



June 7, 2018

Dear Senator,

Since her appointment as Secretary of Education, Betsy DeVos has diminished civil rights enforcement throughout the Department of Education (ED). From reversing protections that improved recourse for sexual assault survivors on campus, to stripping away guidelines protecting the rights of transgender students' access to safe and appropriate school facilities, Secretary DeVos' actions have called into question whether civil rights protections will be equally applied during her tenure.

In this context, the appointment of an individual committed to an equal application of the law to lead the Office of Civil Rights (OCR) at the Department of Education is all the more imperative. OCR is tasked with ensuring equal access to education and resolving complaints of discrimination, and serves as an important office for issues from ensuring equal opportunity to higher education to combating discrimination on college campuses.

Indeed, as our political environment has seen an increase in racist, anti-Semitic, anti-Muslim, anti-Arab, anti-immigrant, anti-women, and anti-LGBTQ incidents, the OCR needs a director that can address these concerns without bias and with even application of civil rights protections for all. The nomination of Kenneth Marcus fails to meet this standard.

The following is provided as a snapshot of Mr. Marcus' views on important contemporary civil rights challenges.

1) LGBTQ Discrimination

No person should be denied the empowering and transformative opportunity to seek and pursue safe and inclusive higher education in America. As such, the ED's OCR should be an important office for the protection of LGBTQ students. The confirmation of Kenneth Marcus would hinder this office's vital role in protecting these already vulnerable populations from discrimination.

On April 2, 1998, Marcus spoke at a conference on Capitol Hill organized by the Traditional Values Coalition (TVC) aimed at stating opposition to two proposed bills, one that enhanced protections for LGTBQ individuals against employment discrimination and another seeking to expand hate crime protections to include sexual orientation, gender, and disability.¹ Designated as an anti-LGBTQ hate group by the Southern Poverty Law Center², the TVC, led by Reverend Lou Sheldon, is known for encouraging discrimination against LGBTQ persons and advocating for discriminatory policies, such as cutting federal funding for public schools “encouraging or supporting homosexuality,” and forcibly rounding up people with AIDS “into cities of refuge”.³

Marcus has argued against the inclusion of sexual orientation into the list of protected groups because doing so would “elevate it to the same level as race and religion” painting it as a vast overreach on the part of the federal government by making “it easier for prosecutors to punish more harshly those who chose a gay victim because he’s gay than a straight victim for some other reasons.”⁴

This interpretation is both legally and morally invalid. In *Price Waterhouse v. Hopkins* the Supreme Court wrote of Title VII of the Civil Rights Act of 1964 that the legislation, “on its face treats each of the enumerated categories,” that is, race, color, religion, sex, and national origin, “exactly the same.” More recently, federal courts have found that the sex category of the Civil Rights Act includes sexual orientation. See: *U.S. EEOC v. Scott Medical Health Center*.⁵

It is important to note that Marcus’ address on the legal implications of the Hate Crimes Prevention Act was sandwiched between two gospel singers and the Executive Director of TVC.

The two gospel singers, Debbie and Angie Winans, shared a musical presentation of their song attacking homosexuality entitled, “Not Natural.” The song includes lines such as “it’s not natural. Just because it’s popular, doesn’t mean it’s cool,” and “no, that’s not the way God planned.” They closed noting that “homosexual behavior was changeable” while race, culture, etc. are “immutable.”⁶

Following Marcus’ address, Executive Director Andrea Sheldon opened with a response to the *Healing the Hate* curriculum which, she believes, urges children to “rat on their parents.” Sheldon also expressed an appalment with the “Preventing Youth Hate Crime” brochure promoting tolerance and attacked its promotion of “revisionist history.”

¹ <https://www.c-span.org/video/?103282-1/homosexuality-public-policy>

² <https://www.splcenter.org/fighting-hate/extremist-files/group/traditional-values-coalition>

³ <https://www.splcenter.org/fighting-hate/extremist-files/group/traditional-values-coalition>

⁴ <https://www.c-span.org/video/?103282-1/homosexuality-public-policy>

⁵ <https://www.eeoc.gov/eeoc/newsroom/release/11-9-16.cfm>

⁶ <https://www.eeoc.gov/eeoc/newsroom/release/11-9-16.cfm>

Considering the ED's rollback of protections for LGBTQ students and the recent surge in hate crimes across the country as evidenced by the FBI's most recent hate crimes report⁷, Marcus' opposition to protections for sexual orientation, and his association with an anti-LGBTQ hate group, are deeply troubling.

2) Hate Crime Laws

At the above-mentioned Traditional Values Coalition (TVC) conference, Marcus joined a panel to offer his analysis of several pending pieces of legislation, including the Hate Crimes Prevention Act, which was introduced in both the House (H.R. 3081) and Senate (S.1529). The legislation would have expanded federal hate crimes protections to include sexual orientation, gender, and disability, while strengthening existing protections for race, religion, and national origin.⁸

In his opening remarks, Marcus asked the audience to regard the hate crimes legislation as part of a bigger agenda, opining the misuse of 'hate' to "describe people who simply disagree with a particular agenda, whether it be a general multicultural agenda, or agenda of a particular group like the homosexual community."⁹

These same arguments have been used by many anti-LBGTQ advocates, including the TVC, which released a 2005 report titled "Prohomosexual Hate Crime Legislation is Back!"¹⁰ In that document, Rev. Sheldon followed a similar template of portraying hate crimes legislation as a threat to First Amendment rights, and coupled it with a rejection of the necessity for including sexual orientation as a protected class, arguing:

*The hate crimes language passed in the House is a threat to free speech, freedom of religion, and association. Homosexuality is a behavior, not a fixed identity. It is similar to smoking or drug use, not an immutable characteristic like race or ethnicity. There are no 'former' Blacks, but there are ex-homosexuals. The existence of ex-homosexuals is clear evidence that homosexuality is behavior-based, not an unchangeable characteristic. It should not receive special minority rights protections in federal law.*¹¹

In kind, Marcus represents hate crimes legislation as an attack on First Amendment rights, calling the increased protections proposed a "slippery slope to controlling our thoughts and motivations." Asking attendees of the conference to consider the Hate Crimes Prevention Act as part of a larger agenda, Marcus argued to congressional staffers in attendance that they cannot trust the courts will "fix it down the line" because the "protections that the courts have been giving to First Amendment rights against hate

⁷ <https://www.fbi.gov/news/stories/2016-hate-crime-statistics>

⁸ <https://www.congress.gov/105/bills/s1529/BILLS-105s1529is.pdf>

⁹ <https://www.c-span.org/video/?103282-1/homosexuality-public-policy>

¹⁰ <https://www.splcenter.org/fighting-hate/extremist-files/group/traditional-values-coalition>

¹¹ <https://www.splcenter.org/fighting-hate/extremist-files/group/traditional-values-coalition>

crimes legislation have been fairly narrow.”¹² Notably, in the 1993 case *Wisconsin v. Mitchell* the Supreme Court unanimously upheld a hate crimes law against claims of First Amendment violations.

Marcus went on to attack the Clinton Administration’s national hate crimes prevention curriculum, *Healing the Hate*¹³, developed jointly by the Department of Justice and Department of Education to spread awareness of hate crime and bigotry in participating public schools. To Marcus, this curriculum indicated the government’s “dangerous tendency to regulate speech and behavior which is simply politically incorrect... it is the tendency to tell some people that because of their moral, or religious, or political views, they will not be allowed to speak.”¹⁴

Kenneth Marcus’ fundamental view that hate crime legislation, which has been unanimously upheld by the Supreme Court, is an infringement on free speech is at odds with the OCR’s central goal to “serve student populations facing discrimination and the advocates and institutions promoting systemic solutions to civil rights problems.” An opponent of key, and constitutional, hate crime legislation designed specifically to protect the civil rights of all minorities should not be entrusted to lead the ED’s OCR.

3) **Definition of Anti-Semitism and the Misuse of Title VI**

Marcus has been a longtime advocate for the adoption of an overly-broad, political definition of anti-Semitism, which includes criticism of the state of Israel.¹⁵ The definition, authored by a State Department official for foreign application, is used by the State Department only for limited international monitoring purposes.¹⁶ A domestic application of the definition would have the effect of classifying legitimate political speech critical of Israel and Israeli governmental policies as anti-Semitic, thereby limiting the protections of the First Amendment and curbing academic freedom.

In 2013 and 2014, the ED’s OCR investigated complaints of politically motivated charges of anti-Semitism under Title VI at the University of California, Irvine¹⁷; University of California, Santa Cruz¹⁸; University of California, Berkeley¹⁹; and Rutgers University.²⁰ All four complaints were closed without further action. In its letter to UC Berkeley, OCR explained that part of the dismissal was because several of the allegations “describe events that constituted expression on matters of public concern directed to the university community.”²¹ The letter went further in defending the right of students to

¹² <https://www.c-span.org/video/?103282-1/homosexuality-public-policy>

¹³ <https://www.ncjrs.gov/pdffiles1/165479.pdf>

¹⁴ <https://www.c-span.org/video/?103282-1/homosexuality-public-policy>

¹⁵ Marcus, K. (2015) *The Definition of Anti-Semitism*, pg. 27.

¹⁶ <https://www.state.gov/s/rga/resources/267538.htm>

¹⁷ https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine_Letter_of_Findings_to_Recipient.pdf

¹⁸ https://news.ucsc.edu/2013/08/images/OCR_letter-of-findings.pdf

¹⁹ http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR_.pdf

²⁰ <https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vi-complaint-7-31-14.html>

²¹ http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR_.pdf

express differing opinions, stating, “In the university environment, exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience. In this context, the events that the complainants described do not constitute actionable harassment.”²²

Marcus himself has admitted that one planned outcome of his tactics is the chilled expression of political speech on campus. In a piece for *The Jerusalem Post* he wrote, “we are creating a very strong disincentive for outrageous behavior by students in particular. Israel-haters now publicly complain that these cases make it harder for them to recruit new adherents...Needless to say, getting caught up in a civil rights complaint is not a good way to build a resume or impress a future employer.”²³ His comments make it clear the motive behind these complaints is the suppression of political speech, not the protection of students. By implying that these complaints could be used to deny future employment opportunities, Marcus intended to misuse the authority of the federal government by getting a student “caught up in a civil rights complaint” so as to intimidate college students as a means to suppress political expression.

By seeking to expand the scope of Title VI protections to include criticism of Israel, Marcus’ approach has threatened free speech by design. Indeed, the domestic application of a State Department definition meant for foreign use threatens to undermine the very real, and increasing, threat of anti-Semitism by drawing focus and resources away from legitimate complaints in favor of a purely political agenda.

Notably, the basis of Marcus’ opposition to hate crimes legislation rests on a desire to protect the First Amendment and political discourse which may make others uncomfortable.²⁴ However, his desire to expand the bounds of anti-Semitism to include legitimate opposition to the policies of the Israeli government rests solely on a politically motivated desire to diminish First Amendment protections of political discourse.

His track record of misusing civil rights protections to intimidate students and discourage political expression is a worrying prospect for those who support the full protections of the First Amendment and value the civil rights mission of the OCR office. These views and actions render Marcus an unsuitable candidate to lead the ED’s Office of Civil Rights.

4) **Affirmative Action**

The Supreme Court has held that the Thirteenth Amendment empowers governments to “pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”²⁵ For generations, one tool used to accomplish this lofty goal has been

²² http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR_.pdf

²³ <http://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648>

²⁴ <https://www.c-span.org/video/?103282-1/homosexuality-public-policy>

²⁵ *Jones v. Alfred H. Mayer Co* 392 U.S. 409 (1968)

race-conscious affirmative action programs. Here, too, Marcus stands in opposition to the goals of civil rights laws in the United States.

The Brandeis Center, which Marcus founded in 2011 and of which he currently serves as President, submitted an amicus brief for *Fisher v. University of Texas at Austin (Fisher I)* opposing admissions standards which consider the diversity of the institution's student body.²⁶ A far cry from quota-based systems the Court has found unconstitutional, the University of Texas's admissions policy merely sought to consider each candidate's broader life experience.²⁷

Nonetheless, the Brandeis Center argued that "...history reveals no distinction between the modern rationales for discriminatory practices and those invoked to justify quotas in an earlier era." Their brief asked the Court to rule in *Fisher I* that admissions be based solely on test scores, excluding all the other dimensions of the human condition which contribute to a valuable and successful campus life and academic experience for all students.²⁸ Indeed, the Court disagreed with the Brandeis Center, holding in *Fisher II* that "Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers."²⁹

The Court further wrote, "...to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court's cases have defined it."³⁰ The Brandeis Center's opposition to combating structural disadvantage in society speaks volumes of its attitude toward the civil rights of systemically marginalized communities in America.

Marcus's rejection of race-conscious admissions policies predates his time at the Brandeis Center. As Acting Assistant Secretary for Civil Rights, Marcus oversaw a report outlining "race-neutral alternatives" to achieving diversity in postsecondary education.³¹ The report sketched out a variety of "race-neutral alternatives" to affirmative action, including socio-economic approaches.

Class-based affirmative action, as a race-neutral alternative, has been criticized by leading civil rights organizations for its lack of success in ensuring racial diversity. In response to the Supreme Court's ruling in *Fisher v. University of Texas*, the NAACP Legal Defense Fund laid out clear evidence that these alternatives put African American students at a disadvantage:

²⁶ http://sblog.s3.amazonaws.com/wp-content/uploads/2012/05/12-05-29_Gura_Final_Fisher_Brief.pdf

²⁷ <https://www.law.cornell.edu/supremecourt/text/11-345>

²⁸ http://sblog.s3.amazonaws.com/wp-content/uploads/2012/05/12-05-29_Gura_Final_Fisher_Brief.pdf

²⁹ <https://supreme.justia.com/cases/federal/us/579/14-981/opinion3.html>

³⁰ <https://supreme.justia.com/cases/federal/us/579/14-981/opinion3.html>

³¹ <https://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html#toc1>

Prior experiments have demonstrated that race-neutral admissions alone are insufficient to achieve meaningful diversity and opportunity on college campuses. After California banned the consideration of race in college admissions, the percentage of African-American admitted freshmen dropped by about half at California's flagship schools, UCLA and UC Berkeley. After Michigan's ban, the University of Michigan saw the percentage of enrolled African-American undergraduate students decline by about a third from 2006 with the number hovering around 4.5% for the past five years.³²

That Marcus has repeatedly challenged policies shown to alleviate the burden of marginalized communities that have faced a history of discrimination once again highlights his unwillingness to equally enforce civil rights protections across communities.

At his hearing before your committee on Tuesday, in response to a disparate impact question from Senator Chris Murphy, he responded that he has seen “what looks to be disparities turn out to be paperwork errors.” In response to a clear case of racial discrimination posed by Senator Elisabeth Warren, Marcus commented that OCR “has no jurisdiction to enforce the Equal Protection Clause.” It is highly disconcerting to consider that someone with such a narrow understanding of civil rights could lead the ED's OCR.

5) Title IX Protections

The mission of the ED's OCR is “to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.”³³ However, during his previous tenure at OCR, one can make the case that Kenneth Marcus undermined equal access to education of women.

In 2004, during Marcus' term as acting Assistant Secretary of Education for OCR, the Department of Education proposed an amendment to Title IX regulations that would increase flexibility for federally assisted educational programs interested in providing single-sex schools or classes.³⁴

The amendments were issued despite extremely limited data in support for single-sex education at the time of the proposed changes.³⁵ Indeed, a comprehensive study on single-sex education from the American Association of University Women found that “There is no evidence that single-sex education in general “works” or is “better” than coeducation.”³⁶

³² <http://www.naacpldf.org/update/us-supreme-court-ruling-reaffirms-importance-diversity-college-admissions>

³³ <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>

³⁴ <https://www.gpo.gov/fdsys/pkg/FR-2004-03-09/pdf/04-5156.pdf>

³⁵ Williams, J. (2016) *The Separation Solution?: Single-Sex Education and the New Politics of Gender Equality*

³⁶ <http://www.ncgs.org/Pdfs/Resources/Separated-By-Sex-A-Critical-Look-at-Single-Sex-Education-for-Girls.pdf>

In the rationale behind the decision to ease regulations on single-sex classrooms, the proposal observed that when Title IX was issued in the early 1970s, “discrimination against female students was widespread at all levels of education, including elementary and secondary education.”³⁷ It goes on to argue that “while there are still gains to be made, schools are now far more equitable in the treatment of female students,”³⁸ making amendments allowing for flexibility in same-sex educational options appropriate.

This argument, based on the notion that discrimination against women in educational settings is no longer a substantial barrier, fails to take into account the continued and pervasive discrimination against women. Only seven years prior to the proposal of the amendments, in *United States v. Virginia*, the Supreme Court struck down the Virginia Military Institute’s male-only admissions policy due to its violation of the Fourteenth Amendment’s Equal Protection Clause.³⁹ Clearly, sex-based discrimination has continued well past the 1970s. The weakening of Title IX regulations proposed by the OCR under Marcus’ leadership only invited further opportunity for violation of the Equal Protection Clause.

At the time of the OCR’s proposal for Title IX amendments, the ACLU submitted written comments opposing the changes, laying out the ineffectiveness and unlawfulness of the proposals, and noting they were not based on sound data.⁴⁰ In their letter, the ACLU noted that, “Instead of addressing the multi-layered challenges confronting the nation’s schools, including continuing gender disparities in opportunities and achievement, the Department of Education has focused its attention on single-sex education programs as a supposed ‘quick fix.’”⁴¹ Indeed, Marcus’ policies set a dangerous precedent of compromising key civil rights protections and implementing policies that fail to adequately address deep-rooted inequalities, raising doubt in his ability to lead OCR in the equal application of civil rights protections moving forward.

Further, if one were to read this as a disagreement on substance and therefore reasonably debatable, Marcus’ appearance on C-SPAN’s Washington Journal in 2004 as an ED official offers a different perspective.⁴² During the interview, a caller noted, “if you have one female who’s dysfunctional in sexual ways...one female who is sexually active totally destroyed the ability to run the class.” Instead of addressing the callers overtly sexist argument for single-sex classrooms, Marcus offered the following response: “There are a lot of important reasons for providing more flexibility and I appreciate your endorsement of the flexibility point. It is also important to make sure that when single-sex education is offered, that it not be based on any sort of stereotypes, including stereotypes about women in math or men in reading.” Marcus chose to address stereotypes related to competence in specific subject matters rather than refute the clearly

³⁷ <https://www.gpo.gov/fdsys/pkg/FR-2004-03-09/pdf/04-5156.pdf>

³⁸ <https://www.gpo.gov/fdsys/pkg/FR-2004-03-09/pdf/04-5156.pdf>

³⁹ <https://www.law.cornell.edu/supct/html/94-1941.ZS.html>

⁴⁰ <https://www.aclu.org/letter/aclu-letter-department-education-single-sex-proposed-regulations-comments>

⁴¹ <https://www.aclu.org/letter/aclu-letter-department-education-single-sex-proposed-regulations-comments>

⁴² <https://www.c-span.org/video/?180867-6/singlesex-classrooms>

derogatory, misogynistic comments of the caller. It would be unfair to suggest Marcus' overlooking of the caller's most egregious comments equates endorsement but this unsettling exchange appears to be an example of Marcus' penchant for overlooking bias if it serves his political agenda.

At a time when women's equal access to education is again at-risk due to the rise in sexual assault and harassment on campuses⁴³ and the rollback of crucial protections for sexual assault victims, Marcus' undermining of equal access to education for women is troubling. Further, at his hearing this week, Mr. Marcus would not commit to maintaining OCR's list of schools that face civil rights investigations related to their handling of sexual violence reports and voiced support for a policy placing a higher burden of proof on colleges for pursuing claims of sexual assault.⁴⁴ A nominee with such poor judgement on a critical issue of safety in higher education does not seem appropriate to lead the OCR.

Since taking office, President Donald Trump has nominated a series of individuals to senior positions whose qualifications and merit have come into question. Some have since resigned in circumstances that suggest those reservations were well founded. Other have been appointed to lead departments whose missions they have been at odds with throughout their careers. Regrettably, the nomination of Mr. Marcus raises similar concerns.

The shortcomings of Kenneth Marcus as a potential leader of ED's OCR are well-documented. Marcus has a history of opposing civil rights protections for historically underrepresented communities. His admitted political agenda will leave students who disagree with his foreign policy views vulnerable to government-backed accusations only meant to intimidate. Marcus' views of civil rights—such as his opposition to crucial and legal affirmative action and his positions on Title IX protections, single-sex education, and their implications on equal access to education for women—which he has held for over two decades, should raise serious and disqualifying concerns regarding his potential confirmation to the Department of Education's Office of Civil Rights.

Lastly, at Tuesday's hearing, Senator Patty Murray asked Mr. Marcus if he disagrees with any discriminatory statement made by President Trump. His response? "I couldn't say." This was not a difficult question. Marcus could have cited President Trump's bigoted views of Mexicans,⁴⁵ his mocking of a disabled journalist,⁴⁶ his treatment of women,⁴⁷ ⁴⁸ insensitivities towards

⁴³ <https://www.wsj.com/articles/reports-of-sexual-assault-rising-sharply-on-college-campuses-1462375421>

⁴⁴ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>

⁴⁵ <http://time.com/4473972/donald-trump-mexico-meeting-insult/>

⁴⁶ <https://www.nbcnews.com/politics/2016-election/trump-s-worst-offense-mocking-disabled-reporter-poll-finds-n627736>

⁴⁷ http://www.slate.com/blogs/the_slatest/2016/10/07/donald_trump_2005_tape_i_grab_women_by_the_pussy.html

⁴⁸ <https://twitter.com/realDonaldTrump/status/331907383771148288>

LGBTQ people,⁴⁹ countless examples of anti-Muslim bigotry,⁵⁰ or his deferential treatment of violent white supremacists.⁵¹ Mr. Marcus chose to remain silent.

Because of his track record on a broad range of civil rights issues, his explicit desire to use OCR to suppress speech he disfavors, and his inability to denounce bigotry when asked, Kenneth Marcus should not be confirmed to lead the Department of Education's Office of Civil Rights.

Thank you for consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Maya Berry', with a stylized flourish extending to the right.

Maya Berry
Executive Director

⁴⁹ <http://www.independent.co.uk/news/world/americas/us-politics/mike-pence-trump-hang-gay-people-joke-visitors-white-house-vp-a8003321.html>

⁵⁰ <http://www.cnn.com/2015/12/08/politics/donald-trump-muslims/>

⁵¹ <https://www.theguardian.com/us-news/2017/aug/12/charlottesville-protest-trump-condemns-violence-many-sides>