



December 12, 2017

*Via email*

Chairman Lamar Alexander  
Committee on Health, Education,  
Labor and Pensions  
428 Dirksen Senate Office Building  
Washington, DC 20515

Ranking Member Patty Murray  
Committee on Health, Education,  
Labor and Pensions  
525 Dirksen Senate Office Building  
Washington, DC 20515

Dear Chairman Alexander & Ranking Member Murray:

The National Women's Law Center has worked for 45 years to advance and protect equality and opportunity for women and girls. From its founding in 1972, the Center has, in particular, focused on Title IX and ensuring that no student is denied access to education because of sex discrimination. Given the centrality of educational opportunity to the lives and futures of girls and women, students of color, LGBTQ students, and undocumented students, the Center strongly opposes the confirmation of Kenneth Marcus to be the Department of Education's Assistant Secretary for Civil Rights.

The Assistant Secretary for Civil Rights is responsible for enforcing federal anti-discrimination statutes to ensure that all students have equal access to education. Over the last eight years, the Office for Civil Rights (OCR) has resolved over 66,000 civil rights cases. OCR's work is especially important given the uptick in hate crimes since the 2016 election, with nearly 40% of those incidents occurring in schools.<sup>1</sup>

Mr. Marcus's actions and statements both during and after his previous tenure as Assistant Secretary for Civil Rights raise very serious concerns about his ability to carry out OCR's crucial function of ensuring equal access to education for all students. For example, it is particularly troubling that Mr. Marcus does not recognize OCR's duty to identify and remedy systemic civil rights violations. At his December 5 hearing, he supported Acting Assistant Secretary Candice Jackson's memo instructing OCR employees not to look for systemic civil rights violations unless they are specifically alleged in a student's OCR complaint. Mr. Marcus's position ignores the reality that most students are unaware of or unfamiliar with the factual and legal bases for alleging systemic discrimination. Particularly given that Mr. Marcus has also refused to commit to preserving the Civil Rights Data Collection and making it publicly available on OCR's website, the vast majority of students will continue to remain unaware of systemic violations

*With the law on your side, great things are possible.*

11 Dupont Circle NW ■ Suite 800 ■ Washington, DC 20036 ■ 202.588.5180 ■ 202.588.5185 Fax ■ [www.nwlc.org](http://www.nwlc.org)

within their school districts. In effect, Mr. Marcus has promised, as Senator Elizabeth Warren so aptly stated, to do as little as possible to protect as few students as possible.

Mr. Marcus's public statements and body of work also raise serious concerns about his commitment to eradicating sexual harassment and violence in education. At his hearing, Mr. Marcus testified that he agreed with the Department's decision to rescind critical Title IX guidance on schools' responsibility to address sexual assault.<sup>2</sup> He also stated his opposition to the use of a preponderance of the evidence standard in sexual assault investigations conducted by schools—despite the fact that the Department has required that schools utilize the preponderance standard in Title IX investigations since at least 1995,<sup>3</sup> including during Mr. Marcus's own previous tenure as Assistant Secretary for Civil Rights.<sup>4</sup> In addition, Mr. Marcus refused to commit to upholding the most basic principles of transparency, such as continuing OCR's practice of publishing a list of its active Title IX investigations on the Department's website. As the #MeToo movement continues to grow and more survivors continue to speak out, students need to know that OCR will enforce their Title IX right to be free from sexual harassment and violence. But Mr. Marcus has stated that he supports the Department's decision to roll back protections for survivors and to provide special rights to students accused of sexual assault—e.g., allowing appeals to be made available only to accused students, tilting the evidentiary standard in favor of accused students and against survivors, and removing the 60-day timeframe for completing an investigation.<sup>5</sup> His support of the Department's harmful actions demonstrates that he is not committed to enforcing Title IX's prohibition of sexual harassment and violence in schools.

Furthermore, Mr. Marcus has consistently demonstrated indifference toward the rights of LGBTQ students. As Assistant Secretary for Civil Rights, Mr. Marcus elevated the right of a white male student to express "conservative Christian views" about homosexuality over the right of LGBTQ students to learn in a non-hostile environment.<sup>6</sup> Years later, at a U.S. Commission on Civil Rights hearing that addressed LGBTQ bullying, Mr. Marcus was again noticeably silent on whether anti-LGBTQ harassment is prohibited by federal law.<sup>7</sup> Mr. Marcus's apparent indifference toward LGBTQ rights conflicts with many federal circuit court opinions<sup>8</sup> and the Department's own guidance issued in 2001 and 2010,<sup>9</sup> which state that Title IX prohibits harassment based on gender stereotypes—including stereotypical notions of masculinity and femininity and regardless of actual or perceived sexual orientation or gender identity. Mr. Marcus's apparent disregard for LGBTQ rights aligns with the current administration's demonstrated commitment to eroding protections for LGBTQ students, as evidenced by OCR's recent rescission of 2016 guidance protecting transgender students.<sup>10</sup> His views indicate that he is unsuited to be the lead enforcer of Title IX's protections for LGBTQ students.

Additionally, while leading OCR in 2004, Mr. Marcus was responsible for sex-segregated education regulations that invited schools to create separate-and-unequal programs based on

pseudoscientific “preferences” and “belief[s]”<sup>11</sup>—programs that are likely to violate the Constitution’s Equal Protection Clause. These regulations purported to give schools greater freedom to offer sex-segregated education despite overwhelming empirical evidence that separating students by sex does *not* improve educational outcomes but does reinforce harmful gender stereotypes.<sup>12</sup> Since the regulations were issued, sex-segregated education has increased sharply in public schools across the country,<sup>13</sup> causing a resurgence of appallingly regressive gender stereotypes in the classroom.<sup>14</sup> Teachers across the country have been instructed, for example, to teach boys using basketball, relay races, and asking “what would you do?” but to teach girls through fairytale stories, tiaras, and asking “how would you feel?”<sup>15</sup> As one parent in Mobile, Alabama, reported, “Our kids were basically being taught ideas about gender that come from the Dark Ages.”<sup>16</sup> The trend became so alarming that the Department issued guidance in 2014, clarifying that schools cannot rely on “overbroad generalizations” about the ability or preferences of either sex in offering sex-segregated programs.<sup>17</sup> Mr. Marcus should not be given a second opportunity to roll back gender equity by encouraging schools to teach boys and girls differently.

The Center is also deeply concerned about Mr. Marcus’s views on discrimination on the basis of race, color, and national origin. For example, Mr. Marcus testified at his hearing that he does not believe OCR is responsible for protecting undocumented students’ equal access to education. His disregard for the civil rights of undocumented students is entirely inconsistent with the Supreme Court’s 1982 ruling that schools may not deny “innocent children” access to public education based on their (or their parents’) immigration or citizenship status<sup>18</sup> and with OCR’s own 2014 guidance to the same effect.<sup>19</sup> As the current administration continues its relentless attacks on immigrants, Mr. Marcus’s apathy toward undocumented children is wholly incompatible with OCR’s duty to enforce the civil rights of all immigrant students.

Mr. Marcus also opposes the use of affirmative action, a critical tool for remedying the effects of historical and present-day discrimination. Like his would-be predecessor, Acting Assistant Secretary Candice Jackson, Mr. Marcus believes in the myth of reverse racism,<sup>20</sup> asserting that actions taken to promote workplace equality in fact “reflect racial prejudice” against white people.<sup>21</sup> In 2007, as Staff Director for the U.S. Commission on Civil Rights, he issued a report recommending that law schools no longer be required to “demonstrate a commitment to diversity.”<sup>22</sup> In 2012, as president of the Louis D. Brandeis Center for Human Rights Under Law, he filed an amicus brief opposing the use of affirmative action in Abigail Fisher’s unsuccessful case before the Supreme Court.<sup>23</sup> His opposition to affirmative action is unsurprising given his openness to the unsubstantiated belief that racial disparities are caused by “cultural dysfunction” and “family structure” within the black community.<sup>24</sup> Such regressive racial stereotypes have no place in the twenty-first century, and certainly not at the head of an agency charged with enforcing protections against discrimination.

Furthermore, Mr. Marcus has said that he does not believe disparate impact discrimination is sufficient on its face to constitute a civil rights violation. Disparate impact discrimination occurs if a policy is written and administered in a neutral manner yet nonetheless has a disproportionate and unjustified effect on members of a protected class. Disparate impact liability is critical to civil rights enforcement because it focuses on addressing structural injustice and implementing remedies rather than on proving intent or assigning blame. However, Mr. Marcus believes that disparate impact discrimination is simply a way of revealing “hidden discriminatory intent,” rather than a standalone form of structural oppression.<sup>25</sup> His reasoning suggests that he fundamentally misunderstands how neutral policies and practices can “freeze” an oppressive status quo, even if no hidden discriminatory intent exists.<sup>26</sup> Mr. Marcus’s views on disparate impact discrimination are particularly harmful to students of color and female students, given that they are often harmed by seemingly neutral policies. As the school-to-prison pipeline continues to grow,<sup>27</sup> it is vital that Mr. Marcus not be given the authority to ignore disparate impact discrimination, or to punish schools for taking proactive measures to avoid such discrimination under a mistaken theory of reverse discrimination.<sup>28</sup>

\*\*\*

As the current administration continues its carefully orchestrated attacks on our nation’s civil rights,<sup>29</sup> it is now more important than ever that the Office for Civil Rights stands firm in protecting the civil rights of our 71 million students. Mr. Marcus’s statements and record demonstrate that he is unfit to lead an office whose mission is “to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation’s schools.”<sup>30</sup> The Center urges you to reject his nomination to be Assistant Secretary for Civil Rights.

Sincerely,



Fatima Goss Graves  
President and CEO

Cc: Committee Members

---

<sup>1</sup> *Update: 1,094 Bias-Related Incidents in the Month Following the Election*, SOUTHERN POVERTY LAW CENTER (Dec. 16, 2016), <https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election>.

<sup>2</sup> Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017) available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

---

<sup>3</sup> E.g., Letter from Office for Civil Rights to Dr. Jane Jervis, President of Evergreen State College, *Re: The Evergreen State College Case No. 10922064* 8-9 (Apr. 4, 1995), available at [https://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed\\_ehd\\_1995.pdf](https://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf) (“The evidentiary standard of proof applied to Title IX actions is that of a ‘preponderance of the evidence.’ ... [T]he standard of evidence required of [Evergreen’s] committee ... is one of ‘clear and convincing proof,’ a higher standard than that of a ‘preponderance of the evidence.’ ... Therefore, the evidence supports a conclusion that the College is not in compliance with Title IX.”).

<sup>4</sup> E.g., Letter from Office for Civil Rights to Ms. Jane E. Genster, Vice President and Counsel at Georgetown University, *Re: OCR Complaint No. 11-03-2017* 1 (Oct. 16, 2003), available at [https://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed\\_ehd\\_1995.pdf](https://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf) (“federal courts, and therefore OCR, use a preponderance of the evidence standard in resolving allegations of discrimination under all of our statutes, including Title IX. Thus, in order for a recipient’s sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must draw conclusions about whether particular conduct rises to the level of sexual harassment using a preponderance of the evidence standard.”).

<sup>5</sup> Office for Civil Rights, *Q&A on Campus Sexual Misconduct* 3, 5, 7 (Sept. 22, 2017), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (stating that “[t]here is no fixed time frame under which a school must complete a Title IX investigation,” the school may apply “either a preponderance of the evidence standard or a clear and convincing evidence standard,” and “the school may choose to allow appeal (i) solely by the responding party”).

<sup>6</sup> Office of Civil Rights, *Title VI and Title IX Discrimination* 2 (Sept. 13, 2004), available at <https://www2.ed.gov/about/offices/list/ocr/letters/religious-rights2004.pdf>.

<sup>7</sup> U.S. Commission on Civil Rights, *Briefing* 221-22 (May 31, 2011), available at [http://www.usccr.gov/calendar/transcript/Transcript\\_05-13-11.pdf](http://www.usccr.gov/calendar/transcript/Transcript_05-13-11.pdf).

<sup>8</sup> *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (affirming district court’s preliminary injunction because “a policy that ... punishes [an] individual for his or her gender non-conformance ... violates Title IX”); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (denying defendant’s motion to stay preliminary injunction because “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination” and “[t]he overriding public interest [lies] in the firm enforcement of Title IX”); *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016) (reversing district court’s dismissal of plaintiff’s Title IX claim regarding restroom access by transgender individuals), *vacated on other grounds*, 137 S. Ct. 1239 (2017); *Carmichael v. Galbraith*, 574 Fed. App’x 286, 294 (5th Cir. 2014) (holding that “harassment ... motivated by the victim’s failure to satisfy gender stereotypes [was] ‘bas [ed] on sex’ in the meaning of Title IX”); *Wolfe v. Fayetteville, Arkansas Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011) (holding that under Title IX, “‘on the basis of sex’ mean[s] the harassment was motivated by either [the plaintiff’s] gender or failure to conform with gender stereotypes”).

<sup>9</sup> Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* 7-8 (Oct. 26, 2010), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (“Title IX prohibits ... gender-based harassment, which may include acts ... based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.... When students are subjected to harassment on the basis of their LGBT status, they may also ... be subjected to forms of sex discrimination prohibited under Title IX.”); Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* v (Jan. 19, 2001), available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (“gender-based harassment, including that predicated on sex stereotyping, is covered by Title IX”).

<sup>10</sup> Office for Civil Rights, *Dear Colleague Letter* (Feb. 22, 2017), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

<sup>11</sup> Office for Civil Rights; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11278-11279 (Mar. 9, 2004) (codified at 34 C.F.R. § 106), available at <https://www2.ed.gov/legislation/FedRegister/proprule/2004-1/030904a.pdf>.

<sup>12</sup> E.g., American Psychological Association, *Single-Sex Education Unlikely to Offer Advantage Over Coed Schools, Research Finds* (Feb. 3, 2014), <http://www.apa.org/news/press/releases/2014/02/single-sex-education.aspx> (analyzing 184 studies of over 1.6 million students from around the world); Diane F. Halpern et al., *The Pseudoscience of Single-Sex Schooling*, 333 SCIENCE 1706-07 (Sep. 23, 2011), available at <http://science.sciencemag.org/content/333/6050/1706>.

---

<sup>13</sup> Haley Sweetland Edwards, *Department of Education Walks Delicate Line on Single-Sex Classrooms*, TIME (Dec. 2, 2014) <http://time.com/3613719/single-sex-education-gender-classrooms> (“In the 2001-2002 school year, only about a dozen public schools offered single-sex classrooms.... Now, there are about 750 public schools that offer one or more single-sex class, and 850 entirely single-sex public schools around the country.”).

<sup>14</sup> See, e.g., National Coalition of Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 63-73 (2017) [hereinafter NCWGE Report], available at <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>.

<sup>15</sup> *Id.* at 68; Gale Sherwin, *The 8 Crazy Stereotypes Used in Wisconsin to Justify Single-Sex Classes and How They're Boomeranging Back on Administrators*, AM. CIV. LIBERTIES UNION (Aug. 14, 2015), <https://www.aclu.org/blog/womens-rights/womens-rights-education/8-crazy-stereotypes-used-wisconsin-justify-single-sex>.

<sup>16</sup> NCWGE Report, *supra* note 15, at 68.

<sup>17</sup> Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* 8 (Dec. 1, 2014), available at <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

<sup>18</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>19</sup> Office for Civil Rights, *Dear Colleague Letter: School Enrollment Procedures* (May 8, 2014), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf>.

<sup>20</sup> Safia Samee Ali, *DeVos Civil Rights Office Pick Once Claimed Discrimination for Being White: Report*, NBC (Apr. 14, 2017), <https://www.nbcnews.com/news/us-news/devos-civil-rights-office-pick-once-claimed-discrimination-being-white-n746786> (“Candice Jackson ... spoke out about being discriminated against for being white as a college student”).

<sup>21</sup> Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 69 (2009), available at <https://ssrn.com/abstract=1462431>.

<sup>22</sup> U.S. Commission on Civil Rights, *Affirmative Action in American Law Schools* 6-7 (Apr. 2007), available at <http://www.usccr.gov/pubs/AALSreport.pdf>.

<sup>23</sup> Brief for the Louis D. Brandeis Center for Human Rights Under Law et al., in Support of Petitioner, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), available at [https://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs/11-345\\_petitioneramcubrandeisctretal.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-345_petitioneramcubrandeisctretal.authcheckdam.pdf).

<sup>24</sup> Kenneth L. Marcus, *The Right Frontier for Civil Rights*, 19 GEO. MASON U. CIV. RTS. L.J. 401, 423 (2008), available at <https://ssrn.com/abstract=1284645>.

<sup>25</sup> Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 65 (2009), available at <https://ssrn.com/abstract=1462431>.

<sup>26</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (holding that “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminat[ion]”).

<sup>27</sup> Libby Nelson & Dara Lind, *The school to prison pipeline, explained*, JUSTICE POLICY INSTITUTE (Feb. 24, 2015), <http://www.justicepolicy.org/news/8775>.

<sup>28</sup> See *supra* note 20 and accompanying text.

<sup>29</sup> See, e.g., Juliet Eilperin & Darla Cameron, *How Trump is rolling back Obama's legacy*, WASHINGTON POST (last updated Nov. 22, 2017), <https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules>; Sunny Frothingham & Shilpa Phadke, *100 Days, 100 Ways the Trump Administration Is Harming Women and Families*, CENTER FOR AMERICAN PROGRESS (Apr. 25, 2017), <https://www.americanprogress.org/issues/women/reports/2017/04/25/430969/100-days-100-ways-trump-administration-harming-women-families>.

<sup>30</sup> Office for Civil Rights, *Office for Civil Rights* (last visited Dec. 8, 2017), <https://www2.ed.gov/about/offices/list/ocr/index.html>.