

Congress of the United States

Washington, DC 20510

May 22, 2018

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

Dear Secretary DeVos:

We are writing to express our serious concerns with the dismissal of more than 500 disability rights complaints by the Office for Civil Rights (OCR) in the Department of Education (the Department). These dismissals are the result of OCR's new protocol for addressing complaints as outlined in the recently updated Case Processing Manual (the Manual).¹ The updated version of the Manual established a protocol for OCR to discharge, without investigation, complaints that are considered to be serial filings, similar filings across institutions, or filings OCR finds unreasonably burdensome. We are concerned the protocol for dismissing complaints, without investigation, both undermines the effectiveness of OCR and relinquishes its mission to address both singular and systemic bias, discrimination, and lack of access to educational programs at all levels. At worst, the new protocol will be both illegal and violate OCR's mission to protect students against discrimination.

OCR is responsible for enforcing federal civil rights statutes that prohibit discrimination based on race, color, national origin, sex, disability or age, in elementary and secondary education and post-secondary education. In fact, OCR's stated mission is to "ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation's schools."² Accordingly, *if there is evidence that a civil rights law has been violated, OCR is obligated to open a case.*

The changes outlined in the Manual regarding investigation and closure of complaints are antithetical to the mission. Selectively choosing which students will be protected and which complaints will be investigated is a violation of the law and will result in serious civil rights violations going unchallenged. Ultimately, the changes in operations dictated by the new procedures in the Manual will result in discrimination against individuals and groups of students and a lack of equal access to education for children and youth that OCR is charged with protecting.

¹ United States Department of Education Office for Civil Rights, *Case Processing Manual* (2018). (online at: <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>).

² United States Department of Education Office for Civil Rights, *About OCR*, (2015). (online at: <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>).

The New York Times³ recently reported that protocols in the Manual have been used to dismiss more than 500 disability complaints filed by disability rights advocates who identified non-compliance concerns at institutions of higher education and preK-12 schools, such as website features that limit accessibility for students and family members with disabilities. Court decisions such as *Brown v. Board of Education of Topeka* in 1954⁴, through the early 1970s disability cases⁵, up to the most recent *Endrew F. v. Douglas* Supreme Court decision⁶ have affirmed equal access to quality education for all children and youth. The new protocols of the Manual will to undermine the protections against discrimination and guarantees of access to quality education that the court decisions cited above and many others have determined to be the rights of all children and youth.

Many cases filed by individuals, dismissively referred to by some as “frequent fliers”, are in fact cases brought by advocates who have identified systemic violations of law who are using the complaint process to address these violations. Without support from advocacy groups who can often determine violations across LEAs and across States, the responsibility for reporting violations falls to family and community members, who may not have the resources to understand or investigate individual civil rights laws or the scope to identify systematic violations. Dismissing multiple complaints, without investigation, from the same advocacy group or individuals ignores OCR’s responsibility to address systematic bias and discrimination.

We also want to address the efficiency rationale that has been cited for the changes to the Manual. Since Horace Mann and Samuel Howe advocated for the education of all children, the United States has built a policy that is unique in the world: We educate every child, no matter their race, creed, religion, country of origin or ability. With our civil rights and education laws, we have made it a policy of our country that quality education must be available to all children and youth. To weaken access to equal education by closing complaints of bias, discrimination and lack of access, without investigation, under the guise of efficiency is contrary to the foundational ideal of equal rights under the law.

We understand that OCR has a heavy caseload and backlog. However, changing the Manual to permit OCR to dismiss a complaint that “places an unreasonable burden on OCR’s resources”⁷ allows for selective responses to complaints resulting in the protection of the civil rights of only some students while allowing others to be violated. Dismissing cases without investigation through the use of arbitrary standards, regardless of merit, is not the appropriate way to resolve such a backlog. Rather, the Department has a duty to ensure that OCR is adequately staffed and has the resources needed to fully implement the law and guarantee all students the right to an equal education.

³ Erica Green, “DeVos Education Dept. Begins Dismissing Civil Rights Cases in Name of Efficiency,” *The New York Times* (20 April, 2018) (online at: <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html>).

⁴ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (online at: <https://supreme.justia.com/cases/federal/us/347/483/case.html>)

⁵ *PARC v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (1972) (online at: <https://www.pubintlaw.org/wp-content/uploads/2012/04/PARC-Consent-Decree.pdf>).

⁶ *Endrew F. v. Douglas County School District*, 580 U.S. ____ (2017) (online at: https://www.supremecourt.gov/opinions/16pdf/15-827_0pm1.pdf).

⁷ United States Department of Education Office for Civil Rights, *Case Processing Manual* (2018), p. 11.

Moreover, we fear this standard may be used to dismantle students' civil rights throughout the Department. Based on an efficiency rationale, a future administration could fiscally starve OCR and argue that only limited responses to civil rights violations would be investigated, resulting in OCR abandoning the very intent behind its creation. In fact, the current administration is moving dangerously close to such a position.

Taken in the context of other actions by the Department, it is clear to us that the updates to the Manual are one of a series of efforts by the current administration to undermine OCR. On June 16, 2017, the New York Times reported that the Administration was scaling back civil rights investigations by eliminating the standard practice of obtaining three years of complaints to assess an institution's compliance.⁸ On December 15, 2017, the Wall Street Journal⁹ reported that 45 full-time positions would be cut from OCR. The FY 2019 budget proposed by the Department recommended a \$10 million cut from FY 2018 levels, a devastating blow to an already underfunded and overloaded office. Finally, since publishing the Manual, OCR's workload has been increased by renegotiating cases that had already been settled with school districts.¹⁰ These behaviors on the part of the Department demonstrate a pattern of disregard for the resources needed to maintain an office dedicated to ensuring students' rights to an equal education.

Given our concerns, we have a number of questions related to the changes in the Manual and the practices that will follow from those operational changes. Please provide responses to the following questions regarding the Case Processing Manual published by the Department of Education's Office for Civil Rights on March 5, 2018, within 14 days.

1. According to the New York Times¹¹, more than 500 civil rights complaints have been dismissed under the new policy without investigation. In some cases, these complaints were under active investigation and summarily dismissed without a conclusion to the investigation. Since the issuing of the updated Manual, we are aware of no oversight of the policy change or accountability of the dismissals. Please provide the total number of cases that have been dismissed since March 5 and the number of cases that were dismissed for each of the reasons under Section 108 (a) through (u). In addition, please provide a breakdown of each of the complaints that have been dismissed since March 5, 2018, including the nature of the violation, the reason(s) for dismissal under Section 108, whether an investigation was open at the time of dismissal and the evidence justifying the dismissal.

⁸ Erica L. Green, "Education Dept. Says It Will Scale Back Civil Rights Investigations," *The New York Times* (16 June 2017) (online at: <https://www.nytimes.com/2017/06/16/us/politics/education-department-civil-rights-betsy-devos.html>).

⁹ Michelle Hackman, "Trump Job Cuts at Education Department Worry Civil Rights Advocates," *The Wall Street Journal* (15 December 2017) (online at: <https://www.wsj.com/articles/trump-job-cuts-at-education-department-worry-civil-rights-advocates-1513333800>).

¹⁰ Ben Wermund, "Trump administration renegotiates months-old civil rights agreements," *Politico Pro* (14 May 2018).

¹¹ Erica Green, "DeVos Education Dept. Begins Dismissing Civil Rights Cases in Name of Efficiency," *The New York Times* (20 April, 2018) (online at: <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html>).

2. According to the same New York Times article, a disability rights advocate in Michigan filed more than 2,400 complaints with OCR against educational institutions across the country that have websites that people who are deaf or blind or who struggle with fine motor skills cannot navigate. This individual has reportedly secured more than 1,000 agreements with institutions to bring their websites into compliance with the Rehabilitation Act of 1973, which prohibits discrimination against people with disabilities and requires that electronic and information technologies be accessible to them. Under the new protocol, it would seem that each of these 2,400 cases would be dismissed, including the more than 1,000 that clearly had merit. How will OCR ensure that cases with merit are not dismissed before being investigated? Please provide a breakdown of the number of cases filed by “frequent fliers” in FY2010-FY2017, the nature of the violation(s), and the resolution of those cases.
3. How were the changes to the Manual developed? Who was involved in the development and approval of the changes? What, if any, stakeholders were consulted? What, if any, evaluation was conducted to assess procedural bottlenecks? What, if any, alternate solutions were considered to relieve the backlog of complaints, particularly regarding the FY2018 appropriations, which increased the OCR budget by more than \$10 million over FY2017 levels with instructions to “increase its level of full time equivalent employment in order to effectively and timely investigate complaints”?¹²
4. The Manual designates the circumstances under which a complaint can be dismissed, presumably to standardize practices across OCR’s 12 sites and to provide transparency in OCR’s addressing of complaints. A number of the protocols, however, use vague language that is subject to interpretation, which may lead to variation in the execution of dismissals. Section 108 of the Manual states, “When OCR receives written information **at or around the same time** by the same complainant that raises identical allegations against the same recipient, OCR will assign one case number to the complaints.” What is meant by “at or around the same time”? What is the appropriate amount of time to have passed before a complaint can be re-introduced? How will OCR apply this policy in cases that were dismissed because the allegation lacked sufficient detail and were resubmitted with the information necessary to proceed with an investigation?
5. Section 103 of the Manual states, “Written information from one or more than one person that raises the same or a **similar** allegation based on the same operative facts against the same recipient may be assigned one case number.” How “similar” must allegations be to warrant a single case number? How will OCR ensure that the specifics of two similar allegations will be addressed in an investigation?
6. Section 108(t) states, “A complaint is a continuation of a pattern of complaints previously filed with OCR by an individual or group against multiple recipients or a complaint(s) is filed for the first time against multiple recipients that, viewed as a whole, places **an**

¹² *Departments of Labor, Health and Human Services, and Education, an Related Agencies Appropriations Act, 2018*, H.R. 3358, 115th Cong., 2nd Sess. (2018) (online at: <https://docs.house.gov/billsthisweek/20180319/DIV%20H%20LABORHHS%20SOM%20FY18%20OMNI.OCR.pdf>), p. 69.

unreasonable burden on OCR's resources. OCR may consider conducting a compliance review or providing technical assistance concerning the issues raised by the complaint." What is "an unreasonable burden on OCR's resources"? Every complaint adds to the burden of OCR's resources. At which point does the burden become unreasonable? How will OCR ensure that this stipulation is not used to dismiss complaints that are merely undesirable or difficult? Over time, how will OCR prevent "drift" from the original intended interpretation? What are the conditions under which a compliance review or technical assistance will be initiated? What is the goal of a compliance review or technical assistance over-and-above what an initial investigation would conclude?

7. The Associated Press¹³ reported in November 2017 that the Department was considering narrowing the focus of OCR from systemic issues to individual complaints. In the prior Administration, when a student complained of discrimination in a particular class or school, the Department would examine not just the individual case but also whether the incident was part of a broader, systemic problem. By looking at the broader issue, the Department increased efficiency by addressing systemic issues and ensured schools came into compliance before many more individual complaints were filed. In the absence of such a proposal, serial complaints provide insight into systemic issues of discrimination in violation of the law. Given that you are proposing to simply dismiss serial complaints, how will you address issues of systemic discrimination? What guardrails will be put in place to ensure that serial complaints are not evidence of systemic issues?
8. The Manual's efforts to restrict complaints submitted by advocates, or "frequent fliers", consequently redistributes the burden of identifying and reporting of violations to individual victims of civil rights violations or the parents of victims. Individuals rarely have the expertise or resources to interpret the law and so, without the support of advocates, may have to turn to paying lawyers or suffer continued violations. We are particularly troubled by this because once the resolution of violations becomes dependent on financial resources, low income families are disproportionately priced out of an equal education for their children with disabilities. What, if any, effort is OCR making to ensure that these new protocols do not introduce issues of inequality between students from low and high income families?

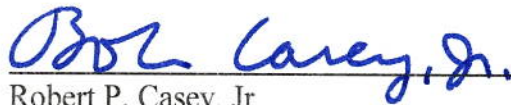
When Congress created the Department of Education in 1979, the Department of Education Organization Act stated that the first purpose of the Department was to "strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual."¹⁴ We are very concerned that the actions taken by the Department to dismiss complaints, without investigation, in the manner described by the updated Manual will result in OCR and the

¹³ Maria Danilova, "Education Department considers narrowing civil rights work," *Associated Press* (22 November 2017) (online at: <https://www.apnews.com/c426dbd252ae4471805d4bf2fb9d1f74/Education-Department-considers-narrowing-civil-rights-work>)

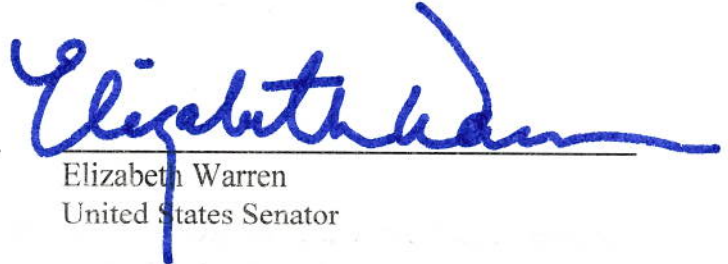
¹⁴ Department of Education Organization Act, Pub. L. No. 96-88, (1979) (online at: <https://www.gpo.gov/fdsys/pkg/STATUTE-93/pdf/STATUTE-93-Pg668.pdf>).

Department abandoning one of the founding purposes of the Department of Education. We look forward to your responses to our questions. We hope that we can work with you to protect the rights of all students and to identify and alleviate bias, discrimination, and lack of access to quality education for all.

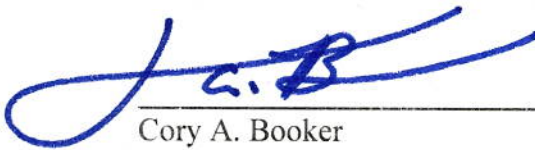
Sincerely,



Robert P. Casey, Jr.
United States Senator



Elizabeth Warren
United States Senator



Cory A. Booker
United States Senator



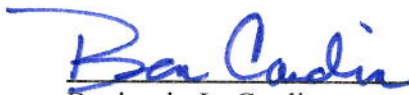
Sheldon Whitehouse
United States Senator



Kirsten Gillibrand
United States Senator



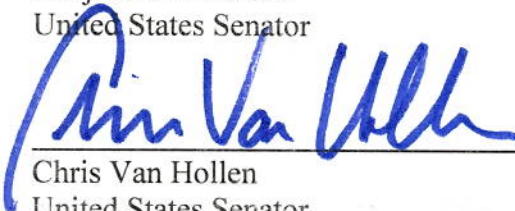
Tammy Duckworth
United States Senator



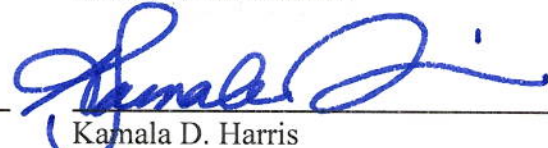
Benjamin L. Cardin
United States Senator



Richard Blumenthal
United States Senator



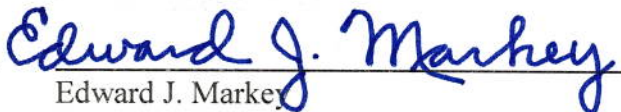
Chris Van Hollen
United States Senator



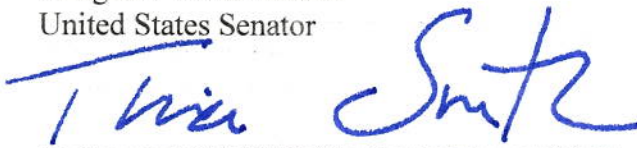
Kamala D. Harris
United States Senator



Margaret Wood Hassan
United States Senator



Edward J. Markey
United States Senator



Tina Smith
United States Senator



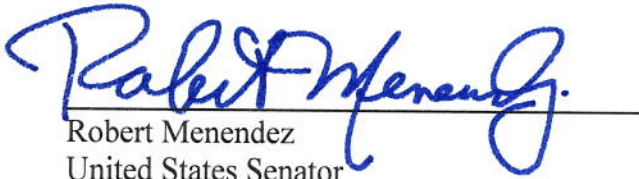
Bernard Sanders
United States Senator



Debbie Stabenow
United States Senator



Gary C. Peters
United States Senator



Robert Menendez
United States Senator

Suzanne Bonamici
Suzanne Bonamici
Member of Congress

Mark Takano
Mark Takano
Member of Congress

Mark DeSaulnier
Mark DeSaulnier
Member of Congress

Lisa Blunt Rochester
Lisa Blunt Rochester
Member of Congress