

**Questions for the Record “Kenneth Marcus to be Assistant Secretary for Civil Rights at the
Department of Education”
Hearing Date: December 5, 2017**

Questions for the Record from Ranking Member Patty Murray

1. Previous Assistant Secretaries for Civil Rights have maintained oversight of specific types of cases to ensure uniform approaches to cases across regional offices. If confirmed, will you require regional directors to report to you on open investigations into certain types of complaints? If so, which types of complaints?

Ensuring national consistency across the regional offices of OCR is an important purpose of management and oversight. If confirmed, I will take appropriate measures to further the goal of uniform approaches to cases throughout OCR.

2. Should OCR investigators only open systemic investigations when the complainant has alleged a systemic problem?

There are many factors that should be considered in a decision whether an investigation should be opened systemically. If confirmed, I will ensure that OCR’s approach to systemic investigations furthers OCR’s mission of vigorous enforcement of the civil rights statutes under OCR’s jurisdiction.

3. When is it appropriate to use each of the following types of OCR enforcement activities: 1) systemic investigations; 2) individual investigations; and 3) compliance reviews?

There are many factors that should be considered in determining the facts and circumstances under which an individual investigation, systemic investigation, or compliance review is most appropriate for a particular enforcement activity. If confirmed, I will ensure that OCR’s approach to each type of investigation furthers OCR’s mission of vigorous enforcement of the civil rights statutes under OCR’s jurisdiction.

4. OCR has seen an increase in the number of civil rights complaints filed from approximately 8,600 complaints in 2009 to about 10,500 unduplicated complaints in 2016. This year, the Department suggested increasing the caseload of field investigators while also proposing cutting the non-attorney staff by 59 employees. Given your experience at the Department, do you agree OCR needs fewer staff members? Do you think OCR has sufficient staff to resolve complaints in a high quality and efficient matter?

If confirmed, I look forward to examining the resources available to OCR and to the best of my ability ensuring that OCR continues to have sufficient staff to resolve complaints in a high quality, efficient manner.

5. The 2018 budget proposed by the Trump Administration for the Office for Civil Rights includes a reduction of \$1.7 million that, combined with increases for the Civil Rights Data Collection (CRDC), would result in 59 fewer staff at a time when OCR continues to experience increasing workloads of complaints and investigations. Both the House and Senate Committees on Appropriations rejected this proposal, with the Senate Committee increasing OCR's budget to the level required to maintain all existing staff and implement the CRDC.

I have strongly argued for increases in OCR's budget because of its critical mission and increasing workloads. Unfortunately, this year OCR reduced its staffing of attorney/equal opportunity specialists by more than 40, or ten percent, and offered buyouts to another 45 employees. That means that the number of staff available to effectively investigate and monitor complaints and investigations will further increase when they already are at unacceptably high levels.

Do you commit that you will advocate for the resources necessary to thoroughly investigate and monitor OCR's workloads and fulfill the mission of OCR? If confirmed and Congress provides you with funding for staff needed to fully investigate and monitor complaints in a timely way, can you assure me that you will use the appropriation for this purpose?

If confirmed, I will advocate for OCR having the budget and resources necessary to fulfill its critical mission, and will manage OCR's operations in such a way that OCR stewards its congressional appropriations to ensure that OCR's role enforcing civil rights is conducted vigorously and efficiently.

6. In your view, how does implicit bias contribute to disparate impact?

Generally speaking, disparate impact in many contexts (e.g., rates of discipline of students) can be caused by a multitude of factors, which may include implicit biases of decision-makers.

7. At the 10th Anniversary National Convention of the American Constitution Society, you participated in a panel on disparate impact, during which you stated that there should be a "good faith exception" to disparate impact liability. What did you mean by "good faith exception," and what sorts of evidence would you accept to demonstrate "good faith" in the disparate impact context? How would a good faith exception operate in practice?

Disparate impact can be a useful civil rights enforcement tool for identifying discrimination in the absence of direct evidence of intent. I presented my personal legal assessment of the issues raised in this question, as I understood them at roughly the time of that ACS conference, in my article on "The War Between Disparate Impact and Equal Protection." That article can be found here:

https://object.cato.org/sites/cato.org/files/serials/files/supreme-courtreview/2009/9/ricci-marcus_0.pdf. To my knowledge, a "good faith" exception does not exist under current

OCR policy. If I were confirmed, I would not infer a good faith exception in OCR disparate impact policies unless one was provided within a statute or regulation over which OCR has jurisdiction.

8. At the same panel, you shared that during your tenure “overseeing civil rights enforcement agencies during the President George W. Bush administration,” you were concerned that the disparate impact doctrine had been “abused” in prior administrations. Please give examples of how the disparate impact doctrine was abused.

I do not recall what examples I had in mind at the time.

9. If a school district’s African-American students are 4.5 times less likely than their white peers to have been identified as eligible for the district’s Gifted and Talented Education (GATE) programs, is that sufficient evidence to open a disparate impact investigation?

There are many factors considered by OCR’s dedicated, qualified career investigators in deciding whether a particular set of circumstances warrant opening an investigation, and it would be inappropriate for me to predetermine a hypothetical set of facts that could come before my potential employer. If confirmed, I will support enforcement of Title VI of the Civil Rights Act of 1964 to ensure that instances of racial discrimination are fully, vigorously investigated and remedied.

10. Do you commit to maintaining the Department of Education and Department of Justice joint 2014 Dear Colleague on disparate discipline?

It’s my understanding that the Department is under presidential Executive Order to systematically review all regulations and guidance, and it would be premature of me to weigh in on that process without being privy to the discussions occurring in the Department in that regard. If confirmed, I look forward to engaging in the regulatory review process as it pertains to the 2014 Dear Colleague Letter on racially discriminatory discipline.

11. As I noted in a letter to Secretary DeVos, there have been far too many examples of messages of intolerance and hate directed at and often intended to intimidate students on our college campuses. As just a few examples, a swastika was found at Georgetown University in a bathroom on the first day of Rosh Hashanah. Flyers saying “Imagine a Muslim-Free America” and “Beware the International Jew” were papered across the University of Houston’s campus. And at the University of Maryland, a noose was placed in the kitchen of the Phi Kappa Tau fraternity.

In fact, since March 2016, the Southern Poverty Law Center has identified more than 329 incidents of white nationalist fliers and recruitment materials on 241 different college campuses. BuzzFeed News identified 154 incidents of white supremacist propaganda and other acts of racism on college campuses since the election, and more than one in three of these incidents directly cited President Trump’s name or one of his slogans. Do you

believe college and university leadership should exercise their rights to disavow hate speech by naming the hate in open, campus-wide communications?

In my personal capacity, and as President of the Louis D. Brandeis Center for Human Rights Under Law, I have repeatedly expressed that view. If confirmed, I will advise the Secretary and work with policymakers in OCR and other areas of the Department to promote the ability and responsibility of college and university leadership to maintain a safe, nondiscriminatory, inclusive campus culture and environment in which the robust exchange of ideas can occur.

12. What do you believe is the role of OCR in combatting hate and discrimination on college campuses? What specific steps will you take at OCR to advance that role?

Hate and discrimination have no place on college campuses, and OCR's critical mission includes enforcing the civil rights statutes prohibiting discrimination based on race, color, national origin, sex, age, and disability over which Congress has granted OCR enforcement authority. If confirmed, I will work to ensure that OCR's enforcement activities identify and remedy illegal discrimination and I will advise the Secretary and other areas of the Department to promote campus environments where free speech is exercised in a manner that ensures the safety and dignity of all students.

13. You authored the law review article "Higher Education, Harassment, and First Amendment Opportunism," in the William & Mary Bill of Rights Journal in 2008. In that article, you wrote "needless to say, the U.S. Department of Education's Office for Civil Rights may limit the extent to which it regulates speech activities as a matter of administrative discretion, even if it is not constitutionally mandated to do so." What factors will you consider when determining whether and how to regulate speech activities?

If I were confirmed, I would apply existing law and policy, rather than my personal views or past academic publications. With respect to speech activities, I would consider the issues set forth in OCR's 2003 First Amendment Dear Colleague letter as well as other applicable guidance and law. <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>

14. In addition to speech activities, when does OCR have discretion to limit its enforcement of federal or constitutional law?

As a federal agency, OCR has a responsibility to conduct its enforcement consistent with the protections guaranteed under the U.S. Constitution and to vigorously fulfill its mission of ensuring equal access to education for all students by remedying discrimination based on race, ethnicity, national origin, sex, and disability. If confirmed, my priority will be to robustly enforce the civil rights with which OCR has been granted jurisdiction, rather than to seek out the limits on OCR's enforcement activities.

15. You have written that without a definition of anti-Semitism, OCR "has been paralyzed" and "is failing in its mission to protect Jewish students." If confirmed, will you adopt a

definition of anti-Semitism? Do you support the adoption by OCR of the State Department's definition of anti-Semitism?

In my personal capacity, and as President of the Louis D. Brandeis Center for Human Rights Under Law, I have indeed supported OCR's adoption of the State Department's definition of anti-Semitism, and I have not changed my views on this subject. If confirmed, however, I would engage in a different process, involving broader discussions with staff within the Department and outside stakeholders, before recommending particular policies of this sort.

16. If confirmed, do you plan to make investigations of anti-Semitic bullying and harassment a priority? Do you plan to initiate systemic investigations of anti-Semitic bullying and harassment?

I am greatly concerned about incidents and patterns of anti-Semitic bullying and harassment in our nation's schools and college campuses. If confirmed, I will support OCR exercising its jurisdiction under Title VI of the Civil Rights Act of 1964 to address anti-Semitic harassment consistent with current law. I am equally concerned about incidents and patterns of bullying and harassment based on other forms of discrimination. If confirmed, I will evaluate the range of enforcement issues facing OCR and advise the Secretary as to any enforcement priorities that may best fulfill OCR's mission of vigorous enforcement of each of the civil rights statutes under OCR's jurisdiction, including whether systemic investigations or compliance reviews into particular types of discrimination will best fulfill that mission.

17. When does criticism of foreign governments constitute actionable harassment?

The line between political speech protected by the First Amendment and actionable harassment often turns on the particular facts and circumstances. Recognizing and taking action against illegal harassment in a manner consistent with constitutional speech protections is one of the most difficult and important functions of OCR's enforcement activities. If confirmed, I will do my best to ensure that OCR consistently undertakes vigorous enforcement of civil rights statutes in a manner consistent with the U.S. Constitution.

18. Erwin Chemerinsky, Dean of Berkeley Law School and constitutional scholar, has criticized your approach to enforcing Title VII. According to news reports, Chemerinsky has said, "any administrator in a public university who tried to follow Professor Marcus's approach would certainly be successfully sued for violating the First Amendment." (Stephen Zunes, "Trump's Dangerous Appointment to Key Civil Rights Position: Kenneth Marcus," Huffington Post, 11/08/17). How would you advise a college administrator to balance concerns about discriminatory rhetoric with the mandate to protect free speech?

It is my understanding that Dean Chemerinsky made this statement specifically about the approach taken in the article on "First Amendment Opportunism" that is discussed in

Question 13. That article was not intended to provide advice for university administrators. The advice that I have given to university administrators, in my role as President of the Louis D. Brandeis Center, is reflected rather in the LDB Best Practices Guide for Combating Campus Anti-Semitism and Anti-Israelism. (see <http://brandeiscenter.com/best-practices-guide-for-combating-campus-anti-semitism-and-anti-israelism/>). Specifically, I have generally tried to avoid advising college administrators to “balance” the concerns described in this question. Rather, I have urged public university administrators to protect free speech to the full extent required under the First Amendment while also fully complying with all applicable antidiscrimination laws. If confirmed, I would advise administrators to comply with all applicable statutes and regulations and would direct them to OCR policies, such as the 2003 First Amendment Dear Colleague letter.

19. When does hate speech become harassment or discrimination? When does hate speech create a hostile environment so severe that OCR has jurisdiction to take enforcement action to address it?

The line between hate speech protected by the First Amendment and actionable harassment often turns on the particular facts and circumstances. Recognizing and taking action against illegal harassment in a manner consistent with constitutional speech protections is one of the most difficult and important functions of OCR’s enforcement activities. If confirmed, I will do my best to ensure that OCR consistently undertakes vigorous enforcement of civil rights statutes in a manner consistent with the U.S. Constitution.

20. In April of 1998, you spoke at a Traditional Values Coalition news conference. You spoke in opposition to a bill sponsored by Senator Kennedy and Senator Specter to expand hate crimes legislation to cover violence based on sexual orientation, calling it a “slippery slope to controlling our thoughts and motivations,” and referenced a “multicultural” and “homosexual” agenda. Do you stand by the comments you made at the April 1998 Traditional Values Coalition news conference about hate crimes legislation? Do you support the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act enacted into law in 2009?

My views on such matters have evolved since 1998. I support full enforcement of federal hate crimes laws.

21. During the same conference, you spoke strongly against President Clinton’s National Hate Crimes Prevention Curriculum (“Healing the Hate” curriculum.) You said it authorizes and legitimizes indoctrination. You read a particular quote that you objected to, which referenced “prejudice and contempt, cloaked in the pretense of religion or political conviction.” Do you stand by the comments you made at the April 1998 Traditional Values Coalition news conference? When does religious conviction or personal moral beliefs permit students to make discriminatory or hurtful comments about their peers based on their race, religion, gender or sexual orientation?

As I indicated in response to the prior question, my views on such matters have evolved since 1998. I can think of no such exception to federal civil rights laws.

22. Secretary DeVos revoked joint Department of Justice and Department of Education guidance clarifying the protections afforded to transgender students. In doing so, she said that protections for transgender students are “best solved at the state and local level. Schools, communities, and families can find – and in many cases have found – solutions that protect all students.” Do you agree that the scope of protections afforded to students under Title IX is an issue best resolved at the state and local level?

Title IX is a federal civil rights statute. For this reason, the scope of protections afforded to students under Title IX is best resolved at the federal level. Title IX prohibitions on sex discrimination, including harassment based on sex stereotyping, continue to protect all students, including transgender students. It is also appropriate for state and local authorities to adopt additional measures to protect all students if they choose to do so.

23. Does Title IX provide transgender students the right to access facilities consistent with their gender-identity? Will you commit to ensuring that OCR consistently investigates complaints that allege transgender students have been denied access to facilities consistent with their gender-identity?

Title IX prohibits discrimination based on sex. As previously indicated, Title IX prohibitions on sex discrimination, including harassment based on sex stereotyping, continue to protect all students, including transgender students. The question as to whether Title IX provides additional protections to transgender students beyond those described above, and the nature and scope of such protections, is currently being litigated. If Congress should pass a law providing OCR with the authority described in this question, I would commit, if confirmed, to ensuring that OCR fully and vigorously enforces it. Similarly, if confirmed, I would commit to ensuring that OCR investigates complaints consistently with any decision that the U.S. Supreme Court should issue on this matter.

24. Does Title IX require schools to take action in response to bullying or harassment on the basis of a students’ sexual orientation or gender identity? If so, under what circumstances does OCR have jurisdiction over these types of complaints?

Title IX obligates schools to respond to incidents of bullying and harassment based on sex so that all students are protected against sex discrimination. This protection applies to each and every student regardless of sexual orientation or gender identity. OCR has jurisdiction over complaints that any school receiving federal education funding has subjected students to sex discrimination in the form of sex-based bullying or harassment.

25. Are there any regions where you believe OCR investigators do not have the authority to investigate complaints of 1) gender-identity discrimination or 2) sexual-orientation discrimination? If so, which regions?

OCR has nationwide jurisdiction under Title IX to investigate complaints of sex discrimination against any student, regardless of gender identity or sexual orientation.

26. In your view, is it appropriate for Regional Directors or individual OCR investigators to determine whether Title IX prohibits sexual orientation or gender identity discrimination?

No; the scope of Title IX's prohibition against discrimination based on sex is a legal determination that requires national consistency within OCR, and should not be determined by OCR's individual Regional Directors or individual investigators.

27. In interviews with my staff and in your confirmation hearing, you have repeatedly called the U.S. Department of Education's Civil Rights Data Collection (CRDC) "valuable" and "important," citing your experiences using the data when you worked at the Department during the George W. Bush Administration. Do you commit to maintaining, at a minimum, the current categories of data collection?

I support the data collection efforts represented in the CRDC. If confirmed, I will continue to consider ways in which the CRDC's usefulness can be improved upon in future data collection cycles.

28. In an August 25, 2017 letter, I wrote to Secretary DeVos about my support for several updated proposals in the most recent proposed revision to the CRDC, including the proposal to include school districts in Puerto Rico in the data collection as well as the proposal to add reporting on computer science classes and school internet access. What do you think of these proposals? Are there other new categories of data collection you would consider adding to the CRDC?

I support the data collection efforts represented in the CRDC. If confirmed, I will continue to evaluate ways in which the CRDC's usefulness can be improved upon in future data collection cycles.

29. In the same letter, I strongly objected to the new proposal to define a student's sex as "the concept of describing the biological traits that distinguish the male and female of a species" rather than the "designation of female or male as indicated in a student's record." As I wrote in the letter, "[b]y asking schools not to identify students based on their own school records, it appears the Department is requiring school employees conduct individual inquiries into students' past medical and social histories. This is an extremely invasive request and an unnecessary violation of students' privacy. All students, including transgender students, deserve to be treated with dignity and respect and their privacy protected by their teachers, schools, and the government." What is your view on this definition of sex as it applies to the CRDC?

Without the benefit of being privy to the discussions occurring in OCR and the Department concerning reasons for inclusion of particular definitions used in the CRDC, I cannot provide an informed view of that definition; however, if confirmed, I look

forward to considering all perspectives in determining ways in which the value of the CRDC as a data and enforcement tool can be strengthened.

30. Beginning with the 2009-2010 collection, school districts have been required to report information about restraint and seclusion of students at school to the Civil Rights Data Collection (CRDC). But according news reports, many school districts—including school districts with large student enrollments such as New York and Chicago—fail to report any data about restraint and seclusion. If confirmed, what specific steps will you take to bring school districts that do not report accurate information on the CRDC into compliance? Will you accept and investigate OCR complaints about schools that fail to report their restraint and seclusion data to the CRDC?

I am aware through media reports of the problem of discrepancies in data reported through the CRDC. If confirmed, I will consider appropriate ways for continually strengthening the reliability of the data collected by the CRDC, including enforcement options as allowed by law.

31. The Brandeis Center under your leadership filed a joint amicus brief in *Fisher v. University of Texas at Austin*. The brief quotes Daniel Golden’s argument that “Asian Americans are the new Jews” and the “most disenfranchised group” in college admissions. Do you personally endorse this view? What does “Asian-Americans are the new Jews” mean to you?

I personally believe that many Asian Americans face stereotypes, discrimination, and bias today, just as Jewish Americans have faced analogous challenges historically. This is unacceptable. I do not have a view on whether Asians are the “most disenfranchised group.” However, I do think that it is important to address discrimination against all groups.

32. The Supreme Court disagreed with the positions set out in this brief and ruled in favor of the University and important non-governmental partners of the Office of Civil Rights. Do you still agree with arguments made in the Brandeis Center’s amicus brief in *Fisher v. University of Texas (Fisher I)*?

I believe that OCR must apply the law as interpreted by the U.S. Supreme Court in its decisions including the *Fisher* case.

33. As Acting Assistant Secretary for Civil Rights in 2004, you published a report encouraging schools to use race-neutral policies, characterizing affirmative action as a set of discriminatory and unlawful “racial preferences” that pose an obstacle “to the achievement of a color-blind society.” Do you agree with the Supreme Court that race-conscious admissions are constitutional and that affirmative action is necessary to achieve the compelling interest of diversity in education?

Respectfully, I do not share that characterization of the 2004 report. Indeed, in the letter introducing that report, I wrote that, “The Supreme Court’s decisions in the Michigan

affirmative action litigation affirm that our shared commitment to diversity is both compelling and just when pursued within lawful parameters.” If confirmed, I would apply the law in the manner set forth by the U.S. Supreme Court, including Supreme Court decisions dealing with the constitutionality of affirmative action and the compelling interest of diversity.

34. In a law review article you authored titled, “The Right Frontier for Civil Rights Reform,” you wrote that the use of race-conscious admissions “appears to have caused demonstrable harms, not only to the qualified white and Asian applicants who have presumably been denied admission on the basis of their race, but also the black (or Hispanic) applicants who have been admitted on that basis.” Do you stand by that position? If so, how will that influence your enforcement of Title VI as interpreted by the Bakke, Grutter, and Gratz decisions?

The quoted language referred to the situation at one institution at a particular time in the past. I do not recall the particular incident well enough to have a view about it now; however, any views that I might have had about it in the past would not influence my enforcement of Title VI if I were confirmed.

35. Do you believe disparities in accessing or participating in athletics exist for women and girls of color? If so, do you think that OCR should take steps to address those disparities?

I believe that disparities unfortunately exist for women and girls of color with respect to access to and participation in athletics. If confirmed, I will ensure that OCR remains committed to vigorous enforcement of Title IX and Title VI by investigating discrimination based on sex and race so that all students have access to their school’s programs and activities, including athletics.

36. The Department adopted a three-part test in 1979 to assess schools’ compliance with Title IX’s athletics participation requirements. Do you believe this three-part test requires institutions to implement quotas or to cut male teams to come into compliance with Title IX?

No.

37. Title IX prohibits discrimination on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom. In order to comply with that prohibition, schools are required to excuse absences for pregnant students for as long as medically necessary, to allow students to make up work missed due to pregnancy or related conditions, and to provide accommodations that are reasonable and responsive to pregnant students’ needs. Will you enforce Title IX protections for pregnant and parenting students, as well as for students who terminate their pregnancies?

If confirmed, I will enforce Title IX protections against sex discrimination for all students, including pregnant and parenting students.

38. The Supreme Court has ruled in *Brown v. Board of Education of Topeka* that separating students based on race is unconstitutional, creating inherent inequities. You have supported policies that allow for separating schools and classrooms based on the sex of students. In your opinion, how can separate schools for boys and girls offer equal opportunity when separate schools based on race do not?

If confirmed, I will support policies that implement applicable law and regulation. Current Department regulations permit single-sex education to occur within certain parameters, and I will enforce those regulations.

*Brown v. Board of Education was a decision of fundamental importance. On matters pertaining to single-sex education, I would if confirmed refer specifically to the principles established by Justice Ruth Bader Ginsberg in *United States v. Virginia* (the “VMI” case) and reflected in OCR regulations.*

39. Is it permissible for schools to offer classes in a coeducational setting and a single-sex setting for one sex but not the other?

Current Department regulations permit schools to provide single-sex classes or extracurricular activities only under certain circumstances as set forth in 34 C.F.R. 106.34(b). To comply with that regulation, a school may be required to provide a substantially equal single-sex class or extracurricular activity for the excluded sex.

40. Women and girls, particularly girls and women of color, are severely under-represented in fields that are non-traditional for their gender, such as science, technology, engineering, and math (STEM). Do you believe that OCR has a role in ensuring that discrimination does not prevent girls and women from entering or being pushed out of fields that are nontraditional for their gender? If so, what is that role and what steps would you take to determine what needs to be done to eliminate such discrimination?

OCR has a critical role in remedying sex-based discrimination for all students, including women and girls in the context of discrimination that prevents women and girls from participating in STEM education. If confirmed, I would ensure that OCR vigorously enforces Title IX protections for women and girls in all educational programs and activities.

41. Do you believe that direct cross-examination of a complainant by a respondent is ever appropriate in Title IX hearings and investigations? If yes, when is it appropriate? Are there times when it is required?

It would not be appropriate for me to provide an opinion on a matter that is under pending consideration by the Department, but if confirmed, I look forward to working with the Secretary on this issue.

42. Do you believe that mediation is appropriate in cases of sexual violence and sexual assault? Do you believe that informal resolutions are appropriate in cases of sexual violence and sexual assault?

It would not be appropriate for me to provide an opinion on a matter that is under pending consideration by the Department, but if confirmed, I look forward to working with the Secretary on this issue.

43. Do you believe that schools should wait or not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation (with allowances for temporarily delaying fact-finding while police are gathering evidence)?

It would not be appropriate for me to provide an opinion on a matter that is under pending consideration by the Department, but if confirmed, I look forward to working with the Secretary on this issue.

44. Do you believe that it is ever appropriate for respondents to be allowed the right to appeal case outcomes but not complainants?

It would not be appropriate for me to provide an opinion on a matter that is under pending consideration by the Department, but if confirmed, I look forward to working with the Secretary on this issue.

45. Can schools fulfill their Title IX obligations if their process or procedure for handling a case of sexual violence or assault is different from other dispute resolution processes?

It would not be appropriate for me to provide an opinion on a matter that is under pending consideration by the Department, but if confirmed, I look forward to working with the Secretary on this issue.

46. If you are confirmed, will the Office for Civil Rights enforce the ADA's community integration mandate, pursuant to the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), which prohibits the unnecessary segregation of people with disabilities, including students? If not, why not?

*It's my understanding that the Department of Justice and the Department of Health and Human Services' Office for Civil Rights have primary responsibility for implementing the Supreme Court's decision in *Olmstead* to ensure that persons with disabilities receive services in the most integrated setting appropriate to their needs. If confirmed to lead OCR, I will as appropriate work with the Department of Education's Office of Special Education and Rehabilitative Services as well as DOJ and HHS to ensure that OCR abides by all applicable Supreme Court precedent.*

47. The Department of Education took the position in *K.M. v. Tustin Unified School District* (725 F.3d 1088 (9th Cir. 2013)) that the Individuals with Disabilities Education Act (IDEA) and Title II of the ADA impose different requirements on schools providing

communication services to students with disabilities. Do you agree with this position? If not, why not?

It would not be appropriate of me to opine on particular actions undertaken by the previous Administration. If confirmed, I will lead OCR in such a manner as to fully and effectively enforce all applicable provisions of Title II of the ADA (over which OCR has jurisdiction), and work with the Department's Office of Special Education and Rehabilitative Services with respect to enforcement of the IDEA.

48. In 2013 the Department of Justice sent a letter to the state of Wisconsin stating that the state's school choice program, which is funded and administered by the state, was subject to Title II of the ADA, which prohibits disability discrimination by state and local governments. The letter states that a student who is eligible for the school choice program "is entitled to the same opportunity as her non-disabled peers to attend the voucher school of her choice and to meaningfully access the general education curriculum offered by that school." Do you agree with this interpretation of the ADA? If not, why not?

It would not be appropriate of me to opine on particular actions undertaken by the previous Administration. If confirmed, I will lead OCR in such a manner as to fully and effectively enforce all applicable provisions of Title II of the ADA.

49. Under your leadership, will the Office for Civil Rights continue to process complaints regarding whether private schools participating in voucher programs violate a student's rights under the ADA or Section 504?

If confirmed, I will lead OCR in such a manner as to fully and effectively enforce the provisions of Title II of the ADA and Section 504 of the Rehabilitation Act of 1973.

50. The Departments of Education and Justice issued joint guidance in 2014 to explain schools' obligations under Title VI to ensure that their enrollment practices do not discriminate against students on the basis of their "actual or perceived citizenship or immigration status." This guidance applies the Supreme Court's ruling in Plyler v. Doe, 457 U.S. 202 (1982). Was this guidance appropriate? Do you commit to maintain this 2014 guidance? If not, why not?

It is my understanding that the Department is under presidential Executive Order to systematically review all regulations and guidance, and it would be premature of me to weigh in on that process without being privy to the discussions occurring in the Department in that regard. If confirmed, I look forward to engaging in the regulatory review process as it pertains to the 2014 Dear Colleague Letter on school enrollment procedures that addresses compliance with Federal civil rights laws and U.S. Supreme Court precedent.

51. The 2015 joint guidance issued by the Departments of Education and Justice clarifies schools' obligations under Title VI to ensure that English Language Learner (ELL) students have equitable access to educational opportunities. Further, the guidance

promotes access to meaningful communication with schools for limited English proficiency (LEP) parents. Was this guidance appropriate? Do you commit to maintain this 2015 guidance? If not, why not?

It is my understanding that the Department is under presidential Executive Order to systematically review all regulations and guidance, and it would be premature of me to weigh in on that process without being privy to the discussions occurring in the Department in that regard. If confirmed, I look forward to engaging in the regulatory review process as it pertains to the 2015 Dear Colleague Letter on ELL and LEP issues.

52. Earlier this year President Trump rescinded Deferred Action for Childhood Arrivals (DACA), effectively revoking Dreamers' work permit eligibility and protection from deportation. What will OCR do under your leadership to protect access to education for Dreamers and undocumented students?

If confirmed, I will ensure that OCR vigorously enforces Title VI of the Civil Rights Act of 1964 to protect every student's right to access his or her education free from discrimination based on race, color, or national origin, consistent with U.S. Supreme Court precedent, such as Plyler v. Doe. Plyler v. Doe established every child's right to receive a public education regardless of immigration status.

53. If confirmed, how will OCR under your leadership treat schools that offer sanctuary protections to undocumented students and teachers?

Under my leadership if I am confirmed, OCR will hold all schools that receive federal funds accountable for compliance with the civil rights statutes under OCR's jurisdiction.

54. Secretary DeVos has denounced the longstanding use of Dear Colleague Letters, and in a September 7th speech, she declared "the era of rule by letter is over." In your role as Acting Assistant Secretary for OCR during the George W. Bush Administration, you signed five Dear Colleague letters clarifying schools' Title VI and Title IX obligations. What is your view on the use of Dear Colleague Letters? Do you agree with Secretary DeVos' position on the use of subregulatory guidance? When is the use of subregulatory guidance appropriate?

Dear Colleague Letters and other forms of subregulatory guidance do not have the force or effect of law, but can provide useful clarifications of existing law and regulation. I agree with the Secretary's position as to subregulatory guidance that has been treated as legally binding without complying with the Administrative Procedures Act.

55. Do you intend to maintain all current Dear Colleague letters unless there is an intervening change in the law or regulations? If not, what factors would lead you to revoke current guidance on a particular issue?

It is my understanding that the Department is under presidential Executive Order to systematically review all regulations and guidance, and it would be premature of me to

weigh in on that process without being privy to the discussions occurring in the Department in that regard, including factors to be considered in recommending whether particular guidance should be modified or revoked.

56. Do you commit to inform the members of this Committee if you intend to undertake any review or revision of any existing guidance?

My understanding is that the Department is thoroughly reviewing all guidance pursuant to Executive Order 13777. If confirmed, I will work, as appropriate within my role, with Department officials, including the Department's Office of Legislation and Congressional Affairs, on these matters.

57. What is your opinion about whether minority members of the HELP Committee have the authority to conduct oversight of the U.S. Department of Education?

I appreciate and respect the oversight responsibilities of members of Congress and this Committee. If confirmed, I will work with the Office of Legislation and Congressional Affairs to be as responsive as possible to all Congressional inquiries in a timely and thoughtful way, regardless of party.

58. If confirmed, do you agree to provide briefings to members of the HELP Committee, including minority members, if requested?

If confirmed, I will work with my colleagues in the Office of Legislation and Congressional Affairs to ensure any briefing requests from members of the HELP Committee regardless of party or position are responded to in a timely and appropriate manner, whenever participation by the Office for Civil Rights is requested.

59. If confirmed, do you commit to answer promptly and completely any letters or requests for information from individual members of the HELP Committee including request for Department of Education documents, communications, or other forms of data?

If confirmed, I work with the Office of Legislation and Congressional Affairs, as appropriate, to be as responsive as possible to all Congressional inquiries and requests for information in a timely and thoughtful way.