

May 16, 2018

Via email to brad.thomas@mail.house.gov; kimberly.knackstedt@mail.house.gov

Chairwoman Virginia Foxx
Committee on Education & the Workforce
2176 Rayburn House Office Building
Washington, DC 20515

Ranking Member Robert Scott
Committee on Education & the Workforce
2101 Rayburn House Office Building
Washington, DC 20515

Re: Full Committee Hearing: *Protecting Privacy, Promoting Data Security: Exploring How Schools and States Keep Data Safe*

Dear Chairwoman Foxx and Ranking Member Scott,

The National Women's Law Center appreciates the opportunity to provide testimony for the record in advance of the May 17, 2018 full Committee Hearing entitled *Protecting Privacy, Promoting Data Security: Exploring How Schools and States Keep Data Safe*. The Center has worked for over 45 years to expand the possibilities for women and their families in the areas of education and employment, family economic security, and health. In particular, since Congress enacted Title IX of the Education Amendments of 1972, the Center has been a leader in ensuring that women and girls have equal educational opportunities.

Although student privacy is a topic worthy of greater exploration, we would be remiss to neglect that this hearing takes place on the 64th anniversary of the Supreme Court's decision in *Brown v. Board of Education of Topeka*. That landmark decision ended *de jure* segregation in schools while bringing the nation closer to the promise of equitable access to educational opportunities. Ten years later, Congress passed the Civil Rights Act of 1964 to fulfill that promise for students of color in the face of continuing opposition from schools and local officials. Since then, Congress expanded protections for historically underserved students by passing Title IX, the Rehabilitation Act of 1974 and the Americans with Disabilities Act of 1992. In sum, these civil rights laws aim to ensure that all students have equal access to educational opportunities regardless of race, ethnicity, color, national origin, disability or sex (which includes gender identity, sexual orientation, and pregnancy status). Historically, the Department of Education has the enormous responsibility to ensure that students can attend school free from discrimination through the enforcement of civil rights laws.

Yet, under Secretary Betsy DeVos' leadership, the Department has undermined that obligation and made many students less safe. One of Secretary DeVos' first acts in office was to rescind the guidance that clarifies schools' obligations to transgender and gender nonconforming students—sending the shameful and erroneous message that schools can ignore discrimination suffered by these students. Since then, the Department has continued to signal its hostility to students' civil rights by:

- replacing robust guidance that clarified schools’ Title IX obligations to address sexual assault in a prompt, impartial and equitable manner with a brief Q&A document that blatantly conflicts with the law’s goal of promoting equity in education for survivors and students accused of sexual assault;¹
- issuing an internal Office for Civil Rights (“OCR”) memo that purported to limit the Department’s jurisdictional scope over complaints alleging transgender discrimination;²
- changing OCR policy to reject complaints alleging transgender discrimination based on the denial of access to facilities that match students’ gender identity, even in states where appellate courts have held that such a denial would amount to a Title IX violation and no other court has held to the contrary;³
- amending the OCR case processing manual to eliminate the appeals process, bar complaints from being filed based on journal articles or news media reports, and dismiss complaints filed against multiple recipients that OCR deems place “an unreasonable burden on OCR’s resources”—resulting in the dismissal of hundreds of complaints alleging discrimination against students with disabilities, among others;⁴ and
- advising OCR staff to employ a narrower approach when deciding the scope of investigations into sexual violence and discriminatory discipline complaints,⁵ which would allow discrimination to persist, systemic problems to thrive undetected, and student safety to be threatened.

In addition to these harmful actions, the Department seems eager to undermine other efforts to promote equal educational opportunities for students of color and students with disabilities. Last month, on the 50th anniversary of the assassination of Dr. Martin Luther King, Jr., Secretary DeVos convened a summit questioning whether the Department should preserve guidance meant to ensure students of color are not pushed out of school by unfair discipline policies and practices. The summit, which was shrouded in secrecy, excluded representation from groups disproportionately and uniquely affected by harsh discipline practices, including students with disabilities, Native American students, LGBTQ students, and immigrant and undocumented students.⁶ The Department has also sought to delay regulations meant to identify

¹ *SurvJustice, Inc., et al. v. DeVos, et al.*, Case No. 3:18-cv-00535-JSC (N.D. Cal 2018).

² Rebecca Klein, *After Rolling Back Transgender Student Protections, Here’s What Trump Is Doing Next*, HUFFINGTON POST (June 16, 2017, 12:32 P.M.) http://www.huffingtonpost.com/entry/transgender-students-civil-rights-rules-us_5943f1a3e4b06bb7d272a1ca?za.

³ Dominic Holden, *The Education Department Officially Says It Will Reject Transgender Student Bathroom Complaints*, BuzzFeed News (Feb. 12, 2018, 11:17 A.M.) https://www.buzzfeed.com/dominicholden/edu-dept-trans-student-bathrooms?utm_term=.wix6D79D8#.mdOPQ9dQ8.

⁴ <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html>

⁵ Jessica Huseman & Annie Waldman, *Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government*, PROPUBLICA (June 15, 2017, 8:00 A.M.) <https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>.

⁶ Nat’l Women’s Law Ctr., *Sign-on Letter Criticizing Exclusive School Discipline Summit* (Apr. 4, 2018) <https://nwlc.org/resources/nwlc-sign-on-letter-criticizing-exclusive-school-discipline-summit/>.

significant disproportionality in special education placement and the administration of punitive discipline for students of color under the Individuals with Disabilities in Education Act.⁷ The proposal to delay implementation comes despite the Department receiving comments from hundreds of individuals and organizations in advance of the final rule in 2016, a 2013 study from the nonpartisan U.S. Government Accountability Office (GAO)⁸ showing widespread noncompliance by states with relevant provisions in IDEA, and the fact that states have been aware of this statutory obligation since 2004.

Given the Department's relentless assault on the laws meant to effectuate *Brown* and its abdication of its duty to protect historically marginalized students, we urge Congress to increase oversight of the Department and act to ensure that the Department fulfills its goals to promote equity in educational programs.

Congress has already begun to undertake such measures. The issuance of the GAO report showing that Black students (boys and girls) face disproportionate rates of suspension—along with students with disabilities and boys in general—highlighted the need to preserve guidance aimed at addressing the excessive use of exclusionary discipline for students of color.⁹ Additionally, Congress rejected the Secretary's request to scale back the budget for OCR—providing \$8.5 million more than last fiscal year and blocking plans to consolidate regional offices.¹⁰ We urge you to compel Secretary DeVos to answer questions illuminating the Department's civil rights enforcement activity when she testifies before the committee on May 22, 2018.

Additionally, Congress should ensure that the Federal Commission on School Safety that the Secretary leads makes recommendations to ensure schools create learning environments that are safe and welcoming for all students—particularly survivors of sexual violence, students of color, LGBTQ students and students with disabilities. Indeed, Congress' contributions are essential to this discussion as the Department has continually sought to marginalize these students. Such recommendations should be intersectional in nature to acknowledge that students often fall into overlapping identities which create unique barriers to educational access. And given the increased presence of law enforcement in schools attended predominantly by students of color, the role of school-based law enforcement in exacerbating the school-to-prison pipeline, and ineffectiveness of zero-tolerance policies, recommendations should embrace such disciplinary alternatives as restorative justice, positive behavior intervention and support, and trauma-informed approaches.

Finally, to the extent that the committee wishes to investigate issues of student privacy, it should focus its efforts on reports that institutions may be misinterpreting federal privacy law to

⁷ Assistance to States for the Education of Children with Disabilities, 34 CFR § 300, <https://www.regulations.gov/document?D=ED-2015-OSERS-0132-0318>.

⁸ See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-13-137, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: STANDARDS NEEDED TO IMPROVE IDENTIFICATION OF RACIAL AND ETHNIC OVERREPRESENTATION IN SPECIAL EDUCATION (2013) available at <http://www.gao.gov/products/GAO-13-137>

⁹ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-18-258, DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS AND STUDENTS WITH DISABILITIES (2018) available at <https://www.gao.gov/products/GAO-18-258>.

¹⁰ Andrew Kreighbaum, *As Civil Rights Office Gets More Money, It Limits Investigations*, INSIDE HIGHER ED (March 30, 2018) <https://www.insidehighered.com/news/2018/03/30/more-money-civil-rights-office-comes-it-narrows-its-investigative-work>.

skirt their duty to provide detailed information to survivors regarding the final result of sexual assault investigations. For example, media reports show that some schools erroneously use the Federal Educational Records Privacy Act (FERPA) to withhold information on school safety plans from student complainants after a finding that sexual misconduct occurred.¹¹ This assertion is wrong as FERPA specifically allows for schools to disclose this information and the Clery Act requires this disclosure for complainants attending institutions of higher education.¹²

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Thank you for considering the Center's testimony on the importance of preserving and enforcing students' civil rights. We would be happy to discuss our recommendations further or answer any questions you may have. For additional information, please contact Emily Martin, Vice President for Education and Workplace Justice, or Adaku Onyeka-Crawford, Senior Counsel, at 202-588-5180.

Sincerely,



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Adaku Onyeka-Crawford
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¹¹Tyler Kingkade, *He Said His Teammates Assaulted Him. Then His School Kept Their Punishment Secret*, BuzzFeed News (May 9, 2018) https://www.buzzfeed.com/tylerkingkade/privacy-laws-students-sexual-assault-harassment-ferpa?utm_term=.dqQZo5KwD#.lp62jXbQW.

¹² Nat'l Women's Law Ctr., *Actually, You Can Disclose That: Transparency in Sexual Assault Reporting & the Family Educational Records Privacy Act (FERPA)*, available at <https://nwlc.org/resources/actually-you-can-disclose-that-transparency-in-sexual-assault-reporting-the-family-educational-records-privacy-act-ferpa/>.