

RECOMMENDATIONS

**Suggestions to Improve Collaboration between School Districts and the
Department of Education Office for Civil Rights**

**PALO ALTO UNIFIED SCHOOL DISTRICT
25 Churchill Avenue, Palo Alto, CA 94306**

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GOAL: To improve collaboration between OCR and school districts on our shared mission to safeguard the civil rights of all students and to include basic due process protections for school districts in OCR investigations that build confidence in OCR's neutral fact-finder role while encouraging effective use of educational resources

Introduction: With this goal in mind, our Board Resolution described ways that OCR's current investigative practices have disrupted rather than facilitated this vital shared mission. The following examples and recommendations are drawn from our District's experience and are offered to improve the working relationship between OCR and school districts. Examples are limited in their specificity consistent with protecting confidential student information.

Initiation of Investigations

1. Opening Investigations Based on Assumptions

- OCR opens an investigation if any allegation would violate a civil right that they enforce using an intake standard that assumes every complaint allegation to be true. OCR does not conduct an initial review of factual information from a school district or require an effort by the complainant to resolve the matter at the district level. This low threshold can unfairly damage public perceptions of a school district and create a heavy burden on school staff.
 - Ex: OCR opened an investigation on a discrimination claim even though a brief review of District evidence would have demonstrated the non-discriminatory basis for the District's action. Sample media perception: "Another civil rights complaint filed against Palo Alto district: Feds launch third investigation in last two months."
 - ❖ *Recommendation:* OCR should conduct a preliminary review of evidence from a complainant and school district to determine if there is merit for opening an investigation and also should require efforts to resolve complaints at the district level. OCR also should ensure that complaints include adequate information before opening an investigation (OCR's Case Processing Manual states that OCR will dismiss a complaint if “the allegation lacks sufficient detail – i.e., who, what, where, when, how.”)

2. Opening Investigations without a Complaint

- OCR will open an investigation when there is no complaint or factual allegation of a district's wrongdoing or even when a district contacts OCR for technical assistance. This discourages efforts, including those of student journalists, to increase public awareness of discrimination/harassment issues and diminishes OCR's availability to assist districts proactively.
 - Ex: OCR opened a school-wide investigation based on a student magazine article without a factual allegation of District wrongdoing or any review of District information.
 - ❖ *Recommendation:* OCR should carefully review facts and law at issue to determine if and when opening an investigation is warranted.

3. Using an Individual Complaint to Initiate a Class-wide/School-wide Inquiry

- OCR will use a complaint in an individual matter to initiate a class-wide/school-wide inquiry. This broadens the scope of an investigation without justification or review of information from a school district and leads to substantial disruption of a school environment. It also lengthens the period of time necessary for OCR to complete an investigation.
 - Ex: In an investigation the District believed could be resolved in a few hours through exchange of documents to show appropriate actions and legal compliance in an individual student matter, OCR opened a school-wide investigation without any review of information from the District. This led to OCR's request for hour-long interviews with 23 school staff members.
 - ❖ *Recommendation:* OCR should open a class-wide/school-wide inquiry only where there is factual support for broadening the scope of an investigation. OCR should review information from a school district prior to opening a class-wide/school-wide inquiry to determine whether there is a reasonable basis for conducting a broad inquiry that will involve substantial time, use of educational resources, and disruption to a school and district environment.

Investigation Practices

4. Data Requests Far Beyond Scope of Complaint

- OCR data requests in individual investigations go far beyond the scope of the individual complaints and create a heavy burden on a district staff, often requiring thousands of pages of documents within 15 days. This extensive production of documents also requires a substantial time period for OCR attorneys to review the documents.
 - Ex: In an investigation of an individual allegation of disability harassment, OCR requested information in 16 areas that led to nearly 1,500 pages of responsive documents. In another investigation, the original allegations did not fall within the jurisdiction of OCR. OCR worked with the complainant to re-frame the allegations to fall within the category of harassment based on disability. OCR then issued a request for documents in 18 areas that led to nearly 2,000 pages of responsive documents. The items set forth in the document request far exceeded the scope of the complaint.
 - ❖ *Recommendation:* Data requests should be focused on the allegations that may have merit and the corresponding legal issues to facilitate OCR's determination on compliance. OCR's Case Processing Manual states that “OCR will ensure that investigations are legally sufficient and that they are dispositive of the allegations raised in the complaint.”

5. Presumption toward Interviews without Review of School District Information

- OCR investigations proceed toward staff interviews, and potentially even student interviews, with little or no prior review of factual information provided by the school district in response to OCR data requests and without regard for the level of evidence needed for a determination.
 - Ex: OCR requested interviews with fifth grade students in a matter where it had not yet reviewed 1,500 pages of documentary evidence it requested.
 - ❖ *Recommendation:* Interviews should be conducted only when necessary. There should be a presumption not to disrupt the educational environment, especially when a complaint lacks merit or there is an ample factual record for a determination.

6. Conducting Large Number of Staff Interviews without a Factual Basis

- OCR operates with a presumption toward conducting large numbers of school staff interviews. This presumption inevitably leads toward substantial disruption of a school environment and a period of months to complete an investigation. This practice also makes any investigation susceptible to a fishing expedition where interviews are not focused on the subject matter of a complaint, but a means for obtaining information on any potential matter of interest.
 - In a complaint regarding an individual student matter that the District believed could be resolved expeditiously through providing documents to demonstrate legal compliance, OCR opened a school-wide investigation without factual support and requested hour-long interviews with 23 school staff members. This coincided with another investigation in the District where OCR requested interviews with 29 school staff members. OCR made both requests during the closing weeks of school when staff and students were engaged in end-of-year projects and were preparing for final exams.
 - ❖ *Recommendation:* OCR could consider initial investigation practices to obtain necessary and relevant information quickly, allow for prompt potential case resolution, and lessen disruption to schools, classrooms, and students. OCR should conduct interviews only when necessary to obtain relevant information for a determination.

7. Conducting Interviews without Adequate Protections for Staff and Students

- OCR attorneys will conduct interviews of staff members and students without adequate protections for participants' rights and the production of timely and verifiable information.
 - Ex: OCR interviewed middle school children based on a form allowing parents to opt out, but not requiring affirmative written consent. OCR has also refused to allow a District observer to be present or for interviews to be recorded. OCR has proposed to interview groups of students without protection for individual privacy and has not responded to District requests for information on investigating attorneys' training and

experience for interviewing children and protecting against risks such as false memories and suggestibility.

- ❖ *Recommendation:* Students should be interviewed by investigating attorneys with appropriate training and experience only when it is believed students have necessary and relevant witness information for an investigation. Per OCR's Case Processing Manual, when investigating attorneys interview students, there should be affirmative prior written consent by parents for the interview and due process protections to ensure student privacy. OCR investigations should provide timely and verifiable information.

8. Seeking Information from Only One Side of Complicated Student Interactions

- OCR does not appear to seek information from both sides of complicated student interactions.
 - Ex: OCR's investigative attorneys indicated they did not have a plan for interviewing or seeking information from the parent of an alleged bully who the District was confident would provide a perspective contrary to the complainant's. In another case, OCR's investigative attorneys did not have a plan for seeking information from two parents with different views on allegations of harassment.
 - ❖ *Recommendation:* When necessary and relevant for a full inquiry, OCR must seek both sides of student interactions that may involve perspectives of multiple parents and students as well as the district. OCR's Case Processing Manual states that "OCR will undertake a robust outreach to the recipient community to increase its access to relevant information in the conduct of an investigation."

9. Not Allowing a School District to Review and Challenge Inaccurate Evidence

- Potential alteration and tampering of evidence by a complainant or anyone threatens the integrity of an investigation. Under OCR's current investigation procedures, a school district is not able to review evidence for accuracy. OCR does not provide copies to a school district of the allegations and evidence that a complainant submits to OCR, which makes it impossible for the district to ensure OCR has all the necessary and relevant information needed to reach a fair and accurate conclusion. A school district may request copies of an OCR complaint and investigation records under the Freedom of Information Act (FOIA), like any member of the public, but even this effort will not ensure access to specific complaint allegations (the "who, what, where, when, how" detail that OCR requires). OCR does not typically release investigation records during an investigation or during implementation of any resolution agreement. If released under FOIA following the completion of an investigation and resolution agreement, investigation records will be heavily redacted by OCR. OCR asserts that protections of due process do not apply to a school district under investigation unless and until the very unlikely occurrence that OCR brings an enforcement action threatening removal of federal funds. Essentially, OCR's process does not offer a school district any opportunity to review or verify the accuracy of information submitted to OCR by a complainant. This process denies a school district an

opportunity to challenge inaccurate or misrepresented information. If altered or misrepresented information is undiscovered, it may pollute an entire investigation.

- Ex: During interviews conducted by OCR, the investigating attorneys presented e-mail correspondence for review by District administrators that did not match the District's stored e-mail record and that appeared altered to misrepresent a communication between the District and complainant. The District requested a copy of the apparently tampered evidence under FOIA. Although the investigation was completed and the District found in compliance, OCR has not released a copy of the requested communication, apparently alleging that it would be a violation of personal privacy (OCR is aware of the relevance of the record to another investigation). Despite the District's timely appeal for release of the disputed records under FOIA, and OCR's legal obligation to respond to the District's appeal in September 2013, to date the District has been unable to obtain a copy of the record.¹

- ❖ *Recommendation:* OCR's Case Processing Manual states that "OCR is committed to a high quality resolution of every case." Accordingly, a school district should be allowed to review allegations and evidence submitted for factual accuracy so that a district has an opportunity to challenge evidence that is not accurate. Personal privacy should not protect potential tampering or misrepresentation of evidence. A school district must have a means for reviewing the integrity of the record prior to OCR issuing a letter of findings.

10. Exceeding Maximum Timelines for Conducting Investigations

- OCR is not abiding by its own 180-day maximum timeline for completing an investigation. This delays resolution for both complainants and school districts and compromises a district's ability to review OCR's determinations.

- Ex: OCR has taken 8, 9, and 15 months to complete investigations in the District, and any OCR investigation appears to take a minimum of two months to complete.²

- ❖ *Recommendation:* OCR must investigate and resolve matters as quickly as possible to provide a prompt and fair resolution for all parties involved, while seeking to minimize disruption to the educational mission and environment of schools.

¹ The District's most recent communications with OCR's Washington Office indicated the OCR review is proceeding on the pending FOIA appeals, and the District may anticipate a response in approximately 30 days.

² A May 1, 2014, CNN article, "Colleges, universities respond to sexual violence investigation," includes reports of universities indicating OCR is exceeding a reasonable timeline for conducting an investigation. In the article, Arizona State University indicated OCR visited ASU in September 2013 to gather information, and the University was awaiting further word from OCR; Washington State University indicated OCR notified it in January 2013 of a complaint, and the University was still waiting to hear on potential participation in the voluntary resolution process; Princeton University indicated it has been cooperating with OCR in an investigation that began in 2010.

11. No Right of Appeal for a School District

- It is unclear what appeal rights, if any, a school district has to OCR's determinations. OCR provides a right of appeal for complainants and issues a written response.
 - Ex: In an investigation that took 15 months to complete, OCR stated it would be willing to review inconsistencies and unsupported determinations that the District found in the letter of findings. OCR had not previously notified the District of a right to request reconsideration. When the District requested OCR's records of the investigation, OCR refused to provide them, claiming that enforcement of the resolution agreement may be jeopardized even though implementation is nearly complete and it is more than six months after the findings.
 - ❖ *Recommendation:* It is vital for a school district to know its appeal and reconsideration rights on OCR investigations and determinations. A district should be able to access the information that provides the basis for OCR's determinations, and a district should have an opportunity to appeal OCR's determinations and show the basis for a different conclusion.

Resolution Practices

12. Proposing Voluntary Resolution Agreements without Review of Information

- OCR attorneys are not carefully reviewing documents provided by school districts in response to OCR data requests prior to proposing terms for voluntary resolution agreements.
 - Ex: OCR attorneys suggested policy initiatives (such as task force creation, training all elementary staff, and the addition of an oversight team to review the recommendations and conduct of an IEP team) to the District for resolution, but had not yet reviewed the District's responsive documents.
 - ❖ *Recommendation:* OCR should initially review documentation for compliance to determine whether any corrective actions or resolution agreements for legal compliance are warranted.

13. Excluding School Board Members from Resolution Discussions

- At the same time OCR attorneys may attempt to direct a district's policies without an adequate basis, they will exclude school board members from participating in those very discussions.
 - Ex: OCR's attorneys refused to attend a resolution discussion if two District board members would attend.
 - ❖ *Recommendation:* OCR should recognize school board members are elected community representatives, a school district's ultimate decision-makers, and vital participants in discussions of policy-related matters.

14. Issuing a Letter of Findings *After* Agreement Reached on Voluntary Resolution

- OCR will issue a letter of findings, with limited or no prior review by the district investigated, *after* OCR has reached an agreement with the district to resolve items of concern. This practice damages the positive, proactive purpose of a resolution agreement and creates a document purportedly based on investigation records that the investigated district is not able to review or even access.
 - Ex: OCR issued a letter of findings with damaging conclusions a month after the District and OCR entered into a resolution agreement providing for the District's commitment to new training and policy efforts on prevention of bullying and harassment. The District's good faith in entering a proactive resolution was contradicted by negative findings that were not consistent with District information. To date, the District has been unable to access OCR's investigation records for the findings issued by OCR in December 2012, despite the District's timely appeal under the Freedom of Information Act and OCR's legal obligation to respond to the appeal in September 2013. Nonetheless, the District has completed implementation of the resolution agreement except for the final year of a three-year training that will be completed in 2014-15.
 - ❖ *Recommendation:* A letter of findings should not follow a resolution agreement. It can negate and complicate an otherwise proactive and collaborative solution. At a minimum, OCR should provide an opportunity to review the records that provide a basis for the findings.

Overreach & Communications

15. Lack of Basic Due Process for School Districts in OCR Investigations

As detailed in other items, OCR's investigations currently proceed without offering basic due process protections to a school district to review a complainant's allegations and evidence, to obtain records of an investigation, and to have an appeal process. This structure places a school district at a constant deficit and undermines a district's confidence in an OCR investigation. Although a school district is the agency under investigation and typically seeks to resolve a matter efficiently and effectively, OCR requires a district to request records of a complaint or investigation under the Freedom of Information Act as any other member of the public.

- OCR asserts that protections of due process do not apply to a district under investigation unless and until OCR brings an enforcement action threatening removal of federal funds. Such an enforcement action is a rare occurrence in an investigation.
 - ❖ *Recommendation:* OCR should provide prompt and routine processes for a school district to access and review a complainant's allegations and evidence, to challenge false statements or supplement a record, and to appeal OCR findings based on conflicting evidence. It is critical for OCR and school districts to share confidence in OCR's investigations. To delay and defer due process protections to the rare event of a judicial enforcement action is at odds with the goal of a transparent, efficient, and effective investigation.

16. Directing a School District's Policies without Legal Basis

- OCR attorneys will attempt to direct a school district's policies without a legal basis.
 - Ex: OCR's attorneys came to a resolution session unprepared to discuss documentation showing the District's responsive efforts in an individual student matter and instead proposed overarching policy initiatives such as creation of a task force and training for all elementary school teachers and administrators.
 - ❖ *Recommendation:* The facts of an individual student matter and legal requirements must provide the basis for corrective actions and proactive solutions. OCR should respect the role of a school district's board, in consultation with the district's community, to set policy.

17. Resolving Federal and State Policy Conflicts through a School District

- As a policy matter, OCR has school districts navigating complicated provisions of federal and state laws on harassment and bullying prevention and complaint investigation when OCR and the respective state have not yet determined a position.
 - Ex: The District worked with OCR over the course of a year on revising a policy and regulation to take account of both federal and state requirements. The length of time and communications required damaged public perceptions of the process and hampered the District's ability to have policies and procedures reviewed and adopted by the Board and communicated to staff for the start of the 2013-14 school year.
 - ❖ *Recommendation:* Policy matters that require resolution of federal and state requirements should be resolved by collaboration of federal and state representatives rather than through a local district.

18. Not Responding to Written Requests

- OCR does not respond in writing to written expressions of concern or questions presented by a school district being investigated, even when OCR has invited or requested documentation of the concerns.
 - Ex: OCR has not responded to the District's letters of May 20, 2013; February 19, 2014; and April 23, 2014, despite those letters following communications where OCR encouraged the District to put its concerns in writing.
 - ❖ *Recommendation:* OCR should identify a process whereby a school district may write to express concerns and receive a written response that addresses the district's concerns and clarifies OCR's position.

19. Undisclosed Directions and Changes in Approach from OCR Headquarters

- Regional OCR officials indicate that policy and procedural decisions, such as whether an early resolution is available or the scope of an investigation, are directed by OCR's Washington Office without any review or description of such policies provided to educational agencies or the public.
 - Ex: The District understands that availability of discussions of a potential early resolution between a district and OCR and the opening an investigation on a class-wide (school-wide) basis, rather than on an individual basis, are determinations currently made at the national rather than regional level, contrary to prior experience.
 - ❖ *Recommendation:* Policies and procedures should be clearly stated in public documents and the basis for decision-making clearly identified.

20. Confidentiality Restrictions on School Districts in Public Communications

- OCR investigations may be exploited in local reporting to the detriment of positive work being done by school administrators, teachers, parents, and students. Once an investigation is opened based on allegations – without any consideration of information from the district – a complainant may share information with local media that prompts important questions to which district staff may not respond because of confidentiality laws on student information. Nonetheless, incomplete information becomes a story that casts a shadow and creates a platform for negative commentary and speculation that lasts at least as long as OCR takes to complete the investigation.³ In this context, OCR's impact and role as a neutral fact-finder is obscured, and the integrity, work, and privacy of school staff and students are fully discounted. It heightens concern when the *Not Alone* report states an intent to publicly identify individual schools, colleges, and universities that are under investigation by OCR without recognizing and communicating that such investigations may be prompted only by allegations and that laws prohibit schools, colleges, and universities from publicly disclosing facts of individual student matters. While it is certainly vital to raise public awareness of harassment and discrimination, it is also vital that the public not be misled about schools, colleges, and universities and the people working diligently inside them to make them safe and respectful for all.

³ Frank Bruni's "Full Screed Ahead" (May 31, 2014, editorial in the *New York Times*) described the increasing prevalence of damaging speculation in contemporary journalism: "Something happens, and before the facts are even settled, the morals are deduced and the lessons drawn. The story is absorbed into agendas. Everyone has a preferred take on it, a particular use for it. And as one person after another posits its real significance, the discussion travels so far from what set it in motion that the truth – the knowable, verifiable truth – is left in the dust."

- Ex: OCR opened an investigation of an allegation of sexual harassment at a District school which soon thereafter became a news article raising questions about actions of District staff based on allegations and incomplete information shared by the complainant. District staff could not respond to the allegations with factual information to inform and reassure the public because of federal and state laws on confidentiality of student information. The story and OCR investigation became platforms for commentary and speculation which misled and confused the public, damaged staff morale, and undermined positive work.
 - ❖ *Recommendation:* OCR should reexamine practices for opening and conducting investigations, timelines for completion, and education of the public in ways that consider the media context, discourage speculation, and encourage respect for ongoing work inside schools.