

Congress of the United States
Washington, DC 20515

October 22, 2019

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

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

Dear Secretary DeVos and Mr. Marcus:

We are concerned that the Department of Education's Office for Civil Rights (OCR) is failing to protect the civil rights of LGBTQ students. The mission of OCR is to "ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation's schools¹," but recent studies have shown that vigorous enforcement of students' civil rights is not occurring.

Federal courts have found that discrimination based on sexual orientation or gender identity is prohibited sex discrimination,² but a recent study by the Center for American Progress (CAP) found that OCR was more than nine times less likely to take corrective action on sexual orientation and gender identity-related complaints under the current administration than under

¹ Department of Education Office of Civil Rights, available at <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>.

² See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (May 1, 1989), available at <https://www.law.cornell.edu/supremecourt/text/490/228>, which held sex stereotyping to be barred by Title VII. Although *Price Waterhouse* was not a Title IX case, courts routinely apply Title VII jurisprudence when deciding Title IX cases, and they have relied on *Price Waterhouse* when deciding Title IX cases for transgender students. As the U.S. Court of Appeals for the 8th Circuit has noted, interpretation of the prohibition on sex discrimination in Title IX (education) is "properly informed" by interpretation of the same prohibition in Title VII (employment). See *Wolfe v. Fayetteville, Arkansas School District*, 8th U.S. Circuit Court of Appeals, 648 F.3d 860, 866 (August 9, 2011), available at <https://www.courtlistener.com/opinion/222749/wolfe-v-fayetteville-arkansas-school-dist/>. For cases that found that discrimination on the basis of sexual orientation is included in Title VII's definition of "sex," see, for example, *Hively v. Ivy Tech Community College*, 7th U.S. Circuit Court of Appeals, 830 F.3d 698 (July 28, 2016), available at <https://www.leagle.com/decision/infco20160728111>; *Hively v. Ivy Tech Community College*, brief of amicus curiae Equal Employment Opportunity Commission, 7th U.S. Circuit Court of Appeals, No. 15-1720 (August 25, 2016), available at <http://files.eeoc.org/wp-content/uploads/2016/11/42-Amicus-Brief-of-EEOC-iso-Rehearing.pdf>; *Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015), available at <https://www.eeoc.gov/decisions/0120133080.pdf>. For cases that found that discrimination on the basis of gender identity is included in Title VII's definition of "sex," see, for example, *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (2012), available at https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/macy-v-holder_edited.pdf; *Smith v. City of Salem*, 6th U.S. Circuit Court of Appeals, 378 F.3d 566 (August 5, 2004), available at <https://law.justia.com/cases/federal/appellate-courts/F3/378/566/592872/>. For cases that found that discrimination on the basis of gender identity is included in Title IX's definition of "sex," see, for example, *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir., 2017); *Dodds v. United States Department of Education*, 845 F.3d 217 (6th Cir., 2016). See also <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination>.

the Obama administration.³ These findings raise serious concerns about whether the OCR is fulfilling its statutory duty to protect civil rights for all students. Every student deserves to learn in a safe environment free from discrimination, and no parent or child should have any doubts that the federal government will protect their rights.

LGBTQ students continue to experience harassment and bullying in schools. After years of steady improvement, GLSEN's 2017 National School Climate Survey showed that improvement in school climate had slowed down, with some indicators showing no change in school climate from prior years.⁴ In fact, the survey results showed that school climate has become worse for transgender students.⁵ Bullying and harassment can cause the affected students to miss school and have poor academic outcomes.⁶ This mistreatment can also take a significant toll on the mental health and wellbeing of these children.⁷ The Center for Disease Control's 2017 Youth Risk Behavior Survey found that lesbian, gay, and bisexual youth are about four times more likely to consider or attempt suicide than their straight peers, and transgender students are also about four times more likely to attempt suicide than their cisgender peers.⁸ The data also shows increased risk for harassment and poorer outcomes for LGBTQ students, highlighting the critical need for the Department to enforce the law so there is equal treatment for all students.

Educators understand the need to protect the safety and wellbeing of their students. In May of 2016, in response to requests from educators, the Departments of Education and Justice jointly issued guidance clarifying protections for transgender students under Title IX.⁹ When the Department first issued the guidance, education experts, health care experts, educators, counselors, pediatricians, and psychologists applauded it because it made students safer at schools.¹⁰ Nevertheless, the Departments revoked this guidance under the leadership of Secretary

³ Shabab Ahmed Mirza and Frank Bewkes, "Secretary DeVos Is Failing to Protect the Civil Rights of LGBTQ Students" (Washington: Center for American Progress, 2019), available at <https://www.americanprogress.org/issues/lgbt/reports/2019/07/29/472636/secretary-devos-failing-protect-civil-rights-lgbtq-students/>.

⁴ GLSEN, "National School Climate Survey Released," *Press Release*, October 15, 2018, available at <https://www.glsen.org/article/glsen-releases-new-national-school-climate-survey-report>. See also: Joe G. Kosciw and others, "The 2017 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools" (New York: GLSEN, 2018), available at <https://www.glsen.org/article/2017-national-school-climate-survey>.

⁵ Ibid.

⁶ Kosciw and others, "The 2017 National School Climate Survey."

⁷ Ibid.

⁸ Centers for Disease Control and Prevention, "Youth Risk Behavior Survey (YRBS)," available at <https://nccd.cdc.gov/Youthonline/App/Results.aspx?LID=XX> (last accessed June 2019). Michelle M. Johns and others, "Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017," *Morbidity and Mortality Weekly Report* 68 (3) (2019): 67–71, available at <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-11.pdf>.

⁹ Catherine E. Lhamon and Vanita Gupta, "Dear Colleague Letter on Transgender Students: Notice of Language Assistance," U.S. Department of Justice and U.S. Department of Education, May 13, 2016, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

¹⁰ National Association of Secondary School Principals, "Principals Applaud Obama Administration for Guidance on Transgender Students," *Press Release*, May 13, 2016, available at <https://www.nassp.org/2016/05/13/principals-applaud-obama-administration-for-guidance-on-transgender-students/>; National Education Association, "NEA President: Every child has the right to feel safe, welcomed and valued," *Press Release*, May 13, 2016, available at <http://www.nea.org/home/66709.htm>; American School Counselor Association, "American School Counselor Association Issues Statement of Support for Obama Administration Guidance on Transgender Access to School Restrooms," May 13, 2016, *Press Release*, available at https://www.schoolcounselor.org/asca/media/asca/Press%20releases/PR_TransgenderRestroom.pdf; American Academy of Pediatrics, "American Academy of Pediatrics Commends White House for Asserting Protections for Transgender Students," *Press Release*, May 13, 2016, available at <https://www.aap.org/en-us/about-the-aap/aap-press->

DeVos and former Attorney General Sessions, causing unnecessary confusion for transgender students, their families, and educators about their civil rights under Title IX.¹¹ In February 2018, Secretary DeVos confirmed that the Department of Education is no longer investigating complaints of anti-transgender discrimination regarding access to school facilities.¹² We urge the Department to reinstate this guidance and let LGBTQ students, parents, and families know that the federal government will protect them from discrimination.

OCR has not produced a single annual report since 2016. Accordingly, the Center for American Progress (CAP) has published the only publicly available record of how the Department has handled civil rights complaints under the current administration.¹³ The CAP study found that most sexual orientation- or gender identity-related complaints contained allegations of harassment.¹⁴ As outlined in an October 2010 guidance issued by OCR, discrimination based on sex in the form of bullying and harassment violates federal civil rights laws.¹⁵ It explicitly includes schools' obligations to address anti-LGBTQ bullying as a form of sex discrimination prohibited under Title IX.¹⁶ Although the Trump administration rescinded the May 2016 guidance, the October 2010 guidance on bullying and harassment is still in effect.¹⁷

The CAP study also found that the current administration is investigating fewer sexual orientation and gender identity-related complaints, even though the overall number of sexual orientation- or gender identity-related complaints filed each quarter has increased.¹⁸ This raises serious concerns about whether OCR is devoting adequate time and resources to complaints filed by LGBTQ students. At the same time, there have been troubling news reports that, pursuant to the Department's request, OCR rushed to prioritize a complaint filed by the Alliance Defending Freedom opposing protections for transgender students.¹⁹ These reports raise serious concerns that the Department is directing OCR to prioritize anti-transgender complaints even as the rate of investigations for all sexual orientation and gender identity-related complaints has decreased. All students deserve a learning environment free from harassment and discrimination. It does not

[room/Pages/WhiteHouseTransgenderStudentLettertoSchools.aspx](#); National Association of School Psychologists, "NASP Applauds Obama Administration Decree on Civil Rights Protections for Transgender Students," *Press Release*, May 13, 2016, available at https://www.nasponline.org/assets/Documents/About%20School%20Psychology/Media%20Resources/NASP_Title%20IX_Release_Final.pdf.

¹¹ Sandra Battle and T.E. Wheeler II, "Dear Colleague Letter: Notice of Language Assistance," U.S. Department of Justice and U.S. Department of Education, February 22, 2017, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹² Moriah Balingit, "Education Department no longer investigating transgender bathroom complaints," *The Washington Post*, February 12, 2018, available at https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/?utm_term=.a4327c71421f.

¹³ U.S. Department of Education, "Serial Reports Regarding OCR Activities," available at <https://www2.ed.gov/about/offices/list/ocr/congress.html> [last accessed August 23, 2019].

¹⁴ Mirza and Bewkes, "Secretary DeVos Is Failing to Protect the Civil Rights of LGBTQ Students" (2019).

¹⁵ Russlynn Ali, "Dear Colleague Letter: Harassment and Bullying," U.S. Department of Education, October 26, 2010, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

¹⁶ *Ibid.*

¹⁷ U.S. Department of Education, "Sex Discrimination," last modified September 25, 2018, available at <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html> [last accessed August 27, 2019].

¹⁸ Mirza and Bewkes, "Secretary DeVos Is Failing to Protect the Civil Rights of LGBTQ Students" (2019).

¹⁹ Chris Johnson, "Exclusive: Emails show DOE rushed to take up complaint from anti-LGBT group," *Washington Blade*, August 8, 2019, available at <https://www.washingtonblade.com/2019/08/08/exclusive-emails-show-doe-rushed-to-take-up-complaint-from-anti-lgbt-group/>.

appear that your office is fulfilling its statutory duty to ensure equal treatment of all students, including LGBTQ students.

We request information about OCR's policies for processing sexual orientation and gender identity-related complaints. Please provide a response by November 5, 2019 to the following questions:

1. What instructions have Office for Civil Rights staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.
2. In light of the February 22, 2017 Dear Colleague letter, what instructions have Office for Civil Rights staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.
3. Please provide documents sufficient to show how the Office for Civil Rights prioritizes the processing of complaints of discrimination.
 - a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to Office for Civil Rights staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
 - b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documents sufficient to show the nature of these complaints.
4. Please provide documents sufficient to show whether the Office for Civil Rights is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.
5. The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity.²⁰ Provide documents sufficient to show how the Office for Civil Rights processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.
6. In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does the Office of Civil Rights process complaints differently than other complaints?²¹

²⁰ *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir., 2017); *Dodds v. United States Department of Education*, 845 F.3d 217 (6th Cir., 2016).

²¹ See, e.g., *Grimm v. Gloucester County School Board*, 2019 WL 3774118 (E.D. Va., 2019).

7. Provide documents sufficient to show what factors the Office for Civil Rights uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.
8. What direction did the Office for Civil Rights receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.
9. What direction did the Office for Civil Rights receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.
10. What recommendations, guidance, research, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to the Office for Civil Rights on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

We appreciate your prompt attention to this matter.

Sincerely,



Suzanne Bonamici
Chair, Subcommittee on Civil Rights
And Human Services



Raúl M. Grijalva
Member of Congress



Mark Takano
Member of Congress



Pramila Jayapal
Member of Congress



Jahana Hayes
Member of Congress




Andy Levin
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Alan Lowenthal
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Ro Khanna
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Ruben Gallego
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Seth Moulton
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Jennifer Wexton
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Joseph W. Morelle
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Salud O. Carbajal
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Darren Soto
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Angie Craig
Member of Congress



Adriano Espaillat
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Kathy Castor
Member of Congress



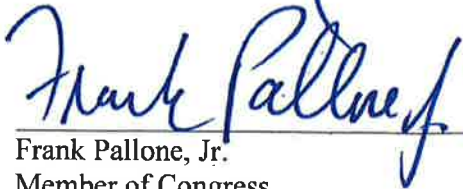
Lucille Roybal-Allard
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Sheila Jackson Lee
Member of Congress



Eleanor Holmes Norton
Member of Congress



Frank Pallone, Jr.
Member of Congress



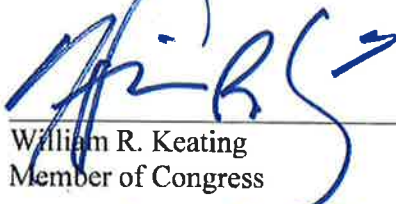
Adam B. Schiff
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Suzan K. DelBene
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Linda T. Sánchez
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William R. Keating
Member of Congress



John B. Larson
Member of Congress



Gilbert R. Cisneros, Jr.
Member of Congress



Peter A. DeFazio
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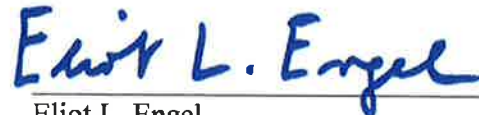
Albio Sires
Member of Congress



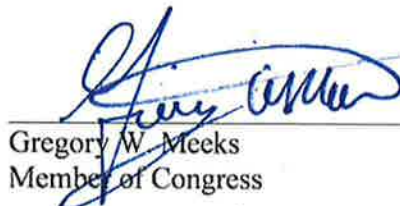
Gwen Moore
Member of Congress



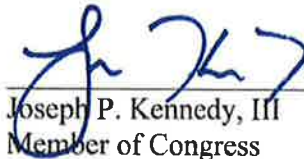
Jan Schakowsky
Member of Congress



Eliot L. Engel
Member of Congress



Gregory W. Meeks
Member of Congress



Joseph P. Kennedy, III
Member of Congress



Rashida Tlaib
Member of Congress



TJ Cox
Member of Congress



Brenda L. Lawrence
Member of Congress



Henry C. "Hank" Johnson, Jr.
Member of Congress



Adam Smith
Member of Congress



Danny K. Davis
Member of Congress



Rick Larsen
Member of Congress



Bill Foster
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Jerrold Nadler
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Jimmy Gomez
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Alcee L. Hastings
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Sylvia Garcia
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David N. Cicilline
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Grace Meng
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Sharice L. Davids
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