

Questions for the Record
“Kenneth Marcus to be Assistant Secretary for Civil Rights at the Department of Education”

Hearing Date: December 5, 2017

Questions for the Record from Senator Elizabeth Warren

1. In your legal opinion, what statutes and laws does the Office of Civil Rights (OCR) have the ability to enforce? What is within the office’s jurisdiction?

OCR has enforcement jurisdiction under: Title VI of the Civil Rights Act of 1964 (prohibiting race, color, or national origin discrimination in all programs or activities receiving federal funds); Title IX of the Education Amendments of 1972 (prohibiting sex discrimination in all education programs or activities receiving federal funds); Section 504 of the Rehabilitation Act of 1973 (prohibiting discrimination based on disability in programs, services, and activities receiving federal funds); the Age Discrimination Act of 1975 (prohibiting age discrimination in all programs or activities receiving federal funds); Title II of the Americans with Disabilities Act of 1990 (prohibiting disability discrimination in state and local government services regardless of receipt of federal funds); and the Boy Scouts of America Equal Access Act of 2001 (prohibiting public elementary and secondary schools from denying equal access to school facilities to the Boy Scouts of America and certain other youth groups). In undertaking enforcement activities pursuant to its jurisdiction under the foregoing statutes, OCR must conduct its enforcement and apply its laws, regulations, and policies in a manner consistent with the U.S. Constitution and all applicable U.S. Supreme Court precedent.

2. In your legal opinion, what civil rights statutes or laws, which may be violated in a school setting in a manner that harms students, fall outside of OCR’s jurisdiction?

OCR’s jurisdiction under the civil rights statutes prohibiting discrimination based on race, color, national origin, sex, disability, age, and equal access for the Boy Scouts (and similar youth groups) provides the basis for OCR’s authority to undertake enforcement activities.

3. In your legal opinion, what type of evidence is needed for OCR to initiate an investigation?

The type of evidence needed for OCR to initiate an investigation depends on the facts and circumstances of the particular potential investigation, but generally, OCR initiates investigations (whether directed investigations or compliance reviews) where facts

indicate concern that a recipient of federal funds may be in violation of one or more of the civil rights statutes OCR is charged with enforcing.

4. During your nomination hearing, you were “unsure” if ensuring undocumented students had access to education fell under OCR’s jurisdiction. What is OCR’s role and obligation with regard to complying with and enforcing the Supreme Court’s decision in *Plyler v. Doe*, concluding that the Equal Protection Clause of the Fourteenth Amendment protects of undocumented students from discrimination?

OCR enforces Title VI of the Civil Rights Act of 1964 to protect every student’s right to access his or her education free from discrimination based on race, color, or national origin, consistent with U.S. Supreme Court precedent, such as Plyler v. Doe, which established every child’s right to receive a public education regardless of immigration status.

5. According to a July 2012 OCR report, under Title VI of the Civil Rights Act of 1964, OCR is responsible for “affirming the equal right of all children in the U.S., regardless of their immigration status, race, color or national origin, to attend public elementary and secondary school.”¹ Do you believe that discrimination on the basis of citizenship status is protected under Title VI’s protection against discrimination on the basis of race, color, or national origin?

If confirmed, I will ensure that OCR vigorously enforces Title VI of the Civil Rights Act of 1964 to protect every student’s right to access his or her education free from discrimination based on race, ethnicity, or national origin, consistent with U.S. Supreme Court precedent, such as Plyler v. Doe, which established every child’s right to receive a public education regardless of immigration status.

6. In your legal opinion, does Title VI prohibit states and districts from unjustifiably utilizing criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of a program for individuals of a particular race, color, or national origin?

If confirmed, I will ensure that OCR vigorously enforces Title VI of the Civil Rights Act of 1964 to protect every student’s right to access his or her education free from discrimination based on race, ethnicity, or national origin, consistent with U.S. Supreme Court precedent, such as Plyler v. Doe, which established every child’s right to receive a public education regardless of immigration status. Under my leadership, if confirmed, OCR will examine any school policy that may operate to violate the rights of students under Title VI to full and equal access to education free from barriers based on race, ethnicity, or national origin.

¹ Office of Civil Rights. (2012, July). “Title VI Enforcement Highlights.” U.S. Department of Education.

7. In 2011, the U.S. Department of Justice and U.S. Department of Education (“The Department”) issued a joint Dear Colleague letter, which notes that a “State may not deny access to a basic public education any child residing in the State, whether present in the United States legally or otherwise”.² In 2014, the same Departments reaffirmed these rights and instructed school districts on how to ensure equal access for all children to public schools, regardless of status.³ Do you agree that under both the U.S. Constitution and Title VI of the Civil Rights Act of 1964, states may not deny access to a basic public education to any child residing in the State, whether present in the United States legally or otherwise?

OCR enforces Title VI of the Civil Rights Act of 1964 to protect every student’s right to access his or her education free from discrimination based on race, color, or national origin, consistent with U.S. Supreme Court precedent, such as Plyler v. Doe, which established every child’s right to receive a public education regardless of immigration status.

8. In your legal opinion, do you believe OCR has the authority to ensure that States and districts do not deny access to a basic public education to any child residing in the State, whether present in the United States legally or otherwise?

OCR has authority under Title VI of the Civil Rights Act of 1964 to protect every student’s right to access his or her education free from discrimination based on race, ethnicity, or national origin, consistent with U.S. Supreme Court precedent, such as Plyler v. Doe, which established every child’s right to receive a public education regardless of immigration status.

- a. If confirmed, what would be your duty to act in a circumstance where undocumented students are clearly facing discrimination in schools?

If confirmed, I will ensure that OCR vigorously enforces Title VI of the Civil Rights Act of 1964 to protect every student’s right to access his or her education free from discrimination based on race, ethnicity, or national origin, consistent with U.S. Supreme Court precedent, such as Plyler v. Doe, which established every child’s right to receive a public education regardless of immigration status.

- b. Will you commit to referring such clear and unconstitutional discrimination to the U.S. Department of Justice if it came to your attention?

If confirmed, I will work with my colleagues in the U.S. Department of Justice, along with the Department of Education’s Office for General Counsel, to abide by all memoranda of understanding, delegation agreements, and other inter-agency agreements, as well as applicable laws and regulations, regarding referrals of matters to appropriate enforcement agencies.

² <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201101.html>

³ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf>

9. A school district refuses to enroll a student who has a foreign birth certificate or fails to provide social security number. Based solely on this information, does OCR have the authority to investigate this district for discrimination against this student?

OCR enforces Title VI of the Civil Rights Act of 1964 to protect every student's right to access his or her education free from discrimination based on race, ethnicity, or national origin. Under my leadership, if confirmed, OCR will examine school policies that may operate to violate the rights of students under Title VI to full and equal access to education free from barriers based on race, color, or national origin. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

10. If confirmed, will your office ensure that school districts will not collect social security numbers in a manner that impedes the enrollment of undocumented or foreign-born students?

Under my leadership, if confirmed, OCR will examine school policies that may operate to violate the rights of students under Title VI to full and equal access to education free from barriers of discrimination based on race, color, or national origin. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

11. If a public school teacher refused to teach any undocumented students, even those who are U.S. citizens, because they believe these students to be undocumented, if confirmed, would OCR step in to protect the civil rights of those undocumented students?

Under my leadership, if confirmed, OCR will examine any school policy that may operate to violate the rights of students under Title VI to full and equal access to education free from barriers of discrimination based on race, color, or national origin. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

12. In February, 2017, Secretary of Education Betsy DeVos and Attorney General Jeff Sessions rolled back guidance from the Obama administration regarding transgender student rights, suggesting there was no legal basis to interpret Title IX in this manner. Do you believe that harassment of lesbian, gay, bisexual, and transgender (LGBT) students falls under the jurisdiction of Title IX?

Title IX prohibitions on sex discrimination, including harassment based on sex stereotyping, protect all students, including LGBT students.

13. Numerous federal circuit⁴ and district⁵ courts have held that federal civil rights nondiscrimination laws that prohibit discrimination on the basis of sex protect transgender people from discrimination. Additionally, a growing body of case law has determined that those laws also prohibit sexual orientation discrimination. For example, the Seventh Circuit has determined that sexual orientation discrimination and gender identity discrimination are prohibited Title VII and Title IX in *Hively v. Ivy Tech*⁶ and *Whitaker v. Kenosha Unified School District*⁷ respectively. In the Seventh Circuit, and in any jurisdiction with applicable case law, do you believe OCR has the authority, under its Title IX responsibilities, to protect LGBT students from discrimination on the basis of their sexual orientation and gender identity?

Title IX prohibitions on sex discrimination, including harassment based on sex stereotyping, protect all students, including LGBT students.

14. I understand that a complaint does not automatically and necessarily constitute a violation of civil rights law. I also understand that a complaint is used by OCR to determine whether or not the office should open an investigation to determine if students' civil rights have been violated.

We note there is no question asked here for response.

15. I would like to understand what types of complaints indicate to you that an OCR investigation is necessary to protect the civil rights of the LGBT students. In your legal opinion, in the following cases, is there enough information to open an OCR investigation to determine if violations of civil rights laws under OCR jurisdiction have occurred? (Please answer each question individually.)

- a. A public high school softball coach refuses to allow a transgender girl to play on the school's softball team.

Evaluation by OCR as to whether to open an investigation depends on the particular facts and circumstances. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

- b. A public school suspends a transgender boy for wearing the boy's version of the school's required uniform.

⁴ See *Schwenk v. Hartford*, 204 F.3d 1187, 1200 (9th Cir. 2000); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Smith v. City of Salem* 378 F.3d 566 (6th Cir. 2004); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017).

⁵ See ,e.g., *Miles v. New York Univ.*, 979 F. Supp. 248, 249-50 (S.D.N.Y. 1997), *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008), and *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

⁶ *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016)

⁷ *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017)

Evaluation by OCR as to whether to open an investigation depends on the particular facts and circumstances. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

- c. A public high school prohibits a student from bringing his boyfriend (or her girlfriend) to prom solely because the school leadership does not believe homosexuality aligns with the school's values.

Evaluation by OCR as to whether to open an investigation depends on the particular facts and circumstances. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

- d. A transgender student's parent notifies school officials that their child prefers a different name and gender pronoun that what is on official school records, but the public school refuses to recognize this preference.

Evaluation by OCR as to whether to open an investigation depends on the particular facts and circumstances. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

- e. A public college prohibits the creation of a Gay Straight Alliance, but allows for other non-curricular student clubs.

Evaluation by OCR as to whether to open an investigation depends on the particular facts and circumstances. It would be inappropriate of me to opine on hypothetical facts that could lead to opening an OCR investigation.

16. Do you believe all American youth, regardless of race, have equal access to resources and activities (e.g., tutors, well-funded public education, extracurricular programs, etc.) that are traditionally considered in the college admissions process?

No.

17. Do you believe that peaceful expressions of criticism of Israeli government policy on United States college and university campuses are protected speech under the First Amendment? Please explain and cite applicable legal authority.

Yes. The Supreme Court has decisively and correctly declared the following: "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation... Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

18. Do you believe that peaceful expressions of criticism of Israeli government policies or actions on United States college and university campuses represent *prima facie* evidence of violations of the civil rights of Jewish students? Please explain and cite applicable legal authority.

No. See Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). OCR has properly recognized that it “interprets its regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles.” See 2003 Dear Colleague Letter, <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>

19. Do you believe that peaceful expressions of criticism of the policies or actions of the Palestinian Liberation Organization (PLO), the Palestinian Authority (PA), any other Palestinian entity or group, or a Palestinian individual on United States college and university campuses are protected speech under the First Amendment? Please explain and cite applicable legal authority.

Yes. Please see my response to question number 17.

20. In your April 2011 paper assessing OCR’s bullying and harassment policy, you recommended that OCR adopt the State Department-endorsed definition of anti-Semitism, which includes examples of ways in which anti-Semitism can intersect with hatred toward Israel (i.e., demonizing Israel, applying a double standard when assessing Israeli government policy, delegitimizing Israel’s existence, etc.). Kenneth Stern, a former director of the division on anti-Semitism and extremism at the American Jewish Committee (AJC) and the lead author of that definition, wrote in an editorial in December 2016 that it “was intended for data collectors writing reports about anti-Semitism in Europe. It was never supposed to curtail speech on campus.”

Are you concerned that, were you to implement your recommendation and require OCR to adopt the State Department definition of anti-Semitism for the purposes of investigating complaints for alleged violations of students’ civil rights, would such an approach lead to unconstitutional restrictions on speech regarding the Israeli-Palestinian conflict on United States college and university campuses? Please explain and cite applicable legal authority.

In my personal capacity and as President of the Louis D. Brandeis Center for Human Rights Under Law, I have recommended that OCR use the State Department definition of anti-Semitism in a manner consistent with the proposed Anti-Semitism Awareness Act and the First Amendment. That is to say, I have recommended that the definition be used to determine whether certain conduct, pertinent to Title VI of the Civil Rights Act of 1964, is motivated by anti-Semitic intent. The Supreme Court has held that “The First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993).

21. In your capacity as President of the Louis D. Brandeis Center for Human Rights Under Law, or in any other role in your professional life, please describe your efforts to promote dialogue and mutual understanding between Jewish and Arab students on United States college and university campuses.

I have promoted dialogue and mutual understanding in a variety of ways. For example, I have personally made it a point to speak out against anti-Arab stereotypes in the media and in the entertainment industry, and I have given public testimony on this issue. http://brandeiscenter.com/wp-content/uploads/2017/10/testimony_021313.pdf.

I have also spoken out against anti-Muslim discrimination, especially in American penal institutions, and have given testimony as well as published research on this area. <https://link.springer.com/article/10.1007/s12552-009-9003-5>.

This reflects the Brandeis Center's vision statement, which provides that "The Louis D. Brandeis Center promotes justice for all as a means of securing the rights of the Jewish people and secures the rights of the Jewish people as a means of advancing justice for all." I have also encouraged the Brandeis Center's law student chapters to collaborate with a wide range of other law student groups and to share best practices for such collaborations with one another.

If you have any questions, then please contact Josh Delaney in my office at (202) 224-4543.