

Title IX Coordinator Training Online Course

Class Four: Anatomy of an OCR Investigation

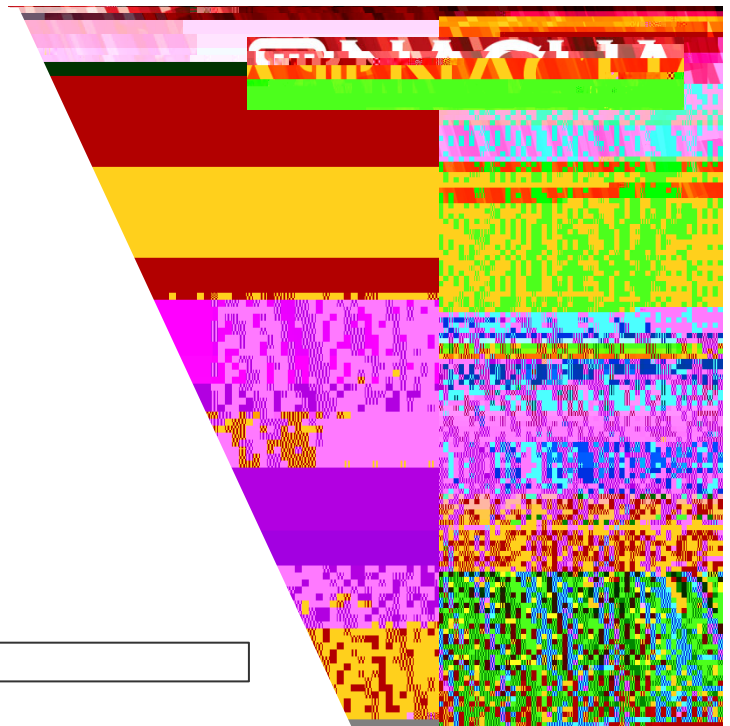
Phil Catanzano
Partner, Holland & Knight LLP

Amy C. Foerster
Partner, Troutman Pepper Hamilton Sanders LLP

Melinda Grier
Melinda Grier Consulting & Novus Law Firm, Inc.

Janet P. Judge
Partner, Holland & Knight LLP

PLEASE



Why is this Important to You?

- OCR is the primary enforcement agency regarding Title IX, which may make your department more likely to interact with them
- OCR's process is its own, meaning that responding to OCR often looks different from responding to litigation or even responding to other civil rights enforcement agencies
- Most importantly, understanding OCR's perspectives and the way that it approaches its role can help you maintain policies, files, and other materials in a way that is helpful to you and eases the burden of an OCR review

What Complaints Does OCR Handle?

- OCR enforces several laws:
 - Title VI
 - Title IX
 - Section 504 of the Rehabilitation Act and Title II of the ADA
 - Age Discrimination Act
- DOJ/USA and EEOC may also conduct investigations that overlap into these areas, e.g., DOJ reviews

Demystifying the OCR Process

- The main phases of an OCR complaint investigation:*
 - Notification to the Institution
 - Early Resolution Options
 - Data Requests
 - Investigation
 - Negotiation and Monitoring of Resolution Agreements (if necessary)

*Note that OCR can also conduct broad, agency instituted compliance reviews, but they typically follow these same phases

OCR Investigations: Resources

- OCR Complaint Processing Manual (Aug. 2020)
- Dear Colleague Letters and Enforcement Guidance by Statute
- Prior OCR/DOJ Resolution

Phase I: Evaluating the Complaint

OCR evaluates the complaint to determine whether it can investigate:

- Does the complaint allege a violation of law enforced by



Phase I: Strategies

- There's not much an institution can do to advocate with OCR when it has advanced notice that a complaint is headed to OCR
 - OCR uses this period to determine whether it has jurisdiction and sufficient facts to investigate
 - OCR typically does not appreciate outside opinions at this early stage of the process; any efforts to intercede should be done very delicately
- When should an institution intercede?
 - A fundamental premise is inaccurate that might lead to dismissal
 - 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

9

Phase II: Notification of Investigation

- OCR sends "Letter of Notification" to the institution and the complainant if it determines it will open the complaint for investigation. This letter typically includes:
 - OCR's jurisdiction
 - A brief factual description and allegations to be investigated
 - A statement that OCR is a neutral party
- OCR may refuse to disclose the identity of the student/group bringing the complaint
- OCR may consolidate multiple similar complaints into a single investigation
- OCR may convert a complaint into a broader compliance review

10

Phase II: Notification of Investigation

- Notification letters are not typically detail heavy
- OCR will typically provide a link to the Case Processing Manual and the complaint, but some offices only provide the complaint upon request and/or with heavy redactions
 - Make FOIA request
 - Simple to do and usually costs nothing
 - OCRs required to respond; but may deny the request until the investigation is concluded
 - May request additional information beyond complaint, *e.g.*, documents submitted by complainant or even prior complaints against the institution



Early Resolution Options

- Rapid Resolution Process (RRP) Cases chosen by OCR because resolution seems more straightforward or timing is an issue. Often precedes the notification letter and could obviate a finding of any sort.
- Facilitated Resolution Between the Parties (FRBP) An OCR facilitated mediation like process:
 - Available only where OCR deems “appropriate.”
 - Both parties must agree to mediate; if unsuccessful the case goes back to mediation. (Different OCR staff mediate v. investigate.)
 - Ultimate agreement not typically monitored by OCR unless a breach is alleged and, even then, OCR will typically revert to investigating the original allegations and not the breach.

13

Voluntary Resolution

- Institutions may seek to affirmatively resolve complaint before conclusion of the investigation by initiating negotiations for a Resolution Agreement (a/k/a “302 Agreement,” because it’s defined under CPM Section 302)
- Appropriate when the institution agrees to forego the investigation and enter a compliance agreement on some or all issues
- OCR reserves the right to include any fact learned to date in the Resolution Letter, which may create a strategic advantage in requesting a Voluntary Resolution early if you know that is where it may be headed
- New change to Section 302 allows recipients an opportunity (5 days) to review the draft resolution letter, usually while negotiating draft resolution agreement

14

Phase IV: Onsite Visit

Types of Activities:

- Interview employees including Title IX



Phase IV: Strategies

- Determine appropriate role of counsel:
 - Will counsel sit in on interviews? Will counsel be able to ask limited questions?
 - Certain lower level employees may have right to refuse to have anyone present during interview and to refuse to reveal interview content
- This is an opportunity to:
 - Demonstrate ongoing compliance efforts to OCR
 - Supplement data response as new info



Phase V: Compliance Determination

- OCR may end Resolution Agreement 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 institution and OCR are still unwilling or unable to negotiate, OCR will issue a Letter of Impending Enforcement Action
- After that, 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

21

Phase V: Examples

Typical requirements in resolution agreements:

- Mandatory training, with OCR potentially reviewing and approving training content. Occasionally, OCR must approve trainer(s).
- Revision of policies and submission of policies to OCR for approval within a specific period.
- Conduct climate surveys or other assessments in the area of concern.

22

Phase V: Strategies

- Seek detail on findings to understand how to narrow agreement terms to findings:
 - Discuss proposed terms and how they align with legal/factual concerns
 -





Questions?

Note

The content of this presentation is to provide news and information on legal issues and all content is provided for informational purposes only and should not be considered legal advice.

The transmission of information in this presentation does not establish an attorney-client relationship with the recipient. The recipient should not act

