



EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

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NEW APPROACH FROM THE OFFICE FOR CIVIL RIGHTS?

OCR's Authority

The United States Office for Civil Rights ("OCR") is charged with the vital task of ensuring the civil rights of all students in America's public schools. OCR investigates complaints of civil rights violations, makes findings, requires corrective action, and refers certain cases to the Department of Justice for litigation. OCR may seek to withhold federal funding to individual school divisions based on civil rights violations. Finally, OCR is charged with completing periodic compliance reviews not precipitated by a complaint.

Examples of traditional OCR complaints include allegations that a disabled student is bullied due to his disability; a female student is subjected to unwanted sexual commentary or actions, thereby being denied access to educational programming; or African-American and disabled students are disciplined at a disproportionately higher rate than their Caucasian and non-disabled peers. Recently, OCR has been flooded with complaints that school/division websites are inaccessible by persons with disabilities.

OCR utilizes its Case Processing Manual, a fairly detailed set of procedures for investigating and resolving complaints. School divisions subject to investigation by OCR often are called upon to provide volumes of data – a time-consuming and sometimes costly exercise – even when responding to a complaint involving one

individual student. Realizing that the civil rights of all students are paramount, divisions seeking to honor those rights may see resources diverted to responding to OCR complaints. A new manner of doing business by the federal agency may now bring some relief for school divisions.

A New Directive for Conducting Investigations

On June 8, 2017, the United States acting assistant secretary for civil rights, Candice Jackson, issued an internal memorandum to OCR regional directors providing "new internal guidance regarding the scope of the investigation of all OCR cases." The memo specifically directed that "there is no mandate that any one type of complaint is automatically treated differently than any other type of complaint with respect to the scope of the

investigation, the type or amount of data needed to conduct the investigation, or the amount or type of review or oversight needed over the investigation by Headquarters." In addition, the memo states "there is no longer a 'sensitive case' or 'call home' list; rather, Headquarters and the Regional Offices (Regional Director) will consult

regularly to determine on a case-by-case basis whether complex or problematic investigations require Headquarters review or intervention and when trends emerge that require Headquarters oversight or direction."

Notably, Ms. Jackson wrote that "OCR will

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Candice Jackson, United States acting assistant secretary for civil rights

no longer follow the existing investigative rule of obtaining three (3) years of past complaint data/files in order to assess a recipient's [school division's] compliance, which rule had been stated [in various OCR internal policy documents issues in preceding years]." Further, "there is no longer a 'one-size fits all' approach to the investigation of any category of complaints....OCR will only apply a 'systemic' or 'class-action' approach where the individual complaint allegations themselves raise systemic or class-wide issues or the investigative team determines a systemic approach is warranted through conversations with the complainant."

School attorneys and other observers note that this new approach already is impacting pending investigations, including the downward revision of large-scale data requests. Anecdotal reports by some Virginia school divisions reveal that investigations initiated before (in some cases years prior to) the June 8 memo are being scaled back. Related consequences of the new regime likely will be the narrowing of the scope of investigations and affording more discretion to local offices to complete the case-by-case approach referenced in the memo – rather than following a prescribed approach dictated by OCR Headquarters.

Clearing the Backlog

The acting assistant secretary emphasized in the internal memo that "OCR's goal is to swiftly address compliance issues raised by individual complaint allegations, reach reasonable resolution agreements with defined, enforceable obligations placed upon recipients directly responsive to addressing the concerns raised in the individual complaint being resolved, and encourage voluntary settlements wherever possible." She reminded the regional directors of their obligation to "robustly enforce the civil rights laws under our jurisdiction...in a neutral,

impartial manner and as efficiently as possible. These instructions in particular are designed to empower our investigative staff to clear case backlogs and resolve complaints within a reasonable time-frame, thus providing effective resolution and justice to complainants and recipients [school divisions]."

The secretary's directive is bearing out in the numbers. From January 21, 2017 through August 17, 2017, OCR closed 7,769 complaints. In the previous years for the same time period, OCR closed the following number of complaints: 2016 – 4,814 complaints (in fact, OCR closed 8,625 complaints for all of 2016); 2015 – 5,858 complaints; 2014 – 6,276 complaints; and 2013 –

6,098 complaints. This reverses a trend of unresolved complaints; for instance, in 2016 OCR received 16,720 complaints (which represented a 61% increase from 2015 and the highest number of complaints in the history of OCR, which was established in 1966), of which it closed just more than one-half. To mine the data further, OCR reports that of the 7,769 complaints closed by August 17, 2017, 76% were dismissed; 7%

were administratively closed; 2% were resolved through the early complaint resolution process; 9% were resolved with a finding of insufficient evidence; and 5% were resolved with resolution agreements.

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Closing Thought

Public School administrators charged with guaranteeing student civil rights should be well-versed in local school board policies regarding those rights – especially the division's internal complaint processes – and stand prepared to implement them faithfully. With a tip of the hat to an oft-repeated phrase: Have policy; know policy; follow policy! And document, document, document.