) are subject to nondiscrimination obligations under the Civil Rights Act of 1964,² the Education Amendments of 1972,³ and the Rehabilitation Act of 1973.⁴ Like many agencies, the Department of Defense has delegated the authority to enforce Title VI to the Department of Education (ED), formerly the Department of Health, Education, and Welfare, with respect to recipients of DOD funding that are elementary and secondary schools or institutions of higher education both because of ED's expertise in those areas and to facilitate consistent application of the law. This delegation, formalized in an interagency agreement on April 14, 1966, was codified on May 4, 1980 when the Department of Education Organization Act took effect.⁵ For nearly 60 years, DOD has played no role in enforcing Title VI against higher education institutions, relying on ED's expertise to achieve compliance.

The Department of Education's Office for Civil Rights (OCR) receives complaints of discrimination, and conducts proactive compliance reviews, regarding recipients of DOD funding. Guided by its Case Processing Manual, OCR investigators evaluate whether a recipient's conduct has violated any laws under the office's jurisdiction.⁶ Typically, if OCR determines that an elementary or secondary school or institution of higher education failed to comply with civil rights laws, such as Title VI, the office will negotiate with the school in the hopes of coming to a voluntary agreement regarding the actions the school will take to come into compliance with federal law.⁷ This process, guided by the primary goal of remedying past discriminatory conduct and ensuring compliance with nondiscrimination obligations in the future, has resulted in changed conduct for thousands of recipients and has guided the actions of other institutions who have the benefit of learning from the findings and resolutions of peer institutions.⁸

If any recipient does not agree to correct noncompliance by entering into a voluntary resolution agreement, then ED OCR may initiate proceedings to suspend, terminate, or refuse federal financial assistance or may refer the case to the Department of Justice (DOJ) for enforcement. Although the overwhelming majority of complaints of discrimination are resolved through voluntary compliance

² Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.) prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance.

³ Title IX of the Education Amendments Act (20 U.S.C. § 1681 et seq.) prohibits discrimination on the basis of sex by education programs and activities operated by recipients of federal financial assistance.

⁴ Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) prohibits discrimination on the basis of disability by recipients of federal financial assistance.

⁵ Title VI of the Civil Rights Act of 1964; Lead Agency Status for Elementary and Secondary Schools. U.S. Department of Education. <https://www.ed.gov/laws-and-policy/civil-rights-laws/civil-rights-act-of-1964/title-vi-of-the-civil-rights-act-of-1964-lead-agency-status-for-elementary-and-secondary-schools>.

⁶ Case Processing Manual (CPM). U.S. Department of Education Office for Civil Rights. July 18, 2022. <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/ocrcpm.pdf>.

⁷ See: Office for Civil Rights Recent Resolution Search. ED.gov. https://ocrcas.ed.gov/ocr-search?f%5B0%5D=field_ocr_statutes:527 and Pendharkar, Eesha. "How a Federal Office Investigates and Resolves Discrimination Complaints Against Schools." *Education Week*. August 16, 2023. <https://www.edweek.org/leadership/how-a-federal-office-investigates-and-resolves-discrimination-complaints-against-schools/2023/08> and Cole, Jared P. "Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964." *Congressional Research Service*. April 4, 2019. <https://crsreports.congress.gov/product/pdf/R/R45665>.

⁸ Office for Civil Rights Annual Reports. U.S. Department of Education. <https://www.ed.gov/about/ed-offices/ocr/serial-reports-regarding-ocr-activities>.

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agreements, ED’s authority to halt funding or refer recipients to DOJ for further enforcement provides a critically important backstop to ensure that students are protected from discrimination.

Title VI does not make distinctions about the size or source of federal financial assistance or the specific function of the recipient. Nor does it permit ED or any other federal agency to waive Title VI violations. Instead, Title VI is clear that “no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁹ This unequivocal application of the law is one of its most important features and helps to limit the politicization of the law’s enforcement.

We welcome increased resources for federal civil rights agencies to ensure thorough and efficient enforcement of our civil rights laws and encourage Congress to conduct hearings into the persistence of discrimination based on race and other bases.¹⁰ However, we oppose in the strongest of terms any effort to disrupt or undermine the enforcement of Title VI or any civil rights law.

Section 220 does not support or enhance the enforcement of Title VI or any civil rights statute and instead undermines and sows confusion regarding the enforcement process. Section 220 does not reference DOD’s longstanding delegation to ED and instead permits DOD to make a separate determination about an educational institution’s compliance with Title VI. The language also applies to Title VI violations by “educational institutions” but not other funding recipients and names “research or development program or activity” in a way that is somehow distinct from the Civil Rights Act’s reference to federal financial assistance. Whereas current law subjects all recipients of federal financial assistance to Title VI’s nondiscrimination obligations, this language suggests different obligations for some recipients versus others and for recipients of some federal funding versus others. In doing so, Section 220 undermines the consistent application of antidiscrimination protections to all federal funding recipients that has been the cornerstone of civil rights enforcement for 60 years, creating the risk of inconsistent enforcement and unequal protections.

More troublesome than even the vagueness around how this civil rights law would apply, the insertion of secretarial waiver authority into the enforcement of a civil rights law is unprecedented and unacceptable.

⁹ The Office for Civil Rights has published many guidance documents over the years describing the application of Title VI with respect to shared ancestry and ethnic characteristics, limited English proficiency, immigration status, and other characteristics of students that are related to race, color, and national origin and which implicate Title VI’s protections. See, for example: Dear Colleague Letter: Protecting Students from Discrimination, such as Harassment, Based on Race, Color, or National Origin, Including Shared Ancestry or Ethnic Characteristics. May 7, 2024. <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-202405-shared-ancestry.pdf>; Dear Colleague Letter: English Learner Students and Limited English Proficient Parents. January 7, 2015. <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-el-201501.pdf>; Dear Colleague Letter: School Enrollment Procedures. May 8, 2014. <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201405.pdf>.

¹⁰ See, for example, “Letter Urging Congress to Double Funding for the Department of Education’s Office for Civil Rights”. The Leadership Conference on Civil and Human Rights. February 14, 2024. <https://civilrights.org/resource/letter-urging-congress-to-double-funding-for-the-department-of-educations-office-for-civil-rights/#>.

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No agency official from any administration since the first civil rights laws of the late 19th century has had the discretionary authority to dismiss a finding of discrimination. Not only would this authority cast doubt on the sanctity of our civil rights laws and the foundational American value of equal opportunity, but it would also open the door for inconsistent enforcement. While there may be a time and place for agency leaders to execute their discretion in making policy decisions, surely that discretion must never be used to permit otherwise unlawful discrimination.

While we welcome conversations about how best to ensure our civil rights laws are robustly enforced and how to ensure all tools are available to protect people from discrimination, those conversations must have the utmost care for the sanctity of our civil rights laws. The Civil Rights Act of 1964 is one of the most important laws ever enacted by this esteemed body, making real the constitutional protections afforded to all Americans. There is much to be learned, and much work to be done, to ensure that the promises made by Congress in this and other civil rights laws are real and confer their intended benefits to all people and our nation as a whole. Section 220 of the Senate NDAA base bill is the wrong course of action. Please contact Liz King, senior education equity program director, at king@civilrights.org with any questions or to further discuss this matter.

Sincerely,

The Leadership Conference on Civil and Human Rights
Asian Americans Advancing Justice | AAJC
NAACP Legal Defense and Educational Fund, Inc.
Southern Poverty Law Center Action Fund