



December 12, 2017

The Honorable Lamar Alexander
Chairman, U.S. Senate Committee on Health, Education, Labor, and Pensions
428 Senate Dirksen Office Building
Washington, D.C. 20510

Dear Chairman Alexander,

As one of our nation's leading racial justice organizations, the Lawyers' Committee for Civil Rights Under Law has worked to secure equal justice for all through the rule of law for more than 50 years, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. As such, we write to express grave concern over the nomination of Kenneth Marcus to be Assistant Secretary for Civil Rights at the Department of Education.

The Office for Civil Rights (OCR) was created to address discrimination that prevents students from enjoying an equal opportunity to learn. Marcus' nomination comes during a time when more and more students are being targeted for discrimination on the basis of race, religion, color, national origin, gender, gender identity, and sexual orientation. At the same time, this Administration has stripped away critical protections from the most vulnerable students. Our children are entitled to an Assistant Secretary for Civil Rights committed to protecting the civil rights of all students.

Since its creation in 1980, OCR's mission has been to "ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights."¹ OCR is tasked with investigating alleged violations of civil rights laws and enforcing civil rights laws in educational settings. Major civil rights laws OCR is responsible for enforcing include Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin; Title IX of the Education Amendments of 1972, which prohibits sex discrimination; and Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability.

The current Administration has ended protections for some of our nation's underrepresented minorities, many of whom are targeted on the basis of their race, religion, gender, gender identity, sexual orientation, or disability. We have seen this Administration challenge race-conscious admissions policies in higher education,² challenge so-called "reverse discrimination" as part of a wider strategy to eliminate admissions policies upheld as constitutional, terminate the Deferred Action for Childhood Arrivals (DACA) program, roll back guidelines on how claims of sexual assault are to be investigated and processed on college campuses, and rescind guidelines clarifying that transgender students have the right to use public school restrooms that match their gender identity. Further, the Department of Education's consideration of pushing back the compliance date of the Individuals with Disabilities Education Act (IDEA) risks delaying the equal protection and treatment of students with disabilities, particularly students of color with disabilities.

¹ <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>.

² <http://www.cnn.com/2017/11/21/politics/harvard-affirmative-action-justice-department/index.html>.



In the past year alone, we have witnessed a rise in hate crimes and hate-inspired incidents across the country, leading to a significant uptick in reported hate incidents inside our nation's schools. Many of these incidents target students on the basis of their race or ethnicity. In this climate of increased tension and incidents of discrimination targeting African Americans and other minority students across the country, it is more imperative than ever that OCR stays true to its mission. Marcus' record on civil rights in education; his lack of clarity on the jurisdiction and mission of OCR; and his failure to understand that all children, regardless of their citizenship status, have a right to attend public school demonstrates that he is not the right person to bring OCR back to its critical mission of ensuring equal access to education for all.

During Marcus' confirmation hearing, he was unable to definitively state that OCR can and should investigate racial disparities. He was further questioned by Senator Elizabeth Warren on whether OCR would step in to protect students barred from attending public school because they are not citizens. He responded, "I don't know whether it would be a violation of one of the laws over which OCR has jurisdiction" and that OCR "has not—to my knowledge—been granted the authority to enforce the Equal Protection Clause per se." Marcus' response is alarming in light of the U.S. Supreme Court's decision in *Plyler v. Doe*³ and the vital role that OCR plays in enforcing our nation's civil rights laws for all students. Under *Plyler*, such an action by a school would clearly violate the Equal Protection Clause of the 14th Amendment of the U.S. Constitution and schools may not bar students from enrolling or attending school based on their citizenship or that of their parents. His unwillingness to enforce clear and established civil rights laws raises significant questions regarding his commitment to protecting the civil rights of all students.

As President and General Counsel of The Louis D. Brandeis Center for Human Rights Under Law, Marcus has advanced policies that infringe on the civil rights of minority students. In 2012, the Brandeis Center filed an amicus brief in opposition to race-conscious admissions policies at the University of Texas at Austin, claiming that race-conscious admissions policies consist of a "minus factor" for individuals "on the other side of the equation."⁴ Race-conscious admissions policies help promote racial diversity at colleges and universities across the country and provide more equitable access and a pipeline of opportunity for all who seek education at institutions of higher learning. More importantly, the constitutionality of such policies was upheld by the U.S. Supreme Court in *Fisher I*⁵ and *Fisher II*.⁶

Marcus has advocated for content-specific policies that infringe on First Amendment rights. By lobbying for legislation that, for the purpose of Title VI, defines anti-Semitism to include political criticism of Israel, Marcus risks opening a dangerous door for the possibilities of discrimination based on political expression.⁷ There is no question that Title VI can and must be used to address anti-Semitism, anti-Muslim bigotry, and other forms of discrimination targeting students on the basis of religion. This definition could actually undermine that work, however, by conflating political criticism with the scourge of anti-Semitism. During a time of heightened sensitivities and divisive public discourse, it is imperative that college campuses remain a safe place where students of all backgrounds are welcomed, ideas can be openly debated, and protests can occur in peaceful settings.

³ *Plyler v. Doe*, 457 U.S. 202 (1982).

⁴ https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-345_petitioneramcubrandeisretal.authcheckdam.pdf.

⁵ *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411 (2013).

⁶ *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198 (2016).

⁷ <https://www.politico.com/agenda/story/2017/01/government-crack-down-anti-semitism-college-campuses-000272>.



The Lawyers' Committee for Civil Rights Under Law is one of the nation's leading civil rights and racial justice organizations. We respectfully ask that this letter be submitted on the record and that these concerns be addressed during the consideration of Mr. Marcus for Assistant Secretary for Civil Rights at the Department of Education.

Respectfully,

Kristen Clarke
President and Executive Director

Brenda Shum
Director, Educational Opportunities Project