



Winter 2023 CLE Workshop - January 25 – 27, 2023

Student Affairs

Anatomy of an OCR Investigation

Dr. Jacquelynn Rich Fredericks, *Vice President of Legal Affairs & General Counsel*,
University of Northern Colorado

Seth F. Gilbertson, *Senior Counsel*, Bond, Schoeneck & King, PLLC

Debbie Osgood, *Shareholder*, Hogan Marren Babbo & Rose, Ltd.

Anatomy of an OCR Investigation

- Overview of OCR
- Investigations and Resolutions
- Recent changes to OCR's *Case Processing Manual*
- Tips for Working Effectively with OCR

A blurred background image of a university campus. Several students are walking along a paved path. In the foreground, a student in a blue shirt and dark pants walks away from the camera. Next to them, a student in a teal shirt and orange pants walks towards the camera. Further back, a student in a grey shirt and green beanie walks away. To the right, a student in a yellow shirt and blue jeans walks towards the camera. The background features a large, modern building with many windows and some trees with autumn-colored leaves.

Overview of OCR

ED/OCR Leadership

Secretary of Education
Miguel Cardona

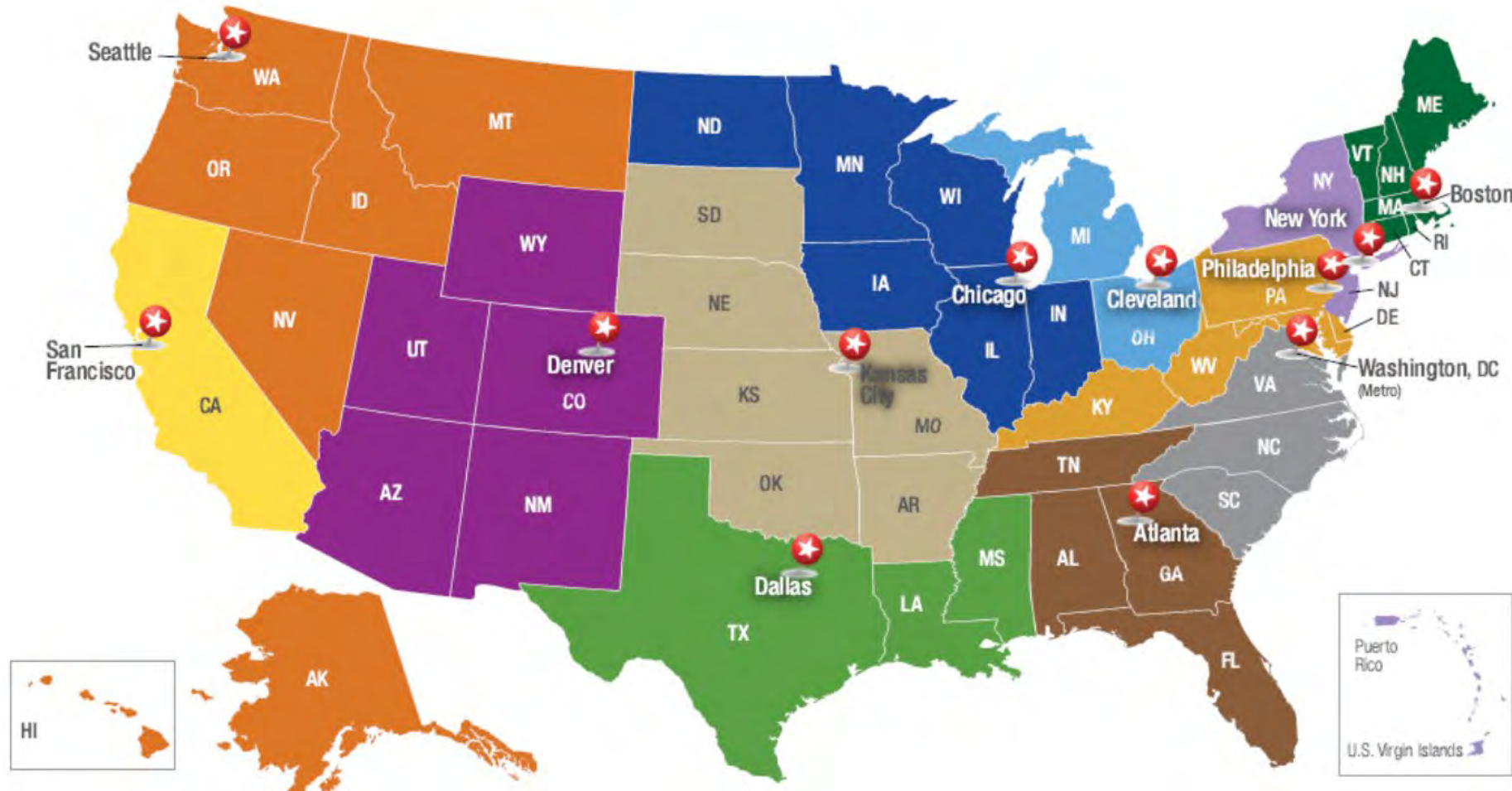


OCR Assistant Secretary
Catherine Llamon



OCR Structure

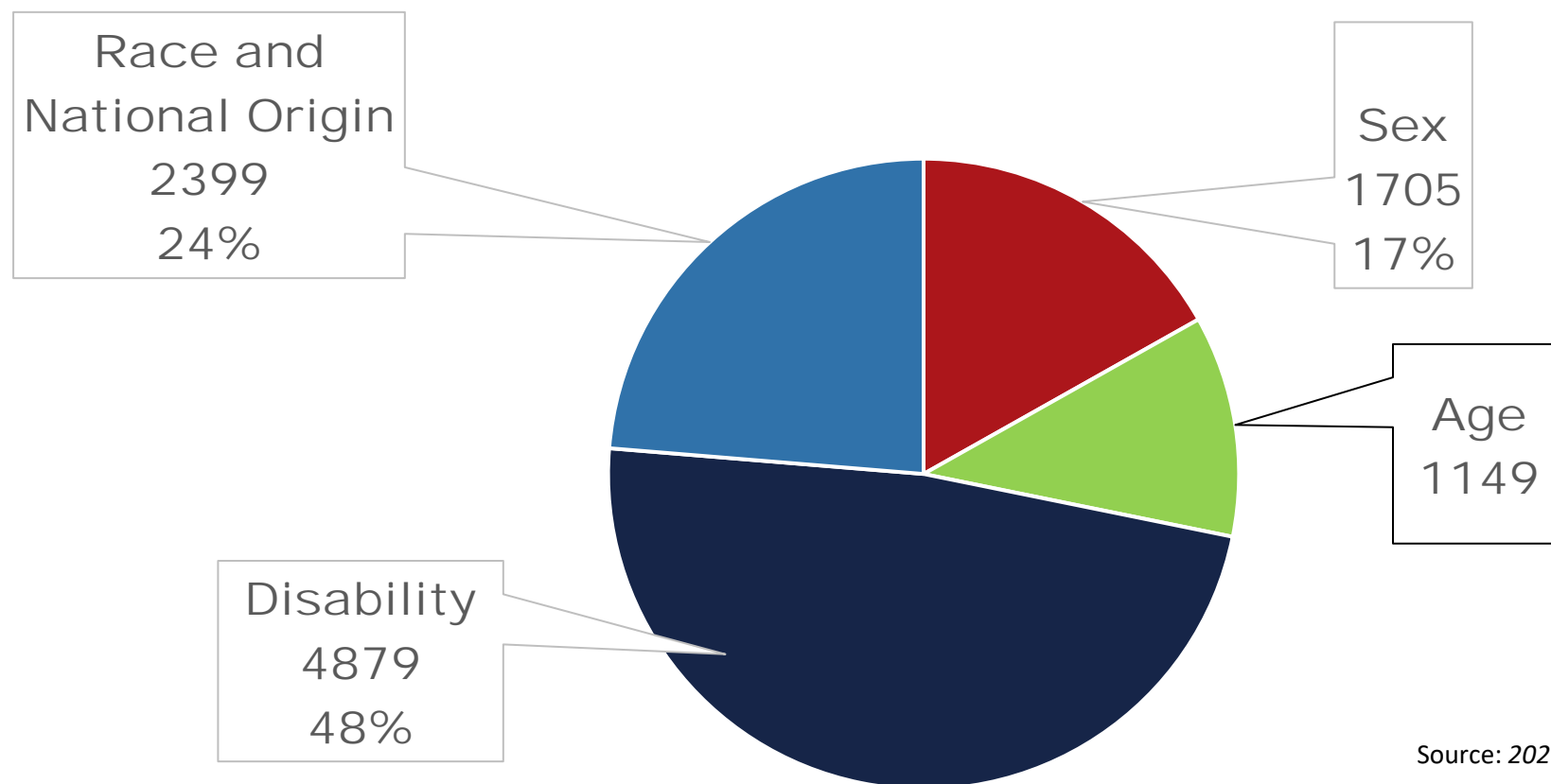
Headquarters in Washington, D.C. and
12 regional enforcement offices



Laws Enforced by OCR – Higher Ed

- Title VI of the Civil Rights Act of 1964
- Title IX of the Education Amendments of 1972
- Section 504 of the Rehabilitation Act of 1973
- Age Discrimination Act of 1975
- Title II of the Americans with Disabilities Act of 1990

Laws Enforced by OCR – Higher Ed



Source: 2021 OCR Annual Report

Recent Regulatory and Policy Changes

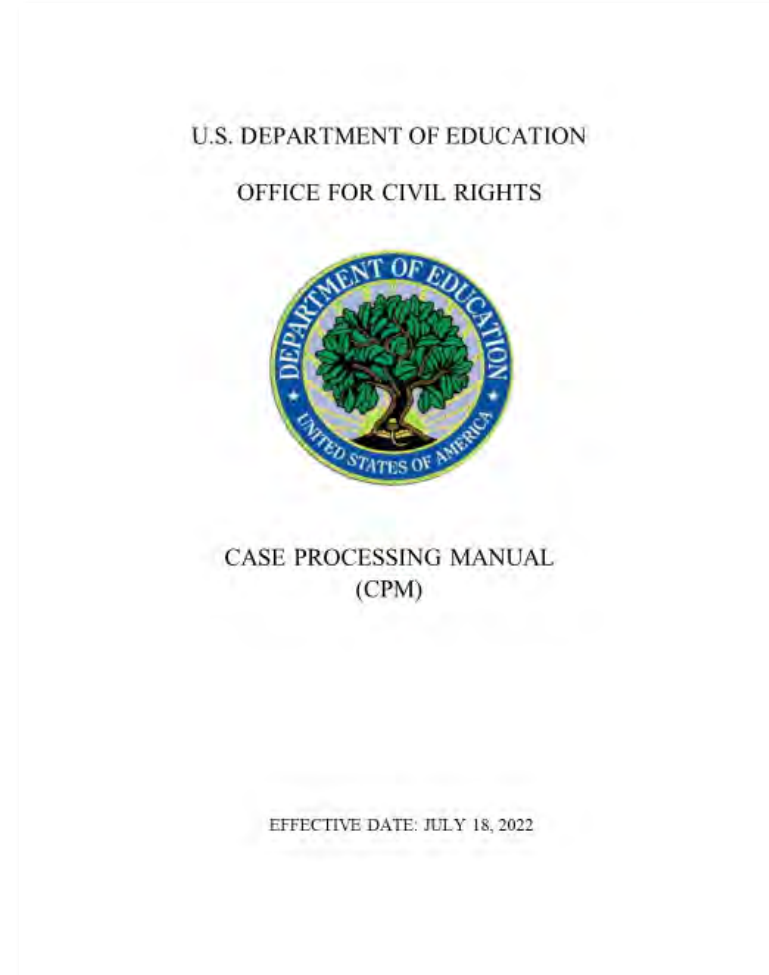
- Forthcoming Regulations
 - Disability
 - Digital Accessibility
- Focus on Pregnancy and Related Conditions
- Focus on LGBTQ Rights
- Proposed Title IX Regulations

A blurred background image of a university campus. Several students are walking along a paved path. In the foreground, a student in a blue jacket and dark pants is walking away. Next to them, a student in a teal shirt and orange pants is walking. Further right, a student in a grey hoodie and green beanie is walking. On the far right, a student in a yellow sweater and blue jeans is walking. In the background, there is a large, modern building with many windows and some trees with autumn-colored leaves.

Investigations and Resolutions

The Case Processing Manual (CPM)

- “The Case Processing Manual (CPM) provides OCR with the procedures to promptly and effectively investigate and resolve complaints, compliance reviews, and directed investigations to ensure compliance with the civil rights laws OCR enforces.”
- Have revisions become a biennial tradition?



Small Changes... Big Impact?

- Font size and color
- Reorganizing TOC
- Terminology
 - No more FRBP
- What First Amendment?
- “OCR *may*”

Key Stages

1. Complaint & Evaluation
2. Investigation
3. Case Closure
 - Dismissal and/or Insufficient Evidence
 - No appeals (2022)
4. Resolution and Monitoring

Georgina Santino

Student Georgina Santino files a complaint with OCR after she is suspended from Directional State University (DSU) for allegedly providing fraudulent information to the Office of Disability Services (ODS) in support of pregnancy–related accommodations. Santino claims that the Director of ODS, Calvin McKarty, discriminated against her based on her age and sex by unfairly examining her medical documentation and violated her FERPA rights by calling her doctor without permission.

Complaint Evaluation

- OCR evaluates whether the allegation, if true, would constitute a violation
- Possible bases for dismissal
 - Untimely
 - No subject matter jurisdiction
 - No jurisdiction over institution
 - No consent form from Complainant
 - Pending litigation on same allegation
- OCR will exercise concurrent jurisdiction and investigate complaints that are also filed in other venues (e.g., EEOC) unless both the complaint and standards applied are identical (2022)

Georgina Santino

OCR receives Santino's complaint and determines that:

- OCR lacks jurisdiction over the FERPA violation
- The remaining allegations are potential violations of Title IX and the Age Discrimination Act
- The age discrimination claim must be referred to the Federal Mediation and Conciliation Service (FMCS)
- The Title IX allegations are opened for investigation

OCR Investigations

- Investigation Types:
 - Complaints
 - Proactive compliance reviews and directed investigations

OCR is required “to make a prompt investigation whenever a compliance review, report, complaint, or other information indicates a possible failure to comply” with laws protecting students from discrimination in academic institutions that receive Federal funding.
34 C.F.R. 100.7(c)

Discontinuations (2022)

OCR will determine whether the investigation raises systemic issue(s) that warrants continuing the investigation, notwithstanding:

- Complainant's refusal to cooperate
- Inability to contact Complainant
- Complainant withdrawal
- Complainant's death

Rapid Resolution Process

- Expedited case processing approach
- Possible circumstances:
 - Recipient has already taken action to resolve the complaint allegations
 - Recipient has indicated willing to take action to resolve the complaint allegations – resolution agreement obtained and monitored by OCR
- Advantage: Expected to be quick

Mediation

- Can be requested by the Complainant (2022)
- No more FRBP (“Facilitated Resolution Between the Parties”)
- OCR facilitates a resolution between the parties
- OCR does not sign, approve, endorse or monitoring any agreement between the parties
- OCR can suspend investigation for 30 calendars to facilitate an agreement; after 30 days, investigation is resumed

Georgina Santino

OCR sends DSU Notice of Complaint. DSU immediately files a FOIA request seeking a copy of the complaint.

OCR separately determines that the complaint would be appropriate for mediation and gets both parties' consent to initiate mediation.

OCR staff reach out to the parties to discuss mediation.

Over the course of the next 60 days, the parties agree on very few of the facts. Georgina demands \$5,000,000 and DSU refuses to pay anything.

The OCR mediation team determines that the case cannot be resolved through mediation.

Georgina Santino

During the OCR mediation, the age discrimination allegation is referred to FMCS. The FMCS mediator assigned to the case is very busy on a Department of Transportation case and does not immediately contact the parties. After 60 days, OCR determines that the age discrimination allegation is ripe for investigation.

Georgina Santino

OCR sends a Notice of Investigation to DSU along with a copy of the CPM and a Data Request.

DSU writes to the investigators seeking an extension to respond to the Data Request and notes it has not received a response to the FOIA request.

Investigation

- Letter of notification to recipient and complainant(s) stating allegation(s) that will be investigated
- Obtain a copy of the complaint
 - Must file FOIA (2022)
- Explore Alternative Resolution Options
 - Mediation
 - Rapid Resolution

Investigation

- Data Requests
 - Provide narrative response even if not requested
 - Timeframe for response - “appropriate amount of time”
 - Denial of access
- Interviews

Georgina Santino

DSU receives a heavily redacted copy of the complaint one day before its response to the Data Request is due.

After reviewing the information provided in response to the Data Request, OCR requests interviews with Director McKarty and the Vice President for Student Affairs, who oversees ODS.

Georgina Santino

DSU contacts the OCR investigators by phone and suggests that they also interview Warren Bosert, an ODS staff member who witnessed many of the interactions between McKarty and Santino.

DSU submits a supplemental response to the Data Request, providing a more detailed and responsive narrative and a few additional files relevant to stray comments in the complaint.

Case Resolution Options

- Mediation
- Rapid Resolution Process (dismissal or resolution agreement)
- Resolution Agreement Reached During an Investigation (Section 302) and OCR Monitoring
- Investigative Determination (Section 303) and OCR Monitoring
 - Resolution after investigation removed (2022)

Section 302 Agreement

- During the investigation, the Recipient expresses interest in resolution and OCR determines resolution is appropriate
- OCR prepares an internal “statement of the case”
- Resolution Agreement signed by the Recipient
- Timeframe for negotiations: 30 calendar days
- OCR does not make legal findings but does identify “OCR’s compliance concerns”
- Resolution letter
- OCR Monitoring

Section 303 Agreement

- OCR determines that the preponderance of the evidence supports a violation
- OCR prepares an internal “statement of the case”
- Resolution Agreement signed by the Recipient
- Timeframe for negotiations: 90 calendar days
- Letter of findings
- OCR Monitoring

Investigative Determination

- Insufficient Evidence (no violation)
- Non-Compliance (violation)
- Mixed (no violation and violation)
- Statement of Case
- Letter of Findings
 - Respondents will not be provided with a draft copy of a findings letter for comment/corrections (2022)

Georgina Santino

OCR reviews three years' of case files related to pregnancy-related accommodations requests. DSU had never before contacted a student's doctor.

During interviews, OCR investigators learned that Santino had requested identical pregnancy-related accommodations for three consecutive semesters and demonstrated no changes in her condition over that time. This prompted McKarty to initiate contact with the provider Santino had listed in records she submitted in support of her accommodations. According to McKarty and Bosert (who was present), the provider had no record of Santino as a patient.

OCR Enforcement Options

- OCR may initiate administrative proceedings to suspend, terminate or refuse to grant or continue Federal financial assistance
- OCR may refer the matter for enforcement to the U.S. Department of Justice



Georgina Santino

OCR investigators ultimately determined that DSU had legitimate reasons to question Santino's pregnancy-related condition since it was not consistent with the other pregnancy-related conditions that DSU had encountered over the past three years.

OCR issued a determination letter stating that "there was insufficient evidence to substantiate the Complainant's allegations" of age and sex discrimination

A blurred background image of students walking on a paved path on a university campus. In the foreground, a student in a blue jacket and dark pants walks away from the camera. To their right, a group of three students walks towards the camera: a woman in a teal top and orange pants, a man in a grey hoodie and grey pants with a backpack, and a woman in a yellow top and blue jeans. Further back, another student in a yellow shirt is visible. The background features a large, modern building with a glass facade and some trees with autumn-colored leaves.

Tips for Working Effectively with OCR

OCR Website

Know Your Rights

www2.ed.gov/about/offices/list/ocr/know.html?src=ft

U.S. Department of Education

Student Loans Grants Laws Data

OCR
Office for Civil Rights

- Home
- Programs/Initiatives
- Office Contacts
- Reports & Resources
- News
- About OCR
- Reading Room
- Frequently Asked Questions
- Careers/Internships
- Blog

Know Your Rights

- OCR Complaint Process
- Sex Discrimination
- Race and National Origin Discrimination
- Age Discrimination
- Disability Discrimination
- Boy Scouts of America Equal Access Act

OCR enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive Federal funds from the Department of Education. These laws prohibit discrimination on the basis of race, color, and national origin, sex, disability, and on the basis of age. These laws extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive U.S. Department of Education funds. OCR also has responsibilities under Title II of the Americans with Disabilities Act of 1990 (prohibiting disability discrimination by public entities, whether or not they receive federal financial assistance). In addition, as of January 8, 2002, OCR enforces the Boy Scouts of America Equal Access Act (Section 9525 of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001). Under the Boy Scouts of America Equal Access Act, no public elementary or

How Do I Find...

- Student loans, forgiveness
- Higher Education Rulemaking
- College accreditation
- Every Student Succeeds Act (ESSA)
- FERPA
- FAFSA
- 1098, tax forms

More >

Information About...

- Transforming Teaching
- Family and Community Engagement
- Early Learning
- Constitution Day

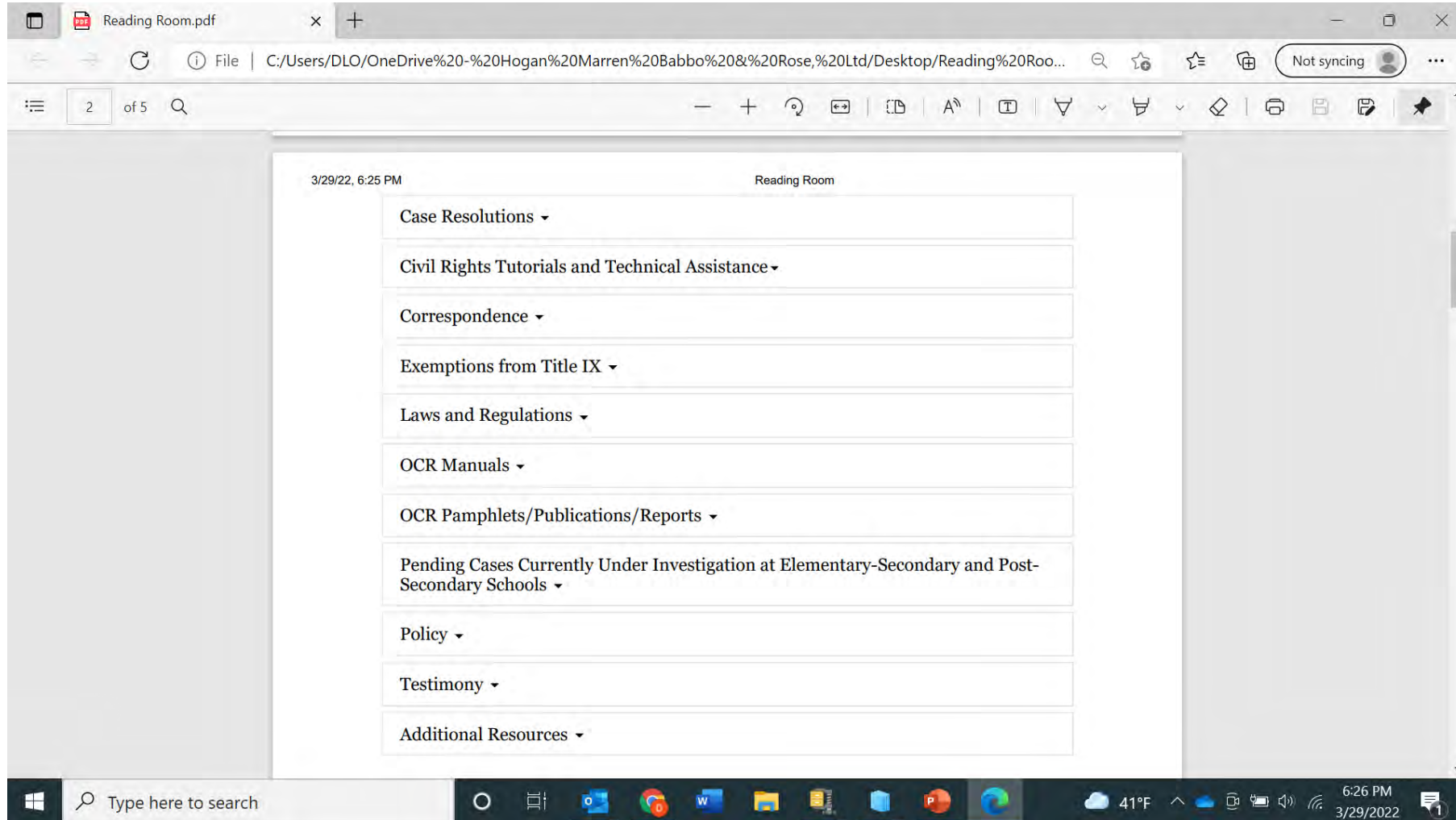
Related Topics

- How to File a Complaint
- Topics A-Z
- Civil Rights Data Collection (CRDC)
- Other Civil Rights Agencies

Type here to search

41°F 6:19 PM 3/29/2022

OCR Website: Reading Room



Additional OCR Resources

- OCR Policy Guidance Portal:
<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>
- OCR Technical Assistance: OPEN (Outreach, Prevention, Education and Non-discrimination)
- OCR blog
- Fact Sheets
- FOIA requests

Tips for Working Effectively with OCR

- Know the CPM, especially options and timelines
- Establish a cooperative relationship with OCR investigators
 - Stay in touch
- Consider resolution options early and make sure the client knows the costs and risks associated with investigation
- Ensure that the data you provide is complete, clear, timely and well organized
- Ensure that your witnesses are well prepared and familiar with the data you provided and the institution's "theory of the case"
- Always debrief and learn lessons from a case

NACUA materials, PowerPoint slides and recordings available as part of this program are offered as educational materials for higher education lawyers and administrators. They are prepared by presenters and are not reviewed for legal content by NACUA. They express the legal opinions and interpretations of the authors.

Answers to legal questions often depend on specific facts, and state and local laws, as well as institutional policies and practices. The materials, PowerPoint slides and comments of the presenters should not be used as legal advice. Legal questions should be directed to institutional legal counsel.

Those wishing to re-use the materials, PowerPoint slides or recordings should contact NACUA (nacua@nacua.org) prior to any re-use.