

U.S. Department of Education's Office for Civil Rights Guidance: An Update

John W. Borkowski, Elizabeth S. Samples,
and Katie Jo Luningham

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Introduction

For the last several years, the U.S. Department of Education Office for Civil Rights (“OCR”) has been aggressively enforcing federal civil rights laws in school districts across the country. After providing a brief background on OCR and the laws it enforces, this article describes OCR’s efforts to enforce such laws through guidance, enforcement, and transparency. It concludes with a brief discussion of what school districts can expect when OCR initiates an investigation.

Background

OCR enforces several federal civil rights statutes that prohibit discrimination on various bases in programs or activities that receive federal financial assistance. OCR has mandatory jurisdiction to enforce several federal civil rights statutes, including the following:

Title VI of the Civil Rights Act of 1964 (“Title VI”) ¹	Prohibits discrimination on the basis of race, color, national origin
Title IX of the Education Amendments of 1972 (“Title IX”) ²	Prohibits discrimination on the basis of sex
Section 504 of the Rehabilitation Act of 1973 (“Section 504”) ³	Prohibits discrimination on the basis of disability
Title II of the Americans with Disabilities Act of 1990 (“ADA”) ⁴	Prohibits discrimination on the basis of disability

OCR both responds to complaints about alleged violations of these laws that may be submitted by individuals or groups and also conducts its own agency-initiated compliance reviews.

School districts are subject to these federal civil rights laws as a result of their acceptance of federal financial assistance, and the penalties for violations include the possible termination of such assistance. This threat looms large for school districts. The threat is so significant that OCR has rarely had to

use it when investigating school districts for alleged violations. OCR often relies instead on agreements to resolve complaints and compliance reviews.

OCR is led by an Assistant Secretary of Education, and the person filling this position is appointed by the President and confirmed by the Senate. As a result, as political winds change, so do enforcement priorities. Under the Obama administration, OCR has aggressively utilized all of its enforcement tools: providing guidance, investigating, and increasing transparency.⁵

OCR Guidance

OCR provides technical guidance in a number of formats—from direct conversations with school districts to various forms of written guidance. Dear Colleague letters are OCR’s primary mode of communicating guidance. These letters often announce OCR’s interpretation of the civil rights laws and its views of compliance obligations. During the Obama administration, OCR has released a large number of such letters. Since 2010 OCR has issued:

- ▶ Eight Dear Colleague letters⁶ focused solely Title VI issues, covering topics such as voluntary consideration of race to avoid racial isolation in schools; avoiding immigration/citizenship status discrimination in the enrollment process; and school obligations to ensure meaningful participation of English Learner students.

On October 1, 2014, OCR issued a sweeping Dear Colleague letter addressing school districts’ legal obligation to provide all students with equal access to all types of educational resources without regard to race, color or national origin.⁷ This guidance was in addition to another lengthy Dear Colleague letter OCR released earlier that year addressing the discriminatory use of student discipline. In the letter, OCR set out a series of expectations on Title VI requirements relating to student discipline. The letter specifically addressed the issues of disciplining similarly situated students of different races differently and selectively enforcing school rules. The letter focused on the need for data collection—in particular, data on referrals, which the letter identified as a

potential problem area for discrimination due to the often subjective and discretionary ability of faculty and staff to decide who and when to refer.

On January 7, 2015, OCR released a joint guidance Dear Colleague letter with the Civil Rights Division of the U.S. Department of Justice.⁸ Noting that both departments share authority for enforcing Title VI in education, the letter addressed schools' obligations to (1) ensure that English Learner students can participate meaningfully and equally in school, and (2) communicate information to parents with limited English proficiency in a language they can understand. The 40-page letter identified and addressed ten Common Civil Rights Issues—including unnecessary segregation of English Learners (including in special programs for “newcomers”) and failing to adequately staff and support English Learner programs.⁹ In keeping with the Department's efforts to make guidance accessible, the letter also provided a Notice of Language Assistance page providing information for English Learners to request language assistance services.¹⁰ In addition to the letter, the Department provided fact sheets and a toolkit to help school districts identify English learner students. The fact sheets were published in English, Arabic, Cambodia, Chinese (simplified and traditional), Hmong, Korean, Laotian, Russian, Spanish, Tagalog, and Vietnamese,¹¹ while the toolkit contained a Home Language Survey sheet asking questions in English, Spanish, French, Vietnamese, Chinese, Amharic, and Arabic.¹²

- Seven Dear Colleague letters exclusively addressing a variety of Title IX topics such as sexual violence, pregnant and parenting students, the obligations of Title IX Coordinators, volunteer youth service organizations, compliance with Title IX's regulatory requirement to accommodate students' athletic interests and abilities, and Title IX protections for transgender students.¹³ In addition to the Dear Colleague letters, OCR also issued Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities¹⁴ and a more than 50-page Question and Answer document clarifying its Title IX sexual violence guidance.¹⁵

With regards to Title IX, sexual harassment and sexual violence are attracting a great deal of attention at OCR and in the national media.

OCR has made clear that much of its sexual harassment and sexual violence guidance also applies at the K-12 level. The Dear Colleague letter on sexual violence discusses school districts' obligations to investigate all instances of sexual violence, including off-campus incidents in certain cases.¹⁶ The letter also instructs that in some cases, a school must investigate an alleged violation even in cases where a parent or student's withholds consent to participate in the investigation. Notably, an April 2015 Dear Colleague letter addressed the obligation of schools to designate a Title IX Coordinator. The letter also highlighted the responsibility of schools to ensure that Title IX Coordinators are properly trained and informed about their responsibilities under Title IX. The letter was accompanied by a letter to Title IX Coordinators and resource guide to assist Title IX Coordinators in their work.¹⁷

Finally, through a May 2016 joint Dear Colleague Letter, OCR and the DOJ released guidance making it clear that the agencies consider Title IX's prohibition on sex discrimination to prohibit discrimination on the basis of a student's gender identity. The guidance states that school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to education programs and activities and discusses schools' obligation to treat students consistent with their gender identity.¹⁸

- Five Dear Colleague letters focused primarily on Section 504 and ADA issues.¹⁹ These letters dealt with addressing the need for educational technology to be accessible; effective communication for students with hearing, vision, or speech disabilities;²⁰ FAQs regarding the Americans with Disabilities Act Amendments Act of 2008 and the broadened definition of "disability;" access to extracurricular activities and sports; and disability-based bullying and harassment.²¹

In January 2013, OCR released a Dear Colleague letter addressing extracurricular activities. The letter explained that school districts must make reasonable modifications and provide the relevant aids and services needed to ensure equal opportunity, unless doing so would constitute a fundamental alteration of the sport or activity.²² The letter also suggested that when the interests and abilities of students with disabilities cannot be satisfied by a district's existing extracurricular

athletic program, the district should consider creating additional opportunities for such students. After outside groups questioned OCR's expansive view and requested clarification, an OCR official responded by saying that school districts are encouraged but not required to create additional extracurricular opportunities for students with disabilities, and the standard OCR will use to evaluate district efforts is not the Title IX standard, which would call for evaluation of whether the needs of students with disabilities can be met as "fully and effectively" with the existing program.

On October 21, 2014, OCR issued a Dear Colleague letter echoing themes that had been raised in a letter from the Office for Special Education and Rehabilitative Services ("OSERS") in 2013 and OCR's bullying letter in 2010.²³ OCR noted that bullying of a student with disabilities on any basis can result in a denial of "Free Appropriate Public Education" ("FAPE"), which must be remedied.

In some instances, OCR's Dear Colleague letters outline more robust compliance obligations than courts have required in civil liability cases. School districts should consult with their attorneys to discuss how to approach their civil rights compliance obligations. Although complying with OCR standards may avoid OCR scrutiny and mitigate risk more generally, it is important for districts to understand what steps outlined by OCR are legally required and which are aspirational.

OCR Investigations: Complaints and Compliance Reviews

As noted above, there are two main types of OCR investigations, those arising from (1) complaints,²⁴ and (2) compliance reviews. Under both approaches, when OCR discovers violations it typically seeks to enter into a resolution agreement with a school district, requiring the district to take corrective actions.

Under the complaint process, OCR considers and may investigate all complaints filed by anyone. The complainant need not be a victim of alleged discrimination or even have any connection to the district. However, OCR will generally limit investigations to those that are filed within 180 days of the last act of discrimination, unless the time for filing is extended by the responsible OCR official.

Unlike complaints, OCR itself initiates compliance reviews. A compliance review involves proactive, broad-scale, district-wide investigations of strategic significance to OCR. History suggests that media stories and a school district's various data reporting obligations, in conjunction with OCR's enforcement priorities at the time, may trigger a compliance review. Recent experience suggests OCR currently is focusing on, among other priorities, sexual violence, equity in athletics, college and career readiness, and discipline. In some cases alleging Title IV discrimination in discipline, OCR is currently expanding investigations of single complaints into district-wide inquiries that resemble compliance reviews.

When an OCR investigation of either variety uncovers noncompliance—including noncompliance with OCR's interpretation of federal civil rights laws as outlined in statutes, regulations, Dear Colleague letters and other guidance—OCR typically seeks to enter into a resolution agreement. Resolution agreements are essentially settlement agreements or consent decrees in which a school district undertakes enumerated steps to remedy the harmful effects of past noncompliance and to achieve compliance. Though ostensibly voluntary, the threat of loss of federal financial assistance often results in districts agreeing to sometimes onerous requirements. Some of these requirements include: individual remedies, such as compensatory

education or revisions to student academic or discipline records, hiring a consultant to advise on strategies for the equitable administration of discipline, developing and administering climate surveys covering various issues, making electronic information technology accessible to individuals with disabilities, and, often, revisions to policies and procedures and staff training.

Transparency

OCR has recently announced an increase in transparency. For example, it has expanded and publicized its Civil Rights Data Collection (“CRDC”) results, and has begun to publish its resolution agreements on its website. OCR also released a revised Case Processing Manual in February 2015, which outlines OCR’s procedures when evaluating, investigating and resolving complaints and compliance reviews.

Although publishing resolution agreements is self-explanatory, the CRDC is not. The CRDC is a mandatory, biennial survey through which OCR collects civil rights data directly from at least a representative sample of school districts for each administration (although some districts are always included, for example, large districts – and the most recent data collection was universal). OCR released the latest data (from the 2011–12 CRDC) in March 2014.²⁵ OCR analyzes the data to identify concerns and trends and, as noted above, to identify districts for compliance reviews. However, when it first released the data in March 2014, OCR also invited crowdsourcing, posting the data in a user-friendly format and encouraging stakeholders to analyze it.

In April 2015, OCR received approval from the Office of Management and Budget (“OMB”) to require every public school and school district in the country to respond to the 2013-14 CRDC. The OMB also approved an additional set of new data items as optional for the 2013-14 CRDC, and mandatory for the 2015-16 CRDC. Because schools are now required to collect and submit CRDC data, districts would be well-advised to spend time reviewing their own CRDC data to identify any areas of concern.

When OCR Knocks at the Door: Some things to Consider

First and foremost, school districts should ensure appropriate processes are available for individuals to make discrimination complaints internally. School districts should do this both because it is required and because it may result in mutually beneficial resolution internally. By having appropriate processes in place, internal resolutions may eliminate the need for an external complaint and investigation. Sometimes, districts fall out of compliance simply by failing to properly utilize the processes they have in place. The simplest way to avoid a potential issue with OCR is to have the required processes in place; to ensure those processes are effectively communicated to members of the school community; and to follow those processes when complaints arise.

In addition, school districts can put themselves in the best position in terms of civil rights compliance, if they remain familiar with OCR guidance and are regularly conduct internal self-assessments. Best practice would be to create an audit calendar that builds in designated internal or external compliance assessments regularly throughout the year. Such self-assessments can allow districts to take appropriate corrective actions without burdensome investigations and without the public controversy that can be generated by civil rights complaints.

However, school districts also must be prepared for the chance that OCR receives a complaint or initiates a compliance review. When this happens, the district first should take measures to preserve relevant documents and to prepare for large document/information requests on relatively tight, though often negotiable, timelines. Consistent and clear record-keeping practices regarding internal complaints, discipline, and students with disabilities, to name a few, will make this task easier. If an investigation is complaint-driven, OCR typically refuses to provide the school district with a copy of the complaint but describes the allegations in general terms. OCR investigations also often include one or more visits by OCR representatives to interview witnesses and stakeholders.

As OCR begins to gather the information necessary for it to assess a school district's compliance, the district should attempt to keep ahead of the investigation by conducting an internal investigation of its own. Only after a school district has closely examined its own level of compliance can the district take steps to remedy any defects or determine what type of resolution is most desirable. Once an internal investigation is completed, the district can then take interim steps designed to address areas of noncompliance as needed. This knowledge may also provide school districts with an opportunity to initiate or enter into OCR-initiated resolution agreements from a position of relative strength. Indeed, in some instances, the school district itself may want to consider proposing a resolution agreement to OCR.

Throughout the investigation and resolution periods, districts also should consider how to manage communication with their communities and the media about the various issues that may arise during an investigation. Although some school districts have found public support for defying OCR, the vast majority of public attention has been critical of schools under investigation. In order to mitigate the potential negative publicity of an OCR investigation, school districts who cooperate can sincerely tout their efforts to work closely with OCR to ensure compliance with the law.

At the end of the day, public school districts and OCR have the same goal: making sure that all students have unimpeded access to a high quality education. Approaching OCR guidance documents, investigations and data reporting with that principle in mind often is the best way to work cooperatively with OCR and to avoid protracted controversies. Indeed, for some school districts, OCR investigations have been handled in a way that refines, promotes and enhances existing educational improvement initiatives that were already under way. In those situations, both the school districts and OCR bolster their mutual pursuit of educational equity.

Endnotes

- 1 *See* 42 U.S.C. § 2000d *et seq.*
- 2 *See* 20 U.S.C. §§ 1681 *et. seq.* *See also* 34 C.F.R. § 106.1 *et seq.* (codified Department of Education regulations “to effectuate title IX of the Education Amendments of 1972”).
- 3 *See* 34 C.F.R. 104 *et. seq.* (regulations implementing Section 504 as related to educational institutions).
- 4 *See* 28 C.F.R. § 35.101 (“to effectuate subtitle A of Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131), which prohibits discrimination on the basis of disability by public entities.”).
- 5 Some educational organizations have complained about what they characterize as OCR’s heavy-handed approach, and have requested clarification of guidance documents articulating expansive enforcement standards. OCR has responded to these complaints, but has not substantially modified its positions.
- 6 This figure does not include guidance documents that cut across several of OCR’s areas of jurisdiction. Recent documents of this type include guidance concerning the prohibition against retaliation under federal civil rights laws, guidance about the application of civil rights laws to charter schools and juvenile justice residential facilities and guidance regarding student-on-student harassment on the basis of sex; race, color and national origin; and disability. The Dear Colleague letters not specifically addressed here can be found on the Department of Education’s website. *See* U.S. Department of Education, Office for Civil Rights, *Race and National Origin Discrimination Policy Guidance* (2016), available at <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/raceorigin.html>.
- 7 Catherine E. Lhamon, Assistant Sec’y for Civil Rights, “*Dear Colleague*” Letter: *Guidance to Ensure All Students Have Equal Access to Educational Resources*, U.S. Dep’t of Educ., Off. for Civ. Rts. (Oct. 1, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.
- 8 “*Dear Colleague*” Letter: *Guidance to Ensure English Learner Students Have Equal Access to a High-Quality Education*, U.S. Dep’t of Educ., Off. for Civ. Rts. & U.S. Dep’t of Justice, Civ. Rts. Div. (Jan. 7, 2015), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>.
- 9 *Id.* at 8-39.
- 10 *Id.* at 3.

- 11 U.S. Department of Education, Office for Civil Rights & U.S. Dep't of Educ., Off. for Civ. Rts. & U.S. Dep't of Justice, Civ. Rts. Div. *School's Civil Rights Obligations to English Learner Students and Limited English Proficient Parents* (January 7, 2015), available at <http://www2.ed.gov/about/offices/list/ocr/ellresources.html>.
- 12 U.S. Department of Education, Office for Civil Rights & U.S. Dep't of Educ., Off. for Civ. Rts. & U.S. Dep't of Justice, Civ. Rts. Div., *Tools and Resources for Identifying All English Learners 6-8* (January 7, 2015), available at: <http://www2.ed.gov/about/offices/list/oela/english-learner-toolkit/chap1.pdf>.
- 13 The Dear Colleague letters not specifically addressed here can be found on the Department of Education's website. See U.S. Department of Education, Office for Civil Rights, *Sex Discrimination Policy Guidance* (2016), available at <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html>.
- 14 Catherine E. Lhamon, Assistant Sec'y for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, U.S. Dep't of Educ., Off. for Civ. Rts. (Dec. 1, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.
- 15 Catherine E. Lhamon, Assistant Sec'y for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. Dep't of Educ., Off. for Civ. Rts. (Apr. 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.
- 16 Catherine E. Lhamon, Assistant Sec'y for Civil Rights, "Dear Colleague" Letter: *Guidance on Addressing Sexual Harassment/Sexual Violence*, U.S. Dep't of Educ., Off. for Civ. Rts. (Apr. 4, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.
- 17 Catherine E. Lhamon, Assistant Sec'y for Civil Rights, "Dear Colleague" Letter: *Guidance on Obligation of Schools to Designate a Title IX Coordinator*, U.S. Dep't of Educ., Off. for Civ. Rts. (Apr. 24, 2015), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.
- 18 See, Joint Dear Colleague Letter, U.S. Dep't of Educ., Off. for Civ. Rts. & U.S. Dep't of Justice, Civ. Rts. Div. *Dear Colleague Letter on Transgender Students* (May 13, 2016), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.
- 19 The Dear Colleague letters not specifically addressed here can be found on the Department of Education's website. See U.S. Department of Education, Office for Civil Rights, *Disability Discrimination Policy Guidance* (2016), available at <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/disability.html>.
- 20 See, Joint Dear Colleague Letter, U.S. Dep't of Educ., Off. for Civ. Rts., U.S. Dep't of Educ., Off. of Special Ed. and Rehabilitative Services. & U.S. Dep't of Justice, Civ. Rts. Div. *Effective Communication for Students with Disabilities* (November 12, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-effective-communication-201411.pdf>.

- 21 This figure does not include Fact Sheets published regarding protecting civil rights while addressing the risk of measles and Ebola in schools.
- 22 Catherine E. Lhamon, Assistant Sec’y for Civil Rights, “*Dear Colleague*” Letter: *Guidance on Schools’ Obligation to Provide Equal Opportunity to Students with Disabilities to Participate in Extracurricular Athletics*, U.S. Dep’t of Educ., Off. for Civ. Rts. (Jan. 25, 2013), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html>.
- 23 Catherine E. Lhamon, Assistant Sec’y for Civil Rights, “*Dear Colleague*” Letter: *Guidance on Bullying of Students with Disabilities*, U.S. Dep’t of Educ., Off. for Civ. Rts. (Oct. 21, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/disability.html>.
- 24 According to the Department of Education’s Office for Civil Rights *Report to the President and Secretary of Education for Fiscal Year 2015*, OCR received more than 10,000 complaints last year. This number is a record number of complaints (10,392), a number that is almost double the complaints received in 2005 (5,533).
- 25 Later this year, OCR plans to release the results of the 2013-14 CRDC, another collection of data from all public schools and districts in the nation.



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