Testimony before U.S. Civil Rights Commission
"Federal Civil Rights Enforcement Efforts in the U.S."

R. Shep Melnick
Thomas P. O'Neill, Jr. Professor of American Politics
Boston College
November 2, 2018

My name is Shep Melnick. I am the Tip O'Neill Professor of American Politics at Boston College and author most recently of The Transformation of Title IX: Regulating Gender Equality in Education. Since my research has benefited from many previous studies by the Commission, for me it is a special honor to testify before you today.

Recognizing the major differences between the enforcement arrangements established by various civil rights statutes, I will focus exclusively on enforcement of Title VI and Title IX by the Office for Civil Rights (OCR) in the Department of Education.

In doing so, I want to emphasize two main points. First, much of the often heated and often partisan debate over "enforcement" of civil rights laws is not really about enforcement at all. For decades Democrats have accused Republican Administrations of failing to enforce civil rights laws; Republicans have accused Democratic Administrations of regulatory overreach and administrative bullying. *In reality, these are debates about what our policies should be—the proper regulatory standards--not the extent to which established policies are being adequately enforced*. Recognizing this central fact will lead to more civil and more productive discussion of these important matters.

Second, *the peculiar process by which OCR formulates and enforces its rules not only contributes to this confusion, but also deprives the entire regulatory regime of transparency, clarity, and, ultimately, legitimacy.* This is not the fault of the current Administration or the Obama Administration. The problem stretches back decades; it is the product of a long series of judicial and administrative decisions made with little attention to their long-term consequences. The Obama Administration took a few steps to bring more transparency to its compliance agreements. The Trump Administration appears to be bringing more transparency and public participation to the rulemaking process. These are moves in the right direction, but OCR needs to go much further on both fronts.

To understand why "enforcement" is so often a disguised or subterranean form of policymaking under Titles VI and IX, it is necessary to appreciate three peculiar features of regulation under these two statutes. I don't think any of this will come as a surprise to those who work in this policy area on a daily basis. But the implications of this peculiar regulatory regime are crucial and too seldom acknowledged.

Peculiarity #1: How OCR makes rules−or rather, avoids doing so

Titles VI and IX authorize federal agencies to issue rules and regulations to spell out the obligations of recipients of federal funds. Such rulemaking is covered by the Administrative Procedure Act's notice-and-comment procedures. Titles VI and IX go beyond that to require that such rules be signed by the president. Congress evidently thought that these rules would be so important and politically sensitive that the president should take responsibility for them.

At first the Office for Civil Rights (then in HEW) followed these procedures. But over time rulemaking became more and more attenuated. Since the 1990s almost everything has been done through unilaterally announced "interpretations," "clarifications," and the now ubiquitous "Dear Colleague Letter" (DCL). Notice-and-comment rulemaking is designed to make room for public participation, to require extensive deliberation and consultation on the part of the agency, and to facilitate "hard look" judicial review. With DCLs, regulators' "colleagues" are told they can comment on the new requirements only after they have been announced.[1] The justification for this avoidance of rulemaking procedures is that such "guidance" contains nothing that is new. In many cases this is obviously untrue−and everyone knows it.

This truncated procedure raises an awkward question: are these various forms of guidance mere suggestions, or are they legally binding? When asked that question by Senator Alexander in 2014, two high ranking officials in the Obama Administration's Department of Education said they were *not* legally binding. A third−Assistant Secretary for Civil Rights Catherine Lhamon−said they *are* legally binding. So does "enforcing civil rights laws" mean requiring schools to follow each command in these often lengthy guidance documents, or does it mean something less demanding? Given the huge gap between what OCR says in its sparse regulations and what it says in its voluminous guidance documents, this is no minor matter.

Moreover, there are many issues on which even these informal guidelines fail to provide sufficient guidance to schools on what they must do to stay within the law. After this Commission conducted a comprehensive review of OCR in 1996, it concluded that the agency's "restrained approach to issuing policy" failed to provide "definite policy guidance for school districts detailing the various program requirements they must address in ensuring equal educational opportunity for all students."[2] It voiced similar criticism in reports issued in 1999 and again in 2004.

In short, the way in which OCR establishes general rules—sometimes in vague directives, sometimes in guidance so detailed that no school can entirely comply, and never in the participatory fashion required by the APA—ensures that substantive policymaking will migrate into the enforcement process—the subject to which I will now turn.

Peculiarity #2: Enforcement sanctions, legal and informal

When Title VI was enacted in 1964, it was seen as creating an administrative *alternative* to court-based enforcement. Termination of federal funding was the sole enforcement power added by that section of the Civil Rights Act. With Title VI in place, it would no longer be necessary to engage in protracted litigation to punish federally funded institutions for discriminating on the basis of

race. Now federal agencies could act expeditiously to punish discriminators by revoking their funds. The same was true for Title IX, which was explicitly modelled on Title VI.

Before long it became evident that termination of federal funding would rarely be used. In fact, after the early days of southern school desegregation, it has almost never been employed. The total number of terminations under Title IX over the past 45 years is *zero*. Given that record, the threat of termination has become an empty one. (OCR, of course, continues to bluff, and school officials continue to tell their subordinates that they had no choice but to go along with OCR's demands.) The funding cut-off has proven too administratively cumbersome and too politically perilous to employ. Moreover, it threatens to hurt the very students these laws are designed to help.

So how are these laws enforced? What and who puts teeth into the enforcement process? The main answer is the federal courts, which have recognized an "implied private right of action" under both laws (and related statutory provisions such as Section 504). Private individuals can go to court to ask for injunctive relief and monetary damages. The threat of litigation is a powerful force leading schools and other institutions to reach agreements with OCR. To the extent the courts defer to OCR's rules and informal guidance, those guidelines become in effect legally binding.

Note how this reverses the initial expectation for Title VI: first seen as an administrative mechanism for enforcing constitutional rules enunciated by the judiciary, it became a judicial mechanism for enforcing rules announced by administrators.

In many area—for example, bilingual education and intercollegiate athletics—policymaking proceeded by a process I have called "institutional leapfrogging." That is, courts and agencies would each take a series of small steps, each time adding to the initiatives of the other. Regulation would expand without anyone acknowledging the extent of change.

But what happens when OCR's interpretation of civil rights laws goes well beyond that of the Supreme Court? The clearest and most important example is sexual harassment under Title IX. On the day before the inauguration of George W. Bush in 2001, OCR explicitly refused to follow the Court's rulings in *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Monroe County Board of Education* (1999). The agency was determined to demand far more from schools than the Court had done. But if administrators can't rely on court enforcement, and they can't terminate funding, how can they enforce their guidelines?

Between OCR's explicit break with the Supreme Court in 2001 and the release of its 2011 DCL on sexual assault and harassment, OCR's enforcement of its sexual harassment guidelines remained minimal. But with that 2011 DCL and the supplemental guidance issued in 2014 came a new form of enforcement, one that proved clever and effective—but also disturbingly arbitrary, opaque, and costly.

To enforce its sexual harassment/sexual assault guidelines OCR made three key changes in its enforcement strategy. First, it publicized its investigations from the outset. Previously it had made public its investigations only after they had been resolved. This change applied only to sexual harassment/assault investigations. The purpose was to put intense public pressure on colleges to

reach agreements with OCR. Well publicized investigations threaten colleges' reputation and prestige, and most schools were eager to get this volatile issue behind them.

Second, OCR turned every complaint by an individual into an extensive and detailed investigation of the entire institution. As a result, these investigations dragged on for months, even years. In fact by 2015 the average length of these investigations was 940 days, nearly three years.

These investigations place enormous stress on college administrators, giving them strong incentives to reach an agreement with OCR if they have already been targeted and to placate OCR if the hammer has not yet fallen. According to a Chronicle of Higher Education report, "Longtime leaders can't recall another issue that so consumed colleges. . . . Some presidents say they've spent half their time on the issue−and serious money, limiting their ability to add another mental-health counselor, for example, or hold down a tuition increase."[3] Student affairs administrators at some schools under investigation told a Chronicle reporter that they were "buckling under the pressure of trying to meet the government's approval with their prevention and adjudication efforts."[4] From 2014-2017, few investigations resulted in a finding of no violation−even if the only specific infractions involved deficient record-keeping. According to Peter Lake of Stetson University, one of the country's leading experts on Title IX compliance, "They come into your closet and say, 'Everything is in order, but we just want into your dresser and your socks are matching.'"[5] In short, *the process became the punishment*.

Third, the agreements that ended these investigations required schools to create large, autonomous Title IX offices. They also required these offices to build constituencies among student groups and to establish extensive ties with professional networks of Title IX administrators. These would remain in place no matter what future administrations did. So far this strategy seems to have worked: colleges have not changed their policies despite the Trump Administration's revocation of the Obama Administration's rules. OCR's leaders seem to have read the political science literature on how to entrench bureaucratic practices.

It was not unusual for schools to agree to provisions in compliance agreements that went well beyond anything explicitly required by OCR's written guidelines. A good example is the use of the "single-investigator model" for resolving allegations of sexual assault. This model constitutes a particularly serious threat to due process. To what extent did OCR officials pressure schools to adopt this deeply flawed model? To what extent did some school officials who favored this model rely on the handy excuse "the feds made me do it" to sell it to their school? We don't know because these agreements were negotiated in private.

Peculiarity #3: Policymaking through complaint investigation

A central feature of civil rights regulation at OCR is its focus on resolving all individual complaints that come through the door. Expeditious resolution of complaints has become its central bureaucratic task. This is where most of its resources go, and that is how it is judged, especially by appropriators. This has been true since the late 1970s.

Why? The key statutes−Title VI, Title IX, section 504, the ADA−do not mention this. In the 1970s the leaders of OCR (those appointed both by President Ford and by President Carter) strenuously objected to this focus because it reduced the agency's ability to direct its limited resources to the most serious problems.

The heavy emphasis on resolving individual complaints came from the federal courts--more precisely from a 1975 appendix to an order issued by federal district court judge John Pratt in the long-running *Adams v. Richardson* case. I won't go into detail on this litigation, other than to note that it in effect placed OCR in judicial receivership for a decade and a half. Not only did the procedures mandated by the court become embedded in agency routine, but OCR found it could defend itself from incessant criticism by showing how many complaints it had resolved−and arguing it could do so more quickly with more money.

What this meant was that policymaking migrated from general rulemaking to resolving individual complaints. Such *ad hoc* decision-making reduced controversy by making policy less visible and by suggesting that federal administrators had imposed nothing on schools−everything had been resolved voluntarily and amicably. Occasionally OCR would use these agreements as the justification for additional guidelines, claiming that such long-established policies do not require any further explanation or defense. More often it would issue no general guidance at all.

This means, in effect, that key policy choices remain hidden in the detailed resolution of individual investigations. When a reporter for the *Chronicle of Higher Education* filed a Freedom of Information Act request on OCR's handling of one investigation, the documents he received were "almost entirely redacted." The conduct of OCR's investigations, he noted, "are notoriously opaque."[6]

In her extensive examination of OCR's use of rulemaking and enforcement discretion, UNC law professor Catherine Kim found that the agency not only "implement[s] contentious policy initiatives through guidance documents to evade the more onerous constraints imposed on rulemaking," but "more alarmingly," also "circumvent[s] even the modest checks on guidance documents by channeling policy initiatives through the strategic exercise of enforcement discretion." "OCR enforcement proceedings," she found, "do not *usually* result in settlement, but rather they *always* do." As a result, "There has not been a single instance over the past quarter century in which enforcement decisions resulted in the final agency action necessary for judicial review." In short, Kim writes, "The limited disclosure of OCR enforcement decisions has precluded the public's ability to exercise meaningful checks on them."[7]

My personal experience is that OCR has further reduced the transparency of its regulatory process by refusing to allow scholars to interview agency officials either in Washington or in the regional offices. Never before in my research on federal agencies have I confronted such a blanket refusal to allow agency personnel to be interviewed by researcher. I don't know when the policy was instituted, but I hope it will be revised soon.

Conclusion and Recommendations

An opaque process that hides policymaking in the detailed resolution of thousands of individual cases has advantages for both Republican and Democratic Administrations: the former can adopt a narrower reading of civil rights statutes without admitting to doing so; the latter can adopt broader reading of civil rights statutes while claiming to do nothing new. Meanwhile, though, the grounds for these policies remain unarticulated, each side accuses the other of bad faith, and public debate is impoverished.

We can attack the underlying problem from two directions. First and most obviously, more use of notice-and-comment rulemaking. Secretary of Education DeVos has promised that "the era of 'rule by letter' is over." I hope that is right. Let's take policymaking out of the twilight of "Dear Colleague Letters" and the darkness of individual investigations and have these debates in broad daylight.

Second, more transparency in both the negotiation and the resolution of individual complaints. Here it was the Obama Administration that took the lead—at least selectively. Recognizing that in some instances the names and circumstances of complainants must remain confidential, why not start with the presumption that all these agreements should be made public unless there are compelling reasons to the contrary?

An important first step in this direction would be to make public the details of the large number of complaints filed by a few hyper-active individuals. In 2016 a single unnamed individual filed 6,157 athletic complaints under Title IX. In 2014 two unidentified individuals filed more than 1,700 complaints. OCR's leaders used these numbers to ask for congressional appropriators for more money. Should we allow three unidentified individuals to dictate agency priorities and possibly influence appropriations levels? Since these individuals could not have been personally involved in all these disputes, there is no justification for confidentiality. OCR should also reconsider the wisdom of allowing individuals to file complaints in which they have no personal stake.

A few years ago I had the opportunity to serve on the Civil Rights Commission's New Hampshire State Advisory Committee. This Committee was diverse in terms of political affiliation, race, gender, and geography. Through long deliberations and hearing from a wide variety of people, we were able to reach a consensus on the difficult issue we chose to address (disparities in the treatment of men and women in prison). I would like to think that we played a role in resolving a bad situation in the state. Especially in an era of intense partisan polarization, federal civil rights agencies would be wise to find ways to increase deliberation and transparency in Washington as well.

ENDNOTES

[1] As a long-time faculty, I will note that those of us who work in educational institutions do not consider federal regulators to be our "colleagues." It would be more accurate and more honest to begin these letters with "To all who are subject to regulation under civil rights statutes."

[2] It added, "OCR has not defined the phrase equal educational opportunity in any of its policies or guidance memoranda." U. S. Commission on Civil Rights, *Equal Educational Opportunity Project Series*, volume 1 (December, 1996) p. 196. https://www.law.umaryland.edu/marshall/usccr/documents/cr12ed8az.pdf

[3] Sara Lipca, "An Arc of Outrage: Despite the Clamor, the Real Conversation about Campus Assault Has Hardly Begun," *Chronicle of Higher Education,* April 13, 2015

[4] Robin Wilson, "Colleges Under Investigation for Sexual Assault Wonder What Getting It Right Looks Like," *Chronicle of Higher Education,* August 11, 2015

[5] Quoted in Robin Wilson, "As Federal Investigations of Sex Assault Gets Tougher, Some Ask if That's Progress," *Chronicle of Higher Education,* October 8, 2015

[6] Andy Thomason, "Why Isn't Baylor Under Title IX Investigation? A Records Request Yields Laughably Little," *Chronicle of Higher Education*, August 3, 2016.

[7] Catherine Y. Kim, "Presidential Control across Policymaking Forms," UNC Legal Studies Research Paper no. 2571068, December 9, 2015 (https://ssrn.com/abstract=2571068), pp. 31-33.