

Testimony of Arne Duncan before U.S. Commission on Civil Rights  
November 2, 2018

I. Introduction

Commission Chair Lhamon and members of the Commission: thank you for inviting me to share views on federal civil rights enforcement. Based on my seven years of experience as Secretary of Education in the Obama Administration, I focus this testimony primarily on federal civil rights enforcement in education but also offer views on such enforcement Administration-wide.

II. Appropriate Role for Federal Civil Rights Enforcement Agencies

I fundamentally view the Department of Education (ED) as a civil rights agency. Congress created the Department of Education to ensure equitable educational opportunity for all the nation's students.<sup>1</sup> Its Office for Civil Rights has the specific charge to enforce federal civil rights laws, principally related to race, sex, and disability status, and my – and, I believe, the general public's – expectation for that office is that it will faithfully fulfill its congressional charge. In addition to its specific enforcement responsibilities, I relied heavily on that office, during my tenure as Secretary of Education, to bring a civil rights lens to all the policy decisions we made at the Department. I included the Assistant Secretary for Civil Rights in my executive team,<sup>2</sup> moved the Office for Civil Rights DC staff from offsite into the main ED building,<sup>3</sup> and I met biweekly with the Assistant Secretary one-on-one to receive information about progress of enforcement work and solicit feedback on policy decisions on my desk.

All significant guidance documents OCR issued in my tenure followed the federal Office of Management and Budget's directive for Good Guidance Practices that any significant guidance document federal agencies issue undergo interagency review and invites public comment.<sup>4</sup> That meant that before issuance OCR staff sought and secured input from other components within the Department of Education as well as from other federal agencies and the White House. This process for securing review and approval of guidance across agencies ensures civil rights office involvement in and influence on federal policy choices. OCR staff reviewed and commented on all guidance documents issued at the Department of Education while I was Secretary of Education, and I met with the Assistant Secretary for Civil Rights one on one and as

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<sup>1</sup> See <https://www2.ed.gov/about/overview/focus/what.html> noting that when Congress created the Department of Education in 1979, the first among its stated purposes was “to strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual.”

<sup>2</sup> <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf> at vii.

<sup>3</sup> James S. Murphy, The Office for Civil Rights's Volatile Power, The Atlantic (March 13, 2017), available at <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/>.

<sup>4</sup> Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at <https://www.federalregister.gov/documents/2007/01/25/E7-1066/final-bulletin-for-agency-good-guidance-practices>; see also U.S. Department of Education, Significant Guidance at the Department of Education, available at <https://www2.ed.gov/policy/gen/guid/significant-guidance.html>.

part of my executive team, affording regular opportunities to discuss civil rights concerns with policy positions the Department took.

At ED, the Assistant Secretary for Civil Rights is the Secretary's principal counsel on civil rights issues and OCR has its own attorneys among its staff, so it does not report through the Office of General Counsel.<sup>5</sup> That structure works to support efficient civil rights enforcement and to ensure civil rights legal expertise within the office. I understand that not all federal agencies are structured this same way; I found it effective to manage that structure within ED.

I sometimes – including before coming to testify today – am asked what are the most currently pressing civil rights topics. I am on record, in response to that question, characterizing trying to prioritize some civil rights issues over others as trying to choose which child a parent loves the most;<sup>6</sup> that is, as it should be, an impossible task. As an example for why it is important for civil rights enforcement offices to address all issues within their jurisdiction, OCR at ED reported that it saw significant complaint increases in the following subject areas during the Obama Administration: restraint and seclusion of students with disabilities, sexual violence, web accessibility for persons with disabilities, and harassment on the basis of race, color, or national origin.<sup>7</sup> The variety of topics, addressing disability rights, sex discrimination, and racial justice, confirms my belief that civil rights enforcement offices should prioritize addressing the full range of the work within their jurisdiction, as distinct from picking one or a handful of issues to focus on.

### III. Evaluation of Civil Rights Enforcement Effectiveness

Ultimately, effectiveness of federal civil rights enforcement – at the Department of Education and elsewhere – should be viewed from the perspective of protecting people from harm. The offices' work should be transparent so the public can evaluate for themselves whether their tax dollars are well spent as well as whether the civil rights laws Congress enacts are lived in Americans' experiences. Data matters and should be collected and reported to share quantitative measures of results.<sup>8</sup> Likewise civil rights offices should look for efficiencies to ensure they best use public dollars assigned to their work.<sup>9</sup> And it is important to evaluate

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<sup>5</sup> See Section 203(c)(2) of the Department of Education Organization Act, available at <https://legcounsel.house.gov/Comps/Department%20Of%20Education%20Organization%20Act.pdf>; see also [https://www2.ed.gov/about/offices/list/om/fs\\_po/ocr/intro.html](https://www2.ed.gov/about/offices/list/om/fs_po/ocr/intro.html) (updated August 2017, reflecting continuation of these practices in the Trump Administration).

<sup>6</sup> <http://edstream.ed.gov/webcast/Play/947d4f4af0b14f2bb9a966d4414300141d>

<sup>7</sup> <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> at page 7.

<sup>8</sup> Data are an imperfect measure of civil rights enforcement effectiveness because data does not capture perceptions of fairness. Nonetheless, data tell an important story. By the numbers, OCR resolved more cases in the eight-year period of the Obama Administration – 66,102 resolutions – than in any prior eight-year period. <https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf> at page 2.

<sup>9</sup> For a summary of efficiency increases achieved in my tenure, see <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf> at page 9.

more than just speed or rate of case closure and in addition to evaluate the quality of results achieved.

Whereas quality of results can be difficult to measure, several available tools are already in place for that work. For example, Congress requires the Office for Civil Rights at the Department of Education to report annually to the President and the Secretary of Education on the results of OCR's work;<sup>10</sup> those reports offer important analyses of the work OCR believes is effective, the way it conducts its work, and descriptions of the investigation successes the Office believes are significant. Public reporting of that type is an important component of measuring effectiveness of federal civil rights enforcement because it captures information data alone cannot report.

In addition, the Inspector General's office at ED evaluated (and approved) the effectiveness of OCR's work during my tenure as Secretary;<sup>11</sup> periodic external evaluation of offices' work is an important additional check on such work.<sup>12</sup> As the Inspector General described results of the OCR audit in 2015:

We found that OCR generally resolves discrimination complaints in a timely and efficient manner and in accordance with applicable policies and procedures. Specifically, we determined that OCR resolves discrimination complaints in a timely fashion at a high overall rate and does not have a large backlog of unresolved cases. The primary factors that contribute to OCR's timely and efficient resolution of complaints include efficient case resolution methods, consistency in case investigation practices, and effective case tracking and information management systems.<sup>13</sup>

The Inspector General also concluded:

OCR has generally developed clearly defined procedures that allow regional staff to follow established policy when resolving the different types of discrimination complaints and allow management to provide clear direction to regional staff when complications or questions arise. We also noted OCR management has created a control environment that ensures the investigative teams understand the importance of compliance with policies and procedures. As a result, OCR is able to ensure that complaints are processed and resolved consistently, efficiently, and effectively across the regions, in line with OCR's statutory and regulatory responsibilities.<sup>14</sup>

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<sup>10</sup> Section 203(b)(1) of the Department of Education Organization Act, available at <https://legcounsel.house.gov/Comps/Department%20Of%20Education%20Organization%20Act.pdf>.

<sup>11</sup> That report (after now referred to as IG Report) is available at this link: <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a19n0002.pdf>.

<sup>12</sup> As explained here, <https://www.thoughtco.com/about-the-office-of-inspector-general-3322191>, federal inspectors general are independent, nonpartisan offices in each agency whose responsibility is to audit agency operations.

<sup>13</sup> IG Report at 2.

<sup>14</sup> IG Report at 3.

This external review confirmed my experience of OCR's effective and efficient work, and I welcomed benefiting from the careful and detailed review.

Finally, agency civil rights enforcement work can be measured by results.<sup>15</sup> OCR's mission at ED includes ensuring equal access to education;<sup>16</sup> its efficacy should be measured, therefore, at least in part by the degree of equality students experience in the nation's schools – and similarly other Cabinet agency civil rights offices should be measured by the degree of equality experienced in the sectors they work in.

The nation saw material equality increases in schools resulting from OCR work in my tenure. Taking only one example, the sea change nationally in expectations for and new refusals to accept sexual assault among college-age youth, following in part from OCR's strong work in this area, reflects two key points worth noting here: (1) the benefit of strong and effective civil rights enforcement work as well as (2) the importance of symbolic leadership. On the first point: OCR's solid and careful investigations coupled with tailored resolution results led to important changes for students at the schools investigated, fulfilling OCR's statutory charge. On the second point: even a small total number of resolutions can prompt significant and lasting change. For example, during the Obama Administration OCR resolved higher education sexual violence investigations with requirements for campus change at a total of 42 schools; this small total number of resolutions, coupled with the visibility of their work in the area and the Administration-wide focus on the importance of the topic, including through the White House Task Force to Protect Students from Sexual Assault, led to a level of Title IX compliance with respect to sexual assault that the country had not before then witnessed in the more than four decades Title IX had been law. Because relatively small investments in work<sup>17</sup> can produce lasting civil rights protection, measuring efficacy of federal civil rights enforcement work should account for analysis of these kinds of results as well.

#### IV. Appropriate Federal Civil Rights Enforcement Tools

The Office for Civil Rights at the Department of Education does not have authority to impose fines on schools that violate civil rights laws. Instead, its enforcement tool is the authority to withhold federal funds for noncompliance with federal civil rights laws. Before it could withhold funds, the Office has several steps it must follow, including that it must have completed an investigation, found a school in violation of the law, communicated those findings to the school and have given the school a chance to dispute the conclusion with OCR and separately on appeal to the Secretary of Education, and have given the school a chance to litigate in court the school's disagreement with OCR's findings, and still after then have given the school a chance to agree to comply with the law. Only after all those steps could OCR

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<sup>15</sup> As the Inspector General put it when evaluating OCR's work: "OCR officials noted that timeliness is just one of the elements that OCR takes into account when resolving complaints. They noted that while timeliness is very important, developing a high-quality and consistent product is just as important." IG Report at 6.

<sup>16</sup> <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>.

<sup>17</sup> For context: The data shows that campus sexual violence investigations represented less than 15% of OCR's casework in my tenure, and there are more than 7,000 colleges and universities in the country.

actually begin the process to withhold federal funds.<sup>18</sup> Unsurprisingly therefore, OCR did not, during the Obama Administration, actually withhold funds from any school. Nonetheless, the enforcement tool was effective in securing compliance with many schools.

In addition to the formal enforcement tools available to OCR over the decades of its existence, ED, like all federal agencies, has other important tools for influencing satisfaction of the civil rights laws within its jurisdiction. These tools include guidance issuance, operational transparency, and the bully pulpit.<sup>19</sup> The job of civil rights enforcement offices necessarily includes sharing guidance information about how they interpret and enforce the law, to assist the regulated community – at the Department of Education: schools – in knowing how to satisfy the law and what could trigger enforcement consequences.<sup>20</sup> Federal agencies also can and should share their expertise, identifying best practices and promoting civil rights compliance, through speeches, meetings, and other uses of the bully pulpit.

## V. Changes in Civil Rights Enforcement During the Trump Administration

The Trump Administration communicates disdain for civil rights generally and for federal civil rights enforcement specifically. I have repeatedly expressed my criticism of President Trump's authoritarian tendencies;<sup>21</sup> those tendencies are themselves inconsistent with promoting civil rights. Cabinet agencies in this Administration carry out the President's disdain for civil rights, repealing critical guidance protecting Americans from discrimination based on who they are,<sup>22</sup> withdrawing federal involvement in systemic police reform to make communities safer,<sup>23</sup>

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<sup>18</sup> OCR described tools for enforcement at page 4 of this letter:

<https://www2.ed.gov/about/offices/list/ocr/correspondence/congress/20150428-t9-sexual-violence-college-campuses.pdf>.

<sup>19</sup> On this point, I agree with Michael Casserly, executive director of the Council of the Great City Schools, who has written that "Washington is often at its best when a president is using the bully pulpit to highlight national educational and civil rights challenges and then tying them to our shared goals." Michael Casserly, "Uncle Sam and the Nation's Great City Schools: Reflections on a Rocky Relationship," in *Carrots, Sticks, and the Bully Pulpit*, ed. Hess and Kelly, 175 (quoted in <http://www.aei.org/publication/what-uncle-sam-can-and-cannot-do-to-improve-k-12-schooling-lessons-for-the-next-four-years/>).

<sup>20</sup> OCR issued 38 policy guidance documents to help educators and school communities understand civil rights laws and how to satisfy them. <https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf> at page 3 (referencing 34 guidance documents published to that point; OCR published four additional guidance documents before the end of the Administration).

<sup>21</sup> E.g. <https://www.the74million.org/arne-duncan-im-not-convinced-this-president-wants-to-have-the-best-educated-citizenry-in-the-world/>

<sup>22</sup> After Attorney General Sessions and Secretary DeVos repealed Department of Education guidance regarding civil rights of transgender students, I was proud to join amicus briefs filed in the Supreme Court and in the Fourth Circuit explaining the work that led to the guidance and the importance of federal civil rights enforcement in this area. See <https://mic.com/articles/170291/obama-administration-officials-filed-a-brief-in-support-of-transgender-teen-gavin-grimm#.J0QFvhbnH>.

<sup>23</sup> I focused my last speech as Secretary of Education on the need to repair relationships between police agencies and local communities. See <http://www.chicagotribune.com/news/ct-arne-duncan-chicago-violence-speech-met->

privileging some faiths over others,<sup>24</sup> and repealing rules designed to promote integrated housing,<sup>25</sup> among so many other actions. These actions communicate a strong message that federal civil rights enforcement is not meaningful now.

In addition to substantive policy changes that harm civil rights, the Trump Administration takes steps to starve civil rights enforcement that could, if unchecked, last well after the end of the current presidency. One pernicious step includes repeated efforts to slash the budgets for civil rights enforcement offices in the President's budget requests. Of course, budgets express policy judgments. I was proud repeatedly to have supported President Obama's request to increase funding for OCR during my time.<sup>26</sup> I saw the staff struggling under crushing caseloads, with insufficient staff resources to investigate the complaints streaming in to the office.<sup>27</sup> As a point of comparison for how great the need had become, OCR's FY 2006 annual report noted that by 2006, OCR's complaint receipts had risen to 5,805 whereas OCR staffing had fallen to 630 people – that report said “this represents the smallest number of staff and nearly the largest number of complaints received in OCR's history.”<sup>28</sup> In contrast, “OCR received 16,720 complaints in FY 2016, by far the highest one-year total in OCR's history” and OCR had 563 full time equivalent staff that year.<sup>29</sup> The ED Inspector General noted in 2015 that OCR “may not be able to maintain current levels of productivity if these trends [in declining staffing compared to “significantly increased” workload] continue.”<sup>30</sup> To be clear, I sought to increase OCR staff significantly, supporting an increase of 200 people in fiscal year 2016 alone.<sup>31</sup> I saw that the President's budget supported a like increase the following year.<sup>32</sup>

Unfortunately, the Trump Administration has consistently proposed to cut OCR's budget, in addition to proposing to cut the Department's budget overall.<sup>33</sup> A prescient article in *The Atlantic* noted several weeks into the current Administration that President “Reagan did restrain the power of the Office for Civil Rights [at ED] by cutting back its funding, reducing investigations and reviews, and rescinding guidance” and predicted “These are the strategies

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[20151231-story.html](#). And I devote my work now to the effort to reduce gun violence. Losing a federal partner in that work undermines the potential for the young men I work with to go on living; I am devastated by that loss.

<sup>24</sup> See <https://www.chronicle.com/blogs/ticker/colleges-scramble-after-trumps-executive-order-bans-citizens-of-7-muslim-countries/116624>.

<sup>25</sup> See <https://www.nytimes.com/2018/05/07/us/civil-rights-groups-plan-to-sue-hud-over-fair-housing.html?login=email&auth=login-email>.

<sup>26</sup> For example, the Inspector General's report notes that “for FY 2016, the Department's budget request for OCR includes a request for an additional 200 FTE.” IG Report at 7.

<sup>27</sup> A chart included at page 9 in OCR's FY16 annual report distills the need for their budget increase. <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf>.

<sup>28</sup> [https://www2.ed.gov/about/reports/annual/ocr/annrpt2006/report\\_pg10.html](https://www2.ed.gov/about/reports/annual/ocr/annrpt2006/report_pg10.html) at page 31.

<sup>29</sup> <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> at pages 7,9.

<sup>30</sup> IG Report at 7.

<sup>31</sup> <https://www2.ed.gov/about/overview/budget/budget16/justifications/aa-ocr.pdf>, at AA-4, AA-11. The budget request explains the justification for the increase at pages AA-13-15.

<sup>32</sup> <https://www2.ed.gov/about/overview/budget/budget17/justifications/z-ocr.pdf>.

<sup>33</sup> <https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf> and <https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf>.

DeVos might well follow.”<sup>34</sup> Secretary DeVos has done exactly that, and other Cabinet agencies appear to follow in lock step.

The Trump Administration’s repeatedly expressed position that the federal government should leave decisions – even decisions about civil rights – to state and local choices is not consistent with the statutory scheme Congress created decades ago and that we have lived ever since. That statutory scheme calls for a fundamental federal role in protecting Americans from civil rights harm, creating a hard line we do not cross as a country. Federal civil rights enforcement agencies are not and should not be the first line of defense against harm; they exist to create clarity about how to comply with civil rights principles, encourage that compliance, and when local decision-making fails then to step in to enforce it. As I explained at an event summarizing the civil rights enforcement work at ED toward the end of the Obama Administration: People don’t call OCR when things are going well; they call when they have tried other avenues and have not gotten relief.<sup>35</sup> For those core issues that Congress has enshrined in federal law – that discrimination on the basis of race or sex or disability, among other baselines, is not acceptable to Americans – the federal government needs to be there for Americans, ensuring that they live those promises. That is the appropriate role for federal civil rights enforcement agencies and, to my dismay, that is not the role we today see from the Trump Administration.

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<sup>34</sup> James S. Murphy, The Office for Civil Rights’s Volatile Power, The Atlantic (March 13, 2017), available at <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/>.

<sup>35</sup> <http://edstream.ed.gov/webcast/Play/947d4f4af0b14f2bb9a966d4414300141d>.