

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20540

10 JUN 1980

Coleman
OCR/CSC
Relationship

MEMORANDUM

TO : The Secretary
Through: US _____
ES _____

FROM : General Counsel
Acting Assistant Secretary
for Civil Rights

SUBJECT : Civil Rights Enforcement between the General
Counsel and Assistant Secretary for Civil
Rights - INFORMATION MEMORANDUM

PURPOSE

This memorandum describes the working relationships of the Assistant Secretary for Civil Rights (ASCR), and the General Counsel (GC), in the area of civil rights enforcement. The GC and ASCR responsibilities set forth below are subject to the Secretary's oversight authority under sections 201, 202(g), and 412 of the Department of Education Organization Act.

DISCUSSION

Pursuant to Section 203 of the Department of Education Organization Act (DEOA), the Secretary has delegated to the ASCR "all powers necessary to effectuate [the civil rights statutes] including, but not limited to, the conduct of investigations, the conduct of negotiations to secure voluntary compliance, the determination that such voluntary compliance cannot be secured, the evaluation and acceptance or rejection of corrective action plans, and the conduct of enforcement activities."^{1/} (The May 4, 1980 delegation memorandum is attached at Tab A. A list of the specific duties for which the ASCR has primary responsibility is attached at Tab B).

The ASCR, in performing the functions delegated to her, will regularly report to the Secretary. A precise description of what civil rights enforcement issues ought properly to be reported is elusive. Even the stage of the enforcement process when these issues might first arise cannot be identified with certainty. Generally speaking, the test for inclusion in the report to the Secretary would relate to the novelty or sensitivity of the matter involved. Where the ASCR proposes to adopt

^{1/} In addition to these functions, 34 CFR 101.23 makes the Assistant Secretary the party to enforcement proceedings.

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a new approach to the enforcement of the law (as by advancing a new legal theory) or to apply the law to a new problem (current examples are minimum competency testing and psychotherapy), a report will be made in advance to the Secretary. Similarly, "routine" matters will be reported in advance if they could significantly affect the department's relationship with Congress, other executive agencies, or nonfederal institutions and organizations.

The General Counsel's role, as provided in Section 211, DEOA, is to provide legal assistance to the Secretary.^{2/} The Office of General Counsel would not serve as the legal arm of the Office for Civil Rights and would not be a party to any administrative proceedings that the Office for Civil Rights initiates. The General Counsel, not being a party to any administrative proceedings that the ASCR initiates, will be in a better position to provide legal assistance to the Secretary in the exercise of her posthearing functions.

Regulations and other policy statements of general applicability relating to civil rights would be reviewed by the General Counsel prior to submission to the Secretary on the same basis as similar documents relating to other departmental functions. The General Counsel will advise the Secretary as to the legal sufficiency of regulations and policy statements and as to their effect on the programs and policies of the department. As with other documents setting forth the department's policy, the General Counsel will perform a mediating function where disputes concerning the document arise, and thereby help to reduce the number, and narrow the scope, of issues requiring Secretarial resolution.

Of particular importance is the relationship of the Assistant Secretary, the General Counsel and the Department of Justice (DOJ) in civil rights litigation. There are three primary ways in which the department works with DOJ on civil rights cases: referrals of cases to DOJ for the filing of civil suits, participation with DOJ as amicus curiae in civil rights cases in which the department is not a party, and defensive litigation.

Primary responsibility for representing the department position in all litigation and for coordination of all litigation involving the department will be exercised by the General Counsel. The centralization of the department's Legal Affairs in the Office of General Counsel will complement the General Counsel's mediating function with respect to intradepartmental disputes over policy. There is often a need to ensure that

^{2/} Attached at Tab C is the General Counsel's plan for creating a division in OGC to handle civil rights matters.

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positions taken in litigation are consistent with overall department policy; because the General Counsel is without direct program responsibility and is the Chief Legal Officer of the department, we believe that she is particularly well-placed to provide litigation coordination.

In all civil rights litigation, determination of the department's position will be made in close consultation with the ASCR. When the General Counsel and the ASCR disagree about what the department's position should be on a major civil rights issue, the dispute will be submitted to the Secretary for resolution.

As a practical matter, the General Counsel will rely to a great extent on the expertise and resources of the ASCR to provide litigation support in connection with civil rights statutes. In most cases, day-to-day contact between the department and DOJ will be handled by OCR staff attorneys, with participation by OGC attorneys when designated by the General Counsel. The General Counsel is responsible for ensuring that such litigation support by OCR attorneys and staff will be consistent with the department's position. The General Counsel will also retain the authority of final review of briefs and other documents filed by DOJ in civil rights cases in which the Department is a party or that otherwise affect departmental interest.

Subject to the general division of responsibilities described above, the three categories of civil rights litigation in the courts will be handled as follows:

Referral of cases to DOJ: Referral is initiated by the recommendation of the ASCR to the Secretary. The General Counsel will review the recommendation prior to submission to the Secretary. When the ASCR and the GC are unable to agree that a case should be referred, the Secretary will resolve the disagreement. Once a case has been referred, day-to-day staff support to the Justice Department generally will be provided by OCR attorneys and staff. OCR staff support will be consistent with the department's position and policies and subject to the review of the General Counsel.

Amicus curiae briefs: Determination of the government's participation as amicus curiae and the filing of briefs is the responsibility of the Justice Department. The ASCR will recommend to the Secretary that the Justice Department be asked to file an amicus curiae

brief. Such recommendations will include a brief statement of the proposed position of the government in the case. The ASCR's recommendations will be reviewed by the General Counsel prior to submission to the Secretary. The Secretary will resolve any disagreements between the ASCR and the GC over whether a request will be made to the Justice Department and over major issues concerning the recommended position. If the Secretary approves participation and Justice agrees to file a brief, staff support in drafting the brief generally will be provided by OCR, subject to the department's position and the review of the General Counsel. The General Counsel will review the brief DOJ proposes to file and will provide departmental concurrence on the brief.

Defensive Litigation: In civil rights cases filed against the department and its officers, the General Counsel will coordinate the defense with the Justice department and in consultation with the ASCR. As a practical matter, the General Counsel generally will rely on the expertise and resources of OCR to provide staff support to the Justice Department.

In all three categories of cases, the General Counsel has primary authority for coordination of the department's participation. In most cases, this will involve the General Counsel in the determination of the department's position, review of the briefs and other major documents to be filed with the court, and on determinations to settle a case. In those cases that the General Counsel deems to be of particular importance to the Department, the General Counsel may take a more active role, including the organization and supervision of a team of OGC and OCR attorneys to provide the staff support. Both the General Counsel and the ASCR agree that the needs of ED and the Justice Department would be ill-served by having the General Counsel review in detail all litigation staff work by OCR and all OCR staff contacts with the Justice Department.

With regard to other day-to-day relationships between the Office for Civil Rights and the Office of the General Counsel, each office will designate someone at a high level to serve as a continuing liaison between the two in order to facilitate communication, coordination, and cooperation. In addition to this mechanism, the two principals will meet frequently to review significant issues.

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3 Attachments:

- Tab A: May 4, 1980 Memorandum to the Acting Assistant Secretary for Civil Rights**
- Tab B: Primary Responsibilities of the ASCR**
- Tab C: General Counsel's plan for OGC Civil Rights matters**

MEMORANDUM

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TO - : The Assistant Secretary for
Civil Rights (Acting)

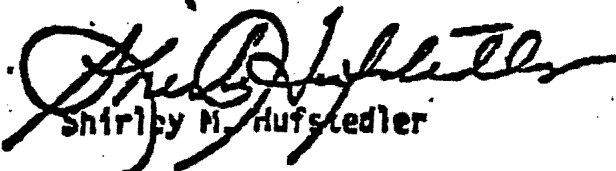
FROM : The Secretary

SUBJECT : Primary Delegations of Authority

Attached is a document which delegates to you the authority to conduct the enforcement functions for which the Office for Civil Rights is responsible. The effective date of these delegations is the date the Department of Education is established. By that date, you should either provide for the exercise of these authorities by the members of your office, or be prepared to exercise them yourself. This document must be read in conjunction with section 203 of the Department of Education Organization Act.

This delegation document continues certain administrative practices followed in the past. For example, I have retained the authority to promulgate regulations and the authority to appoint members of advisory councils (where the appointing authority is vested in me by law). In general, I have delegated to the Assistant Secretary for Management the authority to award contracts and discretionary grants. However, this document delegates to you the authority to enter into contracts and other arrangements under section 203(c) of the Department of Education Organization Act. Similarly, I have retained the general authority to submit reports to Congress or the President. However, this document delegates to you the authority to submit such reports under section 203(b) of the Department of Education Organization Act. If I conclude in the future that certain other authorities should be delegated to you, I will do so in a supplementary document.

These delegation documents must be read and understood in the context of the legal requirements of the Department of Education Organization Act. If you have any questions regarding the meaning or scope of these delegations, contact the Office of the General Counsel or the Office of Evaluation (formerly Management and Analysis Systems Division).


Shirley M. Hufstetler

Attachment

Tab E

The Assistant Secretary for Civil Rights would have the primary responsibility for carrying out the following:

- o proposing enforcement policy through the drafting of such documents as regulations and interpretations of general applicability;
- o determining investigative priorities;
- o releasing recipients for compliance reviews;
- o developing investigation plans;
- o conducting compliance investigations and compliance reviews;
- o determining whether recipients comply with legal requirements;
- o conducting negotiations with noncomplying recipients to achieve voluntary compliance;
- o accepting plans for voluntary compliance;
- o determining that voluntary compliance cannot be achieved;
- o initiating administrative hearings by sending notice of opportunity for hearings;
- o in consultation with the General Counsel, recommending to the Secretary to refer cases to the Department of Justice (DOJ) for enforcement or to participate, with DOJ, as amicus curiae; * /
- o deciding whether to defer approval of new applications pending administrative hearings; and
- o litigating cases in administrative hearings.

1/ Independent of the Assistant Secretary's recommendation, however, the General Counsel may provide legal advice to the Secretary with respect to any matter recommended for referral to DOJ.

Tab C

OGC Organization

A division headed by an assistant general counsel has been created in OGC that brings together both program assistance and enforcement issues in the area of race, sex, and national origin discrimination. Another division focuses on issues involving the handicapped. The objective would be to focus on issues of equal educational opportunity in their totality. This would permit a review and analysis of a full range of strategies in, for example, ensuring that school districts provide full access to an appropriate education for the handicapped.

Through our responsibilities to coordinate the regulations process we will seek to ensure consistency among OCR and OSERS, OCR and OBEMLA, and OCR and OESE.

This division would, of course, continue to provide the kinds of legal assistance provided by the Equal Education Opportunity Branch of the Education Division, FEW-OGC to the various program assistant secretaries who are concerned with programs of assistance in the area of equal educational opportunity (e.g., Title VII of ESEA [bilingual programs], WEEA, ESAA).