

OCR INVESTIGATIONS: INSIGHTS FROM THE INSIDE AND OUTSIDE

By: Lynn Rossi Scott
with input from Kenyatta Braggs

BRACKETT & ELLIS, P.C.
ATTORNEYS AND COUNSELORS

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U.S. Department of Education

- **Discrimination and retaliation**
 - **Race, Color, National Origin**
 - **Sex, Age, Disability**
 - **Open Forum**

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U.S. Department of Justice

- **Discrimination and Retaliation**
 - **Religion, sex**
 - **National Origin, Race, Language**
 - **Disability**

3

ADDRESSING THE COMPLAINT

4

School District

- **Call your lawyer.**

5

OCR

- **You do not need a lawyer ...
trust us.**

6

School District

- **Be kind and cooperative.**
- **“We’re on the same side.”**

7

OCR

- **Goal of OCR is compliance with federal laws.**
- **Staff has no desire to play the “gotcha” game.**

8

School District

- **Use FOIA to request the complaint OR**
- **Ask that relevant portions of complaint allegations be read to you.**

9

OCR

- **Review OCR’s Case Processing Manual (CPM) to ensure complaint meets their jurisdictional requirements.**

10

School District

- **Review the complaint and the data request carefully to determine what you need to locate.**

11

OCR

- **Contact investigator if complaint is unclear and/or data request is burdensome.**

12

School District

- **Work on data requested ASAP.**
- **Make sure you are collecting all requested data.**

13

OCR

- **OCR wants you to get it right the first time. Sending incomplete information only makes work harder for the investigator.**

14

School District

- **Always ask for a deadline extension.**
- **Nothing in the CPM sets your deadlines.**

15

OCR

- **A request for extension is expected and will be granted.**
- **Explain reasons the request is needed (holidays, etc.).**

16

School District

- **Interview potential witnesses so you know the story before you write the response.**

17

OCR

- **This is your best opportunity to explain your position. OCR has heard the worst about you from the complaining party.**

18

School District

- **If you were wrong, fix it ASAP.**
- **Tell OCR what you have done.**
- **Fix it even without parent agreement.**

19

OCR

- **STOP before making changes!**
Consult with investigator first.
Sometimes, OCR does not want corrective action taken until investigation ends.

20

School District

- **Carefully review and analyze all documents you provide to OCR.**

21

OCR

- **Review your policies, publications, and webpages for inaccurate and outdated information.**

22

School District

- **Do not just provide requested data and documents:**
 - **Explain the provided data and documents.**

23

OCR

- **Make the data response as orderly as possible.**
- **Highlight important document sections or policies relevant to your position.**

24

School District

- Do not just provide requested data and documents:
 - Provide data and documents not requested that make the school look good or shows non-discriminatory reason for actions.

25

OCR

- Providing additional data may help OCR understand your position.
- Complaining party usually does not provide information to OCR that does not support complaint allegations.

26

School District

- Do not just provide requested data and documents:
 - When race data is requested, also pull socio-economic data to see if non-discriminatory reason can be shown.

27

OCR

- Investigators will look at everything you submit.

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School District

- Provide photos:
 - Provable measurements when appropriate, i.e. disability access, playgrounds, etc.

29

OCR

- Good photos can reinforce your position and weaken the complaining party's allegations.

30

School District

- Learn what you do not know:
 - Ex. why different punishments for the same infraction?
 - Ex. Why imbalance in numbers on team?
 - Ex. Why softball field in worse shape than baseball field?

31

OCR

- Know your story.

32

School District

- Provide a detailed explanation that is your story.
- It is the last question they ask – tell it first.

33

OCR

- You can provide OCR investigator with information not available to complaining party and explain it better than your witnesses.

34

School District

- Use ShareFile or Dropbox instead of mountains of paper.
- Then, monitor when they look at the file.

35

OCR

- OCR usually requests response via electronic format.
- Check with the investigator about desired format before submitting data.

36

School District

- **After you have sent it all in, be patient.**
 - **Reminders?**

37

OCR

- **Do not expect speedy outcome.**
- **Caseload per investigator (2010): 5 - 7 cases**
- **Caseload per investigator (2017): 35 - 40 cases**

38

School District

- **But I want an answer.**

39

OCR

- **Me too.**
- **Waiting for approval of findings: 3 - 5 levels of supervisor review required.**

40

School District

- **If you receive new or reworded allegations, decide about responding again.**

41

OCR

- **Contact investigator to understand OCR's decision to add new allegations.**

42

INTERVIEWS

43

School District

- Try to get investigator to do interviews on campus.

44

OCR

- They'll come if they have money in the budget.

45

School District

- Interview all witnesses before interviews, if there is time.

46

OCR

- School personnel usually get worried because OCR is coming.
- Assure them there is nothing to fear when meeting with OCR staff.

47

OCR

- Make sure you discuss investigation with employees to be interviewed (when appropriate).
- Make sure witnesses are familiar with exhibits used during interviews.

48

School District

- Provide OCR notice form, or tell them their rights to their own representation, non-retaliation.
- Explain the privacy and FOIA issues.

49

OCR

- OCR's investigator will talk to witness about privacy rights, disclosure under FOIA, and protection from retaliation.

50

School District

- Attend the interviews.

51

OCR

- OCR will inform witness of right to be interviewed without school's counsel present.

52

School District

- If the investigator moves around, follow the investigator.

53

OCR

- The investigator's activities on-site should be planned (with exceptions).
- Ask for a schedule of investigator's activities prior to on-site visit.

54

School District

- **If the investigator identifies a problem, then work with the investigator on how to fix it.**

55

OCR

- **The investigator will usually require pre-approval from OCR management before agreeing to fixes.**

56

School District

- **Lunch?**
- **Snacks?**
- **Water?**
- **Get to know the investigator as a person?**

57

OCR

- **Use interview breaks, etc. to learn more about the investigation.**
- **Remember that OCR does not represent the complaining party.**
- **The investigator may tell you more than you think.**

58

School District

- **Post-interview session – Do it.**

59

OCR

- **OCR investigator may discuss possible outcome of investigation.**

60

School District

- **Thank the investigators for their courtesy and any extraordinary efforts.**

61

OCR

- **A “thank you” is always appreciated and rarely heard by OCR investigators.**

62

School District

- **Show empathy for their efforts with difficult complainants.**

63

OCR

- **If the complaining party is difficult with you, he or she is the same way with OCR.**

64

LETTER OF FINDINGS

65

School District

- **I want to win.**

66

OCR

- **“Win” is not a word OCR uses.**
- **The best you will get is a finding of “insufficient evidence.”**

67

RESOLUTION AGREEMENTS

68

School District

- **Read them carefully, especially dates, to see if the Resolution Agreement is workable.**

69

OCR

- **Due to oversight by HQ, the only negotiation area is completion/implementation dates.**

70

School District

- **Ask for revisions to the resolution agreement:**
 - **Explain why revision are needed.**

71

OCR

- **When HQ creates the Resolution Agreement, OCR regional office cannot revise terms and conditions.**

72

School District

- **Try to avoid OCR approval of any next step (i.e. approve training, survey, etc.).**

73

OCR

- **Avoiding OCR's "prior approval" requirement is usually not successful.**
- **Language is required by OCR management.**

74

School District

- **Once resolution agreement approval is received, get signatures to OCR ASAP.**

75

OCR

- **Investigator has to meet internal deadlines for getting Resolution Agreement signed and case closed.**

76

School District

- **Follow up and make sure you fulfill your responsibilities.**

77

OCR

- **OCR management has highlighted monitoring responsibilities to staff to ensure agreement is followed.**

78

KEN'S WORDS OF WISDOM

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- **Recommend updates and revisions to when appropriate.**

80

- **Be aware of current political climate.**
- **OCR's investigation approach may change based on directives from national leadership and/or demands of local community groups.**

81

- **Expanding investigation is not decided by investigator assigned to complaint.**

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- **Do not present a lot of case law.**

83

- **Do not request a dismissal unless it is jurisdictional.**
- **You will get a letter of findings with a violation or insufficient evidence.**

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