

December 11, 2017

The Honorable Lamar Alexander, Chairman  
The Honorable Patty Murray, Ranking Member  
Committee on Health, Education, Labor and Pensions  
U.S. Senate  
Washington, D.C., 20510

Dear Chairman Alexander, Ranking Member Murray, and members of the U.S. Senate HELP Committee:

As youth- and survivor-led organizations that advocate for survivors of campus sexual assault, we, End Rape on Campus and Know Your IX, write to express our opposition to the nominee for Assistant Secretary for Civil Rights, Mr. Kenneth Marcus. We ask that the Committee examine his record carefully and thoroughly consider how his views expressed during his hearing will negatively impact student survivors and their access to education.

The Department of Education's leadership sets the tone for how schools, and the public more broadly, treat student survivors of gender violence. The Secretary of Education, Betsy DeVos, and Acting Assistant Secretary of the Office for Civil Rights, Candice Jackson, have made it clear that the current Department of Education does not support student survivors and that their intent is to roll back civil right protections for survivors. Secretary DeVos refused to answer specific questions about sexual violence and Title IX in her confirmation hearing, but has now replaced 72 pages of detailed guidance on Title IX with a mere 10 pages of confusing guidance that gives special rights to accused rapists. Acting Assistant Secretary Jackson has made many concerning statements, most notably her false claim in the New York Times in July 2017 that 90% of Title IX investigations are attributed to drunken mistakes and breakups. After Mr. Marcus' public hearing last week, we do not have faith in his ability to carry out his job to ensure survivors have equal access to education as ensured under the laws he would be required to enforce.

Sexual violence on college campuses is an epidemic, one that largely and uniquely impacts students of historically underserved communities. Students of color, LGBTQ students, students with disabilities, and undocumented students face disproportionate rates of sexual violence on campus as well as additional barriers in accessing resources and assistance. As a consequence, the position for which Mr. Marcus is being considered will require him to account for the ways in which gender violence overlaps with other systems of oppression such as racism, homophobia, transphobia, and ableism. However, during his hearing Mr. Marcus made it clear that he is not committed to ensuring survivors, especially survivors from marginalized communities, have equal access to education.

One of the most egregious beliefs Mr. Marcus holds is that Title IX does not protect LGBTQ students. During his tenure as Assistant Secretary for Civil Rights Mr. Marcus promised to "aggressively prosecute" schools that punish students who harassed LGBTQ students, as he

believed these harassers were victims of religious discrimination. LGBTQ students face some of the highest rates of sexual harassment and violence, as reported by the White House Council on Women and Girls. It is alarming that Mr. Marcus prioritizes the views of those harassing LGBTQ students over their victims' civil rights and safety. Further, during his hearing, Mr. Marcus could not clearly articulate how he will ensure transgender and gender nonconforming (GNC) students have equal access to education. One in 4 transgender and GNC undergraduate students experiencing sexual assault in college, and 78% of GNC youth reporting "significant abuse at school," yet the Trump Administration recently revoked guidance which clarified transgender and GNC students' civil rights. LGBTQ students cannot afford to be ignored and dismissed by The Office for Civil Rights (OCR), and the schools that rightly protect LGBTQ students' civil rights cannot afford to be aggressively prosecuted. Mr. Marcus' proposition is absolutely unacceptable.

Mr. Marcus stated that the Office for Civil Rights should not have explicitly clarified that preponderance of the evidence was the appropriate standard for Title IX investigations—even though the OCR required schools to use the preponderance standard the last time he was in charge. Additionally, courts have long affirmed preponderance of the evidence is the appropriate standard for adjudicating civil rights violations, including Title IX, Title VI of the Civil Rights Act, and Title VII of the Civil Rights Act of 1964. As the Supreme Court recognized in *Cannon v. University of Chicago*, the drafters of Title IX modeled the statute after Title VI and "explicitly assumed that [Title IX] would be interpreted and applied as Title VI had been." As claims of discrimination and racially motivated harassment under Title VI are adjudicated using the preponderance standard, so too are claims of discrimination and sexual harassment (including sexual violence) made under Title IX. Beyond civil rights litigation, preponderance of the evidence is the standard employed in most civil actions. If the Department indicated its tolerance for other standards of proof, it would create a system where victims of gender-based harassment face uniquely high barriers while victims of harassment on the basis of all other protected characteristic do not. Such a system would be grossly inconsistent with case law as well as Title IX's purpose of eliminating discrimination on the basis of sex.

Transparency on the issue of sexual violence in schools has large bipartisan support. Prior to the Department of Education publishing the list of schools under investigation for Title IX complaints, the burden fell on the complainant to announce that their school was under investigation and the public was unaware of the scope of the issue. The Department of Education publishing the list has been critical for students, parents, and communities to know whether their school is under investigation for failure to comply with Title IX—vital safety information that students and families deserve to know. During his hearing, not only did Mr. Marcus fail to commit to continue to publish this list, but he also failed to articulate his reasoning for not committing to the publication of the list. We are extremely concerned that Mr. Marcus is interested in going back to a time when schools' failures to properly address sexual violence were swept under the rug. If Mr. Marcus refuses to publish this list, he will harm students and families while giving cover to institutions that deliberately cover up, and fail to adequately respond to, sexual violence.

Not only did Mr. Marcus tell the Senate HELP committee that he couldn't name a single civil rights violation committed by the Trump Administration, he also fed into the false narrative surrounding undocumented immigrants and expressed apathy towards protecting undocumented students. During his hearing Marcus said he felt the office for which he is being considered would not be responsible for protecting undocumented students, either not knowing or willfully omitting his knowledge that the U.S. Department of Education released guidance in 2014 that reminded schools that Title VI prohibits discrimination on the basis of a student's national origin and immigration status. Undocumented students and survivors have consciously expressed that they do not report instances of sexual violence out of fear that they will be deported. Because of this added hardship, many undocumented student survivors are unable to access the resources available to them, and may have to share academic and living spaces with their rapist. Mr. Marcus' apathy as the Trump administration continues their attack on marginalized communities, demonstrates why student survivors cannot afford a head of OCR that is unresponsive to the needs of the most oppressed communities.

Campus sexual violence requires transparency and accountability from universities across the country. The appointment of Mr. Marcus would only limit both of those core tenets. By supporting the rescinding of the 2011 Dear Colleague Letter, not taking a strong stance in support of support transgender students, and suggesting that he would omit the publican of federal Title IX investigations, Mr. Marcus is turning a blind eye to survivors. By supporting this harmful guidance and refusing to uphold survivors civil rights, Mr. Marcus is deterring survivors from reporting.

In a time of pervasive sexual violence and harassment on college campuses, in Washington D.C., and in the workplace, it is imperative that we have an Assistant Secretary who will commit to supporting survivors, not one who is uninterested in upholding their civil rights.

Therefore, we respectfully oppose Mr. Kenneth Marcus as nominee for Acting Assistant Secretary for the Office for Civil Rights. We ask that the committee consider these concerns, and the best interests of survivors of campus sexual assault, LGBTQ students, students of color, and undocumented students in the states they represent.

Respectfully,  
End Rape on Campus  
Know Your IX a Project of Advocates for Youth

