



**U.S. OFFICE OF SPECIAL COUNSEL**  
**1730 M Street, N.W., Suite 300**  
**Washington, D.C. 20036-4505**

**The Special Counsel**

September 17, 2025

The President  
The White House  
Washington, D.C. 20500

Re: OSC File No. DI-19-005088

Dear Mr. President:

I am forwarding to you a report transmitted to the U.S. Office of Special Counsel (OSC) by the U.S. Department of Education (ED) in response to the Special Counsel's referral of disclosures of wrongdoing within the Office of the Chief Financial Officer, Contracts and Acquisition Management (CAM) in Washington, D.C.<sup>1</sup> OSC has reviewed the disclosure, the agency report, and the whistleblower comments, and, in accordance with 5 U.S.C. § 1213(e), I have determined that the report contains the information required by statute and the findings appear reasonable. As summarized below, the agency partially substantiated the allegations.

The whistleblower, [REDACTED], an ED Contracting Officer who consented to the release of [REDACTED] name, alleged that dating back to 2008, CAM (1) entered into non-severable research study contracts without ensuring the availability of adequate appropriations, in violation of federal laws;<sup>2</sup> and (2) paid for research study services using funds from incorrect appropriations accounts, including using expired funds, in violation of federal law.<sup>3</sup> The agency investigation partially substantiated the first allegation and did not substantiate the second.

Given the volume of contracts CAM has awarded since 2008, ED focused its investigation on contracts related to the National Assessment of Educational Progress (NAEP).<sup>4</sup> ED also focused its investigation on contracts procured after 2015 because a more thorough

---

<sup>1</sup> The whistleblower's allegations were referred to then Secretary Betsy DeVos for investigation pursuant to 5 U.S.C. § 1213(c) and (d). ED's Office of the General Counsel's (OGC) Division of Business and Administrative Law conducted the investigation. Cindy Marten was delegated authority to review and sign the agency report.

<sup>2</sup> The whistleblower alleged that CAM routinely violated the Antideficiency Act, the Adequacy of Appropriations Act, the bona fide needs rule, and the prohibition against making or authorizing an expenditure exceeding an apportionment. These provisions require the agency to fund the entire non-severable service in the fiscal year in which the need arises, even though the service will be completed in a later fiscal year. See 31 U.S.C. § 1341(a)(1)(A); 41 U.S.C. § 6301; 31 U.S.C. §§ 1502, 1517.

<sup>3</sup> See 31 U.S.C. §§ 1502, 1552.

<sup>4</sup> CAM is responsible for the solicitation, award, administration, and closeout of most ED contracts, including research study contracts related to the NAEP. The agency confirmed with the whistleblower that his allegations included NAEP contracts. Pursuant to 20 U.S.C. § 9622(b), the agency must carry out a NAEP, which includes a national research study every two years on fourth and eighth grade students' achievements in reading and math; a national assessment in reading and math for twelfth graders in regularly scheduled intervals; and state assessments of student achievement in reading and math for fourth and eighth graders.

review of prior contracts would require ED staff to physically review hundreds of hard copy contract files. Therefore, its findings for the period of 2008-2015 are based on a limited number of contract files and mostly rely on circumstantial evidence and witness statements.

The investigation found that some contracts issued before 2013 were likely structured in ways that violated federal appropriations laws, particularly the bona fide needs rule.<sup>5</sup> The investigation found that CAM did not have a policy or consistent practice in place for how to structure research study contracts—i.e., how to determine whether a contract is for the needs of one year or more; and whether contract requirements are severable or non-severable. Instead, it was CAM's practice to break up and incrementally fund parts of larger contracts, such as the NAEP contracts, to spread the cost out over more than one year rather than fully funding the contracts up front in the year the appropriations were granted.<sup>6</sup> This practice continued unabated until 2013, when an internal workgroup issued a memorandum, in concurrence with ED's OGC, that outlined procedures for how to properly structure and fund contracts. The workgroup reviewed previous contracts administered by CAM and concluded that some of the contracts that were in place at the time CAM issued its 2013 memorandum were structured and/or funded improperly and were not brought into compliance through modification. The investigation found that prior to 2013, CAM entered into contracts, both NAEP and others, without ensuring the availability of adequate appropriations at the time of the award, which likely resulted in violations of federal law, and that practice continued for some time after 2013 for contracts that were already in place. It further found that ED did not report violations of the Antideficiency Act as required under federal law.

OSC requested that ED provide more information on the number and value of the improperly structured contracts to accurately determine the scope of appropriations violations before the adoption of the 2013 memorandum. ED responded that such a review was not feasible given the age and volume of the hard copy contract files.

For contracts issued after the 2013 memorandum, the investigation found that CAM has made good faith efforts to fund these contracts based on the procedures articulated in the 2013 memorandum. The whistleblower disagreed with this finding, particularly on ED's use of multi-year contracting authority to fund what the whistleblower considers the bona fide need of the year in which the services are required. The whistleblower explained that because the NAEP statute requires ED to produce a single report every two years—representing the bona fide need of one year even if performance exceeds that time—the contract must be funded in full in the year appropriations are granted. However, ED maintained that the NAEP statute does not exclusively require a single biennial report. Rather, it requires multiple reports in the form of state and national assessments and data on reading and math for fourth, eighth, and twelfth

---

<sup>5</sup> The bona fide needs rule requires that funds obligated for a fixed period are only available for payment of expenses properly incurred within that period. Therefore, an agency may not obligate current appropriations for the bona fide needs of future fiscal years without statutory authority. See 31 U.S.C. § 1502(a).

<sup>6</sup> The report notes that ED had no-year appropriations authority for NAEP contracts from 2003-2008. A no-year appropriation is funding that does not expire and remains available for the agency to use until the funds are expended. Beginning in fiscal year 2009, the appropriations for NAEP contracts were multiple year appropriations and, therefore, available for obligation for a specific period in excess of one year.

graders at differing intervals that each provide value to the agency. The report noted that there is not a single contract to carry out the NAEP. Instead, various contractors are tasked with fulfilling various aspects of the statute. Therefore, ED asserted, it is permissible to separate the requirements for NAEP contracts into severable and non-severable portions, fund each non-severable portion of a research contract during the fiscal year the service is needed, and fund each severable service when the contractor performs the service. ED relied on an exception to the bona fide needs rule codified in the Federal Acquisition Streamlining Act.<sup>7</sup> ED further noted that, historically, the agency has not received sufficient appropriations to fully fund the NAEP contracts at the time of award. Given this context, ED took the position that multi-year contracting is justified as the NAEP contracts consist of severable and non-severable services that represent the bona fide need of more than one year.

The investigation did not substantiate the allegation that CAM paid for research study services using funds from incorrect appropriations accounts. The report noted that it is ED's Budget Service, with the approval of the U.S. Office of Management and Budget, that prepares funding apportionments for CAM. Every year, ED's Principal Office works with CAM to develop an Acquisition Plan that is then reviewed by Budget Service, which confirms that funding is available. Upon the request of the Principal Office, Budget Service makes funding available for obligation by allotting funds to the Principal Office consistent with the appropriations statute and approved funding apportionments. In other words, CAM cannot obligate funds to a contract unless Budget Service makes those funds available within the spending account.

The report further explained that agencies may obligate expired funds to contracts in limited circumstances. The investigation did not uncover any evidence that Budget Service misappropriated expired funds to research study services.

In addition to the comments discussed previously, the whistleblower criticized ED for focusing its discussion on CAM's policies and procedures for how to structure and fund NAEP contracts, rather than evaluating specific contracts. The whistleblower also criticized ED's reliance on interviews and limited documentation for contracts issued before 2013.

In response to OSC's referral, ED committed to provide regular training on federal procurement law and CAM's policies to employees of CAM and the Institute of Education Sciences—the component of ED tasked with carrying out the research contract requirements. ED further committed to reevaluate the use of multi-year contract authority for funding and structuring future NAEP contracts and to seek statutory authority from Congress to continue incrementally funding NAEP contracts.

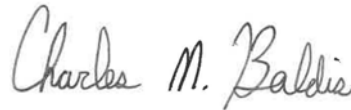
I thank the whistleblower for bringing these allegations to OSC. It appears that the whistleblower's assertion that each NAEP report represents the bona fide need of the year in

---

<sup>7</sup> Pursuant to 41 U.S.C. § 3903, executive agencies may obligate current appropriations to enter a multi-year contract for the acquisition of both non-severable and severable services for the bona fide needs of up to five fiscal years. See *Dep't of Health & Human Servs. Multiyear Contracting & the Bona Fide Needs Rule*, U.S. Government Accountability Office, Comptroller General Decision, B-322455, Aug. 16, 2013.

which services are required is a correct interpretation under the law. It is not clear, though, whether ED's approach to bundle the requirements of the NAEP statute, to give it more flexibility in structuring the contracts, is lawful. Yet, because ED appears to have a reasonable basis for how it has interpreted the law, and has committed to further evaluation and potential legislative changes, I have determined that the findings of the agency head appear reasonable. As required by 5 U.S.C. § 1213(e)(3), OSC has sent copies of this letter, the agency report, and the whistleblower's comments to the Chairman and Ranking Member of the Senate Committee on Health, Education, Labor and Pensions and the Chairman and Ranking Member of the House Committee on Education and Workforce. OSC has also filed redacted copies of these documents and a redacted copy of the referral letter in our public file, which is available at [www.osc.gov](http://www.osc.gov). This matter is now closed.

Respectfully,

A handwritten signature in cursive script that reads "Charles M. Baldis".

Charles N. Baldis  
*Senior Counsel and Designee  
of Acting Special Counsel Jamieson Greer*

Enclosures