Student Affairs

Anatomy of an OCR Investigation

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Anatomy of an OCR Investigation

• Overview of OCR

• Investigations and Resolutions

• Recent changes to OCR’s Case Processing Manual

• Tips for Working Effectively with OCR
Overview of OCR
ED/OCR Leadership

Secretary of Education
Miguel Cardona

OCR Assistant Secretary
Catherine Llamon
OCR Structure

Headquarters in Washington, D.C. and 12 regional enforcement offices
Laws Enforced by OCR – Higher Ed

- 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
- Age Discrimination Act of 1975
- Title II of the Americans with Disabilities Act of 1990
Laws Enforced by OCR – Higher Ed

Source: 2021 OCR Annual Report
Recent Regulatory and Policy Changes

- Forthcoming Regulations
  - Disability
  - Digital Accessibility

- Focus on Pregnancy and Related Conditions

- Focus on LGTBQ Rights

- Proposed Title IX Regulations
Investigations and Resolutions
The Case Processing Manual (CPM)

• “The Case Processing Manual (CPM) provides OCR with the procedures to promptly and effectively investigate and resolve complaints, compliance reviews, and directed investigations to ensure compliance with the civil rights laws OCR enforces.”

• Have revisions become a biennial tradition?
Small Changes... Big Impact?

- Font size and color
- Reorganizing TOC
- Terminology
  - No more FRBP
- What First Amendment?
- “OCR may”
Key Stages

1. Complaint & Evaluation
2. Investigation
3. Case Closure
   • Dismissal and/or Insufficient Evidence
   • No appeals (2022)
4. Resolution and Monitoring
Georgina Santino

Student Georgina Santino files a complaint with OCR after she is suspended from Directional State University (DSU) for allegedly providing fraudulent information to the Office of Disability Services (ODS) in support of pregnancy-related accommodations. Santino claims that the Director of ODS, Calvin McKarty, discriminated against her based on her age and sex by unfairly examining her medical documentation and violated her FERPA rights by calling her doctor without permission.
Complaint Evaluation

• OCR evaluates whether the allegation, if true, would constitute a violation

• Possible bases for dismissal
  • Untimely
  • No subject matter jurisdiction
  • No jurisdiction over institution
  • No consent form from Complainant
  • Pending litigation on same allegation

• OCR will exercise concurrent jurisdiction and investigate complaints that are also filed in other venues (e.g., EEOC) unless both the complaint and standards applied are identical (2022)
Georgina Santino

OCR receives Santino’s complaint and determines that:

• OCR lacks jurisdiction over the FERPA violation

• The remaining allegations are potential violations of Title IX and the Age Discrimination Act

• The age discrimination claim must be referred to the Federal Mediation and Conciliation Service (FMCS)

• The Title IX allegations are opened for investigation
OCR Investigations

- Investigation Types:
  - Complaints
  - Proactive compliance reviews and directed investigations

OCR is required “to make a prompt investigation whenever a compliance review, report, complaint, or other information indicates a possible failure to comply” with laws protecting students from discrimination in academic institutions that receive Federal funding.

34 C.F.R. 100.7(c)
Discontinuations (2022)

OCR will determine whether the investigation raises systemic issue(s) that warrants continuing the investigation, notwithstanding:

• Complainant’s refusal to cooperate
• Inability to contact Complainant
• Complainant withdrawal
• Complainant’s death
Rapid Resolution Process

• Expedited case processing approach
• Possible circumstances:
  o Recipient has already taken action to resolve the complaint allegations
  o Recipient has indicated willing to take action to resolve the complaint allegations – resolution agreement obtained and monitored by OCR
• Advantage: Expected to be quick
Mediation

- Can be requested by the Complainant (2022)
- No more FRBP (“Facilitated Resolution Between the Parties”)
- OCR facilitates a resolution between the parties
- OCR does not sign, approve, endorse or monitoring any agreement between the parties
- OCR can suspend investigation for 30 calendars to facilitate an agreement; after 30 days, investigation is resumed
OCR sends DSU Notice of Complaint. DSU immediately files a FOIA request seeking a copy of the complaint.

OCR separately determines that the complaint would be appropriate for mediation and gets both parties’ consent to initiate mediation.

OCR staff reach out to the parties to discuss mediation.

Over the course of the next 60 days, the parties agree on very few of the facts. Georgina demands $5,000,000 and DSU refuses to pay anything.

The OCR mediation team determines that the case cannot be resolved through mediation.
During the OCR mediation, the age discrimination allegation is referred to FMCS. The FMCS mediator assigned to the case is very busy on a Department of Transportation case and does not immediately contact the parties. After 60 days, OCR determines that the age discrimination allegation is ripe for investigation.
OCR sends a Notice of Investigation to DSU along with a copy of the CPM and a Data Request.

DSU writes to the investigators seeking an extension to respond to the Data Request and notes it has not received a response to the FOIA request.
Investigation

• Letter of notification to recipient and complainant(s) stating allegation(s) that will be investigated

• Obtain a copy of the complaint
  • Must file FOIA (2022)

• Explore Alternative Resolution Options
  • Mediation
  • Rapid Resolution
Investigation

• Data Requests
  • Provide narrative response even if not requested
  • Timeframe for response - “appropriate amount of time”
  • Denial of access

• Interviews
DSU receives a heavily redacted copy of the complaint one day before its response to the Data Request is due.

After reviewing the information provided in response to the Data Request, OCR requests interviews with Director McKarty and the Vice President for Student Affairs, who oversees ODS.
Georgina Santino

DSU contacts the OCR investigators by phone and suggests that they also interview Warren Bosert, an ODS staff member who witnessed many of the interactions between McKarty and Santino.

DSU submits a supplemental response to the Data Request, providing a more detailed and responsive narrative and a few additional files relevant to stray comments in the complaint.
Case Resolution Options

• Mediation

• Rapid Resolution Process (dismissal or resolution agreement)

• Resolution Agreement Reached During an Investigation (Section 302) and OCR Monitoring

• Investigative Determination (Section 303) and OCR Monitoring
  • Resolution after investigation removed (2022)
Section 302 Agreement

- During the investigation, the Recipient expresses interest in resolution and OCR determines resolution is appropriate
- OCR prepares an internal “statement of the case”
- Resolution Agreement signed by the Recipient
- Timeframe for negotiations: 30 calendar days
- OCR does not make legal findings but does identify “OCR’s compliance concerns”
- Resolution letter
- OCR Monitoring
Section 303 Agreement

• OCR determines that the preponderance of the evidence supports a violation
• OCR prepares an internal “statement of the case”
• Resolution Agreement signed by the Recipient
• Timeframe for negotiations: 90 calendar days
• Letter of findings
• OCR Monitoring
Investigative Determination

- Insufficient Evidence (no violation)
- Non-Compliance (violation)
- Mixed (no violation and violation)
- Statement of Case
- Letter of Findings
  - Respondents will not be provided with a draft copy of a findings letter for comment/corrections (2022)
OCR reviews three years’ of case files related to pregnancy-related accommodations requests. DSU had never before contacted a student’s doctor.

During interviews, OCR investigators learned that Santino had requested identical pregnancy-related accommodations for three consecutive semesters and demonstrated no changes in her condition over that time. This prompted McKarty to initiate contact with the provider Santino had listed in records she submitted in support of her accommodations. According to McKarty and Bosert (who was present), the provider had no record of Santino as a patient.
OCR Enforcement Options

• OCR may initiate administrative proceedings to suspend, terminate or refuse to grant or continue Federal financial assistance
• OCR may refer the matter for enforcement to the U.S. Department of Justice
OCR investigators ultimately determined that DSU had legitimate reasons to question Santino’s pregnancy-related condition since it was not consistent with the other pregnancy-related conditions that DSU had encountered over the past three years.

OCR issued a determination letter stating that “there was insufficient evidence to substantiate the Complainant’s allegations” of age and sex discrimination.
Tips for Working Effectively with OCR
OCR Website: Reading Room
Additional OCR Resources

• OCR Policy Guidance Portal:  
  https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html

• OCR Technical Assistance: OPEN (Outreach, Prevention, Education and Non-discrimination)

• OCR blog
• Fact Sheets
• FOIA requests
Tips for Working Effectively with OCR

• Know the CPM, especially options and timelines

• Establish a cooperative relationship with OCR investigators
  • Stay in touch

• Consider resolution options early and make sure the client knows the costs and risks associated with investigation

• Ensure that the data you provide is complete, clear, timely and well organized

• Ensure that your witnesses are well prepared and familiar with the data you provided and the institution’s “theory of the case”

• Always debrief and learn lessons from a case
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