



UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

December 22, 2022

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 report is in response to your June 14, 2021 letter to the U.S. Department of Education (ED) regarding a whistleblower disclosure alleging violations of law, rule, or regulation. The Secretary has delegated to me the authority to review and sign written reports of investigation prepared in response to referrals from the Office of Special Counsel (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).

In your June 14, 2021, letter, you asked ED to investigate whether:

- The issuance of Grant Award No. U165A170062 to Fort Wayne Community Schools ("FWCS") violates Title VI of the Civil Rights Act of 1964 ("Title VI") and current Supreme Court precedent on affirmative action in educational settings;
- 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
- 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:

- 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;
- 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;" and
- 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.

The enclosed report sets forth the findings of ED's investigation.

Sincerely,

Cindy Marten

Cindy Marten
Deputy Secretary
U.S. Department of Education

Enclosures



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

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

Report Date: December 22, 2022

INTRODUCTION

On June 14, 2021, the 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:

- The issuance of Grant Award No. U165A170062 to Fort Wayne Community Schools (“FWCS”) violates Title VI of the Civil Rights Act of 1964 (“Title VI”)¹ and current Supreme Court precedent on affirmative action in educational settings;
- 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
- Any additional, related allegations of wrongdoing discovered during the investigation of the foregoing allegations.

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- 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.

¹ 42 U.S.C. § 2000d (2020).

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

INVESTIGATORY PROCESS

The Office of the General Counsel was assigned to investigate this matter (“OGC”) and the Deputy Secretary has been delegated the authority to review, sign, and submit written reports of investigations prepared in response to referrals from the OSC regarding whistleblower disclosures.³ General Counsel Lisa Brown tasked three career attorneys in OGC (the “Team”) with investigating the Whistleblower’s allegations. One member of the Team works for the Division of Legislative Counsel and the other two members work for the Division of Educational Equity. No member of the Team had previous engagement with the grants at issue or any other matter involving the Whistleblower.

The Whistleblower has expressed concerns that OGC has a conflict of interest and, as a result, cannot conduct a fair and impartial investigation.⁴ Specifically, the Whistleblower claims that OGC cannot impartially carry out this investigation due to: (1) the direct or indirect involvement of OGC attorneys generally in the grant awards process, which the Whistleblower argues creates a conflict of interest for the Team to investigate other OGC attorneys; (2) the work of other OGC attorneys on separate personnel matters involving the Whistleblower; and (3) the Team being subject to undue influence from OGC senior leadership and staff who may have worked on these matters. The Team responded to the Whistleblower’s claims by explaining that OGC has taken significant and meaningful steps to ensure that its investigation would be thorough, impartial, and unbiased—no members of the Team have worked on the grants at issue, nor have they worked on any other matters relating to the Whistleblower; moreover, the General Counsel and two of the three members of the Team were not employed by OGC at the time the grants were awarded. OGC also explained that it has taken steps to “firewall” the Team from any other matters relating to the Whistleblower. The Team has carried out a careful, objective, and confidential investigation of the Whistleblower’s allegations and its conclusions are solely based on the Team’s investigation.

On March 7, 2022, the Team contacted OSC to ask if the Whistleblower would consent to being interviewed by the Team. The Whistleblower later contacted the Team directly, revealing their identity⁵ and sharing several documents that they deemed pertinent to the investigation. Over the course of this investigation, the Team made numerous attempts to meet with the Whistleblower, and ultimately conducted three interviews with them and their counsel on July 6, July 8, and November 21, 2022. In addition, the Team conducted a total of 13 interviews of individuals from each of the Department offices with roles relating to the four identified grants:

- Program Attorney for Magnet Schools Assistance Program, Division of Educational Equity, OGC (who worked on the program during the Magnet Schools grant in question);
- Team Lead, Magnet Schools Assistance Program, OESE;
- Director, Program Legal Group, Office for Civil Rights (“OCR”);

³ [Delegation of Authority](#)

⁴ The Team understands from email correspondence with the Whistleblower and their counsel that the Whistleblower would prefer for the Office of the Inspector General (“OIG”) to conduct this investigation. OIG, acting within its discretion, declined to investigate this matter. 5 U.S.C. § 7(a) (2020).

⁵ While the Team was constituted prior to knowing the Whistleblower’s identity, OGC ensured that none of the Team members had worked on the grants at issue or had any knowledge of pending personnel actions against the Department. While the Team is now aware of the Whistleblower’s identity, it is not disclosing it in this report.

- Attorney, Program Legal Group, OCR;
- Attorney, Program Legal Group, OCR;
- Deputy Director for Science, IES;
- Deputy Director for Administration and Policy, IES;
- Commissioner, National Center for Education Research (“NCER”), IES;
- Commissioner, National Center for Special Education Research (“NCSER”), IES;
- Team Lead, NCER, IES;
- Program Attorney for the IES, OGC;
- Program Officer, Program and Grantee Support, OESE; and
- Program Officer, Program and Grantee Support, OESE.

As part of its investigation, the Team reviewed the applicable laws and regulations, policies, practices, procedures, and memorandums specific to the grants under investigation. This included reviewing and analyzing the specific statutory authority for the particular grant programs, Federal Register (“FR”) notices, application packages, Grant Award Notification (“GAN”), and Annual Performance Reviews (“APR”), as well other documents obtained from the Whistleblower, Department employees, and Department databases.

ALLEGATIONS, FINDINGS AND ANALYSES

I. ALLEGATIONS THAT THE DEPARTMENT VIOLATED TITLE VI

The Whistleblower alleges that the Department violated Title VI by funding the aforementioned grants to FWCS and Harvard University because: (1) “funding the FWCS grant amounts to federal funding of a program that discriminates against individuals based on race”; and (2) the grant to Harvard University is “inherently biased in nature.”⁶ The Whistleblower also alleges that the Department violated Title VI by funding two grants to Indiana University for the Midwest and Plains Equity Assistance Center, which created materials that contained “divisive concepts.”⁷

Title VI seeks to ensure that public funds are not spent in a way that encourages, subsidizes, or results in discrimination based on race, color, or national origin in programs and activities receiving Federal financial assistance. Specifically, 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

Section 602 of Title VI requires Federal departments and agencies that extend financial assistance to issue rules, regulations, or orders effectuating the prohibition on discrimination [in section 601] based on race, color, or national origin.⁹

⁶ OSC File No. DI-21-000533 (pp. 2-3).

⁷ The term “divisive concepts” is defined in Executive Order 13950, which was revoked on January 20, 2021, by Executive Order 13985, and is discussed in greater detail below in Section VI. *See infra* notes 82, 83.

⁸ 42 U.S.C. § 2000d (2020).

⁹ See 42 U.S.C. § 2000d-7 (2020).

The Department’s regulations implementing Title VI prohibit intentional discrimination 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 facilities, or other aspects of program operations.¹⁰

The regulations go on to define a “recipient” of Federal financial assistance as “any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary.”¹¹

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 clarifies that *Title VI does not apply to the Federal Government* (emphasis added).¹²

In the grants at issue, FWCS, Harvard, and Indiana University were the recipients of Federal financial assistance from the Department, and, as such, were required to comply with Title VI and the Department’s regulations during their respective grant periods.¹³ Given that the plain language of the statute and the Department’s implementing regulations prohibit a *recipient* of Federal financial assistance from discriminating based on race, color, or national origin, and that the Department is not, by definition, a recipient of Federal financial assistance, it follows that the Department itself could not violate Title VI for awarding the grants at issue.¹⁴

We find these allegations that the Department violated Title VI to be misplaced, and as such, the Team does not substantiate the allegation that the Department violated Title VI in awarding these grants.

The remainder of this report addresses the Whistleblower’s remaining allegations.

II. ALLEGATION 1: THE DEPARTMENT’S MAGNET SCHOOLS ASSISTANCE PROGRAM GRANT TO FWCS WAS IMPROPER

The Whistleblower alleges that the Department’s Magnet Schools Assistance Program (“MSAP”) grant to FWCS in 2018 was improper because it violated current U.S. Supreme Court precedent on affirmative action. Specifically, the Whistleblower alleges that because FWCS’s

¹⁰ 34 C.F.R. § 100.3 (2021).

¹¹ 34 C.F.R. § 100.13(i) (2021).

¹² [U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, TITLE VI LEGAL MANUAL at Section V, pp. 13-14 \(2021\)](#).

¹³ If the Whistleblower has evidence demonstrating that they are the victim of intentional discrimination by FWCS, Harvard or Indiana University, they have the right to file suit in federal court to address those allegations. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 702–03 (1979). That right is limited to suits against the recipients of federal funds; suits against the funding agencies are not authorized. See *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 191–92 (4th Cir. 1999).

¹⁴ The OSC referral asks a very specific legal question—whether the Department violated Title VI in awarding these grants. The Team did not find it necessary to discuss the specifics of these grants to answer that question, rather instead relying on the applicable law and accompanying regulations for Title VI. In the sections to follow, the Team investigated the underlying concerns raised by the Whistleblower to determine, consistent with the OSC referral, if the Team could substantiate any additional allegations of wrongdoing on the behalf of the Department.

MSAP application¹⁵ proposed to employ the individualized use of race in a lottery process for selecting students to attend oversubscribed schools, i.e., schools where there are more applicants than space available, the Department’s MSAP award to FWCS was improper.

A. THE MSAP

The MSAP was enacted by Congress in 1984 to provide financial assistance to local educational agencies (“LEAs”) that lost federal funds because of the repeal of the Emergency School Aid Act (“ESAA”). ESAA provided federal assistance to local school districts undergoing desegregation either voluntarily or in compliance with court decisions. Because of its concern that, in the face of considerable need for desegregation assistance, funding for desegregation had been sharply reduced, Congress passed the MSAP to provide federal assistance to LEAs involved in desegregation efforts. The MSAP has been continuously reauthorized by Congress and provides grants to assist eligible LEAs or consortia of LEAs in desegregating schools by supporting the elimination, reduction, and prevention of racial isolation in elementary and secondary schools with substantial proportions of minority students. These funds are used in magnet schools that are part of a court-ordered or an approved voluntary desegregation plan and are designed to bring students from different social, economic, ethnic and racial backgrounds together.¹⁶ The program seeks to reduce minority group isolation by funding projects that propose to provide magnet schools with academically challenging, innovative instructional approaches, or specialized curricula “designed to bring students from different social, economic, ethnic, and racial backgrounds together.”¹⁷ As part of the MSAP’s focus on improving academic achievement and reducing minority group isolation, the program included a new statutory priority in 2017 to give a preference to applicants proposing to increase racial integration by taking into account socioeconomic diversity in designing and implementing magnet programs.¹⁸

The program statute requires that before OESE makes an award to an eligible applicant, the Assistant Secretary for OCR “determines that the civil rights assurances described in 20 U.S.C. Section 7231d(b)(2)(C) will be met.”¹⁹ This includes assuring that the applicant will not—

1. engage in discrimination based on race, color, national origin, religion, disability, or sex in the hiring, promotion, or assignment of its employees or other personnel for whom it has administrative responsibility;
2. engage in discrimination based on race, color, national origin, religion, disability, or sex in the assignment of students to its schools or to courses of instruction within its schools; and
3. engage in discrimination based on race, color, national origin, religion, disability, or sex in the design or operation of extracurricular activities.

To make this specific determination, OCR consults with various Federal civil rights enforcement agencies, including DOJ (i.e., the Employment Litigation, Educational Opportunities and

¹⁵ A copy of FWCS’s MSAP grant application at issue is available online at: <https://oese.ed.gov/files/2018/11/0062-Ft-Wayne-Community-Schools.pdf>

¹⁶ 34 C.F.R. § 280.1 (2021) and 20 U.S.C. § 7231 (2020).

¹⁷ 20 U.S.C. § 7231(b)(2) (2020).

¹⁸ [Notice Inviting Applications, 81 Fed. Reg. 89911.](#)

¹⁹ [20 U.S.C. § 7231d \(2020\).](#)

Disability Rights Sections), the United States Equal Employment Opportunity Commission (“EEOC”), and the regional OCR office wherein the applicant is located. Additionally, OCR reviews the applications referred by OESE to determine whether there are any civil rights issues in a proposed plan (these actions will be collectively referred to as the “civil rights review”). If, during this review, OCR determines that there are potential civil rights issues with an applicant’s plan, OCR can work with the applicant to voluntarily address these concerns in order for the applicant to remain eligible to receive a MSAP award. If, after completing its civil rights review, OCR determines that the applicant will meet its civil rights assurances and the applicant’s plan complies with the civil rights laws that OCR enforces, the Assistant Secretary for OCR will sign a Nondiscrimination Determination form indicating that OCR has determined that the applicant’s civil rights assurances will be met.

OESE is responsible for administering the MSAP, which includes the MSAP competition.²⁰ Before the competition begins, OESE issues the notice of the competition. During the competition, OESE provides technical assistance to applicants. After the competition closes, OESE assembles peer review panels to review the applications, creates a numerical slate of the applications, refers the applications in the funding range to OCR for civil rights review, conducts a program review and risk assessment, and issues the awards.

B. THE FWCS MSAP GRANT

On December 13, 2016, the Department issued a Notice Inviting Applications (“NIA”) for the MSAP for new awards for fiscal year 2017.²¹ The NIA states that these grants are renewable for up to five years, notes the deadlines for the competition, provides a description of the funding opportunity, as well as information about the award, eligibility, submission process and review process. As part of the application process, the NIA requires applicants to provide all the information required in 34 C.F.R. 280.20(a) through (g) to satisfy the civil rights eligibility requirements found in 34 C.F.R. 280.20(a) and (b). The MSAP regulations at 34 C.F.R. 280.20(d) states:

Upon request, the LEA or consortium of LEAs shall submit any information that is necessary for the Assistant Secretary for Civil Rights to determine whether the assurances required in paragraphs (b)(3), (4), and (5) of this section are met.²²

FWCS timely submitted its MSAP application on April 11, 2017. After the competition’s closing date, in accordance with its practice, the Department assembled a team of peer reviewers with expertise in both magnet programs and in evaluating educational programs. The Department briefed these reviewers on the selection criteria and competition priorities referenced in the NIA. Multiple reviewers reviewed each application and after each reviewer completed their review independently, the Department assembled peer review panels to discuss each reviewer’s evaluations of the applications and confer to determine a final score for each application. After

²⁰ OESE and the Office of Innovation and Improvement (OII) were consolidated into a single office in late 2019. Since its consolidation, OESE administers the MSAP competition. FWCS’s MSAP award was made pursuant to the competition that was run by OII. See U.S. DEP’T OF EDUCATION, OFFICE OF INNOVATION AND IMPROVEMENT: UPDATE, <https://oese.ed.gov/archived/oii/#:~:text=OII%20makes%20strategic%20investments%20in,Programs%2C%20and%20Education%20Innovation%20Programs.>

²¹ See *Supra* note 18.

²² 34 C.F.R. § 280.20 (2021).

the applications were scored, the Department placed the applications in rank order, i.e., a numerical slate and then reviewed that numerical slate to determine which applications were in the funding range. Consistent with the statute, the Department forwarded the applications in the funding range to OCR for its civil rights review. As FWCS's application was in the funding range, it was sent to OCR for civil rights review.

Consistent with its practice, OCR reviewed FWCS's application and contacted the aforementioned DOJ components, the EEOC, and the regional OCR office in Chicago, IL, about FWCS. None of these agencies expressed a concern that FWCS would not meet its civil rights obligations. On June 12, 2017, OCR advised FWCS that it had started reviewing its MSAP application and asked to meet with the LEA to discuss its application. On June 21, 2017, OCR met with FWCS to discuss its proposed individualized use of race in the event FWCS needed to employ a lottery to select students for placement in oversubscribed schools. During the discussion, FWCS informed OCR that the individualized use of race referenced in its application did not, in fact, accurately reflect the LEA's proposal, because, in the event a lottery was necessary, its plan was to organize groups based on socioeconomic status rather than race. FWCS memorialized this correction in an email to OCR on June 23, 2017 and provided updated sections of its application to OCR reflecting that FWCS would, if necessary, use socioeconomic status rather than race in its lottery system. After reviewing the corrected information, OCR recommended approval of FWCS's MSAP application and the Acting Assistant Secretary for OCR signed the Nondiscrimination Determination on August 10, 2017. In addition to the June 23, 2017, email, the Team also reviewed multiple documents FWCS submitted to OESE that corroborate the correction to the initially provided description of the lottery. These documents include annual performance reviews submitted by FWCS to OESE in October 2019, 2020, and 2021, which confirm that the LEA did not employ the individualized use of race in its lottery proposals.²³ FWCS was notified of its grant award on September 26, 2018.²⁴

C. CONCLUSION

The Team concludes that FWCS' MSAP grant does not fund activity that employs the individualized use of race. While the initial proposal submitted by FWCS to the Department—and reviewed by the Whistleblower—indicated the use of race in a way that raised concerns, those concerns were addressed by OCR during its civil rights review as part of the application review process. Furthermore, the Team found that OESE and OCR confirmed that FWCS never used race in its administration of the lottery during the pendency of this grant. As such, the Team concludes that this allegation is not substantiated by the available information.

²³ OESE reviews these documents to prepare its Annual Performance Report to recommend whether to continue funding the award.

²⁴ The Department awarded 32 new awards to MSAP applicants for fiscal year 2017. While FWCS did not receive an award for fiscal year 2017, the Department was able to award FWCS a grant for fiscal year 2018 due to an increase in appropriations. 34 C.F.R. § 280.33(a) states, "In selecting among applications for funds appropriated for this program in excess of \$75 million, the Secretary first identifies those remaining applicants that did not receive funds under this program in the last fiscal year of the previous funding cycle." <https://www.ecfr.gov/current/title-34/subtitle-B/chapter-II/part-280/subpart-D/section-280.33>. This program's funding level for FY 2018 was \$105 million.

D. RECOMMENDATION

Based on the information described above, the Team recommends that OESE and OCR consider implementing a more robust system of information sharing about changes to an LEA's application that take place during the civil rights review. At present, the Team understands that the documents created during the civil rights review are not routinely provided to OESE. At a minimum, the two principal operating offices should commit to sharing information that would amend the original submitted application. OESE should also consider what award information it posts to its website. As OESE only posts an applicant's original submission or portion thereof, e.g., the abstract, the public is not made aware of any subsequent changes to an application that were made during the Department's civil rights review. OESE should consider posting information about any changes to applications that were made by the applicant because of either its programmatic review, if such changes are allowable, or the civil rights review. This would help to provide greater transparency about its awards.

III. ALLEGATION II: THE DEPARTMENT'S EQUITY ASSISTANCE CENTER GRANTS TO INDIANA UNIVERSITY VIOLATES ITS STATUTORY AUTHORITY

The Whistleblower alleges that the Department's Equity Assistance Center ("EAC") grants to Indiana University in 2011 and 2016 violate its statutory authority because it funds Indiana University's creation of materials that contain what the Whistleblower alleges are "divisive concepts" as defined by revoked Executive Order 13950.²⁵ To support this allegation, the Whistleblower directed the Team to a podcast series, which contained six videos entitled "Anti-Racism Podcast Series: The 20-Minute Talk" that was developed and uploaded to YouTube in 2021 by Indiana University's Midwest and Plains EAC as well as to anti-racism resources on the Center's webpage. The Whistleblower further asserts that a disclaimer that appears on the podcast series demonstrates that the Department abused its authority, because the videos contain "divisive concepts." This disclaimer states, in part, that the contents of presentation materials developed under the grant, do not necessarily represent the policy of the Department.²⁶ The Whistleblower asserts that the presence of the disclaimer is proof that Department staff – either OESE or OGC – reviewed and approved these materials before they were published. The Whistleblower stated that the Department is hiding behind the disclaimer as it continues to

²⁵ [Executive Order 13950, which is no longer in effect](#), defined divisive concepts as concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term "divisive concepts" also included any other form of race or sex stereotyping or any other form of race or sex scapegoating."

<https://www.federalregister.gov/documents/2020/09/28/2020-21534/combating-race-and-sex-stereotyping> This E.O. was revoked by E. O. 13985 (January 25, 2021), which directed the heads of federal agencies to consider suspending, revising, or rescinding any actions taken pursuant to the revoked E.O., including all agency actions to terminate or restrict contracts or grants pursuant to [Executive Order 13950](#), as appropriate and consistent with applicable law. As such, there is no legal import to the terms of the prior E.O. unless those terms are independently required by other laws or regulations.

²⁶ The disclaimer states: "The contents of this presentation were developed under a grant from the U.S. Department of Education S004D11002. However, these contents do not necessarily represent the policy of the U.S. Department of Education, and you should not assume endorsement by the federal government."

support Indiana University’s Midwest and Plains EAC in their discriminatory action. The Whistleblower further intimated that the Department and its staff approve of the information being shared by the EAC and are using the disclaimer to further the Department’s agendas. The Whistleblower provided no information about how awarding the grants themselves violated the Department’s statutory authority and instead opines on the development and publication of the aforementioned materials.

A. EAC

The EAC program is authorized under Title IV of the Civil Rights Act of 1964 (“Title IV”)²⁷ 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.”²⁸ The EAC program is funded annually and is one of the Department’s longest standing investments in technical assistance.

The EAC program is administered by OESE. OESE awards grants based on geographic region, one for each geographic region. Prior to 2016, OESE awarded grants to ten geographic regions. In 2016, OESE changed the number of geographic regions from ten to four. Each of the four geographic regions comprises, on average, 14 states and territories. Technical assistance and training are provided by each EAC at the request of responsible governmental entities with regard to special educational problems occasioned by desegregation, which the regulations defined as those issues that arise in classrooms, schools, and communities in the course of desegregation efforts based on race, national origin, sex, or religion.²⁹

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

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

²⁸ 34 C.F.R. § 270.1 (2021).

²⁹ 34 C.F.R. § 270.7 (2021).

- (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 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 –

- Technical assistance in the identification and selection of appropriate education programs to meet the needs of English learners;
- 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

Since 2011, EAC grants have generally been for project periods of up to 60 months. The last three EAC competitions that OESE ran occurred in 2022, 2016 and 2011.³² In October 2022, OESE issued four grant awards, one for each geographic region, including one to Indiana University.³³ Indiana University was also an awardee of EAC grants during the 2011 and 2016 competitions.

Similar to the MSAP competition – as well as other discretionary grant competitions run by OESE – OESE issues a notice of the competition, and provides technical assistance to applicants, assembles peer review panels to review the applications, creates a numerical slate of the applications, conducts a program review and risk assessment, and issues the awards.

B. INDIANA UNIVERSITY EAC 2011 and 2016 GRANTS

On March 10, 2011, and on July 18, 2016, OESE issued NIAs for the EAC competitions for fiscal years 2011 and 2016, respectively. The 2011 NIA indicates that the grants are renewable for up to 36 months. However, in 2014, OESE extended these grants for two years concluding that it was not in the public interest to incur the disruption in services associated with holding a new competition in fiscal year 2014 and determining that it would be more effective to maintain continuity of the high-quality services offered by these grantees to their clients rather than transition to new grantees every three years. The 2016 NIA changed the renewable project length

³⁰ 34 C.F.R. § 270.4 (2021).

³¹ See [Training and Advisory Services - Equity Assistance Centers \(ed.gov\)](https://oese.ed.gov/offices/office-of-formula-grants/program-and-grantee-support-services/training-and-advisory-services-equity-assistance-centers/applicant-information-training-and-advisory-services-equity-assistance-centers/).

³² OESE cancelled the FY 2021 EAC grant competition and published a Notice of Final Waiver and Extension of Project Periods for the EAC program, which enabled the four existing projects to receive funding for an additional period through September 30, 2022. See [Office of Elementary and Secondary Education, Applicant Information \(2022\) https://oese.ed.gov/offices/office-of-formula-grants/program-and-grantee-support-services/training-and-advisory-services-equity-assistance-centers/applicant-information-training-and-advisory-services-equity-assistance-centers/](https://oese.ed.gov/offices/office-of-formula-grants/program-and-grantee-support-services/training-and-advisory-services-equity-assistance-centers/applicant-information-training-and-advisory-services-equity-assistance-centers/).

³³ [Office of Elementary and Secondary Education, 2022 Grant Award, https://oese.ed.gov/offices/office-of-formula-grants/program-and-grantee-support-services/training-and-advisory-services-equity-assistance-centers/2022-grant-award/](https://oese.ed.gov/offices/office-of-formula-grants/program-and-grantee-support-services/training-and-advisory-services-equity-assistance-centers/2022-grant-award/).

from 36 months to 60 months.³⁴ 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 Regulations³⁵ (“EDGAR”) 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 and conducted its risk assessment. For both the 2011 and 2016 competition, OESE awarded Indiana University the grants.

Consistent with its practice, OESE actively monitored Indiana University throughout the grant periods. These monitoring activities included bimonthly check-ins, reviewing annual monitoring reports from Indiana University, visiting the site and interviewing recipients of technical assistance from Indiana University in connection with these grants. OESE’s monitoring informed its annual determinations that Indiana University was making substantial progress towards meeting the EAC program’s objectives.

The Team spoke with OESE staff who work on the EAC program. Staff informed the Team that OESE neither reviewed the materials referenced by the Whistleblower nor referred these materials to OGC for review. The disclaimer language included in these materials was required by EDGAR at 34 C.F.R. Part 75.620(b):

The grantee shall ensure that any publication that contains project materials also contains the following statements: The contents of this (insert type of publication; e.g., book, report, film) were developed under a grant from the Department of Education. However, those contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government.³⁶

Grantees are made aware of this EDGAR requirement in the Cooperative Agreements they sign with the Department after accepting an EAC grant. The Team reviewed the Cooperative Agreements for both grants at issue for Indiana University and determined that the EDGAR requirement was present in both agreements. Including the disclaimer in the materials complied with the EDGAR requirement.

The Team reviewed the materials referenced by the Whistleblower. Notably, the talks specifically discuss providing a means to define and frame an intersectional, anti-racist educational practice, which the Team determined aligns with the activities of prejudice reduction, as well as combatting biases. The Team’s review of the vodcast series and other

³⁴ See [79 F.R. § 23335](#).

³⁵ 34 C.F.R. § 75 (2021).

³⁶ 34 C.F.R. § 75.620(b) (2021).

materials referenced show that Indiana University’s Midwest and Plains EAC was engaged in typical activities of an EAC.

C. CONCLUSION

The Team concludes that the Department operated within its Title IV authority when it awarded the EAC grants to Indiana University in 2011 and 2016. These awards were made pursuant to the Secretary’s authority as authorized under Title IV. The Team determined there was no information to substantiate the Whistleblower’s allegation to the contrary. The Whistleblower did not provide the Team any evidence of wrongdoing with respect to the awarding of these grants, and the Team did not discover any evidence of wrongdoing by the Department in the awarding of these grants. While the Whistleblower may take exception to some of the work of this particular EAC by characterizing some of the subject matter as propagating “divisive concepts,” the Team has determined that these materials are consistent with the types of projects authorized under the EAC program, discussed above. Regarding the Whistleblower’s assertion that the disclaimer on these materials, specifically the vlogs, is proof that the Department abused its authority by reviewing and approving “divisive concepts,” the mere presence of the disclaimer is only evidence of Indiana University’s compliance with the EDGAR requirement and does not evidence an abuse of discretion by the Department.

IV. ALLEGATION III: IES VIOLATED ITS STATUTORY AUTHORITY BY AWARDING HARVARD UNIVERSITY A NCER GRANT

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 bias³⁷ by awarding a grant to Harvard University under the Education Research Grants Program administered by the NCER, titled “Developing and Testing Training Modes for Improving Teachers’ Race-Related Competencies to Promote Student Learners’ Academic Adjustment.”³⁸

A. IES

IES is the primary research and evaluation arm of the Department. IES was established in 2002 to provide national leadership in expanding the fundamental knowledge and understanding of education from early childhood through postsecondary education.³⁹ IES’s 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.⁴⁰ IES supports research, data collection, and analytics activities, as well as assessments of student academic achievement and progress.

IES is comprised of: (1) The Office of the Director; (2) The National Board for Education Sciences (“NBES”); and (3) four National Education Centers (“IES Centers”)—

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

³⁸ Grant Award No. R305A200278. Abstract available at <https://ies.ed.gov/funding/grantsearch/details.asp?ID=4474>

³⁹ P.L. 107-279 established IES. Titles I, II, and III of the statute each have a short title, but the Act overall does not. The short title of title I is the Education Sciences Reform Act of 2002 (“ESRA”) (20 U.S.C. § 9501 note).

⁴⁰ U.S. DEP’T OF EDUCATION, INSTITUTE OF EDUCATION SCIENCES, ABOUT IES: CONNECTING RESEARCH, POLICY AND PRACTICE, <https://ies.ed.gov/aboutus/>.

- NCER,
- The National Center for Education Statistics (“NCES”),
- NCSER, and
- The National Center for Education Evaluation and Regional Assistance (“NCEE”).

The Director of IES 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.⁴¹ 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,⁴² 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.

ESRA requires that all grants, contracts, or cooperative agreements awarded by IES, at a minimum, 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 \$100,000.⁴³

To comply with the peer review requirements, the Standards and Review Office (“Office”) within the Office of the Director developed peer review procedures after the enactment of ESRA. In January 2006, the NBES, consistent with its statutory responsibility,⁴⁴ formally approved the IES procedures for the peer review of reports and grant applications.⁴⁵ The use of these procedures continues today.

The Office is responsible for the major substantive activities involved in the IES peer review process, including annual planning regarding the number and types of panels needed, identifying, and recruiting reviewers, assigning applications to panels, assigning reviewers to applications, preparing substantive instructions and information for reviewers and panel chairs, and conducting triage after initial scores have been submitted. To ensure that the peer review is as impartial as possible, all peer review activities and Office staff are purposefully situated outside of the IES Centers.

The peer review process requires at least two primary reviewers to complete written evaluations of an application that is found to be responsive and compliant with the FR notice announcing the competition and the accompanying Request for Applications (“RFA”).⁴⁶ These reviewers

⁴¹ 20 U.S.C. § 9514(f)(7) (2020).

⁴² [Final Priorities and Definitions: Secretary’s Supplemental Priorities and Definitions for Discretionary Grants Programs, 86 Fed. Reg. 70612 \(December 10, 2021\).](#)

⁴³ 20 U.S.C. § 9534(b)(1) (2020).

⁴⁴ 20 U.S.C. § 9516(b)(3) (2020).

⁴⁵ [U.S. Dep’t of Education, Institute of Education Sciences, Procedures for Peer Review of Grant Applications \(2006\).](#)

⁴⁶ 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

identify strengths and weaknesses related to each of the review criteria listed in the NIA and RFA. Primary reviewers independently assign a score for each criterion, as well as an overall score, for each application they review. Based on the overall scores assigned by primary reviewers, IES calculates an average overall score for each application and prepares a preliminary rank order of applications before the full scientific peer review panel convenes to complete the review of applications.

The full panel considers and scores only those applications deemed to be the most competitive and to have the highest merit, as reflected by the preliminary rank order. A panel member may nominate for consideration by the full panel any application that they believe merits full panel review but did not qualify based on its preliminary rank order. All panel members, acting independently, and individually, score the applications.⁴⁷

After the panel meetings conclude, the Office prepares an overall score report, which includes average criteria and average overall scores for each application. These averages are based on the scores provided by the full panel.⁴⁸ This rank-ordered report is then provided to the IES Center conducting the competition. After receiving this report, the IES Center reviews the scores and creates a funding slate. When sufficient funds are available, the IES policy is to make awards to applications that receive outstanding or excellent ratings, which correspond to final average overall scores ranging from 1.0 through 2.0. Once a cut point is determined, staff at the IES Center further reviews the applications to make sure that all information is current (i.e., budget, cooperative agreements, participant agreements, etc.) and prepares a slate memo for the Director recommending which and how many applicants to fund for a particular competition.

Successful applicants receive a GAN, containing, among other things, the terms and conditions of the award, including those assurances stemming from Federal civil rights laws that prohibit discrimination in programs and activities receiving Federal financial assistance (34 C.F.R. 100.4, 104.5, 106.4, 108.8, and 110.23).⁴⁹

B. THE HARVARD UNIVERSITY GRANT

NCER is responsible for supporting rigorous research that contributes to solving significant education problems in the United States. NCER engages in research activities designed to provide high-quality education for all children, improve student academic achievement, reduce the achievement gap between high-performing and low-performing students, and increase access to, and opportunity for, postsecondary education.⁵⁰ The goal of NCER research programs is to provide scientific evidence of what works, for whom, why, and under what conditions.

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.

⁴⁷ *Ibid.*, 11.

⁴⁸ *Ibid.*

⁴⁹ [Notice Inviting Applications, 84 Fed. Reg. 28533.](#)

⁵⁰ 20 U.S.C. § 9531(b) (2020).

IES invited applications to the Education Research Grants program, in a FR notice dated June 19, 2019,⁵¹ and a RFA published on June 20, 2019, on the IES website.⁵² The deadline for applicants to apply to this competition was August 29, 2019. The RFA encouraged interested applicants to submit a letter of intent by July 11, 2019. Letters of intent were not binding and did not factor into the review of a subsequent application; rather, they allowed IES staff to identify the expertise needed for the scientific peer review panel and to secure sufficient reviewers to handle the anticipated number of applications.

The competition focused on providing national leadership in expanding knowledge and understanding of the (1) developmental and school readiness outcomes for infants and toddlers with or at risk for a disability; (2) education outcomes for all learners from early childhood education through postsecondary and adult education; and (3) employment and wage outcomes when relevant (such as those engaged in career and technical, postsecondary, or adult education).

Applicants with the ability and capacity to conduct scientifically valid research were eligible to apply. Eligible applicants included, but were not limited to, non-profit and for-profit organizations and public and private agencies and institutions, such as colleges and universities, and research firms. The NIA invited interested applicants to address 1 of 11 specific topics.⁵³ Applicants were also required to specify what type of project they were proposing to carry out-- Exploration, Development and Innovation, Initial Efficacy and Follow-Up, or Measurement.⁵⁴

The application from Harvard University requested funding for a Development and Innovation⁵⁵ project to address the topic of Social and Behavioral Context for Academic Learning. Research in this topic area (which was is one of the 11 areas identified in the NIA) is designed to support research on social and behavioral competencies that support academic achievement and progress through the education system. It includes measures of social and behavioral competencies (which have been shown to be just as important as content knowledge and academic skills for success in school and work), along with the required measures of academic outcomes.⁵⁶

Consistent with IES practice, applicants were advised that IES, in making these competitive grant awards, requires various assurances, including those relating to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance.⁵⁷

The applications received for the Education Research Grant Program during this competition were assigned to one of seventeen review panels that met over the course of several days in February 2020. Through the established peer review process, the Harvard application was found to be responsive and compliant and was assigned to two primary reviewers. Since the purpose of

⁵¹ *Supra* note 39.

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

⁵³ *Supra* note 39.

⁵⁴ [IES FY 2020 Request for Applications Education Research Grants CFDA Number: 84.305A \(p. 20\).](#)

⁵⁵ Development and Innovation projects support the development and pilot testing of new or modified education interventions that are intended to produce beneficial impacts on learner outcomes. A Development and Innovation project will result in a fully developed intervention, evidence of the intervention's theory of change, and data that speak to the intervention's feasibility, fidelity of implementation, costs, and promise for improving learner outcomes. *Ibid.* at p.24.

⁵⁶ *Ibid.* at p. 19.

⁵⁷ *Ibid.*

IES-supported research is to contribute to solving education problems and to provide reliable information about the education practices that support learning and improve academic achievement and access to education for all learners, peer reviewers are asked to assess 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.⁵⁸ These initial reviewers assigned an overall score for the application and this score was included in a preliminary rank order of all applications that was prepared before the full peer review panel convened to conduct its review.⁵⁹

At the full panel meeting, the two primary reviewers presented their individual critiques of the application. The panel listened to the primary reviewers' discussion of the strengths and weaknesses of the four published review criteria. After this discussion, 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 the procedures described above.

This particular grant to Harvard University seeks to identify the most efficient and effective method to prepare educators to engage with students on topics of ethnicity-race. The project 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. The Whistleblower alleges that, in awarding a grant to Harvard University, IES violated its statutory duty to ensure that IES carries out activities that are objective, secular, neutral, and non-ideological and are free of partisan political influence and racial, cultural, gender, or regional bias.⁶⁰ This allegation appears to be based on the general subject matter of the Identity Project itself—ERI, which the Whistleblower claims is "very much a partisan ideology of the political Left" and is "illegally discriminatory."

In support of their allegation, the Whistleblower quotes several references from the website of the Adolescent Ethnic-Racial Identity Development ("AERID") Laboratory⁶¹, the Harvard University laboratory conducting the project. In particular, the Whistleblower focuses on a set of "tip sheets"⁶² that offer practical guidance and tools to best navigate conversations about race, ethnicity, and identity in the classroom.⁶³ These sheets provide suggestions to educators on how to handle conversations around racial stereotypes, racial jokes, and underlying racism in schools. The Whistleblower has raised objections to the content of these "tip sheets" and their suggestions on how educators can deal with race in the classroom.⁶⁴ Additionally, the Whistleblower points

⁵⁸ *Ibid.* at p.52.

⁵⁹ Peer review scores and reports are confidential.

⁶⁰ OSC referral to ED .

⁶¹ [Harvard University, Adolescent Ethnic-Racial Identity Development, Harvard.edu, https://umana-taylorlab.gse.harvard.edu/](https://umana-taylorlab.gse.harvard.edu/).

⁶² These particular 'tip sheets' were developed prior to IES awarding this particular grant to Harvard.

⁶³ [Harvard University, Adolescent Ethnic-Racial Identity Development, Harvard.edu, https://umana-taylorlab.gse.harvard.edu/resources-ethnic-racial-identity](https://umana-taylorlab.gse.harvard.edu/resources-ethnic-racial-identity).

⁶⁴ For example, the Whistleblower objects to a tip-sheet that addresses the question of "why it is so hard to think about stereotypes for White people". The tip-sheet draws the conclusion that stereotypes about White people are less common because Whiteness is made invisible due to the position that being White occupies in the U.S. racial hierarchy. The social and political

to several sections of the grant proposal where they claim that Harvard University is attempting to “...first indoctrinate the teachers into an illegally discriminatory, partisan political ideology - despite and while overcoming the teachers discomfort with the illegal discrimination - then assist the newly-indoctrinated teachers with indoctrinating the students/children.”⁶⁵

The Team reviewed the above-mentioned documents, the grant proposal, and other materials submitted by the Whistleblower and finds that they do not support the claim that IES violated its statutory duty under 20 U.S.C. § 914(f)(7). There is nothing in the grant award to Harvard University to suggest that IES funded a project that is racially biased. IES funded a grant to scientifically study the best way to prepare teachers to teach the concepts of ethnic and racial diversity in their classrooms in order to improve academic outcomes of students, which is consistent with the goals of a project addressing the topic of Social and Behavioral Context for Academic Learning. The subject-matter materials used to teach the concepts of ethnic and racial diversity were not the focus of the grant to Harvard University; rather, the focus of the project and the grant is on enabling the development, feasibility, testing, and refinement of multiple modes of delivery for the training program, with the ultimate goal of developing three equally effective modes of delivery.⁶⁶ Professional development is designed to benefit all students regardless of their race or ethnicity, and there is nothing in the materials that the Team reviewed to suggest that a particular benefit was being provided based on race, nor is there any indication any individual would be disadvantaged under this project on the basis of race. While the Whistleblower is of the opinion that promoting ERI development among students “means causing the students to be more race-conscious and less colorblind, resulting in students treating each other differently because of race,” the Team found nothing in the grant to support this assertion. The Team also notes that the “tip-sheets” highlighted by the Whistleblower and the underlying school-based curriculum that the grantee is using in its project have not been reviewed by IES, nor were they developed with funding from the Department.

It is clear from the OSC referral, conversations with the Whistleblower, and other documents that the Whistleblower provided to the Team during this investigation that the Whistleblower takes issue with the subject matter of this grant (i.e., ERI training),⁶⁷ and with the idea that institutional and systemic racism has played a role in shaping students’ educational experiences and academic outcomes. However, the Whistleblower’s personal objection to ERI training or to the idea, as posited in the grant application, that “Education scholars have found that teachers’ engagement in culturally sustaining pedagogies (“CSP”) that promotes adolescents’ ERI is associated with better academic outcomes among students (Byrd, 2016), and that teachers’ self-reflection and development of their own ERI is essential for their ability to use CSP (Utt & Tochluk, 2016)” is insufficient to demonstrate that IES violated its statutory responsibilities or acted in a racially biased manner. The role of IES, as a Federal research agency, is to fund research projects that

origins of the U.S. led to a contemporary system where White American cultural norms and beliefs are dominant and appear normal. This status offers White Americans privileges including protection from negative stereotypes. *Ibid.*

⁶⁵ White paper provided to the Team from WB counsel.

⁶⁶ PR/Award#R306A200278 page e-67.

⁶⁷ ERI development includes the process by which adolescents explore and develop an understanding of their ethnic-racial background (Umaña-Taylor et al., 2014a). Research supports that ERI development of ethnic-racial minority (“ERM”) student learners could reduce academic inequality. The current project proposes to develop and test multiple modes of delivery for a teacher training program designed to prepare teachers to implement an ERI-focused curriculum (i.e., the Identity Project) in their 9th and 10th grade classrooms. The goal is to develop and pilot test three different modes of delivery for a comprehensive teacher training program.

focus on scientific methodology and process and then use the outcomes of that research to inform evidence-based decision-making by State and local actors. NCER seeks to further that role by supporting research that contributes to improved education outcomes for all students and particularly for those whose education prospects are hindered by inadequate education services and conditions associated with poverty, race/ethnicity, limited English proficiency, and family circumstance.⁶⁸ The Harvard University grant proposal was determined to meet those twin goals by scientifically studying the best way to prepare teachers to teach the concepts of ethnic and racial diversity in their classroom to improve academic outcomes of students.

To the extent that the Whistleblower relies on their objection to ERI training to allege 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.

In addition, as stated earlier, 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, 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. Additionally, unlike other Federal research agencies (e.g., National Science Foundation), IES program officers have no role in the review process, other than to encourage applicants and provide guidance on the RFAs. These steps ensure that IES maintains its independence to carry out its activities in a manner that is free of partisan political influence in keeping with its statutory duty. The Team found no evidence to suggest that IES veered from this established process in order to influence the awarding of this grant.

All IES staff interviewed spoke of IES’s commitment to supporting and protecting the integrity of scientific activities, including by ensuring that funding decisions are based on rigorous independent peer review by qualified experts and that political officials do not suppress or alter scientific approaches, strategies, or methodologies. While recognizing that the underlying subject matter of this research grant is an issue of current public debate, IES would be remiss in carrying

⁶⁸ 20 U.S.C. § 9531(b) (2020).

out its role as a Federal research agency if it chose not to fund a project simply because the topic is “controversial.”

C. CONCLUSION

The Team finds that, in awarding Grant Award No. R305A200278 to Harvard University, IES adhered to its detailed requirements for peer review and funding of grant proposals, to ensure that all funding decisions are based on scientific merit and that decisions are made based on criteria that are objective, secular, neutral, and non-ideological and free of partisan political influence and racial, cultural, gender, or regional bias. The proposal was rigorously peer-reviewed and found to be consistent with the competition’s goal of expanding knowledge and understanding of educational outcomes for all learners and with the underlying mission of NCER to promote scientifically valid research that can provide the basis for improving academic instruction.⁶⁹ The Whistleblower’s allegations are misplaced and appear to demonstrate a personal concern about the underlying subject matter, rather than a concern about the focus of the Department’s grant – to scientifically study and compare teaching methodologies.

V. ALLEGATION IV: IES IS VIOLATING ITS STATUTORY AUTHORITY BY FUNDING, CONDUCTING, OR SUPPORTING RACIALLY DISCRIMINATORY CONTENT ON ITS PLATFORMS

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 bias by funding, conducting, or supporting racially discriminatory content on its platforms. To support this claim, the Whistleblower points to: (1) a January 2022 conference held by NCER and NCSER; and (2) a contract IES entered into with the National Academies of Science, Engineering, and Medicine (“NASEM”).

A. JANUARY 2022 PRINCIPAL INVESTIGATORS MEETING

The January 2022 conference was an annual meeting co-hosted by NCER and NCSER for the principal investigators, co-principal investigators, and training fellows currently supported by IES. As a first step in coordinating the annual meeting, staff from NCER and NCSER reach out to its grantees to solicit co-chairs for the annual meeting. The co-chairs then work together to develop themes and suggest them to NCER and NCSER for final approval. The theme of each year’s conference is designed to reflect issues of current importance to the education research community.

The January conference’s theme was *Advancing Equity and Inclusion in the Education Sciences*. The Commissioners of NCER and NCSER told the Team that this theme was in keeping with IES’ support of rigorous and relevant research to help identify, measure, and address disparities in education access and outcomes. They explained that the theme was of particular interest to the education research community since disparities have been further exacerbated by COVID-19, underscoring the importance of advancing equity and inclusion in the education sciences.⁷⁰

⁶⁹ 20 U.S.C. § 9531(b)(1)(D) (2020).

⁷⁰ [Institute of Education Sciences, Advancing Equity and Inclusion in the Education Sciences, https://ies.ed.gov/pimeeting/2021/Default.aspx](https://ies.ed.gov/pimeeting/2021/Default.aspx).

Once a theme is finalized, grantees and IES staff propose ideas for particular sessions that are in keeping with the theme. These proposals include, among other things, recommendations for a moderator, session materials, and an outline of the session. The topic of the sessions must come from current grantee projects. The Commissioners of NCER and NCSER told the Team that neither NCER nor NCSER controls the content of the panels, rather it reflects the work that is currently being funded by IES.

The Whistleblower raises a particular concern with a panel from the January meeting entitled *Engaging in Anti-Racist, Culturally Responsible Research Practices*. Their concern rests with a definition of “equity” that the panel moderator introduced at the beginning of the session as a guide in discussing the role of science in equity. The moderator defined equity as an “assurance of the conditions for optimal outcomes for all people. Achieving equity requires valuing all individuals and populations equally, recognizing and rectifying historical injustices, and providing resources according to need.”⁷¹ Each of the four panelists then went on to discuss their individual work and research focus. The Whistleblower provided no evidence other than their objection to the definition of “equity” at the beginning of the panel meeting to demonstrate how IES violated its statutory authority. The Whistleblower interprets that definition to mean ensuring equal outcomes for all groups, which they believe to be inherently discriminatory and illegal, but we found no evidence to that effect.

B. CONCLUSION

Based on a review of the transcript of this particular panel and interviews with the Commissioners of NCER and NCSER, the Team did not identify any evidence to substantiate the Whistleblower’s interpretation that the definition of “equity” that was presented by the panel moderator was being used as a proxy for ensuring equal outcomes for all groups or that IES was otherwise violating its statutory duty by hosting the 2022 Principal Investigators meeting.

C. CONTRACT BETWEEN IES AND NASEM

While not included in either of the referrals from the OSC, during an interview with the Whistleblower, they drew attention to a contract entered into between IES and NASEM in January 2021, described below, as additional support for their contention that IES is violating its statutory authority by funding racially discriminatory content. The Whistleblower alleges that IES entered into this particular contract with NASEM in order to provide “cover” for the racially discriminatory activities of IES and its inherently illegal diversity agenda.

On August 6, 2020, the Director of IES wrote a blog post entitled “Acting on Diversity.”⁷² This post affirmed IES’ commitment to diversity and ensuring that the work of IES is carried out in a manner that is free of racial, cultural, gender, or regional bias. Among other things, the Director mentioned engaging principal investigators from underrepresented backgrounds and expanding programs for students from Historically Black Colleges and other minority serving institutions, consistent with the statutory authority of the duties of the Director to undertake initiatives and

⁷¹ “[Engaging in Anti-racist, Culturally Responsive Research Practices](#)” timestamp: 2:27.

⁷² [Mark Schneider, Acting on Diversity, Institute of Education Sciences https://ies.ed.gov/director/remarks/8-06-2020.asp \(Aug 6, 2020\).](#)

programs to increase the participation of researchers and institutions that have been historically underutilized in Federal education research.⁷³ IES later added a diversity statement to its webpage, stating in part that—

All IES work benefits from diverse perspectives. Our ability to conduct and support high-quality research, collect and disseminate timely data, and evaluate the impact of educational policy and practice depends on our ability to attract, train, partner with, and support talented researchers, statisticians, and evaluators from all backgrounds.... We also believe that our commitment to diversity enhances public trust, helps ensure that our work is free of bias, and increases the likelihood that everyone will participate in and benefit from IES-funded work.⁷⁴

On January 13, 2021, the Director wrote another blog post announcing that IES had signed a contract with NASEM to undertake three studies designed to be completed by the start of 2022. The Director noted that he expected the NASEM report to help guide the structure of the 20th anniversary RFAs and to identify new research topics, new methodologies, and new approaches to training programs that IES should emphasize for the next 5–10 years.⁷⁵

In order to carry out its charge under the contract with IES, NASEM, through its Board on Science, convened the Committee on the Future of Education Research (“the Committee”) to provide guidance on the future of education research at NCER and NCSER. The statement of task required the Committee to “inform the Institute of Education Sciences National Center for Education Research and National Center for Special Education Research on:

- Critical problems or issues on which new research is needed;
- How best to organize the request for applications issued by the research centers to reflect those problems/issues;
- New methods or approaches for conducting research that should be encouraged and why; and
- New and different types of research training investments that would benefit IES.”

In order to focus on this broad task, the Committee identified five themes that reflect both advances in education research since the founding of IES and major issues that education will face over the next decade: (1) equity in education, (2) technology in education, (3) use and usefulness of education research, (4) heterogeneity in education, and (5) implementation. These themes formed the lens through which the Committee approached its task. The Committee ultimately produced recommendations based on these themes designed to assist NCER and NCSER in continuing to produce high-quality education research.⁷⁶ The Committee recognized that, because IES is both guided and constrained by its statutory authority, it needed to rely on the statute to guide its deliberations and to ensure that their recommendations were consistent with IES statutory authority.⁷⁷

⁷³ 20 U.S.C. §9514(f)(8) (2020).

⁷⁴ [IES Diversity Statement \(ed.gov\)](#).

⁷⁵ [Mark Schneider, A Year for Reflection and Continued Transformation, https://ies.ed.gov/director/remarks/1-12-2021.asp \(Jan 1, 2021\)](#).

⁷⁶ [The National Academies of Science, Engineering, and Medicine, The Future of Education Research at IES: Advancing an Equity-Oriented Science \(2022\) https://nap.nationalacademies.org/download/26428#](#).

⁷⁷ *Ibid.* at p. 15.

In its decision to adopt equity in education as a focus of its work, the Committee documented disparities in access to educational opportunity for low-income students and students from minority backgrounds and decades of research pointing to educational inequity in all facets of the education system.⁷⁸ In addition, the Committee noted that when the statutory mission of NCER⁷⁹ is to ensure that the work it funds is in service of “ensur[ing] that all children have access to a high-quality education,” it follows that NCER is being asked to address questions of equity in education. The Committee also relied on Executive Order 13985,⁸⁰ which outlines Federal agencies’ responsibilities related to equity. The combination of the focus on equity issues in both ESRA and E.O. 13985 supported the Committee’s decision to use equity in education as a cross-cutting theme in its recommendations to NCER and NCSE.

D. CONCLUSION

After reviewing the NASEM final report and the Director’s statement on diversity, the Team finds no evidence that IES violated its statutory authority either by entering into a contract with NASEM, or by posting a diversity statement to guide the future work of IES. As discussed above, there is sufficient statutory authority for both the Director and the research centers to focus on equity and increasing the participation of those individuals and institutions that have been historically underrepresented in the field of education research. There is nothing to suggest that IES is employing an individualized use of race to support its diversity initiatives. To the claim that IES entered into this contract with NASEM as a means to provide “cover” for its illegal activities, staff noted that the NASEM reports were for both internal purposes and external engagement and that on the 20th anniversary of the creation of IES, publicizing the reports was seen as a way to reconnect the field to the important question of the future direction of the work of IES as a Federal research agency.

VI. ALLEGATION V: THE DEPARTMENT HAS A SYSTEMIC PRACTICE OF PROVIDING FEDERAL FINANCIAL ASSISTANCE FOR ACTIVITIES AND PROGRAMS DISCRIMINATING ON THE BASIS OF RACE IN VIOLATION OF ITS LEGAL AUTHORITY

The Whistleblower alleges that the Department has a systemic practice of providing Federal financial assistance for activities or programs that discriminate on the basis of race. As the basis for this claim, the Whistleblower refers to Executive Order 13950 (“E.O.”), Combating Race and Sex Stereotyping, issued by former President Trump on September 22, 2020.⁸¹

A. E.O. 13950

Former President Trump issued E.O. 13950 on September 22, 2020. The E.O. encouraged diversity and inclusion efforts consistent with the prior Administration’s view of principles of fair and equal treatment, and defined what it termed “divisive trainings” that the Trump

⁷⁸ *Ibid.* at pp. 20-21.

⁷⁹ 20 U.S.C. §9531(b)(1)(A) (2020).

⁸⁰ [Exec. Order No. 13985, 86 F.R. 7009.](#)

⁸¹ <https://www.federalregister.gov/documents/2020/09/28/2020-21534/combating-race-and-sex-stereotyping> As noted above, this E.O. was revoked by E. O. 13985 (January 25, 2021), which directed the heads of federal agencies to consider suspending, revising, or rescinding any actions taken pursuant to the revoked E.O., including all agency actions to terminate or restrict contracts or grants pursuant to [Executive Order 13950](#), as appropriate and consistent with applicable law. As such, there is no legal import to the terms of the prior E.O. unless those terms are independently required by other laws or regulations.

Administration sought to end.⁸² In addition to defining key terms and imposing specific requirements on government contractors, the E.O. contained specific requirements for Federal grants. Specifically, Section 5 of the E.O. required all Federal agencies to review their respective grant programs and identify those programs for which the agency could, as a condition of receiving a grant, require the recipient to certify that it will not use Federal funds to promote specific concepts related to race or sex⁸³ and submit that analysis to the Office of Management and Budget (“OMB”) within 60 days of the date of the E.O.⁸⁴ The Department conducted that review through a data call to principal offices (“Pos”) and compiled a list of programs to which the specific conditions of the E.O. could be attached as a condition of receiving [future] Federal financial assistance. This report was submitted to OMB on November 20, 2020.

In speaking with the Whistleblower and reviewing the materials that the Whistleblower submitted to the Team, it is clear that the Whistleblower fundamentally misunderstands what was required by the E.O. In an email to the Team, they state—

My “Clarifying Questions” email to OSC, which I previously sent you, described an Excel spreadsheet that GPTD compiled via a “data call” with the Pos, in response to the demands of EO 13950, which ED then submitted to OMB. At that time, this spreadsheet was stored on the GPTD shared drive. It indicated only totals, not individual grants by PR number; however, those totals indicated hundreds of grants that contained “divisive concepts.” I’m alleging that grants containing “divisive concepts” likely violate Title VI, since (like the Harvard grant) those “divisive concepts” discriminate against white people on the basis of race/skin color (and/or against males on the basis of sex; e.g. via mentions of “the patriarchy”). For grants funded by IES, those same grants containing “divisive concepts” likely also violate 20 USC 9514(f)(7).⁸⁵

⁸² Section (2)(A) of revoked [Executive Order 13950](#) defined divisive concepts as concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term “divisive concepts” also included any other form of race or sex stereotyping or any other form of race or sex scapegoating.”

⁸³ Section 5 (a)-(h) of revoked [Executive Order 13950](#) listed the conditions that a future recipient of Federal financial assistance would have to certify. This includes ensuring that the recipient will not use Federal funds to promote the concepts that: (a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (e) an individual's moral character is necessarily determined by his or her race or sex; (f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

⁸⁴ OMB further clarified the intent of section 5 of the E.O. and the responsibility of Federal agencies in awarding future grants in [M-20-37 - OMB Memo - Ending Employee Trainings.pdf](#).

⁸⁵ Email from Whistleblower to one of the investigators -June 30, 2022 11:56 AM.

The Whistleblower is operating under the incorrect notion that the E.O. require Federal agencies to identify and report to OMB those grants the agency was currently funding that were violating the new E.O, when in fact the E.O. only required agencies to identify a list of programs to which the specific conditions of the E.O. could be attached as a condition of receiving *[future]* Federal financial assistance.

B. CONCLUSION

The Whistleblower's misunderstanding of the requirements of E.O. 13950 is the root of the Whistleblower's claim that the Department awards Federal financial assistance for activities or programs that discriminate on the basis of race. As made clear through the Team's investigation, the Department carried out its duty under section 5 of the E.O. to determine those grant programs in which it could require the recipients to certify that it will not use Federal funds to promote the "divisive concepts" enumerated in the E.O. and submitted that report to OMB by the deadline stated in the E.O. At no point has the Whistleblower provided any evidence to demonstrate that the Department has any sort of systemic problem with respect to its grants award process. Additionally, the Team's investigation of the four discretionary grants at issue in this referral, yielded no information that indicates that such a problem exists. We find these claims to be without merit.

VII. FINAL CONCLUSION

Across the Whistleblower's complaints, there is a broad allegation that the term "equity" is being used as a "cover" for what the Whistleblower terms "equality of outcome" between racial groups—meaning that all groups end up in the same place, rather than simply treating all individuals equally under the law. During our review of the matters before us, we did not identify any instances in which the Department was attempting to ensure equal outcomes between racial groups. There is no evidence that the Department is favoring one racial group over another or that one racial group has suffered a particular harm as a result of the work of the Department. Rather, the programs and activities that the Department has funded, and that are at issue in this complaint, are designed to provide equal access to all students in order for them to be able to succeed academically. Ensuring access, closing achievement gaps, and improving academic outcomes for students are central to the mission of the Department and its commitment to the success of our nation's students. We came across nothing to suggest that the Department violated any particular law, rule, or regulation in attempting to carry out this mission.

ATTACHMENT A
Delegation of Authority



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

MEMORANDUM

TO: The Deputy Secretary
FROM: The Secretary
SUBJECT: Delegation of Authority

I. DELEGATION

By the authority vested in me by section 412 of the Department of Education Organization Act, 20 U.S.C. § 3472 and the U.S. Office of Special Counsel's (OSC's) Guidance on Agency Reports available at: <https://osc.gov/Resources/1213Appendix.pdf>, I hereby delegate to you, your successor in function, or anyone serving for you in an acting capacity or delegated the authority to perform the functions and duties of your position, the authority: (a) to review and sign written reports of investigation prepared in response to referrals from the OSC regarding whistleblower disclosures; (b) to submit these reports of investigation to the OSC; and (c) to take actions as a result of the investigation pursuant to 5 U.S.C. §§ 1213(d) and (f)(2).

Unless otherwise noted in future delegations of authority, amendments to the authority delegated herein are included within the scope of this delegation.

II. RESERVATIONS

None.

III. REDELEGATION

This authority may not be redelegated.

IV. CERTIFICATION AND EFFECTIVE DATE

This delegation shall become effective upon certification by the Department's Principal Delegations Control Officer.


Betsy DeVos

OGC Clearance and date: Rebecca Friendly 7-13-18

CERTIFIED DATE: 7/13/2018
Sam Clemons
Departmental Delegations Control Officer
EA/EB/176
Control Number

ATTACHMENT B
Employee Key

Investigating Team:

1. [REDACTED], Attorney, Division of Legislative Counsel, Office of the General Counsel (1997 - Present)
2. [REDACTED], Attorney, Division of Educational Equity, Office of the General Counsel (October 2021 - Present)
3. [REDACTED], Attorney, Division of Educational Equity, Office of the General Counsel (July 2021 – Present)

Interviewees:

1. [REDACTED], the Whistleblower
2. [REDACTED], Program Attorney, Division of Educational Equity, Office of the General Counsel
3. [REDACTED], Team Lead, Magnet Schools Assistance Program, Office of Elementary and Secondary Education
4. [REDACTED], Director, Program Legal Group, Office for Civil Rights
5. [REDACTED], Attorney, Program Legal Group, Office for Civil Rights
6. [REDACTED], Attorney, Program Legal Group Office for Civil Rights
7. [REDACTED], Deputy Director for Science, Institute of Education Sciences
8. [REDACTED], Deputy Director for Administration and Policy, Institute of Education Sciences
9. [REDACTED], Commissioner, National Center for Education Research, Institute of Education Sciences
10. [REDACTED], Commissioner of the National Center for Special Education Research, Institute of Education Sciences
11. [REDACTED], Team Lead, National Center for Education Research, Institute of Education Sciences
12. [REDACTED], Program Attorney for the Institute of Education Sciences, Office of the General Counsel

13. [REDACTED], Program and Grantee Support, Office of Elementary and Secondary Education
14. [REDACTED], Program and Grantee Support, Office of Elementary and Secondary Education

The team reviewed the applicable laws and regulations, policies, practices, procedures, and memorandums specific to the grants under investigation. This included reviewing and analyzing the specific statutory authority for the particular grant programs, Federal Register (“FR”) notices, application packages, Grant Award Notification (“GAN”), and Annual Performance Reviews (“APR”), as well other documents obtained from the Whistleblower, Department employees, and Department databases.