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The Special Counsel

June 14, 2021

The Honorable Dr. Miguel A. Cardona
Secretary
U.S. Department of Education
400 Maryland Ave, SW
Washington, DC 20202

Re: OSC File No. DI-21-000533
Referral for Investigation – 5 U.S.C. § 1213(c)

Dear Secretary Cardona:

I am referring to you for investigation a whistleblower disclosure alleging that two grants awarded by the U.S. Department of Education (ED) may constitute violations of law, rule or regulation. A report of your investigation on these allegations and any related matters is due to the U.S. Office of Special Counsel (OSC) by August 13, 2021.

The whistleblower, who wishes to remain anonymous, is a former federal employee who was involved in the grant review process at ED. While reviewing grant applications, the whistleblower identified two grants which the whistleblower alleges violate federal statutes and U.S. Supreme Court precedent. The first grant the whistleblower identified, Successful Equity for Excellent Kids! (SEEK), was awarded under the Magnet Schools Assistance Program (MSAP) to Fort Wayne Community Schools (FWCS) in 2018 in the amount of $14,993,840, distributed over a period of five years.[1] The whistleblower alleges that ED is in violation of Title VI of the Civil Rights Act of 1964 because funding the FWCS grant amounts to federal funding of a program that discriminates against individuals on the basis of race.[2] The second grant the whistleblower alleges was illegally awarded is a four-year Institute of Education Sciences (IES) grant under the Social Sciences and Behavioral Context for Academic Learning Program, awarded in 2020 in the amount of $1,399,993, distributed incrementally, to Harvard University for a grant entitled "Developing and Testing Training Modes for Improving Teachers' Race-Related Competencies to Promote Student Learners' Academic Adjustment."[3] The grant involves refining the Harvard Identity Project curriculum and identifying the most effective and efficient delivery modality. The whistleblower alleges that governmental funding of this grant is

[1] Grant Award No. U165A170062. Copy of grant available at https://oese.ed.gov/files/2018/11/0062-Ft.-Wayne-Community-Schools.pdf.
[2] *See* 42 U.S.C. § 2000d.
[3] Grant Award No. R305A200278. Copy of grant description available at https://ies.ed.gov/funding/grantsearch/details.asp?ID=4474.

inherently racially biased in nature and therefore violates Title VI of the Civil Rights Act of 1964, as well as statutory authorities specific to IES.[4] The allegations to be investigated include:

- The issuance of Grant Award No. U165A170062 to FWCS violates Title VI of the Civil Rights Act of 1964 and current U.S. 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 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.

Given the complex legal nature of these allegations, and the fact the whistleblower has chosen to remain anonymous, I am providing a more thorough explanation of each allegation below.

Allegation 1: FWCS race-based lottery assignments plan

The whistleblower alleges—and a review of the grant to FWCS suggests—that the school system utilizes two broad racial categories, African American in one category and all other racial groups clustered into a second category, to operate parallel lottery systems to select students for oversubscribed schools where the applicant demand is greater than the number of student openings.[5] A review of the grant application leaves various aspects of the selection system unclear or unspecified, such as whether a predetermined number or percentage of slots are reserved for each racial category. Nevertheless, given the apparent use of parallel lotteries, the whistleblower alleges that the selection method for oversubscribed schools violates Title VI of the Civil Rights Act of 1964.

Title VI protects individuals from discrimination based on race, color, or national origin in programs or activities that receive Federal financial assistance.[6] The law requires strict scrutiny review when the government distributes burdens or benefits based on individual racial classifications.[7] To pass strict scrutiny, a school district must demonstrate that the use of individual racial classifications in the assignment plans are narrowly tailored to achieve a

[4] 20 U.S.C. §§ 9511(b)(2)(B), 9514(f)(7). *See also* 20 U.S.C. § 9516(b)(8) (Board responsible "[t]o advise the Director on ensuring that activities conducted or supported by the Institute are objective, secular, neutral, and nonideological and are free of partisan political influence and racial, cultural, gender, or regional bias.")
[5] Please refer to pages e39 to e41 of the grant for a description of the lottery system used to select students for programs for which applicants exceed program capacity. Link provided in footnote 1.
[6] § 2000d.
[7] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (citing *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors. v. Peña*, 515 U.S. 200, 224 (1995)).

compelling government interest, requiring two distinct inquiries: (1) whether the plan is justified by a compelling government interest and (2) whether the plan is narrowly tailored to achieve that interest.[8] One compelling interest identified by the Court is the state interest in remedying the effects of past intentional discrimination, i.e., state-sponsored segregation.[9] The Court has noted that the existence of a court order (absent later achievement of unitary status that eliminates the vestiges of a prior policy of segregation) is one means of demonstrating *de jure* segregation that constitutes a compelling government interest and warrants the use of race-conscious remedies.[10]

Because FWCS was subject to a January 1990 court-adopted desegregation consent decree to achieve racial balance in its school because of past and present state action,[11] it may be able to demonstrate a compelling government interest in using racial classifications in assigning students to schools.[12] Further, the whistleblower has not identified any evidence that FWCS has achieved unitary status or that FWCS has eliminated the vestiges of its prior segregated school system.[13]

While the Supreme Court has indicated that school districts with a compelling government interest to remedy *de jure* segregation may use race-conscious remedies,[14] the law nevertheless requires that when schools adopt assignment policies that consider the race of individualized students, they do so in a manner that is narrowly tailored to the goals of achieving diversity or avoiding racial isolation, and includes race no more than necessary to meet those ends.[15] In *Grutter*, the Court analyzed four considerations in defining the contours of narrow tailoring before concluding that the university's admissions policy was narrowly tailored and, thus, constitutional.[16] For a race-conscious plan to be narrowly tailored, the Court in *Grutter* required: (1) consideration of workable race-neutral alternatives, (2) flexible and individualized review of students, (3) minimization of undue burdens on other students, and (4) time limitations and periodic review.[17] The Court held that in order to be narrowly tailored, "a race-conscious

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[8] *Parents Involved*, 551 U.S. at 720 (citing *Adarand*, 515 U.S. at 227); *see also City of Richmond v. J.A. Croson Co*., 488 U.S. 469 (1989).
[9] *Parents Involved*, 551 U.S. at 720-21, 736 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).
[10] *Id*. at 720-21, 736-37; *Richmond v. J. A. Croson Co*., 488 U.S. 469, 524-25 (1989) (Scalia, J., concurring).
[11] Consent decree was achieved through settlement negotiations between the parties and adopted by the court after it found the agreement "fair, reasonable, and adequate." *Parents for Quality Educ. With Integration, Inc. v. State of Ind.*, 728 F. Supp. 1373, 1374, 1377-79 (N.D. Ind. 1990).
[12] *See Parents Involved*, 551 U.S. at 720. Note that the duration of the consent decree was "[f]rom the 1991-92 school year when the plan [would be] fully implemented through the 1996-97 school year." *Parents for Quality Educ. With Integration, Inc.*, 728 F. Supp. at 1380. The FWCS consent decree specified that "[s]ubsequent to the 1996-97 school year, FWCS [would] no longer be required to maintain racial balance ratios such as those set forth in Section 6 of this Decree or to pursue the methods of racial balance set forth in Sections 3 and 7 of the Decree; provided, however, that FWCS will continue to maintain a racially integrated school system." *Id.* The existence of the sunset provision, however, is not evidence of achievement of unitary status. *See Id.* at 1380-81.
[13] *See Parents Involved*, 551 U.S. at 736-37.
[14] *Id*. at 736-37; *see also North Carolina State Bd. Of Educ. v. Swann*, 402 U.S. 43, 45-46 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971).
[15] *Grutter*, 539 U.S. at 333-34; *Richmond v. J. A. Croson Co*., 488 U.S. 469, 524-525 (1989) (Scalia, J., concurring).
[16] *Grutter*, 539 U.S. at 333-35, 339-42.
[17] *Id.* at 334-43.

admissions program cannot use a quota system – it cannot "'insulate each category of applicants with certain desired qualifications from competition with all other applicants.'"[18] Instead, a university may *consider* race or ethnicity as a "plus" in a particular applicant's file, as did the university in *Grutter*.[19] Although the Court later clarified that the compelling interest in *Grutter* was specific to the unique context of higher education,[20] the application of the narrow tailoring test may nonetheless be useful in FWCS's context, since both cases involve a compelling government interest, albeit different ones.

The *Parents Involved* Court considered challenges to voluntary efforts by two school districts—one in Seattle, Washington, and the second in Jefferson County, Kentucky—to achieve a racial balance in their respective school systems by relying upon an individual student's race in assigning that student to a particular school.[21] Neither school was positively determined to have a compelling governmental interest because of past state-sponsored segregation.[22] The Seattle School District classified children as White or non-White and used those classifications as the second in a series of tiebreakers in finalizing students' admissions.[23] The Jefferson County School District classified students as Black or "other" in order to make certain elementary school assignments and to rule on transfer requests.[24]

In contrast to *Grutter*, the Court in *Parents Involved* determined that the assignment plans used by both districts were not narrowly tailored in light of the requirements for narrow tailoring set out in *Grutter*.[25] The Court found the assignment plans violated the equal protection clause of the Fourteenth Amendment, because, among other reasons, the extreme measure of relying on race in assignments was unnecessary to achieve the stated goals given the plans were not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits but were instead somewhat arbitrarily tied to each district's racial demographics and to a limited definition of diversity as White/non-White or Black/"other."[26] The Court also considered that the use of individual racial classifications had only a minimal effect on student assignments, suggesting other means would have been effective in achieving the districts' stated ends;[27] that the districts failed to show that they considered methods other than explicit racial classifications to achieve their stated goals;[28] and that the plans did not provide for meaningful individualized review of

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[18] *Id*. at 334 (quoting *Regents of Univ. of Cal. v. Bakke* 438 U.S. 265, 315 (1978)).
[19] *Id*.
[20] *Parents Involved*, 551 U.S. at 724-25.
[21] *Id*. at 709-11.
[22] *Id*. at 720-21.
[23] *Id.* at 711-12.
[24] *Id*. at 710.
[25] *Id*. at 723-24, 734-35, 744.
[26] *Id.*at 726-30.
[27] *Id.* at 733-35.
[28] *Id.* at 726-28, 733-35, 747. When discussing whether the school districts had a compelling justification, the Court found it to be unconstitutional "when race [came] into play, it [was] decisive by itself, and that the plans relied on racial classifications in a non-individualized, mechanical way and employed a limited notion of diversity, viewing race exclusively in White/non-White or Black/"other" terms. *Id.* at 722-24.

applicants because they relied on racial classifications in a mechanical and non-individualized manner.[29]

Since FWCS's assignment plan explicitly employs individual race classifications, it is subject to strict scrutiny under *Parents Involved*. Although FWCS's assignment plan purports to be race-neutral, its explicit use of parallel lottery systems based on race appears analogous to the assignment plans at issue in *Parents Involved*, where the determinant weight of race ultimately proved illegal.[30] There, the Court clarified that "the entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual…The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a *broader* assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be 'patently unconstitutional.'"[31] (emphasis added). While FWCS's lottery system incorporates other considerations such as sibling enrollment, as did the Seattle School District's plan, race nonetheless seems to be the prevailing determinant of admissions when applied. This would likely prove unconstitutional under the Court's strict scrutiny standard and narrow tailoring test.

Allegation 2: The Identity Project's racially biased and ideological curriculum

The whistleblower alleges that because the Identity Project Grant to Harvard University is racially biased, it violates Title VI of the Civil Rights Act of 1964, which makes it illegal to use federal funds to discriminate against any individual on the basis of race, color, or national origin,[32] as well as IES's statutory authority, which requires the Director of IES, with the advice of the National Board for Education Sciences, "to ensure that activities conducted or supported by the Institute are objective, secular, neutral, and nonideological and are free of partisan political influence and racial, cultural, gender, or regional bias."[33]

The Harvard grant's abstract explains that "[t]he Identity Project is a school-based universal intervention program that provides adolescents with tools and strategies for engaging in ERI [ethnic-racial identity] development."[34] The Harvard study proposes to develop and compare three distinct modes of professional development to deliver the Identity Project's pedagogical approach to educators, and to measure outcomes through metrics such as students' academic outcomes. The Identity Project grant application[35] describes its operative theoretical framework as "increas[ing] teachers' ERI development, reduc[ing] their colorblind ideology, and increas[ing] their ERI content knowledge [i.e., race-related competencies]." The grant further

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[29] *Id*. at 723 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276, 280 (O'Connor, J., concurring))
[30] *See Id*. at 732.
[31] *Id*. at 722-23, 730, 732 (quoting *Grutter*, 539 U.S. at 330).
[32] § 2000d.
[33] 20 U.S.C. §§ 9511(b)(2)(B), 9514(f)(7), 9516(b)(8).
[34] *Developing and Testing Training Modes for Improving Teachers' Race-Related Competencies to Promote Student Learners' Academic Adjustment*, Institute of Education Sciences, https://ies.ed.gov/funding/grantsearch/details.asp?ID=4474.
[35] Grant excerpts were provided by the whistleblower, who no longer has access to the full grant application.

provides, "CSP [culturally sustaining pedagogy] requires that educators engage in regular self-reflection regarding issues of race and ethnicity, recognize and continuously check their implicit biases, and practice constant self-awareness regarding the impact of their actions on ERM [ethnic-racial minority] students." As the background for this self-reflection, it notes that, "although teachers of all backgrounds vary in their own ERI formation and attitudes towards discussing racial issues, White teachers in particular […] struggle with acknowledging their own privilege and recognizing racism, which can hinder productive conversations about race with students."

Information resources on the Identity Project's webpage further the whistleblower's arguments.[36] The webpage links to resources such as a tip sheet for educators titled "Why is it so difficult to think of stereotypes for White people?"[37] The sheet provides guidance for teachers who may be asked about the differences between stereotypes for different racial groups during the course of delivering the Identity Project curriculum. The listed key takeaways are "(1) 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 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. (2) Stereotypes against people of color often have more significant and harmful consequences than those for White people."[38] Another tip sheet addresses the query, "What should I do if I'm a White educator and a student of color says that I shouldn't be teaching the Identity Project because I'm White and I can't understand their ethnic-racial identity or experiences?"[39] The response provided notes that the "student is not in the wrong" and goes on to explain, among other things, that "there is a long and unfair history of White educators making decisions about what's 'best' for students of color."[40] In general, these and other Identity Project resources are geared toward assisting "educators in navigating discussions about race, ethnicity, and identity with their students."[41]

I have concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation. Please note that specific allegations and references to specific violations of law, rule or regulation are not intended to be exclusive. As previously noted, your agency must conduct an investigation of these matters, and I will review the report for sufficiency and reasonableness before sending copies of the agency report, along with the whistleblower's comments and any comments or recommendations I may have, to the

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[36] Adriana Umaña-Taylor, *Identity Project: An Intervention Targeting Adolescents' Ethnic-Racial Development*, Harvard Graduate School of Education, https://umana-taylorlab.gse.harvard.edu/identity-project/.
[37] Adriana Umaña-Taylor, *ERI Resources*, Harvard Graduate School of Education, Microsoft Word - 10_YMBW_White Stereotypes_Final_04-12-21.docx (harvard.edu).
[38] *Id*. (emphasis in original).
[39] Adriana Umaña-Taylor, *ERI Resources*, Harvard Graduate School of Education, Microsoft Word - 09_YMBW_Role of White educators in IP_Final_04-12-21.docx (harvard.edu).
[40] *Id*.
[41] Adriana Umaña-Taylor, *Identity Project: An Intervention Targeting Adolescents' Ethnic-Racial Development*, Harvard Graduate School of Education, https://umana-taylorlab.gse.harvard.edu/identity-project/.

President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the Appendix, which can also be accessed online at https://osc.gov/PublicFiles. If your investigators have questions regarding the statutory process or the report required under section 1213, please contact Elizabeth McMurray, Chief of the Retaliation and Disclosure Unit, at (202) 804-7089 for assistance. I am also available for any questions you may have.

Sincerely,

Henry J. Kerner
Special Counsel

Enclosure

cc: Ms. Sandra Bruce, Acting Inspector General, Department of Education

APPENDIX
AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: https://osc.gov/PublicFiles. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).