



Fall Forum 2023
Bracing For Significant Regulatory Changes

OCR RECENT ACTIONS



Jennifer Mausekapf, Esq.
jmausekapf@bruman.com
Monica Pascual, Esq.
mpascual@bruman.com



1

Fall Forum 2023
Bracing For Significant Regulatory Changes

TOPICS WE'LL DISCUSS

- ✓ Office for Civil Rights (OCR) Overview
- ✓ OCR Investigations & Resolution Agreements
- ✓ Funding Considerations in Serving English Learners (ELs)
- ✓ Civil Rights Obligations for Serving ELs
- ✓ OCR Case Study




The Bruman Group, PLLC © 2023. All rights reserved.

2

Fall Forum 2023
Bracing For Significant Regulatory Changes

OCR ESTABLISHMENT AND MISSION

U.S. Department of Education

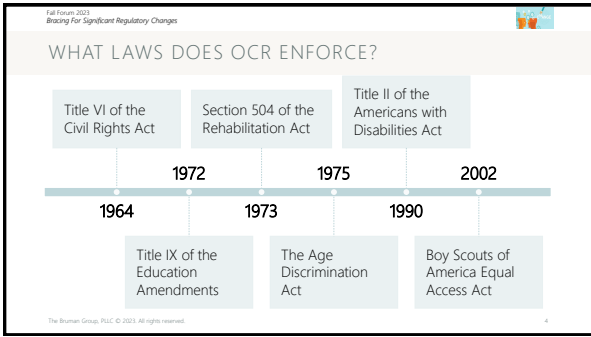


Office for Civil Rights

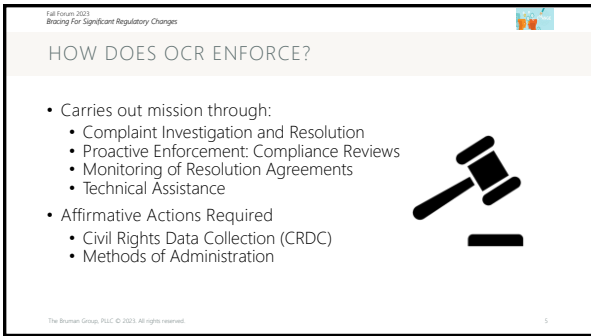
- Established by Statute: 20 U.S.C. § 3413
- Mission: *To ensure equal access to education and to promote educational excellence throughout the Nation through vigorous enforcement of civil rights law.*

The Bruman Group, PLLC © 2023. All Rights Reserved.

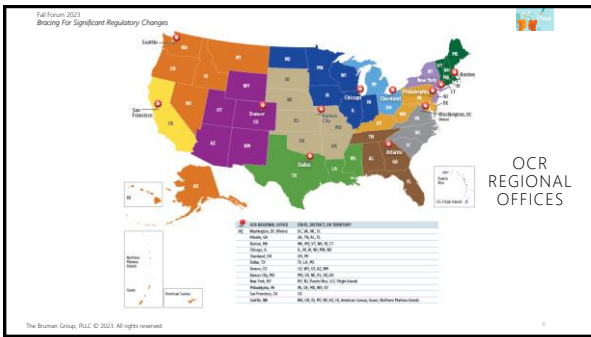
3



4



5



6


Fall Forum 2021
Bracing For Significant Regulatory Changes

OCR LEADERSHIP

Assistant Secretary for Civil Rights:

Catherine Lhamon

- Confirmed Oct. 20, 2021
- Asst. Sec. OCR, 2013-2016
- Chairwoman for the U.S. Commission on Civil Rights, 2016-2021
- California Legal Affairs Secretary under Gov. Newsom, 2019-2020



The Brunner Group, PLLC © 2021. All rights reserved.

7

Fall Forum 2021
Bracing For Significant Regulatory Changes

OCR INVESTIGATIVE DETERMINATIONS & RESOLUTION AGREEMENTS




The Brunner Group, PLLC © 2021. All rights reserved.

8

Fall Forum 2021
Bracing For Significant Regulatory Changes

HOW DOES OCR RESOLVE INVESTIGATIONS?

- Case Processing Manual (CPM): <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>
- At the conclusion of an investigation, OCR will determine, using a preponderance of the evidence standard, whether:
 - There is insufficient evidence to support a conclusion of noncompliance, or
 - The evidence supports a conclusion of noncompliance.
- Issuance of Letter of Findings & Resolution Agreements




The Brunner Group, PLLC © 2021. All rights reserved.

9

Fall Forum 2023
Bracing For Significant Regulatory Changes

WHAT IS A RESOLUTION AGREEMENT (RA)?

- Resolution Agreement
 - When fully implemented, the RA will address OCR's compliance concerns and/or identified violations.
 - OCR monitors implementation of the RA.
- Contents:
 - Signed
 - Specific actions to take to resolve compliance concerns
 - Dates and timelines
 - Documents to submit
- If breach →
 - OCR may start enforcement proceedings or "refer case to DOJ"



The Brunson Group, PLLC © 2023. All rights reserved. 10

10

Fall Forum 2023
Bracing For Significant Regulatory Changes

WHAT IS A RESOLUTION AGREEMENT (RA)?

- Monitoring the RA**
 - OCR will evaluate each report and response
 - OCR will provide written notification of deficiencies and take appropriate actions
- Modifying the RA**
 - OCR may agree to modify or terminate RA when "circumstances have arisen that substantially change, fully resolve, or render moot some or all" issues
 - May address new compliance issues
 - Requests for modification must be in writing
- Conclusion of RA through written notification**
 - When OCR "determines that the recipient **has fully and effectively complied** with the terms of the resolution agreement" including modifications and complies with laws and regs.


The Brunson Group, PLLC © 2023. All rights reserved. 11

11

Fall Forum 2023
Bracing For Significant Regulatory Changes

ENFORCEMENT ACTIONS

- "When OCR is unable to negotiate a resolution agreement with the recipient, OCR will initiate enforcement action by
 - (1) initiating administrative proceedings to suspend, terminate, or refuse to grant or continue federal financial assistance or, with respect to the Boy Scouts Act, funds made available through the Department to the recipient; or
 - (2) referring the case to DOJ for judicial proceedings to enforce any rights of the United States under any law of the United States."



The Brunson Group, PLLC © 2023. All rights reserved. 12

12

Fall Forum 2023
Bracing For Significant Regulatory Changes

FUNDING CONSIDERATIONS IN SERVING ENGLISH LEARNERS

\$

The Bruner Group, PLLC © 2023. All rights reserved. 13

13

Fall Forum 2023
Bracing For Significant Regulatory Changes

THE BIG PICTURE

The Bruner Group, PLLC © 2023. All rights reserved. 14

14

Fall Forum 2023
Bracing For Significant Regulatory Changes

LIMIT ON USE OF TITLE III FUNDS

Title III SNS Provision, §3115(g):

- Title III funds shall be used to *supplement the level of Federal, State, and local public funds* that, in the absence of such availability, would have been expended for programs for ELs and immigrant children and youth *and in no case to supplant such Federal, State, and local public funds.*

Sept. 2016 Title III Guidance A-2:

- Generally, supplanting is presumed if Title III funds are used to provide services that the SEA or LEA:
 - 1) was required to make available under other laws; or
 - 2) provided with non-Federal funds in the prior year.

➤ *Therefore...Title III funds cannot be used to fulfill an LEA's obligations under Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act (EEOA)?

The Bruner Group, PLLC © 2023. All rights reserved. 15

15

Fall Forum 2021
Bracing For Significant Regulatory Changes

LEGAL OBLIGATIONS TO ELS UNDER TITLE VI OF THE CIVIL RIGHTS ACT

The Brunson Group, PLLC © 2021. All rights reserved.

16

Fall Forum 2021
Bracing For Significant Regulatory Changes

CIVIL RIGHTS REQUIREMENTS

Sept. 2016 Guidance & SNS @ A-3
<https://www2.ed.gov/policy/eiseec/leg/essa/essatitleiiguidenglishlearners92016.pdf>

- Reviews legal obligations to ELS under Title VI of the Civil Rights Act and EEOA
 - Under Title VI of the Civil Rights Act, States and LEAs must ensure that ELS can participate meaningfully and equally in educational programs and services.
- Identifies 10 civil rights obligations addressed in:
 - 2015 ED OCR/DOJ Joint Dear Colleague Letter
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>
 - ED's English Learner Toolkit
<https://www2.ed.gov/about/offices/list/oela/english-learner-toolkit/index.html>

The Brunson Group, PLLC © 2021. All rights reserved.

17

Fall Forum 2021
Bracing For Significant Regulatory Changes

2015 ED OCR/DOJ Joint Dear Colleague Letter

1. Identifying and Assessing All Potential EL Students
2. Providing EL Students with a Language Assistance Program
3. Staffing and Supporting an EL Program
4. Providing Meaningful Access to All Curricular and Extracurricular Programs
5. Avoiding Unnecessary Segregation of EL Students and Creating Inclusive Environment


The Brunson Group, PLLC © 2021. All rights reserved.

18

Fall Forum 2023
Bracing For Significant Regulatory Changes

2015 ED OCR/DOJ Joint Dear Colleague Letter

6. Addressing ELs with Disabilities (Special Education)
7. Meeting the Needs of EL Students Who Opt Out of EL Programs or Services
8. Monitoring and Exiting EL Students from EL Programs and Services
9. Evaluating the Effectiveness of a District's EL Program
10. Ensuring Meaningful Communication with Limited English Proficient Parents




The Brunner Group, PLLC © 2023. All rights reserved. 19

19

Fall Forum 2023
Bracing For Significant Regulatory Changes

OCR CASE STUDY

OCR Resolution Agreement with Tucson Unified School District



The Brunner Group, PLLC © 2023. All rights reserved. 20

20

Fall Forum 2023
Bracing For Significant Regulatory Changes

OCR COMPLAINT: TUCSON UNIFIED SCHOOL DISTRICT

- October 25, 2022: Complaint filed alleging the District discriminates against ELs at Cholla High School
- District EL Data
 - District serves 47k students in 89 schools and programs
 - 11.75% of students are ELs
- School EL Data
 - School served ~1670 students, of which ~11.5% ELs
 - 2nd highest percentage of ELs among District's 11 high schools
 - Disparities in assessment results and graduation rate
 - 21-22: only two ELD teachers and an ELD coordinator
 - 22-23: increased EL students, yet only one ELD teacher the first semester, two the second semester, no ELD coordinator

The Brunner Group, PLLC © 2023. All rights reserved. 21

21

Fall Forum 2023
Bracing For Significant Regulatory Changes

INVESTIGATION & RESOLUTION

- OCR investigated EL program under Title VI (SYs 2021-22 & 2022-23)
 - Reviewed documents, interviewed 29 District and School employees
- April 24, 2023: OCR issues determination letter & signed RA
 - No consistent description of the school's process for identifying ELs
 - Many ELs that were supposed to be in the ELD program were not
 - Identified noncompliance not only at Cholla HS but also Districtwide
 - RA Terms include:
 - Plan to provide compensatory language acquisition services
 - Plan to adequately serve EL Students
 - Policies, Procedures, and Forms
 - School Staff Training
 - District Oversight

The Brunner Group, PLLC © 2023. All rights reserved. 22

22

Fall Forum 2023
Bracing For Significant Regulatory Changes

1. IDENTIFYING AND ASSESSING ALL POTENTIAL EL STUDENTS

- Timely Identification and 30 day written parental notice:
 - School did not provide consistent description of process to identify ELs
 - 22-23: The School did not send Home Language Survey to new students until March 2023
 - Delays in evaluating students enrolled mid-year because of staffing issues
 - Students given placement assessment between 22 and 118 days from enrollment
- Action: District to Update, Disseminate, and Monitor Policies and Procedures (P&Ps) to timely and accurately identify students, provide assessment, and notify parents

The Brunner Group, PLLC © 2023. All rights reserved. 23

23

Fall Forum 2023
Bracing For Significant Regulatory Changes

2. PROVIDING EL STUDENTS WITH A LANGUAGE ASSISTANCE PROGRAM

- Services must be "educationally sound in theory and effective in practice"
 - Many of the School's ELs were not scheduled into the ELD program for the 2022-23 SY.
 - 70 students in the first two levels of ELD (ELD I and II) did not have a consistent ELD teacher for both periods of ELD targeted instruction
 - Many students who are not in an ELD class that is appropriate for their proficiency level
 - Many ELs at the School who have been in the District's ELD program since kindergarten or first grade have not yet achieved proficiency on the AZELLA.

The Brunner Group, PLLC © 2023. All rights reserved. 24

24

Fall Forum 2023
Bracing For Significant Regulatory Changes

2. PROVIDING EL STUDENTS WITH A LANGUAGE ASSISTANCE PROGRAM (CONT.)

- Action:
 - Remedial Services (what, when, who, oversight, transportation, notification, registration)
 - District will annually conduct analysis to determine the funding and staffing needed to adequately serve EIs at the School during the upcoming school year.
 - Update, Disseminate, and Monitor P&Ps:
 - Services that address their level of ELP
 - Educationally sound and effective in practice
 - Enable students to achieve English proficiency and parity of participation
 - Appropriate language assistance surveys

The Brunner Group, PLLC © 2023. All rights reserved. 25

25

Fall Forum 2023
Bracing For Significant Regulatory Changes

3. STAFFING AND SUPPORTING AN EL PROGRAM

- District must
 - Provide resources to effectively implement the ELD programs.
 - Have qualified teachers, trained administrators
 - Adequate and appropriate materials
- Investigation:
 - Not enough teachers
 - 21-22 ELD coordinator left, and School's Data Coordinator assisted the ELD program
 - District did not provide staffing and administrative support sufficient to implement the SEI two-hour model
 - Overcrowded classrooms result in mismanagement
 - The School lack sufficient materials and physical space for EL students


The Brunner Group, PLLC © 2023. All rights reserved. 26

26

Fall Forum 2023
Bracing For Significant Regulatory Changes

3. STAFFING AND SUPPORTING AN EL PROGRAM (CONT.)

- Action
 - The District will, annually, train all relevant School staff about the P&Ps, and forms approved by OCR.
 - Trainings will be conducted by individuals that meet qualifications criteria
 - Provide OCR training materials, agenda, list of individuals trained, and qualifications of trainer



The Brunner Group, PLLC © 2023. All rights reserved. 27

27

Fall Forum 2023
Bracing For Significant Regulatory Changes

4. PROVIDING MEANINGFUL ACCESS TO ALL CURRICULAR & EXTRACURRICULAR PROGRAMS

5. AVOIDING UNNECESSARY SEGREGATION OF EL STUDENTS AND CREATING INCLUSIVE ENVIRONMENT

Ensure ELs have meaningful opportunity to participate in **grade-appropriate** core curriculum (proficiency and recoup deficits)

- ELs struggle to access content in their core classes and ELD skills are not reinforced in those classes (particularly in math and science).
- ELs not placed in core classes with EL trained teachers
- Core general education teachers not provided training on working with ELs

Action

- Update, Disseminate, and Monitor P&Ps

The Bruman Group, PLLC © 2023. All Rights Reserved. 28

28

Fall Forum 2023
Bracing For Significant Regulatory Changes

6. ADDRESSING ELS WITH DISABILITIES (SPECIAL EDUCATION)

- Provide adequate language assistance services to dually identified students in a self-contained setting
- Lack of ELD services to dually identified students in self-contained settings
- Lack of resources to SPED teachers
- No monitoring the progress of dually identified students in ELD or review their AZELLA scores
- ELD Coordinator did not regularly attend IEP meetings
- Language needs not considered during IEP meetings


The Bruman Group, PLLC © 2023. All rights reserved. 29

29

Fall Forum 2023
Bracing For Significant Regulatory Changes

6. ADDRESSING ELS WITH DISABILITIES (SPECIAL EDUCATION) (CONT.)

- Action:
 - Update, disseminate, and monitor P&Ps:
 - Include staff who are qualified in EL instruction and second language acquisition in placement decisions (per IDEA and Section 504)
 - Provides ELs with disabilities with both language assistance and disability related services



The Bruman Group, PLLC © 2023. All rights reserved. 30

30

Fall Forum 2023
Bracing For Significant Regulatory Changes

7. MEETING THE NEEDS OF EL STUDENTS WHO OPT OUT OF EL PROGRAMS OR SERVICES

8. ENSURING MEANINGFUL COMMUNICATION WITH LIMITED ENGLISH PROFICIENT PARENTS

- Must ensure that parents' decisions to opt out of language assistance programs are **knowing, voluntary, and appropriately documented**.
- If opt-out, civil rights protections remain and affirmative steps to be taken! (e.g.: English language and other academic needs)
 - School recommended to opt-out b/c of staffing issues and overcrowded classes
 - Opt-out information provided to parents was not always complete or in language they could understand
 - Lack of accurate records of opt-out numbers, reasons, and timing
 - School is not monitoring progress of opt-out students
 - Teachers don't know who are the opt-out students

The Bruman Group, PLLC © 2023. All Rights Reserved. 31

31

Fall Forum 2023
Bracing For Significant Regulatory Changes

7. MEETING THE NEEDS OF EL STUDENTS WHO OPT OUT OF EL PROGRAMS OR SERVICES (CONT.)

8. ENSURING MEANINGFUL COMMUNICATION WITH LIMITED ENGLISH PROFICIENT PARENTS (CONT.)

Action:

- Update, disseminate, and monitor P&Ps:
 - Respects the right of parents to opt out
 - Provides guidance in a language parents can understand
- Parent's request is knowing and voluntary
- Documents parent communications (including opt-out decisions)
- Takes affirmative steps for opt-out students
 - (e.g., informing lack of progress and offering the parents further opportunities to enroll the student in the EL program or at least certain EL services at any time).

The Bruman Group, PLLC © 2023. All Rights Reserved. 32

32

Fall Forum 2023
Bracing For Significant Regulatory Changes

9. MONITORING AND EXITING EL STUDENTS FROM EL PROGRAMS AND SERVICES

- District must monitor the academic progress of former ELs for at least 2 years
 - No premature exit
 - Academic deficits remedied
 - Meaningful participation
- District is not monitoring:
 - Students who are reclassified (must monitor for 2 years after exiting ELD)
 - Whether the ELs who attend Tucson Unified Virtual Academy (TUVVA) are receiving ELD program services and have meaningful access to the core curriculum.
 - the progress of ELs in achieving English language proficiency
 - (i.e.: opt-out students, students attending TUVVA, and dually identified students)


The Bruman Group, PLLC © 2023. All rights reserved. 33

33

Fall Forum 2023
Bracing For Significant Regulatory Changes

9. MONITORING AND EXITING EL STUDENTS FROM EL PROGRAMS AND SERVICES (CONT.)

- Action:
 - Update, disseminate, and monitor P&Ps:
 - Monitors (at least annually for at least two years) the academic progress all opt-out students
 - Valid, reliable, and grade-appropriate ELP re-test
 - if a persistent language barrier, re-enroll the student into EL status and offer EL services




The Brunner Group, PLLC © 2023. All rights reserved. 54

34

Fall Forum 2023
Bracing For Significant Regulatory Changes

10. EVALUATING THE EFFECTIVENESS OF A DISTRICT'S EL PROGRAM

- Must:
 - Use longitudinal data to compare performance in core content areas of current and exited ELs with never-ELs
 - Modify programs that are not successful
- Investigation:
 - The District and School lacked assessments, analyses, or studies
- Action:
 - Through P&Ps, periodically evaluate the programs, ensuring comprehensive and reliable comparison of ELs to never-ELs and make changes accordingly




The Brunner Group, PLLC © 2023. All rights reserved. 55

35

Fall Forum 2023
Bracing For Significant Regulatory Changes

ADDITIONAL ISSUE

- Records maintenance
 - "The School's records for ELs are incomplete and inconsistent and do not meet the District's record-keeping obligations under Title VI."




The Brunner Group, PLLC © 2023. All rights reserved. 56

36

Fall Forum 2023
Bracing For Significant Regulatory Changes

RESOURCES

- **Sept. 2016 Title III Guidance:** <https://www2.ed.gov/policy/elsec/leg/essa/essatitleiiienglishlearners92016.pdf>
- **2015 ED OCR/DOJ Joint Dear Colleague Letter** <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>
- **EL Toolkit** <https://www2.ed.gov/about/offices/list/oela/english-learner-toolkit/index.html>
- **Tucson OCR Letter:** <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08231063-a.pdf>
- **Tucson OCR Agreement** <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08231063-b.pdf>
- **OCR Recent Resolutions Search:** <https://ocrcas.ed.gov/ocr-search>



The Bruman Group, PLLC © 2023. All rights reserved. 37

37

Fall Forum 2023
Bracing For Significant Regulatory Changes



QUESTIONS??

The Bruman Group, PLLC © 2023. All rights reserved. 38

38

Fall Forum 2023
Bracing For Significant Regulatory Changes

LEGAL DISCLAIMER

This presentation is intended solely to provide general information and does not constitute legal advice or a legal service. This presentation does not create a client-lawyer relationship with The Bruman Group, PLLC and, therefore, carries none of the protections under the D.C. Rules of Professional Conduct. Attendance at this presentation, a later review of any printed or electronic materials, or any follow-up questions or communications arising out of this presentation with any attorney at The Bruman Group, PLLC does not create an attorney-client relationship with The Bruman Group, PLLC. You should not take any action based upon any information in this presentation without first consulting legal counsel familiar with your particular circumstances.

The Bruman Group, PLLC © 2023. All rights reserved. 39

39



40
