



## **OCR Basics: Understanding and Surviving a Civil Rights Investigation**

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### **What is OCR?**

The Office for Civil Rights (OCR) is an agency within the U.S. Department of Education with the mission to “ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.”<sup>1</sup> OCR focuses on serving student populations that face the following types of unlawful discrimination:

- Race, color, and national origin discrimination prohibited by Title VI of the Civil Rights Act of 1964;
- Sex discrimination prohibited by Title IX of the Education Amendments of 1972;
- Disability discrimination prohibited by Section 504 of the Rehabilitation Act of 1973;
- Age discrimination prohibited by the Age Discrimination Act of 1975;
- Disability discrimination prohibited by the Americans with Disabilities Act of 1990; and
- Violations of the Boy Scouts of America Equal Access Act.

OCR is led by an assistant secretary for civil rights who is appointed by the president and confirmed by the Senate. OCR headquarters are located in Washington D.C., but most of its enforcement activities are carried out by twelve regional offices in locations around the country. The Dallas Regional Office is responsible for public schools and colleges in Texas as well as Arkansas, Louisiana, and Mississippi.

### **What does OCR do?**

A school district or college that receives federal financial assistance may be the subject of an OCR “complaint review,” or investigation of a complaint of discrimination by the district against a student or students. Anyone who believes that a district has discriminated against a student on the basis of race, color, national origin, sex, disability, or age may file a complaint with OCR. The complainant need not be a victim of the alleged discrimination or a member of the protected class; i.e., a complaint may be filed by a district employee or other community member on behalf of a student or students.<sup>2</sup> Alternatively, OCR may initiate its own investigation to determine whether a school district is practicing compliance with the federal

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<sup>1</sup> U.S. Dep’t of Educ., Office for Civil Rights, *About OCR*, [ed.gov/about/offices/list/ocr/aboutocr.html](http://ed.gov/about/offices/list/ocr/aboutocr.html).

<sup>2</sup> U.S. Dep’t of Educ., Office for Civil Rights, *About OCR*, [ed.gov/about/offices/list/ocr/aboutocr.html](http://ed.gov/about/offices/list/ocr/aboutocr.html).

laws that OCR enforces. These investigations are called “compliance reviews” or “directed investigations.”<sup>3</sup> The procedures used by OCR to conduct enforcement activities are set out in the OCR Case Processing Manual, which is publicly available on the Department of Education Website at [ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf](https://ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf).

In addition, OCR issues written policy guidance to assist districts in complying with the above laws. The OCR Reading Room Website contains OCR’s *Dear Colleague Letters* and other policy guidance documents addressing a wide range of issues, including bullying, sexual harassment, nondiscriminatory school discipline, rights of pregnant and parenting students, and equal access to extracurricular activities for students with disabilities.<sup>4</sup> OCR relies on these documents to communicate its interpretation of federal civil rights laws and regulations to the general public as well as to recipients of federal funds. (OCR frequently refers to school districts and colleges as “recipients.”)

OCR also administers the Civil Rights Data Collection (CRDC), a mandatory, biennial survey designed to collect data, disaggregated by race or ethnicity, sex, limited English proficiency, and disability, on student enrollment and educational programs from every public school in the nation. The CRDC data, which are publicly available on the U.S. Department of Education Website at [ed.gov/about/offices/list/ocr/data.html?src=rt/](https://ed.gov/about/offices/list/ocr/data.html?src=rt/), offer a unique perspective on educational opportunity at the campus level.

### **What standards does OCR use in enforcement activities?**

Federal civil rights statutes and their implementing regulations provide OCR with administrative authority and procedures for addressing and resolving alleged violations, including the authority to withhold federal funding if OCR finds a violation that the district is unwilling to resolve. Districts can also be sued in federal courts by individuals seeking monetary damages or other legal remedies for civil rights violations. Historically, OCR has taken the position that the administrative nature of its authority means that the agency is not restricted by the standards that apply in a court of law. Some critics, including the National School Boards Association (NSBA), have taken issue with OCR’s approach to enforcement.

For example, in October 2010, OCR issued a “Dear Colleague Letter” (DCL) regarding bullying and harassment that gave multiple hypothetical examples of bullying due to a victim’s protected characteristic and discussed how school officials should have responded in each instance.<sup>5</sup> The DCL emphasized that schools must assess the nature of student misconduct, whether characterized as bullying, teasing, hazing, etc., to determine whether the behavior implicates the victim’s civil rights and, if so, must take comprehensive action in response.

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<sup>3</sup> See U.S. Dep’t of Educ., Office for Civil Rights, *Case Processing Manual*, Article IV (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf](https://ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf).

<sup>4</sup> These publications are available online at the OCR Reading Room Website, [ed.gov/about/offices/list/ocr/frontpage/fag/readingroom.html](https://ed.gov/about/offices/list/ocr/frontpage/fag/readingroom.html).

<sup>5</sup> U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter* (Oct. 26, 2010), [ed.gov/about/offices/list/ocr/letters/colleague-201010.html](https://ed.gov/about/offices/list/ocr/letters/colleague-201010.html).

When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school's responsibility is to eliminate the hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.<sup>6</sup>

NSBA responded to the DCL with a letter expressing solidarity with OCR's mission to address bullying and improve the school climate but urging caution with respect to the DCL's scope.<sup>7</sup> Among other issues, NSBA raised the concern that OCR's approach to bullying incidents significantly expanded the standard for school district liability previously set out by the U.S. Supreme Court in *Davis v. Monroe County Board of Education*.<sup>8</sup> Under *Davis*, a district may not be held liable for student-to-student harassment unless the district has "actual knowledge" of the harassment and fails to reasonably respond.<sup>9</sup> According to the DCL, however, a district is "responsible for addressing harassment incidents about which it *knows or reasonably should have known*."<sup>10</sup> According to NSBA, the DCL's suggestions as to what the schools should have done to respond to the bullying incidents failed to acknowledge the professional judgment of professional educators and threatened to expose districts to increased litigation and liability beyond the limitations established by the *Davis* court. "[A]bsent clarification," NSBA cautioned, OCR's "expansive reading of the law as stated in the DCL will invite misguided litigation that needlessly drains precious school resources and creates adversarial climates that distract schools from their educational mission."<sup>11</sup>

OCR responded to NSBA's concerns by noting, in correspondence dated March 25, 2011, that its guidance represented the agency's enforcement interpretation and did not purport to replace the standard for legal liability (i.e., money damages) that a plaintiff would have to meet in a federal court.<sup>12</sup>

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<sup>6</sup> U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter* (Oct. 26, 2010), at 3-4, [ed.gov/about/offices/list/ocr/letters/colleague-201010.html](http://ed.gov/about/offices/list/ocr/letters/colleague-201010.html).

<sup>7</sup> Letter from Francisco M. Negron, Jr., General Counsel, Nat'l Sch. Bds. Ass'n, to Charlie Rose, General Counsel, Dep't of Educ. (Dec. 7, 2010), [nsba.org/sites/default/files/reports/NSBA%20Response%20to%20OCR%20Guidance%20December%202010.pdf](http://nsba.org/sites/default/files/reports/NSBA%20Response%20to%20OCR%20Guidance%20December%202010.pdf).

<sup>8</sup> Letter from Francisco M. Negron, Jr., General Counsel, Nat'l Sch. Bds. Ass'n, to Charlie Rose, General Counsel, Dep't of Educ. (Dec. 7, 2010), [nsba.org/sites/default/files/reports/NSBA%20Response%20to%20OCR%20Guidance%20December%202010.pdf](http://nsba.org/sites/default/files/reports/NSBA%20Response%20to%20OCR%20Guidance%20December%202010.pdf).

<sup>9</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>10</sup> U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter* (Oct. 26, 2010), at 2 (emphasis added), [ed.gov/about/offices/list/ocr/letters/colleague-201010.html](http://ed.gov/about/offices/list/ocr/letters/colleague-201010.html).

<sup>11</sup> Letter from Francisco M. Negron, Jr., General Counsel, Nat'l Sch. Bds. Ass'n, to Charlie Rose, General Counsel, Dep't of Educ. (Dec. 7, 2010), at 1-2, [nsba.org/sites/default/files/reports/NSBA%20Response%20to%20OCR%20Guidance%20December%202010.pdf](http://nsba.org/sites/default/files/reports/NSBA%20Response%20to%20OCR%20Guidance%20December%202010.pdf).

<sup>12</sup> Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, Dep't of Educ., to Francisco M. Negron, Jr., General Counsel, Nat'l Sch. Bds. Ass'n (Mar. 25, 2011), [nsba.org/sites/default/files/reports/ED\\_Response\\_-\\_NSBA\\_Bullying\\_Letter\\_2011.pdf](http://nsba.org/sites/default/files/reports/ED_Response_-_NSBA_Bullying_Letter_2011.pdf).

In the years following the DCL, federal courts with jurisdiction over Texas districts have continued to uphold the *Davis* standard of liability.<sup>13</sup> Nonetheless, districts in Texas have experienced the impact of OCR's broader enforcement interpretation in investigations and compliance reviews.

### **What is the impact of OCR on Texas school districts?**

While OCR has been in existence for decades, in recent years school officials have become more aware of the agency's enforcement activities as the volume of complaints has greatly increased. According to OCR's Fiscal Year 2016 Report to the President and Secretary of Education, in 2016 OCR received a record 16,720 complaints, including significant increases in certain types of complaints. In the area of disability, between 2011 and 2016 the number of complaints regarding restraint and seclusion of students with disabilities increased by 100 percent, and complaints regarding web accessibility for persons with disabilities increased 511 percent. In the same five year time period, sexual violence complaints rose 277 percent in K-12 schools and 831 percent in higher education, and complaints regarding harassment on the basis of race, color, or national origin increased 17 percent.<sup>14</sup>

In Texas, complaints resolved in FY 2016 mirror national statistics. According to OCR's FY 2016 Report to the President and Secretary of Education, out of a total of 31 complaints resulting in resolution agreements with Texas districts, 27 involved allegations of disability discrimination.<sup>15</sup> A significantly smaller amount of resolved complaints in 2016 involved allegations of gender discrimination (3) or race, national origin or ethnic discrimination (1).<sup>16</sup>

### **So you're being investigated by OCR. Now what?**

Clearly, an OCR complaint has the potential to require a substantial amount of district resources. It can also have a negative effect on morale, as parents, employees, or other community members may cite a complaint or investigation as evidence of unlawful actions. As such, it is important that district officials have a basic understanding of OCR's procedures in

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<sup>13</sup> See, e.g., *Kelly v. Allen Indep. Sch. Dist.*, 602 F. App'x 949, 952-54 (5th Cir. 2015) (discussing that liability under Title IX requires the plaintiff to show that the district had actual knowledge of harassment); *but see T.K. v. New York City Dept. of Educ.*, 32 F.Supp.3d 405 (E.D.N.Y. 2014) (finding that school officials failed to take reasonable steps to address bullying and quoting extensively from 2013 DCL in defining liability standard for bullying in special education context), *aff'd*, 810 F.3d 869 (2d Cir. 2016).

<sup>14</sup> U.S. Dep't of Educ., Office for Civil Rights, *Securing Equal Educational Opportunity: FY 2016 Report to the President and Secretary of Education* (Dec. 2016), [ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf](http://ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf).

<sup>15</sup> U.S. Dep't of Educ., Office for Civil Rights, *Securing Equal Educational Opportunity: FY 2016 Report to the President and Secretary of Education* (Dec. 2016), Appendix, [ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf](http://ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf).

<sup>16</sup> U.S. Dep't of Educ., Office for Civil Rights, *Securing Equal Educational Opportunity: FY 2016 Report to the President and Secretary of Education* (Dec. 2016), Appendix, [ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf](http://ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf).

order to provide others with accurate information, prevent false rumors, and help to mitigate any negative psychological effects.

### Initiation of an investigation

OCR must investigate any complaint that meets the basic criteria: a written explanation of the allegation(s) describing a matter under OCR’s jurisdiction; identification of the injured person(s); and identification of the alleged perpetrator of the discrimination. According to the OCR Case Processing Manual (CPM), OCR will dismiss a complaint if the allegation: (1) fails to state a violation of one of the laws that OCR enforces; (2) provides insufficient details; or (3) is so “speculative, conclusory, or incoherent” that OCR cannot infer that a violation occurred.<sup>17</sup> Unlike in a lawsuit, however, there is no formal procedure for a district to challenge the adequacy of a complaint prior to initiation of an investigation.

When OCR determines that a complaint is proper, a case number will be assigned and the complainant and district will receive notification that a case has been opened for investigation. OCR will provide the district with the allegations to be investigated and a copy of its complaint processing procedures with the notification.<sup>18</sup> The CPM does not, however, require OCR to provide the district with a copy of the complaint itself. Upon receiving notification of an investigation, the district should immediately contact its attorney in order to begin an internal review of the allegations. It may be necessary to file a Freedom of Information Act request with OCR in order to obtain a copy of a complaint.<sup>19</sup>

### Conducting the investigation

Depending on the scope of the investigation, the district may be required to direct substantial time and resources responding to the OCR investigator’s requests for documents and information. The CPM gives each regional enforcement office the authority to determine the appropriate time for responding to data requests. OCR requests for data in a particular format must be “reasonable and take into consideration the burden placed on the recipient.”<sup>20</sup> Nonetheless, when district employees are tasked with responding to OCR information requests, in addition to regular job duties, a stressful impact on workplace morale may be inevitable.

OCR may also seek to conduct interviews with relevant employees, which may be in-person and on district property. The purpose of these interviews could be to assess witness credibility, evaluate the district’s response to the allegations in a complaint, and/or gain a deeper understanding of the records in a case. Witnesses are entitled to a representative at an interview.

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<sup>17</sup> U.S. Dep’t of Educ., Office for Civil Rights, *Case Processing Manual*, § 108 (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrspm.pdf](http://ed.gov/about/offices/list/ocr/docs/ocrspm.pdf).

<sup>18</sup> U.S. Dep’t of Educ., Office for Civil Rights, *Case Processing Manual*, § 109 (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrspm.pdf](http://ed.gov/about/offices/list/ocr/docs/ocrspm.pdf).

<sup>19</sup> 5 U.S.C. § 552.

<sup>20</sup> U.S. Dep’t of Educ., Office for Civil Rights, *Case Processing Manual*, § 702(c)(3)(ii) (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrspm.pdf](http://ed.gov/about/offices/list/ocr/docs/ocrspm.pdf).

A district employee may opt to have the district's attorney attend an interview or may invite a personal representative. The OCR investigator must advise witnesses of their rights prior to the interview, including notification that the witness has the right to refuse to have anyone else present during the interview and not to reveal the content of an interview.<sup>21</sup> However, the CPM provides that "[i]n most cases," the district's attorney will be permitted to attend interviews with "upper level management."<sup>22</sup> OCR may also interview student witnesses. Typically, the CPM requires parental consent in order to interview a student.<sup>23</sup>

Throughout the investigation, the district should be working with its own attorney. The district's refusal to cooperate with OCR's requests for information or interviews may result in deferral of federal funds and referral of the case to the Department of Justice for judicial enforcement proceedings.<sup>24</sup>

### Concluding an Investigation

An investigation may be resolved at any time if OCR determines that a resolution agreement is appropriate. During the complaint process, OCR may invite the parties to voluntarily resolve the dispute through the Early Complaint Resolution (ECR) process. OCR must consider whether a complaint is appropriate for ECR as early as possible, even during the initial evaluation of a complaint. If the parties agree to participate in ECR, the investigation may be suspended for up to 30 days while OCR acts as a confidential, impartial mediator to facilitate discussions and work towards a mutually acceptable resolution. According to the CPM, "to the extent possible," OCR staff assigned to act as the ECR facilitator will not be the same staff assigned to investigate the complaint.<sup>25</sup> OCR may offer assistance with writing a resolution agreement between the parties; however, OCR is not a party to any agreement reached through ECR and will not monitor either party's compliance with the agreement. School districts may also initiate early resolution of a complaint under Section 302 of the CPM. This may be a good strategy where a district's internal investigation reveals compliance issues that require corrective action.

When an investigation is concluded, OCR will determine, based on a preponderance of the evidence standard, whether there is sufficient evidence to support a finding that the district failed to comply with the law. OCR will then issue a letter of finding(s) to the parties explaining the basis for the decision and notifying the complainant that he or she has the right to file a

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<sup>21</sup> U.S. Dep't of Educ., Office for Civil Rights, *Case Processing Manual*, § 702(d)(2)(iv) (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf](http://ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf); see also U.S. Dep't of Educ., Office for Civil Rights, *OCR Notice of Witness Rights*, [ed.gov/about/offices/list/ocr/docs/witness-notice-mw.pdf](http://ed.gov/about/offices/list/ocr/docs/witness-notice-mw.pdf).

<sup>22</sup> U.S. Dep't of Educ., Office for Civil Rights, *Case Processing Manual*, § 702(d)(2)(vi) (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf](http://ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf).

<sup>23</sup> U.S. Dep't of Educ., Office for Civil Rights, *Case Processing Manual*, § 702(d)(4) (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf](http://ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf).

<sup>24</sup> U.S. Dep't of Educ., Office for Civil Rights, *Case Processing Manual*, Art. VI (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf](http://ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf).

<sup>25</sup> U.S. Dep't of Educ., Office for Civil Rights, *Case Processing Manual*, §§ 201, 202 (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf](http://ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf).



private lawsuit in federal court whether or not OCR found a violation.<sup>26</sup> If OCR determines that a violation has occurred, it will also issue a statement of the case and a draft resolution agreement. Complainants may appeal OCR letters of finding to the Regional Director of the Enforcement Office that issued the letter.<sup>27</sup> In contrast, the CPM does not include a procedure for a district to challenge an OCR determination.

If OCR determines through an investigation that a district failed to comply with one of the civil rights laws that OCR enforces, OCR will encourage the district to enter into a voluntary resolution agreement designed to bring the district into compliance. Resolution agreements must include specific steps that the district will take in order to resolve compliance issues, dates for implementation of each step, and requirements for providing documentation of compliance to OCR.<sup>28</sup> Resolution agreements further require the district to acknowledge that OCR will monitor the district's implementation of the steps called for in the agreement until the district "has fulfilled the terms of the agreement and is in compliance with the statute(s) and regulation(s) that were at issue in this case."<sup>29</sup> In some cases, a board approving a resolution agreement may go beyond the terms of the agreement to make other district-wide changes. For example, a district may decide to modify its procedures for student discipline or hearing grievances based on the issues raised by an OCR complaint or the result of the district's internal investigation.

It is crucial that a district work with its attorney throughout the complaint process to assist in evaluating the allegations, coordinating the district's response, and negotiating with OCR in any resolution discussions. Furthermore, should the district enter into a resolution agreement, an attorney can provide valuable assistance and relieve the district's administrative burden during the monitoring period (which may last for several years) by tracking important deadlines and helping to prepare documentation of compliance.

## Conclusion

OCR and school districts want the same thing: to protect students from discrimination and retaliation in school so that they can focus on learning. With mutual understanding as to the policies, issues, and practical constraints that apply to each other, OCR and school districts can improve collaboration in order to achieve this common goal.

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<sup>26</sup> U.S. Dep't of Educ., Office for Civil Rights, *Case Processing Manual*, § 301(c) (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf](http://ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf).

<sup>27</sup> U.S. Dep't of Educ., Office for Civil Rights, *Case Processing Manual*, § 306 (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf](http://ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf).

<sup>28</sup> U.S. Dep't of Educ., Office for Civil Rights, *Case Processing Manual*, § 304 (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf](http://ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf).

<sup>29</sup> U.S. Dep't of Educ., Office for Civil Rights, *Case Processing Manual*, § 304 (Feb. 2015), [ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf](http://ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf).

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