

**When OCR Comes Knocking:
Responding to an OCR Complaint or
Compliance Review**

AICUM Fall Symposium 2015

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INTRODUCTION

Overarching goal: demystify the OCR process

- Discuss the different stages of the OCR process and provide practical tips for working with OCR through each:
 - What can you control?
 - Where can you push?
 - Why the delay?
- Answer any questions you might have about OCR's internal workings or the way it investigates and makes determinations

WHY THE DELAY?

- OCR enforces several laws, including Title VI, Title IX, Section 504, Title II of the ADA, Age Discrimination Act.
 - DOJ/USAO and EEOC may also conduct investigation; complaint may also be referred by OCR to DOJ for enforcement.
- Extremely easy for individuals to file complaints; certain process must occur at OCR even to dismiss cases. Leads to backlog...
- Once OCR receives a case, the time ranges for each phase can vary wildly:
 - Intake and Initial Review (20-60+ days)
 - Notification/Data Request (7-10 days after initial review, depending on issue)
 - Data Response/Investigation (60-90+ days, depending on issue)
 - Compliance Determination and Negotiation (???)

CURRENT STATE OF OCR INVESTIGATIONS

Apr. 28, 2015: Letter from DOE to Senator Boxer – Status of DOE Efforts to Prevent Sexual Violence

- **Attempts to increase transparency.**
 - OCR provides (upon request) list of postsecondary institutions under Title IX “sexual assault related” review. Resolution agreements now posted online.
- **Chart of Sexual Violence Complaints FY09 – Apr. 8, 2015**

Postsecondary Education

FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015 (as of 4/8/15)	TOTAL
9	11	19	17	32	102	51	241

*FY 2008 – Apr. 8, 2015 OCR initiated 25 “pro-active” investigations involving sexual violence.

CURRENT STATE OF OCR INVESTIGATIONS

Apr. 28, 2015 Letter

- **OCR goal:** Resolve complaints within 180 days.
- **Reality:** Title IX investigations take much longer.
- **Stated factors:**
 - OCR “comprehensively examines” campus culture; reviews response to complaints over a period of years; interviews students and school officials; meets with student groups; review of policies, procedures, and training protocol.

Avg. Duration of Sexual Violence Investigations FY09 – Apr. 8, 2015

FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015 (as of 4/8/15)
379	368	291	308	478	1,469	940

OCR INVESTIGATIONS: RESOURCES

- OCR Complaint Processing Manual (Feb. 2015), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.
- Dear Colleague Letters and Enforcement Guidance by Statute: <http://www2.ed.gov/about/offices/list/ocr/publications.html>
- Resolution Agreements by Statute: <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html?exp=2>
- *Protecting Civil Rights, Advancing Equity, OCR Report to the President and Secretary of Education (Apr. 2015), available at* <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf>
 - Overview of enforcement activity: number and nature of cases broken down by jurisdiction

PHASE I: EVALUATION OF COMPLAINT

OCR evaluates complaint to determine if it can investigate.

- Does complaint allege a violation of law enforced by OCR?
- Was complaint filed on time within 180 days of last act which complainant alleges to be discriminatory.
 - OCR may contact complainant for clarification on allegations or timing of filing.
 - OCR may waive 180 day filing requirement at its discretion.

PHASE I: EVALUATION OF COMPLAINT

Grounds for potential administrative closure/dismissal:

- It has no legal authority to investigate.
- Complaint does not state a violation of a law OCR enforces.
- Complaint not filed timely, and waiver will not be granted.
- Complaint is unclear/incomplete and complainant did not provide OCR with clarifying information.
- Complaint has been investigated by another federal, state, or local civil rights agency and resolution meets OCR regulatory standards.
- Same allegations have been filed by same complainant against same school in state or federal court.
- Allegations are foreclosed by previous decisions of federal courts, DOE, or OCR policy determinations.

PHASE I: STRATEGIES

- If you receive advance notice that a complaint is headed to OCR (i.e., from complainant or the media), little can be done to advocate with OCR at this phase of the process
- OCR views this as the period to determine if it has jurisdiction and sufficient facts to investigate. OCR typically does not appreciate outside opinions at this stage of the process, except as detailed below. Any efforts to intercede should be done very delicately.
- When should an institution intercede?
 - A fundamental premise is inaccurate that might lead to dismissal, e.g., a complainant misstated the institution's determination on a central matter and proof of misstatement is crystal clear to an outsider.
 - The matter in question is currently being heard internally at the institution and the process is not completed, or it has been filed in court or with another agency. (Grounds for administrative closure.)
 - Do not intercede just to correct minor details or to advocate a position.

PHASE II: OCR **NOTIFICATION LETTER**

- OCR sends **Notification Letter** to school and complainant, if it determines it will open complaint for investigation.
- OCR may refuse to disclose to school the identity of student bringing complaint. (Federal law permits OCR to determine if revealing name would assist or impede the investigation.)
- OCR may consolidate multiple similar student complaints into a single investigation. OCR can also convert a complaint into a broader compliance review.

PHASE II: OCR **NOTIFICATION LETTER**

- Identifies when complaint was made and nature of allegation, e.g., sex discrimination.
- May provide non-detailed basic description of complaint:
Example: Complaint alleges school did not respond promptly and effectively to report and to other information indicating student was subject to sexual misconduct. Complainant alleges a hostile environment.
- OCR typically does not give school copy of complaint.
 - ❑ Tip: **Make FOIA request**. OCR required to respond; but may deny request until investigation is concluded. Still, it is simple to do and costs nothing for the institution.

PHASE II: OCR NOTIFICATION LETTER

- Provides insight into what OCR will investigate.
Example:
 - Did school adopt and publish grievance procedures that provide for prompt and equitable resolution of complaints?
 - Did school respond in a prompt and equitable manner to information suggesting student(s) were subject to sexual misconduct?
- Advises school it may not retaliate against any complainant or any person who participates in OCR investigation.

PHASE II: STRATEGIES

Early Resolution?

- ❑ Early Complaint Resolution (ECR) is an opportunity to resolve allegations quickly. OCR facilitates settlement discussions between parties. Both parties must be willing to try this approach.
- ❑ Available only where OCR deems “appropriate.” In recent Title IX investigations, OCR has declined to initiate ECR.
- ❑ School may also seek to resolve complaint before conclusion of investigation by initiating negotiations for a Voluntary Resolution Agreement. OCR must determine if this is “appropriate.”

Research Prior Findings

- ❑ Upon receipt of notification letter, review OCR Dear Colleague Letters and Region I determinations to learn how OCR addresses compliance issue. Note: case law research less helpful here.

PHASE III: OCR DATA REQUEST

- Along with the Notification Letter, OCR will also send school a **Data Request**.
- Seeks documents and explanations re: policies and practices and responses to complaints.
- School must respond within 15-30 days. Brief extensions may be granted on request.
 - Have a justification and alternative response plan ready with your request, e.g., “need time to gather information but will provide information by Nov. 11.”

PHASE III: OCR DATA REQUEST

Likely requests:

- School’s policies and procedures (e.g., notice of nondiscrimination, policies on sexual harassment and sexual assault).
- Names and contact information for key personnel (e.g. Title IX Coordinator).
- Description of responsibilities of key personnel.
- Information about how students, staff, and others are notified of key personnel.
- Copies of all documents related to complainant’s report.
 - OCR will define requested documents very broadly, including: witness statements, interview notes, letters, e-mails, telephone records, hearing transcripts, discipline records, campus public safety records, and investigative reports and findings.

PHASE III: OCR DATA REQUEST

Likely requests:

- Information on **trainings** for a specific time period, including (1) description; (2) who attended; (3) materials offered during training; (4) identity and qualifications of trainers.
- Information on **processes and culture**, including:
 - School's system for tracking and maintaining information on incidents and reports, name and title of person who maintains complaints, investigative materials, and findings regarding incidents.
 - Campus newspaper articles, climate surveys, and studies for a specific time period.
 - Certain OCR staff are savvier than others re: online information and setting up Google alerts on an institution, so take care with online disclosures and press releases.

PHASE III: STRATEGIES

- ❑ Maintain updated and comprehensive records of trainings.
- ❑ Review accessibility and consistency of policies now. OCR will promptly search school's website and closely review all policies to determine accessibility and consistency.
- ❑ Data requests are voluminous and time consuming: begin gathering information upon receipt of Notification Letter. Clearly communicate delays with OCR staff.
- ❑ PROVIDE A NARRATIVE: An opportunity to educate OCR staff; can also propose witnesses
- ❑ OCR does not have authority to compel production; obligation can be satisfied by permitting OCR to come onsite and permit access.
 - All data submitted to OCR subject to FOIA request.
 - Who will be responsible for redactions. School? OCR?
 - OCR may permit use of a code to identify students.

PHASE IV: ONSITE VISIT

Types of Activities:

- **OCR interviews of personnel**, including Title IX Coordinator and Deputies; Director of Student Conduct; Dean of Students; Resident Directors; Athletics Director; coaches; etc.
- **OCR interviews of students**, including Resident Assistants; or students trained to respond to reports of sexual misconduct; student member(s) of the judiciary/hearing board; members of student organizations; students involved in the grievance process, both as complainants and respondents.
- **OCR focus group meetings**: Community members (including students) who wish to meet with OCR to share their perception of climate on campus regarding presence and effects of sexual harassment.
- **File review**, if not already completed.

PHASE IV: STRATEGIES

- ❑ Be involved: The process can take clumps of days over an extended period of time and OCR will take as much autonomy as an institution gives them. Be judicious in choosing battles.
- ❑ Identify / suggest relevant witnesses to OCR. (See Narrative)
- ❑ Prepare witnesses
 - Demystify OCR/DOJ staff by explaining types of questions
 - Provide institution staff with relevant policies/procedures
 - Evidentiary rules don't apply; OCR will weigh hearsay in certain situations – explain this to witnesses.
 - Explain OCR v. DOJ demeanor and the traps that follow

PHASE IV: STRATEGIES

- ❑ Determine appropriate role of counsel:
 - Will counsel sit in on interviews? Will counsel be able to ask limited questions?
 - School employee has right to refuse to have anyone present during interview and to refuse to reveal interview content.
- ❑ Opportunity to present ongoing compliance efforts to OCR.
- ❑ Opportunity to supplement data response and narrative as new information becomes apparent.
- ❑ Opportunity to develop a relationship with OCR staff who will be critical in remaining phases of the case.

PHASE V: COMPLIANCE DETERMINATION

- Determination will be explained in a **Letter of Findings** sent to school and complainant.
 - Fact-specific investigative findings.
 - Letter of Findings are not formal statements of OCR policy.
- If OCR determines school failed to comply with law, it will seek to enter a **Voluntary Resolution Agreement (VRA)**.
 - Written agreement that describes specific remedial actions school will undertake to address areas of noncompliance identified by OCR.
 - Typically accompanied with monitoring requirements that will require continued interaction with OCR for several years.

PHASE V: COMPLIANCE DETERMINATION

- OCR may end VRA negotiations at any time if there is an “impasse” or if 90 day period expires. Letter provides OCR will issue findings within 10 days if resolution is not reached.
- If school and OCR are still unwilling or unable to negotiate VRA, OCR will issue a **Letter of Impending Enforcement Action**.
- OCR will initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant or continue Federal financial assistance, or refer to DOJ for litigation.
- OCR may also move to defer any new or additional Federal financial assistance to school.

PHASE V: COMPLIANCE DETERMINATION - Examples

OCR often imposes extensive requirements in VRAs. A non-exhaustive list includes:

- ❑ Retain equity consultant with expertise in harassment in question to evaluate and recommend revisions to policies.
- ❑ Mandatory training, with OCR dictating training content. Requires in-person training of multiple constituencies across school. OCR must approve trainer(s).
- ❑ Mandatory revision of policies and submission of policies to OCR for approval within a specific number of days.
- ❑ Develop or revise existing pamphlets and website materials for students and submit to OCR for approval.

PHASE V: COMPLIANCE DETERMINATION - Examples

Examples continued:

- ❑ Develop one or more annual climate surveys.
- ❑ Review all complaints of discrimination during specific time period to determine if investigated properly and take action to address any concerns, including appropriate remedies that may still be available to parties, such as referrals to counseling or academic adjustments. Submit report to OCR.
- ❑ Track complaints according to detailed OCR requirements. School agrees to provide access to case files during OCR's monitoring to confirm information is maintained as specified.
- ❑ Continued monitoring.
 - May build credibility through timely compliance.
 - OCR will not remind of dates; internal tracking essential.

PHASE V: STRATEGIES

- Seek details on findings to understand how to narrow agreement terms to findings.
 - In-person meeting to discuss proposed terms.
 - Document OCR’s positions on issues throughout case
 - Review and be prepared to discuss OCR recent resolution letters addressing the same statute.
- Focus on flexibility for the institution
 - What is a realistic time period for compliance?
 - How can the institution get a “win” out of the process?
- OCR generally not interested in proceeding with enforcement; may be room for negotiation
 - Have a candid conversation to try to determine OCR’s internal flexibility (or inflexibility – often not driven by regional office).

In Summary ...

- An OCR Investigation requires significant internal resources to address data requests and onsite visits.
- Be actively involved, as appropriate in each stage of the process: draft a narrative response; prepare witnesses; engage with OCR staff
- Identify and begin taking steps to remedy possible vulnerabilities upon notice of complaint. Keep OCR informed and build credibility; give the regional OCR office the opportunity to address the institution's efforts in findings – they can't address your efforts if they don't know about them.
- Organize files and develop effective tracking process as part of school's regular process (and not just if there is an OCR investigation).

QUESTIONS?

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