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Secretary Betsy DeVos
Assistant Secretary for Civil Rights Kenneth Marcus
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: **Request for Extension of Comment Period** for Proposed Rule Regarding
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving
Federal Financial Assistance – Docket ID ED-2018-OCR-0064

Dear Secretary DeVos and Assistant Secretary Marcus:

The Department of Education has still not released critical records – either proactively, as required by the Administrative Procedure Act and Executive Order 13563, or in response to multiple Freedom of Information Act requests. Tens of thousands of comments have been submitted to Regulations.gov but have not been made available to the public. And the Office of Advocacy of the Small Business Administration is shut down, and thus cannot perform its critical commenting functions under the Regulatory Flexibility Act and Executive Order 13272. For all these reasons, the National Center for Youth Law and the Center for American Progress respectfully demand that you extend the time for submitting comments responsive to the Notice of Proposed Rulemaking (NPRM) regarding Title IX of the Education Amendments. 83 Fed. Reg. 61,462 (Nov. 29, 2018).

The time to comment on the NPRM should be extended from January 28, 2019, for at least 30 days (1) *after* all existing comments have been posted on Regulations.gov for review by members of the public; (2) *after* the Office of Advocacy of the Small Business Administration is no longer shut down; and (3) *after* the Department has released on Regulations.gov all the data, internal studies, analyses, and reports that it relied on in the NPRM, *whichever is later*.

The Department must wait until people have a meaningful opportunity to review all the comments already filed on Regulations.gov in response to the NPRM. The NPRM said that Regulations.gov was a place “during ... the comment period” where members of the public “may inspect all public comments about these proposed regulations.” Even apart from today’s confusing unavailability of Regulations.gov, there is no way for people to review the more than 50,000 comments that have already been submitted when only a few thousand have been approved for posting on Regulations.gov by the Department. The comment period must be

extended for at least 30 days after the Department has posted all the comments it has already received so that NCYL, CAP, and other members of the public can review and respond to them. Otherwise, the promise of transparency and meaningful opportunity to inspect and respond to comments has been negated.

The Department must wait until the Office of Advocacy of the Small Business Administration has a meaningful opportunity to exercise its rights under the Regulatory Flexibility Act and Executive Order 13272. The inability of the Office of Advocacy of Small Business Administration to submit comments due to the shutdown of the Small Business Administration is an independent reason why the comment period should be extended beyond January 28, 2019.

The NPRM estimates that the overwhelming majority of school districts (more than 99%) are small entities, 83 Fed. Reg. at 61,490/3; and that 68% of all two-year institutions of higher education and 43% of all four-year institutions of higher education are small entities, *id.* at 61,491/2-3.

The Office of the Advocacy is charged with “represent[ing] the views and interests of small businesses [including small government entities] before other Federal agencies.” 15 U.S.C. § 634c(a)(4). The Regulatory Flexibility Act (RFA) and Executive Order 13272 anticipate a significant role for the Office of Advocacy in rulemakings that affect a significant number of small entities. Under the RFA, the Department was required to transmit a copy of its IFRA to the Office of Advocacy when it was published in the Federal Register. 5 U.S.C. § 603(a). If the Office of Advocacy submits comments during the comment period, the Department is required to give “every appropriate consideration” to the Office of Advocacy’s views, Executive Order 13272 § 3(c), and to issue a “detailed statement of any change made to the proposed rule in the final rule as a result” of the Office of Advocacy’s comments, 5 U.S.C. § 604(a)(3).

Unfortunately, the Office of Advocacy is not currently in operation due to a lapse in federal funding for its agency. Thus, it is not able to perform its critical function to provide knowledgeable comments regarding the effects of the proposed regulations on small entities. Until the Office of Advocacy’s agency is funded, the Office of Advocacy cannot engage in these critical tasks assigned by the RFA and the Executive Order. Nor is this a mere hypothetical concern. Less than five months ago, the Office of Advocacy submitted negative comments on another Department NPRM.¹ And, as we note below, there are significant open questions about the Department’s analysis of the costs of the proposed regulations that could warrant the Office of Advocacy’s participation.

The comment period should therefore be extended so that the Office of Advocacy has at least 30 days to submit comments once the shutdown of its agency is over.

The Department has failed to make proactive disclosures required by the Administrative Procedure Act and Executive Order 13563 and has failed to release records under FOIA. In the NPRM, the Department relied on a number of documents and analyses that it did not make available to the public, thus making it impossible for the public to determine whether the agency is drawing improper conclusions from its documents and analyses or to otherwise meaningfully comment. Several of these documents and analyses involve the Department’s Regulatory Impact

¹ Letter from U.S. Small Business Administration’s Office of Advocacy to Sec. Betsy DeVos (Aug. 30, 2018), https://www.sba.gov/sites/default/files/SBA_Advocacy_BD_comment.pdf.

Analysis (RIA), which attempts to assess the costs of the proposed regulations as required by Executive Order 12866 as modified by Executive Order 13563.² Others involve the NPRM's initial regulatory flexibility analysis (IFRA) as required by the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603.³

The failure to make all these documents available to the public on Regulations.gov is a violation of Executive Order 13563. That Executive Order requires agencies to “provide, for both proposed and final rules, *timely online access to the rulemaking docket on regulations.gov*, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, *such access shall include*, to the extent feasible and permitted by law, *an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.*” § 2(b) (emphases added).

The failure to make all these documents available to the public also violates the Administrative Procedure Act (APA). The APA requires federal agencies to reveal “for public evaluation” the “‘technical studies and data’ upon which the agency relies” in rulemaking. “More particularly, ‘[d]isclosure of staff reports allows the parties to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it.’”⁴ This includes information, data, and studies an agency uses to assess the costs and benefits of the proposed changes (and alternatives) for the RIA required by Executive Order 12866.⁵

Due to these nondisclosure violations, the National Center for Youth Law and its employees have submitted a number of Freedom of Information Act (FOIA) requests to obtain the information that the Department should have released proactively for purposes of the RIA and

² The Department said that in preparing the RIA, it “examined public reports of Title IX reports and investigations at 55 [institutions of higher education] nationwide.” 83 Fed. Reg. at 61,485/2. It also mentioned a “sample of public Title IX documents” reviewed by the Department. *Id.* at 61,487/1. Similarly in the NPRM’s RIA, the Department engaged in an analysis spanning 5 pages of the Federal Register to try and determine the current number of Title IX investigations occurring in school districts and institutions of higher education eligible for Title IV federal funding. 83 Fed. Reg. at 61,485-419. It appears to have engaged in nine different simulations of its statistical model, *id.* at 61,489/3, and also generated alternative estimates. *Id.* at 61,485/3 n.18, 61,486/2 n.22, 61,487/1 n.27, 61,487/2 n.28, 61,489/1 n.34.

³ In preparing the IFRA, the Department relied on various calculations or estimates. 83 Fed. Reg. at 61,491-493. Among the studies relied on were “[p]rior analyses” that “show that enrollment and revenue are correlated for proprietary institutions,” *id.* at 61,491/1, and an analysis of “a number of data elements available in IPEDS,” *id.* at 61,491/1-2.

⁴ Both quotations in the paragraph are from *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008). The first quotation is, itself, quoting in part *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006). The second quotation is quoting in part *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984).

⁵ See *Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199, 201-202 (D.C. Cir. 2007).

IFRA analyses, as well as other matters relevant to the appropriateness of the proposed regulations. Many of those FOIAs remain outstanding and overdue.⁶

The failure to timely provide all these critical data, studies, and analyses denies our organizations, and other members of the public, the opportunity to assess the accuracy of the Department's claims or otherwise critique the Department's RIA and IFRA models. There are now fewer than 8 business days before the current comment deadline of January 28, 2019. Even if all the materials required to be released under Executive Order 13563 and the APA and FOIA were released immediately, there would not be sufficient time for commenters to review all that information, engage in their own analyses, and provide meaningful comments prior to January 28, 2019. We believe 30 days is necessary for organizations such as ours to sufficiently analyze the currently unreleased information and provide comments on the NPRM, including the RIA and IFRA.

We are aware that many others have requested an extension of time in order to allow students, faculty, and others from educational institutions to have sufficient time to comment. We agree with that rationale as well. But we emphasize that the failure to grant our requested extension would leave uncured violations of statutes and Executive Orders and would significantly interfere with our ability (and the ability of many others) to meaningfully comment on the NPRM.

Sincerely,

/s/

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/s/

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⁶ See FOIA Request 19-00576-F (data sources and spreadsheet used for RIA and IFRA); 18-02832-F (assessments of Civil Rights Data Collection quality); 19-00149-F (specific records regarding Civil Rights Data Collection quality); 19-00577-F (communications between Department and the Advocacy); 19-00151-F (current OCR policy about damages, which the NPRM proposes to eliminate); 19-00579-F (OCR's past application of 34 C.F.R. § 106.9(b)(2), which the NPRM proposes to amend); 19-00578-F (current OCR policy about tribal schools, which will be affected by the proposed amendments); 18-00054-A (current OCR policy about handling sexual violence cases); FOIA 18-02772-F (Department's interpretations of provisions governing rulemaking located in Title IV of the Higher Education Act).