

TESTIMONY OF CATHERINE E. LHAMON BEFORE HOUSE COMMITTEE ON EDUCATION AND THE
WORKFORCE ON PROTECTING PRIVACY, PROMOTING DATA SECURITY: EXPLORING HOW
SCHOOLS AND STATES KEEP DATA SAFE

Chair Foxx, Ranking Member Scott, and Members of the Committee:

Thank you for inviting me to testify today. I am Catherine Lhamon and I Chair the U.S. Commission on Civil Rights and am Of Counsel at the National Center for Youth Law, where I litigate civil rights cases on behalf of children and youth in poverty. Before my current positions, I was Assistant Secretary for Civil Rights at the U.S. Department of Education from August 2013 through January 2017. Litigation and policy advocacy for civil rights in education have consumed the bulk of my 22-year legal career, and I speak to you today in my personal capacity and not on behalf of the U.S. Commission on Civil Rights or of the National Center for Youth Law.

Student data is, of course, essential to tracking schools' progress in delivering educational equity and protecting students' civil rights. The astonishing recent gains in reducing rates of student bullying, following data sunlight about the persistent prevalence of such harassment,¹ highlights one example of the effectiveness of data in spurring action on equity indicators in schools. Having managed the U.S. Department of Education's Civil Rights Data Collection for three and a half years while working closely with the Department's Privacy Office and other offices focused on education data, I appreciate this Committee's attention to the important topic.

As critical to educational opportunity as student privacy is, other and more pressing topics currently threaten our national commitment to equity in education. Especially because today marks the 64th anniversary of the U.S. Supreme Court's pathbreaking decision in *Brown v. Board of Education*, I understand the Committee invited me to speak to these additional topics, based on my civil rights background. I urge this Committee to recognize the crisis moment at which the nation now teeters with respect to civil rights in education and to use its oversight authority to examine urgent topics such as the U.S. Department of Education's satisfaction of the solemn charge Congress has given it to safeguard equity for students. Given my deep respect and appreciation for the value and power of Congress' oversight authority, I share here a handful of examples of ways the U.S. Department of Education today creates an equity emergency, ignoring Congress' express commands in so doing.

In this Administration, the Department of Education repeatedly undermines equity, contrary to its Congressional charge. Just this week, news reports confirm that the Department has "marginalized, reassigned or instructed to focus on other matters" the team of investigators

¹ Sarah Sisaye, U.S. Department of Education, *Bullying Rates Drop*, May 15, 2015, <https://www.stopbullying.gov/blog/2015/05/15/bullying-rates-drop.html> (discussing 2013 data from the School Crime Supplement to the National Crime Victimization Survey which reflected a drop in bullying after staying persistently high since 2005).

who previously worked on protecting students from predatory and misleading advertising claims from some for-profit colleges that benefited financially from their student populations' reliance on their false claims.² Ceasing the important work of making defrauded students whole and operating effective controls against financial fraud for vulnerable students runs directly counter to the equity mission of the Department. Yet the action is consistent with countless other recent steps that merit this Committee's review and examination.

This week also marked the conclusion of the public comment period on the Department's proposal to reconsider and delay operation of a regulation to implement Congress' mandate that schools that identify, place, or discipline students of color with disabilities at significantly disproportionate rates must spend some of their federal special education funds on comprehensive early intervention services.³ Rather than driving forward with urgent response to persistent data reflecting that students of color with disabilities are subject to exclusionary school discipline at rates wildly disproportionate to their student population numbers, this Administration seeks a two-year delay to contemplate further a problem Congress years ago charged the Department to address (and to which the regulation proposed for delay offers a modest, cautious solution).

In a similar vein, this Administration has announced the creation of a Commission, headed by the Secretary of Education, charged specifically with making recommendations on the repeal of existing policies regarding nondiscrimination in school discipline.⁴ That announcement alone signals to the broader education community that compliance with nondiscrimination laws in this area is now optional. I hope I don't need to explain to this Committee, on the 64th anniversary of *Brown v. Board of Education*, how deeply dangerous to equity it is to send a message that satisfaction of the nation's core civil rights principle – that discrimination against Americans on the basis of race is anathema – is merely an aspiration and not a mandate. We know from the painful history of implementing the Supreme Court's clear mandate in *Brown* that unless federal enforcement is a real possibility, too many among us will not satisfy even that most basic constitutional principle that none of us should be discriminated against on the basis of the color of our skin.⁵

² Danielle Ivory, Erica L. Green, and Steve Eder, *Education Department Unwinds Unit Investigating Fraud at For-Profit Colleges*, N.Y. Times, May 13, 2018, <https://www.nytimes.com/2018/05/13/business/education-department-for-profit-colleges.html>.

³ Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 83 Fed. Reg. 8396 (Feb. 27, 2018), <https://www.federalregister.gov/documents/2018/02/27/2018-04102/assistance-to-states-for-the-education-of-children-with-disabilities-preschool-grants-for-children>; see also 20 U.S.C. section 1418(d).

⁴ The White House, *President Donald J. Trump is Taking Immediate Actions to Secure Our Schools*, Fact Sheet, Mar. 12, 2018, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-immediate-actions-secure-schools/> (describing the creation of the Federal Commission on School Safety which will take up, among other topics, the “[r]epeal of the Obama Administration’s ‘Rethink School Discipline’ policies”).

⁵ For more on that history, see U.S. Commission on Civil Rights, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation*, Jan. 2018, <http://www.usccr.gov/pubs/2018-01-10-Education-Inequity.pdf> at pp. 12-14.

Notwithstanding the demonstrated importance, over decades, of federal civil rights enforcement, every time this Administration has had an opportunity to express its values through budgets, it has chosen to undervalue equity, requesting devastating reductions to the Department of Education's budget generally⁶ and to the budget of the Office for Civil Rights (OCR) specifically.⁷ According to the Department's own projections, if Congress had acceded to the President's budget recommendation, OCR staff would have carried crushing, untenable caseloads, drowning the possibility of meaningful civil rights enforcement.⁸ Fortunately, Congress rejected these starvation budget proposals, each time in these past 16 months increasing the budget of the Office for Civil Rights and supporting right-sizing the budget Departmentwide, to allow for continued equity focus consistent with Congress' equity commands.

In this Administration, the Department of Education has – so far unchecked – arrogated to itself the power and authority to ignore the law. The Department has made a blanket determination that Title IX of the Educational Amendments of 1972,⁹ which protects against sex discrimination in schools, does not protect transgender students' rights to access bathrooms and locker rooms consistent with their gender identity. The Department's Office for Civil Rights rejected jurisdiction over allegations of discrimination in these areas even in those states that are bound by federal court decisions at both the trial and appellate levels that reach exactly the opposite conclusion.¹⁰ Congress has not (and constitutionally could not have) given a federal agency authority to ignore the law. In past Administrations, the Department has enforced the law as interpreted in particular federal courts of appeals even when other federal courts of appeals ruled differently. In contrast, the Department in this Administration operates a blanket practice to reject jurisdiction over any allegation that a transgender student has been denied access to a restroom or locker room consistent with his or her gender identity even in those states in which federal courts of appeals have rejected the Administration's misreading of the law and ruled that such denial of access constitutes sex discrimination in violation of Title IX.

⁶ U.S. Department of Education, Fiscal Year 2019 Budget Summary and Background Information, <https://www2.ed.gov/about/overview/budget/budget19/summary/19summary.pdf>.

⁷ U.S. Department of Education, Office for Civil Rights, Fiscal Year 2019 Budget Request, <https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf>; U.S. Department of Education, Office for Civil Rights, Fiscal Year 2018 Budget Request, <https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf>.

⁸ Recent reporting following the convictions of former Michigan State University athletics doctor Larry Nassar sheds some sunlight on the challenges OCR staff can face when investigating allegations of discrimination, including recalcitrant schools failing timely (or ever) to provide information relevant to the investigation. See Paula Levigne, *Michigan State sought to end federal oversight, delayed sending Nassar files*, ESPN, Jan. 25, 2018, http://www.espn.com/espn/otl/story/_/id/22211140/michigan-state-sought-end-federal-oversight-delayed-sending-feds-files-larry-nassar-espn. The potential to face these and related challenges exists in each case the office investigates, compounding a challenge of a caseload the current Department of Education projected to rise as high as 42 cases per person, in contrast to times ten or more years ago when investigators carried on average six cases per person.

⁹ 20 U.S.C. sections 1681-1688.

¹⁰ Dominic Holden, *The Education Department Officially Says It Will Reject Transgender Student Bathroom Complaints*, BuzzFeed News, Feb. 12, 2018, https://www.buzzfeed.com/dominicholden/edu-dept-trans-student-bathrooms?utm_term=.qgawOYel9#.esnGgvdr9.

The Department's flouting of the law that binds it is not limited only to its failure to protect transgender students' civil rights. The precedent its action sets – that the Department may ignore the law as Congress writes it and as interpreted in courts that are binding on the Department – has wide-ranging ramifications for each and every civil right Congress has charged the Department to protect, and therefore for every student who relies on the Department for equal educational opportunity.

Those wide-ranging ramifications are not theoretical. Recent actions make concrete their reach. OCR has begun closing, and refusing to open, cases over which it has jurisdiction simply because the complainant who seeks aid and review from OCR has filed some unspecified number of other cases in addition.¹¹ OCR lacks jurisdiction to pick and choose which cases to open; its regulatory charge is to act “whenever” it has evidence that the law it enforces may have been broken.¹² That charge means that OCR must open for investigation any timely complaint over which it has jurisdiction. But OCR's new practice in this Administration now shuts out repeat filers, even if their complaints raise valid issues of discrimination. OCR's new practice actually turns the federal government's back on evidence of discriminatory harm to students, which Congress in its wisdom has long outlawed. At a time when the best available evidence shows ample need for strong enforcement,¹³ the Office for Civil Rights is relinquishing its rightful place on the field to protect the rights that give it its name. This new practice places an arbitrary limit on justice, leaving discretion to individual Department staff to determine that a complainant seeks too much of what Congress has promised.

In this Administration, the Department of Education's Office for Civil Rights has abdicated its commitment to enforcing all the laws within its jurisdiction fairly and fully. Whereas Congress' charge to the Department of Education, through its Office for Civil Rights, is to enforce each of the federal civil rights laws over which Congress has assigned the Office jurisdiction,¹⁴ the Department in this Administration has taken repeated steps to denigrate the vitality of particular laws and components of laws within its enforcement jurisdiction. For example, the Department has begun renegotiating existing agreements with schools regarding how the schools will satisfy the law to protect rights of students with disabilities, taking the further step to expend resources undermining these students' rights as distinct from protecting

¹¹ Erica L. Green, *DeVos Education Dept. Begins Dismissing Civil Rights Cases in Name of Efficiency*, N.Y. Times, Apr. 20, 2018, <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html>.

¹² 34 C.F.R. section 100.7(c); 34 C.F.R. section 106.71.

¹³ Mark Keierleber, *Federal Civil Rights Data Highlight Racial Disparities in Discipline as DeVos Mulls Guidance Rollback*, The 74, Apr. 24, 2018, <https://www.the74million.org/federal-civil-rights-data-highlights-racial-disparities-in-discipline-as-devos-mulls-guidance-rollback/>; Brianna Sacks, *High Schools Are Dealing with Repeated Acts of Racism and Students Are Concerned*, BuzzFeed News, Oct. 23, 2017, https://www.buzzfeed.com/briannasacks/teens-at-these-high-schools-are-protesting-a-rise-in-racist?utm_term=.tlMAywoNJ#.kgX5PMLq1.

¹⁴ See U.S. Department of Education Office for Civil Rights, *Securing Equal Educational Opportunity: Report to the President and Secretary of Education*, <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> at p. 6 (illustrating the timeline of civil rights laws over which Congress assigned OCR jurisdiction, as well as summarizing in text each of those laws).

them equally with all other students.¹⁵ This devaluation of existing resolutions of viable civil rights cases signals in the strongest possible terms that the Department is not reliably open for business for students with disabilities, in addition to undermining the Department's own stated goal of operating more efficiently to resolve outstanding cases.

Similarly, the Department recently rescinded existing guidance regarding schools' obligations to prevent and respond to sexual violence, consistent with federal law prohibiting sex discrimination in schools, replacing it with new guidance that violates Congress' mandate.¹⁶ To cite only one example of the flaws in the Department's new position: the new guidance deletes text providing for all parties to have equitable access to appeal of school administrators' decisions – notwithstanding the longstanding Title IX regulatory requirement, affirmed by the United States Supreme Court, that schools must have prompt and equitable procedures in place to address sex discrimination.¹⁷ Privileging one party's access to process over another's is a hallmark of inequity; the new "interim" guidance from the Department cannot square with the commonsense regulatory requirement that the Department ensure equity in schools' procedures.

Through these, among other, actions, the Department in the current Administration has taken distressing backward steps to undermine civil rights, spurning the obligations this body set for the Department, in service of students' rights.

In this Administration, the Department of Education has abandoned transparency that is critical to Americans' understanding of how to achieve the equity Congress charges the Department to oversee. In addition to the substantive equity harms summarized above, the Department of Education has become less transparent in its activities, rarely issuing press releases regarding investigation results and failing timely to update its website to allow public access to its analytic expertise regarding equity in education. Again in this area, too, the Department violates Congress' statutory command. Whereas the FOIA Improvements Act of 2016 requires federal agencies to make available for public electronic review any released records about which it has received three or more FOIA requests,¹⁸ the Department does not post this information, keeping the American public in the dark even about regularly requested information Congress has mandated be made public. Moreover, the Department's Office for Civil Rights does not timely post resolutions to its website, hampering the public's ability to learn how OCR applies the law to facts and to benefit from OCR's expertise. Especially concerning for the topic of today's hearing, the Department has reassigned the longtime Chief Privacy Officer amidst reports of "a broader reorganization that could have big implications for

¹⁵ Benjamin Wermund, *Trump Administration Renegotiates Months-Old Civil Rights Agreements*, Politico, May 14, 2018, <https://subscriber.politicopro.com/education/article/2018/05/trump-administration-renegotiates-months-old-civil-rights-agreements-537000>.

¹⁶ U.S. Department of Education, *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, Press Release, Sept. 22, 2017, <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>.

¹⁷ 34 C.F.R. section 106.8(b).

¹⁸ 5 U.S.C. section 552(a)(2).

how the federal government supports schools and districts in protecting student privacy.”¹⁹ The persisting absence of transparency, retreat from focus on equity, and potential to discontinue core privacy enforcement and technical advising and guidance work raise significant civil rights concerns.

Conclusion

These concerns, among others, lowlight a crying need for effective Congressional oversight to curb practices in this Administration that harm the nation’s students. I applaud this Committee for meeting today, on the anniversary of the nation’s most foundational Supreme Court decision related to school equity. And I am also dismayed that this Committee marks today’s significant anniversary with such a limited focus on a single subtopic relevant to education and to equity, rather than examining a more fulsome scope of the Department’s critical work. I urge this Committee to use its expertise and jurisdiction to review much more closely the uses to which the U.S. Department of Education currently puts its authority regarding equity, for the sake of my two public school daughters as well as of every one of our nation’s students. The strength of our nation’s commitment to justice depends in significant part on strong oversight from Congress to ensure federal agencies’ vigilant satisfaction of Congress’ charges in statutes. The strongest indicators so far during the first 16 months of the current Administration suggest inattention to, and often direct contravention of, core civil rights commands Congress has over decades directed to the Department of Education. The nation’s students deserve Congressional vigilance to correct those practices, with, as Dr. King put it, the fierce urgency of now.

¹⁹ Benjamin Herold, *Shakeup in Office Overseeing Student Privacy Rights*, Education Week, Mar. 20, 2018, <https://www.edweek.org/ew/articles/2018/03/21/shakeup-in-office-overseeing-student-privacy-rights.html>; Jenny Abamu, *U.S. Dept of Ed Reassigns Chief Privacy Officer, Leaving Key Position Vacant*, EdSurge, Mar. 14, 2018, <https://www.edsurge.com/news/2018-03-14-u-s-dept-of-ed-reassigns-chief-privacy-officer-leaving-key-position-vacant>.