

June 23, 2023

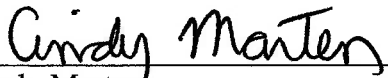
Henry J. Kerner
Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, DC 20036-4505

Re: OSC File No. DI-21-000533

Dear Mr. Kerner:

The enclosed supplemental report is in response to a May 15, 2023, email from [REDACTED] of your office to [REDACTED] of the U.S. Department of Education's (ED's) Office of the General Counsel indicating that the U.S. Office of Special Counsel (OSC) generally finds that the ED failed to meaningfully address the grants awarded to Indiana University for the Midwest and Plains Equity Assistance Center (EAC) and to Harvard University for the Identity Project in its December 22, 2022 report to OSC. We appreciate the opportunity we had to meet with your staff on May 18, 2023, to discuss OSC's concerns and to provide this supplemental report. The Secretary has delegated to me the authority to review and sign written reports of investigation prepared in response to referrals from OSC regarding whistleblower disclosures; to submit these reports of investigations to OSC; and to take actions as a result of the investigation pursuant to 5 U.S.C. §§ 1213(d) and (f)(2).

Sincerely,


Cindy Marten

Enclosures



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

Supplemental Report of Investigation to the U.S Office of Special Counsel OSC File No. DI-21-000533

Report Date: June 23, 2023

I. Introduction

On June 14, 2021, the U.S. Office of Special Counsel (“OSC”) referred for investigation allegations that two grants awarded by the United States Department of Education (“Department”) may constitute violations of law, rule, or regulation. Specifically, the OSC referral identified the following allegations for investigation:

1. The issuance of Grant Award No. U165A170062 to Fort Wayne Community Schools violates Title VI of the Civil Rights Act of 1964 (“Title VI”)¹ and current Supreme Court precedent on affirmative action in educational settings;
2. The issuance of Grant Award No. R305A200278 to Harvard University for the Identity Project violates Title VI and the Institute of Education Sciences (“IES”) statutory authority because the project is racially biased in nature; and
3. Any additional, related allegations of wrongdoing discovered during the investigation of the foregoing allegations.

On July 19, 2022, OSC added three additional allegations to the scope of the investigation:

4. The Department’s Office of Elementary and Secondary Education (“OESE”), in funding Grant Award Nos. 12D004D110021 and S004D160011 to Indiana University, Indianapolis, Indiana, for the Midwest and Plains Equity Assistance Center, is violating Title VI; and/or abusing its authority;
5. IES is funding, conducting, or supporting racially discriminatory content on its platforms and is promoting racially discriminatory research funding practices in violation of Title VI and statutory authorities specific to IES designed to ensure that its activities, as well as the activities supported by the office, are “objective, secular, neutral and nonideological and are free of partisan political influence and racial, cultural, gender, or regional bias;”² and
6. The Department has a systemic practice of providing Federal financial assistance for activities or programs discriminating on the basis of race in violation of the legal authorities noted above.

On December 22, 2022, the Department submitted its report detailing its findings and suggested recommendations to OSC. The report notes the efforts the investigative team took to address the allegations in the referral, which included reviewing the applicable laws and regulations, policies, practices, procedures, and memorandums specific to these grants, as well as information related to these grants in Federal Register (“FR”) notices, application packages, the Grant Award Notifications (“GAN”), and the Annual Performance Reviews (“APR”). The Department also reviewed additional information obtained from the whistleblower, Department employees, and

¹ 42 U.S.C. § 2000d (2020).

² 20 U.S.C. §§ 9511(b)(2)(B), 9514(f)(7), 9516(b)(8) (2020).

Department databases. Finally, the Department considered information obtained by the investigative team during interviews with the whistleblower and 13 Department staff with relevant information. The Department's report concluded that the allegations were without merit and did not identify anything to indicate that the Department violated any particular law, rule, or regulation in awarding the grants at issue, yet suggested recommendations with respect to one grant program to promote greater transparency about its awards.

On May 15, 2023, OSC provided its assessment of that report to the Department and, after subsequent discussion with the Department, indicated that it did not have any additional questions or concerns with respect to allegations 1,3, 5 and 6. With respect to allegations 2 and 4, OSC questioned the Department's legal analyses related to the Department's interpretation of Title VI, and raised concerns that the Department artificially limited its factual inquiry relating to both allegations and was dismissive of the whistleblower's specific concerns with the content of the Harvard grant materials.

The Department appreciates the opportunity to submit this supplemental report to address these concerns. Specifically, this supplemental report details why Title VI does not apply to the Federal Government. Nonetheless, this report then addresses OSC's inquiry into whether IES' or OESE's grant awards were discriminatory under Title VI and finds no evidence that the programs at issue funded by the IES or OESE grants violated Title VI. The Department then responds to OSC's concern that it limited its factual inquiry into the allegations that the Harvard University grant and the Midwest and Plains Equity Assistance Center grants violated the Department's statutory authority, explaining the thoroughness of the investigation underlying its conclusion that the Department did not abuse its authority in awarding these grants.

The Department respectfully submits this report to supplement its original findings and determinations, reaffirming its conclusion in its original report that the Department's grants did not violate any law, rule, or regulation.

II. Allegations Regarding Violations of Title VI

In its May 15, 2023, email, OSC questioned the Department's conclusion that the Department could not violate Title VI by awarding the grants at issue. The Department supplements its original report with legal support for its conclusion and discusses the Department's Title VI enforcement mechanism for recipients of Federal financial assistance from the Department. Notwithstanding this conclusion, the Department evaluated the grants under OCR's Title VI framework and considered whether its grantees violated Title VI in carrying out their respective grant activities and determined that they did not.

Title VI And Its Implementing Regulations Prohibit Discrimination Based on Race, Color, or National by Recipients of Federal Financial Assistance from the Department

Courts have consistently held that Title VI does not apply to the Federal government itself. *See, e.g., Halim v. Donovan*, 951 F. Supp. 2d 201, 207 (D.D.C. 2013) ("Title VI does not apply to programs conducted directly by federal agencies"); *Williams v. Glickman*, 936 F.Supp. 1, 5 (D.D.C.1996) (same); *Gary v. F.T.C.*, 526 F. App'x 146, 149 (3d Cir. 2013) ("Title VI does not apply to federal agencies"); *Maloney v. Soc. Sec. Admin.*, 517 F.3d 70, 75-76 (2d Cir. 2008) (concluding "that, as with Title VI, the Age Discrimination Act does not apply to a federal agency implementing a federal program"); *Keener v. United States*, No. 2:22-CV-1640-DCN,

2023 WL 2478367, at *8 (D.S.C. Mar. 13, 2023) (“Title VI does not apply to the United States or ... a federal administrative agency”).³

Rather, Title VI extends only to “program[s] or activit[ies]” receiving Federal financial assistance, and that term has been repeatedly held not to encompass federal agencies. *See, e.g., Est. of Boyland v. Young*, 242 F. Supp. 3d 24, 28 (D.D.C. 2017) (“This statutory definition excludes federal agencies, and therefore it is well-recognized that Title VI does not reach ‘the operations of the federal government and its agencies.’”) (quoting *DynaLantic Corp. v. U.S. Dep’t of Defense*, 885 F.Supp.2d 237, 291 (D.D.C. 2012)); *Maloney*, 517 F.3d, at 75.

Accordingly, the Department’s regulations implementing Title VI prohibit discrimination by grant recipients based on race, color, or national origin, including in any disposition, service, financial aid, or other benefits provided under the recipient’s program, the determination of the site or location of its facilities, or other aspects of its program operations.⁴ The United States Department of Justice (“DOJ”) Civil Rights Division’s Title VI Legal Manual, which provides an overview of Title VI legal principles, provides a plain language meaning of the term “recipient” and explicitly recognizes that Title VI does not apply to the Federal Government itself.⁵

While Title VI does not apply to the Federal Government itself, the Department does significant work to enforce the requirements of Title VI by recipients of Federal financial assistance from the Department. At its core, Title VI is an enforcement mechanism for ensuring that individuals are not being discriminated against under any program or activity receiving Federal financial assistance, and the agency’s role in ensuring compliance with that requirement is to carry out enforcement activities. In carrying out that role, the Department maintains a robust civil rights enforcement scheme through its Office for Civil Rights (“OCR”). OCR fulfills its Title VI enforcement responsibilities by receiving complaints of discrimination and conducting investigations or compliance reviews to determine whether a recipient of Federal financial assistance from the Department has failed to comply with Title VI. If an investigation indicates a failure to comply with Title VI, OCR will seek to resolve the noncompliance with the recipient.⁶

In addition to OCR’s enforcement activities, OCR provides technical assistance to the public on the laws and regulations it enforces. Recently, in January 2023, OCR issued a Fact Sheet on Diversity & Inclusion Activities Under Title VI,⁷ which states, “Activities intended, in whole, or in part, to further objectives such as diversity, equity, accessibility and inclusion are not generally or categorically prohibited under Title VI.” The Fact Sheet goes on to provide examples of activities that Title VI does not categorically prohibit, which include:

- diversity, equity, and inclusion training;
- instruction in or training on the impact of racism or systemic racism;
- cultural competency training or other nondiscrimination trainings; or

³ Courts have also held that Title VI does not create a cause of action against the federal government. *See, e.g., Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 191 (4th Cir. 1999); *Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 750 (D.C. Cir. 1990); *accord. Cannon v. Univ. of Chicago*, 441 U.S. 677, 715 n.51 (1979).

⁴ 34 C.F.R. § 100.3 (2021).

⁵ U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, TITLE VI LEGAL MANUAL at Section V, pp. 13-14 (2021).

⁶ The extent of OCR’s enforcement activities demonstrates the import that OCR and the Department more generally place on the Department’s responsibility to take steps to ensure compliance with Title VI by recipients of federal funding. As it relates to Title VI complaints, in fiscal year 2022, OCR resolved 2,408 complaints to address a broad range of issues in institutions across the nation.

⁷ <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tvi-dia-202301.pdf>

- use of specific words in school policies, programs, or activities, such as equity, discrimination, inclusion, diversity, systemic racism, or similar terms.

Title VI Claims in Allegations 2 and 4

OSC's referral to the Department asked whether the Department violated Title VI in awarding the grant to Harvard University for the Identity Project and two grants to Indiana University for the Midwest and Plains Equity Assistance Center. While the Department is not subject to Title VI, OSC has asked the Department to analyze whether the grantees' actions in carrying out their respective grant activities violated Title VI. As explained below, the Department finds that they did not.

Section 601 of Title VI provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.⁸

In determining whether a recipient subjected an individual to discrimination on the basis of race in a way that interfered with or limited their ability to participate in or benefit from a program or activity of the recipient, the Department considers whether the recipient treated similarly situated individuals Allegations 2 and 4 differently on the basis of race. If evidence of different treatment is found, the Department then determines whether the reasons offered by the recipient for the different treatment are legitimate or a pretext for unlawful discrimination. Additionally, the Department examines whether the information shows that the recipient treated the individual in a manner that is inconsistent with the recipient's established policies, practices, and procedures or whether any other evidence of discrimination based on race exists.

The Department also considers whether a recipient created a racially hostile environment. A racially hostile environment exists if harassment is severe, pervasive, or persistent so as to interfere with, or limit, the ability of an individual to participate in, or benefit from, the services, activities, or privileges provided by a recipient. A recipient violates Title VI if it is determined that a racially hostile environment existed, that the recipient had actual or constructive notice of the racially hostile environment, and the recipient failed to respond adequately to redress the racially hostile environment.

Applying this framework, the Department considered whether the grantees' activities funded under these grants violate Title VI. To the extent that the whistleblower asserts that the activities under these grants impermissibly promote efforts designed to foster equity, we note, as stated above, that these activities are not generally or categorically prohibited under Title VI. Moreover, both Congress and the Executive Branch have acknowledged that voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds is in the best interest of the United States.⁹

⁸ 42 U.S.C. § 2000d (2020).

⁹ 20 U.S.C. § 7231(a)(4)(A) ("It is in the best interest of the United States ... to continue the Federal government's support of ... local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education."); *See also* E.O. 14035, Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce, 86 Fed. Reg. 34,593, 34,593-94 (June 25, 2021) ("This order establishes that diversity, equity, inclusion, and accessibility are priorities for my Administration and benefit the entire Federal Government and the Nation ...").

With respect to the grant to Harvard, the whistleblower first asserts that the grantee's efforts to engage participants-teachers to "see race" regarding their students, ... causes [them] to treat students differently based on the race of their students, which is illegally (sic) disparate treatment." Second, they assert that the grantee's efforts to seek "equitable" outcomes rather than 'equal opportunity of outcome' through reduction of 'inequities in academic outcomes' ... is designed to achieve equal outcome (equity) between racial groups of students in education, via illegal disparate treatment of students based on race." In making these assertions, the whistleblower assumes a harm without articulating a harm to students of any particular race or presenting evidence of any harm.

Based on the materials that were included in the original grant application and appendices¹⁰ and subsequent APRs, we note that there is no evidence to suggest that the curriculum tells students how to feel towards different ethnic racial groups or to adopt any sort of political ideology. It is entirely up to students to engage in the process of ethnic-racial identity exploration and resolution. The Identity Project ("IP") is designed to provide both students of color and white students strategies, tools, and time with which to explore their ethnic-racial background, learn about their peers' backgrounds, and discuss issues of race and ethnicity in school. As stated in the grant application, the curriculum "was developed to be relevant to youth from diverse backgrounds, rather than one specific group." All students have an ethnic-racial identity, and this curriculum is designed to engage all students in this developmental process.

The grantee also includes safeguards for addressing potential adverse effects on those participating in the research. They note that participants may have questions or concerns about the assessment procedures and provide safeguards to address those concerns. To address these concerns, subjects are informed prior to the assessment that (1) they may choose to skip any question or procedure they find uncomfortable; and (2) fellows and the field supervisor will be able to answer questions and address any issues regarding participant discomfort during the implementation of the IP curriculum.

The Department found no evidence to suggest that either Harvard University's or Indiana University's activities under their respective grants treated similarly situated individuals differently on account of their race in a way that interfered with, or limited their ability to participate in or benefit from, a program or activity. The Department confirmed that OCR has received no complaints alleging Title VI discrimination under either grantee's grant activities. Moreover, neither OSC nor the whistleblower allege that any individuals were excluded from participating in, denied the benefits of, or subjected to discrimination on the grounds of race, color, or national origin, nor do they allege that the activities carried out by these grantees created a racially hostile environment. The assertions of racial discrimination presented to the Department are only speculative based on the whistleblower's concerns about the potential for harm. To the extent the whistleblower alleges that activities to further diversity, equity, accessibility, and inclusion are inherently discriminatory, OCR has explained that these activities are not categorically prohibited under Title VI and the Department found no evidence supporting such an allegation.

¹⁰ As discussed in the Department's response to OSC, the curriculum being used in the Harvard grant was not submitted, or required to be submitted, for review as part of the application package. The applicant did, however, include appendix D, which discussed the first session of the Identity Project ("IP") Curriculum.

III. Allegation that IES violated its statutory authority in making the Harvard University Grant

Allegation

The whistleblower alleges that IES violated its statutory duty to ensure that the activities carried out by IES are objective, secular, neutral, and non-ideological and are free of partisan political influence and racial, cultural, gender, or regional bias¹¹ by awarding a grant to Harvard University under the Education Research Grants Program administered by the National Center for Education Research ("NCER"), titled "Developing and Testing Training Modes for Improving Teachers' Race-Related Competencies to Promote Student Learners' Academic Adjustment ("Harvard grant")."¹² The Department, in its original report, concluded that IES did not violate its statutory duty in awarding this grant to Harvard. After reviewing the report, OSC raised a concern that the Department limited its factual inquiry with respect to this allegation. The Department reaffirms that it conducted a fulsome inquiry into the whistleblower's allegation but appreciates the opportunity to supplement its original conclusions.

The whistleblower posits that Harvard is promoting a certain partisan political and ideological agenda [i.e., critical race theory] "that half of the country would neither approve of taxpayer funding for it, nor accept any data it may yield. Funding the study with taxpayer dollars could result in a PR disaster for ED".¹³ In addition, the whistleblower explicitly asks "Why is ED (under this current administration) funding this proposal at all" and makes the argument that if [former] Secretary DeVos had known about the content of the Harvard grant that she would have disapproved it on its face because of the prior Administration's stance on diversity, equity and inclusion, as set out in E.O. 13950.¹⁴ After reviewing the grant, the whistleblower asserts that "there is no justified or justifiable reason to encourage teachers to 'infuse' ideological cultural identification into teaching, nor is the grant seeking to determine any justifiable reason"¹⁵ and

¹¹ 20 U.S.C. §§ 9511(b)(2)(B), 9514(f)(7) (2020).

¹² Grant Award No. R305A200278.

¹³ 9/8/2020 email from the whistleblower to ED supervisor.

¹⁴ Executive Order 13950

¹⁵ This argument is in response to a statement on p. 63 of the grant application that "the Identity Project curriculum is comprised of a series of activities and assignments covered over an 8-week period that directly engage students and teachers in practices that promote ethnic and racial identity and enable key aspects of culturally sustaining pedagogies (CSP)." What the whistleblower fails to note is that the principal investigator presents a scientifically valid reason for incorporating "cultural identification" into teaching, along with the positive effects of doing so. "Education scholars have noted that teachers' engagement in CSP represents a key lever of change to reduce ethnic-racial academic inequalities (Delpit, 2006; Hammond, 2015). . . . CSP emphasizes the need for educators to move beyond teaching in ways that are relevant or responsive to students' cultural experiences and toward creating learning environments that support and sustain the cultural identities of learners (Paris, 2012). Thus, teacher training is an essential component of preparing teachers to implement an ERI-based curriculum, and implementation of such curriculum will provide teachers with concrete and manualized lesson plans to enact CSP in their classrooms."

“that the racial-essentialism of this grant is very much a partisan ideology¹⁶ of the political left.”¹⁷

Background

The Director of IES (“Director”) is appointed by the President and confirmed by the Senate and is responsible for, among other things, ensuring that the IES carries out its activities in a manner that is objective, secular, neutral, and non-ideological and free of partisan political influence and racial, cultural, gender, or regional bias.¹⁸ The Director is also required to ensure that the scientific methodology applied in conducting research, development, evaluation, and statistical analysis is consistent with the standards for those activities. In addition, all grants, contracts, or cooperative agreements awarded by IES are, at a minimum, required to be awarded on a competitive basis, and, when practical, through a process of peer review. Further, the Director is required to establish a peer review procedure (involving highly qualified individuals with an in-depth knowledge of the subject to be investigated) for reviewing and evaluating all applications for grants and cooperative agreements that exceed \$100,000.¹⁹

Unlike other discretionary grant programs that are administered by the Department, the IES awards process, by design, does not use the Secretary’s supplemental priorities,²⁰ which reflect the Secretary’s and the Administration’s vision for American education, nor does it offer competitive preference points to reward certain types of applicants or activities. This is to ensure that IES, as a national Federal research agency, maintains its independence to carry out its activities in a manner that is free of partisan political influence.

The Harvard grant proposed to develop and test three modes of delivery for a professional development program designed to prepare educators to implement a school-based curriculum that aims to build students’ ethnic and racial identity (“ERI”) to improve academic outcomes and close the academic achievement gap.

As documented in the grant application:

The ethnic-racial academic achievement gap is among the most egregious social inequalities of U.S. society (Bradbury, Corak, Waldfogel, & Washbrook, 2015). Compared to non-Latino White youth, Black and Latino youth are less likely to meet grade-level expectations in math and reading (NCES, 2018), get tracked into honors or advanced

¹⁶ To the extent that the Whistleblower alleges that this grant to Harvard University is not “nonideological,” it is important to note that the statutory phrase “secular, neutral, and nonideological” is derived from the Supreme Court’s Establishment Clause jurisprudence and the term “nonideological” cannot be read in isolation. The Court coined the phrase “secular, neutral, and nonideological” to refer to the conditions under which religious schools and other organizations could receive government benefits or provide services to the public consistent with the Establishment Clause. *See, e.g., Comm. For Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973) (“In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid [to religious schools] in whatever form is invalid.”); *Tilton v. Richardson*, 403 U.S. 672, 687 (1971) (“Our cases from *Everson* to *Allen* have permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school that they attend.”). The provision is designed to ensure that the services funded by the Department, and administered by State and local entities, are not religious in content (for example, religious instruction). In reviewing Grant Award No. R305A200278, the Team did not find any evidence to suggest – nor does the Whistleblower allege – that IES was funding religious content.

¹⁷ Email from the whistleblower’s counsel to investigators on 11/18/2022 at 3:59PM. These examples are not meant to be exhaustive, but rather serve as an illustrative example of the concerns the whistleblower has regarding the the Harvard grant.

¹⁸ 20 U.S.C. § 9514(f)(7) (2020).

¹⁹ 20 U.S.C. § 9534(b)(1) (2020).

²⁰ [Final Priorities and Definitions: Secretary’s Supplemental Priorities and Definitions for Discretionary Grants Programs. 86 Fed. Reg. 70612 \(December 10, 2021\).](#)

placement courses (Card & Giuliano, 2015), graduate from high school (McFarland, Stark, & Cui, 2016), and complete bachelor's degrees (NCES, 2018). These inequities in academic outcomes are explained, in part, by ethnic-racial minority ("ERM") youths' experiences of ethnic-racial discrimination, which are consistently associated with poorer mental and physical health (Pascoe & Smart Richman, 2009), and can interfere with students' ability to concentrate on and excel in their schoolwork (Levy, Heissel, Richeson, & Adam, 2016). Given that ERM youth comprise more than half of U.S. public school students (NCES, 2018) and are driving the nation's population growth (U.S. Census Bureau, 2015), it is imperative to identify paths toward dismantling ethnic-racial inequalities in academic outcomes. Decades of theoretical (e.g., Neblett, Rivas-Drake, & Umaña-Taylor, 2012) and empirical research (e.g., Miller-Cotto & Byrne, 2016) suggest that supporting ethnic-racial identity (ERI) development of ERM student learners is a promising avenue to pursue to reduce academic inequality. Moreover, findings from a randomized control trial (RCT) supported the efficacy of an ERI school-based curriculum (i.e., the Identity Project) for promoting students' ERI and, in turn, reducing mental health problems and increasing general well-being and academic adjustment (Sladek, Umaña-Taylor, Wantchekon, McDermott, & Updegraff, 2019, under review; Umaña-Taylor, Kornienko, Bayless, & Updegraff, 2018a). The next step is to identify the most efficient and effective method to prepare educators to engage with students on topics of ethnicity-race and effectively deliver this program in their classroom.

Accordingly, the goal of this Development and Innovation (Goal Two) proposal is to develop and pilot test three different modes of delivery for a comprehensive training program designed to prepare educators to implement an evidence-based ERI development curriculum (i.e., the Identity Project) in their high school classrooms.

Consistent with IES' practices, and as detailed more fully in the Department's original report, the peer reviewers assigned to review this application assessed the strengths and weaknesses of the application as related to each of the four published review criteria—significance, research plan, personnel, and resources—in order to determine the likelihood that the proposed research will have a substantial impact on the pursuit of that underlying purpose.²¹ Ultimately, the full panel reviewed the Harvard application and members independently assigned final scores for each of those criteria, as well as a final overall score. As a result of its final score, the Harvard University application was funded in accordance with IES guidelines.

Discussion

The statutory provisions in 20 U.S.C. §§ 9511(b)(2)(B), 9514(f)(7), 9516(b)(8), along with IES' reliance on its independent scientific peer review process,²² are designed to ensure that IES carries out its activities in a manner that is free of partisan political influence, and that funding decisions are based on scientific merit. If the Department's political leadership had an opportunity to influence the Director into rejecting this proposal based on its content or on the leadership's opposition to diversity, equity, and inclusion training, or on the fact that "half the country wouldn't support funding it" then it could run afoul of the statutory responsibilities to ensure that activities of IES are carried out in a manner that is free of partisan political interference. The fact that none of those things occurred and that the grant to Harvard was funded, reinforces the fact that IES adhered to its statutory obligations.

²¹ [IES FY 2020 Request for Applications Education Research Grants CFDA Number: 84.305A](#) at p.52.

²² See discussion on pp. 13-14 of Department response to OSC dated 12/22/2022 for a fulsome discussion of IES peer review process.

Peer reviewers found the grant application provided well-documented support that “engaging in this developmental process has been consistently positively associated with adolescents’ academic adjustment, as noted by a recent meta-analysis of 47 empirical studies.”²³ In addition, the grant application documents that “findings from a randomized control trial supported the efficacy of an ERI school-based curriculum (i.e., the Identity Project) for promoting students’ ERI and, in turn, reducing mental health problems and increasing general well-being and academic adjustment.”²⁴

The whistleblower claims that bringing teachers to the Harvard Graduate School of Education campus over a period of 4 days to engage in activities and lessons designed to further their learning in four intersecting domains—(1) gaining ERI content knowledge, (2) engaging in self-reflection regarding their own ERI, (3) understanding systemic inequities and how they contribute to ethnic-racial stereotypes and threats faced by members of ERM groups, and (4) learning strengths-based facilitation strategies for discussing issues of race and ethnicity in the classroom -- is intended “to indoctrinate teachers by assuming unidentified ‘systemic inequities’ that contribute to unnamed stereotypes.”

Investigating this allegation, the Department conducted a thorough review of the applicable laws and regulations, policies, practices, procedures, and memoranda specific to the Harvard grant. That review yielded no evidence that IES was pursuing a particular ideological or political objective around the topic of ethnic and racial identity or providing any sort of preference for applicants proposing such research projects. The FR notice announcing the competition stated that NCER would hold a total of 5 competitions and that applicants needed to address one of 8 specific topic areas.²⁵ The FR notice directed eligible applicants to the Request for Applications (“RFA”) for specific application and program requirements, including the standards under which each application would be evaluated.²⁶ The Department found no evidence, and the whistleblower provided us no evidence, to support the assertion that IES was pushing a particular ideological or political agenda through this grant competition or by awarding the Harvard grant.

IES' mission is to provide scientific evidence on which to ground education practice and policy and to share this information in formats that are useful and accessible to educators, parents, policymakers, researchers, and the public.²⁷ This mission would be compromised if individuals outside of the scientific community influenced/determined/decided what was worthy of scientific study/review based on partisan political influence, rather than a commitment to science. The record shows that IES maintained both its commitment to scientific objectivity and scientific decision-making by adhering to its principles of scientific peer review, as well as its commitment to ensuring that funding decisions are not subject to undue political interference.

²³ *Ibid* at p.58

²⁴ *Ibid* at p.52

²⁵ [Notice Inviting Applications, 84 Fed. Reg. 28533.](#)

²⁶ The Department is required to publish a NIA in the FR for all IES discretionary grant competitions. IES supplements these FR notices with an RFA, which sets out the general requirements for a grant application and provides (1) further detail on research topics and project types; (2) information about other narrative content for the application, including required appendices; and (3) information on competition regulations and the review process and criteria specific to project type; and (4) a checklist for applicants to use to ensure that all required application elements are included in order to advance to scientific peer review. 8 topic areas: Career and Technical Education; Cognition and Student Learning; Early Learning Programs and Policies; Education Technology; Effective Instruction; English Learners; Improving Education Systems; Postsecondary and Adult Education; Reading and Writing; Science, Technology, Engineering, and Mathematics; and Social and Behavioral Context for Academic Learning.

²⁷ U.S. Dep’t of Education, Institute of Education Sciences, About IES: Connecting Research, Policy, and Practice, <https://ies.ed.gov/aboutus/>

IV. Allegation that OESE Violated its Statutory Authority in Making Grants to the Midwest and Plains Equity Assistance Center

The whistleblower alleges that the Department's OESE abused its authority in funding Grant Award Nos. 12D004D110021 and S004D160011 to Indiana University, Indianapolis, Indiana, for the Midwest and Plains Equity Assistance Center. In its original report, the Department concluded that OESE's awards to the Midwest and Plains Equity Assistance Center were consistent with its statutory authority under Title IV of the Civil Rights Act of 1964 ("Title IV").²⁸ The Department responds below to OSC's concern that the Department limited its factual inquiry with respect to this allegation, explaining that the Department conducted a fulsome investigation into materials available and found the grant award to be consistent with the Department's statutory authority...

Background

The Equity Assistance Center (EAC) program is authorized under Title IV and its implementing regulations at 34 C.F.R. Part 270. Specifically, section 2000c-2 of Title IV provides:

The Secretary is authorized, upon the application of any school board, State, municipality, school district or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption, and implementation of plans for the desegregation of public schools. Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation, and making available to such agencies personnel of the Department of Education or other persons specifically equipped to advise and assist them in coping with such problems.

This program awards grants "to operate regional EACs that provide technical assistance (including training) at the request of school boards and other responsible governmental agencies in the preparation, adoption, and implementation of plans for the desegregation of public schools" – which in this context means plans for increasing equity (including desegregation based on race, national origin, sex, and religion) – "and in the development of effective methods of coping with special educational problems occasioned by desegregation."²⁹ The EAC program is funded annually and is one of the Department's longest standing investments in technical assistance.

The EAC regulations authorize EAC grantees to provide desegregation assistance, which may include, among other activities:

- (1) Dissemination of information regarding effective methods of coping with special educational problems occasioned by desegregation;
- (2) Assistance and advice in coping with these problems; and
- (3) Training designed to improve the ability of teachers, supervisors, counselors, parents, community members, community organizations, and other elementary or secondary

²⁸ 42 U.S.C. §§ 2000c, 2000c-2, 2000c-5 (2020).

²⁹ 34 C.F.R. § 270.1 (2021).

school personnel to deal effectively with special educational problems occasioned by desegregation.³⁰

An EAC's typical activities in providing desegregation assistance may include, but are not limited to –

- Training to develop educators' skills in areas such as distributing information on successful education practices and the legal requirements related to nondiscrimination in education programs;
- Assisting schools in dealing with harassment, bullying, and prejudice reduction;
- Instructing school officials on how to prevent sexual harassment and combat biases.³¹

On March 10, 2011, and on July 18, 2016, OESE issued a Notice Inviting Applications (NIA) for the EAC competitions for fiscal years 2011 and 2016, respectively. Both NIAs note the deadlines for the competition, provide a description of the funding opportunity, and include information about the award, eligibility, submission process and review process.

Indiana University timely submitted its EAC applications for both competitions. In accordance with its practice, OESE assembled a team of peer reviewers with expertise in evaluating the quality of the projects. OESE briefed reviewers on the selection criteria from the Education Department General Administrative Regulations ("EDGAR")³² as well as competition priorities referenced in the respective NIAs. After each reviewer completed their review independently, OESE assembled peer review panels to discuss each reviewer's evaluations of the applications and conferred to determine a final score for each application. After the applications were scored, OESE placed the applications in rank order. OESE identified the highest ranked application in each geographic region, which for the 2011 and 2016 competitions was Indiana University; as such, OESE awarded Indiana University the grants.

Discussion

Neither OSC nor the whistleblower point to any aspect of these applications that the Department funded or provide any factual support to show that these awards violated any laws or regulations at the time they were funded. Notwithstanding these limitations, the Department conducted a fulsome investigation based on an analysis of the specific statutory authority for the particular grant program, FR notices, application packages, GANs, and APRs, as well other documents obtained from the whistleblower, Department employees, and Department databases.

Accordingly, the Department finds that these awards were consistent with the Department's Title IV authority and the whistleblower provided no information to substantiate their allegation to the contrary.

With respect to Grant Award 12D004D110021 (October 1, 2011 – September 30, 2016), there was no information provided by OSC or the whistleblower to show that any of this EAC's activities during the project period violated any laws or regulations. Notwithstanding this, the Department thoroughly reviewed relevant documentation. Accordingly, it is unclear to the Department what factual inquiry the Department failed to engage in with respect to this grant.

³⁰ 34 C.F.R. § 270.4 (2021).

³¹ See [Training and Advisory Services - Equity Assistance Centers \(ed.gov\)](#).

³² 34 C.F.R. § 75 (2021).

The Department engaged with the factual support the whistleblower provided for their allegation that the Department abused its authority in awarding Grant Award S004D160011. This support consisted of materials this EAC published in February 2021 along with a disclaimer required by the Department's regulations on these materials during the project period from October 1, 2016 - September 30, 2022. The Department carefully considered the whistleblower's assertion that the presence of the required disclaimer on these materials was proof that it was abusing its authority. With respect to the materials to which the whistleblower objects, the Department determined that these materials are within the scope of work that is typical and permissible by EACs, specifically, assisting schools in dealing with harassment, bullying, and prejudice reduction and instructing school officials on how to prevent harassment and combat biases.³³ Accordingly, the Department found no violation of statutory authority.

V. Conclusion

The Department appreciates the opportunity to provide additional information regarding these allegations. Please let us know if there is any additional information we can provide that will be helpful to you in resolving this referral.

³³ Moreover, as OCR notes in its previously discussed Fact Sheet, these types of activities – which fit squarely under the four examples of activities identified above – are not categorically prohibited by Title VI, and we found no evidence of a Title VI violation.