



# Review of U.S. Department of Education Freedom of Information Act (FOIA) Program

What OGIS Found	What OGIS Recommends
<p><b>1. Education’s FOIA regulation has not been updated since 2010 and is out of compliance with the statute. (<i>Recommendation 1</i>)</b></p> <p><b>2. Education’s template letters and standard language are not in compliance with the statute and could be clearer. (<i>Recommendations 2 &amp; 3</i>)</b></p> <p><b>3. Technology that Education uses to administer FOIA is not seamless or being used to its fullest extent. (<i>Recommendation 4</i>)</b></p> <p><b>4. Management controls and a decentralized FOIA program challenge Education’s effectiveness and efficiency. (<i>Recommendations 5, 6 &amp; 7</i>)</b></p> <p><b>Opportunities exist for the Department’s new Chief FOIA Officer to fulfill the statutory duties of ensuring compliance with FOIA and recommending improvements to FOIA implementation.</b></p>	<p><b>1. Education must update its FOIA regulation to reflect amendments to FOIA as well as the Department’s processes for implementing the substantive and procedural changes.</b></p> <p><b>2. Education must comply with FOIA by providing estimated dates of completion to requesters who seek such information.</b></p> <p><b>3. Education must update its template letters and standard language to comply with the statute.</b></p> <p><b>4. Education should establish a partnership between the FOIA Service Center and the Department’s Customer Service and Technology Team to analyze the costs and benefits of moving to a Department-wide system and leverage technology to improve and streamline the Department’s FOIA process.</b></p> <p><b>5. Education should track and establish response time performance standards for program office records searches.</b></p> <p><b>6. Education should use data to set goals for the numbers of cases closed and pages reviewed by each FOIA processor.</b></p> <p><b>7. Education should incorporate FOIA performance standards into performance plans for all employees with FOIA responsibilities.</b></p>
<b>What OGIS Reviewed</b>	
<p><b>OGIS reviewed written materials including the Department’s FOIA regulation, standard operating procedures, management reports, FOIA Annual Reports, and organizational charts, among other materials. OGIS conducted 12 interviews of Education FOIA professionals and administered an online survey to 42 Department FOIA professionals. OGIS also reviewed a statistically significant random sample of 340 initial request files processed in Fiscal Year (FY) 2017, the most recent available at the time of our review in August 2018.</b></p>	

## **Introduction**

The Freedom of Information Act (FOIA) mandates that the Office of Government Information Services (OGIS) review FOIA policies, procedures and compliance, and identify procedures and methods for improving FOIA compliance.<sup>1</sup> OGIS periodically conducts independent, systematic reviews of agencies' FOIA programs to evaluate their compliance with FOIA.

While our compliance assessment process recognizes that there is no one-size-fits-all approach to administering FOIA—each agency's records are unique and as such, management of the FOIA process differs—we have observed that successful FOIA programs share three general characteristics: they manage their resources appropriately; they use technology effectively; and they communicate well with requesters. To that end, our compliance assessment program, the first of its kind in the administration of FOIA, reviews and issues findings regarding a FOIA program's management, technology and communication.

This report assesses the FOIA program at the U.S. Department of Education (Education or Department). This report and our recommendations, which the Department had the opportunity to review prior to publication, is intended to assist the Department in its continued efforts to fulfill its FOIA responsibilities. OGIS will follow up with Education regarding the status of these recommendations in 120 business days.

### **What We Reviewed**

This report is the result of direct observation and review of initial FOIA request case files; a review of the Department's FOIA regulation, FOIA web page, and other written material such as the Department's FOIA standard operating procedures, policies, Annual FOIA Reports, and organizational chart; interviews with FOIA officials and staff; and a review of the Department's FOIA litigation from January 2009 to July 2018. We also conducted an online survey and received responses from 42 Department FOIA professionals.

Education provided us with data about FOIA case files closed in Fiscal Year (FY) 2017, the most recent available at the time of our review.<sup>2</sup> OGIS reviewed 334 initial FOIA request files, a statistically significant random sample of the 2,574 requests the program processed in FY 2017. That allowed us to generalize to the population of FOIA requests the program processed in FY 2017.<sup>3</sup>

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<sup>1</sup> 5 U.S.C. § 552(h)(2).

<sup>2</sup> We conducted most of our review in the fourth quarter of FY 2018 and completed our review of FOIA case files in the first quarter of FY 2019. A vacancy on the OGIS Compliance Team and the government shutdown in December 2018 and January 2019 contributed to the delayed completion of this report.

<sup>3</sup> See Methodology on page 19.

During our assessment, Education reported its annual FOIA data for FY 2018. In situations in which the data varies significantly from FY 2017 or continues a noteworthy trend, we cite that in this report.

## **Background**

Education is a cabinet-level department that oversees the nation’s education system. The Department’s mission is “to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.”<sup>4</sup>

During our assessment, the Education FOIA Service Center (Center) operated under the Department’s Office of the Chief Privacy Officer (OCPO) within the Office of Management (OM), one of seven offices within the Office of the Deputy Secretary. The Center is responsible for overseeing the Department’s FOIA operations, which includes administering FOIA and providing overall guidance throughout the Department to ensure agency compliance with the statute.<sup>5</sup>

The Department’s 12 Office for Civil Rights (OCR) regions have authority to administer the Department’s responsibilities under the FOIA for the documents maintained in their respective offices; their work falls under the umbrella of the Department’s FOIA Service Center. The Department’s Office of Inspector General (OIG) operates its own separate FOIA program.<sup>6</sup> We did not include the OIG’s FOIA program as part of our assessment.

## ***Requests and Backlog***

Between FY 2009 and FY 2017, Education received an average of 2,375 FOIA requests per fiscal year, according to data reported in the Department’s Annual FOIA Reports. During that same period, Education responded to an average of 2,323 requests per fiscal year. As shown in figure 1, the backlog (the number of requests that are pending at an agency at the end of the fiscal year that are beyond the statutory response time of 20 working days) ranged from a low of 234 requests in FY 2013 to 618 requests in FY 2017. The backlog jumped to 857 requests in FY 2018.

Between FY 2016 and FY 2018, the backlog jumped 124 percent—from 381 requests in FY 2016 to 857 requests in FY 2018. During that same period, the number of requests Education processed increased by 24 percent.

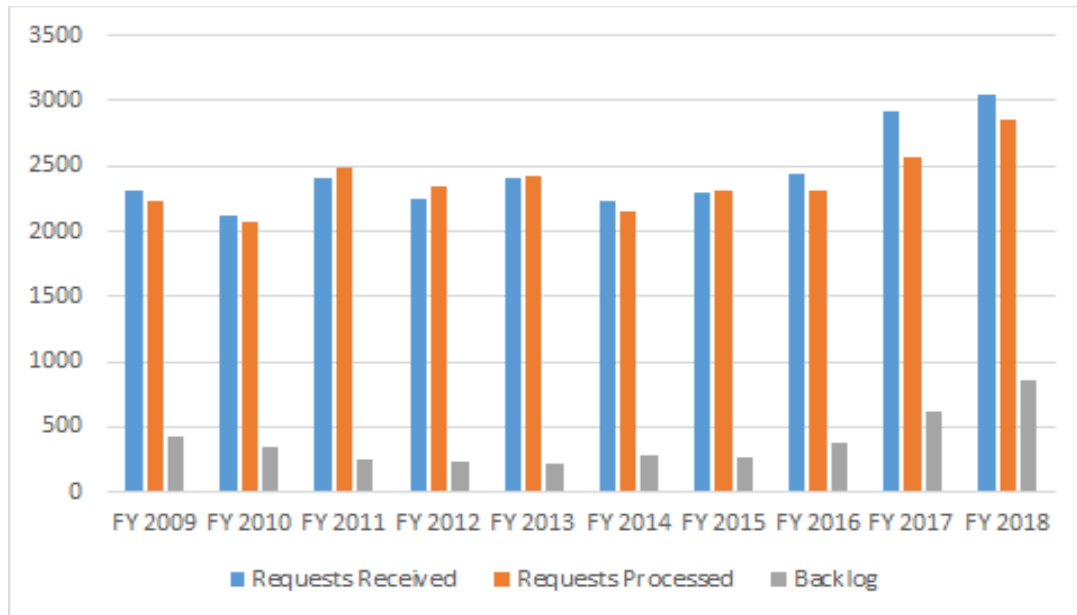
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<sup>4</sup> <https://www.ed.gov/>, accessed April 10, 2019.

<sup>5</sup> During our assessment, the Department’s Assistant Secretary for Management served as the Chief FOIA Officer. In January 2019, after we had completed our work, but before this report was written, Education’s FOIA operations moved to the Office of the Executive Secretariat, within the Office of the Secretary. The Director of the Office of the Executive Secretariat is now also the Chief FOIA Officer.

<sup>6</sup> Our sample of initial FOIA request files included requests processed by the OCR regional offices and the OIG, although the OIG FOIA program was not part of our assessment.

Figure 1: Education Requests Received, Processed & Backlogged FY 2009-2018<sup>7</sup>



Between FY 2009 and FY 2017, Education responded to simple requests in an average of 28 days and complex requests in an average of 78 days. The average response time for complex requests ranged from a low of 44 days in FY 2010 to a high of 112 days in FY 2017. As shown in figure 2, the average age of Education’s 10 oldest requests reached a low of 199 days at the end of FY 2009, rose to a high of 1,109 days in FY 2016, and shrank to 988 days in FY 2017. Since FY 2011, the average age of Education’s 10 oldest requests has exceeded the government-wide average.

At the time of our assessment, Education’s oldest request, received on January 3, 2011, had been among the Department’s 10 oldest since the end of FY 2012; by the end of FY 2018, that request remained the Department’s oldest.

### ***FOIA Program Administration***

Between FY 2009 and FY 2017, Education reported that its FOIA program cost an average of \$3.99 million per fiscal year. Litigation-related costs accounted for an average of 4.8 percent of the total cost of the FOIA program from FY 2009 to FY 2017—ranging from 1 percent in FY 2014 to 12 percent in FY 2011.<sup>8</sup>

<sup>7</sup> Data from Education Annual FOIA Reports as reported on [www.foia.gov](http://www.foia.gov), accessed July 5, 2018.

<sup>8</sup> Data from the Department’s FOIA Annual Reports for FY 2009 - 2017; litigation-related spending reported in Annual FOIA Reports represents staff time spent on litigation-related issues; this figure does not include any attorney’s fees awarded to the plaintiff, or the value of any settlements that the agency reached with a litigant.

Figure 2: Average Age in Days of Education’s 10 Oldest Requests FY 2010-2017<sup>9</sup>

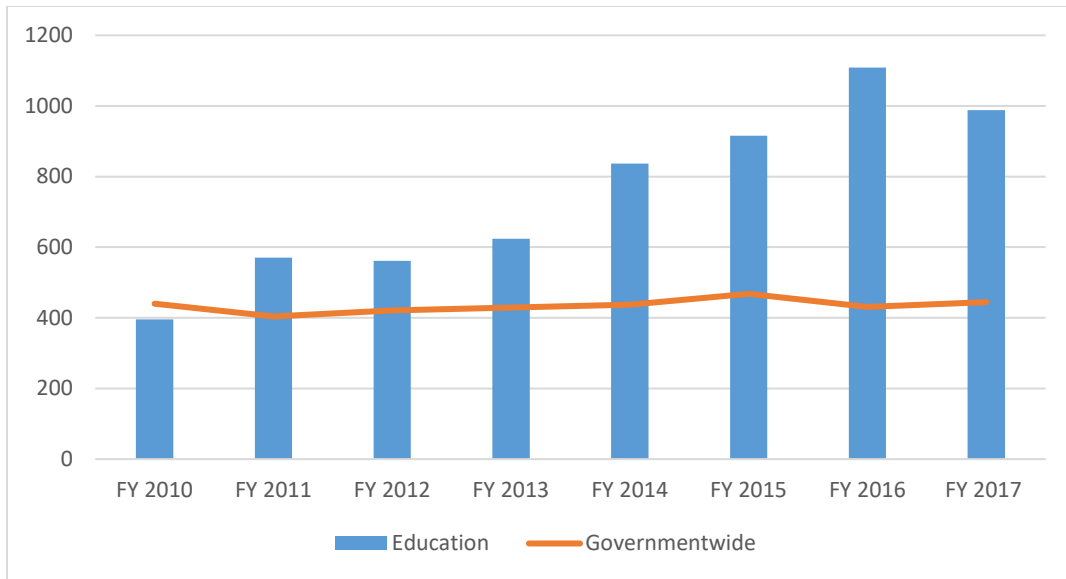
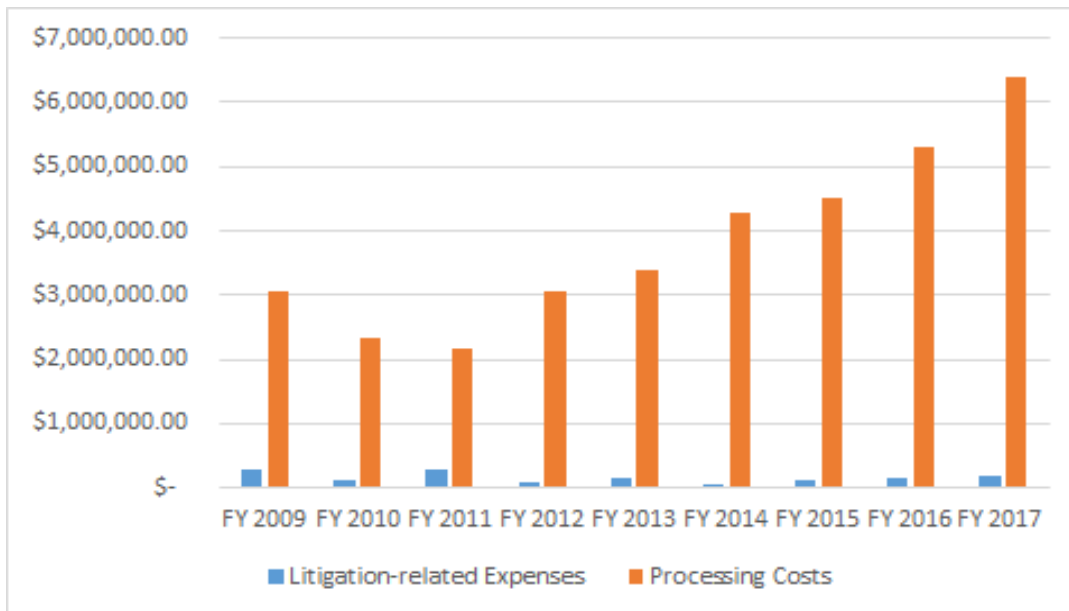


Figure 3: Total Costs of Education FOIA Processing FY 2009-2017<sup>10</sup>



<sup>9</sup> Data from Education Annual FOIA Reports as reported on [www.foia.gov](http://www.foia.gov), accessed July 5, 2018.

<sup>10</sup> Data from Education Annual FOIA Reports as reported on [www.foia.gov](http://www.foia.gov), accessed July 5, 2018.

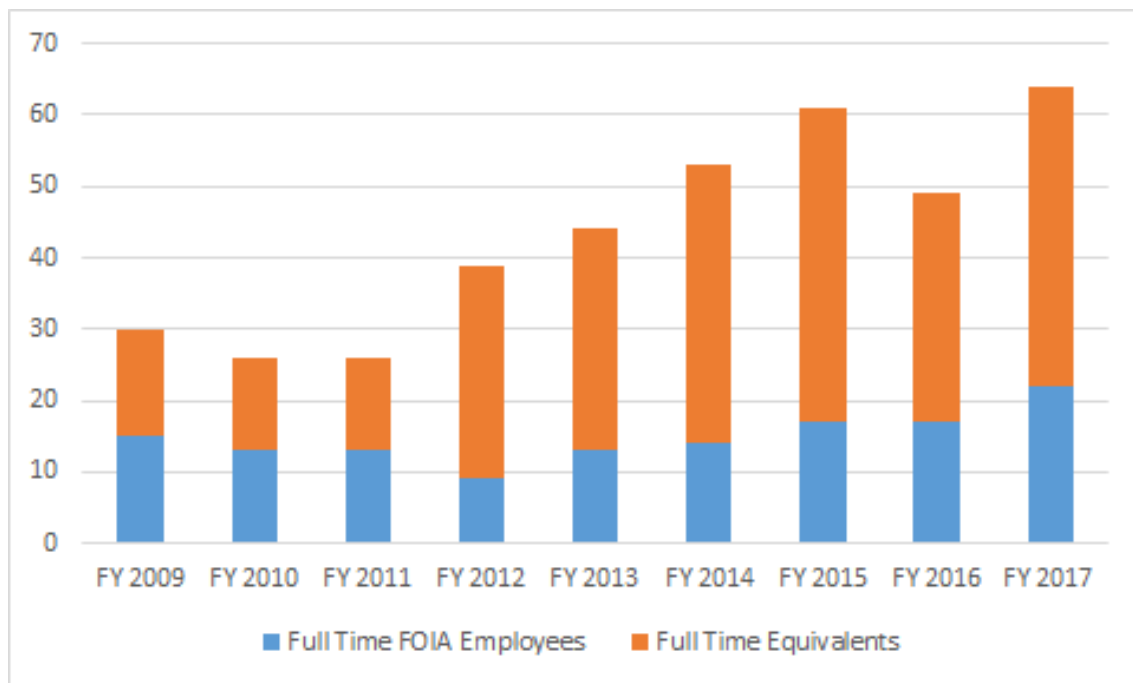
**Staffing**

The FOIA Service Center consists of one Supervisory Government Information Specialist (SGIS) at the General Schedule (GS) 15 level; two GS-14 Government Information Specialist (GIS) team lead analysts overseeing initial processing and appeals, respectively; two GS-12 GIS FOIA analysts and one GS-9 GIS.

At the time of our assessment, the FOIA Service Center also employed a team of three contractors comprised of an intake specialist to provide administrative support and two processors to handle various aspects of the FOIA process, including working with FOIA coordinators throughout the Department who are responsible for searching for responsive records.

More than half—56 percent—of the Department’s FOIA professionals have worked at the Department for 10 or more years, according to the online survey OGIS conducted of Education’s FOIA processors and managers. Two-thirds of those responding—66 percent—have worked as a FOIA professional for at least five years.

Figure 4: Education FOIA Staff FY 2009-2017<sup>11</sup>



<sup>11</sup> Data from Education Annual FOIA Reports as reported on [www.foia.gov](http://www.foia.gov), accessed July 5, 2018.

### ***FOIA Process***

Education has a decentralized FOIA process with a centralized FOIA Service Center. The FOIA Service Center in Washington, D.C., assigns requests for Department records to a Washington-based FOIA GIS and sends requests to search for responsive records to the 12 OCR region offices.

Within each OCR region, a Regional FOIA Review Officer manages all FOIA releases and denials as they relate to requests for records maintained by their respective offices.

The FOIA Service Center divides its requests into three processing tracks: expedited processing, simple requests and complex requests. FOIA analysts review incoming requests to determine whether they are proper FOIA requests and whether they require clarification. The analysts task FOIA Coordinators in the relevant program offices with coordinating the searches for responsive records using a “FOIA Request Assignment/FOIA Search” form. The FOIA Service Center expects the program offices to provide any responsive records to the assigned analyst within 10 business days or contact the analyst to discuss any search, scope, or fee issues.

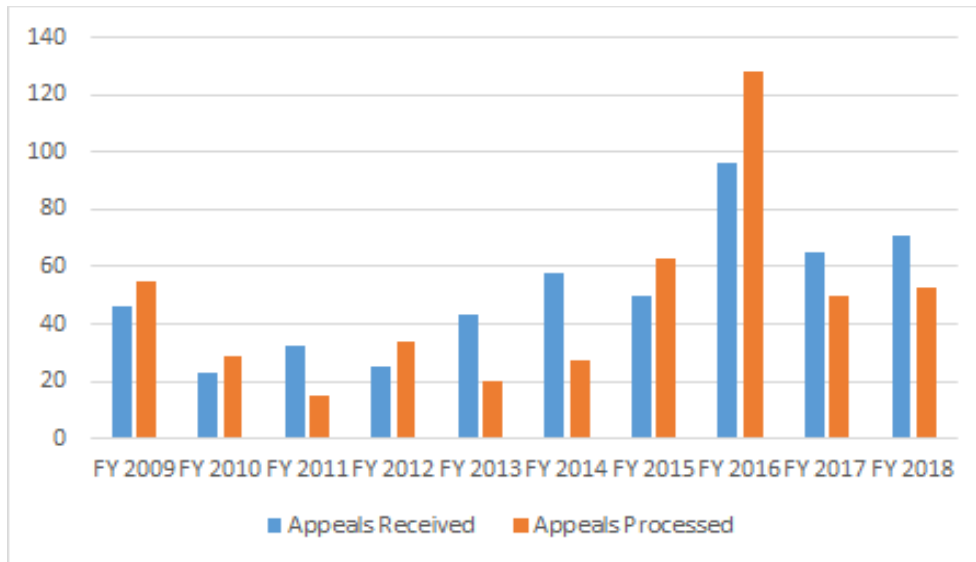
The FOIA Coordinators manage the searches, upload responsive records into the FOIA case management system, and make initial redactions to the responsive records. The FOIA Service Center analysts review and correct redactions, as needed; prepare and respond to the requester; and complete an internal “Processing Closeout Checklist” to document the activities involved in the processing of a request including the search, the fees assessment, the application of redactions, the preparation of a response, updating the case management system, the coordination list review, and close out activities. The Office of General Counsel (OGC) reviews requests from the media or those deemed “sensitive.” Generally, if the FOIA Service Center has not heard back from OGC within three days, it sends the response.

### ***Appeals and Litigation***

A FOIA Appeals Coordinator logs all appeals and ensures the administrative record is complete and ready for review by the program office that processed the request. The FOIA Appeals Coordinator sends the appeal to the program office FOIA Coordinator and Director to assign appeals so that the individual who processed the request does not process the appeal. The FOIA Appeals Coordinator reviews the appeal responses, returning them to the program office if necessary, and sends them to the OGC for legal review. Next, the Chief FOIA Officer reviews and signs the final appeal package.

We reviewed Education’s FOIA litigation filed between January 1, 2009 and July 6, 2018, and identified 67 lawsuits naming Education as a defendant. More than two-thirds of the lawsuits cited a failure to respond within the statutory 20-working-day response time. Nine lawsuits challenged the Department’s searches for responsive records, while seven lawsuits challenged the Department’s

Figure 5: Education Appeals Received & Processed FY 2009-2018<sup>12</sup>



withholdings, two lawsuits cited denials of expedited processing and one lawsuit cited denial of a fee waiver.<sup>13</sup>

Thirteen cases remain open. Of the 54 closed cases we reviewed, four resulted in rulings in favor of Education, while two cases resulted in a ruling in favor of the requester. Courts dismissed 48 cases for various reasons, including failure to state a claim, lack of jurisdiction, or settlement by joint stipulation.<sup>14</sup>

### ***Training***

Education estimated in its 2018 Chief FOIA Officer Report that at least 90 percent of FOIA professionals and staff with FOIA responsibilities attended training during 2018.<sup>15</sup> Ninety percent of respondents to an online OGIS survey administered as part of this assessment said that Education offered training or guidance on how to properly process a FOIA request.

The FOIA Service Center’s training focuses on using the FOIA case management system while the OGC’s training focuses on exemption use and other legal aspects. The OGC offers training “as-needed” and tailors it to the trainees’ needs, according to the attorney assigned to handle FOIA matters.

<sup>12</sup> Data from Education Annual FOIA Reports as reported on [www.foia.gov](http://www.foia.gov), accessed July 5, 2018.

<sup>13</sup> See Appendix for list of FOIA lawsuits filed against Education between January 1, 2009 and July 6, 2018.

<sup>14</sup> The status of these cases is as of August 2019.

<sup>15</sup> <https://www2.ed.gov/policy/gen/leg/foia/2018-ed-cfo-report-doj.pdf>, accessed April 11, 2019.



## **Finding 1: Education’s FOIA Regulation is Out of Compliance**

*Education’s FOIA regulation has not been updated since 2010 and is out of compliance with changes to the law and related guidance that have occurred since then. The regulation, which governs how the Department administers FOIA, provides an incorrect deadline for filing an administrative appeal, provides incorrect information regarding certain fee assessments, and does not provide procedures for engaging in dispute resolution.*

The Department last updated its FOIA regulation on June 14, 2010.<sup>16</sup> Well-crafted FOIA regulations offer both FOIA requesters and processors a tool for understanding and navigating the process. FOIA requires agencies to publish regulations that provide for the expedited processing of requests;<sup>17</sup> provide for fees and fee waivers;<sup>18</sup> and provide procedures for engaging in dispute resolution through the FOIA Public Liaison and OGIS.<sup>19</sup>

Public Law No. 114-185, Sec. 3, part of the FOIA Improvement Act of 2016 that did not directly amend FOIA, also required agencies to review their regulations and “issue regulations on procedures for the disclosure of records under [the FOIA] in accordance with the amendments made by” the 2016 changes to the law.

To help agencies meet this requirement, on September 7, 2016, the U.S. Department of Justice, Office of Information Policy (OIP), released an updated version of its Guidance for Agency FOIA Regulations and an updated Template for Agency FOIA Regulations that reflect changes to the statute.<sup>20</sup>

These changes include:

- alerting requesters to the dispute resolution services that agency FPLs and OGIS offer;
- providing a minimum of 90 days to file an administrative appeal; and
- providing limitations on assessing certain fees if an agency fails to comply with FOIA’s time limits and no unusual or exceptional circumstances exist.

OIP guidance is that agencies should follow the template as closely as possible.<sup>21</sup>

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<sup>16</sup> <https://www.ecfr.gov/cgi-bin/text-idx?SID=06fad67948b8ac19b955e34e051819dc&node=pt34.1.5&rgn=div5>, accessed on April 16, 2019.

<sup>17</sup> 5 U.S.C. §§ 552(a)(E)(i)-552(a)(E)(ii).

<sup>18</sup> 5 U.S.C. §§ 552(a)(4)(A)(i)- 552(a)(4)(A)(viii).

<sup>19</sup> Public Law No. 114-185, Sec. 3.

<sup>20</sup> <https://www.justice.gov/oip/blog/updated-foia-regulation-template-and-guidance-now-available>, accessed on April 11, 2019.

<sup>21</sup> <https://www.justice.gov/oip/oip-guidance/guidance-agency-foia-regulations>, accessed on April 18, 2019.

**Recommendation 1:** Education must update its FOIA regulation to reflect the amendments to FOIA as well as the Department’s processes for implementing the substantive and procedural changes it has made. We recommend using the OIP regulation template.

**Finding 2: Communication with Requesters Not in Compliance and Could Be Clearer**

*There is a lack of consistency in providing estimated dates of completion and in response letters issued by the FOIA Service Center and the regional Office for Civil Rights (OCR) offices. Lack of consistency also exists regarding notifying requesters about services offered by the FOIA Public Liaison and OGIS. Requesters seeking records from the 12 regional OCR offices are not consistently directed to the same office when seeking information about the FOIA process. FOIA jargon, legal citations and a lack of explanation of the FOIA process in some response letters may confuse requesters.*

**Estimated Dates of Completion**

Requesters are entitled to an estimated date of completion under the FOIA statute.<sup>22</sup> In our survey of Education’s FOIA professionals, nearly half—48 percent— responded that they provide requesters with estimated dates of completion when requested “sometimes” (32 percent); “rarely” (5 percent); or “never” (nearly 11 percent.)

**Alerting Requesters to Dispute Resolution Services**

The FOIA Improvement Act of 2016 requires that agencies alert requesters to dispute resolution services at two distinct points in the FOIA process. In cases of adverse determinations, agencies must include information about dispute resolution services provided by the agency FOIA Public Liaison and OGIS.<sup>23</sup> FOIA requires that when an agency needs more than 10 additional days beyond the 20-day statutory response time to process requests in cases involving “unusual circumstances,” the agency must make the FOIA Public Liaison available and inform the requester of the right to seek dispute resolution services from OGIS.<sup>24</sup>

In our review of the FOIA initial request files, we observed that in 20 percent of cases, Education did not alert requesters to OGIS services; in 12 percent of cases, the Department did not inform requesters about the dispute resolution services offered by the FOIA Public Liaison; and in 12 percent of the cases, the Department did not alert requesters to the services offered by either one.

**Response Letters**

More than 80 percent of respondents to OGIS’s online survey reported that Education maintains and

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<sup>22</sup> 5 U.S.C. § 552 (a)(7)(B)(ii).

<sup>23</sup> 5 U.S.C. § 552 (a)(6)(A)(i).

<sup>24</sup> 5 U.S.C. § 552 (a)(6)(B)(ii).

uses standard template letters or language. (The other nearly 20 percent responded that they were unsure whether the Department has or uses such letters or language (12 percent) or that the Department did not use template letters or language (7 percent.)

In our review of a sample of the Department’s FOIA case files from FY 2017, we found a lack of clear, consistent and standard responses from offices throughout the Department. Among the issues we noted in Department correspondence with requesters:

- Responses from a majority of the OCR offices did not provide information about the number of pages located, withheld in full and in part, and released in their entirety;
- “No records” responses did not include appeal rights; and
- Exemptions not consistently explained in plain language or in numerical order.

We noted several letters which appeared to try to explain how people who file complaints with one of the Department’s OCR offices access copies of their complaint files. There is a non-FOIA method for obtaining such records through an “Early Complaint Resolution” process, but that process is not shared with requesters who seek those records through FOIA.

**Recommendation 2:** Education must comply with FOIA’s statutory mandate by providing estimated dates of completion to requesters who seek such information.

**Recommendation 3:** Education must update its template letters to comply with the statute. OGIS recommends that Education write its template letters in plain language so that requesters can more easily understand the Department’s FOIA process and actions

### **Finding 3: Technology Not Seamless or Being Used to its Fullest Extent**

*Education has several technology platforms at its disposal to help administer the FOIA process. In some cases, the platforms cannot operate in tandem with other platforms, creating inefficiencies. In other cases, a platform is not being used to its fullest extent.*

#### **Tracking and Processing System**

Nearly half—49 percent of respondents to OGIS’s survey— reported being “dissatisfied” or “very dissatisfied” with the technology the Department uses throughout the FOIA process. The Department used two case management systems, an e-discovery tool and a web-based collaborative platform for document review.

During our visit to the Department, we heard that the primary case management system is often slow or requires configuration changes during which processors cannot use the system. At the time of our assessment, Education was in the final stages of moving its case management system to the cloud— using remote servers rather than servers located at the Department. The Department sought this change to increase the speed of using the system and to lessen downtime for end-users. Since we completed our

assessment, but before this report was written, the move to the cloud occurred.

During our assessment, the office of Federal Student Aid (FSA) was rolling out the FOIA Integrity Management System (FIMS) for FSA-wide use as a case tracking system. The software was developed in collaboration with FSA's Business Transformation Team and Technology Office. (FSA accounted for about 12 percent of the random sample of FOIA initial request files we reviewed.)<sup>25</sup> The roll-out is continuing, according to the Director of the FOIA Service Center.

Education uses an e-discovery tool for speedier and more targeted searches of emails, although limits on the number of licenses mean that only two members of the FOIA Service Center staff can use it to search for records in multiple offices. The tool is not compatible with the Department's FOIA case management systems.

The Department's web-based collaborative platform allows processors to coordinate cases assigned to multiple program offices. This platform gives staff the ability to review documents in one central location rather than distributing them amongst staff.

Between January 2018 and August 2018, a team of six senior-level employees at Education participated in the Partnership for Public Service's Excellence in Government (EIG) Fellows Program, a 10-month leadership development program. The team, which included one of two FOIA Service Center team leads and the Director of the Customer Service and Technology Team, who has worked with the FOIA program, assessed the Department's FOIA program and recommended improvements. Among the team's recommendations, made in August 2018, was that Education analyze the costs and benefits of moving to a Department-wide system that brings together all platforms used for FOIA processing, including FOIA case management, e-discovery and de-duplication

**Recommendation 4:** The FOIA Service Center should partner with the Department's Customer Service and Technology Team to analyze the costs and benefits of moving to a Department-wide system and leverage technology to improve and streamline Education's FOIA process.

#### **Finding 4: Management Controls & Decentralized FOIA Program Challenge Effectiveness & Efficiency**

*Education tracks data related to its FOIA program, but, at the time of our assessment, lacked performance metrics and goals for program offices tasked with responding to searches, and individual employees with FOIA responsibilities. The decentralized nature of the Department's FOIA program creates inefficiencies in the process including untimely search results, in some cases, inconsistencies in program offices' recommended redactions.*

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<sup>25</sup> See Methodology, page 19.

During our assessment, we noted a lack of performance metrics and goals necessary to assess the overall performance of the FOIA Service Center. At the time of our assessment, the Center reported every other week to the Chief FOIA Officer on metrics such as the backlog, the average and median age of all requests, the 10 oldest requests, the number of appeals, and requests closed by each processor. Such data is crucial to managing an effective FOIA program; setting data-driven goals would help decrease backlogs and increase timeliness.

In its Chief FOIA Officer Report for 2018, published after our assessment but before this report was written, the Department estimated the average number of pages processed per request to be between 150 pages and 175 pages.<sup>26</sup> The agency noted that its current process does not allow for more precise tracking but that it would revisit whether to track pages processed.

During our assessment, we repeatedly heard from FOIA managers and processors that some program offices do not provide timely responses to the FOIA Service Center's search requests. However, three-quarters of the FOIA professionals responding to the OGIS survey reported that FOIA contacts within the program offices are "somewhat cooperative" or "very cooperative" with search and production of records. We were not able to determine whether response times for search requests is a Department-wide problem.

The FOIA Service Center does not appear to systematically manage and measure the performance of individual program offices nor does the Center appear to have specific goals related to the program offices timeliness in responding to the searches tasked to them.

We observed that the Department does not track the time it takes program offices to respond to search requests. Without such data, it is unclear how outstanding searches affect the Department's backlog, which swelled from 381 requests at the end of FY 2016 to 857 requests at the end of FY 2018. Tracking the extent to which search delays affect the Department's ability to respond to requests within 20 working days is particularly important for identifying trends, setting performance goals and measuring progress.

Performance plans for employees with FOIA duties do not contain standards reflecting those expectations. The absence of a FOIA performance element in individual performance plans may challenge management's efforts to hold employees accountable in this area.

The EIG team also recommended in August 2018 that the Department fully centralize FOIA administration and ensure there are well-trained points of contact in each program office.

**Recommendation 5:** The FOIA Service Center should track the time it takes Department program offices to respond to search requests, and establish performance standards and protocols for handling

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<sup>26</sup> <https://www2.ed.gov/policy/gen/leg/foia/2018-ed-cfo-report-doj.pdf>, accessed April 11, 2019.

overdue search responses. The data may help determine whether to centralize the Department's FOIA program as recommended by the EIG team.

**Recommendation 6:** The FOIA Service Center should work with human capital staff to use data to develop individual performance metrics and goals for each processor (e.g., numbers of cases closed and pages reviewed) to reduce the backlog and improve timeliness.

**Recommendation 7:** The FOIA Service Center should work with human capital staff to incorporate FOIA performance standards into performance plans for all employees with FOIA responsibilities.

### **Observation**

The four findings and seven recommendations in this report related to management controls, the FOIA regulation, technology, and communication with requesters, fit squarely into the duties of the Chief FOIA Officer, who is required under FOIA to review all aspects of FOIA administration annually, including agency FOIA regulations.<sup>27</sup> In response to our online survey, 20 percent of respondents said they were "dissatisfied" or "very dissatisfied" with the Chief FOIA Officer's oversight of the FOIA program, while 32 percent said they were "neutral."

At the time of our assessment, Education's Acting Chief FOIA Officer was the Acting Chief Privacy Officer and the head of the Privacy, Information, and Records Management Services Division. As previously discussed, in January 2019, Education moved its FOIA program from the Office of Management into the Office of the Secretary. The Department's Chief FOIA Officer is now the Director of the Office of the Executive Secretariat and the first-line supervisor for the FOIA Service Center Director.

The move into the Office of the Secretary raises the profile of the FOIA office within the Department and presents an opportunity for increased communication between the FOIA Service Center Director and the new Chief FOIA Officer. The new reporting structure also presents an opportunity for the Chief FOIA Officer to ensure compliance with FOIA. The statute requires Chief FOIA Officers at each Federal agency to:

- support efficient and appropriate compliance with FOIA and make recommendations as necessary to improve implementation;
- oversee FOIA operations by monitoring implementation and reporting to the head and the chief legal officer of the agency and the Attorney General;
- recommend improvements, including funding, to FOIA implementation;
- support customer service by taking certain steps to improve public understanding of FOIA by designating one or more FOIA Public Liaisons; and

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<sup>27</sup> 5 U.S.C. § 552(j)(3)(A).

- ensure that FOIA staff have adequate, periodic training.<sup>28</sup>

The Chief FOIA Officer is best-positioned to use the authority of the FOIA statute to ensure efficient and appropriate FOIA compliance throughout the Department. The Chief FOIA Officer should continue to communicate closely with the FOIA Service Center Director. The Chief FOIA Officer should also engage the EIG team about its recommendations (to the extent this has not already taken place), which include updating the Department's strategic plan to include FOIA and including FOIA work in employee performance appraisals department-wide, two recommendations OGIS endorses.

### **Relevant Best Practices**

In reviewing FOIA policies, procedures and compliance of Federal agencies, identifying ways to improve compliance, and resolving FOIA disputes, OGIS has identified a number of practices for improving FOIA administration that agencies, regardless of size, may use.

Below are several Best Practices that OGIS has identified as relevant and potentially helpful to Education's FOIA program, based on the findings and recommendations in this report. Education should also incorporate, to the extent possible, the Best Practices outlined in the Final Report and Recommendations of the 2016-2018 Term of the FOIA Advisory Committee.<sup>29</sup>

**Best Practice 1:** Use model language and formatting suggestions provided by OGIS in its first advisory opinion, published in July 2018, to alert requesters to the dispute resolution services available to them.<sup>30</sup>

**Best Practice 2:** To the extent possible, final response letters should include information describing the search or searches the Department conducted to locate responsive records. Search information could include the key words and search terms personnel used to conduct the search, the locations and record systems searched, and whether a search was manual and/or electronic. Providing this information would enhance the requester's understanding of the Department's action on a request.

**Best Practice 3:** Improve the FOIA website and e-reading room using guidance provided by OIP: Agency FOIA Websites 2.0.<sup>31</sup>

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<sup>28</sup> 5 U.S.C. § 552(j)(2).

<sup>29</sup> <https://www.archives.gov/files/final-report-and-recommendations-of-2016-2018-foia-advisory-committee.pdf>.

<sup>30</sup> <https://www.archives.gov/files/communication-advisory-opinion.pdf>. See also OGIS Issue Assessment on Agency Compliance with Required Dispute Resolution Notices, <https://www.archives.gov/files/notice-of-dispute-resolution-services-compliance-assessment.pdf>.

<sup>31</sup> OIP Guidance: Agency FOIA Websites 2.0, <https://www.justice.gov/oip/oip-guidance/OIP%20Guidance%3A%20%20Agency%20FOIA%20Websites%202.0>.

## **Methodology**

OGIS Compliance Team Lead Kirsten Mitchell and OGIS staff member Christa Lemelin conducted the assessment of the Education FOIA program. This report is the result of their first-hand review of Education FOIA initial request files; analysis of applicable data and documents including Education FOIA regulations, the FOIA website and other written material; an online survey of FOIA professionals; and interviews with Education FOIA officials and staff.

On August 22 and 23, 2018, we visited Education and interviewed the following people:

- FOIA Service Center Director
- FOIA Service Center Team Lead/FOIA Public Liaison
- FOIA Service Center Team Lead/FOIA Appeals Coordinator
- Three GISs/FOIA Analysts
- Two contract GIS employees
- Intake Specialist
- Attorney, Business and Administrative Law Division, OGC
- Director of Customer Service and Technology, OCR
- Acting Chief Privacy/FOIA Officer

We also re-interviewed the FOIA Service Center Director on April 18, 2019.

We reviewed a “statistically significant sample” of FOIA case files Education processed in FY 2017—in this case 334 files—which allows us to say that the findings and analysis apply to the entire population of 2,574 cases Education processed in FY 2017. The Department Education provided us with a spreadsheet of the FOIA cases it closed in FY 2017. An online sample size calculator (<https://www.surveysystem.com/sscalc.htm>) revealed that we needed to review 334 case files for a confidence level of 95 percent. We used Excel to assign sequential numbers to each of the 2,574 cases and the random number generator to select the sample of 334 cases. For each case, Education copied the administrative record minus the responsive records to a CD for our review. We finished our review of the case files on December 19, 2018.

On June 11, 2019, we presented our findings to Education’s Special Assistant, Office of the Deputy Secretary; Chief FOIA Officer; the FOIA Service Center Director; and the FOIA Service Center Team Lead/FOIA Appeals Coordinator. Education provided feedback on our assessment, which prompted us to re-review the litigation and update our assessment and Appendix of FOIA litigation.

Please direct questions to OGIS at [ogis@nara.gov](mailto:ogis@nara.gov) or 202-741-5770.



## Appendix

FOIA lawsuits filed against Education between January 1, 2009 and July 6, 2018

1. *Apollo Grp., et al. v. U.S. Dep't of Educ.*, Civ. No. 09-01044 (D.D.C. Dec. 16, 2009) (dismissed with prejudice by joint stipulation);
2. *Wells, et al. v. U.S. Dep't of Educ., et al.*, Civ. No. 09-00456 (M.D. La. Aug. 12, 2009) (dismissed without prejudice), *aff'd*, Case No. 09-30768 (5th Cir. Jan. 11, 2010);
3. *Ctr. for Pub. Integrity v. U.S. Dep't of Educ., et al.*, Civ. No. 09-01765 (D.D.C. Mar. 5, 2010) (plaintiff's motion for voluntary dismissal without prejudice granted);
4. *Ferguson v. U.S. Dep't of Educ.*, Civ. No. 09-10057 (S.D.N.Y. Sept. 14, 2011) (granting in part and denying in part defendant's motion for summary judgment), *appeal withdrawn by stipulation*, Case No. 11-4821 (2d Cir. Aug. 6, 2012);
5. *Ctr. for Pub. Integrity v. U.S. Dep't of Educ.*, Civ. No. 10-00591 (D.D.C. June 3, 2010) (dismissed with prejudice by joint stipulation);
6. *Allen v. U.S. Dep't of Educ.*, Civ. No. 10-01101 (D.D.C. Dec. 14, 2010) (granting defendant's motion to dismiss or for summary judgment);
7. *Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Educ.*, Civ. No. 11-00651 (D.D.C. Nov. 16, 2011) (settled and dismissed with prejudice by joint stipulation);
8. *Reade v. U.S. Dep't of Educ.*, Civ. No. 10-02559 (D. Ariz. Oct. 18, 2011) (settled and dismissed with prejudice by joint stipulation);
9. *Coal. for Educ. Success v. U.S. Dep't of Educ.*, Civ. No. 10-02084 (D.D.C. Dec. 20, 2011) (dismissed with prejudice);
10. *Wells, et al. v. U.S. Dep't of Educ.*, Civ. No. 11-00016 (M.D. La. July 15, 2011) (dismissed without prejudice), *aff'd*, Case No. 11-30686 (5th Cir. Nov. 21, 2011);
11. *Coal. for Educ. Success v. U.S. Dep't of Educ.*, Civ. No. 11-00213 (D.D.C. Dec. 20, 2011) (dismissed with prejudice);
12. *Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Educ.*, Civ. No. 11-00651 (D.D.C. Nov. 16, 2011) (settled and dismissed with prejudice by joint stipulation);
13. *Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Educ.*, Civ. No. 11-00878 (D.D.C. Oct. 17, 2011) (settled and dismissed with prejudice by joint stipulation);
14. *Moya, et al. v. U.S. Dep't of Educ., et al.*, Civ. No. 11-80750 (S.D. Fla. Nov. 8, 2011) (granting defendant's motion to dismiss);
15. *Chapel, et al. v. U.S. Dep't of Educ.*, Civ. No. 11-04344 (N.D. Cal. May 16, 2012) (voluntarily dismissed without prejudice);
16. *Nye-Wilson, et al. v. U.S. Dep't of Educ.*, Civ. No. 11-05678 (N.D. Cal. May 16, 2012) (voluntarily dismissed without prejudice);
17. *Gallup, Inc. v. U.S. Dep't of Educ., et al.*, Civ. No. 12-00025 (D. Neb. Feb. 7, 2012) (voluntarily dismissed);

18. *Chapel, et al. v. U.S. Dep't of Educ.*, Civ. No. 12-01919 (N.D. Cal. June 5, 2012) (voluntarily dismissed without prejudice);
19. *Kyle v. U.S. Dep't of Educ.*, Civ. No. 12-01639 (D. Md. Nov. 9, 2012) (dismissed for lack of jurisdiction);
20. *Andela v. Admin. Office of the U.S. Courts, et al.*, Civ. No. 13-00865 (E.D. Pa. April 30, 2013) (dismissing claim against U.S. Dep't of Educ.), *aff'd*, Case No.14-952 (3d Cir. June 17, 2014);
21. *Elec. Privacy Info. Ctr. v. U.S. Dep't of Educ.*, Civ. No. 13-00345 (D.D.C. Nov. 4, 2013) (settled and dismissed with prejudice by joint stipulation);
22. *Family Research Council, Inc. v. U.S. Dep't of Justice, et al.*, Civ. No. 13-00405 (D.D.C. May 29, 2014) (dismissed with prejudice by joint stipulation);
23. *Brustein & Manasevit, PLLC v. U.S. Dep't of Educ.*, Civ. No. 13-00714 (D.D.C. Mar. 31, 2014) (granting defendant's motion for summary judgment);
24. *Geltner v. U.S. Dep't of the Treasury, et al.*, Civ. No. 14-00233 (E.D. Va. June 20, 2014) (dismissed without prejudice by joint stipulation);
25. *Nat'l Consumer Law Ctr. v. U.S. Dep't of Educ.*, Civ. No. 14-12206 (D. Mass. Feb. 23, 2015) (dismissed with prejudice by joint stipulation);
26. *Brozzo v. U.S. Dep't of Educ.*, Civ. No. 14-01584 (N.D.N.Y. May 11, 2017) (granting defendant's motion for summary judgment);
27. *Bagwell v. U.S. Dep't of Educ.*, Civ. No. 15-00334 (D.D.C. Apr. 26, 2016) (granting defendant's motion for summary judgment);
28. *New York Legal Assistance Grp. v. U.S. Dep't of Educ.*, Civ. No. 15-03818 (S.D.N.Y. Jan. 2, 2018) (settled and dismissed with prejudice by joint stipulation);
29. *Am. Civil Liberties Union v. Dep't of Homeland Sec., et al.*, Civ. No. 16-00221 (filed Feb. 10, 2016 D.D.C.) (pending);
30. *Nye-Wilson, et al. v. U.S. Dep't of Educ., et al.*, Civ. No. 16-00104 (D. Haw. June 15, 2016) (dismissed with prejudice by joint stipulation);
31. *Am. Civil Liberties Union Found., Inc., et al. v. U.S. Dep't of Educ.*, Civ. No. 16-10613 (D. Mass. Mar. 30, 2018) (granting in part and denying in part defendant's motion for summary judgment), *appeal dismissed*, Case No. 18-1502 (1st Cir. Oct. 31, 2018);
32. *Students for Fair Admissions, Inc., et al. v. U.S. Dep't of Educ.*, Civ. No. 16-02154 (D.D.C. October 27, 2016) (dismissed without prejudice by joint stipulation);
33. *Brustein & Manasevit, PLLC v. U.S. Dep't of Educ.*, Civ. No. 16-02383 (D.D.C. July 25, 2017) (settled and dismissed with prejudice by joint stipulation);
34. *Stein v. Cent. Intelligence Agency, et al.*, Civ. No. 17-00189 (filed Jan. 31, 2017 D.D.C.) (pending);
35. *Tr. of Princeton Univ. v. U.S. Dep't of Educ.*, Civ. No. 17-00485 (D.D.C. December 11, 2017) (settled and dismissed without prejudice by joint stipulation);
36. *Judicial Watch, Inc. v. U.S. Dep't of Educ.*, Civ. No. 17-00501 (D.D.C. July 13, 2017) (settled and dismissed with prejudice by joint stipulation);
37. *Voigt v. U.S. Dep't of Educ.*, Civ. No. 17-00790 (D.D.C. Jan. 24, 2018) (settled and dismissed with prejudice by joint stipulation);

38. *Am. Oversight v. U.S. Dep't of Commerce, et al.*, Civ. No. 17-00920 (D.D.C. October 31, 2017) (settled and dismissed without prejudice by stipulation);

39. *Neborak v. U.S. Dep't of Educ.*, Civ. No. 17-00678 (W.D. Pa. Aug. 10, 2017) (dismissed with prejudice by joint motion);

40. *Judicial Watch, Inc. v. U.S. Dep't of Educ.*, Civ. No. 17-01021 (D.D.C. Sept. 22, 2017) (dismissed with prejudice by joint stipulation);

41. *Nat'l Women's Law Ctr. v. U.S. Dep't of Educ.*, Civ. No. 17-01137 (D.D.C. May 4, 2018) (settled and dismissed with prejudice by joint stipulation);

42. *Am. Oversight v. U.S. Dep't of Educ.*, Civ. No. 17-01247 (filed June 26, 2017 D.D.C.) (pending);

43. *Lambda Legal Def. & Educ. Fund, Inc. v. U.S. Dep't of Educ., et al.*, Civ. No. 17-06390 (S.D.N.Y. Mar. 9, 2018) (settled and dismissed with prejudice by joint stipulation);

44. *New York Times Co., et al. v. U.S. Dep't of Justice, et al.*, Civ. No. 17-07439 (S.D.N.Y. January 17, 2018) (voluntarily dismissed with prejudice by joint stipulation);

45. *Reyes v. U.S. Dep't of Educ.*, Civ. No. 17-02548 (D.D.C. June 28, 2018) (settled and dismissed with prejudice by joint stipulation);

46. *Democracy Forward Found. v. U.S. Dep't of Educ.*, Civ. No. 17-02609 (D.D.C. Oct. 26, 2018) (dismissed with prejudice by joint stipulation);

47. *Almeda v. U.S. Dep't of Educ., et al.*, Civ. No. 17-02641 (filed Dec. 8, 2018 D.D.C.) (pending);

48. *Century Found. v. DeVos, et al.*, Civ. No. 18-01128 (S.D.N.Y. March 14, 2018) (voluntarily dismissed without prejudice);

49. *Am. Oversight v. U.S. Dep't of Commerce, et al.*, Civ. No. 18-00534 (filed March 8, 2018 D.D.C.) (pending);

50. *Am. Oversight v. U.S. Dep't of Agriculture, et al.*, Civ. No. 18-00568 (D.D.C. June 13, 2019) (voluntary dismissal without prejudice by plaintiff);

51. *Am. Oversight v. U.S. Dep't of Veterans Affairs*, Civ. No. 18-00656 (filed March 22, 2018 D.D.C.) (pending);

52. *Nye-Wilson v. U.S. Dep't of Educ.*, Civ. No. 18-01846 (N.D. Cal. Dec. 21, 2018) (granting plaintiff's motion to dismiss without prejudice);

53. *Pub. Citizen, Inc. v. U.S. Dep't of Educ.*, Civ. No. 18-00691 (D.D.C. June 28, 2019) (settled and dismissed with prejudice by joint stipulation);

54. *Century Found. v. U.S. Dep't of Educ.*, Civ. No. 18-03299 (S.D.N.Y. Oct. 19, 2018) (voluntarily dismissed without prejudice);

55. *Century Found. v. U.S. Dep't of Educ.*, Civ. No. 18-03352 (S.D.N.Y. July 23, 2018) (settled and dismissed with prejudice by joint stipulation);

56. *Nat'l Consumer Law Ctr. v. U.S. Dep't of Educ.*, Civ. No. 18-10763 (filed April 19, 2018 D. Mass.) (pending);

57. *Century Found. v. U.S. Dep't of Educ.*, Civ. No. 18-03581 (S.D.N.Y. Aug. 1, 2018) (voluntarily dismissed without prejudice);

58. *Democracy Forward Found. v. U.S. Dep't of Educ.*, Civ. No. 18-00976 (D.D.C. March 14, 2019) (dismissed with prejudice by joint stipulation);

59. *Pub. Citizen, Inc. v. U.S. Dep't of Educ.*, Civ. No. 18-01047 (D.D.C. May 22, 2019) (granting defendant's motion for summary judgment);
60. *Century Found. v. U.S. Dep't of Educ.*, Civ. No. 18-01120 (D.D.C. Dec. 11, 2018) (dismissed with prejudice by joint stipulation);
61. *NAACP Legal Def. & Educ. Fund, Inc. v. U.S. Dep't of Educ.*, Civ. No. 18-04433 (filed May 18, 2018 S.D.N.Y.) (pending);
62. *Nat'l Student Legal Def. Network, et al. v. U.S. Dep't of Educ.*, Civ. No. 18-01201 (filed May 22, 2018 D.D.C.) (pending);
63. *Nat'l Student Legal Def. Network v. U.S. Dep't of Educ.*, Civ. No. 18-01209 (D.D.C. May 2, 2019) (settled and dismissed with prejudice by joint stipulation);
64. *Nat'l Student Legal Def. Network v. U.S. Dep't of Educ.*, Civ. No. 18-01464 (filed June 21, 2018 D.D.C.) (pending);
65. *Buzzfeed, Inc. v. U.S. Dep't of Educ.*, Civ. No. 18-01535 (filed June 27, 2018 D.D.C.) (pending);
66. *Democracy Forward Found. v. U.S. Dep't of Educ.*, Civ. No. 18-01596 (filed July 5, 2018 D.D.C.) (pending);
67. *Nat'l Student Legal Def. Network v. U.S. Dep't of Educ.*, Civ. No. 18-01606 (filed July 6, 2018) (pending).