

**NACUA  
2021  
VIRTUAL  
CONFERENCE**

## Hot Topics in Student Civil Rights Law (Other Than Title IX!)

- Catherine Spear, Vice President and Title IX Coordinator USC Office for Equity, Equal Opportunity, and Title IX (panelist)
- Dannelle Whiteside, Vice President for Legal Affairs and Organizational Strategy at Austin Peay State University (panelist)
- Kristen Bowes, General Counsel, Mercy College (moderator)

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## What this session will cover:

- OCR in 2021
- Hot Topics
- Civil Rights Compliance and DEI Efforts



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# OCR in 2021

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## U.S. Department of Education, Office for Civil Rights (OCR)

- OCR is the federal agency charged with enforcement of federal non-discrimination laws in our nation's educational institutions.
- OCR has jurisdiction to investigate and resolve complaints of discrimination on claims involving alleged violations of:
  - Title VI
  - Title IX
  - Section 504 of the Rehabilitation Act
  - The Age Discrimination Act of 1975
  - Title II of the Americans with Disabilities Act (for public institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools))
  - Boy Scouts of America Equal Access Act

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## OCR Now

- Catherine Lhamon nominated as OCR Assistant Secretary
- Approach to investigations --
  - A revised *Case Processing Manual*
  - Systemic?
  - Disparate Impact?
  - Proactive technical assistance?



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## OCR's *Current* Case Processing Manual – Possible Routes

- Complaint, Compliance Review or Directed Investigation?
- Dismissal
- Administrative Closure
- Rapid Resolution Process (RRP)
- Facilitated Resolution Between the Parties (FRBP)
- Investigation and Resolution
- Monitoring
- Administrative Enforcement



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## OCR Has Finished its Investigation: Now What?

- OCR uses a preponderance of the evidence to make its determination
- OCR can find:
  - Insufficient evidence;
  - Non-compliance; or
  - Mixed resolution.
- Recipient has five calendar days to inform OCR of any factual errors. OCR will consider those concerns and will make revisions where appropriate.



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## Resolution Agreements: 302 or 303?

### Section 302

- Voluntary agreement *before* finding
- 30-day negotiations period
- Case investigation may be suspended during this time.
- If an agreement is not reached, the case will go back into investigation, but negotiations under this section can continue.

### Section 303

- Agreement after violation finding
- 90-day negotiations period
- If no agreement, OCR issues a 10-day Impasse Letter
- If no agreement within 10 days, OCR issues Letter of Impending Enforcement Action



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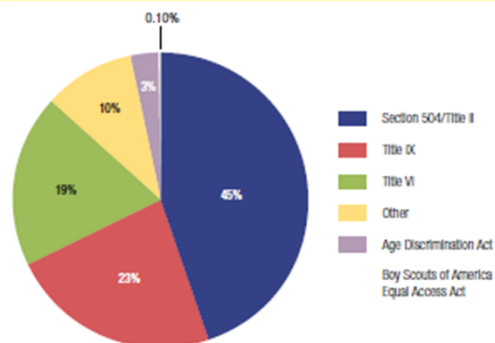
## Hot Topics

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## OCR Complaint Issues

Close to 10,000 complaints received in FY2020.

**Figure 3:** Allegations Received in FY 2020 Complaints, by Statute



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## COVID and Digital Education

- Many students faced barriers to instruction with the swift transition to remote instruction in 2020.
- Accessibility in online education must be an institutional priority.



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## COVID and Accommodations

- Student concerns about attendance
- Accommodations in housing
- Requiring the vaccine upon return to campus



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## Transgender and Sexual Orientation

- Department of Justice (DOJ) confirms that Title IX prohibits discrimination on the basis of sexual orientation and gender identity in educational settings. (April 5, 2021: DOJ guidance)
- OCR announced plans to begin a comprehensive review of its Title IX regulations in accordance with the Biden Administration's March 8, 2021 Executive Order on *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*; June 2021 public hearings



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## Race and National Origin: AAPI

- President Biden's 1/26/21 Memorandum Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States:

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-condemning-and-combating-racism-xenophobia-and-intolerance-against-asian-americans-and-pacific-islanders-in-the-united-states/>



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## Race and National Origin: AAPI

- Additional actions announced by President Biden on 3/30/21:
  - Focus on anti-Asian bias and violence, particularly at the intersection of gender-based violence
  - Reconvened DOJ's Hate Crimes Enforcement and Prevention Initiative
  - Language diversity: DOJ website information in four most frequently spoken AAPI languages: Chinese, Japanese, Korean, Tagalog, and Vietnamese.
  - FBI civil rights training for Law Enforcement on recognizing and reporting anti-Asian bias
- May 26, 2021 OCR "Dear Educator" Letter Re: AAPI:

<https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202105-aapi.pdf>



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## Race: Black Lives Matter

- President Biden immediately rescinded Trump's Executive Order on "Combating Racist and Sexist Stereotypes" (target was DEI training, critical race theory)
- *What is Old is New Again*: OCR has recently referenced its 1994 *Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance* as current resource
- Current challenge—tension between racist statements and academic freedom, free speech, inclusive teaching



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# Religion

- Title VI does not apply to religion, *per se*
- Where reach occurs is OCR recognition of discrimination based on “actual or perceived shared ancestry and ethnic characteristics”—OCR 2010 Dear Colleague Letter: Harassment and Bullying
- Recent OCR Letters: New York University, Case 02-19-2174 (2020); Rutgers Univ., Case 02-11-2157 (2014; reopened August 2018); UC Berkeley, Case 09-12-2259 (2013)



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# Age

- During FY 2020, OCR received 465 complaints alleging one or more violations of the Age Discrimination Act. Of the 10,185 complaints that OCR resolved in FY 2020, 518 (5.1 percent) included at least one alleged violation of the Age Discrimination Act. OCR resolved nine of those complaints (1.74 percent of Age Discrimination Act complaint resolutions overall) with change, although a large majority of the Age Act allegations were dismissed, including those dismissed for insufficient evidence.
- **Most common issues:** admissions, inadequate grievance procedures, financial aid distribution, access to programs and activities, employment, and retaliation.
- OCR must first refer all Age Discrimination allegations (student services) to the Federal Mediation and Conciliation Service (FMCS) for attempted resolution first. (Employment allegations will be referred to EEOC).
- NOTE: applies to any age (no 40 and over requirement, like the ADEA)



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## Alignment of Civil Rights Compliance and Diversity, Equity, and Inclusion (DEI) Efforts in Higher Education

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### Pros of Collaboration

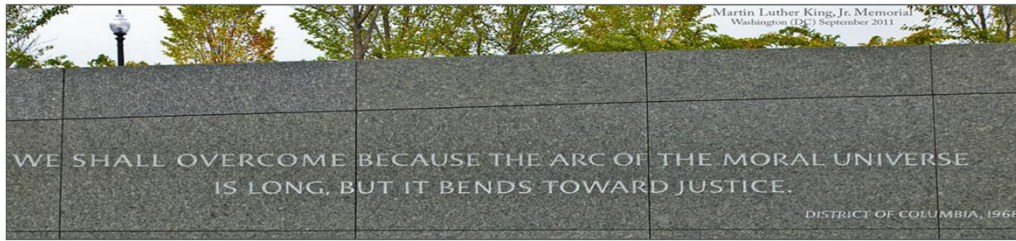
- DEI and Civil Rights offices have similar but distinct roles—collaboration can amplify effectiveness of both
- Office of General Counsel is also a key partner
- Common intersections: setting the tone/messaging, climate assessments, responding to general or specific events/incidents

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## Questions and Answers

*"The arc of the moral universe is long, but it bends toward justice."*

*Martin Luther King, Jr.*



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