Title IX Coordinator Training Online Course

Class Four: Anatomy of an OCR Investigation

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Class Overview

- Demystifying the OCR's Multi-Phase Process
- Understanding different aspects of OCR's Case Processing Manual
- Practical Points to Consider in Working with OCR
- Summary

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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

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What Complaints Does OCR Handle?

- OCR enforces several laws, including:
  - Title VI
  - Title IX
  - Section 504 of the Rehabilitation Act and Title II of the ADA
  - Age Discrimination Act
- DOJ, HUD, and EEOC may also conduct investigations that overlap into these areas, *e.g.*, DOJ reviews disability issues under Title III of the ADA, sexual misconduct issues under VAWA; HUD may take service animal/emotional support animal cases in housing
- OCR may refer complaints to DOJ for enforcement and DOJ occasionally transfers cases to OCR for investigation

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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**

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OCR Investigations: Resources

- OCR Complaint Processing Manual (Aug. 2020)
- Dear Colleague Letters and Enforcement Guidance by Statute
- Prior OCR/DOJ Resolution Agreements by Statute
- Case law can be helpful, but OCR does not always recognize court precedent unless it is directly on point and typically only federal cases (but see state cases in CA that require certain process)

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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 OCR?
- Was the complaint filed within 180 days of last act which complainant alleges to be discriminatory?
- OCR may:
  - Contact complainant for clarification
  - Waive 180 day filing requirement at its discretion
  - Do all of this without the institution knowing it's happening!

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Phase I: Evaluating the Complaint

OCR may administratively close/dismiss the Complaint if, *e.g.*:

- Complaint does not state a violation of a law OCR enforces
- Complaint is not filed timely
- 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

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Phase I: Strategies

- There's not much an institution can do to advocate with OCR when it has advance 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 very delicate and only in appropriate scenarios
- 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

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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

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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
    - OCR is required to respond; but may deny the request until the investigation is concluded
    - Complaint should be made available per OCR policy, but may request additional information, *e.g.*, documents submitted by complainant or prior complaints against the institution

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Phase II: Strategies

- Review regulatory provisions cited by OCR for insight into what OCR will investigate, *e.g.*, facts may cloud the fact that OCR is only focused on the publication of a policy or whether a certain notice is provided.
- OCR will remind the institution that it may not retaliate against any complainant or any person who participates in OCR investigation; make sure that is understood by relevant community members who may interact with the complainant.

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Early Resolution Options

- Rapid Resolution Process (RRP): Cases chosen by OCR because resolution seems more straight forward 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 investigation. (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.

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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
- Allows recipients an opportunity (5 days) to review the draft resolution letter, usually while negotiating draft resolution agreement

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Phase III: Data Request

- OCR will typically include a Data Request with the notification letter:
  - Requests documents, policies, practices, data and explanations
  - Offers opportunity for the institution to provide additional information at its discretion
  - OCR is exempt from FERPA
- Must respond within date on letter, usually 10-30 days
  - Brief extensions may be granted on request; not limitless
  - Keep in mind OCR has an internal clock for case processing and that clock often runs from date OCR receives complaint

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Phase III: Strategies

- Maintain updated and comprehensive records of trainings
- Maintain accessibility and consistency of policies
- Begin gathering information *promptly* 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 in a specific form or require the creation of materials; obligation can be satisfied by permitting OCR to come onsite and permit access
- All data submitted to OCR is subject to a FOIA request; consider redactions, as appropriate

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Phase IV: Onsite Visit

Types of Activities:

- **Interview employees**, including Title IX Coordinator and Deputies; Director of Student Conduct; Dean of Students; Resident Directors; Athletics Director; coaches; etc.
- **Interview students**, including those trained to respond to reports of sexual misconduct; member(s) of the judiciary/hearing board; members of student organizations; students involved in the grievance process
- **Focus group meetings,** involving 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 (May ask OCR to only review certain sensitive material on campus so it does not end up in the government file.)

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Phase IV: Strategies

- Be involved: The process can take clumps of days over an extended period of time. Be judicious in choosing battles
- Identify/suggest relevant witnesses to OCR
- Prepare witnesses
  - Demystify OCR staff by explaining types of questions and reasons OCR may be interested in certain policies/issues
  - Provide witnesses with relevant policies/procedures
  - Evidentiary rules don't apply; explain this to witnesses
  - Share OCR "Rights of Witnesses" document

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Phase IV: Strategies

- Determine appropriate role of counsel:
  - Will counsel sit in on interviews? Will counsel be able to ask limited questions? DO NOT assume that an OCR interview will be akin to a deposition or a trial proceeding
  - 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 information becomes apparent
  - Develop a relationship with OCR staff who will be critical in remaining phases of the case

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Phase V: Compliance Determination

- If OCR determines the institution is out of compliance with a legal requirement, it will issue a Resolution Letter and a Resolution Agreement:
  - Resolution Letters are fact-intensive summaries that apply the law to OCR's factual findings, but OCR makes clear that they are <u>not formal statements of OCR policy</u>
  - The Resolution Agreement then sets forth the agreed upon steps the institution will take to correct the compliance concern
  - Resolution Agreements typically include specific monitoring requirements that often involve continued oversight by OCR

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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

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Resolution 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.

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Phase V: Strategies

- Seek details on findings to understand how to narrow agreement terms to findings:
  - Discuss proposed terms and how they align with legal/factual concerns
  - Review and be prepared to discuss OCR recent resolution letters addressing the same statute and similar facts
- Focus on flexibility for the institution
  - What is a realistic time period for compliance?
  - Have a candid conversation to try to determine OCR's internal flexibility (or inflexibility – often not driven by regional office) on certain issues, *e.g.*, timing

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In Summary …

- An OCR investigation requires significant internal resources to address data requests and onsite visits
- Be an active participant, as appropriate, in each stage of the process
- Identify and begin taking steps to remedy possible vulnerabilities upon notice of complaint
- Organize files and processes as part of school's regular operations – not just if there is an OCR investigation

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Questions?

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