

Reports from the Frontline:

What You Should Know About OCR's Recent Investigation and Compliance Review Process

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Introduction:

The key goal of this presentation and accompanying paper is to assist educational agencies and their counsel as they proactively interact with the U.S. Department of Education’s Office for Civil Rights (OCR) in fulfilling their shared mission to safeguard the civil rights of all students. This material will assist school attorneys in asserting their due process protections in OCR investigations and build confidence in OCR’s neutral fact-finder role while encouraging effective use of educational resources.

With this goal in mind, we highlight a number of areas that can be cumbersome to navigate given OCR’s current practices, with practice tips on how educational agencies can more effectively maintain ownership of the process. Examples are drawn from the collective experiences of the contributors and illustrate specific situations you may encounter under OCR’s current approach to conducting investigations. We also offer recommendations drawn from our experience to assist you with navigating and concluding an OCR investigation of a school you represent. Examples and recommendations proceed chronologically from the opening of an investigation until its conclusion.

Background:

OCR Authority

U.S. Department of Education’s Office for Civil Rights (OCR) enforces:

- Title VI of the Civil Rights Act of 1964 – prohibits discrimination on the basis of race, color, and national origin (42 U.S.C. § 2000d et seq., 34 C.F.R. Part 100).
- Title IX of the Education Amendments of 1972 – prohibits discrimination on the basis of gender in educational programs receiving federal funds (20 U.S.C. §§ 1681 et seq., 34 C.F.R. Part 106).
- Section 504 of the Rehabilitation Act of 1973 – prohibits discrimination and harassment based on disability in programs that receive federal financial assistance (29 U.S.C. § 749, 34 C.F.R. Part 104).
- Title II of the Americans with Disabilities Act of 1990 – prohibits discrimination and harassment based on disability by public entities (42 U.S.C. §§ 12131 et seq., 28 C.F.R. Part 35).
- Age Discrimination Act of 1975 – prohibits discrimination based on age (42 U.S.C. §§ 6101 et seq., 34 C.F.R. Part 110).
- Boy Scouts of America Equal Access Act of 2001 – prohibits denial of equal access to school facilities or programs or discrimination against any group officially affiliated with Boy Scouts (20 U.S.C. § 7905, 34 C.F.R. Part 108).

OCR regulations implementing its enforcement of these acts are at 34 C.F.R. Parts 100-110. OCR also issues non-binding “Dear Colleague Letter” guidance that explains, and many would

argue expands upon, obligations imposed by federal non-discrimination statutes and regulations. In recent years, OCR has begun issuing many more Dear Colleague Letters than it did in the past.¹ These lengthy Dear Colleague Letters indicate OCR's current investigation and enforcement priorities – areas that schools concerned about OCR investigations should be especially cautious about.

OCR also enforces compliance through (1) Complaint Investigations and (2) Compliance reviews.

Compliance reviews are initiated without a complaint upon OCR's initiative. See [Case Processing Manual](#), Section 401. A compliance review traditionally consists of a top-to-bottom review of the school's practices and procedures relating to one or more areas of concern for OCR. Examples of recent compliance reviews include:

- [**Title VI: Discipline: Minneapolis Public Schools \(School\) \(MN\) \(05-12-5001\)**](#)
- [**Title VI: LEP Parental Communication and Equal Access to Non-Academic Programs/Activities for EL Students: Dearborn Public Schools \(MI\): \(15-10-5001\)**](#)
- [**Title VI \(Access to STEM\): Cleveland Metropolitan School District \(15-11-5003\)**](#)
- [**Title IX, Title VI, Section 504 & Title II: Sex, Race, and Disability Harassment: Yakima School District \(WA\) \(10-11-5001\)**](#)
- [**Title IX: Interscholastic Athletics: Indianapolis Public Schools \(IN\) \(05-10-5002\)**](#)

In a Complaint Investigation, OCR investigates and facilitates resolution of complaints of discrimination by individuals. See [Case Processing Manual](#), Article III. Traditionally, complaint investigations were focused on potential discrimination against the complaining individual and more focused and limited than Compliance Reviews. In recent years, however, OCR has used individual complaints to initiate broader “Class-Wide” investigations on compliance issues relating to the subject of the complaint, especially when a complaint concerns one of the topics of OCR's recent Dear Colleague Letters. These class-wide investigations can involve requests for data from all schools in an educational agency over multiple years and interviews with dozens of school staff and students. OCR's recently revised Case Processing Manual (CPM) also provides for “Directed Investigations,” “when a report or other information indicates a possible

¹ From January 1, 2014 through early 2015, OCR issued the following Dear Colleague Letters:

- [Nondiscriminatory administration of school discipline](#), January 8, 2014
- [The Supreme Court ruling in *Schuette* and ED's continued support for the voluntary use of race and ethnicity to achieve diversity in education](#), May 6, 2014
- [Schools' enrollment procedures and the obligation to enroll all regardless of race, national origin, immigration, or citizenship status](#), May 8, 2014
- [The applicability of Federal civil rights laws to charter schools](#), May 14, 2014
- [Ensuring students have equal access to educational resources without regard to race, color, or national origin](#), October 1, 2014
- [Schools' obligations to respond to the bullying of students with disabilities, even if only eligible under Section 504](#), October 21, 2014
- [Concerning effective communication for students with hearing, vision, or speech disabilities in public elementary and secondary schools](#), November 12, 2014
- [The applicability of Federal civil rights laws to juvenile justice residential facilities](#), December 8, 2014
- [Schools' obligations to ensure that English Learner students can participate meaningfully and equally in school](#), January 7, 2015

failure to comply with the regulations and laws enforced by OCR.” [Case Processing Manual](#), Section 402. These were previously very rare, but are becoming more common and now are often related to media reports.

The OCR’s Basic Investigation Process, as outlined in its [Case Processing Manual](#), is:

- Evaluation of the Complaint
 - School receives Notice of Complaint
- Early Complaint Resolution (ECR)
- Investigation
 - Request records & data, Position statement
 - Interviews
 - Student Focus Groups
- Resolution
 - Section 302: Agreement without finding of violation
 - Section 303: Agreement after finding of violation
- Issuing of Letters of Finding
- Enforcement Action - Comply or risk losing federal funding

Illustrations:

Initiation and Expansion of Investigations

1. Opening Investigations Based on Assumptions

- OCR’s practice is to open an investigation if any allegation would violate a civil right that they enforce, using an intake standard that assumes every complaint allegation to be true. OCR does not conduct an initial review of factual information from an educational agency or require an effort by the complainant to resolve the matter at the school level. This low threshold can unfairly damage public perceptions of an educational agency and create a heavy burden on school staff.
- This low threshold also potentially violates Section 108(c) of OCR’s CPM that requires dismissal if the allegation is so speculative, conclusory, or incoherent that it is not sufficiently grounded in fact for OCR to infer that discrimination or retaliation may have occurred or is occurring. A CPM footnote states that the complaint “must provide more than conclusions of alleged violations of the laws enforced by OCR.”
 - Ex: OCR opened an investigation on a discrimination claim even though a brief review of evidence from the educational agency would have demonstrated the non-discriminatory basis for the school’s action. Sample media perception: “Another civil

rights complaint filed against Educational Agency: Feds launch third investigation in last two months.”²

- Ex: OCR opened an investigation on a retaliation claim without sufficient facts to ascertain if the employee was engaged in an activity protected by the regulations enforced by OCR. The educational agency had evidence that the employee was not assigned to or serving the student at issue. The retaliation was speculative, and the complainant failed to provide sufficient detail for OCR to infer that retaliation may have occurred.

- ❖ *Practice Tip:* With a class-wide investigation, OCR requires an underlying complaint to do the expansive investigation unless they decide to initiate a compliance review. Consider taking steps to have the process closed or significantly narrowed from the outset by challenging the underlying complaint. As soon as the educational agency has notice of a complaint, gather basic background facts to determine if there is any basis in fact underlying the complaint. Do not expect OCR to conduct a preliminary review of evidence from a complainant and school to determine if there is merit for opening an investigation. Proactively gather facts and data that support the educational agency’s position that there is no factual basis for the claim and relay this immediately to the OCR attorney and/or investigator. While this approach may not get the matter closed, it may serve to limit the data request by OCR, and it keeps the educational agency in a proactive position during the investigation and data gathering. While OCR also should ensure that complaints include adequate information before opening an investigation (The CPM states OCR will dismiss a complaint if “the allegation lacks sufficient detail – i.e., who, what, where, when, how.”), in practice, this is not the case. The educational agency’s best initial defense is a strong factual foundation, with documentation, statements, and data to provide a basis for early closure.

- ❖ *Practice Tip:* If there is public misperception of OCR opening an investigation, consider using a press release and other communication techniques to tell the school’s side and explain OCR’s process. In considering the message to the school’s community, review whether themes like “government overreach or overregulation” will resonate. Be careful to respect all confidentiality laws restricting the release of student information.

- ❖ *Practice Tip:* Work with OCR and the complainant to resolve complaints as soon as possible through the Early Complaint Resolution (ECR) process. Recently, OCR has frequently taken the position that ECR is not an option. Educational

² In a June 24, 2014 *National Review* article entitled “Shaming Our Schools”, attorney Scott Coffina discussed problems with the Department of Education publicly identifying schools under investigation given the low standards used for opening investigations and the confidentiality laws preventing educational agencies from responding substantively on matters under investigation. Mr. Coffina asserted that the Department of Education’s new policy was “counterproductive to achieving a cooperative resolution of the matter.” He stated further: “The Department of Education ought to reconsider its policy of publicly identifying schools under investigation, and it should also reinterpret FERPA to allow schools to respond publicly when students choose to air their grievances at a press conference.”

agencies should question why ECR is not available in certain cases, citing the shared goal of preventing a burdensome investigation when a school is willing to enter into an agreement. An educational agency also may consider resolving a complaint with an individual complainant without OCR's approval and ask that the complainant withdraw his/her complaint as a condition of the resolution. Note that under CPM Section 110(l), OCR may decide not to close its investigation even if an individual withdraws his/her complaint if the investigation "raises systemic issues that warrant continuing the investigation" or if OCR has already gathered enough evidence to complete its findings.

- ❖ *Practice Tip:* OCR will frequently initiate an investigation based on a borderline complaint where those processing the complaint identify deficiencies in policies and process. Make sure your educational agency's internal complaint procedures are (1) legally compliant, (2) well-publicized, and (3) staff are trained to effectively resolve allegations, so as to keep complaints in-house and avoid unnecessary OCR involvement.

- ❖ *Practice Tip:* Assert to OCR that one or more grounds in Section 110 of the CPM for closing a complaint during the early stages of investigation applies, such as:
 - 110(a) Complaint is being handled internally or in court;
 - 110(c) Complaint allegations are foreclosed by previous court decisions;
 - 110(j) Meritless complaints;
 - 110(o) The allegations are moot.

2. Opening Investigations Without a Complaint

- OCR will open an investigation when there is no complaint or factual allegation of an educational agency's wrongdoing, or even when an educational agency contacts OCR for technical assistance. This discourages efforts, including those of student journalists, to increase public awareness of discrimination/harassment issues and diminishes OCR's availability to assist schools proactively.
 - Ex: OCR opened a school-wide investigation based on a student magazine article without a factual allegation of wrongdoing by the educational agency or any review of information from the school.

 - ❖ *Practice Tip:* Under Section IV of the CPM, a class-wide Compliance Review or Directed Investigation is always a possibility, even without any formal complaint. An educational agency is more likely to successfully challenge the basis for a burdensome investigation, however, when there has been no complaint.

 - ❖ *Practice Tip:* Educational agencies cannot rely on OCR to conduct a sufficient inquiry to determine if there is any factual basis for opening an investigation. Therefore, when a seemingly unwarranted investigation is opened by OCR, the best defense is to have staff promptly gather all materials and data available so that counsel is armed with facts to rebut the need for OCR to conduct an expansive school-wide investigation.

3. Using an Individual Complaint to Initiate a Class-wide/School-wide Inquiry

- As previously noted, OCR will sometimes use a complaint in an individual matter to initiate a class-wide/school-wide inquiry. This broadens the scope of an investigation without justification or review of information from the educational agency, and leads to substantial disruption of a school environment. It also extends the time necessary for OCR to complete an investigation.
 - Ex: In an investigation the educational agency believed could be resolved in a few hours through exchange of documents to show appropriate actions and legal compliance in an individual student matter, OCR opened a school-wide investigation without any review of information from the school. This led to OCR’s request for hour-long interviews with 20+ school staff members, and more than a year passed before OCR made any determination.
 - Ex: An issue involving a complaint about a suspension of one student led to an investigation of all discipline taking place at all schools in the educational agency over a three-year period, a large volume of data requested, and interviews with dozens of staff and student focus groups. *Note:* Racial or Disability-Based statistical disparities in survey data collected by OCR from all schools and available at <http://ocrdata.ed.gov/> can prompt OCR to convert an individual complaint on an issue in which there are statistical disparities into a class-wide investigation. The CPM states, “Generally, statistical data alone are not sufficient to warrant opening an investigation, but can serve to support the opening of an investigation when presented in conjunction with other facts and circumstances.”
 - Ex: A parent complained that meetings of the board of the educational agency rebroadcasted on local cable channels were not closed-captioned. OCR expanded its investigation over a three-year period and ultimately required all programs produced by the Division’s PEG TV stations, live and rebroadcasted, to be closed-captioned. The division was not entitled to rely on FCC Regulations, Title 47, Part 79.1, a self-implementing regulation whereby a public entity is entitled to rely on the exemption without application to the FCC if it locally produced and distributed non-news programming; its captioning expense is in excess of 2 percent of gross income; the channels produced revenues under \$3M; or it was locally produced educational programming.
 - ❖ *Practice Tip:* OCR should open a class-wide/school-wide inquiry only where there is factual support for broadening the scope of an investigation beyond mere statistical disparities. *See Texas Dept. of Housing v. Inclusive Communities Project* (2014) (“A statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. A robust causality requirement ensures that ‘racial imbalance . . . does not, without more, establish a prima facie case of disparate impact.’ And thus protects defendants from being held liable for racial disparities they did not create.”)

- ❖ *Practice Tip:* Because DOJ and OCR have adopted a hardline approach on equally effective access (far narrower than the courts), OCR takes the position that the language in Section 504 and Title II trump the FCC exceptions. “Persons with disabilities must be afforded **equally effective communication....**” To avoid a class-wide/school-wide inquiry, be prepared to demonstrate what is available, what has already been investigated, determine costs associated with alternatives, and be prepared to compromise.
- ❖ *Practice Tip:* Insist that OCR review information from an educational agency prior to opening a class-wide/school-wide inquiry to determine if there is a reasonable basis for conducting a broad inquiry that will involve substantial time, use of educational resources, and disruption to a school and school environment.

Investigation Practices

4. Data Requests Far Beyond Scope of Complaint

- OCR data requests in individual investigations go far beyond the scope of individual complaints and create heavy burdens on a school staff, often requiring thousands of pages of documents within short periods of time. This extensive production of documents also requires substantial time for OCR attorneys to review the documents.
 - Ex: In an investigation of an individual allegation of disability harassment, OCR requested information in 16 areas that led to nearly 1,500 pages of responsive documents. In another investigation, the original allegations did not fall within OCR's jurisdiction. However, OCR worked with the complainant to re-frame the allegations to come within the category of harassment based on disability. OCR then issued a request for documents in 18 areas that led to nearly 2,000 pages of responsive documents. The items set forth in the document request far exceeded the scope of the complaint.
 - Ex: In an investigation of an individual allegation of a race-based discipline decision, OCR requested a large volume of records and data over three years for all schools in the educational agency, asked for reports to be created on data categories the educational agency did not keep, asked for interviews with staff from every school in the educational agency, and asked to talk with “focus groups” of students from different schools in the educational agency.
 - Ex: In an investigation of a parent allegation that the educational agency retaliated against her for her advocacy at IEP meetings, OCR required the school to provide information of each and every instance where a parent was excluded from school property for any reason for a period of two to three years, requiring the educational agency to review extensive paperwork from each of its schools to determine which “No Trespass” notices were relevant to the inquiry.
- ❖ *Practice Tip:* Since data requests should be focused on allegations that may have merit and corresponding legal issues to facilitate OCR’s determination of compliance, counsel should attempt to focus OCR investigators on areas of inquiry

that correlate to the relevant issues. OCR’s CPM states “OCR will ensure that investigations are legally sufficient and that they are dispositive of the allegations raised in the complaint.”

- ❖ *Practice Tip:* An educational agency may consider meeting obligations to provide access to information by offering that OCR make an on-site visit to access data rather than dedicating staff time to compiling the reports and data requested. The risk is that OCR will seek to obtain information that it would not obtain if the school staff compiled the requested data directly.
- ❖ *Practice Tip:* To address privacy concerns and limit the scope of the disclosure, consider redacting data provided.
- ❖ *Practice Tip:* If data OCR requests is not collected or does not exist, object to requests to create new data or indicate when new data will become available.
- ❖ *Practice Tip:* Assert the attorney-client privilege to withhold attorney-client privileged communications. For example, *U.S. v. Phoenix Union High SD*, 681 F.2d 1235 (9th Cir. 1982), and *OCR v. Capistrano Unified SD*, 75 ELR 1396, 1410, 1992 WL 220791 (1992) support the position that OCR is legally obligated to honor state law on attorney-client privileged communications if not waived. Voluntary disclosure of attorney-client privileged communications to a government agency risks waiving the privilege on all documents related to the same subject matter.

5. Presumption Toward Interviews Without Review of Information

- OCR investigations proceed toward staff interviews, and potentially even student interviews, with little or no prior review of factual information provided by the educational agency in response to OCR data requests and without regard for the level of evidence needed for a determination.
 - Ex: OCR requested interviews with fifth grade students in a matter where it had not yet reviewed 1,500 pages of documentary evidence it requested.
 - Ex: In a class-wide investigation, OCR requested interviews with 20+ school staff members prior to identifying any concerns in the student discipline data provided, and suggested it would need to re-interview or interview additional staff about specific discipline incidents once it had reviewed the data provided.
 - Ex: OCR interviewed a related service provider.
- ❖ *Practice Tip:* Educational agencies should discuss the particulars of OCR interviews with staff members in advance of the interviews and carefully review the “Notice of Recipient Interviewee Rights and Protections” prior to the interview. One of the first questions OCR will ask is whether the interviewee has read and understood the Notice. That Notice also determines whether counsel for

the educational agency remains with staff during the interview, because OCR's position is that staff may ask to speak with OCR without counsel present.

❖ *Practice Tip:* Counsel should review documents and data that have been provided to OCR that are relevant to the interview with the staff member prior to the interview, so that staff can intelligently comment on questions asked. Interviews are often conducted by telephone.

❖ *Practice Tip:* Interviews should be conducted only when necessary. Counsel may ask OCR to reconsider interview requests that appear unwarranted or irrelevant and that needlessly disrupt the school environment and staff time. There should be a presumption not to disrupt the educational environment, especially when a complaint lacks merit or there is an ample factual record for a determination.

6. Conducting Large Numbers of Staff Interviews Without a Factual Basis

- OCR operates with a presumption toward conducting large numbers of school staff interviews. This presumption inevitably leads toward substantial disruption of a school environment and months or even years to complete an investigation. This practice also makes any investigation susceptible to a fishing expedition where interviews are not focused on the subject matter of a complaint, but a means for obtaining information on any potential matter of interest.
 - Ex: In a complaint regarding an individual student matter that the educational agency believed could be resolved expeditiously through providing documents to demonstrate legal compliance, OCR opened a school-wide investigation without factual support and requested hour-long interviews with 20+ school staff members. This coincided with another investigation in the educational agency where OCR requested interviews with 20+ school staff members. OCR made both requests during the closing weeks of school when staff and students were engaged in end-of-year projects and preparing for final exams.
 - Ex: OCR interviewed an administrator and a teacher from every building just to get a survey of general practices, despite being provided with documentary evidence.
- ❖ *Practice Tip:* Counsel for educational agencies should request OCR to narrow investigation practices to obtain necessary and relevant information quickly, allow for prompt potential case resolution, and lessen disruption to schools, classrooms, and students. OCR should conduct interviews only when necessary to obtain relevant information for a determination.
- ❖ *Practice Tip:* Object to large numbers of staff interviews and propose a specific smaller number of interviews be conducted first. Schedule interviews at times that are most convenient for staff and the instructional calendar.

7. Conducting Interviews Without Adequate Protections for Staff and Students

- OCR attorneys will conduct interviews of staff members and students without adequate protections for participants' rights and the production of timely and verifiable information.
 - Ex: OCR interviewed middle school children based on a form allowing parents to opt out, without requiring affirmative written consent. OCR also refused to allow an observer from the educational agency to be present or for interviews to be recorded. OCR has proposed to interview groups of students without protection for individual privacy and has not responded to educational agency requests for information on investigating attorneys' training and experience for interviewing children and protecting against risks such as false memories and suggestibility.
 - Ex: OCR requested 40 students attend focus groups during the last weeks of school when students were focused on exams.
 - ❖ *Practice Tip:* Students should be interviewed by investigating attorneys with appropriate training and experience only when it is believed students have necessary and relevant witness information for an investigation. Per OCR's CPM, when investigating attorneys interview students, there should be affirmative prior written consent by parents for the interview and due process protections to ensure student privacy. OCR investigations should provide timely and verifiable information.
 - ❖ *Practice Tip:* Review previously used and anticipated questions to prepare school staff for interviews.
 - ❖ *Practice Tip:* Require signed affirmative parental consent forms for student participation in focus groups. Cite applicable school policies and the Protection of Pupil Rights Amendment. Object to segregating students by class in student focus groups. *See Letter to Senator Cochran.*
 - ❖ *Practice Tip:* Request procedures for protecting student privacy and confidential student information in a focus group setting. Propose alternatives for producing relevant, appropriate information such as results from valid surveys of students authorized by the educational agency rather than relying on information from a focus group discussion easily influenced by peer comments, authority figures, and leading questions.
 - ❖ *Practice Tip:* Insist that a staff person or attorney for the educational agency be present during student focus groups.

8. Seeking Information From Only One Side of Complicated Student Interactions

- OCR does not appear to seek information from both sides of complicated student interactions.

- Ex: OCR’s investigative attorneys indicated they did not have a plan for interviewing or seeking information from the parent of an alleged harasser who the educational agency was confident would provide a perspective contrary to the complainant’s. In another case, OCR’s investigating attorneys did not have a plan for seeking information from two parents with different views on harassment allegations.
- ❖ *Practice Tip:* When necessary and relevant for a full inquiry, OCR must seek both sides of student interactions that may involve perspectives of multiple parents and students as well as the educational agency. OCR’s CPM states “OCR will undertake a robust outreach to the recipient community to increase its access to relevant information in the conduct of an investigation.”
- ❖ *Practice Tip:* If possible and necessary in the situation, obtain and provide to OCR a written statement illustrating other perspectives.

9. Not Allowing an Educational Agency to Review and Challenge Inaccurate Evidence

- Potential alteration and tampering of evidence by a complainant or anyone threatens the integrity of an investigation. Under OCR’s current investigation procedures, an educational agency is not able to review evidence for accuracy. OCR does not provide copies to an educational agency of the allegations and evidence that a complainant submits to OCR, which makes it impossible for the educational agency to ensure OCR has all the necessary and relevant information needed to reach a fair and accurate conclusion. An educational agency may request copies of an OCR complaint and investigation records under the federal Freedom of Information Act (FOIA), like any member of the public, but even this effort will not ensure access to specific complaint allegations (the “who, what, where, when, how” detail that OCR requires). OCR does not typically release investigation records during an investigation or during implementation of any resolution agreement. If released under FOIA following the completion of an investigation and resolution agreement, investigation records will be heavily redacted by OCR. OCR asserts that protections of due process do not apply to an educational agency under investigation unless and until the very unlikely occurrence that OCR brings an enforcement action threatening removal of federal funds. Essentially, OCR’s process does not proactively offer an educational agency any opportunity to review or verify the accuracy of information submitted to OCR by a complainant. This process denies an educational agency an opportunity to challenge inaccurate or misrepresented information. If altered or misrepresented information is not discovered, it may pollute an entire investigation.
- Ex: During interviews conducted by OCR, the investigating attorneys presented e-mail correspondence for review by administrators of the educational agency that did not match the educational agency’s stored e-mail record and that appeared altered to misrepresent a communication between the school and complainant. The educational agency requested a copy of the apparently tampered evidence under FOIA. Although the investigation was completed and the educational agency found in compliance, OCR objected to release of the requested communication, alleging it would be a violation of personal privacy.

- Ex: OCR accepted inaccurate information provided by complainant on a claim of retaliation to establish the complainant was engaged in a protected activity and there was adverse action by the educational agency as a result of protected activity. Facts asserted included that the complainant parent was advocating for her student, a protected activity, and that she was fired from her employment as a result of this advocacy. The complainant was not fired, but was transferred by her employer, an entity which served multiple school divisions and regularly transferred employees within the service area. OCR directed the educational agency to ask the third-party employer to transfer complainant back to the school and to pay for any additional commuting and day care expenses she may have incurred as a result of the initial transfer.

- Ex: FOIA requests have had mixed results for what educational agencies have been able to obtain about a complaint. OCR took over a year to respond to a FOIA appeal and ultimately found that the justifications for not providing requested documents did not support non-disclosure, but that the documents would still not be provided for other reasons.

- ❖ *Practice Tip:* Educational agencies must be prepared to present the accurate facts to OCR, with written verification, to nullify inaccuracies presented by complainants to OCR attorneys and investigators. OCR’s CPM states “OCR is committed to a high quality resolution of every case.” Accordingly, counsel should request that the educational agency be allowed to review allegations and evidence submitted for factual accuracy so that a school has an opportunity to challenge inaccurate assertions or misrepresented evidence. Since this has not been OCR’s practice, educational agencies should assert that a school must have a means for reviewing the integrity of the record prior to OCR issuing a letter of findings.

10. Exceeding Maximum Timelines for Conducting Investigations

- OCR is not abiding by its own 180-day maximum timeline for completing an investigation. This delays resolution for both complainants and educational agencies, and compromises an educational agency’s ability to review OCR’s determinations.
 - Ex: OCR regularly exceeds a year to complete an investigation which delays resolution for educational agencies and compromises the integrity of any conclusions.³

 - Ex: FOIA appeals to OCR’s Washington Office have taken over a year, or have not been substantively responded to for nearly two years, when FOIA and OCR’s regulations require a response within 20 days.

³ A May 1, 2014 CNN article, “Colleges, universities respond to sexual violence investigation,” includes reports of universities indicating that OCR is exceeding a reasonable timeline for conducting an investigation. In the article, Arizona State University indicated that OCR visited ASU in September 2013 to gather information, and the University was awaiting further word from OCR; Washington State University indicated that OCR notified it in January 2013 of a complaint, and the University was still waiting to hear on potential participation in the voluntary resolution process; Princeton University indicated it has been cooperating with OCR in an investigation that began in 2010.

- ❖ *Practice Tip:* It is in the best interest of an educational agency to have an OCR investigation conducted in a prompt and fair manner, with a goal of minimizing disruption to the educational mission and environment of schools. To that end, educational agencies can facilitate resolution by working collaboratively with OCR counsel and investigators to provide all relevant documents and data promptly to OCR. Despite the preference that an OCR investigation be completed quickly, as noted in items 5, 6, 8 and 9, counsel for educational agencies should insist that OCR consider responsive documents and information before conducting interviews, asking for additional data, and to facilitate resolving the complaint.

11. No Right of Appeal for an Educational Agency

- It is unclear what appeal rights, if any, an educational agency has to OCR's determinations. OCR provides a right of appeal for complainants and issues a written response.
 - Ex: In an investigation that took 15 months to complete, OCR stated it would be willing to review inconsistencies and unsupported determinations that the educational agency found in OCR's Letter of Findings. OCR had not previously notified the educational agency of a right to request reconsideration. When the educational agency requested OCR's records of the investigation, OCR refused to provide them, claiming that enforcement of the resolution agreement may be jeopardized even though implementation was nearly complete and it was more than six months after the findings. Nearly two years after filing a timely appeal under FOIA for the records of the investigation, the educational agency had still not received OCR's records of the investigation.
 - ❖ *Practice Tip:* It is vital for an educational agency to know its appeal and reconsideration rights on OCR investigations and determinations. An educational agency should be able to access the information that provides the basis for OCR's determinations, and an educational agency should have an opportunity to appeal OCR's determinations and show the basis for a different conclusion.

Resolution Practices

12. Proposing Voluntary Resolution Agreements Without Review of Information

- OCR attorneys are not carefully reviewing documents provided by educational agencies in response to OCR data requests prior to proposing terms for voluntary resolution agreements.
 - Ex: OCR attorneys suggested policy initiatives (such as task force creation, training all elementary staff, and addition of an oversight team to review the recommendations and conduct of an IEP team) to the educational agency for resolution, but had not yet reviewed the documents the educational agency provided in response to OCR data request.
 - Ex: Policies and procedures recommended by OCR are often duplicative and not supported by any evidence that the policies or procedures effectively address alleged

discrimination in schools. A November 20, 2014 [settlement agreement](#) with Minneapolis Public Schools is 21 pages long and includes separate requirements to: (1) review and revise all discipline policies; (2) review implementation of discipline policies; (3) consult with an expert on discipline policies; and (4) establish a discipline team to ensure implementation of discipline policies. It also requires that the school: (1) administer an annual climate survey; (2) conduct an annual forum on discipline issues; (3) establish a student committee at each school to discuss discipline; and (4) establish a staff/parent working group at each school to address discipline issues.

- Ex: An OCR Resolution Agreement required that the school establish a policy prohibiting retaliation against individuals who have engaged in activities protected by the regulations enforced by OCR that prohibit discrimination on the basis of race, color, and national origin without consideration of school policies already in place addressing this issue.

- ❖ *Practice Tip:* Know your educational agency's policies and procedures and be prepared to defend them. While OCR should initially review documentation for compliance to determine whether any corrective actions or resolution agreements for legal compliance are warranted, the reality is that OCR does not always conduct this most basic review.

- ❖ *Practice Tip:* If school staff do not believe items requested by OCR in a resolution agreement will actually be effective, do not agree to the requested items and request revisions that will be effective. Point out the administrative burden of duplicative requirements and ask for evidence of efficacy.

13. Excluding School Board Members from Resolution Discussions

- At the same time OCR attorneys may attempt to direct policies of an educational agency without an adequate basis, they will exclude school board members from participating in those very discussions.
 - Ex: OCR's attorneys refused to attend a resolution discussion if two governing board members of the educational agency would attend.

 - Ex: OCR required that a draft policy be reviewed and approved by OCR, and then did not provide sufficient time for the educational agency to follow its internal procedure for review and adoption of school policies, which included review by a Policy Review Committee, and three presentations to the school board.

 - ❖ *Practice Tip:* It is critical that the educational agency provide OCR attorneys and investigators information on policy adoption procedures. OCR should recognize school board members are elected community representatives, an educational agency's ultimate decision-makers, and vital participants in discussions of policy-related matters.

14. Issuing a Letter of Findings *After* Agreement Reached on Voluntary Resolution

- OCR will issue a letter of findings, with limited or no prior review by the educational agency investigated, *after* OCR has reached an agreement with the educational agency to resolve items of concern. This practice damages the positive, proactive purpose of a resolution agreement and creates a document purportedly based on investigation records that the investigated agency is not able to review or even access.
 - Ex: OCR issued a letter of findings with damaging conclusions a month after the educational agency and OCR entered into a resolution agreement providing for the educational agency's commitment to new training and policy efforts on prevention of bullying and harassment. The educational agency's good faith in entering a proactive resolution was contradicted by negative findings that were not consistent with the educational agency's information. As of August 2015, two years after filing an appeal under FOIA for OCR's records of the investigation, the educational agency had not received OCR's investigation records for its findings in December 2012. OCR was legally obligated to respond to the appeal under FOIA in September 2013. Nonetheless, the educational agency completed implementation of its resolution agreement with OCR.
 - ❖ *Practice Tip:* A letter of findings should not follow a resolution agreement. It can negate and complicate an otherwise proactive and collaborative solution. At a minimum, OCR should provide an opportunity to review the records that provide a basis for the findings.
 - ❖ *Practice Tip:* Educational agencies should consider insisting on non-disparagement provisions in resolution agreements including a prohibition against issuing negative findings.

Overreach & Communications

15. Lack of Basic Due Process for Educational Agencies in OCR Investigations

- As detailed in other items, OCR's investigations currently proceed without offering basic due process protections to an educational agency to review a complainant's allegations and evidence, to obtain records of an investigation, and to have an appeal process. This structure places a school at a constant deficit in an investigation and undermines a school's confidence in OCR's process. Although a school is the agency under investigation and typically seeks to resolve a matter efficiently and effectively, OCR requires a school to request records of a complaint or investigation under FOIA as any other member of the public.
 - OCR asserts that protections of due process do not apply to an educational agency under investigation unless and until OCR brings an enforcement action threatening removal of federal funds. Such an enforcement action is a rare occurrence in an investigation.

- ❖ *Practice Tip:* An educational agency should insist on prompt and routine processes with OCR for a school to access and review a complainant’s allegations and evidence, to challenge false statements or supplement a record, and to appeal OCR findings based on conflicting evidence. It is critical for OCR and educational agencies to share confidence in OCR’s investigations. To delay and defer due process protections to the rare event of a judicial enforcement action is at odds with the goal of a transparent, efficient, and effective investigation.

16. Directing an Educational Agency’s Policies Without Legal Basis

- OCR attorneys will attempt to direct an educational agency’s policies without a legal basis.
 - Ex: OCR’s attorneys came to a resolution session unprepared to discuss documentation showing the educational agency’s responsive efforts in an individual student matter, and instead proposed overarching policy initiatives such as creation of a task force and training for all elementary school teachers and administrators.
 - ❖ *Practice Tip:* Counsel for educational agencies should insist that the facts of an individual student matter and legal requirements provide the basis for corrective actions and proactive solutions. OCR should respect the role of an educational agency’s governing board, in consultation with the community, to set policy. Educational agencies should assert principles of local governance when OCR pushes for a one-size-fits-all resolution.

17. Resolving Federal and State Policy Conflicts

- As a policy matter, OCR has schools navigating complicated provisions of federal and state laws on harassment and bullying prevention and complaint investigation when OCR and the respective state have not yet determined a position.
 - Ex: The educational agency worked with OCR over the course of a year on revising a policy and regulation to take account of both federal and state requirements. The length of time and communications required damaged public perceptions of the process and hampered the educational agency’s ability to have policies and procedures reviewed and adopted by its governing board and communicated to staff for the start of the school year.
 - ❖ *Practice Tip:* Policy matters that require the resolution of federal and state requirements should be resolved by collaboration of federal and state representatives rather than through a local educational agency. At the very least, educational agencies should document disparities between federal guidance and state law.

18. Not Responding to Written Requests

- OCR rarely responds in writing to written expressions of concern or questions presented by an educational agency being investigated, even when OCR has invited or requested documentation of the concerns.

- Ex: OCR did not respond to multiple letters of an educational agency expressing concerns and requesting clarifications, despite those letters following communications where OCR encouraged the educational agency to put its concerns in writing.
- ❖ *Practice Tip:* An educational agency should request that OCR identify a process whereby a school may write to express concerns and receive a written response that addresses the school's concerns and clarifies OCR's position.

19. Undisclosed Directions and Changes in Approach from OCR Headquarters

- Regional OCR officials indicate that policy and procedural decisions, such as whether an early resolution is available or the scope of an investigation, are directed by OCR's Washington Office without any review or description of such policies provided to educational agencies or the public.
 - Ex: Availability of discussions of potential early resolution between an educational agency and OCR and the opening an investigation on a class-wide (school-wide) basis, rather than on an individual basis, now appear to be determinations made at the national rather than regional level, contrary to prior experience.
 - Ex: OCR changed its practice with respect to Early Complaint Resolution (ECR) at the beginning of 2015 with little notice to educational agencies. Prior practice allowed for the investigation of the complaint to be temporarily stayed while the parties engaged in ECR, including mediation. Now the investigation and the requirement that the educational agency provide complete responses to OCR's Data Requests continue despite ECR efforts.
 - ❖ *Practice Tip:* Educational agencies should not avoid ECR, as the process may lead to positive, proactive resolution with the complainant. Counsel and staff members, however, must now be prepared to engage in ECR and respond to the Data Request simultaneously. Educational agencies must also be prepared to continue to engage with OCR investigators on case resolution, despite closure of a complaint with an individual complainant. OCR now often continues an investigation notwithstanding the complainant's withdrawal, raising systemic issues that OCR claims warrant continuing the investigation.

20. Confidentiality Restrictions on Educational Agencies in Public Communications

- OCR investigations may be exploited in local reporting to the detriment of positive work done by school administrators, teachers, parents, and students. Once an investigation is opened based on allegations – without any consideration of information from the school – a complainant may share information with local media that prompts important questions to which school staff may not respond because of confidentiality laws on student information. Nonetheless, incomplete information becomes a story that casts a shadow and creates a platform for negative commentary and speculation that lasts at least as long as OCR takes to

complete the investigation.⁴ In this context, OCR’s impact and role as a neutral fact-finder is obscured, and the integrity, work, and privacy of school staff and students are fully discounted. It heightens concern when the Department of Education’s *Not Alone* report states an intent to publicly identify individual schools, colleges, and universities that are under investigation by OCR without recognizing and communicating that such investigations may be prompted only by allegations and that laws prohibit schools, colleges, and universities from publicly disclosing facts of individual student matters. While it is certainly vital to raise public awareness of harassment and discrimination, it is also vital that the public not be misled about schools, colleges, and universities and the people working diligently inside them to make them safe and respectful for all.

- Ex. OCR opened an investigation of an allegation of sexual harassment at an educational agency which soon thereafter became a news article raising questions about actions of school staff based on allegations and incomplete information shared by the complainant. School staff could not respond to the allegations with factual information to inform and reassure the public because of federal and state laws on confidentiality of student information. The story and OCR investigation became platforms for commentary and speculation which misled and confused the public, damaged staff morale, and undermined positive work.
- ❖ *Practice Tip:* OCR should reexamine practices for opening and conducting investigations, timelines for completion, and education of the public in ways that consider the media context, discourage speculation, and encourage respect for ongoing work inside schools.

⁴ Frank Bruni's "Full Scream Ahead" (May 31, 2014, editorial in the *New York Times*) described the increasing prevalence of damaging speculation in contemporary journalism: "Something happens, and before the facts are even settled, the morals are deduced and the lessons drawn. The story is absorbed into agendas. Everyone has a preferred take on it, a particular use for it. And as one person after another posits its real significance, the discussion travels so far from what set it in motion that the truth – the knowable, verifiable truth – is left in the dust." See *infra* note 2 for a discussion of Scott Coffina's June 24, 2014, article in the *National Review* entitled "Shaming Our Schools."

Bibliography

List of ED resources: <http://www.nsba.org/key-federal-agency-guidance-2008-2015>

Littlefield et al paper from Nashville:

<http://www.nsba.org/anatomy-ocr-complaint-or-what-ocr-when-my-clients-are-sweating-bullets-over-complaint>

2013 Webinar Series: Guiding Your Clients Through the OCR Woods (available for purchase)

<http://allendsmeet.com/cosa/>

Attached as Exhibit C: OCR's Notice of Recipient Interviewee Rights and Protections given to those OCR interviews

Exhibit A: Example of questions for building administrators in a race/discipline investigation

1. What is your name and title?
2. How many years have you been employed in your current position?
3. How many years have you been employed with School/Schools? And, in what other capacities?
4. Demographics of Schools (grade levels, number of students)
5. Describe who the school's disciplinary policies and practices work at each grade level at your school including:
 - a. Identify person responsible for referral and how these individuals are informed of this role;
 - b. Provide a description of the process from referral to imposition of sanctions including the name and the title of the persons responsible for imposing sanctions (who imposes sanctions?);
 - c. Explain how the school administrator determines what sanctions are assigned to which infractions and how the administration ensures consistency for all students;
 - d. Indicated whether the school uses a progressive discipline system, ranking system, and/or point system for assigning discipline or sanctions;
 - e. Provide a description of all relevant documents (e.g. code, procedures, infraction/sanction matrices and any other information concerning the school's disciplinary practices at your school);
 - f. Identify any policies that request the mandatory imposition of sanctions and other offenses for which these mandatory sanctions are imposed (i.e. guns, weapons, drugs);
 - g. With respect to parent notification, specify when parents are notified that their child has been disciplined, whether parents are notified of low level disciplinary actions (i.e. warnings, referrals to the office) and the manner by which parents are notified (i.e. in writing, by phone call).
6. With respect to staff responsible for making disciplinary referrals (but not necessarily assigning discipline), describe the criteria for referring students for disciplinary action and the processes or procedures utilized by staff in doing so, including any documentation (forms, etc.) that may be required as part of the process.
7. Describe whether the disciplinary policies at your school ensure the right of students to due process (and if so, describe that process) in connection with referrals and any disciplinary sanction imposed by the school/school. (Do the students have an opportunity to tell "their side of the story" and provide witnesses?)
8. Identify the school and/or school's policies that define disciplinary offenses. If there is not specific policy or procedure, explain how the assigner of discipline defines the offenses. (Beyond the discipline code)
9. Describe policies and practices regarding the exercise of discretion in referrals and the imposition of sanctions (any guidance to teacher or staff on how you want to do referrals? And for sanctions?)
10. Indicate whether the school's individual procedures differ from school-wide procedures, and describe (and present the reasons for any differences.
11. Describe who established the current School-wide and individual school site student disciplinary policies and procedures, the date(s) they were implemented, and if any policies have changed within the past three years, a description of any the reason(s) for the change(s).

12. Describe how and where discipline policies are publicized and disseminated to staff members, students and parents/guardians.
13. Describe the role and responsibility of school security personnel, including school resource officers (SRO's) or other police officers, and the administration of the disciplinary policies and procedures.
14. Describe the academic and counseling services offered to students at your school who are sanctioned with in-school suspensions, out-of-school suspensions, alternative placements, and placement in juvenile offender facilities. For example, are they provided full instructional curriculum, behavior modifications programs, etc.?
15. Is mediation an option for students with respect to discipline? If so, explain.
16. Identify and discuss any additional policies, procedures, or educational programs provided at your school that address student behavior and provide support for students.
17. Describe the manner in which and how frequently the school communicates behavior expectations and disciplinary policies and procedures to students and their parents/guardians.
18. Describe all staff/administrator training and dates of the training at your school in the last three years relating to the school's non-discrimination policies and procedures and disciplinary policies and procedures.
19. Does your school conduct any self-monitoring of the discipline imposed on students to ensure consistency of application of discipline? If so, describe how and how often the school does this.
20. Are there school based disciplinary committees? If yes, who are the members?
21. Do you have a gifted program at your school? If so, have you observed any correlation between being in the gifted program and not being disciplined?
22. Do you have honors, AP or IB courses at your school? If so, please describe. Have you observed any correlation between being in these courses and not being disciplined?
23. Has the school done a school climate survey?

Example of questions for instructional staff in a race/discipline investigation

1. Can you describe the disciplinary process in your school, from start to finish?
2. In terms of detention, are the teachers allowed to give other types of discipline?
3. Can you explain the teacher discretion involved in the referral process?
4. Are there certain offenses that are a direct referral? What are they?
5. Do you have specific classroom rules different from school rules?
6. How are students made aware of rules and procedures?
7. In your opinion, do you feel administration prefers to handle in classroom or make referrals?
8. What types of behaviors result in a discipline referral?
9. What types of behavior does not result in a referral?
10. When you impose detentions, do you file any reports and/or notify administration?
11. Do you keep any log of classroom discipline?
12. In the past school year, have you referred any students to the office for discipline? How many? Why?
13. What is included on the referral form are there things to check off is there a narrative?
14. Have you received any cultural or diversity training from the district?
15. Have you witnessed any unfair treatment by others toward students regarding discipline in your district?
16. Do you believe that there is disparity between discipline referrals between White and African American students?
17. Are there any programs or initiatives, positive reinforcement programs?
18. Have there been any changes to policy in district, pertaining to how discipline is imposed?

Exhibit B: Letter to Senator Cochran regarding student focus group procedures.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 29, 2015

The Honorable Thad Cochran
United States Senate
113 Dirksen Senate Office Building
Washington, D.C. 20510-2402

Re: OCR Compliance Review #06-14-5001

Dear Senator Cochran:

I am pleased to respond to your letters dated September 30, 2014, March 12, 2015, and March 23, 2015 on behalf of Secretary Duncan, regarding the Department's Office for Civil Rights' (OCR) investigation into the Vicksburg-Warren School District (the District), in Vicksburg, Mississippi. I take seriously the concerns raised in your letters that, in conducting a September 2014 on-site visit as part of the OCR compliance review, staff of OCR's Dallas regional enforcement office interviewed students without prior parental consent and separated them by race for group interviews.

Please accept my apology for the delay in responding to your letters. Given this delay and the importance of the issues raised in your letters, I requested to meet with members of your staff to discuss these issues. I appreciate the productive discussion that I had with your staff members on April 13, 2015.

As I stressed to your staff when we met, I sincerely apologize to you and your constituents regarding the concerns raised. I have now reviewed appropriate OCR interview practices with my staff, including the importance of not separating students by race generally and specifically in this instance, and I have instituted safeguards to ensure that the concerns you raise will not recur. OCR's default rule is to not separate students by race in student focus groups. Recognizing that there could be rare instances in which deviation from this default might be appropriate, OCR has instituted a new process requiring regional enforcement offices to first obtain authorization from senior officials in OCR Headquarters in these rare situations. OCR has informed all of its regional enforcement offices of its new process for obtaining advance approval from OCR Headquarters.

Additionally, we have reviewed our procedures regarding ensuring student consent while respecting privacy interests for students. As I shared with your staff, school district staff, not OCR staff, collect parent and guardian consent forms to ensure that OCR staff do not collect individually identifying information about students. However, to further protect student privacy during focus group interviews, OCR staff will now secure signed

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confirmation from school district staff that parents or guardians have signed consent forms for their students' participation in focus groups, where such permission is necessary.

I thank you for raising these important issues with my office. I hope that this letter and my meeting with your staff address your concerns. Should you have any further questions, please contact Lloyd Horwich, the Principal Deputy Assistant Secretary (delegated the authority of the Assistant Secretary) within the Office of Legislation and Congressional Affairs at (202) 401-0020.

Sincerely,



Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education

Exhibit C: Notice of Recipient Interviewee Rights and Protections.



United States Department of Education Office for Civil Rights

OCR NOTICE OF WITNESS RIGHTS

The U.S. Department of Education, Office for Civil Rights (OCR), is responsible for enforcing Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the Age Discrimination Act of 1975, which prohibit discrimination on the bases of race, color, national origin, sex, disability, and age. OCR is also responsible for enforcing the Boy Scouts of America Equal Access Act of 2001.

You have been identified as an individual who may have information relevant to a case OCR is investigating. Prior to initiating the interview with you, OCR will provide you with the following information:

1. The general purpose of the interview, including OCR's role, what law or laws may be pertinent to the investigation and, where appropriate, a brief explanation of what is under investigation.
2. A general explanation of the potential uses of the information that OCR obtains from you during the interview. This explanation will include information about the Freedom of Information Act.
3. You have the right to personal representation during the interview by a person of your choice.
4. If you are an employee of the school district, postsecondary institution, or other entity that is the subject of this investigation, you may refuse to have anyone else present during the interview. You also have the right to refuse to reveal what you said during an interview. If, however, you are in an upper level position of such authority that you speak for the institution (e.g., superintendent, college president), in most cases, the institution's counsel will be allowed to be present during your interview. If you are not an upper level employee and you identify the institution's legal counsel as your personal representative, OCR will inform you that such a person may have a conflict of interest between his or her responsibilities to the institution and his or her responsibilities as your personal representative.
5. A school district, postsecondary institution, or other entity that is the subject of an investigation may not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the civil rights laws enforced by OCR or because an individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing conducted pursuant to the laws enforced by OCR. If you believe that you are being retaliated against, you may file a complaint with OCR.

Any individual who will need reasonable accommodations due to a disability in order to participate in the interview should notify Tracey Solomon, Investigator at (202) 453-5930 or via email, at Tracey.Solomon@ed.gov as far in advance of the interview as possible. For further information about OCR, please visit our website at: <http://www.ed.gov/ocr/> or contact the Office at 400 Maryland Avenue, SW, Washington, DC 20202-1475. Telephone number (202) 453-6020. Facsimile (202) 453-6021. TDD number (877) 521-2172.

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