WHISTLEBLOWER COMMENTS

PROVIDED PURSUANT TO 5 U.S.C. § 1213(e)

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U.S. Department of Education (ED)
Report of Investigation
submitted to the
U.S. Office of the Special Counsel
OSC File No. DI-21-000533

SUBMITTED TO:

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Table of Contents

Introduction 3
The obvious subject avoidance of the ED Report. 5
The ED Report failed to address retaliation against the whistleblower. 5
OSC failed to refer all wrongdoing to ED for investigation. 7
Since neither statute nor regulation impose detailed investigative standards, ED was allowed to abuse this investigation. 8
Title VI applies to ED. 10
34 CFR § 100 *et seq*. requires ED to effectuate the provisions of Title VI. 10
The ED Report misconstrues the statutory language of Title VI. 11
The ED Report has adopted an absurd view of ED's obligations and relation to Title VI. 11
The ED Report ignores the role of OCR. 14
The Standards of Ethical Conduct of Employees in the Executive Branch, 5 C.F.R. § 2635.101, should have precluded ED's funding of discriminatory grants – but did not. 14
The equal protection component of the Due Process Clause (i.e. reverse-incorporation) applies to ED. 15
The Ft. Wayne grant violates The Common Rule, 34 CFR § 97 and appeared to violate Title VI. 15
The ED investigation of the Indiana University EAC grants fails to meet the statutory requirements in failing to offer facts or legal analysis. 17
The Harvard grant was funded in violation of both Title VI and ESRA. 19
The Harvard grant qualifies as political ideology. 22
The Harvard, Ft. Wayne, and Indiana University grantees violated their assurances to the federal government. 23
The ED Report misstated E.O. 13950 to justify its actions and failed to articulate or analyze the facts about which the whistleblower protested. 24
The Harvard, Ft. Wayne, and Indiana University grants violate E.O. 13985. 26
IES has a systemic practice of violating Title VI and ESRA. 26
The ED Report must be rejected because it was produced with an irreconcilable conflict of interest. 28
OSC failed to make the whistleblower "whole" 37
Recommendations 41

Exhibit A: OSC Form-14….42
Exhibit B: "Clarifying Questions" email to OSC….77
Exhibit C: Timeline for OSC….98
Exhibit D: Harvard, Fort Wayne, Biden EO email packet….103
Exhibit E: Waste and 34 CFR 97 Noncompliance email packet….142
Exhibit F: PRIM&R and SACHRP email packet….178
Exhibit G: Harvard grant application excerpts; highlighted by the whistleblower….223
Exhibit H: Harvard grant online resources….285
Exhibit I: Fort Wayne grant application excerpts; highlighted by the whistleblower….315
Exhibit J: online materials produced by the Indiana University grant….381
Exhibit K: IES anti-racism and DEI resources….406
Exhibit L: The Future of Education Research at IES: Advancing an Equity-Oriented Science....515
Exhibit M: excerpted correspondence between the whistleblower, OSC, and the ED investigators....801
Exhibit N: "The Power-Mad Utopians" by Michael Lind, published in Tablet on January 30, 2023……..880
Exhibit O: ED OGC functional statements….893

Introduction

These whistleblower's comments on the U.S. Department of Education ("ED")'s investigation Report for case DI-21-000533 ("the Report") demonstrate many instances of the Report's failing to meet the required standard for a "thorough" investigation.[1] In fact, so many essential elements were omitted that one might conclude the Report has purposefully offered result-oriented conclusions based on partial evidence, obviously erroneous analysis, and a failure to assess critical elements.

The initial and supplemental whistleblower disclosures that the U.S. Office of Special Counsel ("OSC") evaluated primarily relate to how ED funded grants and trainings that purveyed illegal discrimination on the basis of race (i.e. disparate racial treatment), including concepts of "Whiteness," "white privilege," "systemic racism," etc. These individual illegal funding decisions align with an illegal racial "equity" concept at ED, requiring reverse-racism to achieve "equal outcome" rather than assuring "equal opportunity."

Specifically, an illegal "equity" agenda in this context is an agenda that requires "equality of outcome between racial groups."[2] The evidence brought forward by the whistleblower shows

[1] 5 USC § 1213 empowers the Special Counsel to reject an agency's deficient report and require additional investigation resulting in a supplemental report. This mechanism is supposed to result in a thorough investigation. See also, *Wren v. MSPB*, 681 F.2d 867, 874 (DC Cir. 1982) which cited the Congressional intent that an investigation be "thorough."

[2] This definition of "equity" is also the product of a politicized agenda. While this whistleblower matter is not a question of politics, the whistleblower notes that the Educational Sciences Reform Act of 2002 ("ESRA"), 20 USC § 9514(f)(7) prohibits ED grants that are NOT "objective, secular, neutral, and nonideological" and it specifically requires such grants to be "free of partisan political influence and racial, cultural, gender, or regional bias." This is the law. This matter involves respect for the law as it existed at the time of these events, nothing more. ED's practices may thus also be described as "political," "discriminatory," or "biased," but the fact is the ED practices subject to the whistleblower's complaint are prohibited under ESRA, the Code of Federal Regulations applicable to ED, ED's own code of ethical conduct, basic anti-discrimination statutory laws, and basic American constitutional

that ED not only uses federal tax dollars to fund the proliferation of this agenda but in doing so disregards specific legal directives against such action. ED's adoption of this particular brand of "equity" is blatantly contrary to what is legal "equity" which, *even as defined by the current Administration's E.O. 13985*, means "the consistent and systematic fair, just, and *impartial* treatment of all *individuals*…" (Emphasis added.) Equity based on reverse racism is not impartial treatment of all individuals.

The whistleblower's disclosures about ED's illegal activities are grounded in the belief in these same concepts, i.e. fair, just, and impartial treatment of all *individuals* in the use of federal tax dollars for funding both grants and trainings. The whistleblower pointed out issues of illegality with specific ED grants and trainings. He made his disclosures about ED's illegal activity because the fair, just, and impartial treatment of all *individuals* concept is not discriminatory in achieving what all Americans, and the law, agree should be equal treatment under law. Treating racial groups differently to achieve an "equitable" or uniform *outcome* is, however, discriminatory. The whistleblower has at all times been aware of this principle, as recently affirmed by the U.S. District Court in *Greer's Ranch Café v. Isabella Casillas Guzman and United States Small Business Administration*, 540 F. Supp. 3d 638 (N.D. Texas, filed May 18, 2021).

The ED Report had an obligation to recognize the law when conducting its investigation. It had an obligation to assess the situation in the knowledge that the whistleblower believed, and had solid basis to believe, that "equality of outcome" is illegal and discriminatory and "equal treatment of all individuals under law" is not illegal or discriminatory. It had an obligation to "thoroughly" assess the areas of the whistleblower's individual concerns, along with the manner in which he made his disclosures and the result of his disclosure (for which he was fired).

It is obvious that the ED Report failed in its obligations resulting in an egregious disregard for the legal (and ethical) responsibility to discharge a "thorough" investigation – specifically required by law – to examine and document ED's pervasive, systemic, and illegal use of federal tax dollars. The fact that the ED Report was prepared by an investigative team of attorneys who were in a conflict-of-interest position underscores the fact that the ED Report is legally, substantively, and ethically unacceptable.

One further point is necessary to keep in mind when assessing the whistleblower's employment being terminated in retaliation for expressing his concerns. In reaction to what for any neutral observer would be a very troubling situation at ED, the whistleblower simply asked that the practices about which he raised questions – which he perceived to be illegal – be reviewed by ED's legal arm, the Office of General Counsel (OGC), for a legal opinion to confirm whether ED's activities were in conformance with the law. He did this respectfully and within the chain of his command. For this he was told that raising concerns of illegal agency action was not his job. He was reprimanded, he was silenced, he was isolated, and he was ultimately fired.

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principles. Notions of "equity"– aside from being discriminatory, illegal, and political – are explained further in a *Tablet* article by Michael Lind entitled "The Power-Mad Utopians" (January 30, 2023) (Exhibit N, starting p. 880). The article explains how the rote use of the bureaucratic phrase "diversity, equity, and inclusion" (DEI) is an effort to radically restructure the U.S. on the basis of racial quotas, so that all racial and ethnic groups are represented in equal proportions in all occupations, classes, academic curriculums, and even literary and artistic canons.

The obvious subject avoidance of the ED Report.

ED's Report found "nothing to suggest that the Department violated any particular law, rule, or regulation[.]"[3] This conclusion is so utterly contrary to the facts and law that it suggests the investigators were willfully blind. The added element of the ED investigative team's conflicts of interest suggests one underlying reason for these failures.

The Report evidences three methods by which ED actually did the opposite of its statutory duty to conduct a thorough investigation:

1) Choosing to have ED's Office of General Counsel (OGC) conduct the investigation rather than a neutral team or ED's Office of Inspector General (OIG);
2) Artificially narrowing the scope of the investigation by ignoring inconvenient facts and legal arguments provided by both OSC and the whistleblower himself, despite OSC's "catch-all" referral, as required by 5 USC § 1213 of "Any additional, related allegations of wrongdoing discovered during the investigation" and the requirement to do a "thorough" investigation of the matters at hand; and
3) Perverting the plain meaning of numerous legal authorities.

The whistleblower made every effort to correct the three aforementioned methods, including:

1) Objecting to the conflict of the investigative team several times, offering one alternative to have OIG conduct the investigation rather than OGC, and when ED refused, extensively documenting OGC's conflicts of interest;[4]
2) Clarifying the nature of the issues to set the proper scope of the investigation by making additional disclosures to OSC, which OSC referred to Secretary Cardona on July 19, 2022;[5] and
3) Providing documentary evidence of discrimination and articulating the legal concepts of discrimination to both OSC and the ED investigators, both in writing via email[6] and during three one-hour discussions with the investigators (and the whistleblower's attorney) on July 6, July 8, and November 21, 2022.

These efforts were rejected in the investigation.

The ED Report failed to address retaliation against the whistleblower.

At the outset, the Report ignored the most obvious of the required topics of investigation – whether the whistleblower was fired in retaliation for his requests for legal review. This is not pardonable.

5 USC § 1213(d) lists the requirements for a disclosure Report, which are as follows:

[3] See, disclosure Report, page 24.
[4] See, Exhibit M, p. 821-847.
[5] See, Report, page 1.
[6] See, Exhibit B, starting on p. 77.

> (d) Any report required under subsection (c) shall be reviewed and signed by the head of the agency and shall include—
>
> (1) a summary of the information with respect to which the investigation was initiated;
> (2) a description of the conduct of the investigation;
> (3) a summary of any evidence obtained from the investigation;
> (4) a listing of any violation or apparent violation of any law, rule, or regulation; and
> (5) a description of any action taken or planned as a result of the investigation, such as—
>
> (A) changes in agency rules, regulations, or practices;
> (B) the restoration of any aggrieved employee;
> (C) disciplinary action against any employee; and
> (D) referral to the Attorney General of any evidence of a criminal violation.

The underlying fact pattern gave rise to the consideration of three separate administrative remedies: (1) the ED disclosure investigation and Report; (2) a complaint to OSC regarding Prohibited Personnel Practices (PPP) (i.e. illegal retaliation against the whistleblower for whistleblowing, in violation of the Whistleblower Protection Act)[7]; and (3) a complaint to ED's EEO Office (OEEOS) and subsequent administrative hearing (i.e. illegal retaliation against the whistleblower for opposing discrimination, in violation of Title VII of the Civil Rights Act).[8]

Despite being fully aware of the fact that the whistleblower's employment was terminated by his supervisor because of the whistleblower's "repeating his concerns regarding both the Harvard and Fort Wayne grants," as admitted by ED in its discovery responses in a concurrent EEOC hearing,[9] and despite the element of "the restoration of any aggrieved employee" as listed by 5 § USC 1213(d)(5)(B), ED's "investigative team" failed to even mention this item in their Report.

Further, if ED had performed a real investigation, a "thorough" investigation of the facts and any related matters, it would have perceived the critical, numerous, and obvious factual inconsistencies, sometimes termed "lies," where the whistleblower's supervisor asserted facts that were contravened by sworn testimony of others, including: 1) the whistleblower's second line supervisor asserting he had nothing to do with the firing and the first line supervisor asserting he was involved, requested it, and approved it; 2) the first line supervisor stating that the whistleblower was "out of scope" of his job contravened by: A) the sworn statements of others that this was a part of his responsibilities and that it was acceptable to raise these concerns, and B) legal requirements to bring concerns to the fore; 3) the first line supervisor's excuse that members of the whistleblower's team stated they did not want to work with him being contravened by the sworn statements of those members to the contrary; and 4) the first line supervisor initially denying the need for any legal opinions, then suggesting the whistleblower write up his concerns for legal review (which was never sought), and then firing the whistleblower for bringing up these very concerns. The factually contradicted excuses point inexorably to a retaliatory firing – yet both the inquiry and the facts were somehow ignored in the Report.

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[7] 5 USC § 2302.
[8] 42 USC § 2000e–16.
[9] ED's responses to the whistleblower's interrogatories stated, in part:
(1) "The Complainant often went outside the scope and role of his employment during weekly team meetings and during biweekly one-on-one meetings with his supervisor by repeating his concerns regarding both the Harvard and Fort Wayne grants after being instructed that he was exceeding the scope of his role." and
(2) "The Agency does not contend that other conduct by Complainant was one of the reasons for Complainant's termination."

These are only some of the examples where ED's disclosure Report fails to fulfill all statutory requirements.

OSC failed to refer all wrongdoing to ED for investigation.

On May 6, 2021, the whistleblower filed a "Complaint of Prohibited Personnel Practice Or Other Prohibited Activity," Form-14, with the U.S. Office of Special Counsel ("OSC").[10] This complaint had two sections: disclosures of illegality/other wrongdoing, and Prohibited Personnel Practice (PPP) allegations. The ED Report was produced in response to the whistleblower's disclosures regarding the underlying illegalities at ED. The whistleblower's PPP allegations relate to retaliation against the whistleblower by his ED supervisor because of his whistleblowing to her.

Regarding disclosures, the initial complaint involved very specific violations of law at ED, as follows:

1) ED's Institute of Education Services ("IES") in funding the [Harvard Grant][11], and ED's Office of Elementary and Secondary Education ("OESE") in funding the [Ft. Wayne Grant],[12] violated the following: the Federal Policy for the Protection of Human Subjects, 34 CFR § 97; the Educational Sciences Reform Act of 2002 ("ESRA"), 20 USC § 9514(f)(7); 5 CFR § 2635, Standards of Ethical Conduct for Federal Employees in the Executive Branch; 34 CFR 100; the 14th Amendment; the equal protection component of the 5th Amendment; and other legislative prohibitions against discrimination based on race;

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[10] See, Exhibit A, starting on p. 42.

[11] See, Exhibit A, p. 51-53, which stated that while working at ED, the whistleblower "disclosed to both my team leader (….) and manager (….), both verbally and via email, what I reasonably believed were violations of law in connection with a grant - specifically, a grant that *the Institute of Education Sciences (IES)* had chosen to fund, then forwarded to my team for human subjects review under 34 CFR 97. The grant's PR number is R305A200278. I reasonably believed that this grant: 1) violated the IES director's statutory duty under 20 USC 9514(f)(7) "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"; 2) violated OMB memo M-20-34; 3) ran contrary to the (at that time, Trump)administration's publicly-stated positions; 4) ran contrary to the unitary executive view of government, including the premise that political appointees should make the sort of political decision at issue in this grant rather than career people; 5) violated President Trump's Executive Order on Combating Race and Sex Stereotyping; 6) violated OMB memo M-20-37; and 7) violated long-standing bipartisan/non-partisan and Constitutional norms."

[12] See, Exhibit A, p. 54-56, which stated that "While working at ED, I disclosed to both my team leader and manager, both verbally and via email, what I reasonably believed was a violation of law in connection with a grant - specifically, a magnet school grant that a program office had chosen to fund, then forwarded to my team for human subjects review under 34 CFR 97. The grant's PR number is U165A180062. I reasonably believed this grant violated: 1) The Supreme Court's holding in Grutter, which banned racial quotas for school admissions; and 2) two sections of the Federal Register governing magnet school grants, specifically 34 CFR 280.1(f) and 280.20(b)(7). … Here, ED had chosen to fund a grant application from a magnet school (Fort Wayne) that: 1) had a race-based admissions policy (separate lotteries based on race, meaning admissions tracks), which I reasonably believed violated Supreme Court precedent, and 2) focused on "equity" in its curriculum, which I reasonably believed violated multiple legal authorities, including two sections of the federal register. This term ("equity") has two different meanings, and in this context, it was the "equality of outcome" or "equality between groups" rather than "equal treatment of individuals under law." Similar to the aforementioned matter of the "Identity Project" grant from Harvard, the Trump administration's publicly-stated position ran contrary to funding an inherently partisan & political grant application such as this one.

2) ED's Office of Finance and Operations ("OFO") and its Office of Equal Employment Opportunity Services ("OEEOS") for discriminatory employee training violated Title VI and Title VII of the Civil Rights Act of 1964;[13]
3) OFO and OEEOS for restarting previously-halted discriminatory trainings violated Title VI and Title VII of the Civil Rights Act of 1964 and the "equity" requirements under E.O. 13985[14]; and
4) The Grants Policy and Training Division ("GPTD"), the division of OFO responsible for enforcing the "Common Rule," systemically failed to ensure ED-funded grants complied with the Common Rule ("Federal Policy for the Protection of Human Subjects"),[15] 34 CFR § 97.

Despite these numerous allegations and the voluminous supporting evidence provided by the whistleblower,[16] OSC initially chose to only make referrals about the Harvard and Ft. Wayne grants, along with the empty investigation of a third "catch-all" referral of "any additional, related wrongdoing." In its initial referrals, OSC failed to specifically refer the following: (1) discriminatory trainings that the whistleblower attended, (2) the restarting of previously-halted discriminatory trainings, (3) systemic violations of the Common Rule, 34 CFR § 97, (4) IES having a systemic practice of funding discriminatory grants and other content on its platforms, (5) ED having a systemic practice of funding discriminatory grants.

OSC's failure to make additional specific referrals, relying instead on its "catch-all" referral, allowed the ED investigators to ignore all five items listed above – completely ignoring the whistleblower's insistence upon a "full and impartial" investigation and in derogation of the legal standard of a "thorough" investigation. In an attempt to clarify for ED the requirement to investigate the two systemic problems at IES and ED, the whistleblower made subsequent disclosures to OSC on June 22, 2022.[17] OSC then made three subsequent referrals to ED on July 18, 2022, referring a third grant (to Indiana University) along with specifically describing the aforementioned systemic discriminatory practices at IES and ED.[18] Had the whistleblower not made his additional disclosures, the ED Report would have certainly omitted both systemic problems entirely.

However, the whistleblower's efforts did not entirely fix the obvious problem. Due to the absence of specific referrals from OSC, and because the ED investigators refused to investigate "any additional, related wrongdoing," ***violations of the Common Rule and the discriminatory trainings were never investigated.*** For additional details on these, see Exhibits B, C, D, E, and F.

Since neither statute nor regulation impose detailed investigative standards, ED was allowed to abuse this investigation.

Under 5 USC § 1213(b), OSC reviews whistleblower information and in those cases where there is a *substantial likelihood* of a violation of law, regulation, abuse of authority, etc., the law

[13] See, Exhibit A p. 57-59
[14] See, Exhibit A p. 59
[15] See, Exhibit A p. 72-73
[16] See, Exhibit A. See also, Exhibit B.
[17] See, Exhibit M, p. 859.
[18] See, Exhibit M, p. 860.

requires OSC to simply refer the information to the agency head and "require" that the agency conduct an "investigation" of the whistleblower information and any related matters. The referred matters are therefore not trivial, but are vetted and serious. While the statute "requires" an investigation and certain matters to be addressed,[19] it does not specify *how* that investigation is to be handled or codify judicial references to the quality of the investigation.[20] Agencies are understandably permitted substantial discretion in how the investigation is to be executed. However, an insufficient amount of direction has also left room for any sort of "investigation" desired, even sham or self-protective investigations such as is evident in ED's Report. In fact, ED's "investigation" is a poster child for how an agency can protect – not discipline – its employees who act illegally.

Any well-intentioned observer would suppose that agency officials would immediately look into a matter of such seriousness as referred by OSC and fix it to comport to the law and the high ethical standards to which Federal Executive employees are to be held.[21] But Congress knew better than to rely on bureaucratic execution of duties according to proper principles and enacted legal whistleblower protections.[22] Unfortunately, the matter of *how* the investigations should be handled was left broad, with an unfortunate result. It should not be up to a whistleblower to articulate these egregious agency practices. Nor should OSC accept, even initially, this type of Report. In doing so, OSC is actually inviting agencies to misuse the investigation in deference to agency self-protection. This is especially the case here where certain divisions of ED have articulated, in sworn testimony, an arrogant disregard for Congress and the law.[23] This is a serious mistake.

This tolerance of self-protection exists for two reasons: 1) the whistleblower statute does not articulate strong investigative standards; and 2) OSC demonstrated a failure to require such investigative standards, procedures, and protocols on its own that will assure the type of investigation contemplated by Congress instead of the type of "investigation" Report submitted by ED in this case. Some might argue that OSC cannot mandate detailed procedures government wide. But OSC can certainly require strict adherence to conflict of interest law, professional standards and reject obviously substandard work in its discretion to require further action from the agency; it can require that "other matters" to be investigated as articulated; and it can assure that whistleblowers have an opportunity to verify that all salient points are investigated and questions answered, etc. The point is that OSC certainly can do more than a "hands-in-the-pockets" approach.

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[19] See, 5 USC § 1213(d).
[20] See, *Wren v. MSPB*, 681 F.2d 867, 874 (DC Cir. 1982) which cited the Congressional intent that an investigation be "thorough."
[21] See, 5 CFR § 2635.
[22] See, S. Rep. No. 95-969, at 8 (1978) "In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth." The sad fact is that in enacting the WPA and WEPA, Congress recognized that safeguards are necessary, otherwise bureaucratic self-interest, self-preservation, group loyalty, and raw survival instincts will protect illegal employee behavior and not the public interest.
[23] In describing IES 'independence' and methodology, a top IES official provided sworn testimony that IES uses rigorous 'science' as an independent agency rather than rigorously monitoring IES' legal constraints, arrogantly rejecting supervision with a "thank you very much, Mr. Secretary, we're a science organization," deemphasizing compliance with the law in favor of IES' interpretation of what "science" will allow. He stated that IES does not "police" application of ESRA, but made the point that IES *does* monitor at the broader level what IES referred to as "interference" from ED top management, the White House, Congress or some "outside entity."

This case is a perfect example of abuses in this regard. Congress must either fix the statutory language or require OSC to properly implement a common-sense approach to investigations.

The ED "investigation" pattern of ignoring salient facts, failing to analyze the situation, and engaging in advocating a position that is clearly not justified under the law all underscore the issues that Congress needs to remedy. Congress should consider a range of responses, such as 1) requiring by statute a non-conflicted team of investigators, 2) requiring a statement of laws, rules, regulations, policies, etc. that need to be assessed and explicitly having OSC reject any investigation that falls short, with an explicit right of action for a whistleblower to force respect for the investigative mandate, and 3) providing a mandate to OSC to discipline any investigative team that, like here, blatantly ignores the investigative responsibility and acts only to justify the agency's illegal actions.

Title VI applies to ED.

It is not without basis to characterize ED's "investigation" of its own unlawful behavior as a seemingly intentional disregard of ED's violation of both 1) ED's own regulations at 34 CFR §100 *et seq*. promulgated under Section 602 of Title VI, and 2) Section 601 of Title VI itself (hereafter, "Title VI").

34 CFR § 100 *et seq*. requires ED to effectuate the provisions of Title VI.

The three ED grants questioned by the whistleblower involve "recipients" of taxpayer funds for ED to lawfully disburse as appropriated by Congress. ED's responsibility and obligation in regard to Title VI is described by 34 CFR §100 *et seq*. which *requires that ED respect Title VI requirements* when it funds any "recipient" with financial assistance. One level of ED's responsibility to enforce Title VI requirements thus does not come directly from Title VI, but from its self-defined regulations. In short, these regulations sensibly require ED, not a "*recipient*," to:

> "… effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end that 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 otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Education." 34 C.F.R. §100.1.

This responsibility is given to ED to effectuate the provisions of Title VI, unmistakably directly charged to ED, not to third parties, by the terms of this regulation. *It makes the most basic sense to even the most partisan (or conflicted) of observers that ED should have this responsibility in connection with its own grants*. ED is funded to disburse taxpayer funds in accordance with the laws of the United States, not contrary to the law or with disregard for the law. Any other view borders on ridiculousness. Under the law, ED must therefore affirmatively effectuate the Title VI provisions when disbursing funds so that no person is excluded or denied on the basis of race or color, or is subject to discrimination by a program funded by ED.

The "investigators" made sure not to mention 34 CFR 100, *et seq*, in the Report. This acted *to falsely legitimize ED's radical assertion that just because ED is not a Title VI "recipient," it was disassociated from **any** responsibility to respect the anti-discrimination provisions of Title VI* and therefore there was no cognizable "violation of law" by ED with the discriminatory grants. The problem is that ED is *very* associated with respecting Title VI through 34 CFR § 100 *et seq*., and simple reference – which the Report failed to do – makes this very clear.

The ED Report misconstrues the statutory language of Title VI.

Furthermore, the statutory language of Title VI (specifically, Section 601) clearly imposes a blanket prohibition:

> "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."

Title VI does not say *who* is prohibited from discriminating; it does not prohibit discrimination by "recipients" of federal financial assistance *alone*. Instead, by omitting the "who," Title VI articulates a *blanket* prohibition against discrimination in federally-funded programs on the basis of race – prohibiting *all* discrimination, by *anyone* and *everyone* (including ED). Title VI is, essentially, a commandment from Congress: "No person … shall, on the ground of race … be subjected to discrimination." It is not only a commandment to "*recipients*" but to all persons.

Rather than acknowledging Title VI as a blanket prohibition, ED chose to apply the prohibition only to grant recipients, thus perverting the plain meaning of the statute, absolving itself from the prohibition, and providing an *ex post facto* justification for its award of discriminatory grants – as ED did award to Harvard, Fort Wayne, and Indiana University.

The ED Report has adopted an absurd view of ED's obligations and relation to Title VI.

In addition to totally ignoring the requirements of the statute and regulation, ED adopted the absurd rationale that because the Federal government could not be a "recipient" of Title VI funds, ED somehow has no responsibility for the grants that discriminated contrary to Title VI. ED's contortion completely evades the real question: Do *the grants themselves* violate Title VI?

The ED "investigators" made sure that the Report made no findings of critical facts and associated no salient facts with the grants in question, despite the statutory obligation to conduct a mandatory, "thorough" and "reasonable" investigation.[24] One would assume that facts should count in any investigation, unless as here, ED is investigating itself. ED clearly violated its statutorily dictated responsibility to properly investigate under 5 USC §1213.[25]

[24] See, *Wren v. MSPB*, 681 F.2d 867, 874 (DC Cir. 1982) which cited the Congressional intent that the investigation be "thorough."

[25] §1213(c)(A) requires an investigation of the information transmitted and "any related matters." ED failed to respect this obligation to understand the essence of the information in favor of narrowly viewing the complaint.

At a minimum, the factual question ED needed to investigate was whether ED was funding grants that violated the terms of Title VI, and if so, with what frequency and what was the articulation of ED's responsibility in that situation. This inquiry was ignored. Indeed, no proper inquiry could even begin without finding the salient facts about the grants and whether they were illegally discriminatory. But the ED "investigation" Report artfully, if not disingenuously, dodged this inquiry by ignoring it. It failed to find the salient facts, failed to analyze or even mention the obligations under 34 CFR §100 *et seq.*, and failed to analyze or even mention the Standards of Ethical Conduct of Employees in the Executive Branch, 5 C.F.R. § 2635.101 which should have independently precluded by itself the funding of discriminatory grants.

Rather than find the facts in the context of applicable law, the Report focused on the federal government's not being a Title VI statutory "recipient" of funds. The "investigators" then hastily concluded that since the government was not a statutory "recipient," it had no statutory recipient obligations and therefore did not violate the law.

Apparently, the view is that while ED is charged with not discriminating, ED can fund grants that discriminate. Based on this rationale, ED's Report asserted that the whistleblower's concerns with Title VI violations were "misplaced" because ED could not be held to Title VI standards, and therefore his complaint had no basis.[26]

The "investigation" should have focused on the facts and law, i.e. 1) whether the terms of the grants were discriminatory, 2) was ED obligated under 34 C.F.R. § 100 *et seq*. to not fund grants whose terms violated Title VI, and 3) why did the ED Office for Civil Rights (OCR) ***not*** investigate the situation it is tasked with doing after the whistleblower's notice?[27] Had the ED "investigators" focused on these questions, the ED Report would have reached an obvious and different conclusion sustaining the whistleblower's concerns.

This glaring disregard for ED's important responsibility is totally unacceptable both from a program standpoint and for ED having wrongfully rejected the basis of the whistleblower's concerns in raising illegal activity. Congress should be aware that under the current statutory scheme, an agency's ability to self-investigate and bury the issue is very real and present.

By relying on the irrelevant assertion that under Title VI the Federal government is not a "recipient" of funds, the ED "investigators" falsely concluded that ED had no role to play in taking responsibility for the illegal discrimination in its grants. Rather, they portrayed the ultimate "recipients" of the ED funding as the sole parties responsible for illegal discrimination. This is not true. It amounts to disingenuous finger pointing. ED has responsibility as well under 34 CFR § 100 *et seq*. Congress must be made aware that ED is purveying a raw, cynical, and unacceptable distortion of its responsibilities associated with Title VI discrimination. ED does

[26] See p.4 of the Report which concluded: "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."

[27] The ED Office for Civil Rights (OCR) is responsible for enforcing Title VI as it applies to programs and activities funded by ED. OCR's responsibility to ensure that institutions that receive ED funds comply with Title VI is carried out through compliance enforcement. The principal enforcement activity is the investigation and resolution of complaints alleging discrimination on the basis of race, color or national origin.

have a responsibility, and this is true in light of common sense and the clear requirements of 34 CFR § 100 *et seq*. Incredibly, the sole rationale offered by the Report, as stated below, totally ignores the fact that violations of *rules and regulations* are specified under 5 USC § 1212 *et seq*. as a direct *violation of that law.* ED, however, incredibly asserted:

> 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.
>
> 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.

Apparently, by pretending 34 CFR § 100 et seq. does not exist, ED wants Congress to view ED as merely occupying the role of a Pontius Pilot who can fund programs that discriminate but who can simultaneously and conveniently turn a blind eye to discrimination because it is the grant "recipient" who actually is responsible and not ED who knowingly funded the discrimination.

If there is any doubt about the whistleblower's conclusion that the "investigation" failed the law, all doubts can be immediately dispelled by reference to the obvious tactic of the "investigators" referenced in footnote 2 of the Report. That footnote states:

> Fn 2. 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.

Actually, the "Team" *did have an obligation* to discuss the specifics of the grants because the "Team" *knew very well* what issue was being raised by the whistleblower. The "Team's" self-imposed muzzle amounts to willful blindness as an excuse to not rely on the applicable law and the *relevant* accompanying regulations for Title VI. If the "Team" had examined the facts, the law, the regulations, and the rules, the "Team's" conclusion would have had to be very different.

It seems the "investigators" assumed that if the question of ED's obligation to not fund discriminatory grants could be avoided by distorting the requirements of Title VI and not addressing either 34 CFR § 100 *et seq*. or the Executive Branch Standards of Ethical Conduct, then the uninformed reader might assume that ED committed no wrong. The Report's failure to address these issues seems much more than just an unfortunate oversight. Congress should be aware not only of ED's propensity to ignore the law, but of an evident propensity to hide the behavior when statutorily required to disclose it.

The ED Report ignores the role of OCR.

ED not only ignored its own regulations but it ignored the significance of the role that its own Office for Civil Rights (OCR) *should have* played, but did not, in enforcing Title VI for the grants in question. OCR should be an *active* backstop to prevent discrimination in ED funded grants, but apparently in many cases it is not.

Programs and activities that receive ED grant funds must operate in a non-discriminatory manner. ED maintains an enforcement arm in OCR which is supposed to investigate any program's alleged discrimination, especially if there is a complaint. This means that if ED funds a program that does discriminate, OCR is the last check on illegal funding. Apparently, that enforcement is selective only when ED wants to acknowledge it, and certainly not when the whistleblower pointed out the issue.[28] Further, if ED *at the outset* either knowingly funded a discriminatory program or ignored a discriminatory ED funded program, it is not only 1) violating its own regulations and, depending on the facts, *conspiring or aiding and abetting* the grant recipient to operate a discriminatory program, but may also be 2) intentionally misusing taxpayer funds appropriated by Congress for an active OCR which is supposed to be used for enforcement of Title VI, but is not. All this was ignored by the Report.

Given these outrageous abuses, Congress should consider initiating a GAO audit of how OCR is selectively used by ED to avoid finding illegal discrimination, and in how many cases; what the ED process is in screening grants for legal compliance prior to funding; and why OCR acts in some cases but not in others.

The Standards of Ethical Conduct of Employees in the Executive Branch, 5 C.F.R. § 2635.101, should have precluded ED's funding of discriminatory grants – but did not.

The "investigators" totally ignored another applicable regulation that is critical to their inquiry, i.e. the role and importance to the "investigation" of the Standards of Ethical Conduct of Employees in the Executive Branch, 5 CFR. § 2635.101. These Standards dictated that ED employees should not be funding discriminatory grant programs contrary to ED's legal responsibility associated with Title VI and 34 CFR § 100 *et seq*. Conversely, the Standards also dictated the whistleblower had an affirmative duty to properly register his concern for illegality – an obligation *he* respected and properly executed but which only resulted in his retaliatory firing. All ED employees are under the same ethical standards:

[28] Astoundingly, the ED Report acknowledged that one grant, the Fort Wayne Grant, was reviewed by OCR in 2017, found discriminatory, and was purportedly amended. The Report also acknowledges that the whistleblower was not given this amended version to review for compliance with the Common Rule but was given the original version found to be discriminatory. After the whistleblower raised his concerns, he was never told about the changes but received only assurances that the version both he and OCR found to be discriminatory was "not" discriminatory. This points to not only the veracity and significance of the whistleblower's concerns, but ED's attitude towards those who raise the issue. *See*, Report at p. 7.

> (a) *Public service is a public trust.* Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.

Again, the "investigators" ignored this element totally and ignored the fact that it is a breach of public trust for ED and ED employees to grant taxpayer funds to programs that breach the most fundamental trust the government can offer – laws and regulations that require non-discrimination. Equally important, the ED "investigators" totally ignored what is a central attribute to our government – acting ethically. Here acting ethically means, at a minimum, respecting direct and clear ethical standards. Congress needs to be aware that these Standards are not being respected by ED, neither in funding discriminatory grants nor in executing what should be a "thorough" investigation. Apparently, the subject of ethics and respecting ethics is not in ED's current lexicon. Again, Congress should consider directing a GAO investigation of whether, or to what extent, ED is living up to required ethical standards.

The equal protection component of the Due Process Clause (i.e. reverse-incorporation) applies to ED.

Taking ED's blatantly disingenuous argument on its own terms: even if ED *itself* could not violate Title VI because it is not "receiving" federal funds (which is untrue), ED indisputably is bound by the U.S. Constitution. This includes the equal protection component of the Due Process Clause, applicable to the federal government via reverse incorporation. Like Title VI, equal protection prohibits discrimination on the basis of race.

Under the doctrine of reverse incorporation, generally identified with the U.S. Supreme Court's decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court held that equal protection binds the federal government even though the Equal Protection Clause by its terms is addressed only to the states. Essentially, the Court interpreted an equal protection component into the Due Process clause, thus applying equal protection to the federal government – including to ED itself.

Per the whistleblower's "Clarifying Questions" email to OSC (Exhibit B), which the whistleblower later directly provided to the ED investigators, the ED was demonstrably aware of these issues as "relevant" to their inquiry. The whistleblower also mentioned these protections during his second hour-long discussion with the ED investigators. Despite this, the Report completely omits any mention of reverse-incorporation.

The Ft. Wayne grant violates The Common Rule, 34 CFR § 97 and appeared to violate Title VI.

In what only can be described as an astonishing admission with an intentional failure to follow-up or draw obvious conclusions, the ED Report admitted that one of the grants identified by the whistleblower as discriminatory was *in fact* found to be discriminatory as early as 2017 but the

whistleblower was never told nor was he given the proper grant application to assess. The implications of this are explored below but this does not mean that the ED Report's failure to analyze the other grants in question leads to a different conclusion regarding the failures of the Report, and it raised other questions which were ignored.

The grant, commonly known as the Fort Wayne Grant was initially reviewed by OCR in 2017. OCR, *sua sponte*, found the race-based discriminatory admissions provision "concerning" – which is a code word for discriminatory. The Report stated that the following "adjustments" were made after OCR was assured that the meaning of the words in the grant application did not mean what they said:

> …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*. [Emphasis added] 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. Report at p. 7

At this point the Report actually validated the whistleblower's concerns about the original grant proposal. But if the illegal element was corrected in 2017, how was it that the whistleblower picked up the original illegal discrimination? The answer is that the whistleblower was not given a copy of the amended grant to review that reflected the correction. The Report explained:

> 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. Report at p. 7.

How this provision got through the original approval process is in itself concerning, but not out of the realm of mistake. However, the unanswered question is why the whistleblower was not validated in his comment or told of the correction? Instead, the whistleblower was told nothing and chastised for noticing what the Report admitted was an illegal feature of the grant, and he was further told not to engage in any more disclosures – then he was fired. This element of retaliation in termination of employment should have been further investigated, but it was not. Congress should be concerned that this sequence of events is indicative of a pattern of ED grant approvals that ignore discrimination reflecting an ED attitude that present-day targeted discrimination is acceptable as a remedy to past broad, "systemic" discrimination.[29]

The Report gave a further indication of ED operating illegally, however, when it noted that:

> 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. Report at p. 7

The fact is that no grant funds can be spent on this grant without certification from the whistleblower's GPTD group that the grant complied with the terms of "The Common Rule" at

[29] Indeed a top official at IES, the approving body for the Harvard grant admitted that it does not screen its grants for compliance with the non-discrimination provisions of ESRA, including the Harvard grant.

34 CFR § 97 *et seq*. The individual who was given responsibility for this certification after the whistleblower was removed from the grant file recently testified that there *never had been any certification of that grant*. This would mean that, if the grant had indeed been funded, as it seems from the Report language, funds were knowingly spent on human subject-related expenses without the certification required by law. The Report obviously ignored this issue.

The ED investigation of the Indiana University EAC grants fails to meet the statutory requirements in failing to offer facts or legal analysis.

The whistleblower noted that multiple ED grants were awarded to Indiana University's Midwest and Plains Equity Assistance Center, and that at least one of these grants funded the production of six podcast videos produced in 2021. The ED "investigative" team reduced the complaint to the videos having "divisive concepts" as defined by revoked Executive Order 13950. ED's characterization of the complaint as limited to E.O. 13950 is totally at odds with both the OSC referral and the facts involved with the vodcast series, which were curiously left out of the ED Report but statutorily were required to be in the Report.

First, however, it should be noted that the Report contained only one "fact" it found relevant to the issue of whether the vodcasts contained discriminatory content. This slight mention was buried near the end of the Report, coming after 1,669 words and 152 lines, and revealed that:

> "OESE neither reviewed the materials referenced by the Whistleblower nor referred these materials to OGC for review."

After admitting that there was no contemporaneous review of the discriminatory content, the ED "investigative" team simply stated that it "reviewed the materials referenced by the Whistleblower." No materials were specified as to exactly what was reviewed nor was there any affirmative statement that *all* the vodcasts and web site materials were assessed. Rather than state facts, the ED "investigative team" simply concluded:

> 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.

Congress may be surprised to learn that the Secretary's authority under Title IV has been re-interpreted so that ED's "efforts to cope with educational problems occasioned by desegregation" contain blatantly racist viewpoints and comments. If the ED "investigative" team had stated facts and not self-protective conclusions, the following types of comments would have been explained and either justified as non-racist or admitted to be illegally discriminatory. The following examples are from vodcasts which, contrary to the surprising conclusion of the ED "investigative" team, do substantiate the allegations of discrimination:[30]

> Vodcast #1. Comments by Kathleen King Thorius, the principal investigator (PI): "[A]s a white, non-disabled, cis[gender] woman, I and white people are socialized into racialized belief systems and racist policies, practices, and belief systems. […] We need resources to be able to sustain our

[30] See, Exhibit J, p. 381-394 for information on these Vodcasts, including a transcript of discriminatory comments.

attention to how we've benefitted from those as white people, how we have perpetuated, and how we need to sustain our efforts to disrupt those kinds of our racist systems in our schools and in our society, in our communities and in our families."

Vodcast #1. Comments by Nickie Coomer: "I do want to point to a few of our resources that we've developed at the MAP Center that are related to antiracism. So I encourage our viewers to stop by our website at greatlakesequity.org and visit our online equity resource library. They'll find there a few different titles on our antiracism webpage, one of which is our Equilearn webinar, "Ensuring Every Student Succeeds: Understanding and Redressing Intersecting Oppressions of Racism, Sexism, and Classism", as well as our Equity Digest entitled "Race Matters in School"."

Vodcast #2. Comments by Perry Wilkinson referred to the "white supremacy culture" and "iceberg culture." He characterized the educational system as a "white system" which as a "white system" presented "oppression and barriers" to people of color. His comments also included the cynical view that "…if people of color are out front, we know the ones who will be let go first…"

Vodcast #3. Comments by Anthony Lewis: "And I like the way, I think, Dr. Kyser and Dr. Anderson both said, dismantle these systems of oppression. You know, some people say we want to disrupt, you know if I disrupt the room I can put the room back together, but I want to totally dismantle these systems of oppression. And in really examining yourself and educating yourself, really truly understanding the historical context of how we got here, really understanding from our Native American perspective, from our African-American perspective, in terms of being dehumanized, truly understanding that foundation of work of why and how America was built with these racist ideologies, with these racist practices."

Vodcast #3. Comments by Nicki Coomer: "Thanks so much Dr. Anderson and Dr. Lewis. I just wanted to add something that I heard from both of you. If there's a reason not to be liked, that's the reason not to be liked. And I think that ties in really importantly with the idea of being a co-conspirator and an accomplice. That means that you're giving something up in order to resist a system that is harmful, to be a co-conspirator, to be an accomplice means that you're ready to get into the work and you're ready to be un-liked, you're ready to get in trouble, to get in good trouble, to not only be disruptive, but to dismantle. And I think, again, to really call white colleagues to the table, when you know that you're positioned in a way where you get a benefit of a doubt that your Black colleagues do not get, acknowledge that publicly and say it out loud, and engage in that anti-racist work as well, to your detriment, and then prepare to bear the consequences of that."

Vodcast #6. Comments by Dr. New characterized the teachers in her school district as "80% white female who live outside the district" and that these teachers (as a group) "do not have the cultural competence" to teach children of color, concluding they "don't know how to work with students of color." Dr. New characterized children of color (as a group) as being taught that their "abilities are negated by my skin color." Dr. New's take on this is that children of color should be affirmed by people "who look like them" and that the white teachers have not experienced what the children of color experienced or not had the same "home learning." Dr. New characterized the white teachers as "people (who) don't worry about those things unless you are a person of color" and said that she hopes we get to a place "where people leave those prejudices, implicit biases and overt biases, in the past."

Perhaps the ED "investigative" team's conclusion would have been different if the podcasts had White educators characterize "80% of the teachers are Black who are not from the area" and therefore, Black teachers presented a system of "oppression and barriers to White children" and they could not possibly have the "cultural competence" to either teach White children or work with them. (This rather sweeping stereotype, of course, does not account for the success of Asian students taught by the incompetent White teachers.) These are harsh words, but

discrimination is harsh in whatever form it could take. It is hard to believe that if the ED "investigative" team had in fact heard these podcasts, they could in any sense of objectivity have missed the discrimination about which the whistleblower registered his concerns.

Further, it is hard to justify the legal conclusions the ED "investigative" team drew from the fact that E.O. 13950 had been revoked by E.O. 13985. As the ED Report admits, after revocation by E.O. 13985, "there is no legal import to the terms of the prior E.O. *unless those terms are independently required by other laws or regulations.*" (Emphasis added.) ***The fact is that every "divisive concept" as applied to race, along with "race…stereotyping" and "race…scapegoating," were already illegally discriminatory by law including Title VI, the Code of Federal Regulations, and the US Constitution well prior to E.O. 13950, and remained illegally discriminatory after E.O. 13950 was revoked.***

Predicably, the Report did not determine whether "race stereotyping" or "race scapegoating" is prohibited by any "independent" bases in existing legal "requirements," when even the most partisan advocate would admit that such terms are discriminatory. As for non-discrimination requirements, perhaps the ED "investigative team" totally overlooked Title VI and 34 CFR §100 *et seq*. Perhaps the ED "investigative" team should also have read and assessed E.O. 13985, the Executive Order cited as replacing the revoked E.O. 13950. That E.O. stated, in plain terms, *"The term "equity" means the consistent and systematic fair, just, and impartial treatment of all individuals…"* (Emphasis added.) Certainly, classifying all White female teachers in a school district as being incapable of understanding their students of color, viewing them all as exhibiting implicitly and overtly racist tendencies, and perpetuating a "White supremacist educational system" fails all such tests.

The Harvard grant was funded in violation of both Title VI and ESRA.

The whistleblower's allegation regarding the Harvard grant included his concerns that it violated 20 USC § 9514(f)(7) ("ESRA") and laws prohibiting discrimination (including Title VI) because the grant program was not "objective, secular, neutral, and non-ideological and are free of partisan political influence and racial, cultural, gender, or regional bias." Instead of finding facts to analyze the grant terms, the ED "investigative" Report inaccurately repackaged the whistleblower's allegation as "based on the general subject matter of the Identity Project itself—ERI [meaning Ethnic Racial Identity concepts], which the Whistleblower claims is 'very much a partisan ideology of the political Left' and is 'illegally discriminatory.'"[31] This characterization avoids the central issue.[32]

The fact is that the "Identity Project" is infused with illegal concepts of "partisan political influence" including "White Privilege," "Whiteness," "systemic racism," and "endemic racism" in both "White" teachers and in the educational system itself. In the Report, no facts were discerned, no tenants were explored, no examples were cited for the Identity Project curriculum and whether it is a product of "partisan political influence." There is a reason for this oversight,

[31] See, Report p. 16.

[32] The characterization also dismisses 20 USC § 9514(f)(7)'s prohibition of "partisan political influence." No assessment is made of compliance with this ESRA prohibition.

for in doing so a factual basis would have been established to permit a determination for whether the Harvard grant violates the standards of ESRA and laws prohibiting discrimination.

Instead of an objective investigation and clarity on what is being taught, the Report took the facts offered by the whistleblower and dismissed them without legal analysis. Rather, the Report substituted a conclusion for analysis of facts, stating:

> "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. § 9514(f)(7). (*sic*)" Report at p. 18.

This Report methodology is insufficient. The "investigative" Team needed to examine the terms of the grant application and the proposed curriculum that was to be taught, and understand that curriculum (the "Identity Project") so it could be properly analyzed under the law. They did not do so. This total failure to investigate along with conclusory statements does not meet the type of investigation required by statute. If they had investigated, found facts and assessed, the terms of the grant and the ideology of the Identity Project would have required a different result.[33]

Instead of doing the job, the "investigators" spent considerable time explaining irrelevant grant methodology and science techniques. These conditions do not matter in this complaint. They are totally different from and unconnected to the requirements of the law, in particular ESRA, and not "science." It is apparent that no legal analysis was ever prepared to document the grant's compliance with ESRA as part of the approval process.

Lending "cover" to the grant, the Report mischaracterizes the grant application itself, stating:

> "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." Report at p. 16

This description sanitizes the grant by portraying it as only a grant to develop and deliver a "professional development" program. A methodology, not *developing* a curriculum. *That is half the truth and half the story – totally misleading and disingenuous.* The grant may not be developing a curriculum, but it is developing a teaching method for a pre-existing discriminatory curriculum, i.e. The Identity Project. This is like proffering the excuse that the syringe was unconnected with the cause of death of the patient, it was really the poison injected by the syringe. The complete Harvard grant project is to build the most effective "delivery method" to teach a specific, illegally discriminatory ideology – The Identity Project. What the Report stopped short of saying, but what it should have admitted, is what is stated in the Harvard grant application itself:

[33] See, *Greer's Ranch Café v. Guzman and United States Small Business Administration*, No 4- 21-cv-00651-540 F. Supp. 3d 638 (N.D. Texas, 2021); *Blessed Cajuns LLC v. Guzman*, 4:21-cv-00677-0, ND. Texas, May 28, 2011; *Vitolo et al. v. Guzman*, No 21-5517, US Court of Appeals for the Sixth Circuit, May 27, 2021.

> The goal of the proposed research is to develop and pilot test different modes of delivery of a comprehensive training program designed to prepare educators to implement an evidence-based ethnic-racial identity development curriculum (i.e., the Identity Project) in their classrooms.

The whistleblower's concern was not with legal pedagogy of "race" and "identity" that is not racist and discriminatory. His concern is that The Identity Project is itself discriminatory, racist and illegal, just like the expenditure of Federal tax dollars to purvey the discriminatory, racist, and illegal curriculum. Any "thorough" investigation, as required by statute, would have looked at the Identity Project terms to make this determination. If they had, they would have understood that building a teaching method specifically to force any student, teacher, or administrator to sit through a federally-funded presentation filled with partisan – and highly ideological – buzzwords such as "equity," "systemic racism," "diversity," "Whiteness," "White privilege" and "antiracism" not only creates a hostile environment for those compelled to attend, but an equally hostile grant-making and evaluation program for those who can read the racist handwriting on the wall. For example, the Harvard grant makes its intent known throughout the grant application (Exhibit G),[34] as follows:

> "However, although teachers of all backgrounds vary in their own ERI formation and attitudes toward discussing racial issues, ***White teachers in particular (currently 80% of Kl2 educators; NCES, 2019) struggle with acknowledging their own privilege and recognizing racism***, which can hinder productive conversations about race with students (Tatum, 1992; Utt & Tochluk, 2016). These challenges can result in ***teachers acting on their racial biases, adopting a colorblind approach that can create a hostile learning environment for ERM students, and hindering teachers' ability to establish strong relationships with their ERM students (Castro Atwater, 2008).*** *"* (Emphasis added.) *See*, Exhibit G, p. 255, 257.

> "The training is also designed to address ethnic-racial ***systemic inequities***. Activities and training content will prepare teachers ***to understand and be able to explain how institutional racism has resulted in an educational system and practices that reproduce social inequalities and result in symptoms such as the academic achievement gap***. Educators will be able to explain and provide at least one specific example of ***how institutional racism plays out in the U.S. education system in a manner that reproduces ethnic-racial inequalities in academic outcomes*** (***e.g., by reifying the notion that Whites do not have an ethnic-racial identity and therefore are the "norm," thereby othering youth from ERM backgrounds***)." (Emphasis added.) *See*, Exhibit G, p. 257.

> "The learning goals for the second day of the training are to build teachers' ***understanding of systemic inequities, practice teachers' facilitation strategies around race and ethnicity, and to reflect on historic and contemporary factors that contribute to ethnic-racial inequality (e.g., White supremacy)*** and to apply this understanding to their students' meaning making, interpretations, and social positions. Day 2 of the summer camp intensive covers material related to Sessions 3 and 4 of the Identity Project curriculum. …..To meet the learning goals, Day 2 also involves teachers in a series of activities and discussions focused on ***Whiteness*** including: learning shared definitions around ***White supremacy*** and how it shapes the context

[34] See, Exhibit G: The goal of the grant is to develop, not explore, ethnic racial identity in students (p. 241); the project treats educators as implicitly biased (p. 243); the project teaches that social institutions such as schools reproduce and perpetuate social inequities (p. 247); the project teaches that disparities in outcome involve racial discrimination (p. 241); the project focuses on teachers reflecting on and admitting their own ERI (p. 269); the object of the project is to train teachers as to "social systemic inequities" (i.e. how institutional racism has shaped US youth's schooling experiences) (p. 269); the object of the project is to erase "initial colorblind attitudes," i.e. treat people differently because of their race, gender or ethnicity (p. 276).

> in which all students are developing their identities, ***examining the role of power and privilege*** in their own identities and classrooms, and working through pedagogical strategies for addressing these ideas in their classrooms." (Emphasis added.)

This type of classification, racial stereotyping, and treating people differently because of their race/color is unlawful. The grant terms on their face are not neutral, non-ideological, free of partisan political influence, and racial or cultural bias. *See*, ESRA 20 USC § 9514(f)(7). *See also*, Grutter v. Bollinger 539 U.S. 306, 341 "We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." See, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)."

Tellingly, the "investigative" Report addresses none of this. What it needs to address is whether under the law the objectives and methods of the grant are being executed in an illegal manner, contrary to laws prohibiting discrimination and, in particular, 34 CFR §100 *et seq*. and ESRA's requirements. This question could only be answered if a factual inquiry is made into the concepts of the Identity Project, the implementation of which was the subject of the grant. This, however, was curiously avoided.

Instead of a factual inquiry, the "investigative" Report merely advocated the position that the science in the Harvard grant was the focus of attention and that if the science of developing modes of delivery of the Identity Project was scientifically valid, the grant would be valid. This ignores the obvious: the validity of the science is meaningless if the objectives are illegal, and here what was being delivered – The Identity Project – is the subject of illegality. The Tuskegee Syphilis study may have involved legitimate science, but the shocking study itself spawned many legal prohibitions as embodied in laws like ESRA and restrictions from The Common Rule. This is the same type of case. The Report's emphasis is misplaced on scientific validity so as to avoid the question of legal validity, ascertainable only by investigating the facts of the Identity Project curriculum and making a legal analysis. The failure to do so is unacceptable in the context of The Identity Project's known basis in teaching concepts of "systemic racism," "Whiteness," "White privilege," and an indictment of the educational system itself as inherently racist.

What is evident from the grant excerpts above is that there was a glaringly solid basis for the whistleblower, within his chain of command, to seek a legal review of the grant application. There was also a glaringly solid basis for him to have a reasonable belief that the grant was not legal. He was under a duty to mention this by his obligations under 5 CFR § 2635, the Standards of Ethical Conduct for Federal Employees of the Executive Branch. Indeed, his job was to assess the grant application for compliance with The Common Rule, 34 CFR § 97 – compliance which by definition could not be attained if the grant was discriminatory, since discrimination is harmful. So, rather than being fired by his superiors for acting "out of scope," the whistleblower should have been lauded for respecting his obligations.

The Harvard grant qualifies as political ideology.

As described above, the Harvard grant violated 20 USC § 9514(f)(7) ("ESRA") and Title VI because of its glaring racial discrimination. However, under ESRA, IES must ensure its

programs are "objective, secular, neutral, and non-ideological and are free of partisan political influence and racial, cultural, gender, or regional bias."

During the whistleblower's second meeting with the ED investigators, he pointed-out that the Harvard grant promotes more than just isolated racial discrimination. Rather, the grant's references to "Whiteness," "White privilege," "systemic racism," etc. are also part-and-parcel of a partisan discriminatory ideology of the political Left, often labeled Critical Race Theory. As such, the Harvard grant is clearly not "free of partisan political influence," nor is it "non-ideological" (since Critical Race theory is an ideology stemming from Marxism, another ideology). *See*, Exhibit B. In addition, the grant is not for merely studying an academic topic, but to actively teach this political ideology which also happens to be racist. No competent investigator could miss this related issue.

Just to make the point clear, the whistleblower also pointed-out that the radical ideology purveyed by the Harvard grant (Critical Race Theory, and critical theory generally) fundamentally rejects the notion of objective truth, resulting in the grant not being "objective." While discussing with the investigators, the whistleblower pointed to a *Chevron* analysis within his "Clarifying Questions" email (Exhibit B) to indicate that the statutory language of "objective, secular, neutral, and non-ideological and are free of partisan political influence" means exactly that.[35] The statute is not ambiguous, nor is the racism of the Harvard grant's political ideology.

In its Report, ED refers to Establishment Clause jurisprudence, essentially arguing that "objective, secular, neutral, and non-ideological" means only "not religious." Evidently the Report stopped at the ESRA admonition that grants must be "free of partisan political influence." This is absurd on its face. The statute is clear, and it means what it says. ED's assertion otherwise reveals how desperate the investigators were to cover-up wrongdoing.

The Harvard, Ft. Wayne, and Indiana University grantees violated their assurances to the federal government.

When submitting a grant application to ED to request funding, every grantee must include signed "assurances."[36] A grant application will not be considered for federal funding without these assurances. The assurances include the following:

> As the duly authorized representative of the applicant, I certify that the applicant:
>
> 6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; […] (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and, (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

[35] See, Exhibit B, p. 80.
[36] See, Exhibit G, p. 283 for Harvard's signed assurances; and Exhibit I, p. 318 for Fort Wayne's assurances.

> 14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.
>
> 18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program.

Assurance 14 relates to The Common Rule, 34 CFR § 97. This is the regulation that the whistleblower was responsible for checking compliance with on behalf of ED by reading each grant application and, if appropriate, certifying the proposal by "clearing" the grant. The Fort Wayne grant was funded prior to, *and without ever receiving*, this human subjects clearance. To this day, it has not received clearance. The Harvard grant provided an IRB determination of "exempt research only," which was rejected. (There is no excuse for a Harvard grant application to misapprehend Common Rule compliance.) After the grant was removed from the whistleblower's review, ED approved an improper exemption based on The Identity Project being "normal educational practice." This impropriety has never been reviewed.

Assurance 6 relates to compliance with Title VI, while Assurance 18 mandates compliance with "all other Federal laws, *executive orders*, regulations, and policies governing this program" (emphasis added). These assurances (and their corresponding EDGAR regulations at 34 CFR § 75.500[37] and 34 CFR § 75.700[38]) thus put grantees on notice that they must comply with nondiscrimination legal authorities, including executive orders (such as E.O. 13950 and its two related OMB memos). Again, there is no excuse of sophisticated institutions to miss the legal issues which militated against misrepresentative assurances.

As previously described, neither Harvard nor Ft. Wayne nor Indiana University complied with Title VI due to their racially discriminatory grant projects. As such, all three grantees violated their signed assurances, essentially lying to ED to obtain funding for their grant applications.

The ED Report misstated E.O. 13950 to justify its actions and failed to articulate or analyze the facts about which the whistleblower protested.

The ED "investigative" Report initially misstated the whistleblower's reference to Executive Order 13950 "Combatting Race and Sex Stereotyping," issued on September 22, 2020, by characterizing that E.O. as the basis of his systemic discriminatory grant complaint. This was untrue. The Report presented the whistleblower's concerns as if saying that E.O. 13950 and its definition of "divisive concepts" were the sole source of his conclusion that the grants were discriminatory and that E.O. 13950 alone defined the nature of the grants as discriminatory by containing "divisive concepts."

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[37] 34 CFR § 75.500 Constitutional rights, freedom of inquiry, and Federal statutes and regulations on nondiscrimination. (a) Each grantee shall comply with the following statutes and regulations: Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d through 2000d-4), 34 CFR part 100.

[38] 34 CFR § 75.700 Compliance with the U.S. Constitution, statutes, regulations, stated institutional policies, and applications. A grantee shall comply with § 75.500, applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, and applications.

The E.O. 13950 definition of "divisive concepts" describes acts that are discriminatory and illegal independent from E.O. 13950. ***They were illegal before EO 13950 and they are illegal after EO 13950 was revoked.*** Activity that meets the "divisive concepts" definition does not need any connection with E.O. 13950 to be considered illegal or discriminatory. Similarly, the whistleblowers' complaint does not need connection to E.O. 13950 to legitimately point out illegal ED behavior.

The ED "investigative" Report neatly seeks to capitalize on the revocation of E.O. 13950 and expansively conclude that since it was revoked, any grants identified as funding "divisive concepts" are therefore not to be considered illegal. [39]

E.O. 13950 and its two related OM memos clearly had several components with which ED did not comply. The first was a direction from OMB contained within M-20-34 (September 4, 2020), the operative language of which states:

> "… all agencies are directed to begin to identify all contracts ***or other agency spending*** related to any training on "critical race theory," "white privilege," or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil. In addition, all agencies should begin to identify all available avenues within the law to cancel any such contracts and/or to divert Federal dollars away from these un-American propaganda training sessions." (emphasis added)

Having read this OMB memo, as was assigned to the whistleblower by his supervisor, the whistleblower believed that "other agency spending" included the Harvard grant, and thus he inquired into obtaining a legal opinion from ED's Office of General Counsel (OGC). No legal opinion was ever provided and, as far as the whistleblower is aware, ED never carried-out the aforementioned OMB directive.

The second component was a statement of the *present policy* of the United States, as follows:

> "…it shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes. In addition, Federal contractors will not be permitted to inculcate such views in their employees." E.O. 13950, Section 1.

This was not a statement of future policy, but a statement of present policy which, under Section 9, was "effective immediately." Since E.O. 13950 was effective immediately, this principle applied immediately even though it was actually nothing more than a restatement of current policy and law against acts of discrimination of the sort described as "divisive concepts."

The third component appears in OMB memo M-20-37 (September 28, 2020), which states:

> "For Federal financial assistance, as required by Section 5 of the E.O., Federal awarding

[39] See ED Report, fn.81, which states: "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."

> agencies are required to identify all programs for which the agency may, as a condition of receiving Federal grants and cooperative agreements, require the recipient to certify that it will not use Federal funds to promote the concepts listed in Section 5 of the E.O. Additionally, ***although training and education for employee development may otherwise be an allowable cost under 2 CFR 200.472, training or education on the divisive concepts specified in the Executive Order is not an allowable cost unless otherwise provided by law***." (emphasis added).

Here, OMB Director Russel Vought provided an official OMB interpretation of an OMB regulation applicable to all grants – including those funded by ED. The referenced section, 2 CFR § 200.472, was renumbered as 2 CFR § 200.473 and reads:

> "§ 200.473 Training and education costs.
> The cost of training and education provided for employee development is allowable."

What does the Harvard grant do? It funds training for schoolteachers ("employee development"), and then it subsequently funds training for school students provided by both the researchers and the newly-training teachers. Because the training was discriminatory and included "divisive concepts," it was not an allowable cost at that time – meaning the grantee violated 2 CFR § 200.473.

What does the Indiana University grant do? The vodcasts were, essentially, training in "anti-racism" – meaning they were discriminatory and included "divisive concepts." Again, this meant it was not an allowable cost at the time.

The Harvard, Ft. Wayne, and Indiana University grants violate E.O. 13985.

The "investigative" Report's disingenuous interpretation of E.O. 13950 – based on E.O. 13985's revoking it – still would not sanction ED's funding of discriminatory grants. E.O. 13985 itself did not sanction discrimination. It defines "equity," in Section 2, as "the consistent and systematic fair, just, and impartial treatment of all individuals…" Even under the terms of E.O. 13985, the three grants containing "divisive concepts" *remained* discriminatory, illegal, and contrary to E.O. 13985's mandate for the "impartial treatment of all individuals."

IES has a systemic practice of violating Title VI and ESRA.

Evidence of IES's systemic practice of discriminating on the basis of race, and violating other requirements of 20 USC § 9514(f)(7) ("ESRA"), can be found:

1) in the rather shocking admissions of IES in sworn testimony which reflected: a) an arrogant disregard for respect of Congressional directives, and b) a disingenuous refuge in "science" to justify grants like the Harvard grant[40] that clearly purveyed a race-based discriminatory philosophy. The emphasis on science to the exclusion of the law reflected nothing but a

[40] See, Exhibit G.

mirror image of the identical attitude which led to the scandalous Tuskeegee project and resulting adoption of the Common Rule to preclude perniciously hiding behind the moniker of "science" to engage in discriminatory behavior.

2) in a January 2022 "Principal Investigators Meeting" on "Advancing Equity and Inclusion in the Education Sciences";[41]
3) in discriminatory materials posted on its website;[42]
4) in a December 2020 working paper entitled "Increasing Diversity and Representation of IES-funded Education Researchers;"[43] and
5) in a preliminary September 2021 paper from the National Academies of Science commissioned by IES entitled "Diversity, Equity and Inclusion in Peer Review."[44] The author examines racial quota systems currently enacted by the National Science Foundation (NSF) and the National Institutes of Health (NIH) and recommends that IES adopt a similar quota system.
6) In a 2022 paper from the National Academies of Science commissioned by IES entitled "The Future of Education Research at IES: Advancing an Equity-Oriented Science."[45]

Having previously examined the Harvard grant in-depth, these whistleblower comments will not belabor that blatant discrimination. Instead, to preempt ED's rebuttal of "it's just a single grant, not a systemic problem," the IES website reveals additional discriminatory language that points towards a systemic problem. An April 6, 2022 post on the IES blog mentioned a January 2022 meeting that IES hosted on "Advancing Equity and Inclusion in the Education Sciences." Quoting the presenter:

> "Just a couple of definitions that we're all sort of working through. So, first, anti-racism. It really is a conscious and intentional action that includes policies, programs and strategies that really eliminate hierarchy, privilege, marginalization and dehumanization based on race or skin color. So really, it's about you're working against issues of racism, which is a system of hierarchy and privilege. And so anti-racism is the act of fighting against racism. So you can't be not racist. You're either racist or anti-racist. And that's something really important that I hope we can make sure we get today.
>
> "And then finally, equity. Which is like I tell people, equity is like the word "the" that everybody has in front of their sort of lexicon. And so just the definition that we're using today really is about, equity is assurance of the conditions for optimal outcomes for all people. … And then disparities will be eliminated when equity is fully achieved."[46]

Here, IES has embraced the lexicon of "equality of outcome" definition of equity – the opposite of legal "equity" as defined by the current Administration's E.O. 13985 as "the consistent and systematic fair, just, and *impartial* treatment of all *individuals*…" (Emphasis added.) As the presenter stated, first "eliminate hierarchy, privilege…" which as seen in the Identity Project means "White privilege" and a "racist educational system." Then comes the application of reverse racism until "disparities will be eliminated when equity is fully achieved."

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[41] See, Exhibit K, p. 409-418.
[42] See, Exhibit K, p. 407-466.
[43] See, Exhibit K, p. 467-491.
[44] See, Exhibit K, p. 492-514.
[45] See, Exhibit L, starting p. 515.
[46] See, Exhibit K, p. 411-412.

Disparities between what, one might ask? In traditional Marxism/Communism, disparities between individuals are eliminated, leading to "equality of outcome" between each person (i.e. making everyone equally poor). Here, though, it is disparities between racial groups that "will be eliminated when equity is fully achieved." IES has essentially endorsed racial Marxism, more commonly known as Critical Race Theory. This language should be shocking to any party interested in non-discriminatory agency practices.

Seeking equitable outcomes necessitates illegal disparate treatment on the basis of race; specifically, rectifying historic injustices with a reverse-racist approach of simultaneously disadvantaging White (and Asian) "hierarchies and privileged oppressors" on a systemic basis while advantaging Black (and Hispanic) persons on a systematic basis. This is reflected in racial quotas, resulting in what some have described as a progressivist "Quota Project."[47]

The record of whistleblower's revelations, in conjunction with IES personnel's sworn testimony reflecting an emphasis on "science" and IES's disregard for legal requirements in favor of a political ideology reflecting equal outcomes rather than equal opportunity, reflects that IES has pivoted from merely collecting statistics and researching methodology (i.e. doing "the science") to "challeng[ing] and chang[ing]" "current manifestations of racism" through reverse racist policies. This obviously points towards a systemic problem that must be rectified by the type of investigation by Congress to which IES feels "immune" under the rubric of being an "independent" agency.

The ED Report must be rejected because it was produced with an irreconcilable conflict of interest.

By implicating numerous ED offices in its disclosures (including IES, OESE, OFO, and OEEOS), the whistleblower complaint necessarily involved other ED offices and actions that were subject to scrutiny for possible discipline, including attorneys from the Office of General Counsel (OGC) and other ED personnel. The disclosures involved:

1) For the Harvard grant, IES considered and approved funding of the grant application with the alleged supervision of an OGC program attorney and OGC's *Division of Educational Equity*.[48] A top IES official made it clear in sworn testimony that the program attorney did not perform a legal review for the Harvard grant's compliance with ESRA and other laws. IES considered itself beyond scrutiny by Congress or the White House as an "independent agency." IES concern was scientific methodology, not legal compliance.[49]
2) For the Fort Wayne grant, while OESE considered and approved funding of the grant application, OGC's *Division of Educational Equity* also advised OESE[50] while the ED Office for Civil Rights (OCR) was responsible for certifying the grant.
3) With regard to training and alleged violations of the Civil Rights Act of 1964, OFO issued the directive to restart previously-halted trainings in response to Executive Order 13985 and

[47] See, Exhibit N, starting at p. 880.
[48] See, Exhibit O, p. 894-895.
[49] A top IES official made sworn statements that IES does not "police" application of ESRA. He made the point that IES *does* monitor at the broader level what IES referred to as "interference" from ED top management, the White House, Congress or some "outside entity."
[50] See, Exhibit O, p. 894-895.

OEEOS was responsible for the subsequent training.

As its first step in responding to the whistleblower complaint, OSC determined there was a substantial likelihood that the disclosures revealed wrongdoing pursuant to 5 USC § 1214(a)(1)(A), triggering the obligation to conduct an investigation of the claims under 5 USC § 1212 (a)(3) (i.e. "the ED disclosure investigation" or "Report"). This meant that an investigation was required into violations of law by ED in its grant approvals and trainings as well as any wrongdoing committed by the ED offices listed above, through their personnel, and *any related matters*.[51]

With respect to the disclosure investigation and pursuant to 5 USC § 1212(a)(3), OSC referred the investigation of ED's alleged wrongdoing to ED, essentially *asking ED to investigate itself* about the disclosures of violations of law, rule, or regulation, gross mismanagement and/or abuse of authority. OSC's investigative mandate to ED was to "conduct an investigation with respect to the information *and any related matters."*[52] (Emphasis added.) OSC also delegated to ED the task of finding facts that could lead to "the restoration of any aggrieved employee"[53] and "disciplinary action against any employee,"[54] which included ED personnel in IES, OESE, OFO and OGC – particularly OGC's *Division of Educational Equity*.

The ED Inspector General, for unspecified reasons, was not tasked with, nor did it accept, the required investigation. Instead, ED appointed three attorneys from OGC. Unlike the Inspector General's office, the whistleblower perceived that these attorneys held positions that were neither insulated nor nominally impartial. Specifically, he perceived that two of the three attorneys tasked with the investigation actually worked in the same OGC *Division of Educational Equity* that was under scrutiny. That division, and its attorneys, were subject to investigation because they performed extensive legal and other work for IES and OESE for the grants being scrutinized. Moreover, this *Division of Educational Equity* continued to provide legal services for IES and OESE during the time of the investigation.

The *Division of Educational Equity's* mission, among other things, is stated as providing legal services in connection with ED's civil rights enforcement activities pertaining to race and color and the administration of formula and discretionary grant programs intended to ensure and support equal opportunities[55] – the very legal issues involved with the complaint about the Harvard grant. The *Division of Educational Equity* also provides legal assistance in connection with the Magnet Schools Assistance Program – the very program involved with the complaint about illegality with the Fort Wayne grant. The Fort Wayne grant was the responsibility of OESE. The Harvard grant was the responsibility of IES and its NCER division. The *Division of*

[51] Additionally, because the whistleblower also alleged Prohibited Personnel Practices ("PPP"), OSC was required to conduct its own investigation into retaliation against the whistleblower for disclosing violations of law to within ED. Since the complaint also comprehended OSC's power to bring petitions for stays under 5 USC §1212(a)(2); petitions for corrective action under § 1214; and to file a complaint or make recommendations for disciplinary action under § 1215, the OSC investigation necessarily also required inquiry into each of the attorneys and other employees in the offices listed above to determine their roles in the actions under scrutiny and any wrongdoing.
[52] 5 USC § 1213(c)(A)
[53] 5 USC § 1213(d)(5)(B)
[54] 5 USC § 1213(d)(5)(C)
[55] See, Exhibit O, p. 894-895.

Educational Equity would have had then-confidential information from these ED divisions regarding not only the grants in question but those divisions' systemic practices that violated the laws, regulations, and rules in question.

Along with the *Division of Educational Equity's* work that was under scrutiny, the Office for Civil Rights (OCR) was involved in certifying the Ft. Wayne Grant. One of the two attorneys from the *Division of Educational Equity* tasked with the investigation had in fact just transferred from OCR to the *Division of Educational Equity*, meaning that he was tasked with investigating OCR for work performed by that office at the time he was an OCR attorney.

In short, the whistleblower perceived that these two attorneys were being asked to investigate for wrongdoing, and they did so investigate for wrongdoing, OESE, IES, and OCR (i.e. their own "clients") for the Harvard and Ft. Wayne Grants. These grants also involved work of their own current OGC *Division of Educational Equity*. Moreover, the whistleblower perceived that one of the attorneys was even being asked to, and did, investigate OCR, the division in which he worked during the period under his own investigation.

The Conflict Ignored

This situation reflected an obvious conflict of interest, and gave pause to the whistleblower who registered his objections based on the most basic legal concepts of conflict of interest. This objection was later echoed by the whistleblower's counsel. But these concerns were also ignored by OSC and ED without a ***full*** explanation or analysis of the relationships involved. Meaning, in particular, at a minimum the appearance was overwhelming that the OGC *Division of Educational Equity* and two of the three attorney "investigators" were allowed to basically investigate their own offices, potentially their own ongoing "clients" and with their ongoing confidential client knowledge. At the same time these attorneys were continuing to perform work of the same type then under scrutiny, on an ongoing basis, on the same issues raised in the complaint, for the very same ED "clients" that the two attorneys were supposed to be investigating for illegal acts, and on those very topics in which the *Division of Educational Equity* had performed legal services.

Given the facts and specific conflict objections articulated to them, OSC and ED were under an obligation to conduct and disclose a competent conflict analysis (i.e. one used in any investigation), including defining the entire factual scenario, determining whether a duty had arisen to a party in the inquiry, defining that duty, determining whether the facts and nature of the work resulted in a conflict and if so, defining the nature of the conflict.

Rather than working through the steps of this analysis, OSC simply listed minor, partial facts that it represented mitigated any conflict – which it did not. This is not what the law requires. Had OSC or ED conducted the required full exposition of facts and legal analysis, the result would have been admission of the inherent conflicts in which the ED investigative team had found itself, and would have resulted in the team being disqualified and the Report being nullified.

Had it been done as obviously called for, ED/OSC's analysis would have exposed the following:

The Factual Scenario

The intertwined nature of the investigating attorneys with the offices being investigated raised obvious conflict of interest issues *per se*. In effect, the team investigating the illegal behavior was investigating its own division, i.e. the *Division of Educational Equity*, and the very clients to whom the division provided, and continues to provide, legal services. The team was also investigating one of its own members' recent former divisions, OCR. The involvement of the *Division of Educational Equity* was never admitted, nor was the role of OCR ever admitted, much less addressed or analyzed in connection with the investigation into the legality of the grants in question. Moreover, the issue of whether the investigative attorneys had exposure to confidential client information was never addressed. This needed to be addressed irrespective of whether the two attorneys *themselves* performed direct work on the two grants in question.

The Duty

Unquestionably, ED had a duty to appoint an investigative team whose members were free from conflicts associated with the investigation. ED, the attorneys involved, and the *Division of Educational Equity* in particular had duty arising from multiple sources, including: 1) The Rules of Professional Responsibility[56] which govern individual attorneys conducting an investigation, 2) ED's duty to perform a *reasonable, thorough* investigation, 3) The conflict requirements of 5 CFR § 1810.4, and 4) The Standards of Ethical Conduct for Federal Employees of the Executive Branch, 5 C.F.R. 2635 *et seq*. Whether the duty flowed to Complainant or to OSC, on whose behalf ED was performing the services required, is immaterial. Undertaking an investigation pursuant to multiple standards clearly created a duty. In addition, OSC has an independent duty to acquit its statutory obligation to assure an investigation of the circumstances free of conflict, whether that investigation is performed by itself or performed, per the statute, under OSC's supervision by a proxy agency – here ED.

The particular duties involved, whether statutory, by regulation or by rules of professional responsibility, all require that the investigation be conducted free of conflict. Under the circumstances here, it was not.

More specifically, the duties involved arose from and are articulated as follows:

1) **5 CFR § 1810.4** Investigative policy regarding agency liaisons.

> "Agency liaisons facilitate their agency's cooperation with OSC's investigations by ensuring that agencies timely and accurately respond to OSC's requests for information and witness testimony, as well as by assisting with the resolution of complaints. To maintain the integrity of OSC's investigations and to avoid actual or perceived conflicts, agency liaisons should not have current or past involvement in the personnel actions at issue in the assigned case."

[56] Reference is made herein to the ABA Model Rules of Professional Responsibility. These rules are consistent with any jurisdiction which might control the professional responsibility standards of the ED attorneys, in addition to the DC Rules of Professional Responsibility which would cover work done by such attorneys in the District of Columbia.

This section generally recognizes the requirement to avoid actual or perceived conflicts even though it specifies one source of conflict.

2) **5 CFR § 2635.101** sets out the following standards of ethical conduct:

(b)(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain….
(b)(5) Employees shall put forth honest effort in the performance of their duties….
(b) (11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities….
(b) (13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

The conflicts described here precluded the *Division of Education Equity* attorneys from fulfilling their duties under 5 CFR § 2635.101, which places ethical principles above conflicts of interest.

3) ABA Model Rules of Professional Conduct

Rule 1.3 Client-Lawyer Relationship. [57]
A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.7 Client-Lawyer Relationship [58]
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer

Rule 1.9 Client-Lawyer Relationship [59]
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and

[57] The District of Columbia Rule 1.3 is more explicit, requiring:
(a) A lawyer shall represent a client zealously and diligently within the bounds of the law.

[58] The District of Columbia Rule 1.7 is more explicit, requiring:
(a) A lawyer shall not advance two or more adverse positions in the same matter.
(b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:
(1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter …..;
(2) Such representation will be or is likely to be adversely affected by representation of another client;
(3) Representation of another client will be or is likely to be adversely affected by such representation;
(4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests

[59] The District of Columbia Rule 1.9 states:
A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.13 Client-Lawyer Relationship [60]

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization

Reading ABA Model Rule 1.13(a)-(d) in the context of this case illustrates an irrevocable conflict. The rule recognizes that a lawyer for an organization owes primary allegiance to the organization and does not, in an investigation, have to reveal the client's illegal behavior. Yet ED specifically undertook to perform a reasonable investigation to look for illegal behavior in IES, OESE, and ED, presumably planning to reveal any illegal behavior contrary to the rule. No analysis or case law has been cited by ED or OSC to reconcile this conflict.

The Conflict and The Breach of Duty

OGC's *Division of Educational Equity*'s work for IES "provid[ed] legal services for research and information programs administered by the Director, Institute for Education Sciences" and "[provided] formal and informal legal advice to [...] the Institute for Education Sciences" sections.[61] Its work for OESE was similar, "Provid[ing] formal and informal legal advice [...] with respect to [...] Magnet Schools Assistance Program--the Office of Elementary and Secondary Education."[62] This ED description of the Division's work indicates that it would have provided legal advice to IES and OESE regarding the legality of the grants under consideration. Such work should have specifically *prevented* the grants in question from being funded/awarded

[60] The District of Columbia Rule 1.13 states in relevant part:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

[61] See, Exhibit O, p. 894-895.

[62] Id.

if illegal. Yet they were approved and funded. Investigating whether this was legal requires independence.

The starting point for analyzing the conflicts situation is the fact that these ED attorneys are doing work requested by, and doing work for, OSC and not ED. OSC is charged with investigating ED wrongdoing and is interested in whether ED personnel have violated any laws. ED has an obvious interest in not exposing its wrongdoing and continuing its patterns of grant-making without the spotlight of outside monitoring, which was directly confirmed by a top IES official in sworn testimony.[63] This was also within the *Division of Education Equity*'s purview, or at least it should have been. This creates an initial institutional conflict between OSC and ED's ability to investigate itself with two interested attorneys. The attorneys looking into this issue individually also have individual ethical obligations as attorneys and distinct obligations as Federal employees to not only avoid conflicts but to adhere to the highest ethical standards. See, 5 CFR § 2635.101. They cannot do so while investigating ED under these circumstances. None of this was addressed by ED.

The two *Division of Educational Equity* investigative attorneys were tasked with assessing violations of the law in direct conflict with the interests of their division in OGC. Additionally, their ability to conduct an independent review would have been tainted by any confidential knowledge they would have from their work for ED, OESE, and IES, and from their ongoing work in the very areas they were to investigate. Specifically, these two attorneys were looking into the question of whether discipline of their own division was justified based on the facts they were investigating. Also, the fact that they were conducting the investigation while privy to confidential information of ED, OESE, and IES practices, created irreconcilable conflicting duties to different clients regarding confidentiality, loyalty, diligence, and zeal, making it impossible to fulfill these duties to both clients at the same time. Under these circumstances, it would have been impossible for ED to render legal services in supposedly investigating ED, OESE, and IES with loyalty, diligence, and zeal, given their obvious conflicts.

The fact that the two *Division of Education Equity* attorneys had not participated directly with the whistleblower or with the Harvard or Fort Wayne grants is immaterial. The investigation required a conclusion as to whether IES and OESE, the attorneys' *current* "client" divisions at ED, had broken the law and/or were currently in derogation of the law. It is the conflict arising from the investigation of a current client, not association with the whistleblower or two grants in question, that gives rise to the conflict.

The implications from this conflict are significant. If from an investigation of IES and OESE it became clear they were in derogation of the law, these *Division of Education Equity* attorneys would also have access to confidential information bearing on that illegality. ABA Model Rule 1.13 suggests they would then have a duty *not* to reveal the illegality, thereby conflicting with their duty to provide all information from a reasonable investigation and report it to OSC.

[63] In describing IES 'independence' and methodology, a top IES official provided sworn testimony that IES uses rigorous 'science' as an independent agency rather than rigorously monitoring IES' legal constraints, arrogantly rejecting supervision with a "thank you very much, Mr. Secretary, we're a science organization," deemphasizing compliance with the law in favor of IES' interpretation of what "science" will allow.

In addition, if they revealed adverse information about their current clients IES and/or OESE, it would also reveal that the *Division of Educational Equity,* for whom these two attorneys currently work, had failed to do its job in preventing illegal behavior. This conflict exists even if it was not those two attorneys themselves who had dropped the ball but others in their division.

The bottom line is that these two attorneys assumed an obligation to conduct a reasonable investigation to look for illegal behavior knowing that, if found, it would unmask their own *Division of Education Equity* and/or IES and OESE, who concurrently were their clients. Additionally, had illegal conduct been discovered, they would have been at the same time statutorily obligated to report it and prohibited from disclosing it due to confidentiality obligations. To conduct such an investigation is not only inherently conflicted but the results are patently unreliable.

The justifications listed in the ED Report are insufficient to remove the intrinsic conflict created by intertwined client relationships and conflicting duties.

The whistleblower interposed a timely objection to these investigators and other inherent conflicts of interest[64] manifest in the "investigation" at the outset of ED's efforts, as did his counsel at a later date. These objections were dismissed. ED proceeded as planned. It did not fully elucidate the facts nor did it fully analyze the duties involved. Instead, it issued a Report that totally exonerated ED, and justified the conflict based on the following reasons:[65]

1. no members of the Team have worked on the grants at issue,
2. nor have they worked on any other matters relating to the Whistleblower
3. 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
4. that it has taken steps to "firewall" the Team from any other matters relating to the Whistleblower.
5. 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.

Considered in the context of basic principles of conflict analysis and government ethics, as discussed above, these statements do not justify the preparation and issuance of the investigative Report by these conflicted individuals.

The first three reasons ED advanced to justify its investigation rest on the underlying assertion that the attorneys had no prior direct dealings with the grants in question or with the Complainant. However, this is irrelevant.

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[64] The third attorney came from the ED Division of Legislative Counsel, which is one of three sections within ED OGC's Division of Ethics, Legislative Counsel and Regulatory Services. One of the other two sections is the Ethics Division, led by an Assistant General Counsel (AGC) involved in the decision to fire the whistleblower. When findings about the retaliatory firing are determined, this AGC may be implicated. In effect, the attorney in the Legislative Counsel Division is investigating an AGC who works for her boss (the Deputy General Counsel). Further, the ED investigative attorney works in the division that drafts the Department's legislation and related documents, reviews all education-related legislation pending in Congress, and acts as the Department's liaison to OMB with respect to the clearance of legislative matters, and thereby provides services to IES.

[65] See, ED Report, p. 2

The Model ABA rules, in particular Rules 1.7 and 1.9, establish that a conflict exists even if the attorney who had no direct dealings is working on a "substantially related matter." The investigation into the legality of IES' Harvard grant and OESE's Fort Wayne grant was substantially related to the work that the *Division of Education Equity* attorneys were simultaneously doing with ED and IES pertaining to the legality of IES grant activity. This is clear from the fact that a finding of illegality in the subject investigation could directly impact the very work the attorneys were doing for ED and IES. Points 1 through 3 simply do not address this additional aspect of conflict.

Case law establishes that a conflict need not arise from direct involvement in a particular matter if involvement is adverse to the general interests of another client. See, *Celgard, LLC v. LG Chem, Ltd*., 594 F. App'x 669 (Fed. Cir. 2014) in which the court explained that North Carolina's Rule 1.7(a) prohibits representation when the representation will be "directly adverse" to another client. The representation involved in *Celgard* was directly adverse to the client's general "interests and legal obligations" (not necessarily the particular matter) and the duty of loyalty prevented representation of *Celgard* because a client's "interests and legal obligations" are not limited to an individual matter.

While ED seems to maintain that *current direct adversity* only arises from related matters, *Celgard* illustrates that a lawyer's representation of a client may be directly adverse to another client *even if the matters are unrelated*.[66] From a lawyer's standpoint, the lack of direct relation between the concurrent matters is no defense to this type of direct adversity conflict.[67] Nor may a lawyer overcome a direct adversity conflict on the basis that the client to whom the lawyer is directly adverse is represented by another lawyer in the matter.[68] In sum, if a lawyer represents one client against another client that the lawyer (or the lawyer's firm) simultaneously represents in an unrelated matter, there still is a direct adversity conflict. Here the *Division of Education Equity* lawyers are doing legal work for OSC while at the same time being charged with working for IES and OESE, and generally ED, all on the same matter. The same quality of convergence of "interests and legal obligations" of the *Division of Education Equity* attorneys to IES, OESE, and ED in general, prevents their undertaking a conflict-free investigation for OSC.

In any case, the standard set forth in 5 CFR § 1810.4 makes the question of related or unrelated matters irrelevant:

> Agency liaisons facilitate their agency's cooperation with OSC's investigations by ensuring that agencies timely and accurately respond to OSC's requests for information and witness testimony, as well as by assisting with the resolution of complaints. To maintain the integrity of OSC's

[66] *El Camino Res., Ltd. v. Huntington Nat'l Bank*, 623 F. Supp. 2d 863, 877 (W.D. Mich. 2007) (quoting *Fla. Ins. Guar. Ass'n, Inc. v. Carey Canada, Inc.*, 749 F. Supp. 255, 259 (S.D. Fla. 1990)); Model Rules of Professional Conduct R. 1.7 cmt. 6 (2020).

[67] *See, e.g.*, *GSI Commerce Sols., Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204, 210 (2d Cir. 2010) ("In this respect, it will not suffice to show that the two matters upon which an attorney represents existing clients are unrelated."); *Reed v. Hoosier Health Sys*., 825 N.E.2d 408, 412 (Ind. Ct. App. 2005) ("Reed contends IRPC 1.7(a)'s use of 'directly' indicates there must be some relation between the suits before disqualification is proper. . . . However, IRPC 1.7(a)'s use of 'directly' refers to the adverse effect to the client not the attorney-client relationship." (citations to the record omitted)).

[68] *Quinn v. Anvil Corp.*, No. C08-0182RSL, 2008 WL 11344647, at *2 (W.D. Wash. Aug. 27, 2008).

> investigations and to avoid actual or perceived conflicts, agency liaisons should not have current or past involvement in the personnel actions at issue in the assigned case.

Under this regulation, the directive is to "avoid actual or perceived" conflicts. The intertwinement of the *Division of Education Equity* attorneys prevents them from meeting this requirement.

The rationale that the team members are "firewalled" from any other matters involving the Whistleblower misses the point. If in fact a firewall strategy could have mitigated this conflict, it would have had to separate the attorneys involved in the investigation of whistleblower's claims from other agency work that could prejudice their investigation. No such firewalling was attempted. The subject attorneys maintained a *present and ongoing relationship with, and in support of*, IES and OESE. They currently are thus investigating something to the detriment of their current client's best interests.

Finally, an unsupported, self-serving, conclusory statement that the investigation was 'objective,' 'careful' and 'confidential' cannot overcome a substantive conflict. A major point of conflicts analysis is that a conflicted person cannot, by their nature be objective, which is why they are excluded. The claim that the investigation was 'careful' is undermined by the failure to follow the most basic requirements of full identification of evidence, state of the law or applicable obligations, or an analysis of the evidence in the context of the law. Likewise, the assertion that the investigation was 'confidential' ignores the fact that it was impossible for them, as attorneys, to fulfill their ethical requirements of confidentiality due two adverse parties when simultaneously representing or owing identical duties to both parties.

The whistleblower did not receive the benefit of the whistleblower statute.

Having filed his complaint, the whistleblower is entitled to the full benefit of all whistleblower statutory protections. A conflicted investigation does not meet that standard.

OSC failed to make the whistleblower "whole"

The U.S. Office of Special Counsel (OSC)'s primary mission is supposed to be to protect federal employees against reprisal for whistleblowing, as happened in this case. The statute provides OSC with two methods of protecting whistleblowers: 1) where appropriate, recommending corrective action on behalf of the whistleblower to obtain relief designed to make him "whole"; and 2) where appropriate, initiating disciplinary action against civilian government officials who commit prohibited personnel practices ("PPP") (i.e. retaliation against a whistleblower).[69]

[69] *See*, "The U.S. Office of Special Counsel's Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing" by The Honorable Carolyn N. Lerner, Special Counsel, U.S. Office of Special Counsel and Jason M. Zuckerman, Senior Legal Advisor, U.S. Office of Special Counsel.

Here, OSC failed to seek full protection for the whistleblower, i.e. make him "whole" based on a misperception of the facts that, had they been investigated, provide a solid basis for OSC to pursue truly making the whistleblower whole.

In particular, OSC thought it a point of weakness in the whistleblower's case when it noted that he had been warned by his superior "not to go outside your job description."[70] OSC reference to this admonition implied that the whistleblower had in fact done something wrong by reporting actual or perceived illegal behavior, and this was cited as the reason why OSC thought the whistleblower was not entitled to be made "whole."

The whistleblower understands the need for the appropriate exercise of prosecutorial discretion in OSC's execution of its mandate. While every case cannot result in full satisfaction for all parties, this case exhibits two defects in the statutory scheme for whistleblower protection that must be remedied if OSC is to live up to its Congressional mandate of "making a whistleblower whole."

The first structural defect.

The first defect is that OSC came to a glaring misapprehension of the facts which dictated its response to the whistleblower's desire to be "made whole," as required by the law. The statutory structural defect does not involve a dispute about OSC's exercise of discretion. Rather, this is a whistleblower case where the "out of job description" activity was the whistleblowing itself.[71] The whistleblower had mentioned the actual illegality of ED grants and practices, and *within his chain of command* simply asked for an independent opinion from the ED Office of General Counsel. He was silenced and ignored. When the whistleblower brought up the subject again, he was fired on the excuse that whistleblowing was "out of (his) job description." Further evidence developed that the whistleblower's supervisor interposed reasons justifying the firing, each of which was directly contradicted by sworn testimony of other ED employees. In this context, appropriate whistleblowing was within the job description, there was no cognizable reason other than retaliation to fire the whistleblower, and consequently there was no basis for OSC to draw its conclusion except ignorance of the facts in part because of ED's incomplete "investigation."

Since the whistleblower's comments about legality were the only comments deemed "out of job description," it seems that OSC has adopted the view that the whistleblower's whistleblowing was "out of scope." This is unfortunate. It is not consistent with the law. Whistleblowing cannot possibly be out of scope for *any* federal employee. In fact, the whistleblower's comments were actually *required* by his fidelity to his ethical duties, embodied in the Standards of Ethical

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[70] See, Exhibit M, p. 876, "By comparison, here, your supervisor counseled you for going outside your job description and cautioned you that further such actions could warrant disciplinary action. We do not believe that this record is sufficient to meet the high legal bar for establishing a hostile work environment."

[71] ED's responses to the whistleblower's interrogatories stated, in part:
(1) "The Complainant often went outside the scope and role of his employment during weekly team meetings and during biweekly one-on-one meetings with his supervisor by repeating his concerns regarding both the Harvard and Fort Wayne grants after being instructed that he was exceeding the scope of his role.", and
(2) "The Agency does not contend that other conduct by Complainant was one of the reasons for Complainant's termination.

Conduct for Federal Executive Employees, 5 CFR part 2635. But ED's conflicted "investigation" examined none of this, and OSC's failure to recommend corrective action indicates its failure to reject the absurd "out of scope" argument.

The second structural defect.

The second structural defect resulting in OSC's failure to attempt to make the whistleblower "whole" concerns acknowledging what it takes to make a whistleblower victim whole. OSC seems to believe that it can make a whistleblower whole in a settlement, like here, where the agency offered to purportedly "cleanse" the employee file without any admission of fault, but that making a whistleblower "whole" by requiring an affirmative statement about retaliatory firing or wrongdoing – when circumstances require that admission for independent purposes[72] – not within the ambit of the concept "whole." The basis offered by OSC is a view that MSPB case law does not "ordinarily" provide such relief.[73] This practice is a serious deviation from the Congressional intent to make a whistleblower, under appropriate circumstances, "whole."

The harm in settling a retaliatory firing claim.

In its latest amendments to the whistleblower protections, Congress clarified that that while disciplining those who commit PPPs may be a means by which to protect employees, "the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration."[74] Part of the acknowledged corrective action for a PPP violation consists of remedies that make the whistleblower "whole." These remedies include reinstatement, back pay (lost wages), medical costs, compensatory damages, compensation for any other reasonable and foreseeable consequential charges, and attorneys' fees and costs.

The whistleblower is appreciative that OSC took full and total account of the financial elements such as back pay, medical costs, attorney fees and other economic losses when offering, on behalf of ED, a "clean record settlement" offer for all claims.[75] The whistleblower noted, however, that while such an agreement requires the agency to act in matters relating to the individual as if he or she had a clean record, that agency obligation *does not* fix the damage so as to make the whistleblower whole. *This is so because the settlement terms offered by ED did not*

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[72] The whistleblower specifically requested some sort of written explanation of his firing or other relief to have documentation in the record to supplement answers that *he and not the Agency* would have to provide to questions such as "were you ever fired" from a job. Without such documentation, the whistleblower's reputation is forever sullied and reliant on his, not an official, explanation.

[73] See, Exhibit M, p.877, in which the whistleblower was told by OSC that "While you may believe a formal admission of wrongdoing, a favorable judgment, or formal findings vindicating your position provide benefits beyond a rescission of the termination and expungement of all relevant documentation from agency files, OSC's longstanding policy in evaluating an agency's offer of corrective action is to compare the offer with the specific relief we could obtain before the Board rather than the collateral benefits of a factual finding in the individual's favor."

[74] *See* Pub. L. No. 101-12, Sec. 2 (1989).

[75] In addition, whistleblower will note for the record that the representatives of OSC have at all times been most respectful and personally accommodating, for which he is appreciative and for which OSC should be commended. The whistleblower's issues with OSC are solely over OSC's professional judgment.

deal with the salient damage coming from the whistleblower's having been "fired" for bad "conduct."[76]

While the agency offered to treat the record as if it were "clean," the settlement offer did nothing to remove the whistleblower's obligation to answer questions truthfully about the fact of the firing and the stated reason, leaving to him to deal with and explain inquiries about his past jobs. This current agency "clean" settlement practice means that because the reasons for the retaliatory firing are never fully remedied or repudiated, the whistleblower is forced forever truthfully answer on any application, whether for a job or professional license, that he had been fired and when asked why, he has to truthfully answer that the "why" for the firing was stated by the agency at the time of firing as being "bad conduct."

If that seems attenuated or remote, consider the following. The whistleblower, a law student, has to answer these questions if he applies for membership in a state bar association or if he applies for a security clearance. For example, one state bar association's Character & Fitness Application questionnaire asks:

> "Have you ever been terminated, suspended, discharged, or permitted to resign in lieu of termination from any employment?"

The answer has to be "yes." And any explanation is unofficial and comes from the whistleblower.

Further, consider security clearance questions (e.g. the e-QIP) which have been known to ask:

> For this employment have any of the following happened to you in the last seven (7) years? ◦ Fired; ◦ Quit after being told you would be fired; ◦ Left by mutual agreement following charges or allegations of misconduct; ◦ Left by mutual agreement following notice of unsatisfactory performance

Without an official statement of wrongful firing or other similar indicia, a "fired" whistleblower must answer truthfully, leaving the only explanation that a claim for wrongful termination was brought and that it was "settled." Any such statement does not affirm that the firing was unjustified; it does not affirm that the whistleblower had done nothing wrong, that he had done his duty and was the object of retaliation. It just affirms that the claim was "settled." All but the hopelessly naïve could not see that the basis for a "settlement" could be for a panoply of reasons *other than* the whistleblower's actual good character, innocence, or the illegal reprisal to which he was subject. Under these circumstances, the whistleblower is not "made whole"; rather, he remains wounded forever.

Thus the "stain" on the whistleblower's record cannot in reality be removed by a settlement without an acknowledgment of the wrongdoing. The illegal firing to which the whistleblower

[76] The February 5, 2020 termination memo stated: "You are being terminated because your conduct fails to meet the expectations of a Pathways Intern and of a Federal employee at this Agency. You demonstrated the inability to work cooperatively as part of a team and maintain a respectful working relationship with management officials. Additionally, you failed to follow instructions related to your work and/or your requirements as a program participant."

was subject cannot be officially clarified short of that, and any inquiring prospective employer has to then justify the whistleblower's explanation or investigate the situation. No one can, in fairness and with a straight face, argue that a settlement offered under these terms either protected the whistleblower or made him "whole," despite offering full economic compensation.

"Cleaning" the agency record without a correction of the reasons for the firing itself is not something beyond protection for whistleblowers who should *not* have to settle for a cynical disposal of their claim by settlement which *de facto* exonerates the wrongdoer without making the victim truly whole. This deficiency in the protections Congress intended to provide for whistleblowers stems from a policy that OSC adopted voluntarily and can – and should – be easily remediated by OSC or Congress.

Recommendations

The facts developed regarding the ED systemic discrimination of the "investigative" Report raise two important considerations:

1) Congress, and particularly OSC, should require an investigation into the record of this "investigative" team for possible disciplinary action: a) for potential violations of the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635 and b) for possible pursuit of a performance-based adverse action proceeding against each such team member under chapter 43 or 75 of title 5, United States Code.
2) Congress should consider statutory action to assure that agencies, when self-assessing a reference of information from OSC, must have an investigation evaluation performed by an independent agency outside of the agency involved in the information under consideration. Alternatively, Congress should consider *requiring* that an agency's Office of Inspector General investigate all disclosure referrals by OSC.
3) Congress should consider a private right of action on terms that are fair but accessible for whistleblowers to redress improper, illegal disclosure investigations – as was conducted by ED.
4) Congress should consider a GAO audit of ED grant funding procedures, and grants, to assure compliance with applicable law, particularly ESRA, Title VI and 34 CFR 100 et seq., and 5 C.F.R. §2635.101, 34 C.F.R. 97 et seq. (the Common Rule); and the Due Process & Equal Protections clauses of the United States Constitution.

Exhibit A
(OSC Form-14)

CARDINAL MAIL [redacted]

Your Office of Special Counsel Complaint Has Been Received

CRM Records Owner <CRMRecordsOwner@usosc.onmicrosoft.com> Thu, May 6, 2021 at 11:58 AM
To: [redacted]

Your submission was received by the Office of Special Counsel. In the near future, we will email you to provide more specific information about your filing, including a case number and contact person at OSC.

Please bear in mind that OSC receives a large number of filings each year. While we attempt to handle them as expeditiously as is possible, we generally process them in the order received.

COMPLAINT OF PROHIBITED PERSONNEL PRACTICE OR OTHER PROHIBITED ACTIVITY

For instructions or questions, call the Case Review Division at (202) 804-7000.

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

- Retaliation for Whistleblowing
- Retaliation for Protected Activity
- Obstruct Competition
- Give Unauthorized Preference
- Encourage Withdrawal from Competition
- Nepotism
- Improper Political Recommendation
- Violate Veterans' Preference
- Discrimination for Non-Job-Related Conduct
- Other Bases of Discrimination
- Improper Personnel Actions
- Non-Disclosure Agreement
- Improper Accessing of Medical Records
- Coerce Political Activity
- Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

PART 1: IMPORTANT INFORMATION ABOUT FILING A COMPLAINT

Required Complaint Form. Complaints alleging a prohibited personnel practice or a prohibited activity must be submitted on this form, either by e-filing or by mail. Information not submitted on or accompanied by this form may be returned by OSC to the filer. The complaint will be considered filed on the date on which OSC receives the completed form. 5 C.F.R. § 1800.1, as amended.

No OSC Jurisdiction. OSC cannot take any action on complaints filed by employees of

- the FBI, CIA, DIA, NSA, National Geospatial-Intelligence Agency, ODNI, National Reconnaissance Office or other intelligence agencies excluded from coverage by the President;
- the Government Accountability Office;
- the Postal Rate Commission; and
- the uniformed services of the United States (*i.e.*, uniformed military employees). OSC does have jurisdiction over civilian employees of the armed forces.

Limited OSC Jurisdiction. For employees of some federal agencies or entities, OSC's jurisdiction is limited to certain types of complaints, as follows –

- FAA employees only for allegations of retaliation for whistleblowing under 5 U.S.C. § 2302(b)(8) and most allegations of retaliation for engaging in protected activities under 5 U.S.C. § 2302(b)(9).
- employees of government corporations listed at 31 U.S.C. § 9101 only for allegations of retaliation for whistleblowing under 5 U.S.C. § 2302(b)(8) and most allegations of retaliation for engaging in protected activities under 5 U.S.C. § 2302 (b)(9).
- U.S. Postal Service employees only for allegations of nepotism.
- TSA employees only for allegations of discrimination under § 2302(b)(1), retaliation for whistleblowing under 5 U.S.C. § 2302(b)(8), and most allegations of retaliation for engaging in protected activities under 5 U.S.C. § 2302(b)(9).

Election of Remedies. You may choose only one of three possible methods to pursue your prohibited personnel practice complaint: (a) a complaint to OSC; (b) an appeal to the Merit Systems Protection Board (MSPB) (if the action is appealable under law or regulation); or (c) a grievance under a collective bargaining agreement. If you have already filed an appeal about your prohibited personnel practice allegations with the MSPB, or a grievance about those allegations under the collective bargaining agreement (if the action is grievable under the agreement), OSC may lack jurisdiction over your complaint.5 U.S.C. § 7121(g).

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

- Retaliation for Whistleblowing
- Retaliation for Protected Activity
- Obstruct Competition
- Give Unauthorized Preference
- Encourage Withdrawal from Competition
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- Discrimination for Non-Job-Related Conduct
- Other Bases of Discrimination
- Improper Personnel Actions
- Non-Disclosure Agreement
- Improper Accessing of Medical Records
- Coerce Political Activity
- Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

Complaints Involving Discrimination.

- Race, Color, Religion, Sex, National Origin, Age, and Disability (or Handicapping Condition): OSC is authorized to investigate discrimination based upon race, color, religion, sex, national origin, age, or disability (or handicapping condition), as well as retaliation related to EEO activity. 5 U.S.C. § 2302(b)(1). However, OSC generally defers such allegations to agency procedures established under regulations issued by the Equal Employment Opportunity Commission (EEOC). 5 C.F.R. § 1810.1. If you wish to report allegations of discrimination based on these bases, you should contact your agency's EEO office immediately. There are specific time limits for filing such complaints. Filing a complaint with OSC will not relieve you of the obligation to file a complaint with the agency's EEO office within the time prescribed by EEOC regulations (at 29 C.F.R. Part 1614).
- Marital Status and Political Affiliation: OSC is authorized to investigate discrimination based on marital status or political affiliation. 5 U.S.C. § 2302(b)(1).
- Sexual Orientation and Gender Identity: OSC is authorized to investigate discrimination based on sexual orientation and gender identity. 5 U.S.C. §§ 2302(b)(1) and (b)(10). EEOC also may have jurisdiction over complaints of discrimination on these bases.

Complaints Involving Veterans Rights. By law, all complaints alleging denial of veterans' preference requirements or USERRA must be filed with the Veterans Employment and Training Service (VETS) at the Department of Labor (DOL). 38 U.S.C. § 4301, *et seq.*, and 5 U.S.C. § 3330a(a).

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

- Retaliation for Whistleblowing
- Retaliation for Protected Activity
- Obstruct Competition
- Give Unauthorized Preference
- Encourage Withdrawal from Competition
- Nepotism
- Improper Political Recommendation
- Violate Veterans' Preference
- Discrimination for Non-Job-Related Conduct
- Other Bases of Discrimination
- Improper Personnel Actions
- Non-Disclosure Agreement
- Improper Accessing of Medical Records
- Coerce Political Activity
- Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

PART 2: SELECT YOUR PPPs

Please check **ALL** that apply (you MUST check one option). A customized series of questions will appear following the "Biographical Information" section, below, based on your selections. You can return to this part at any time prior to submitting your complaint if you would like to add or remove allegations. All fields allow ample space to respond, but each question has a character limit; if you can no longer type you have hit the limit.

RETALIATION CLAIMS

☑ ***Retaliation for Whistleblowing***

Retaliation for reporting a violation of law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; a substantial and specific danger to public health or safety; or censorship related to scientific research.

☐ ***Retaliation for Protected Activity***

Retaliation for filing a complaint or grievance; assisting another with a complaint or grievance; cooperating with an OSC, OIG, or internal investigation; or refusing to obey an illegal order.

ILLEGAL SELECTION PRACTICE CLAIMS

☐ ***Obstruct Competition***

Intentionally deceive or obstruct anyone from competing for federal employment.

☐ ***Give Unauthorized Preference***

Give an unauthorized preference or advantage, including defining the manner or scope of competition, to improve or injure the employment prospects of any person.

☐ ***Encourage Withdrawal from Competition***

Influence or encourage anyone to withdraw from competition to improve or injure the employment prospects of any person.

☐ ***Nepotism***

Involvement in the appointment, promotion, or advancement of a relative, or advocacy on behalf of a relative.

☐ ***Improper Political Recommendation***

Request or consider a recommendation based on political connections or influence rather than one based on personal knowledge of a person's ability to perform a job.

☐ ***Violate Veterans' Preference***

Take or fail to take, recommend, or approve a personnel action if doing so would violate a veterans' preference requirement. This type of complaint must be filed with the Department of Labor. Please click here to go to that site.

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

- Retaliation for Whistleblowing
- Retaliation for Protected Activity
- Obstruct Competition
- Give Unauthorized Preference
- Encourage Withdrawal from Competition
- Nepotism
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- Violate Veterans' Preference
- Discrimination for Non-Job-Related Conduct
- Other Bases of Discrimination
- Improper Personnel Actions
- Non-Disclosure Agreement
- Improper Accessing of Medical Records
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- Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

DISCRIMINATION CLAIMS

☐ ***Discrimination for Non-Job-Related Conduct***

Discrimination for conduct that does not adversely affect job performance, including claims of sexual orientation or gender identity discrimination.

☑ ***Other Bases of Discrimination***

OSC examines claims of discrimination based on **marital status** and **political affiliation.** OSC does NOT ordinarily investigate claims of discrimination based on race, color, religion, sex, national origin, age, and handicapping condition. These claims are typically better filed with an agency's EEO office.

OTHER CLAIMS

☑ ***Improper Personnel Actions***

Take or fail to take a personnel action if doing so would violate any law, rule, or regulation implementing or directly concerning a merit system principle.

☐ ***Non-Disclosure Agreement***

Implement or enforce a non-disclosure agreement or policy that lacks notification of whistleblower rights.

☐ ***Improper Accessing of Medical Records***

Accessing the medical records of another employee or applicant for employment as a part of, or otherwise in furtherance of, the commission of a prohibited personnel practice.

☐ ***Coerce Political Activity***

Coerce a person to engage in political activity, to include providing a political contribution or service, or take action against a person for doing so.

☐ ***Other***

Please use this area to describe employment problems that do not fall into one of the categories listed above.

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

PART 3: BIOGRAPHICAL INFORMATION

* Denotes Required Fields

1. Complainant Information:

Title

First Name* [redacted] Middle Initial [redacted]

Last Name* [redacted]

2. Contact Information:

Address Location* ☑ Domestic ☐ International

Address Line 1* [redacted]

Address Line 2

City* [redacted] State* [redacted]

Zip Code* [redacted]

*At least **ONE** phone number **OR** email address is required.

Cell Phone Number [redacted]

Office Phone Number Ext.

Home Phone Number

Email Address [redacted]

Preferred means of contact:

☑ email ☐ home phone ☐ cell phone ☐ office phone

☐ Please do not contact me on my office phone

3. Do you have representation?* ☐ Yes ☑ No

4. Complainant's employment status:*

☐ Current Federal Employee

☑ Former Federal Employee

☐ Applicant For Federal Employment

☐ Non-Federal Employee *(please specify below)*

5. If current or former federal employee, please list most recent position title, series, grade:

Title (for instance, Investigator) Management and Program Analyst

Series (for instance, GS-1810) GS-0399

Grade (for instance, GS-9) GS-5

COMPLAINT OF PROHIBITED PERSONNEL PRACTICE OR OTHER PROHIBITED ACTIVITY

For instructions or questions, call the Case Review Division at (202) 804-7000.

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

6. Please provide your dates of employment in this position. July 6, 2020-Feb 5, 2021

7. Department name:* EDUCATION

8. Agency name:* OTHER

Office of Acquisition & Grants Administration, within Office of Finance & Operations

9. Agency subcomponent: Grants Policy & Training Division (GPTD)

10. Street Address: 400 Maryland Ave, SW

11. City:* Washington

12. State:* DC ☐ Check here if agency address is international.

13. Zip Code: 20202

14. Are you covered by a collective bargaining agreement? *(Check one.)*

☐ Yes ☐ No ☑ I don't know

15. Which of the following apply to your employment status? *(Check all applicable items.)*

a. Competitive Service

☐ Temporary appointment ☐ Career or career-conditional appointment
☐ Term appointment ☐ Probationary employee

b. Excepted Service

☐ Schedule A ☐ Schedule B ☐ Schedule C
☐ National Guard Technician ☐ Postal Service
☐ Tennessee Valley Authority ☐ Non-appropriated fund
☐ Other *(specify)*:

c. Senior Executive Service (SES) or Executive Level

☐ Career SES ☐ Executive Level V or above
☐ Non-career SES ☐ Presidential appointee (Senate-confirmed)

d. Other

☐ Civil service annuitant ☐ Military officer or enlisted person
☐ Former civil service employee ☐ Contract employee
☑ Unknown ☑ Other *(specify)*: Pathways Intern

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

16. What other action(s), if any, have you taken to appeal, grieve, or report this matter under any other procedure? *(Check all that apply.)*

- ☐ None, or not applicable
- ☐ Appeal with Merit Systems Protection Board (MSPB) Date: _____
- ☐ Grievance under collective bargaining agreement procedure Date: _____
- ☐ Grievance filed under agency grievance procedure Date: _____
- ☐ Discrimination complaint filed with agency Date: _____
- ☐ USERRA claim with VETS (Department of Labor) Date: _____
- ☐ Appeal filed with Office of Personnel Management Date: _____
- ☐ Lawsuit filed in Federal Court Date: _____
  Court name: _____
- ☐ Reported matter to agency Inspector General Date: _____
- ☑ Reported matter to member of Congress Date: Feb 11, 2021
  Name of Senator or Representative: Representative Matt Gaetz
- ☑ Other *(specify)*: Contacted OEEOS (ED's EEO office) Date: Mar 17, 2021

17. What action would you like for OSC to take if we find that a prohibited personnel practice has occurred?

Any/all of the following: Reinstatement to my position; damages/backpay; addressing the underlying illegalities and other problems at ED; any/all other remedies that may be applicable

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

- Retaliation for Whistleblowing
- Retaliation for Protected Activity
- Obstruct Competition
- Give Unauthorized Preference
- Encourage Withdrawal from Competition
- Nepotism
- Improper Political Recommendation
- Violate Veterans' Preference
- Discrimination for Non-Job-Related Conduct
- Other Bases of Discrimination
- Improper Personnel Actions
- Non-Disclosure Agreement
- Improper Accessing of Medical Records
- Coerce Political Activity
- Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

PART 4: DETAILS OF YOUR COMPLAINT

Retaliation for Whistleblowing

An agency official is prohibited from taking, failing to take, or threatening to take or fail to take, a personnel action against an employee or applicant because the individual made a disclosure of information that s/he reasonably believed evidenced wrongdoing (*i.e.*, a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; substantial and specific danger to public health or safety; or censorship related to scientific research.) 5 U.S.C. § 2302(b)(8). This is commonly referred to as a retaliation for whistleblowing claim.

IMPORTANT INFORMATION ABOUT RETALIATION ALLEGATIONS

YOU SHOULD LIST ALL DISCLOSURES AND PERSONNEL ACTIONS INVOLVED IN YOUR COMPLAINT. This is because: (1) failure to list any disclosure or personnel action may delay the processing of your complaint by OSC; and (2) a comprehensive listing will help avoid disputes in any later Individual Right of Action (IRA) appeal that you may file with the Merit Systems Protection Board (MSPB).

You may add additional allegations of retaliation for whistleblowing to this complaint while it is pending at OSC. Submission of any additional allegations to OSC in writing will help you if you later decide to file an IRA appeal with the MSPB.

To establish its jurisdiction over an IRA appeal, the MSPB will require you to show that your IRA appeal relates to the same disclosure(s) and personnel action(s) raised in your complaint to OSC. The following documents will help meet this requirement: a copy of the retaliation allegations in your complaint, any additional allegation(s) of retaliation that you submitted to OSC in writing while the complaint was pending, and any official correspondence you receive from OSC about your complaint. **IT IS IMPORTANT, THEREFORE, THAT YOU SAVE COPIES OF ALL THESE DOCUMENTS FOR YOUR RECORDS.**

If OSC fails to complete its review of your whistleblower retaliation allegation within 120 days after it receives your complaint, or if it closes your complaint at any time without seeking corrective action on your behalf, you have the right to file an IRA appeal with the MSPB. 5 U.S.C. § 1214(a)(3).

Please briefly answer the following questions about your retaliation claim. **If there is more than one instance, you may repeat the process until you have answered the questions for each instance. To do so, click the "Add Another Retaliation for Whistleblowing Claim" button at the end of this section. You will have an opportunity to attach supporting documentation before you submit your form.**

1. What did you disclose? If you made your disclosure in writing, please attach a copy to your complaint before you submit it.**

While working at ED, I disclosed to both my team leader ([redacted]) and manager ([redacted]), both verbally and via email, what I reasonably believed were violations of law in connection with a grant - specifically, a grant that the Institute of Education Sciences (IES) had chosen to fund, then forwarded to my

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

team for human subjects review under 34 CHR 97. The grant's PR number is R305A200278. I reasonably believed that this grant: 1) violated the IES director's statutory duty under 20 USC 9514(f)(7) "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"; 2) violated OMB memo M-20-34; 3) ran contrary to the (at that time, Trump) administration's publicly-stated positions; 4) ran contrary to the unitary executive view of government, including the premise that political appointees should make the sort of political decision at issue in this grant rather than career people; 5) violated President Trump's Executive Order on Combating Race and Sex Stereotyping; 6) violated OMB memo M-20-37; and 7) violated long-standing bipartisan/non-partisan and Constitutional norms.

2. When did you disclose it?

There were multiple phone conversations and emails. Some important emails are dated August 6, 2020 and September 8, 2020

3. To whom did you make your disclosure?

My team leader ([redacted]) and later our manager ([redacted])

4. How did you learn of the information you disclosed?

My team's primary duty is reading grant applications then making a human subjects determination under 34 CFR 97. I read this grant application in the normal performance of my duties, and noticed what I reasonably believed to be violations of law.

5. When and how did agency officials learn about your disclosure?

I told my team leader ([redacted]) and later our manager ([redacted])

6. What action did the agency take in response to your disclosure? (For example, did the agency investigate or otherwise look into what you disclosed or was disciplinary action taken against responsible parties?)

I do not have full knowledge of what actions management took. I do not know who, if anyone, looked into this grant. At the time, I was told by my manager ([redacted]) that my reasonable belief of violations of law was "out of scope."

7. What personnel action(s) do you believe was taken, not taken, or threatened because of your disclosure?
Check all applicable:

- [x] Removal
- [ ] Suspension
- [ ] Other Discipline
- [ ] VA Expedited Process
- [ ] Gag Order
- [ ] Detail
- [ ] Promotion
- [ ] Appointment
- [ ] Reinstatement
- [ ] Reassignment
- [ ] Harassment/Hostile Work Environment
- [ ] Psychiatric Examination
- [ ] Performance Evaluation
- [ ] Changes to Duties/Working Conditions
- [ ] Pay, Benefits, Training
- [ ] Other

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

- Retaliation for Whistleblowing
- Retaliation for Protected Activity
- Obstruct Competition
- Give Unauthorized Preference
- Encourage Withdrawal from Competition
- Nepotism
- Improper Political Recommendation
- Violate Veterans' Preference
- Discrimination for Non-Job-Related Conduct
- Other Bases of Discrimination
- Improper Personnel Actions
- Non-Disclosure Agreement
- Improper Accessing of Medical Records
- Coerce Political Activity
- Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

Describe:

8. When was the personnel action(s) taken? By whom?

February 4, 2021. The termination memo was signed by my manager ([redacted]). However, I have reason to believe the decision to terminate me was made, at least in part and perhaps in large part, by the Deputy Assistant Secretary (Phillip Juengst).

9. What was the agency's stated reason for taking the personnel action(s)?

"You are being terminated because your conduct fails to meet the expectations of a Pathways Intern and of a Federal employee at this Agency. You demonstrated the inability to work cooperatively as part of a team and maintain a respectful working relationship with management officials. Additionally, you failed to follow instructions related to your work and/or your requirements as a program participant."

10. What facts demonstrate that the personnel action(s) is retaliatory? (For example, were comments made that suggest that agency officials were angry because of your disclosure or did your relationships cool following your disclosure?)

Many comments were made both verbally and via email by my manager ([redacted]) that indicated management above her (meaning the Deputy Assistant Secretary, Phillip Juengst, in particular, and also management at IES) were very unhappy because of my disclosures about this grant. For example, my manager ([redacted]) said during a phone call with me that Phillip (the DAS) had been contacted by IES management about my email on this issue, and that Phillip was very unhappy. Another example is that, on February 4, 2021, during a phone call with my manager ([redacted]) where she informed me of ED's preliminary decision to dismiss me, the matter of this grant and another matter were cited. [redacted] said she thought I was terminated because of my emails regarding IES (meaning the grant described above) and Denise (meaning Biden's new EO; this is described later).

11. Why do you believe agency officials would retaliate against you? (For example, did agency officials suffer some adverse impact or embarrassment because of your disclosure?)

For this particular grant, IES (which, by statute, must be non-partisan) had chosen to fund a grant application submitted by Harvard for the "Identity Project," which is very similar to the 1619 Project. This grant is inherently partisan & political in nature. At the time, the Trump administration had publicly stated that ED will never fund the 1619 Project - yet ED & IES actually were funding a project substantially similar to it. I initially noticed & reasonably believed that funding this grant violated both one OMB memo and several longstanding bipartisan/nonpartisan American values. I later noticed & reasonably believed that funding this grant also violated an Executive Order, a second OMB memo, and the IES Director's statutory duties.

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

12. Please provide the name, title, and position in your chain of command of the agency official(s) involved in taking the personnel action(s) that you believe was retaliatory.

First Name	Last Name	Title (*e.g.*, Deputy Director)	Chain of Command (*e.g.*, 1st level supervisor)	
Denise	Carter	Assistant Secretary (now Dep. Secretary)	3rd level supervisor	Del
Phillip	Juengst	Deputy Assistant Secretary	2nd level supervisor	Del
[redacted]	[redacted]	Office Director	1st level supervisor	Del

Add Row

13. Were the agency officials involved in taking the personnel actions against you accused of wrongdoing in your disclosures? If yes, which ones?

No. I suggested only that IES's decision to fund this particular grant application was a political decision, that may or may not have an element of intent (regardless of intent, the grant application is inherently political, which makes the decision to fund it a political decision, which I reasonably believed violated several legal authorities). I suggested that we ask the Office of General Counsel (OGC) for its legal opinion on this matter

Delete the Retaliation for Whistleblowing Claim Below

1. What did you disclose? If you made your disclosure in writing, please attach a copy to your complaint before you submit it.**

While working at ED, I disclosed to both my team leader and manager, both verbally and via email, what I reasonably believed was a violation of law in connection with a grant - specifically, a magnet school grant that a program office had chosen to fund, then forwarded to my team for human subjects review under 34 CHR 97. The grant's PR number is U165A180062. I reasonably believed this grant violated: 1) The Supreme Court's holding in Grutter, which banned racial quotas for school admissions; and 2) two sections of the Federal Register governing magnet school grants, specifically 34 CFR 280.1(f) and 280.20(b)(7).

2. When did you disclose it?

There were multiple phone conversations and emails. Some important emails are dated September 14, 2020, December 21, 2020, and January 11, 2021

3. To whom did you make your disclosure?

My team leader ([redacted]) and later our manager ([redacted]). The other two members of our team (the human subjects team) were also aware of this

4. How did you learn of the information you disclosed?

My team's primary duty is reading grant applications then making a human subjects determination under 34 CFR 97. I read this grant application in the normal performance of my duties, and noticed what I reasonably believed to be a violation of law

COMPLAINT OF PROHIBITED PERSONNEL PRACTICE OR OTHER PROHIBITED ACTIVITY

For instructions or questions, call the Case Review Division at (202) 804-7000.

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

5. When and how did agency officials learn about your disclosure?

I told my team leader ([redacted]) and later our manager ([redacted])

6. What action did the agency take in response to your disclosure? (For example, did the agency investigate or otherwise look into what you disclosed or was disciplinary action taken against responsible parties?)

I do not have full knowledge of what actions management took. I do not know who, if anyone, looked into this grant. At the time, I was told by my manager ([redacted]) that my reasonable belief of violations of law was "out of scope." When I brought this matter up again later, my manager ([redacted]) asked me to draft an email to OGC (the Office of General Counsel), but I do not know whether my email ever reached OGC. I later learned, during the February 4 phone call with my manager, that OGC did not concur with my analysis. I asked what OGC's view was and whether there was a legal opinion. I was told there was not a legal opinion, and only that OGC had not concurred with my analysis, rather than what OGC thought on this matter

7. What personnel action(s) do you believe was taken, not taken, or threatened because of your disclosure?
Check all applicable:

- ☑ Removal
- ☐ Reinstatement
- ☐ Suspension
- ☐ Reassignment
- ☐ Other Discipline
- ☐ Harassment/Hostile Work Environment
- ☐ VA Expedited Process
- ☐ Psychiatric Examination
- ☐ Gag Order
- ☐ Performance Evaluation
- ☐ Detail
- ☐ Changes to Duties/Working Conditions
- ☐ Promotion
- ☐ Pay, Benefits, Training
- ☐ Appointment
- ☐ Other

Describe:

8. When was the personnel action(s) taken? By whom?

February 4, 2021. The termination memo was signed by my manager ([redacted]). However, I have reason to believe the decision to terminate me was made, at least in part and perhaps in large part, by the Deputy Assistant Secretary (Phillip Juengst).

9. What was the agency's stated reason for taking the personnel action(s)?

"You are being terminated because your conduct fails to meet the expectations of a Pathways Intern and of a Federal employee at this Agency. You demonstrated the inability to work cooperatively as part of a team and maintain a respectful working relationship with management officials. Additionally, you failed to follow instructions related to your work and/or your requirements as a program participant."

COMPLAINT OF PROHIBITED PERSONNEL PRACTICE OR OTHER PROHIBITED ACTIVITY

For instructions or questions, call the Case Review Division at (202) 804-7000.

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

10. What facts demonstrate that the personnel action(s) is retaliatory? (For example, were comments made that suggest that agency officials were angry because of your disclosure or did your relationships cool following your disclosure?)

Many comments were made both verbally and via email by my manager ([redacted]) that clearly indicated management above her (meaning the Deputy Assistant Secretary in particular, Phillip Juengst) was very unhappy because of my disclosures about this grant. For example, during a human subjects team meeting, [redacted] stated that "Phillip doesn't want anything to do with this."

11. Why do you believe agency officials would retaliate against you? (For example, did agency officials suffer some adverse impact or embarrassment because of your disclosure?)

Here, ED had chosen to fund a grant application from a magnet school (Fort Wayne) that: 1) had a race-based admissions policy (separate lotteries based on race, meaning admissions tracks), which I reasonably believed violated Supreme Court precedent, and 2) focused on "equity" in it's curriculum, which I reasonably believed violated multiple legal authorities, including two sections of the federal register. This term ("equity") has two different meanings, and in this context, it was the "equality of outcome" or "equality between groups" rather than "equal treatment of individuals under law." Similar to the aforementioned matter of the "Identity Project" grant from Harvard, the Trump administration's publicly-stated position ran contrary to funding an inherently partisan & political grant application such as this one.

12. Please provide the name, title, and position in your chain of command of the agency official(s) involved in taking the personnel action(s) that you believe was retaliatory.

First Name	Last Name	Title (*e.g.*, Deputy Director)	Chain of Command (*e.g.*, 1st level supervisor)	
Denise	Carter	Assistant Secretary (now Dep. Secretary)	3rd level supervisor	Del
Phillip	Juengst	Deputy Assistant Secretary	2nd level supervisor	Del
[redacted]	[redacted]	Office Director	1st level supervisor	Del

Add Row

13. Were the agency officials involved in taking the personnel actions against you accused of wrongdoing in your disclosures? If yes, which ones?

No. I suggested only that we ask OGC for its legal opinion on this matter, and I drafted an email to OGC for my manager to that effect. I also suggested that, if OGC agreed with my analysis, we might ask the grantee (Fort Wayne) to change its admissions policy to be in-line with Supreme Court precedent

Delete the Retaliation for Whistleblowing Claim Below

1. What did you disclose? If you made your disclosure in writing, please attach a copy to your complaint before you submit it.**

While working at ED, I disclosed to my manager via email what I reasonably believed was a violation of law in connection with a new ED policy. Denise Carter

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

(Assistant Secretary and/or DepSec) announced via email that diversity & inclusion-related training at ED that had been stopped due to President Trump's Executive Order would resume under President Biden's new Executive Order (which had repealed & replaced the prior EO). [redacted] had previously emailed our division President Trump's Executive Order. She later emailed us President Biden's EO. She instructed me and another Pathways intern to read & analyze President Biden's new EOs (including this one). Denise Carter then emailed everyone in OFO. I reasonably believed that restarting the diversion & inclusion training previously halted by Trump's EO, as described in Denise's email, would violate President Biden's new EO, and I emailed [redacted] about this matter. I quoted the Biden EO's definition of "equity" as "the consistent and systematic fair, just, and impartial treatment of individuals," which is a good Constitutional definition and is different from "equity" as "equality of outcome," and emailed my manager (meaning [redacted], not Denise; I have never contacted Denise) that perhaps Denise may not understand this distinction and may be misinterpreting the EO. I suggested we may want to consider discussing this distinction with the office in charge of diversity and inclusion, so they can structure their trainings to avoid violating President Biden's EO.

2. When did you disclose it?

There was one phone conversation and multiple emails. An important email is dated January 26, 2021.

3. To whom did you make your disclosure?

My manager ([redacted])

4. How did you learn of the information you disclosed?

[redacted] had previously emailed our division President Trump's Executive Order. She later emailed us President Biden's EO. She instructed me and another Pathways intern to read & analyze President Biden's new EOs (including this one). Denise Carter then emailed everyone in OFO. I reasonably believed that restarting the diversion & inclusion training previously halted by Trump's EO, as described in Denise's email, would violate both the law and President Biden's new EO, and I emailed [redacted] about this matter

5. When and how did agency officials learn about your disclosure?

I emailed my manager ([redacted])

6. What action did the agency take in response to your disclosure? (For example, did the agency investigate or otherwise look into what you disclosed or was disciplinary action taken against responsible parties?)

I do not have full knowledge of what actions management took. I do not know who, if anyone, looked into this. At the time, I was told by my manager that my reasonable belief of violation of law was "out of scope."

7. What personnel action(s) do you believe was taken, not taken, or threatened because of your disclosure?
Check all applicable:

- [x] Removal
- [ ] Reinstatement
- [ ] Suspension
- [ ] Reassignment

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

☐ Other Discipline ☐ Harassment/Hostile Work Environment

☐ VA Expedited Process ☐ Psychiatric Examination

☐ Gag Order ☐ Performance Evaluation

☐ Detail ☐ Changes to Duties/Working Conditions

☐ Promotion ☐ Pay, Benefits, Training

☐ Appointment ☐ Other

Describe:

8. When was the personnel action(s) taken? By whom?

February 4, 2021. The termination memo was signed by my manager ([redacted]).

9. What was the agency's stated reason for taking the personnel action(s)?

"You are being terminated because your conduct fails to meet the expectations of a Pathways Intern and of a Federal employee at this Agency. You demonstrated the inability to work cooperatively as part of a team and maintain a respectful working relationship with management officials. Additionally, you failed to follow instructions related to your work and/or your requirements as a program participant."

10. What facts demonstrate that the personnel action(s) is retaliatory? (For example, were comments made that suggest that agency officials were angry because of your disclosure or did your relationships cool following your disclosure?)

Comments were made both verbally and via email by my manager that indicated management above her were very unhappy because of my email about this matter. For example, on February 4, 2021, during a phone call with my manager ([redacted]) where she informed me of ED's preliminary decision to dismiss me, this matter and the matter of the Harvard (IES) grant were cited. She informed me of the Department's preliminary decision to dismiss me. I asked if there was anything wrong with my work. She said no, there was nothing wrong with my work. She said that she thought I was being dismissed because of my emails regarding IES and Denise (meaning Biden's new EO).

11. Why do you believe agency officials would retaliate against you? (For example, did agency officials suffer some adverse impact or embarrassment because of your disclosure?)

I stated that I reasonably believed that ED restarting the diversity & inclusion-related training, as mentioned in Denise Carter's email, would violate President Biden's new Executive Order. I raised questions about the legality of the grants and the training program. Having to go back and check might be embarrassing for ED management.

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint
Select your PPPs
Biographical Information
Your Complaint
Retaliation for Whistleblowing
Retaliation for Protected Activity
Obstruct Competition
Give Unauthorized Preference
Encourage Withdrawal from Competition
Nepotism
Improper Political Recommendation
Violate Veterans' Preference
Discrimination for Non-Job-Related Conduct
Other Bases of Discrimination
Improper Personnel Actions
Non-Disclosure Agreement
Improper Accessing of Medical Records
Coerce Political Activity
Other
Attachments
Consent
Report Government Wrongdoing (Disclosure)
Certification
Submission

12. Please provide the name, title, and position in your chain of command of the agency official(s) involved in taking the personnel action(s) that you believe was retaliatory.

First Name	Last Name	Title (*e.g.*, Deputy Director)	Chain of Command (*e.g.*, 1st level supervisor)	
Denise	Carter	Assistant Secretary (now Dep. Secretary)	3rd level supervisor	Del
Phillip	Juengst	Deputy Assistant Secretary	2nd level supervisor	Del
[redacted]	[redacted]	Office Director	1st level supervisor	Del

Add Row

13. Were the agency officials involved in taking the personnel actions against you accused of wrongdoing in your disclosures? If yes, which ones?

Yes. Denise Carter was likely involved in the decision to terminate my employment (although I do not know that for sure). I told my manager ([redacted]) that the new policy Denise announced likely violated President Biden's Executive Order

Add Another Retaliation for Whistleblowing Claim

Other Bases of Discrimination

(Based on Race, Color, Religion, Sex, National Origin, Age, Disability, Marital Status, or Political Affiliation)

An agency official is prohibited from discriminating for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, disability (or handicapping condition), marital status or political affiliation. 5 U.S.C. § 2302(b)(1). OSC routinely examines claims of discrimination based on **marital status** and **political affiliation**. However, we defer nearly all claims of discrimination based on race, color, religion, sex, national origin, age, disability (or handicapping condition) to the EEO process. Filing an OSC complaint based upon one of these bases will not change the deadlines for filing an EEO complaint. While allegations of sexual orientation and gender identity discrimination are also sex discrimination, **OSC also examines these allegations as complaints of Discrimination for Non-Job-Related Conduct. If you are making an allegation of sexual orientation or gender identity discrimination, please complete the questions for that section.**

Please briefly answer the following questions about your discrimination claim. **If there is more than one instance, you may repeat the process until you have answered the questions for each instance. To do so, click the "Add Another Other Bases of Discrimination Claim" button at the end of this section. You will have an opportunity to attach supporting documentation before you submit your form.**

COMPLAINT OF PROHIBITED PERSONNEL PRACTICE OR OTHER PROHIBITED ACTIVITY

For instructions or questions, call the Case Review Division at (202) 804-7000.

Navigation Bar

◂ **Add / Delete a Complaint**

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

1. What is the basis of your discrimination claim?

- [x] Race
- [x] Color
- [ ] Religion
- [x] Sex
- [ ] Disability (or handicapping condition)
- [ ] National Origin
- [ ] Age
- [ ] Marital Status
- [x] Political Affiliation

2. What is your status within that basis? (For example, if you are claiming marital status discrimination, are you married, single, widowed, or separated?)

I am Caucasian/white (bases of discrimination: race & color) and male (basis: sex). I support longstanding bipartisan/non-partisan American values and norms, including those that are based upon and uphold the Constitution. In our modern political scene, I believe this counts as political affiliation, particularly when working in the federal government generally and at the Department of Education (ED) specifically, since ED officially promotes an ideology (which I will refer to as Critical Race Theory (CRT) for the sake of simplicity) that runs counter to the aforementioned values and norms.

3. What action(s) did the agency take or fail to take? Check all applicable:

- [x] Removal
- [ ] Suspension
- [ ] Other Discipline
- [ ] VA Expedited Process
- [ ] Gag Order
- [ ] Detail
- [ ] Promotion
- [ ] Appointment
- [ ] Reinstatement
- [ ] Reassignment
- [ ] Harassment/Hostile Work Environment
- [ ] Psychiatric Examination
- [ ] Performance Evaluation
- [ ] Changes to Duties/Working Conditions
- [ ] Pay, Benefits, Training
- [ ] Other

Describe:

4 When did the action(s) occur?

February 4, 2021. The termination memo was signed by my manager ([redacted]). However, I have reason to believe the decision to terminate me was made, at least in part and perhaps in large part, by the Deputy Assistant Secretary (Phillip Juengst).

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

5. State the name, title, and position in your chain of command of the agency official(s) involved in the action(s).

First Name	Last Name	Title (*e.g.*, Deputy Director)	Chain of Command (*e.g.*, 1st level supervisor)	
Denise	Carter	Assistant Secretary (now Dep. Secretary)	3rd level supervisor	Del
Phillip	Juengst	Deputy Assistant Secretary	2nd level supervisor	Del
[redacted]	[redacted]	Office Director	1st level supervisor	Del

Add Row

6. What was the agency's stated reason(s) for the action(s)?

"You are being terminated because your conduct fails to meet the expectations of a Pathways Intern and of a Federal employee at this Agency. You demonstrated the inability to work cooperatively as part of a team and maintain a respectful working relationship with management officials. Additionally, you failed to follow instructions related to your work and/or your requirements as a program participant."

7. What facts support your assertion that the action was discriminatory?

Please see the attached timeline. From the events listed there, a pattern emerges showing that ED management, along with other parts of the federal government, uses official means to promote a particular partisan political ideology (which I will refer to as "Critical Race Theory") that discriminates on the bases of race, color, sex, and political orientation (e.g. against white men).
For example (and drawing from the attached timeline), during an official ED training (a grants policy forum led by my colleague [redacted]), an ED employee named [redacted] was invited to speak. From my notes: [redacted] asking [redacted] about unconscious bias, & about what to do about our unconscious bias regarding grantees who have a bad history (e.g. not accounting for all money). [redacted] said to give "additional flexibility," particularly for minority grantees. [redacted] talking about "systemic racism," "institutional racism," and "unconscious bias."
Another example (again from the timeline) is Denise Carter announcing that ED will restart this type of "diversity and inclusion related training at the Department" per President Biden's Executive Order revoking President Trump's EO on Combating Race and Sex Stereotyping. As stated previously, I told my manager ([redacted]) that I reasonably believed restarting this type of training would violate President Biden's EO. During a phone conversation with [redacted], she said that she thought I was terminated in part because of my reasonable belief on this issue.
Other examples (again, see the attached timeline) include: the PRIM&R conference that ED paid for my team and I to attend as training; SACHRP inter-agency calls and emails; and how the aforementioned Critical Race Theory is being promoted via ED's grants-making process.

Add Another Other Bases of Discrimination Claim

Navigation Bar

- ◂ Add / Delete a Complaint
- **Prohibited Personnel Practices (PPP)**
  - About Filing a Complaint
  - Select your PPPs
  - Biographical Information
  - Your Complaint
    - Retaliation for Whistleblowing
    - Retaliation for Protected Activity
    - Obstruct Competition
    - Give Unauthorized Preference
    - Encourage Withdrawal from Competition
    - Nepotism
    - Improper Political Recommendation
    - Violate Veterans' Preference
    - Discrimination for Non-Job-Related Conduct
    - Other Bases of Discrimination
    - Improper Personnel Actions
    - Non-Disclosure Agreement
    - Improper Accessing of Medical Records
    - Coerce Political Activity
    - Other
  - **Attachments**
  - Consent
- Report Government Wrongdoing (Disclosure)
- Certification
- Submission

Improper Personnel Actions

An agency official is prohibited from taking or failing to take a personnel action if doing so results in the violation of a law, rule, or regulation that implements, or directly concerns, a merit system principle listed in 5 U.S.C. § 2301. 5 U.S.C. § 2302(b)(12). Retaliation for petitioning a member of Congress or exercising your First Amendment rights falls under this section.

Please briefly answer the following questions about your claim under this section. **If there is more than one instance, you may repeat the process until you have answered the questions for each instance. To do so, click the "Add Another Improper Personnel Actions Claim" button at the end of this section. You will have an opportunity to attach supporting documentation before you submit your form.**

1. What was the personnel action(s) taken or not taken?
   Check all applicable:

☑ Removal	☐ Reinstatement
☐ Suspension	☐ Reassignment
☐ Other Discipline	☐ Harassment/Hostile Work Environment
☐ VA Expedited Process	☐ Psychiatric Examination
☐ Gag Order	☐ Performance Evaluation
☐ Detail	☐ Changes to Duties/Working Conditions
☐ Promotion	☐ Pay, Benefits, Training
☐ Appointment	☐ Other

Describe:

2. When was the personnel action(s) taken or not taken?
   February 4, 2021. The termination memo was signed by my manager ([redacted]).

3. State the name, title, and position in your chain of command of the agency official(s) involved in the personnel action(s).

First Name	Last Name	Title (*e.g.*, Deputy Director)	Chain of Command (*e.g.*, 1st level supervisor)	
Denise	Carter	Assistant Secretary (now Dep. Secretary)	3rd level supervisor	Del
Phillip	Juengst	Deputy Assistant Secretary	2nd level supervisor	Del
[redacted]	[redacted]	Office Director	1st level supervisor	Del

Add Row

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

4. Describe the role played by each agency official listed above in the personnel action(s) that is the subject of your complaint. (*e.g.*, recommending official, proposing official, deciding official, approving official, etc.).

My manager ([redacted]) signed my termination memo. Based upon her comments (previously described), I have reason to believe that Phillip Juengst and/or Denise Carter were involved in the decision to dismiss me. These include: [redacted] said she thought I was dismissed because of my emails regarding IES and Denise (meaning Biden's new EO); [redacted] mentioning during an HSR team meeting that "Phillip doesn't want anything to do with this" in reference to my concerns about the Fort Wayne grant; and other conversations I had with [redacted].

5. What law, rule, or regulation was violated by the agency's taking or failing to take the personnel action(s)?

I believe the following Merit system principles were violated, in relation to my whistleblowing about several grants, ED's historical and ongoing noncompliance with the Common Rule (34 CFR 97) (described further in the next section), etc.:
5 USC 2301(b):
(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.
(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.
(5) The Federal work force should be used efficiently and effectively.
(8) Employees should be—
(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes,
(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—
(A) a violation of any law, rule, or regulation, or
(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Add Another Improper Personnel Actions Claim

Navigation Bar

◂ Add / Delete a Complaint

Prohibited Personnel Practices (PPP)

About Filing a Complaint

Select your PPPs

Biographical Information

Your Complaint

Retaliation for Whistleblowing

Retaliation for Protected Activity

Obstruct Competition

Give Unauthorized Preference

Encourage Withdrawal from Competition

Nepotism

Improper Political Recommendation

Violate Veterans' Preference

Discrimination for Non-Job-Related Conduct

Other Bases of Discrimination

Improper Personnel Actions

Non-Disclosure Agreement

Improper Accessing of Medical Records

Coerce Political Activity

Other

Attachments

Consent

Report Government Wrongdoing (Disclosure)

Certification

Submission

Attachments

☑ I would like to attach documents to my complaint.

Please note that the space available for attachments is limited. Therefore, **DO NOT** attach every document and email that may be relevant to your claim. You will have an opportunity to make additional submissions at a later date. We recommend limiting attachments to official forms and correspondence that document the action(s) at issue in your complaint (*e.g.*, proposed AND final disciplinary action, along with any written reply you submitted; letter of reprimand; performance appraisal; PIP; vacancy announcement) **if these documents are relevant to your allegations.**

To see the attachments that have been successfully added to your form, click on the paperclip icon in the dark gray panel on the far left side of your screen. Please note that, if you print a copy of your form, the attachments will not print with it. However, any documents that appear in the paperclip panel will be transmitted to OSC.

Navigation Bar
◂ Add / Delete a Complaint
Prohibited Personnel Practices (PPP)
About Filing a Complaint
Select your PPPs
Biographical Information
Your Complaint
Retaliation for Whistleblowing
Retaliation for Protected Activity
Obstruct Competition
Give Unauthorized Preference
Encourage Withdrawal from Competition
Nepotism
Improper Political Recommendation
Violate Veterans' Preference
Discrimination for Non-Job-Related Conduct
Other Bases of Discrimination
Improper Personnel Actions
Non-Disclosure Agreement
Improper Accessing of Medical Records
Coerce Political Activity
Other
Attachments
Consent
Report Government Wrongdoing (Disclosure)
Certification
Submission

PART 5: CONSENT TO CERTAIN DISCLOSURES OF INFORMATION

* Denotes Required Fields

OSC asks everyone who files a complaint alleging a possible prohibited personnel practice or other prohibited activity to select one of three Consent Statements shown below. Please: (a) select and check one of the Consent Statements below; and (b) keep a copy for your own records.

If you initially select a Consent Statement that restricts OSC's use of information, you may later select a less restrictive Consent Statement. If your selection of Consent Statement 2 or 3 prevents OSC from being able to conduct an investigation, an OSC representative will contact you, explain the circumstances, and provide you with an opportunity to select a less restrictive Consent Statement.

You should be aware that the Privacy Act and other applicable federal laws allow information in OSC case files to be used or disclosed for certain purposes, regardless of which Consent Statement you sign. Information about certain circumstances under which OSC can use or disclose information under the Privacy Act appears in the Form Submission part of this form.

***(Please check ONLY one)**

☑ ***Consent Statement 1***

I consent to OSC's communication with the agency involved in my complaint. I agree to allow OSC to disclose my identity and information about my complaint if OSC decides that such disclosure is needed to investigate my complaint (for example, to request information from the agency, or seek a possible resolution).

☐ ***Consent Statement 2***

I consent to OSC's communication with the agency involved in my complaint, but I *do not agree* to allow OSC to disclose my identity to that agency. I agree to allow OSC to disclose only information about my complaint, without disclosing my name or other identifying information, if OSC decides that such disclosure is needed to investigate my complaint (for example, to request information from the agency, or seek a possible resolution). I understand that in some circumstances, OSC could not maintain my anonymity while communicating with the agency involved about a specific personnel action. In such cases, I understand that my request for confidentiality may prevent OSC from taking further action on the complaint.

☐ ***Consent Statement 3***

I do not consent to OSC's communication with the agency involved in my complaint. I understand that if OSC decides that it cannot investigate my complaint without communicating with that agency, my lack of consent will probably prevent OSC from taking further action on the complaint.

Navigation Bar

◂ **Add / Delete a Complaint**

Prohibited Personnel Practices (PPP)

Report Government Wrongdoing (Disclosure)

About Filing a Disclosure

Biographical Information

Details of Your Disclosure

Select Your Disclosures

Your Disclosure

Violation of Law,Rule, or Regulation

Gross Mismanagement

Gross Waste of Funds

Abuse of Authority

Danger to Public Health

Danger to Public Safety

Censorship Related to Scientific Research

Attachments

Consent

Certification

Submission

PART 1: IMPORTANT INFORMATION ABOUT FILING A DISCLOSURE

OSC WHISTLEBLOWER DISCLOSURE CHANNEL

Under 5 U.S.C. § 1213 and related provisions, the Office of Special Counsel (OSC) serves as a secure channel for federal employees, former federal employees, and applicants for federal employment with reliable knowledge of the wrongdoing to disclose:

- a violation of law, rule or regulation;
- gross mismanagement;
- gross waste of funds;
- an abuse of authority;
- a substantial and specific danger to public health or safety; and/or
- censorship related to scientific research.

OSC JURISDICTION

OSC has no jurisdiction over disclosures filed by:

- employees of the U.S. Postal Service and the Postal Regulatory Commission;
- members of the armed forces of the United States (*i.e.*, non-civilian military employees);
- state employees operating under federal grants;
- employees of federal contractors;
- other employees or federal agencies that are exempt under federal law; and
- Congressional or judicial branch employees.

ANONYMOUS SOURCES

While OSC will protect the identity of persons who make disclosures, it will not consider anonymous disclosures. If a disclosure is filed by an anonymous source, the disclosure will be referred to the Office of Inspector General in the appropriate agency. OSC will take no further action.

RETALIATION

Do you believe you suffered retaliation by your agency for disclosing wrongdoing? If yes, you may file a complaint for retaliation by selecting Add/Delete a Complaint from the top left corner. Select Option 1 to complete and submit a Complaint of Prohibited Personnel Practice or other Prohibited Activity (PPPs). *If you have already completed the Complaint of Prohibited Personnel Practice or other Prohibited Activity above, please continue with this Disclosure.* PPPs are employment-related activities that are banned in the federal workforce. PPPs generally involve some type of personnel decision or action and may result in personal relief for people who have been subject to a PPP. For example, if we find that you were removed from federal service in retaliation for whistleblowing, OSC may act to get your job back. PPPs can also include allegations of harassment, failure to issue appraisals, and improper hiring. Do not file a disclosure to report retaliation or other PPPs.

Navigation Bar

- ◂ Add / Delete a Complaint
- Prohibited Personnel Practices (PPP)
- **Report Government Wrongdoing (Disclosure)**
  - About Filing a Disclosure
  - Biographical Information
  - Details of Your Disclosure
  - Select Your Disclosures
  - Your Disclosure
    - Violation of Law,Rule, or Regulation
    - Gross Mismanagement
    - Gross Waste of Funds
    - Abuse of Authority
    - Danger to Public Health
    - Danger to Public Safety
    - Censorship Related to Scientific Research
  - **Attachments**
  - Consent
- Certification
- Submission

PART 2: BIOGRAPHICAL INFORMATION

* Denotes Required Fields

1. Complainant Information:

Title _____

First Name* [redacted] Middle Initial [redacted]

Last Name* [redacted]

2. Contact Information:

Address Location* ☑ Domestic ☐ International

Address Line 1* [redacted]

Address Line 2 _____

City* [redacted] State* [redacted]

Zip Code* [redacted]

*At least **ONE** phone number **OR** email address is required.

Cell Phone Number [redacted]

Office Phone Number _____ Ext. _____

Home Phone Number _____

Email Address [redacted]

Preferred means of contact:

☑ email ☐ home phone ☐ cell phone ☐ office phone

☐ Please do not contact me on my office phone

3. Do you have representation?* ☐ Yes ☑ No

4. Complainant's employment status:*

☐ Current Federal Employee

☑ Former Federal Employee

☐ Applicant For Federal Employment

☐ Non-Federal Employee *(please specify below)*

_____

5. If current or former federal employee, please list most recent position title, series, grade:

Title (for instance, Investigator) Management and Program Analyst

Series (for instance, GS-1810) GS-0399

Grade (for instance, GS-9) GS-5

REPORT GOVERNMENT WRONGDOING (DISCLOSURE)

Do not use this form to submit classified information.
For instructions or questions, call the Disclosure Unit at (202) 804-7000.

Navigation Bar

- ◂ Add / Delete a Complaint
- Prohibited Personnel Practices (PPP)
- **Report Government Wrongdoing (Disclosure)**
  - About Filing a Disclosure
  - Biographical Information
  - Details of Your Disclosure
  - Select Your Disclosures
  - Your Disclosure
    - Violation of Law,Rule, or Regulation
    - Gross Mismanagement
    - Gross Waste of Funds
    - Abuse of Authority
    - Danger to Public Health
    - Danger to Public Safety
    - Censorship Related to Scientific Research
  - **Attachments**
  - Consent
- Certification
- Submission

6. Please provide your dates of employment in this position. July 6, 2020-Feb 5, 2021

7. Department name:* EDUCATION

8. Agency name:* OTHER

   Office of Acquisition & Grants Administration, within Office of Finance & Operations

9. Agency subcomponent: Grants Policy & Training Division (GPTD)

10 Street Address: 400 Maryland Ave, SW

11. City:* Washington

12. State:* DC ☐ Check here if agency address is international*

13. Zip Code: 20202

14. Are you covered by a collective bargaining agreement? *(Check one.)*
    ☐ Yes ☐ No ☑ I don't know

15. Which of the following apply to your employment status? *(Check all applicable items.)*

    a. Competitive Service
    ☐ Temporary appointment ☐ Career or career-conditional appointment
    ☐ Term appointment ☐ Probationary employee

    b. Excepted Service
    ☐ Schedule A ☐ Schedule B ☐ Schedule C
    ☐ National Guard/Reserve Tech ☐ Postal Service
    ☐ Tennessee Valley Authority ☐ Non-appropriated fund
    ☐ Other *(specify)*:

    c. Senior Executive Service (SES) or Executive Level
    ☐ Career SES ☐ Executive Level V or above
    ☐ Non-career SES ☐ Presidential appointee (Senate-confirmed)

    d. Other
    ☐ Civil service annuitant ☐ Military officer or enlisted person
    ☐ Former civil service employee ☐ Contract employee
    ☑ Unknown ☑ Other *(specify)*: Pathways Intern

Navigation Bar

- ◂ **Add / Delete a Complaint**
- Prohibited Personnel Practices (PPP)
- **Report Government Wrongdoing (Disclosure)**
  - About Filing a Disclosure
  - Biographical Information
  - Details of Your Disclosure
  - Select Your Disclosures
  - Your Disclosure
    - Violation of Law,Rule, or Regulation
    - Gross Mismanagement
    - Gross Waste of Funds
    - Abuse of Authority
    - Danger to Public Health
    - Danger to Public Safety
    - Censorship Related to Scientific Research
  - **Attachments**
  - Consent
- Certification
- Submission

PART 3: SELECT YOUR DISCLOSURES

Please identify the type of wrongdoing that you are alleging (check ALL that apply - you MUST check one option). If you check "violation of law, rule, or regulation," specify, if you can, the particular law, rule or regulation violated (by name, subject, and/or legal citation).

- ☑ Violation of law, rule, or regulation *(please specify)*:

  _____

- ☐ Gross mismanagement
- ☐ Gross waste of funds
- ☐ Abuse of authority
- ☐ Substantial and specific danger to public health
- ☐ Substantial and specific danger to public safety
- ☑ Censorship related to scientific research

For each allegation, please answer the following questions (be as specific as possible). Please keep in mind that you will have an opportunity to provide more information and someone from OSC will contact you.

If OSC determines there is a substantial likelihood of wrongdoing, OSC will refer your disclosures to the involved agency for an investigation and report. To meet the substantial likelihood standard, there must be a significant probability that the information reveals wrongdoing that falls within one or more of the categories above. In its evaluation, OSC considers the strength, reliability, and credibility of the disclosures. If the substantial likelihood determination cannot be made, OSC will determine whether there is sufficient information to exercise its discretion to refer the allegations.

If there is more than one instance, you may repeat the process until you have answered the questions for each instance. To do so, click the "Add Another Instance" button at the end of each section. All fields allow ample space to respond, but each question has a character limit; if you can no longer type you have hit the limit. You will have an opportunity to attach supporting documentation before you submit your form.

Navigation Bar

- ◂ Add / Delete a Complaint
- Prohibited Personnel Practices (PPP)
- **Report Government Wrongdoing (Disclosure)**
  - About Filing a Disclosure
  - Biographical Information
  - Details of Your Disclosure
  - Select Your Disclosures
  - Your Disclosure
    - Violation of Law,Rule, or Regulation
    - Gross Mismanagement
    - Gross Waste of Funds
    - Abuse of Authority
    - Danger to Public Health
    - Danger to Public Safety
    - Censorship Related to Scientific Research
  - **Attachments**
  - Consent
- Certification
- Submission

Violation of law, rule, or regulation

a. Who took the action?

First Name	Last Name	Title	
Phillip	Juengst	Deputy Assistant Secretary	Del
[redacted]	[redacted]	Office Director	Del

Add Row

b. What action did they take?

Disregarding my concerns about illegalities related to the Harvard grant that IES had chosen to fund, and later terminating my employment, in part because I expressed concerns of illegalities related to this grant, according to [redacted]. See the previous PPP section.

c. When did this action occur? See previous PPP section. Emails begin 9/8/2020

d. How did you discover this action?

I read the aforementioned grant application in the normal performance of my duties.

e. What additional facts support your allegation of a violation of law, rule, or regulation?

See the previous PPP section, along with the previously attached timeline and emails.

Violation of law, rule, or regulation

Delete the Violation of Law Claim Below

a. Who took the action?

First Name	Last Name	Title	
Phillip	Juengst	Deputy Assistant Secretary	Del
[redacted]	[redacted]	Office Director	Del

Add Row

b. What action did they take?

Disregarding my concerns about illegalities related to the Fort Wayne grant that IES had chosen to fund. (For example, during an HSR team meeting, [redacted] stated that Phillip didn't want anything to do with this (meaning my concerns of illegalities related to the Fort Wayne grant). See the previous PPP section.

c. When did this action occur? See previous PPP section. Emails begin 9/14/2020

Navigation Bar

- ◂ Add / Delete a Complaint
- Prohibited Personnel Practices (PPP)
- **Report Government Wrongdoing (Disclosure)**
  - About Filing a Disclosure
  - Biographical Information
  - Details of Your Disclosure
  - Select Your Disclosures
  - Your Disclosure
    - Violation of Law,Rule, or Regulation
    - Gross Mismanagement
    - Gross Waste of Funds
    - Abuse of Authority
    - Danger to Public Health
    - Danger to Public Safety
    - Censorship Related to Scientific Research
  - **Attachments**
  - Consent
- Certification
- Submission

d. How did you discover this action?

I read the aforementioned grant application in the normal performance of my duties.

e. What additional facts support your allegation of a violation of law, rule, or regulation?

See the previous PPP section, along with the previously attached timeline and emails.

Violation of law, rule, or regulation

Delete the Violation of Law Claim Below

a. Who took the action?

First Name	Last Name	Title	
Denise	Carter	Assistant Secretary (now Deputy Secretary)	Del
Phillip	Juengst	Deputy Assistant Secretary	Del
[redacted]	[redacted]	Office Director	Del

Add Row

b. What action did they take?

Disregarding my concerns about illegalities related to restarting diversity and inclusion-related training at ED, and later terminating my employment, in part because I expressed concerns on this matter, according to [redacted] See the previous PPP section.

c. When did this action occur? See previous PPP section. Emails begin 1/26/2021

d. How did you discover this action?

I was assigned to read President Biden's new Executive Orders, and I had previously been assigned to read President Trump's EO on Combating Race and Sex Stereotyping, as that EO was interpreted and implemented by our division (GPTD). I learned that the diversity and inclusion-related training would be restarted at ED by reading Denise Carter's OFO-wide email.

e. What additional facts support your allegation of a violation of law, rule, or regulation?

See the previous PPP section, along with the previously attached timeline and emails.

Navigation Bar

- ◂ Add / Delete a Complaint
- Prohibited Personnel Practices (PPP)
- **Report Government Wrongdoing (Disclosure)**
  - About Filing a Disclosure
  - Biographical Information
  - Details of Your Disclosure
  - Select Your Disclosures
  - Your Disclosure
    - Violation of Law,Rule, or Regulation
    - Gross Mismanagement
    - Gross Waste of Funds
    - Abuse of Authority
    - Danger to Public Health
    - Danger to Public Safety
    - Censorship Related to Scientific Research
  - **Attachments**
  - Consent
- Certification
- Submission

Violation of law, rule, or regulation

Delete the Violation of Law Claim Below

a. Who took the action?

First Name	Last Name	Title	
Phillip	Juengst	Deputy Assistant Secretary	Del
[redacted]	[redacted]	Office Director	Del

Add Row

b. What action did they take?

Longstanding and ongoing non-compliance by ED management with the Common Rule (34 CFR 97). I mentioned this to [redacted] numerous times (see attached emails), and I mentioned it to Phillip during a private Zoom call I had with him. See previous PPP section and attachments.

c. When did this action occur? See previous PPP section and attachments.

d. How did you discover this action?

I was a member of the Human Subjects team, within GPTD.

e. What additional facts support your allegation of a violation of law, rule, or regulation?

See previous PPP section and attachments, particularly the emails from [redacted].

Add Another Violation of Law, Rule, or Regulation Claim

Censorship related to scientific research

a. Who took the action?

First Name	Last Name	Title	
[redacted]	[redacted]	A leading member of SACHRP	Del
		Various members of SACHRP (within HHS)	Del
		Various members of PRIM&R	Del

Add Row

b. What action did they take?

SACHRP is an inter-agency working group within HHS, responsible for matters relating to the Common Rule (see the previous PPP section attachments for details). This working group has been promoting a politically partisan ideology

Navigation Bar

- ◂ Add / Delete a Complaint
- Prohibited Personnel Practices (PPP)
- **Report Government Wrongdoing (Disclosure)**
  - About Filing a Disclosure
  - Biographical Information
  - Details of Your Disclosure
  - Select Your Disclosures
  - Your Disclosure
    - Violation of Law,Rule, or Regulation
    - Gross Mismanagement
    - Gross Waste of Funds
    - Abuse of Authority
    - Danger to Public Health
    - Danger to Public Safety
    - Censorship Related to Scientific Research
  - **Attachments**
  - Consent
- Certification
- Submission

(which I refer to as Critical Race Theory) within the scientific context of the Common Rule for the Protection of Human Subjects in Research. Politically partisan and ideological concepts such as "equity" (meaning equality of outcome; which is very different from "equality," equal treatment under law), unconscious bias, systemic racism, white privilege, etc.
Similarly, PRIM&R has been promoting this ideology as related to the Common rule and in the scientific context more broadly, including in documents referenced and distributed by SACHRP (see attachments), and also during a training that I attended with my team, which was funded by ED (see attachments).

c. When did this action occur? See previous PPP section and attachments.

d. How did you discover this action?

I worked on the Human Subjects team at ED, responsible for implementing the Common Rule at ED. I interacted with SACHRP and PRIM&R during the normal performance of my duties.

e. What additional facts support your allegation of censorship related to scientific research?

See the attached timeline and emails.

Add Another Censorship Related to Scientific Research Claim

1. What action would you like OSC to take?

This is a difficult problem to solve, as this form of scientific censorship concerns one particular (radical and discriminatory) ideology being promoted to the exclusion of all other viewpoints. It is certainly censorship, since other viewpoints are discouraged both explicitly and implicitly. If possible, OSC should seek to end this type of hostile work environment by studying the situation and protecting federal employees who do not subscribe to the aforementioned one and only acceptable view, which is to be in favor of Critical Race Theory, and which is promoted throughout the federal government by official means

PART 4: WHERE ELSE DID YOU REPORT THIS MATTER?

2. I have also disclosed this information to *(complete all that apply)*:

☐ None or not applicable

☐ Inspector General of department / agency involved Date: _____

Navigation Bar

- ◂ **Add / Delete a Complaint**
- Prohibited Personnel Practices (PPP)
- **Report Government Wrongdoing (Disclosure)**
  - About Filing a Disclosure
  - Biographical Information
  - Details of Your Disclosure
  - Select Your Disclosures
  - Your Disclosure
    - Violation of Law,Rule, or Regulation
    - Gross Mismanagement
    - Gross Waste of Funds
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    - Danger to Public Health
    - Danger to Public Safety
    - Censorship Related to Scientific Research
  - **Attachments**
  - Consent
- Certification
- Submission

a. Who did you contact?

First Name: _____ Last Name: _____

Title: _____

Address: _____

Email Address: _____

Telephone Number: _____

Case ID #: _____

b. What is the status of the matter?

_____

☑ Other office of department / agency involved *(please specify)*:
The EEO office at ED Date: (see PPP section

☐ Department of Justice Date: _____

☐ Other Executive Branch / department / agency *(please specify)*:
_____ Date: _____

☐ General Accounting Office (GAO) Date: _____

☑ Congress or congressional committee *(please specify member or committee)*:
Representative Matt Gaetz Date: (see PPP section

☐ Press / media (newspaper, television, other) *(please specify)*:
_____ Date: _____

☐ Other *(please specify)*: _____

NOTE: MATTERS INVESTIGATED BY AN OFFICE OF INSPECTOR GENERAL
It is the general policy of OSC not to transmit allegations of wrongdoing to the head of the agency involved if the agency's Office of Inspector General has fully investigated, or is currently investigating, the same allegations.

Navigation Bar

- ◂ **Add / Delete a Complaint**
- Prohibited Personnel Practices (PPP)
- **Report Government Wrongdoing (Disclosure)**
  - About Filing a Disclosure
  - Biographical Information
  - Details of Your Disclosure
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  - **Attachments**
  - Consent
- Certification
- Submission

ATTACHMENTS

☑ The attachments I added in the Prohibited Personnel Practices (PPP) section also apply to my disclosure.

☐ I would like to add attachments specific to my disclosure.

Please note that the space available for attachments is limited. Therefore, DO NOT attach every document and email that may be relevant to your claim. You will have an opportunity to make additional submissions at a later date. We recommend limiting attachments to official forms and correspondence that document the action(s) at issue in your disclosure **if these documents are relevant to your allegations.**

To see the attachments that have been successfully added to your form, click on the paperclip icon in the dark gray panel on the far left side of your screen. Please note that, if you print a copy of your form, the attachments will not print with it. However, any documents that appear in the paperclip panel will be transmitted to OSC.

CONSENT

* Denotes Required Fields

Do you consent to the disclosure of your identify to others outside OSC if it becomes necessary in taking further action on this matter?*

☑ I consent to disclosure of my identity.

☐ I do not consent to disclosure of my identity. (Even if you do not consent, OSC may disclose your identity if necessary due to an imminent danger to public health or safety or imminent violation of any criminal law. See 5 U.S.C. § 1213(h).)

U.S. Office of Special Counsel

Navigation Bar

- ◂ **Add / Delete a Complaint**
- Prohibited Personnel Practices (PPP)
- Report Government Wrongdoing (Disclosure)
- **Certification**
- Submission

CERTIFICATION

* Denotes Required Fields

☑ I certify that all of the statements made in this complaint are true, complete, and correct to the best of my knowledge and belief. I understand that a false statement or concealment of a material fact is a criminal offense punishable by a fine, imprisonment, or both 18 U.S.C. § 1001

BURDEN: The burden for this collection of information (including the time for reviewing instructions, searching existing data sources, gathering the data needed, and completing and reviewing the form) is estimated to be an average of one hour to submit a disclosure of information alleging agency wrongdoing, one hour and fifteen minutes to submit a complaint alleging a prohibited personnel practice or other prohibited activity, or 30 minutes to submit a complaint alleging prohibited political activity. Please send any comments about this burden estimate, and suggestions for reducing the burden, to the U.S. Office of Special Counsel, General Counsel's Office, 1730 M Street, NW, Suite 218, Washington, DC 20036-4505.

OTHER INFORMATION: An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PLEASE KEEP A COPY OF YOUR COMPLAINT, ANY SUPPORTING DOCUMENTATION, AND ANY ADDITIONAL ALLEGATIONS THAT YOU SEND TO OSC NOW OR AT ANY TIME WHILE YOUR COMPLAINT IS PENDING.

REPRODUCTION CHARGES UNDER THE FREEDOM OF INFORMATION ACT MAY APPLY TO ANY REQUEST YOU MAKE FOR COPIES OF MATERIALS THAT YOU PROVIDED TO OSC.

If you would like to print and mail your complaint, please address it to:

U.S. Office of Special Counsel
1730 M Street, NW
Suite 218
Washington, DC 20036

Exhibit B
(“Clarifying Questions” email to OSC)

CARDINAL MAIL [redacted]

Clarifying Questions

[redacted] Mon, Jun 7, 2021 at 7:52 AM
To: "[redacted]"
Cc: "[redacted]", "[redacted]" <[redacted]>

Hi [redacted], [redacted],

This email will answer [redacted] second question. I haven't yet finished drafting my EEO formal complaint, but I'm emailing you early due to the tight timeframe [redacted] mentioned. I could do a better job if given more time, and I'm sure an attorney could better articulate the arguments (I am still unrepresented).

In my previous email (and in the ED emails I disclosed to you), I alleged facts that raise numerous legal issues. I've attempted to separate the issues into two parts via two emails. However, it seems (based on my discussions with the ED EEO officer and my own research) that the EEO process does not cover the issues presented in my first email, nor even most of the issues I'll present in this second email.

Per 5 CFR 1810.1, "The Special Counsel is authorized to investigate allegations of discrimination prohibited by law, as defined in 5 U.S.C. 2302(b)(1). Since procedures for investigating discrimination complaints have already been established in the agencies and the Equal Employment Opportunity Commission, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiating an independent investigation."

If you do make a referral for investigation, I hope OSC will consider determining that my case is not "normal," and choose to investigate all the allegations. I believe there are so many legal issues, and they overlap to such an extent, that they cannot be adequately considered individually or disentangled for consideration in separate fora without prejudicing my case – and wasting significant government resources via two parallel investigations.

A culture of fear:

If you examine the Timeline, you should notice how *early* in my employment the violations of law began, how *frequently* they occurred, and how *blatant* it all was. Just a few examples from the start of the Timeline:

- My *third day on the job*, I received [redacted] email about "the backlog" – the one about a single OGC lawyer being [redacted] "only friend in the Department" and [redacted] being "frankly told by [his] supervisor that there was no interest in increasing staffing for the post beyond n=1 – that realistically nothing would happen to increase staffing until there was a crisis, until something 'blew up.'"
- My *fourth day on the job*, I emailed [redacted] about the interagency human subjects "charge" regarding inserting "equity" into interpreting the Belmont Report's principle of "justice."
- *My fifth day on the job*, I sat-in on the two interagency human subjects calls. The first had the FOIA avoidance, and the second call dealt with two topics: the first topic was purely scientific, with multiple viewpoints expressed and open discussion. But the second topic was about the aforementioned "equity" as related to the Belmont Report. This second topic was handled very differently; there was obviously only a single allowable viewpoint, and a "chilling effect" on the discussion (which had been lively during the first topic). Federal employees were "self-censoring" during a call on the protection of human subjects in *scientific research*.
- *My seventh day on the job* (taking the weekend into account), I attended a training organized by my GPTD colleague [redacted], for which he'd invited [redacted] (from ED's diversity & inclusion office) to speak. Quoting my notes: "[redacted] asking [redacted] about unconscious bias, & about what to do about our unconscious bias regarding grantees who have a bad history (e.g. not accounting for all money). [redacted] said to give "additional

flexibility," particularly for minority grantees. [redacted] talking about "systemic racism," "institutional racism," and "unconscious bias."" [This training happened prior to the OMB memos and President Trump's EO.]
- Etc. etc.

These allegations (and those in my previous email, and many other examples) aren't just isolated incidents; they form a pattern, they describe *a culture* at ED, a *culture of fear*. One that almost certainly predated my employment at ED by many years.

The following is, perhaps, an example that best characterizes this culture: On page 1 of the PDF labeled "Harvard, Fort Wayne, Biden EO," [redacted] wrote (in reference to the Harvard grant) "Hi [redacted], [redacted] made mention of his concerns in this regard in our one-on-one meeting last week (not to this level of detail)."

In that private conversation she's referring to, in which we discussed the Harvard grant, [redacted] gave me some advice: this Harvard grant sounds politically controversial, so it's best not to pursue the issues, to keep quiet. According to her, during her career as a civil servant, she'd seen other federal employees face severe personal consequences for bringing up similar issues, *and she didn't want that to happen to me*.

[Reviewing this email before sending, I noticed that line can be read in two ways. Don't read it like Don Corleone; [redacted] gave me good, honest advice in that conversation – as she usually did. The only contentious verbal conversation we ever had was when I quoted directly from the Harvard grant application. [redacted] was the same, giving me heaps of helpful, honest advice (with him, it wasn't just over the phone, it was also via email). They were trying their best to help me, to mentor me. It was clear that both [redacted] and [redacted] *really cared*. They are good people, truly *good* people, doing the best they can in a broken system. They have far more to lose and more people depending on them than I do ([redacted] with a daughter in college, and Jeff so close to retirement), so "doing what they can" is limited. They can't affirmatively fight for what's legal regardless of personal cost like me – but they do what they can, and I think that counts for something. If (likely *when*) ED "throws them under the bus," please don't end the OSC investigation there – the *real* issues run deeper.]

The takeaway is this: career federal employees are disincentivized from mentioning any legal problems they notice (meaning, among other things, that so-called "internal controls" is a sham). This is done by using the "stick" of an ever-present threat of professional consequences for any federal employee who raises a problem ("shooting the messenger"). The types of problems that "shall not be named" generally fall into two categories:
1) Inter-office politics (see my previous email); and
2) The orthodox ideology expressed by buzzwords of: "systemic racism," "unconscious bias," "diversity, equity, inclusion," etc. etc. These words are all manifestations of the ideology of critical race theory.

This email will focus on the latter category (the orthodox ideology). It the bigger "taboo" category, entailing harsher penalties and for smaller "sins."

[It's important to remember the "bureaucratic incentives" I described in my previous email, along with the high degree of compartmentalization. The *process itself* both facilitates and enhances these perverse incentives. This is a *systemic* problem (I hate using that word, but it's appropriate here).]

<u>The narrow legal issues</u>

I'll cover the narrow issues first, before getting to the deeper legal issue of the "equity" distinction.

In my ED emails mentioning OGC and requesting a legal opinion (e.g. the Harvard email, and the OGC draft email mentioning Fort Wayne), I expected OGC to do what you guys at OSC have done thus far: read my email, acknowledge its receipt, request additional information if necessary, then make a decision.

However, I *never* heard *anything* from OGC. No acknowledgement, no "Great, thanks, we'll handle this" – about *anything*. If I'd received something like that, I could have dropped the matter (maybe even without OGC resolving

the issues with a legal opinion). I could have thought to myself: "They're *the lawyers*, they follow *the Rules of Professional Conduct* – if *they* know about it, it *can't* be illegal."

I cared less about *what* conclusion OGC would come to, about *how* they chose to interpret the law, than about actually receiving *any* legal opinion (or at least acknowledgement) that I could reasonably defer to, per 5 CFR 2635.107. (I say "reasonably" defer to because many, but not all, interpretations of law can be reasonable. A good example of the broad range of "reasonable" is this debate between Justices Scalia and Breyer at the University of Arizona in 2009; they frequently disagreed, but both judicial philosophies were reasonable. I could have deferred to *any* reasonable legal opinion as consonant with upholding my own Oath of office.)

But that's not what I received. Instead, up until my penultimate day, all I received was "out of scope" repeated ad nauseum by [redacted] (a non-lawyer) at the behest of Phillip (another non-lawyer) – without resolving any of the issues I'd raised, and without confirmation that OGC was handling it. "Out of scope" as a management response to reporting violations of law was absurd. Us four staffers on the HSR Team had given HSR clearance to some grants I believed contained illegalities, and we were continuing to receive new "bad grants" via the broken process, and we were continuing to "clear" those bad grants – and we needed OGC to tell us what to do, and preferably help us *fix the process* to prevent additional illegalities.

In my emails mentioning or addressing OGC, I didn't fully articulate all of the relevant legal arguments. There were two reasons for this:
1) I didn't think I needed to for OGC to understand the legal issues involved. They're *lawyers*; I assumed they have broader and deeper legal knowledge than I do, and the ability to both understand a sort of "legal shorthand" (assuming a certain level of legal knowledge) and make logical inferences. I thought it sufficient to "issue-spot" and provide enough analysis to convince [redacted], [redacted], and Phillip to bring the matter up with OGC – then let OGC handle it.
2) We at the HSR Team had a queue of PR numbers (linked to grant applications) a *mile* long waiting for review for purposes of 34 CFR 97. (As I mentioned, our team is understaffed and using inefficient technology as part of an inefficient process.) I wanted to raise the legal issues so OGC could deal with them, then I could review more grant applications.

If OGC had ever asked for either more information or my opinion (and they did neither), I might have articulated something similar to the following:

Regarding IES & the Harvard grant:

Per 20 U.S.C. § 9514(f)(7):
"(f) The duties of the Director shall include the following:
"(7) 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.

Chevron analysis, Step 1: Statute is likely unambiguous under both approaches: plain meaning (Scalia approach), and also if considering legislative history. If unambiguous, the "activity" of IES deciding to award, and then actually awarding, ED funding to the Harvard grant application almost certainly fails to fulfill all the statutory requirements (just *read the grant application itself*, with its language about reducing colorblind racial ideology, white privilege, etc. etc.).

If ambiguous at Step 1, see below ("deference generally"), which applies to Chevron Step 2.

Regarding the Fort Wayne grant:

ED will likely attempt to claim deference for whichever interpretations of "equitable access" and "equitable consideration" make funding the Fort Wayne grant legally permissible.

Auer deference can be eliminated because 34 CFR 280.1(f) and 280.20(b)(7) merely "parro[t] the statutory text" of 20 U.S.C. §§ 7231(b)(6) and 7231d(b)(2)(E), respectively. An agency "gets no special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." Kisor v. Wilkie, 139 S. Ct. 2400, 2449 (2019).

Deference generally:

The set of facts I've alleged isn't "normal"; there's a deeper problem here, a problem with the grant-making process. In a "normal case," there are three premises:
- First, that "the agency" *actually made* an interpretation of an ambiguous statute (Chevron deference) or regulation that "the agency" promulgated (Auer (now Kisor?) deference);
- Second, that "the agency" *actually has* some "expertise and experience" *and actually used it when it made its interpretation* (Skidmore deference); and
- Third, that "agencies ([u]nlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public" (Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019)) – and *this is the basis for the agency getting any kind of deference at all*.

The facts I've alleged undermine all three premises.

What exactly constitutes "the agency," and "the agency's interpretation"? I'm alleging that the agency's legal office (OGC) was essentially Missing in Action: no uniform, regular legal review of individual grant applications (14,000 funded annually, and many more applications unfunded) built into the process. That left only two offices that were "reviewing" the actual grant applications – the PO, and the HSR Team.

But what constitutes "reviewing"? I know that our (the HSR Team's) manager ([redacted]) normally reads neither the actual grant applications nor even the abstracts. It was only after I brought up legal problems with the Harvard grant that she read the abstract for it – and even then, she said she didn't read the actual grant application. It was just us four staffers on the HSR Team that read the grant applications – and even then, we divide-up the PR numbers, and only one of us four read each grant application, and he/she can unilaterally decide whether to clear it immediately, ask for an IRB certification, request an IRB re-review something as nonexempt, etc.

How about at the POs? There are six different POs – they have significant autonomy and each operates differently. They each "score" their respective grant applications – but I only ever saw a handful of these completed "score sheets" uploaded into the G5 system, despite using G5 to search for and open hundreds of grant applications (I'm not sure exactly how many I personally cleared, I'm guessing between 150 and 250). (As I mentioned, the process is highly compartmentalized.)

So we're talking about a few career federal employees and/or contractors at the POs (the ones who *actually read the grant applications*) being "the agency," and the "score sheets" for the Harvard and Fort Wayne grants being both the "agency interpretations" and the reasoning.

The "score sheets" for the Harvard and Fort Wayne grants had not been uploaded into G5, so I had no clue whether someone at the PO had even noticed any of the same legal issues that I noticed, much less whether they'd reached a decision on those issues or provided any sort of reasoning in support of their decision. I thought it most likely that *nobody* at the PO had noticed the legal issues; as I mentioned, the PO staff have backgrounds in academia – they're not lawyers. Which is why I asked for OGC legal review.

The situation is that:
A small number of career federal employees and/or contractors at a PO
1) read the Fort Wayne grant application, along with many other grant applications,
2) scored them
   - (probably without noticing the legal issues I mentioned;
   - and even if they did notice, probably without addressing those issues (e.g. of "equity" as "equal treatment of

individuals under law" v. "equality of outcome") by making an "interpretation";
- and even if they did make an interpretation, probably without providing any reasoning;
- and even if they did make an interpretation and provide reasoning, probably not having the legal expertise to do so;
- and even if they did make an interpretation, and provide reasoning, and have sufficient expertise to do so, definitely not informing the HSR Team (which is the next step in the grant-making process) of either their interpretation or their reasoning),
3) decided to fund the Fort Wayne grant application, and then
4) forwarded it (as part of a "batch" of PR numbers for grants the PO had already decided to fund) to the HSR Team for review per 34 CFR 97.

Regarding all the "probably" and "even if they did" language – that's exactly the ambiguity I was attempting to clear-up when I asked for guidance from OGC.

It never got to the point where I was questioning an "agency interpretation" because, it seemed to me, *nobody* had addressed the legal issues that I noticed and *there was no agency interpretation* – and *nobody would tell me*: 1) *if* there was an agency interpretation, much less 2) what that interpretation *actually was*. (Why wouldn't anyone tell me? Getting back to the aforementioned "avoidance of accountability" and "culture of fear," I think it's likely that *nobody* wanted to be on record regarding *any* of this.)

If you decide to refer for investigation, I think it likely that (at least some, if not most, of) the "interpretation" and "reasoning" ED provides OSC will be *post hoc* – inadequate under Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

Regarding the third premise (of political accountability): The Court in Overton Park, like in most judicial decisions, talks about "review of the Secretary's decision," "the Secretary's construction of the evidence," "if the Secretary acted within the scope of his authority," etc. etc. But in the situation I described above, *the Secretary* (Betsy DeVos) likely *didn't know about any of this stuff*, primarily because she was a political appointee (and of the Trump administration at that), and us career federal employees *weren't telling the politicals what they needed to know* (see my previous email; Phillip's comment at the OAGA meeting was particularly illustrative). If *the Secretary* had known exactly how *her* authority (delegated to us career employees) was being used, she almost certainly would have intervened (if her public statements and those of President Trump, among other things, are any indication) – which she did have the authority to do (see previous email).

The deeper legal issue – "Equity" defined as "Equal treatment of individuals under law" v. "Equality of outcome":

Per [redacted] question: "is there any additional evidence you can provide to support 1) the claim that 34 CFR 280 defines "equitable" as "equality of opportunity," or that it is specifically operating under the definition "equality of outcome," and 2) the claim that operating under the definition of "equality of outcome" would be a violation of law, rule, or regulation?

This is the root legal issue. I didn't type all this out to OGC because it would have taken too long – and because I assumed they already knew *because they're lawyers*, and even if they did not know, it's *their* job to figure out these legal issues.

I am far from the first person to have noticed and understood these different "equity" definitions and the distinctions between them, along with the legal implications; in fact, I'm rather surprised [redacted] asked me this question. This distinction is *the fundamental* legal distinction, manifested throughout our nation's legal history.

Even Vice President Kamala Harris (who, it must be remembered, is a lawyer) pointed-out this distinction in a November 1, 2020 tweet (linked here):



VP Harris used slightly different terminology, but she described the same distinction I'll describe: "Equal treatment of individuals under law" (which she calls "equality"; although she "straw mans" it a little) v. "Equality of outcome" (which she calls "equity," and which she defines as "we all end up in the same place").

The language of "we all end up in the same place" can mean two things, either:
1) "All individuals end up in the same place" -> which is called Marxism, Socialism, Communism (there are distinctions, but I won't go into them now); or
2) "All groups (e.g. Americans separated into groups by their race/skin color, or sex, or other irrelevant immutable characteristics) end up in the same place" -> which we call critical theory. As applied to race/skin color, this is called critical race theory – an ideology started by several American legal scholars in the 1970s, most notably Derrick Bell (lawyer and tenured professor at Harvard Law School) – and stemming from a derivation of Marxism.

Critical race theory achieves its goal of racial "equality of outcome" by: 1) categorizing Americans in terms on their race/skin color, then 2) treating racial groups differently, by helping certain racial groups and hindering other racial groups; this includes: "hard" racial quota systems, "soft" racial quota systems, etc. Regarding (1), critical race theory is premised on separating Americans into groups based on race, meaning it is premised on discrimination based on race – a "suspect classification" requiring strict scrutiny.

Most government actions that discriminate based on race do not survive strict scrutiny; however, some do. The notable example is "affirmative action" – although, as I mentioned in the Fort Wayne emails, that was intended to be a narrow exception, and the Supreme Court banned more blatant forms of discrimination based on race in that same decision (e.g. banning quotas and separate admissions tracks). (If you watched the Scalia/Breyer debate linked earlier, Justice Breyer described how difficult a decision it was for him to vote in favor of even the narrow exception of affirmative action.)

"Equality of outcome"

I've already provided plenty of examples of the aforementioned orthodoxy (critical race theory), but this next example is particularly explicit. [redacted], [redacted], [redacted], and I were attending the annual PRIM&R conference (consisting of virtual presentations on the protection of human subjects in research; ED paid for both our enrollment fees and our attendance time as on-the-clock training. When we enrolled, ED was trying its hardest to spend whatever money remained in the expiring budget ASAP, and basically all training, overtime, and other spending was being solicited and getting approved). Quoting Row 26 of the Timeline:

"The second speaker just explicitly stated in the Q&A that we should impose racial quotas on clinical trial participants, and IRB composition ('more than just one or two black or brown people'), and research personnel ('we need more black principal investigators') to address past discrimination and 'implicit bias.'"

(I also recall that this same speaker, during his presentation, had a PPT slide on the Black Panther Party, of which

he spoke favorably.)

The assumption:

The assumption underlying the speaker's statement is that the racial make-up of our nation should be the benchmark for comparison. If the percentage of "black or brown people" on an IRB is lower than the percentage of "black or brown people" in our nation's population generally, that can only (or at least primarily) be because of "implicit bias" (meaning implicit bias against black people, meaning racism against black people on the basis of their skin color). Same for when the percentage of African Americans participating in clinical trials is lower than in our nation's population generally – it must be racism. (I'm aware the speaker mentioned both "implicit bias" and past discrimination; I'll address both).

(This is the same assumption often used in other situations, such as (to use a legal example) when our nation's incarceration system is labeled "racist." More of "Minority Group [XXX]" are incarcerated than their share of the U.S. population – therefore, the prisons are racist!)

This is a flawed assumption (and I mentioned this in the context of the Fort Wayne grant on pages 25 and 26 of the PDF labeled "Harvard, Fort Wayne, Biden EO"). Humans are not identical widgets, and we're not living in a Randomized Controlled Trial where racism (past and/or present) is the *only* factor that can impact outcomes. There is *absolutely no reason* to believe that racism is the only factor, the primary factor, or *even a significant factor* in explaining differences *today* between representation of racial groups in the U.S. population as compared to on an IRB, in a clinical trial, or in the prison population. (E.g. A significant amount of evidence shows single motherhood to be a greater factor.) (And, to be clear, I'm not saying "Everything's A-OK in the prisons!" – I'm simply saying you cannot jump immediately from "too many incarcerated minorities" to racism.)

The fact (yes, scientific fact, with evidentiary basis – not merely my opinion) that this assumption is flawed that I just articulated above is verboten at ED and in the interagency human subjects process, a good example of "that which must not be said" within category 2 – even in the context of *scientific research*. De facto censorship. It *might* be OK for me to state this fact as a premise upon which to build an argument when speaking with someone I know well (e.g. [redacted]), but definitely not when more than one person is listening (e.g. the interagency process of protection of human subjects in *scientific research*; see above for the "chilling effect" example).

[This inability to freely discuss facts in a *scientific context* (because those facts were politically inconvenient) was a huge obstacle – particularly for me, because Jeff hired me for my scientific background (which was a big focus of my interview), and because [redacted] overarching 3-part assignment for me was: 1) learn the system; 2) document the system; and 3) figure out how to automate/improve the system. My thinking in terms of systems and processes was hindered by so many topics being taboo.]

Regarding past discrimination – of course that has an effect on the present. Basically everyone agrees it does. However, evidence suggests there are factors other than discrimination (past or present) that have a greater impact on reality in the present day.

Additionally, with past discrimination, there is a serious problem of misattribution: the people who did the discriminating are already dead, as are the people who were discriminated against. The people now living were not directly harmed, nor are they directly responsible for any harm. In legal terms, there is a problem proving causation.

The goal:

"Equality of outcome," is, quite simply, reaching that "goal" of every sub-division of the U.S. population (including, per the example, IRB compositions and clinical trial participant groups) matching the racial make-up of our nation.

Example: "Minority Group A" makes up 10% of the U.S. population? Then the desired "outcome" of IRB

membership (or incoming freshman class, or corporate board membership, etc.) is at least 10% "Minority Group A." If it's less than 10%? "The system" must be racist ("systemic racism")! (regardless of other factors that may explain the difference).

(It's important to note how the term "systemic racism" has changed over time; originally, it meant a racially discriminatory law currently in effect (e.g. Jim Crow laws during the time of segregation). However, the critical race theorists now use the term "systemic racism" to mean systems that do not result in "equality of outcome" – meaning, basically, that every system allowing for liberty and freedom is "systemically racist," including our own system of government and our own Constitution.

(A quote from Lt. Col. [redacted] last month describing diversity, equity, inclusion training taught officially at his base is a good example of this new definition for "systemic racism": "at the time the country ratified the United States Constitution, it codified White supremacy as the law of the land. If you want to disagree with that, then you start [being] labeled all manner of things including racist.")

The speaker I mentioned above in my human subjects example advocated for instituting racial quotas: this is the popular method of achieving "equality of outcome." Blatant racial quotas are illegal (e.g. in the context of admissions to educations institutions, per Grutter), but critical race theorists still advocate for them, and they still happen de facto. Stopping de facto quota systems was the reason for the Trump DOJ (under Attorney General Bill Barr) suing Yale; and next week, the Supreme Court will consider whether to hear a similar case involving Harvard (Students for Fair Admissions, Inc. v. President and Fellows of Harvard College).

"Equality of outcome," critical race theory, and their many accompanying buzzwords are championed by, among others, Ibram X. Kendi. ED recently quoted Kendi when proposing new priorities for OESE discretionary grant competitions (OESE is one of the POs), here, which also referred favorably to the 1619 Project. It's important to note that Kendi also wrote the following:

"The only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination."

Let that sink in for a moment.

Specific legal issues with "equality of outcome":

There are so many, I'm not sure where to begin. As you know, I am alleging that this particular "equality of outcome" interpretation, in its manifestations as both training and deciding to fund grant containing critical race theory (both done officially by ED) violate numerous legal authorities. I could quote the plain meaning of the Civil Rights Act and the Constitution, I could cite legislative history, I could articulate the arguments, but I don't have time – your 9 AM deadline approaches, and I need to get to my "real" work. You guys are lawyers; I'm sure you can figure it out after reading the rest of this email.

Specifically relating to my EEO complaint, I'll revisit Row 13 in the Timeline: My notes stated, during the ED training, that: [redacted] said to give "additional flexibility," particularly for minority grantees. [redacted] talking about "systemic racism," "institutional racism," and "unconscious bias."

[redacted] was advocating for *treating grantees differently based upon their race/skin color*. I described earlier that critical race theory and "equality of outcome" necessarily engage in illegal disparate treatment based on race, specifically *in favor* of minorities and *against* white people; this here is an example of it at ED. Would it be reasonable to believe that discriminatory ideology would have resulted in, been "a motivating factor" in, illegal discrimination against *me*, a "straight, white, male"? I believe so.

[I've attached something relevant: a recent temporary restraining order enjoining the use of race, sex, veterans, and/or socially and economically disadvantaged status priorities for the distribution of the "Restaurant

Revitalization Fund", linked here. Greer's Ranch Café v. Isabella Casillas Guzman and United States Small Business Administration, No 4- 21-cv-00651-O (N.D. Texas, filed May 18, 2021).]

"Equal treatment of individuals under law":

Equal "treatment of all individuals" under law (per President Biden's EO 13985) is an idea variously phrased as: "Equal Justice Under Law," as inscribed on the SCOTUS building; and "equal protection of the laws," per the 14th Amendment - applicable to the federal government via reverse incorporation (Bolling v. Sharpe, 347 U.S. 497 (1954)). (There are, perhaps, slight differences between phrasings – but the general principle, the underlying value, is what they allude to, and is what I'm (inadequately) attempting to describe.)

Basically, it's an *ideal* that all individuals be treated(/protected/punished/helped/burdened) equally by the law, regardless of various irrelevant immutable characteristics – most notably (as applied to the legal issues in my case) race/skin color, but also sex, sexual preference, etc. An ideal often expressed (at least partially) as Lady Justice with the blindfold, scales, and sword (an ancient lineage; the scales and sword stretch back to the Roman Empire, while the blindfold was added in the 1500s). An ideal that undergirds our nation's laws stretching back to our founding (including, for my particular case, the Constitution, the Civil Rights Act of 1964, and a *huge* amount of jurisprudence).

This ideal wasn't articulated fully-formed from the start, and it wasn't achieved/manifested in reality (usually in our nation's laws and their enforcement by our judiciary) immediately either. Our nation was built upon a legacy of striving towards, and making incremental progress towards, realizing this ideal – and our nation has, during its comparatively short history of 245 years, done more to realize this ideal than any other nation in world history. Our nation made progress towards more fully realizing this ideal at the following times (and this is, of course, a non-exhaustive list): 1776; 1789; 1865; 1920; 1964; etc.

This ideal is foundational to our system of government, invoked in notable speeches and writings by so many great Americans stretching back to our nation's founding. Examples are so numerous that it's difficult for me to choose just a few, but I'll try.

Quoting President Abraham Lincoln (who, it must be remembered, was a self-taught lawyer, admitted to the Illinois bar in 1836) (Debate at Alton, October 15, 1858):
"I think the authors of that notable instrument [the Declaration of Independence] intended to include all men, but they did not mean to declare all men equal in all respects. They did not mean to say all men were equal in color, size, intellect, moral development or social capacity. They defined with tolerable distinctness in what they did consider all men created equal — equal in certain inalienable rights, among which are life, liberty and the pursuit of happiness. This they said, and this they meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right so that the enforcement of it might follow as fast as circumstances should permit."

Quoting Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896):
"There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."

Quoting the line for which Dr. Martin Luther King Jr. is best known (1963):
"I have a dream that little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

At bottom, this ideal is inspirational, a truly *American* ideal. "The Land of the Free, and the Home of the Brave." A color-blind society, equal in the eyes of the law. An ideal *unique* among all nations, a *special* country founded upon that ideal and *striving* to actualize it over 245 years.

This "equal treatment of individuals under law" is consonant with our founding documents, with the Civil Rights Act, and with so much of our law.

Specific evidence:

The Harvard grant application specifically, explicitly seeks to "reduce [teachers'] colorblind racial ideology." It explicitly rejects "equal treatment of all individuals under law." It explicitly uses the buzzwords of "equality of outcome" and promotes that interpretation and ideology of critical race theory. *Simply read the actual grant application.*

The Fort Wayne grant application also rejects the "equal treatment of all individuals under law" interpretation and embraces the "equality of outcome interpretation." *Simply read the actual grant application*.

ED's announced restarting of "diversity and inclusion" training:

Denise Carter's announced that "Diversity and Inclusion (D&I) related training at the Department will resume," per Denise's citation to President Biden's EO 13985 revoking President Trump's EO 13950 (see PDF packet labeled "Harvard, Fort Wayne, Biden EO").

If you read President Trump's EO 13950 and the two OMB memos, you should have noticed that they specifically did not shut down all diversity, equity, inclusion training – only the training that was "un-American," per those documents. I've gone into far greater detail than did OMB Director Russell Vought or President Trump in those documents – but it's clear they meant to stop only training that promoted what I've termed "equality of outcome," and allow training that promoted "equal treatment of individuals under law" to continue.

For all of the reasons I've previously mentioned or implied, I believed that ED restarting training that promotes "equality of outcome" would be a violation of law.

President Biden's EO 13985:

This EO used a very particular definition for "equity": Equal "treatment of all individuals" under law, including many minorities that were previously discriminated against historically. The plain meaning indicates that it means "equal treatment of all individuals under law" – not "equality of outcome." Under the Scalia approach, that's the end of the analysis.

If one were to consider extrinsic sources of meaning, I recommend watching this exchange between then-candidate Biden and then-candidate Harris during the Democratic primary debate on September 12, 2019, here (Remember, they both are *lawyers*; this debate reveals their different legal philosophies.):

[Moderator paraphrases Biden's statement that "you can't just ban assault rifles by executive order."]
Harris: "Hey Joe, instead of saying "no, we can't," let's say "yes, we can.""
Biden: "That's unconstitutional, we have a Constitution."

The exchange shows that President Biden and VP Harris have held conflicting views of the Constitution and its importance on at least one issue for a long while now. What about "equal treatment of all individuals under law" v. "equality of outcome?" VP Harris endorsed "equality of outcome" very clearly – what about President Biden's view?

The definition of "equity" chosen by EO 13985 indicates what President Biden's view is; *it's his signature on the EO*. His history as a *good man* who *cares about the Constitution and defends it* reinforces that his choice is likely "equal treatment of all individuals under law" – the interpretation *most* consistent with our Constitution (and, when compared with "equality of outcome," *the only* interpretation consistent with it).

This is a legal matter, not a policy matter:

I'm sure ED will argue "this is a policy matter, not a legal one!" That is, quite simply, absurd. This is a legal matter, dealt with by *lawyers* over the past *245 years*, and not just any legal matter – it's the *foundational* legal distinction. I am alleging violations of law – but I'm not the only one who believed that violations of law had occurred when the government acted similarly to how ED acted in my case.

It was clear, by both the words and actions of the politicals, that the Trump administration sought to promote "equal treatment of all individuals under law" and that it believed "equality of outcome" was unconstitutional and otherwise illegal (just read EO 13950!). (In addition to actual legal authorities like the EO and OMB memos, prominent lawyers serving as politicals in the Trump administration, including OMB Director Russell Vought and Attorney General Bill Barr, made that administration's position clear.) Yet "equality of outcome" continued to be promoted at the career levels, including by funding of the Harvard and Fort Wayne grants. I remain astounded by the lack of accountability for career federal employees and the use of delegated authority in ways not intended by the politicals.

Please let me know if you have any questions. I'm sorry for such an incredibly long email.

Best regards,

[redacted]

On Wed, Jun 2, 2021 at 2:13 PM [redacted] wrote:

> Hi [redacted],
>
> Thank you for the response. Unfortunately, we cannot give you until next Wednesday to get us the rest of the information. We have very tight timeframe for evaluating your disclosure filing and making a determination on whether to refer the allegations for investigation. This requires us to leave time to make a referral, if warranted. Please provide us with the additional information by 9 am on Monday, June 7, at the latest. I'm sorry we cannot accommodate you. Please let me know if you have any questions or concerns.
>
> Best,
>
> [redacted]
>
> [redacted]
>
> Attorney
>
> Retaliation and Disclosure Unit
>
> U.S. Office of Special Counsel
>
> 1730 M Street, N.W.
>
> Suite 218
>
> Washington, D.C. 20036
>
> [redacted]
>
> [redacted]

NOTICE: This message and any attachments may contain information that is sensitive, confidential, or legally privileged. If you are not the intended recipient, please immediately notify the sender and delete this email from your system; you should not copy, use, or disclose its contents. Thank you for your cooperation.

From: [redacted]
Sent: Wednesday, June 2, 2021 10:08 AM
To: [redacted]
Cc: [redacted]
Subject: Re: Clarifying Questions

CAUTION: EXTERNAL EMAIL Do not click on links, open attachments, or provide information unless you are sure the message is legitimate and the content is safe.

Hi [redacted],

Great to hear from you! I'm so glad OSC is following-up on this.

Those are good questions, but each answer requires a significant amount of background information, mostly regarding ED's bureaucratic processes. I'm not sure I explained these clearly enough on the call with [redacted].

This email will address only your first question. Your second question (on various definitions of equity) is at the heart of my EEO complaint, which I'm still in the process of drafting. (I received Notice of Right to File Formal on May 25; I need to file the formal complaint by June 9.) I'm pursuing both the OSC and EEO administrative remedies *pro se*, while also doing "real work" for a new employer, so it takes me a while to properly articulate the arguments. I'll answer your second question via email before June 9.

Description of grant-making process:

I described ED's grant-making process for discretionary grants on pages 23 to 24 of the PDF labeled "Harvard, Fort Wayne, Biden EO." To expand on that:

1) One of the six grant-making offices at ED (the "PO," meaning Program Office or Principal Office; they're used interchangeably at ED) issues a Notice Inviting Applications (NIA).
2) Applicants (usually university professors, as with the Harvard grant; but for the Fort Wayne grant, applicants were magnet schools) submit grant applications/research proposals to the PO.
3) Career federal employees at (and/or, depending on which PO it is, federal contractors of) the PO read the grant applications and "score" them. The PO then awards ED funding to the highest-scoring applications. This "grant competition" is very competitive, with a fraction of a point often determining whether a grant application receives funding.
4) After deciding which applications to fund, the PO makes a preliminary decision regarding human subjects research (HSR). The PO is supposed to refer all grants and contracts to the HSR Team if the grant or contract may contain HSR. (The HSR Team is led by [redacted] and is located within the Grants Policy and Training Division (GPTD), which is managed by [redacted].)
5) For grant applications that may contain HSR, the PO emails the grant PR numbers of only the applications the PO decided to fund to the HSR Team.
6) The HSR Team (me, [redacted], [redacted] and [redacted]) divides-up the list of PR numbers among ourselves (deciding who reviews which grant).
7) Each HSR staffer (using myself for this example) visits http://www.g5.gov (called "G5"), logs in, then searches for

a grant using the PR number linked to each grant from the PO's email. A single result pops up, which shows information about that grant and numerous PDF attachments (usually the grant application and Grant Award Notice (GAN), and sometimes also an HSR Narrative).
8) If there is an HSR narrative, I read that, to make an HSR determination per 34 CFR 97. If there is not an HSR narrative, or if the narrative was unclear, I read the grant application, to make an HSR determination.
9) If I decide that the grant's research is either not covered by 34 CFR 97 or entirely falls within one or more of the eight enumerated exemptions, I clear the study. Skip to Step 13.
10) If I decide the proposed research is covered by & nonexempt under 34 CFR 97, I email the grantee to request an Institutional Review Board (IRB) certification.
11) The grantee (eventually) emails me an IRB certification. (This certification says, basically, "The IRB at [XXX] University reviewed this research proposal, and believes it is [not covered research, exempt research only, or nonexempt research]." If the IRB determined it was nonexempt research, the certification also means, basically, that "The IRB approved this nonexempt research because the IRB believes there are adequate protections for the human subjects involved in the research, the risks to human subjects have been minimized, and the expected results of the research outweigh the risks.")
12) I read the IRB certification. If the IRB determined the research was either not covered or exempt only, and I disagree, I email the grantee to request the IRB redo its review at a higher level of scrutiny (usually to review as nonexempt research). (I'm able to do this, and have done it, because 34 CFR 97 gives the Secretary of Education this authority, and I utilize that authority on the Secretary's behalf). If I agree with the IRB's determination, I clear the study. If the IRB determined the research was nonexempt, and it approved/certified it as nonexempt, I (must) clear the study.
13) I email the PO (and copy the grantee on) a "clearance email." (This email says, basically, "The Department of Education gives protection of human subjects clearance for grant [PR number].")
14) The PO then "releases" ED funding, which allows the grantee to start spending ED funds on human subjects-related expenses.
15) For the duration of the grant (usually 5 years), the PO monitors the grant (allowable expenses, etc.) and communicates with the grantee. They also do close-out procedures.

Important things to note:

1) There is no uniform, regular legal review of grant applications built into this process, neither before the PO decides which applications to fund, nor after. The career federal employees and/or contractors at the PO have backgrounds in academia – they're not lawyers. There are no lawyers on the HSR team (or on GPTD). ED's lawyers are located in the Office of General Counsel (OGC) – and OGC doesn't review each individual grant application.

There is a practical reason for this: OGC is tiny. It's not DOJ, with hundreds or thousands of lawyers. The six POs at ED manage 264 grant programs (listed here), awarding approximately 14,000 grants totaling $45 billion per year (which is split 90-10 between awarding noncompetitive (called "formula") grants and competitive (called "discretionary") grants, respectively). It would be impossible for OGC, as it's currently staffed, to review all 14,000 funded grants per year – much less the far higher number of grant applications received by ED annually.

Additionally (per Row 44 of the timeline), I inadvertently learned that 1) OGC doesn't even review all contracts, only contracts of over $1 million; and 2) OGC doesn't have even a single lawyer who specializes in contracts.

2) Not all grants and contracts are referred by the POs to the HSR Team (see Step 4, above). Staff at each PO are supposed to refer all grants and contracts to the HSR Team if the grant or contract may contain HSR. But (based on statistical evidence from [redacted]) it's likely that some PO staff are simply skipping this step entirely, or erroneously deciding their grants definitely do not contain any HSR even when the grants do or might. This means the PO never emails the PR numbers to the HSR team; instead, the PO immediately releases ED funding to the grantee. This all means that ED is, and always has been (so since 1991), noncompliant with 34 CFR 97.

Some (but not all) evidence of this contention can be found on:
- Pages 5 to 15 of the PDF labeled "Waste and 34 CFR 97 noncompliance."
  - Particularly important is [redacted] comment on Page 5, which states: "The program office does not make this initial determination [of whether a grant may contain HSR], at least not for IES grants. **They do not have the training to make that determination**." ([redacted] previously did grants at the IES Program Office, before joining the HSR Team.)
- Pages 1 to 3 of the same PDF.
- Pages 23 to 24 of the PDF labeled "Harvard, Fort Wayne, Biden EO."

Similar to (1) regarding OGC (above), there is a practical reason for not sending us (meaning the HSR Team) all the

grants and contracts: the HSR Team is tiny – we can't review 14,000 funded grant applications per year. For many years, [redacted] was the only person doing review for purposes of 34 CFR 97; up until February 2021, when I was fired, there was just four of us.

Per page 1 of the PDF labeled "Waste and 34 CFR 97 noncompliance," [redacted] wrote that:
- "The lawyer in OGC who handled the reg [meaning 34 CFR 97] used to kid me that he was 'my only friend in the Department' – because the Program Offices etc. would prefer to not have to deal with the regulation"; and
- "More recently, while […] I was the only one involved in implementing the reg at ED, I was frankly told by my supervisor that there was no interest in increasing staffing for the post beyond n=1 – that realistically nothing would happen to increase staffing until there was a crisis, until something 'blew up.'"

3) The POs have enormous autonomy and influence within ED (loosely comparable to regional desks within the CIA or State Department, if you're familiar with those). Information about the process is highly compartmentalized, but not classified per se.

Each PO monopolizes the process, including by: 1) deciding on its own which grant applications to fund; 2) deciding on its own whether or not to send a funded grant application to the HSR team; 3) having the exclusive ability to edit the grant file within G5 [this is why we at the HSR Team had to send a clearance email to the PO, so they could "tick the Cleared for HSR box" within G5; we couldn't input that info ourselves because we had only "read access" to G5 rather than "write access"]; and 4) communicating with the grantee and monitoring the grant over its lifetime (usually 5 years).

Even if OGC and the HSR Team had sufficient staffing to review all grants and contracts, it's likely the process would stay exactly the same (just as dysfunctional as I've described) because the POs oppose changing the process in any manner that would result in them having less control.

Here are three examples (not included in the timeline, but some are partially shown in the email PDFs):

I) Page 1 of the PDF labeled "Waste and 34 CFR 97 noncompliance" (quoted above).

II) Pages 10 to 15 of the same PDF show emails relating to a meeting that [redacted], [redacted] and I had with [redacted], a member of CAM (the contracts division; if you're looking at an org chart, CAM is parallel to GPTD, both within the Office of Acquisition and Grants Administration (OAGA), managed by Phillip Juengst).

[redacted] and I discussed the upcoming meeting before it occurred. [redacted] was adamant about not inserting us (meaning the HSR Team) into the contracting process any more than necessary because CAM would react badly if we did. [redacted] agreed that we had the reg (34 CFR 97) on our side, but in [redacted] opinion insisting upon compliance with the law was not worth aggravating CAM and the POs.

During the actual meeting with [redacted], we learned how ED's contracting process works (as I mentioned, information about the process is highly compartmentalized). It turns out that there's a Contracting Officer (COR) within each PO. In [redacted] opinion, we (the HSR Team) should not insist that the POs send us their contracts for HSR review; he thought it best if we trained the PO staff to make the initial HSR determination themselves (the POs were supposed to already be making this initial determination; this meeting confirmed [redacted] statistical evidence that the POs were skipping this step entirely). ([redacted] implied that the POs would react badly if we told them they must send us all contracts for review, to comply with the law; basically the same as what [redacted] had told me explicitly prior to the meeting.)

III) Regarding the Harvard grant, [redacted] later told me that [redacted] had forwarded my initial email to IES (which is the PO that decided to fund the Harvard grant) rather than to OGC. According to [redacted], the IES staffer had forwarded it to one of their managers, who had forwarded it to our DAS (Phillip Juengst). Apparently, IES management was *very* unhappy that I suggested we ask for OGC legal review of one of *their* (IES's) grants (the Harvard grant). (Emphasis on "their"; this conversation with [redacted] indicated to me both that: 1) IES is very possessive about the process, objecting to the fact I sent an email at all, and 2) IES objected to the substance of my email, my questioning of the grant's legality.) And, in turn, Phillip was *very* unhappy with me and [redacted].

4) Per Step 12 (above), if the IRB reviewed the research/grant proposal and cleared it as nonexempt, we (meaning the HSR Team) had to accept the IRB's determination and clear the study. It didn't matter if we believed that the risks of the study were greater than the perceived, expected benefits of the proposed research; it didn't matter if the study's methodology was insufficiently scientific; it didn't matter if the study contained illegalities unrelated to 34 CFR 97. If the grantee sent us an IRB certification of cleared as nonexempt research, we had to grant HSR clearance – and we did.

This is exactly what happened with the Harvard grant. Per my email (Pages 2 to 3 of the PDF labeled “Harvard, Fort Wayne, Biden EO”), I thought we should ask OGC for a legal opinion – but we cleared the grant anyway, without ever receiving an OGC legal opinion.

It’s important to realize that it was the Harvard IRB that approved/certified this particular Harvard grant proposal – both located at Harvard. Another topic for another time.

5) Per Step 14 (above), after an HSR Team staffer sends the PO a clearance email, the PO “releases” ED funding, which allows the grantee to start spending ED funds on human subjects-related expenses. However, even prior to HSR clearance, the grantee can (and does) spend ED funds on expenses not involving human subjects directly.

Bureaucratic incentives:

You’ve probably realized “that’s a lot of office politics at ED.” Correct.

Of particular note is how many people knew about ED’s noncompliance with 34 CFR 97, but were unwilling to “rock the boat” (meaning, primarily, to incur the POs’ ire). At minimum, the following people knew for months, if not years:
- Us 4 at the HSR team (me, [redacted], [redacted], [redacted]).
- [redacted], office director of GPTD (I explained it to her myself. Interestingly, she was the HSR Team’s manager for a year prior to me joining ED, but during that time she didn’t know what we did and how we did it. [redacted] showed her the HSR Team’s MS.Access database for the first time a few months after I joined.)
- Phillip Juengst, DAS of OAGA (I explained it to him myself, using screenshare on a private video call to walk him through all the steps of the grant-making process described above, with PPT pictures. I specifically mentioned ED’s noncompliance and likely massive legal liability.)
- The lawyer at OGC mentioned in [redacted] email.

I once asked [redacted] whether he’d ever documented ED’s noncompliance with 34 CFR 97 over the years. He told me that, no, he hadn’t, almost everything had been verbal. Based on this conversation, I suspect the emails I’ve submitted to OGC (and a few I didn’t get the chance to print) are the best documentary evidence you’ll find.

Regarding the lack of documentation, it’s important to note Row 10 in the timeline. To summarize: I sat-in on a Human Subjects interagency call, during which the “leader” of the call told everyone not to email anything before the next interagency call because those emails might be subject to FOIA (her words, not mine). Just think about that: 20+ agencies on that call, and the speaker thought it perfectly normal to remind everyone to avoid FOIA. I have additional examples specific to ED, if you’re interested.

The reason for widespread avoidance of FOIA is that there’s no personal upside for the federal employee being FOIA’d, and a lot of personal downside; you only ever get criticized, you never get congratulated. To the average federal employee’s thinking, it’s best to avoid written communications altogether. The system’s incentives are aligned such that avoiding FOIA is the best option for each individual federal employee – and has been for so long that it’s become de facto Standard Operating Procedure at ED and, it appears, at 19+ other federal agencies.

Similarly, bureaucratic incentives help explain why so many people knew of ED’s noncompliance with 34 CFR 97 for so long, yet chose to refrain from fixing/changing the process to bring ED into legal compliance with the reg. ED coming into compliance may benefit the Department, but there’s a huge individual downside to any federal employee trying to make it actually happen. As [redacted] wrote, “the Program Offices would prefer to not have to deal with the regulation” and he “was frankly told by [his] supervisor that there was no interest in increasing staffing for the post beyond n=1.”

The POs prefer to not comply with the regulation for two reasons: 1) They erroneously view ED-funded research as uniformly harmless; and 2) They seek to maintain maximum control over the process. If the HSR Team plays a larger role in the process (as would be required to make ED compliant with the reg), the PO necessarily plays a relatively smaller role. Same would happen if OGC started legal review of all grants.

Regarding “n=1,” ED management has, for years, resisted increasing HSR staffing for two reasons: 1) Same as the first reason above; and 2) There is an unending inter-office “competition” for resources, specifically additional staffing and funding. [redacted] once mentioned that other offices were unhappy that GPTD had gotten new staffers (me, working part-time, and later [redacted], a FTE).

This inter-office competition for resources mirrors how federal agencies vie for additional funding from Congress. Quoting Row 12 in the timeline: “PPT slide: ED goals: #1: No unobligated funds (-> meaning a primary goal for ED

is spending its entire budget each year. I asked about this; if we don't spend it all, we won't get more next year, according to [redacted])."

Answering your first question re: the Harvard grant:

As you mentioned, the timeline is as follows:

- September 4, 2020: M-20-34 signed
- September 8, 2020: I sent an email
- September 14, 2020: I sent an email
- September 22, 2020: EO 13950 signed
- September 28, 2020: M-20-37 signed

However, this is not a complete timeline; that's why I labeled the Timeline "Partial" (see Row 2 of the Timeline). There are additional emails that I was not able to print out. (It's a miracle I printed as many as I did; my termination letter said "Your network access account will be terminated today," but it didn't happen immediately.) Also, I had numerous conversations with [redacted] that are not included in the timeline.

I recounted one of these conversations to [redacted]: I had asked [redacted] if she had read the actual Harvard grant application, not just the abstract (which is, basically, a summary). She said no, she'd only read the abstract. I tried quoting to her directly from the Harvard grant application, including the quotations listed on pages 8 and 9 of the PDF labeled "Harvard, Fort Wayne, Biden EO" that mention "reduc[ing] [teachers'] colorblind racial ideology"; that "White teachers in particular struggle with acknowledging their own privilege and recognizing racism"; that "The training [**meaning the Harvard grant's research, now receiving ED funding from IES**] is also designed to address ethnic-racial systemic inequities," including "by reifying the notion that Whites do not have an ethnic-racial identity and therefore are the 'norm,' thereby othering youth from ERM backgrounds," etc. etc. [redacted] interrupted me repeatedly, preventing me from even quoting the Harvard grant application.

It's important to note that the Harvard grant application itself refers to its research as "training" (see emails above) – which is exactly what IES is funding: training middle-school teachers to teach "The Identity Project" to middle-school children, with researchers monitoring both the teachers and the children. This is relevant to the OMB memos and EO.

Data call!

As you wrote: "Regarding the Harvard grant, you mention two potential sources of law (amongst others), the Executive Order on Combating Race and Sex Stereotyping and OMB memo M-20-37, **both of which give agencies time to become compliant**. The **executive order gives 60 days for agencies to identify and compile lists of grants that violate any of the provisions**, listed (a) through (h), of Section 5 of the order. **OMB memo M-20-37 utilizes the same timeline, giving agencies until November 20th to become compliant with Section 5 of the order**."

Good catch! Our division (GPTD) was responsible for putting together a list of grants, getting that list approved within ED (e.g. by Phillip, our DAS), then sending that list to OMB. However, we didn't actually read any grant applications ourselves for this purpose; instead, we sent out a "data call" to the POs.

As I mentioned, ED has six POs; each PO has a liaison-of-sorts within GPTD. (I mentioned [redacted] and [redacted] were staffers on the HSR Team; each of them also served as a point-of-contact with a PO). So each one of those six staffers within GPTD requested from their respective POs a list of grants that met the criteria in the EO and OMB memo (this is a "data call").

Each PO then sent its respective GPTD liaison a list of grants, GPTD compiled a single Excel spreadsheet, we got it approved, and we sent it to OMB.

This process had two problems:

1) Assuming the POs gave us accurate data, the spreadsheet that OMB received was 100% useless.

I viewed the final product, the one sent to OMB by the deadline of November 20, 2020. (It's on our GPTD share drive. My network access was cut off before I could print it, but anyone at GPTD can access it, if OGC requests a copy.) It looked very similar to the table found at this link (screenshot below), along with an additional column showing a number (indicating the number of grants within that grant program the PO believed fulfill the criteria):

You'll notice what's not listed: individual grants by PR number.

Regarding the Harvard grant, it did not appear on the spreadsheet we sent to OMB. If included at all in the total number of grants fitting the EO/OMB memo criteria, it only appeared as one of [XX] grants included in Row [XXX] appearing as:

Program Title:
Social & Behavioral Context for Academic Learning

Description:
[Generalized description of program; not related to the Harvard grant in particular]

Office:
IES

Number of grants fitting criteria:
[XX]

OMB could not have possibly learned about the Harvard grant (or any individual grant, for that matter) and what that grant contained via the spreadsheet we sent them. We knew what info OMB wanted, and we knew why they wanted that info (to defund grants containing critical race theory) – which is why they didn't receive anything useful from ED.

…which, it appears, was intended (see below).

2) There is no reason to assume that the PO gave us accurate numbers.

At ED, I quickly learned that we career federal employees view our "constituents" (so to speak) as the grantees – more so than the political appointees, the American taxpayer, or the American public generally. We (meaning, specifically, staff at the POs and the HSR Team – including me personally) communicate directly with federal grantees and contractors on a daily basis; our goal is to keep them happy, and that means ensuring that ED funds continue flowing to them.

Pages 16 and 17 of the PDF labeled "Waste and 34 CFR 97 noncompliance" provide one example of this mentality. Here's another example:

We at GPTD were asked to prepare a transition memo, in preparation for a new administration. [redacted] mentioned Phillip asked her to document the grant-making process, listing places where political appointees can "make policy." (This was a few weeks prior to the 2020 election, so we didn't yet know who would win.) [redacted] delegated part of this assignment to me. GPTD was discussing the transition memo and various ways to "make policy" during our weekly team meeting, and I mentioned the option of defunding already-funded grants. I mentioned that the Grant Award Notice (GAN) the PO sends each grantee upon award of ED funding lists numerous conditions; by withdrawing ED funds, the grantee agrees to all conditions listed in the GAN. One condition states:

"This award supports only the budget period [listed above, meaning for one year]. The Secretary [of Education] considers, among other things, continued funding if: ... The Department determines that continuing the project would be in the best interest of the government." (To elaborate, most ED grants are five years in duration, but most of those only receive one year of funding at a time – very few have all five years funded up-front.)

I said that, if Biden won, the new Secretary of Education could utilize that GAN language to deny further funding to grants he/she disapproved of (e.g. magnet school grants), by stating that "The Secretary determines that continuing these grants are no longer in the best interest of the government." (For example, if a grant was funded for the standard five years, but had received only one year of funding thus far, it would not receive funding each year for the remaining four years.) Similarly, if President Trump won reelection, Secretary De Vos (or her future replacement by President Trump) could, anytime between now and January 20, 2025, choose to deny further funding to grants that met the criteria in the EO and OMB memo (meaning, grants that promoted critical race theory).

That idea was quickly skipped-over, and defunding grants was not mentioned in the final transition memo as a way for political appointees to "make policy." Unsurprisingly, suggesting we let the politicals know they have the authority to defund grants doesn't go over well in a grants policy office.

The important takeaway is this: we federal career employees have our own personal interests, and we don't give the political appointees (at ED, or at OMB) information that we don't want them to have. This helps to explain why IES was so opposed to my suggestion (in the Harvard email) that "we should ask OGC and/or a political appointee for guidance." If you're issue-spotting, there's a separation of powers/lack of a "unitary executive" problem.

Specific evidence:

To answer your question: "Is there specific evidence you have that the agency was noncompliant (with either the E.0. or the OMB memo) from November 20th, 2020, to January 20th, 2021?"

Yes:
- The Harvard grant was still being funded the entire time, including during that period. It was still being funded when I checked G5 in early 2021, and it's presumably still being funded now.
- The spreadsheet we sent OMB was completely useless. It was likely intended to be useless. I believe (reasonably, in my opinion) that this violated the EO, OMB memo, Merit System Principles (5 U.S.C. § 2301), and the oath of office we all swore to (5 U.S.C. § 3331).

Regardless, my "reasonable belief" of the illegality of the Harvard grant does not rest solely on EO 13950 and OMB memo M-20-37. The "open-and-shut case" relies on 20 U.S.C. § 9514(f)(7).

Additionally, there is the M-20-34 memo. And funding the Harvard grant likely violated Title VI of the Civil Rights Act of 1964, while the Harvard grant's "research" (meaning its 1619 Project-type training of both students and teachers) likely violated Title VII. Constitutionally, there are likely First Amendment and equal protection problems.

Nor does my reasonable belief of illegality at ED rest solely on the Harvard grant. The 34 CFR 97 issue stands on its own. The Fort Wayne grant and Biden EO present similar issues to those of the Harvard grant; as promised, I'll cover all this in a future email on "equity."

Oath of office:

Fundamentally, I believe that a lot of federal employees, at both ED and other agencies, are failing to uphold their oaths of office.

Quoting from this article, "the framers of the U. S. Constitution included the requirement to take an Oath of Office in the Constitution itself. Article VI of the Constitution says,

"'The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.'

"The Constitution does not prescribe the actual text of the Article VI oaths. For federal civil service employees, the oath is set forth by law in 5 U.S. Code § 3331, which reads as follows:

"'An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, ___, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."'"

I think it reasonable to believe that all of the following violates the Oath and other legal authorities:
- Purposely evading a law to avoid accountability to the public (e.g. FOIA avoidance);
- Purposely utilizing the borrowed authority of the Secretary of Education (Betsy DeVos) that was delegated to you in a manner contrary to the public statements of both the Secretary and the President (e.g. IES deciding the fund the Harvard grant) (I find it very difficult to believe Secretary DeVos knew about any of this, and I have no evidence indicating she did know);
- Purposely keeping political appointees (at both ED and OMB) "in the dark," so to speak, to avoid accountability (e.g. not informing the politicals of the Harvard grant; not informing the politicals of their option to defund grants to "make policy"; deliberately interpreting the EO and OMB memo in a manner that frustrates OMB's goal. Row 35 of the Timeline is illustrative: During an OAGA all-staff meeting, Phillip (our DAS) stated that he knew it had "been difficult for all of you" (meaning us federal employees) "under this administration" (meaning the Trump administration)).

I hope this helps your investigation. I'm working on the answer to your second question; I'm sorry for the delay.

Best regards,

[redacted]

On Fri, May 28, 2021 at 4:53 PM [redacted] wrote:

> Good afternoon,
>
> My name is [redacted] and I am a legal intern working with [redacted] on your OSC cases. I have two clarifying questions.
>
> First, I wanted to clarify the timeline of one of your disclosures. Regarding the Harvard grant, you mention two potential sources of law (amongst others), the Executive Order on Combating Race and Sex Stereotyping and OMB memo M-20-37, both of which give agencies time to become compliant. The executive order gives 60 days for agencies to identify and compile lists of grants that violate any of the provisions, listed (a) through (h), of Section 5 of the order. OMB memo M-20-37 utilizes the same timeline, giving agencies until November 20th to become compliant with Section 5 of the order. According to your timeline and the emails we have, your Harvard grant disclosure was in early September of 2020 (see 9/8 and 9/14 emails). Regarding the Harvard grant disclosure and the corresponding allegation that ED violated the aforementioned sources of law, is there specific evidence you have that the agency was noncompliant (with either the E.0. or the OMB memo) from November 20th, 2020, to January 20th, 2021?
>
> Second, apart from the definition of "equity" provided in President Biden's Executive Order 13950, is there any additional evidence you can provide to support 1) the claim that 34 CFR 280 defines "equitable" as "equality of opportunity," or that it is specifically operating under the definition "equality of outcome," and 2) the claim that operating under the definition of "equality of outcome" would be a violation of law, rule, or regulation?
>
> I hope to hear from you soon. Thank you for your help in clarifying this.
>
> Best, [redacted]
>
> **NOTICE**: This message and any attachments may contain information that is sensitive, confidential, or legally privileged. If you are not the intended recipient, please immediately notify the sender and delete this email from your system; you should not copy, use, or disclose its contents. Thank you for your cooperation.

--

[redacted]

J.D. Candidate, Class of 2022

The Catholic University of America

Columbus School of Law

--
[redacted]
J.D. Candidate, Class of 2022
The Catholic University of America
Columbus School of Law

Exhibit C
(Timeline for OSC)

[redacted]

ED Timeline - Partial. Does not include most of the work I did at ED

Date	Time	Description
27-Jun		Final offer letter received from HR ([redacted])
6-Jul		Online orientation for new employees. Then my first day working
8-Jul	10:00 AM	GPTD weekly meeting. I first heard about "the backlog" (see email)
8-Jul		[redacted] emails me about "the backlog," in reply to my question about it. See the email - [redacted] describes a massive amount of historical noncompliance by ED, including the following example: "I was the only one involved in implementing the reg at ED, I was frankly told by my supervisor that there was no interest in increasing staffing for the post beyond n=1-- that realistically nothing would happen to increase staffing until there was a crisis, until something 'blew up.'"
9-Jul		I emailed [redacted] about the SACHRP (interagency group led by HHS) "charge" regarding inserting "equity" into interpreting the Belmont Report's principle of "justice," and about the PRIM&R conversation that HHS attached to its email along with the "charge." I said that both the charge itself and the PRIM&R conversation distributed by SACHRP clearly portrayed SACHRP's partisan political ideology (including Critical Race Theory). See emails
10-Jul	10:00 AM	Interagency call regarding protection of human subjects. [redacted] invited me to sit-in and listen. The "leader" of the call (name forgotten, and not written down in my notes; it was a female voice, I think she represented the VA) discussed coordinating agency response regarding IHEs getting informed consent for research. She told everyone not to email anything before the next interagency call because those emails might be subject to FOIA (these were her words)
10-Jul	11:00 AM	Interagency call (Subcommittee on Harmonization (SOH), within SACHRP, within HHS). There were 2 topics on the agenda; first was fine-tuning a flow chart for Common Rule determinations, then second was "equity" and the charge. There was very good group collaboration on the first topic, including multiple viewpoints and open discusion. But this was not the case for the second topic. I took the following notes: 1) [redacted] -> "Vulnerability is NOT about the individual. It is something bigger" (reference to minority groups); 2) [redacted] -> "Is the language of the charge final?" (no response.) [redacted] asks question again. (no response.) "Everyone agree this is an appropriate topic?" (2 people say "yes"; rest are silent) "Does anyone have anything else to add?" (no response). ([redacted] made multiple clear & obvious references to "these times," by which he meant the BLM protests).
10-Jul	1:00 PM	Meeting with [redacted]. He used a PPT to explain the grants process via videochat, but did not email it to me. Two important notes I took: 1) ED monitors compliance -> new revision to Common Rule means ED must now monitor LEAs ([redacted] mentioned LEAs; I wrote this as a reference to something I learned from [redacted] previously); and 2) PPT slide: ED goals: #1: No unobligated funds (-> meaning a primary goal for ED is spending its entire budget each year. I asked about this; if we don't spend it all, we won't get more next year, according to [redacted])
14-Jul	1:00 PM	Grants Policy Forum (a training led by [redacted]). Notes: [redacted] asking [redacted] about unconscious bias, & about what to do about our unconscious bias regarding grantees who have a bad history (e.g. not accounting for all money). [redacted] said to give "additional flexibility," particularly for minority grantees. [redacted] talking about "systemic racism," "institutional racism," and "unconscious bias."
15-Jul	10:00 AM	GPTD meeting. Notes: Grants.gov (ED was recently added to Grants.gov, for which it paid $450,000). ED uses G5 (ED's "system of record").
6-Aug		I emailed [redacted] about the Harvard grant. I quoted from the grant application itself (citing "white privilege," "unconscious bias," etc.)

24-Aug		[redacted] replies to an email I sent him describing/documenting a meeting I had with [redacted] about automating the HSR process. See email. I later pitched this automation solution to Phillip in a Zoom meeting, and mentioned ED's noncompliance with the Common Rule to him.
2-Sep	10:00 AM	GPTD meeting. Discussion of our budget. Notes: $140,000 for GrantsMAT. $100,000 for Grantee Satisfaction Survey ([redacted]: this money was "swept away." $100,000 "does not seem like a lot of money to me," considering) -> [redacted] & [redacted] worried about our relationship with the contractor and Dept. of Interior. Phillip is trying to find the $100,000 somewhere else. Exec. Office did not get paper signatures in time, despite being copied on emails about this project from [redacted]
8-Sep		I emailed [redacted] about the Harvard grant. See email. In that email, I cited OMB memo M-20-34, which had operative language stating "all agencies are directed to begin to identify all contracts or other agency spending related to any training on "critical race theory," "white privilege," or any other training or propoganda effort that..." The Harvard grant application contained those terms and likely fell within "other agency spending." The Harvard grant is called the "Identity Project" and is very similar to the 1619 Project. Soon after, President Trump signed an Executive Order on Combating Race and Sex Sterotyping and OMB issued the M-20-37 memo, both of which validated my analysis of the Harvard grant. I later mentioned these to [redacted] as well
10-Sep		[redacted] forwarded my email about Harvard to [redacted]
14-Sep		I emailed [redacted] about the Harvard and Fort Wayne grants.
15-Sep		[redacted] emailed me about "scope". She said my observation and analyses about the Harvard grant were out of scope. She did not address the Fort Wayne grant.
8-Oct		[redacted] emails me & the HSR team SACHRP's draft answer to the "charge" on justice. The answer contains significant partisan political ideology. See emails
3-Nov		I email [redacted] a summary of our HSR meeting (this email went through several revisions by [redacted] and [redacted] before I sent it to [redacted]). This email documents significant noncompliance with the Common Rule by ED
18-Nov		As a follow-up to a topic discussed in a weekly GPTD meeting (about another office within ED complaining about being forced to manually input and verify 4,500 DUNS numbers because the G5 system is inadequate), I suggest a method of automation. [redacted] replies in support. No reply from [redacted]
30-Nov		[redacted] emails me & the HSR team about how ED is not applying the Common Rule to contracts (which is noncompliance with the reg)
1-Dec		The entire HSR team (including [redacted] and I) attend the online PRIM&R conference (paid for by ED as training). I emailed [redacted] after the first presentation, entitled "Is this conference normal"? My email asks about the partisan political ideology being presented by the speakers. Many examples, one of which is "the second speaker just explicitly stated in the Q&A that we should impose racial quotas on clinical trial participants, IRB composition ('more than just one or two black or brown people'), and research personnel ('we need more black principal investigators') to address past discrimination and 'implicit bias.'"
2-Dec		[redacted] replies to my email "Is this conference normal?"
2-Dec		[redacted] emails me an article written & published by one of the SACHRP members entitled "Justice in Research." See emails
21-Dec		I emailed [redacted] about the Fort Wayne grant. I said that I really needed a legal opinion regarding mandatory reporting obligations as a federal employee, and regarding the Rules of Professional Conduct (am I bound by them now? If not, at what point will I be?)
21-Dec		[redacted] replied saying she will look into this. She reminded me of "scope"
24-Dec		I emailed [redacted] & [redacted] about a possible solution for Fort Wayne

8-Jan		I emailed [redacted] & [redacted] a draft email about the Fort Wayne grant that I'd like to send OGC, per [redacted] request to me during a phone call. It described the flawed HSR clearance process, and used the Fort Wayne grant as an example of the type of problem that we at the HSR team encounter when reading through grants. The email included questions that I wanted to ask OGC. I do not know if OGC ever saw this email, or issued an opinion on these matters
11-Jan		[redacted] emails me & [redacted] his comments
11-Jan		I emailed [redacted] & [redacted] about [redacted] comments on my draft email to OGC
14-Jan	9:30 AM	OAGA all-staff meeting, with approx. 80 employees on the call. Phillip stated that he knew it had "been difficult for all of you" (meaning us federal employees) "under this administration" (meaning the Trump administration), and he blamed President Trump for the violence on January 6.
22-Jan		[redacted] emails GPTD about President Biden's new EO regarding "equity"
22-Jan		[redacted] emails me & [redacted] an assignment: analyze President Biden's new EOs
22-Jan		I email [redacted] & [redacted] my analysis of Biden's new EOs. I describe the different definitions of "equity," noting the one used in the EO is a good constitutional definition consistent with MLK's "I have a dream" ideal
25-Jan		[redacted] replies to me & [redacted]
25-Jan		Denise emailed an "OFO ALL EMPLOYEE NOTICE" to everyone
26-Jan		I emailed [redacted] about the "OFO ALL EMPLOYEE NOTICE," which stated that "Diversity and Inclusion related training at the Department will resume" because of President Biden's new EO, which revoked President Trump's EO on Race & Sex Stereotyping. I quoted the Biden EO's definition of "equity" as "the consistent and systematic fair, just, and impartial treatment of individuals," which is different from "equity" as "equality of outcome," and stated that Denise may not understand this distinction and may be misinterpreting the EO. I said we may want to consider discussing this distinction with the office in charge of diversity and inclusion, "so they can structure their trainings to avoid violating President Biden's EO."
26-Jan		[redacted] replied, saying that my observations were out of scope.
26-Jan		I emailed [redacted] about "scope." I mentioned that I was assigned the Harvard grant, the Fort Wayne grant, and President Biden's EO, and that I stand by my analyses for all three. I believed my work was within scope for all three because: I noticed possible violations of law; I noticed them during the normal performance of my duties; I only ever discussed them with [redacted] and/or [redacted] (meaning I stayed within the chain of command); I simply requested that we ask for a legal opinion or guidance from OGC, or discuss the grant/EO with the other office within ED; possible noncompliance does not necessarily mean anyone is at fault - rather, it's simply a problem we need to figure out a solution for.
27-Jan		I attended an all-day training with ED participants from various offices, taught by [redacted] (a former ethics attorney). The training consisted of studying GAO cases and the GAO "Red Book." During the training, another ED participant named [redacted] (I forget his full name) mentioned that only contracts of over $1 million go through OGC (meaning legal review), and that OGC does not currently have any lawyers that specialize in contracts. This was mentioned in both voice chat and the written group chat (but I did not save this part of the chat). I joked "That's great! I'll graduate soon and I love contracts! Maybe OGC will hire me." Later, at the end of the course, [redacted] was answering questions in the group chat. I asked a general question about whether we, as federal employees, have a mandatory obligation to report violations of law, or is it instead permissive? [redacted] said the mandatory v. permissive distinction does not apply; we swore an oath to uphold the constitution. He then posted a link to GAO.gov so "you can drop a dime on someone anonymously."
28-Jan		[redacted], [redacted], and I attend a meeting with [redacted] (from CAM, the contracts division) about applying the Common Rule to contracts (which is supposed to be happening now, but is not happening, which is noncompliance with the reg). I email [redacted] & [redacted] my notes immediately after the meeting.

3-Feb		I comment on [redacted] draft email to [redacted] about contracts and HSR
4-Feb	9:30 AM	Phone call with [redacted]. She informed me of the Department's preliminary decision to dismiss me. I asked if there was anything wrong with my work. She said no, there was nothing wrong with my work. She said she thought it was because of my emails regarding IES and Denise (meaning Biden's new EO). She said I don't get along with management. I said I get along well with my team, [redacted], [redacted], and [redacted], and I get along with you (meaning [redacted]), right? She agreed that I do get along well with the HSR team and GPTD, "but there's this other side to you as well." She said OGC had reviewed my emails and did not concur with my analyses. I thanked her for asking OGC, and asked what their view was, and if they had issued a legal opinion. She said there was not a legal opinion, and could not tell me what OGC thought, only that they did not concur with my analyses. I asked how I could appeal the preliminary decision. She said I should email [redacted] or Phillip. I asked who I should start with. She said to start with Phillip. --> It was a pleasant conversation, as usual. I emailed Phillip immediately after.
4-Feb		I emailed Phillip to appeal the preliminary decision to dismiss me and request a meeting, as instructed by [redacted]. I never received a reply.
5-Feb		[redacted] emails [redacted] about applying the Common Rule to contracts at ED (which is currently not happening for most contracts). The email contains many questions for [redacted], because we (at the HSR team and at GPTD) don't know how the contracts process currently works (which is why those contracts are not currently being reviewed for HSR purposes).
5-Feb	10:24 AM	I email [redacted] a diagram I made of the current HSR process, as part of the automation project
5-Feb	10:25 AM	I received an email from [redacted]. Subject: "Notice of Termination" with an attached termination memo. Quoting from memo: "You are being terminated because your conduct fails to meet the expectations of a Pathways Intern and of a Federal employee at this Agency. You demonstrated the inability to work cooperatively as part of a team and maintain a respectful working relationship with management officials. Additionally, you failed to follow instructions related to your work and/or your requirements as a program participant." "If you believe this decision is based on descrimination on basis of ... and/or reprisal (for previously engaging in protected activities), you may file a complaint" with ED's OEEOS. "Your initial contact with OEEOS must occur within 45 calendar days from the date this action is effective."

Exhibit D
(Harvard, Fort Wayne, Biden EO email packet)

[redacted]

From: [redacted]
Sent: Thursday, September 10, 2020 8:26 AM
To: [redacted]
Cc:
Subject: RE: OMB memo & Harvard - R305A200278

Importance: High

Hi [redacted]

[redacted] made mention of his concerns in this regard in our one-on-one meeting last week (not to this level of detail), however I advised him to refer to your leadership and to focus on the work that falls under GPTD's purview. I also informed [redacted] that we do not make funding decisions and as civil servants we must understand our level of authority and role in the grants process here at the Department. The content in [redacted] message is out of scope with regards to our work on determining if an applicant's research is covered by the common rule. I am directing you both to stand down. I will touch basis with Phillip on this. Thanks!

[redacted]

From: [redacted]
Sent: Tuesday, September 8, 2020 6:05 PM
To: [redacted]
Subject: FW: OMB memo & Harvard - R305A200278

Hi [redacted],

FYI, the R305A2000278 grant to Harvard includes a covered research study that examines interventions to enhance student resilience, etc.

Best regards,
[redacted]

From: [redacted]
Sent: Tuesday, September 8, 2020 5:54 PM
To: [redacted]
Subject: RE: OMB memo & Harvard - R305A200278

Hi [redacted],

Thank you for the link to the OMB document. Important policy developments, including context for educational research on civics instruction, etc. I hadn't seen the actual document yet.

As context, on Monday (Labor Day) the NYT reported: "*Mr. Trump wrote or reposted roughly 20 Twitter messages about the memo on Saturday and on Sunday* ***said the Education Department would investigate schools that use curriculum from the 1619 Project by the New York Times Magazine****, an effort to look at American history through the frame of slavery's consequences and the contributions of Black Americans*" (Peter Baker, "Trump makes White Grievance a Pillar of his Campaign", NYT p. A 13, Sept 7, 2020.)

Best regards,
[redacted]

From: [redacted]
Sent: Tuesday, September 8, 2020 1:42 PM
To: [redacted]
Subject: OMB memo & Harvard - R305A200278

Hi [redacted]

Last Friday (Sept. 4), just before the Labor Day weekend, OMB released the M-20-34 memo. The operative language is copied below:

"MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Training in the Federal Government

The President has directed me to ensure that Federal agencies cease and desist from using taxpayer dollars to fund these divisive, un-American propaganda training sessions. Accordingly, to that end, the Office of Management and Budget will shortly issue more detailed guidance on implementing the President's directive. In the meantime, all agencies are directed to begin to identify **all contracts or other agency spending related to any training on "critical race theory," "white privilege," or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil.** In addition, all agencies should begin to identify all available avenues within the law to **cancel any such contracts and/or to divert Federal dollars away from these un-American propaganda training sessions."**

https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf

Additionally, on Sept. 6, the President tweeted the following:



I previously emailed you concerns I had about the Harvard grant (R305A200278). It seemed to me that Harvard's proposal should not have been funded for three separate reasons, any one of which constitutes sufficient grounds for refusing to fund the proposal with taxpayer dollars. They were as follows:

1) The proposal is not sufficiently scientific. Its methodology is unsound, it makes numerous political/ideological assertions without sufficient factual justifications for those assertions, etc. Because its methodology and assumptions are so vulnerable and unscientific, any data the proposal may yield would be useless, meaning the proposal cannot contribute to "generalizable knowledge."
2) The proposal is so blatantly partisan and political that half the country would neither approve of taxpayer funding for it, nor accept any data it may yield. Funding the study with taxpayer dollars could result in a PR disaster for ED.
3) The proposal overtly undermines the longstanding bipartisan consensus around several key American concepts, including:
    a. The existence of objective scientific truth, which we can discover via the scientific method
    b. Equal protection under law ("Our Constitution is color-blind" per Justice Harlan's dissent in Plessy v. Ferguson, 1896)
    c. People should "not be judged by the color of their skin but by the content of their character." (MLK, 1963)
    d. Etc.

The OMB memo and the President's tweet now add an additional two independent and sufficient grounds for refusing to fund the proposal:

4) The proposal almost certainly falls within the broad language of the OMB memo, in which case ED must "identify all available avenues within the law to cancel ... and/or to divert Federal dollars away from" it.
5) The proposal states that it will implement the "Identity Project" within three public schools; this project is very similar to the 1619 Project, and thus should not be funded because doing so would run counter to the current administration's priorities, per the President's tweet (and any actions that followed the tweet, of which I am not aware).

According to the HSR database, we emailed Harvard a request for an IRB approval certification, but we have not yet received that approval, nor have we granted HSR clearance.

Can we ask ED OGC for guidance regarding the OMB memo and Harvard's proposal? It seems to me that IES's decision to fund it was a mistake, perhaps a politically-motivated mistake. Us career employees should not be making political decisions, yet that's exactly what IES did. To avoid making that same mistake ourselves, I believe we should ask OGC and/or a political appointee for guidance.

--[redacted]

From: [redacted]
Sent: Monday, August 24, 2020 12:33 PM
To: [redacted]
Subject: RE: Harvard - R305A200278

Hi [redacted],

Thank you for sending the draft. I've made a couple of edits and sent it out. I'm recording it in the HS.Log as one that you did the review for and drafted the contact note. After a few more reviews, we'll shift to you doing the reviews and sending out the contact notes on your own, touching base with me or other team members if you have questions.

What is your current ED workload situation at this point (given the start of the school year)? Any points we need to chat about, additional studies needed for review, etc.?

Best regards,
[redacted]

From: [redacted]
Sent: Monday, August 24, 2020 10:00 AM
To: [redacted]
Subject: FW: Harvard - R305A200278

Hi [redacted]

I think this was the most recent email regarding R305A200278 (below). I do not think I ever actually sent a contact email. I can do so now if you'd like, or you can do so. I think there was a few emails between us about this grant that were left hanging.

Thanks,

[redacted]

From: [redacted]
Sent: Thursday, August 6, 2020 11:24 AM
To: [redacted]
Subject: RE: Harvard - R305A200278

Hi [redacted],

Please find the Harvard draft email attached.

Thanks,

[redacted]

From: [redacted]
Sent: Thursday, August 6, 2020 9:40 AM
To: [redacted]
Subject: RE: Harvard - R305A200278

Hi [redacted]

I concur with your determination that the proposed study includes covered research and needs IRB approval. If you haven't already done so, please prepare a contact email requesting the materials needed for ED to clear the study. The email should note that the application indicated that the PI would be headed to the IRB and ask whether that IRB approval/determination is now available. If not now available, ...

Best regards,
[redacted]

PS There is a long history of "feel good" research fads in education that come and go. They are often easy to critique and mock, even when there is something real at their core. Someone (possibly Sec of Education Bill Bennett) used to complain about the student "self-esteem" programs, claiming something to the effect that the US has the students with the highest self-esteem in the world, and "among the worst" educational achievement. Interventions to build students' self-identity can be highly vulnerable to criticism, even if they improve teaching and learning.

That said, there is substantial and growing evidence that teachers and their attitudes matter. (cf Jaime Escalante as portrayed in the "Stand and Deliver" movie. He was portrayed as a stand alone hero when in fact he was part of a network of motivated reformers and a sustained multiyear effort that achieved remarkable improvements in the achievement of mostly low income, Hispanic (now "LatinX") students. Teachers—and the systems of formation and support around them—matter.

There is substantial data on the impacts of effective teachers. There is substantial and growing data on the impact of teachers as role models (including the importance of having at least some teachers "who look like me"). There is substantial evidence of the positive (or negative) impacts that teachers' use of stereotypes (eg gender, racial, religious ...) (including the "microaggressions" literature) can have on how students score on high stakes standardized tests, college enrollment, career aspirations, and so on.

Mark Twain quipped that Wagner's music "is better than it sounds". Good reason for a "trust but verify" perspective on interventions such as this, but well worth checking to see "what works". The stakes for students and the nation are high. Education research finds that many educational interventions have little or no impact—and a fair number have iatrogenic impacts. Better to have a credible assessment of a popular approach than to not check it out.

Best regards,
[redacted]

From: [redacted]
Sent: Wednesday, August 5, 2020 12:43 PM
To: [redacted]
Subject: Harvard - R305A200278

Hi [redacted]

Regarding the 5th (last) award you gave me (for Harvard), the grantee thinks there is nonexempt research; I agree. They have an IRB pending already. Work record is attached.

This was the easiest HSR determination of the 5 awards, and I had thought our job was limited to that, but I'm thinking about your excellent answers from yesterday (relevant parts copied at the end), and this answer in particular:

It's part of "grantsmanship". That means that we are stuck with having to assess whether their claims of generating "new knowledge" is credible or "snake oil".

I'm wondering what your opinion is of the Harvard proposal (starting on page 57 of the grant application)?

Even if one were to agree with/adopt Harvard's point of view (as many do), it seems undeniable that Harvard's proposal is pushing a certain political and ideological agenda – one that half the country and our current administration would almost certainly disagree with. Furthermore, many scientists who do share Harvard's political leanings (e.g. Bret Weinstein) have objected to similar research in the past (and questioned the entire area of research in which Harvard's proposal sits) for seeking to promote a political agenda under the guise of "science," and doing so at the expense of scientific methodology, integrity, impartiality, and bipartisan faith in science itself.

This begs the question... **why is ED (under this current administration) funding this proposal at all?**

Thanks,

[redacted]

➔ *There is an amazing amount of performance monitoring etc. that is based on little more --than hunches, that never were assessed using scientifically credible research. So yes, it often happens (not to exclude GPRA, GE's "rank and yank" staff evaluations under Jack Welch, OMB's PART assessment of whether programs provide "value for money etc. BusinessWeek had a wonderful cover a few years back showing a doctor standing in front of a rotating wheel that listed various treatments. The article noted that a large portion of medical treatments lack scientific evidence of their effectiveness—and regularly studies turn up long used and/or popular medical treatments that in fact don't work, or don't work any better than less expensive and less risky alternatives.*

➔ *Many grant applications are to fund various educational activities, and that is the priority of the applicant. Then they encounter the grant requirement to conduct a credible project evaluation—which can make them subject to the Common Rule.*

➔ *For ongoing projects, they often evolve. So that a project that was little more than "a wing and a prayer" at the time of the initial application for funding ends up, for various reasons, deciding to initiate credible measurement with an ability to assess impact and perhaps generalizability.*

➔ *It's an amazing world. For example, grantees for bilingual education programs have long been required to conduct project evaluations as part of the grant.*

Someone a few years ago had the reasonable idea that that stack of project evaluations for the program could be "mined" to provide credible information about program effects.

A major research firm (e.g. RAND or someone like them) was hired to do the analysis of the years of studies. They dug deep and thought seriously

The final report essentially said that the studies were so methodologically weak that you couldn't draw any conclusions from them. (Indeed, some grantees seemed to have the idea (probably accurate) that the mandated project evaluation was a "paper chase". The evaluation reports were submitted, put on a shelf, and no one ever read them.

That is among the reasons that in recent years there has been strong pressure to upgrade the quality of project evaluations.

One implication is that more of those increasingly credible studies now fit the definition of "human subjects research".

Regarding the "can develop or contribute to new generalizable knowledge," each of the grant applications I've read through thus far seem to be "selling"/marketing themselves; they each claim that the results of study will contribute something "new" and their study is thus worth the time and ED funding. I can't really imagine reviewing a study for HSR that does not claim to yield new knowledge?

→Yep. It's part of "grantsmanship". That means that we are stuck with having to assess whether their claims of generating "new knowledge" is credible or "snake oil".

- *There is a nice article in the "science section" of today's NYT. It has a title something like "How to Talk Like An Epidemiologist". Basically it is a nice discussion of Bayesian statistics in the context of disease control. It notes that statisticians have a wry/snarky comment in criticizing others' analyses: "Update your priors". (e.g in the spirit of Keynes, when the facts change, consider changing your position.*
    - ➔ *An individual study rarely can settle an issue (given sampling variation, measurement error, excluded variables, sample attrition....). So just because there has been a study or even several prior studies of a topic doesn't mean that an additional study is not needed.*
    - ➔ *For example, there has been major concerns in recent years in both the "hard" and the "social" sciences about a "failure to replicate". Sometimes this has meant that even landmark research is proved wrong.*
    - ➔ *So a "Bayesian" perspective is needed in assessing whether a study is likely to generate "new knowledge" in a particular field.*

- ➔ *Clearly we don't want to "overregulate", requiring PIs to delay their studies while they take a study through IRB review. On the other hand, we don't want ED studies to "blow up", harming study participants and potentially teachers, families and others. Moreover, particularly in this social media age, even a few studies "gone bad" can create enormous public distrust of educational research, discourage use of findings, make it difficult or impossible to recruit participants in future studies.*
- ➔ *So this involves a delicate balancing act in assessing risks, ability to contribute to new knowledge of what works in teaching and learning. The basic notion behind the Common Rule is that studies should not create significant harms to participants, particularly without informed consent. In making the determinations we try very hard to be reasonably consistent and grounded in facts, so that determinations of coverage are not "arbitrary or capricious".*

[redacted]

From: [redacted]
Sent: Thursday, August 6, 2020 10:56 AM
To: [redacted]
Subject: RE: Harvard - R305A200278
Attachments: TestimonyOfBretWeinstein5-22-18.pdf

Follow Up Flag: Follow up
Flag Status: Completed

Hi [redacted],

Up until the past few years, there has been bipartisan agreement and support for the following:

1. The existence of objective scientific truth, which we can discover via the scientific method
2. Equal protection under law ("Our Constitution is color-blind" per Justice Harlan's dissent in Plessy v. Ferguson, 1896)
3. People should "not be judged by the color of their skin but by the content of their character." (MLK, 1963)
4. Etc.

The current administration has publicly supported the 3 things listed above and denounced the radical viewpoint that seeks to undermine those things (including in the educational context, which applies to us at ED). Perhaps the best example of this is President Trump's July 4th speech at Mt. Rushmore. (Full transcript: https://singjupost.com/full-transcript-president-trumps-july-4-2020-speech-at-mount-rushmore/?singlepage=1

The Harvard proposal directly contradicts at least one of those things. It runs contrary to both the longstanding bipartisan consensus and the current administration's publicly-stated position.

Excerpting from the Harvard proposal's grant application, starting from page 57:

- "The theory of change guiding this work indicates that **the Identity Project training program** increases teachers' ERI development, **reduces their colorblind racial ideology**, and increases their ERI content knowledge (i.e., race-related competencies);"
- "Education scholars have noted that teachers' engagement in CSP represents a key lever of change to reduce ethnic-racial academic inequalities (Delpit, 2006; Hammond, 2015). **CSP** (Paris, 2012) **evolved from revolutionary models of culturally relevant** (Ladson-Billings, 1995) **or responsive** (Gay, 2000) **pedagogy, which emphasized the importance of creating a classroom context in which students can affirm and accept their cultural identities, while also developing the ability to think critically about social institutions (such as schools) that reproduce and perpetuate social inequities** (Ladson-Billings, 1995). Moreover, **CSP emphasizes the need for educators to move beyond teaching in ways that are relevant or responsive to students' cultural experiences and toward creating learning environments that support and sustain the cultural identities of learners** (Paris, 2012).
- "Furthermore, **CSP 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 students**.
- However, although teachers of all backgrounds vary in their own ERI formation and attitudes toward discussing racial issues, **White teachers in particular** (currently 80% of K12 educators; NCES, 2019) **struggle with acknowledging their own privilege and recognizing racism**, which can hinder productive conversations about race with students (Tatum, 1992; Utt & Tochluk, 2016). **These challenges can result in teachers** acting on their racial

biases, **adopting a colorblind approach that can create a hostile learning environment for ERM students**, and hindering teachers' ability to establish strong relationships with their ERM students (Castro Atwater, 2008).

- The training is also **designed to address ethnic-racial systemic inequities.** Activities and training content will **prepare teachers to understand and be able to explain how institutional racism has resulted in an educational system and practices that reproduce social inequalities and result in symptoms such as the academic achievement gap.** Educators will be able to explain and provide at least one specific example of how institutional racism plays out in the U.S. education system in a manner that reproduces ethnic-racial inequalities in academic outcomes (e.g., by **reifying the notion that Whites do not have an ethnic-racial identity and therefore are the "norm," thereby othering youth from ERM backgrounds).**

Additionally, the proposal states:

- "The proposed project would support the investigative team's efforts to develop two additional modes of delivering the Identity Project training program and to pilot test and further **refine all three modes of delivery in preparation for a future full-scale efficacy trial.**"

I agree with you that it's "Better to have a credible assessment of a popular approach than to not check it out." However, I'm concerned about two things:

1) The Harvard study goes beyond merely a "self-esteem program," as you put it. It explicitly states that it seeks to undermine "a color-blind approach" and reaffirm students' racial identities; that it "evolved from revolutionary models of culturally relevant pedagogy"; and it includes numerous fundamentally political (rather than scientific) questions/ideas/references: "white privilege" (as something distinct from privilege based on wealth, education, etc.), "reifying the notion that Whites do not have an ethnic-racial identity and therefore are the "norm," thereby othering youth from ERM backgrounds," etc.

   These are clearly "hot" political topics that half the country and the current administration would object to. Should ED really be allocating taxpayer funding to "research" that is more political than scientific in nature, when half the taxpayers oppose that political view?

2) Just as you mentioned regarding the ASU study, there is a potential for a PR disaster here – regarding both the controversial content of Harvard's proposal and it's admission that the proposal seeks to "refine all three modes of delivery [of the controversial content] in preparation for a future full-scale efficacy trial." This seems to be exactly the sort of thing the President criticized our educational system for in his July 4th address.

Thanks,

[redacted]

PS. Regarding your other inquiry on this topic, the following 4 links may be helpful (and I'm sure you'll find the first 2 humorous):

How the political influence on scientific fields of study is eroding the scientific method:

1) https://www.thecollegefix.com/men-behind-conceptual-penis-hoax-say-academe-trades-respectability-ideological-crusades/
2) https://www.thecollegefix.com/from-sexist-potatoes-to-rape-culture-at-dog-parks-the-story-behind-the-hoax-against-academic-journals/

3) Bret Weinstein's testimony to the House in 2018 (also attached): https://web.archive.org/web/20181223205821/https://oversight.house.gov/wp-content/uploads/2018/05/TestimonyOfBretWeinstein5-22-18.pdf

4) Bret Weinstein's take on the recent #ShutDownSTEM:
https://www.thecollegefix.com/scientist-chased-out-of-evergreen-state-thumbs-nose-at-shutdownstem-day-with-live-podcast/

From: [redacted]
Sent: Thursday, August 6, 2020 9:40 AM
To: [redacted]
Subject: RE: Harvard - R305A200278

Hi [redacted]

I concur with your determination that the proposed study includes covered research and needs IRB approval. If you haven't already done so, please prepare a contact email requesting the materials needed for ED to clear the study. The email should note that the application indicated that the PI would be headed to the IRB and ask whether that IRB approval/determination is now available. If not now available, ...

Best regards,
[redacted]

PS There is a long history of "feel good" research fads in education that come and go. They are often easy to critique and mock, even when there is something real at their core. Someone (possibly Sec of Education Bill Bennett) used to complain about the student "self-esteem" programs, claiming something to the effect that the US has the students with the highest self-esteem in the world, and "among the worst" educational achievement. Interventions to build students' self-identity can be highly vulnerable to criticism, even if they improve teaching and learning.

That said, there is substantial and growing evidence that teachers and their attitudes matter. (cf Jaime Escalante as portrayed in the "Stand and Deliver" movie. He was portrayed as a stand alone hero when in fact he was part of a network of motivated reformers and a sustained multiyear effort that achieved remarkable improvements in the achievement of mostly low income, Hispanic (now "LatinX") students. Teachers—and the systems of formation and support around them—matter.

There is substantial data on the impacts of effective teachers. There is substantial and growing data on the impact of teachers as role models (including the importance of having at least some teachers "who look like me"). There is substantial evidence of the positive (or negative) impacts that teachers' use of stereotypes (eg gender, racial, religious ...) (including the "microaggressions" literature) can have on how students score on high stakes standardized tests, college enrollment, career aspirations, and so on.

Mark Twain quipped that Wagner's music "is better than it sounds". Good reason for a "trust but verify" perspective on interventions such as this, but well worth checking to see "what works". The stakes for students and the nation are high. Education research finds that many educational interventions have little or no impact—and a fair number have iatrogenic impacts. Better to have a credible assessment of a popular approach than to not check it out.

Best regards,
[redacted]

From: [redacted]
Sent: Wednesday, August 5, 2020 12:43 PM
To: [redacted]
Subject: Harvard - R305A200278

Hi [redacted]

[redacted]

From: [redacted]
Sent: Tuesday, September 15, 2020 8:03 AM
To: [redacted]
Cc: [redacted]
Subject: RE: Progress update - [redacted]

Importance: High

Hi [redacted],

Thanks for forwarding the progress update on your work. With regards to moving forward on the HSR reviews, I have concerns with your understanding of what I conveyed to you with regard to your role as a Pathways Intern on the GPTD Team.

In our meeting yesterday, I specifically indicated the following facts:

1. In your position as a Pathways Intern you are learning at a moderate progressive pace supported by GPTD's Senior Analysts to review grant applications referred for 34 CFR 97, Common Rule for the Protection of Human Subjects in Research (Common Rule) applicability.
2. The assertions that you have provided regarding the grant applications listed in your message below are your opinions.
3. Grant application funding decisions are specifically delegated to the Assistant Secretary/equivalent and/or designee, and GPTD does NOT engage in or make such decisions.
4. Authority to make funding decisions regarding grant applications in this regard is NOT delegated to you and you do not have authority to make such decisions.
5. The GPTD does not have authority to make funding decisions in this regard, nor are we engaged in the process to do so.
6. The GPTD does not make assertions regarding who should be funded; provide application analysis outside common rule applicability, or legal interpretation as described in your email.
7. All Department of Education's legal opinions are established by the Office of General Counsel and staff working in that office. Therefore, your proposed legal interpretation is not applicable.
8. Your position is developmental and calls for an understanding of both individual staff as well as office roles, responsibilities, and delegated authorities.

Based on the above facts your opinion in this regard does not apply. Additionally, in your official capacity of Pathways Intern any analysis and/or legal interpretation of an applicant's proposal is out of scope for your work in relation to the HSR review process. Your reference below to "similar problems in future" coupled with your continued assertions related to applicant proposals and funding decisions in your "To wrap-up the Harvard grant" remains out of scope and leads me to concerns regarding your willingness to follow instructions and make constructive contributions to the specific work of the GPTD Team. Previously I directed you to stand down on this matter. I am, once again, directing you to stand down as your message below is out of scope. Your conduct as outlined in this message is unacceptable.

At the Department, it has been my experience that leadership and staff are knowledgeable and devoted to the mission to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access. Your position provides a great opportunity to learn and make meaningful contributions to the work that we do in GPTD. Directing your focus on the ED's Common Rule policy and related assignments with an open mind; allowing yourself the patience to learn our processes; and maintaining

respect for the staff that are mentoring/teaching you and the leadership that is in place to make decisions will lend for more effective engagement with colleagues and collaboration efforts with staff across the Department. I encourage you to work with myself and the GPTD staff to continue learning the HSR review process and make meaningful contributions to the team. I will set up a meeting for Friday so we can discuss any questions you have regarding this message.

[redacted]

[redacted] *Director*
Grants Policy and Training Division
Office of Acquisition and Grants Administration
Office of Finance and Operations
U.S. Department of Education
[redacted]

Checkout the updated GrantsMAT, now including both the Formula and Discretionary sites!

Stay up-to-date on Department-wide grants administrative policy, guidance, & training by joining the *"Grant Connections Listerv"*
How to subscribe to the listserv? Address email to: listserv@listserv.ed.gov and write in the email message's body: subscribe Grant-Connection your name (For example: subscribe Grant-Connection [redacted] –**NOTE**: Listserv is internal to ED only. DON'T include any additional text in the email, such as your office, phone number, &/or automatic email signature or the listserv may not be able to understand your request.

From: [redacted]
Sent: Monday, September 14, 2020 10:50 AM
To: [redacted]
Cc: [redacted]
Subject: FW: Progress update - [redacted]

Hi [redacted],

Per our discussion this morning, please find the progress report that I emailed to [redacted] last Friday copied below. I have not yet had a chance to discuss my projects with [redacted].

One of the items on the list below is the Fort Wayne grant. There are two categories of questions that I asked [redacted] for answers on:

1) Questions relating to HSR determinations for magnet school grants in general; and
2) Questions relating to problems unique to the Fort Wayne grant. These problems are similar to those previously identified for the Harvard grant.

Per our discussion, I now understand that the second category of questions is out of scope for us at GPTD. I will no longer mention similar problems in future, if I notice them when reading future grant applications.

To wrap-up the Harvard grant:

I appreciate your feedback on the Harvard email. I understand how some people may read it as merely expressing an opinion; however, I disagree. I have never expressed my own politics or opinion at work, and I will never do so. I am

simply viewing an issue from multiple perspectives, asking questions, and requesting guidance – all in a nonpartisan manner.

Because I have not yet passed the bar exam, I cannot give a "legal opinion"; however, as a second-year law student, I can offer an analysis that is "legally-informed," and suggest that we ask OGC for guidance.

As I wrote in the Harvard email, "4) The proposal almost certainly falls within the broad language of the OMB memo, in which case ED must 'identify all available avenues within the law to cancel ... and/or to divert Federal dollars away from' it."

To elaborate, if you read Harvard's grant application (not just the abstract), you will find the following (starting on page 57): The proposal includes "training" for teachers that "reduces their colorblind racial ideology" and utilizes controversial ideological/political concepts, including white privilege.

From a legal perspective and a plain reading of the OMB memo, which explicitly mentions "training" and "white privilege," the Harvard proposal clearly falls within that memo. This is why I believed OGC should be asked for guidance. Nowhere in this analysis have I stated my opinion; there is only legal interpretation and asking questions.

To wrap-up the Fort Wayne grant:

Magnet school grants are governed by 34 CFR 280. The regulation mentions "equity" only twice:

- 280.1(f): "Ensuring that all students enrolled in the magnet school programs have equitable access to high quality education"; and
- 280.20(b)(7): "Will give students residing in the local attendance area of the proposed magnet school program equitable consideration for placement in the program, consistent with desegregation guidelines and the capacity of the applicant to accommodate students."

The regulation's mention of "equitable access" and "equitable consideration for placement" likely mean "equal access" or "equality of opportunity," not "equity" as it has recently been interpreted to mean "equality of outcome."

The Fort Wayne proposal explicitly seeks to achieve "equity" in the sense of "equality of outcome" across categories of gender/race/ etc. via its proposed STEAM program and its racial quota system for admissions (one random lottery for African American applicants, and a separate random lottery for all other applicants). This is legally questionable, as it may not entirely comply with 34 CFR 280, court precedent in this area of law, and/or the current administration's publicly-stated position. This is why I believed OGC should be asked for guidance. Nowhere in this analysis have I stated my opinion; there is only legal interpretation and asking questions.

--[redacted]

From: [redacted]
Sent: Friday, September 11, 2020 12:03 PM
To: [redacted]
Subject: Progress update - [redacted]

Hi[redacted],

I've updated the GPTD_work FY20 document on the sharepoint for the projects I'm included on. Below is a summary:

- ACS documents (intra- and extra-mural):
  - I emailed final versions to you last week for your review.

- Changes for the HSR website:
  - I emailed a final list of changes to you for your review.
- SOP for HSR document:
  - I incorporated some of your comments into the draft, after which [redacted] added some comments herself. She wants this completed before Sept 30. I'm not sure what else I can do with it. Can you look at her comments?
- OMB memo and Harvard:
  - [redacted] directed us to not do anything further.
- Grants currently assigned to [redacted] for HSR clearance (12 minus 1, so 11 total):
  - I emailed two non-magnet school grants to you two weeks ago for review.
  - I emailed two magnet school grants to you two weeks ago for review, along with a request for guidance. [redacted] was copied on that, and her reply is below. It is a little helpful, but I'd appreciate your opinion on it. The original question is copied below:

    Regarding two of the magnet school grants (U165A170043 - DeSotoa ISD; and U165A170044 - IDEA Public Schools), I do not see where there could be covered & nonexempt HSR. They are simply proposing to start new magnet/publicly funded charter schools (and also, for one of them, revise existing magnet schools). As the applications state, these kinds of schools have been around long enough and in enough variations that their establishment would generally fall within Exemption 1 (Normal Educational Practice), unless they proposed a "new" type of magnet school – assuming there is any covered HSR at all, which I'm not convinced of, unless the simply act of "establishing a school that children attend" counts as covered HSR. Am I missing something?

  - The remaining seven are for K-to-12 magnet/charter school establishment. I have work records for them already, but I have not yet emailed them to you, because I'm waiting for your review for the first two magnet school grants. I am really not sure about these magnet school grants. There are some interesting HSR questions that apply to all of them, but there are additional problems that apply to only a few of them.

  - One problematic grant is described below (summarized from the work record I have not yet sent you, for U165A180062). I don't mean to "beat a dead horse," but I really would like a real answer from somebody...

    Fort Wayne Public Schools' proposal includes establishing five new magnet schools. One of them will have a STEM theme, while the other four will have a STEAM theme. According to the grant application, STEAM is STEM plus "Arts" for the A; also according to them, the "Arts" is supposed to add "equity" to STEM across all sorts of intersectional lines (gender, race, etc.).

    I am concerned about this; it seems to me that the grantee intends to add an ideological/political/partisan dimension to the teaching of STEM, and seeks to achieve "equity" meaning "equality of outcome" across several intersectional categories (gender, race, etc.), rather than creating a level playing field where each individual student can succeed or fail to the best of his/her own individual ability. Why is aiming for equity/equality of outcome rather than equality of opportunity necessary or desirable? What was wrong with plain old STEM? Am I the only one who recognizes that there is a political aspect to this, that all this politically-correct terminology (e.g. "equity") is itself political, and not simply nonpartisan/bipartisan science?

    According to Fort Wayne Public Schools' proposal, "If the number of applicants for a magnet program exceeds capacity at a chosen school, FWCS will employ random lottery system to assign youth to selected schools."

    "1. Lottery applicants have been arranged in a student number sequence which will produce three separate listings for lottery selection. A Random Number Assignment Program will then assign three random numbers to each applicant according to ethnicity and priority groups.
    2. Applicants are initially divided into two ethnic groups for lottery processing: majority and minority groups. Majority groups include all ethnicities except African American.

3. After random number assignments are completed, each applicant has been placed in one of the priority groups in the order shown on the next page. Three separate listings for lottery selection have been run arranging students in various sequence based on the assigned random number within each priority group.
4. Prior to conducting the lottery, the number of openings in each oversubscribed grade level has been determined by space availability. When the lottery is conducted, an audience participant will choose one of the three listings for each ethnic group. The number of openings, at this time, is the cutoff point on the listing; those above the cutoff will be enrolled, and the students below the cutoff point are on the waiting list."

The proposal states their lottery system is "random," but it is clearly not random, because the randomization only occurs after applicants are divided into two groups of "African American" and "everyone else" – which is the definition of a quota system based on race. This is clearly an inherently political decision, similar to how the focus on "equity" above is also a political decision. I understand that this particular school district had integration problems in the past, but even so (perhaps especially so), this is exactly why a political appointee should be making the decisions here, not us.

The issue here is the same as the issue in the Harvard proposal: us career employees (you, me, IES, etc.) are all making political decisions that we are not supposed to make. Can we please ask OGC and/or a political appointee for guidance? Or, at the very least, can we ask [redacted] to bring this up with Phillip?

Thanks,

[redacted]

From: [redacted]
Sent: Sunday, August 30, 2020 10:34 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Request for IRB approval: IDEA Public Schools- U165A170044

Hello,
Below I requested an IRB approval for IDEA to include the new Magnet school starting in the Austin area. IDEA has a proliferation of Magnet program in TEXAS an I deliberated weather to request an approval however given that this was a new program I felt it needed its' own review.

I did not review the [redacted] proposal.
[redacted]

From: [redacted]
Sent: Tuesday, August 25, 2020 2:14 AM
To: [redacted]
Subject: FW: Request for IRB approval: IDEA Public Schools- U165A170044

FYI- original had misspelled email address.

From: [redacted]
Sent: Tuesday, August 25, 2020 2:12 AM
To: [redacted]

Cc: [redacted]
Subject: Request for IRB approval: IDEA Public Schools- U165A170044

The U.S. Department of Education (ED) has determined that the activities under this grant include nonexempt human subjects research. (34 CFR 97) These include focus groups, use of student records for research purposes, student interviews, classroom observations, interview teachers and class level descriptions to assess fidelity of implementation. Under the regulation, the Federal funding agency has final say as to the whether its funded research is exempt. Institutional Review Board (IRB) approval of the research as nonexempt human subjects research is necessary to complete ED protection of human subjects clearance for the proposed research. The evaluation strives to bolster the current body of research with instrumentation and analytics methodology aligned directly with the priorities and selection criteria of the Magnet Schools Assistance Program (MSAP), and is intended to contribute to the evidence-based database on magnet schools.

The purpose of this e-mail is to ask that IDEA Public Schools provide IRB approval for engagement in the proposed research by September 25, 20202. If that timeline is not practical given the study specifics, please contact me to provide information on when you expect to be able to provide IRB approval for research under this grant

No covered human subjects research can be conducted under this grant until it has ED protection of human subjects clearance.

The research presents minimal risk.

Thank you and let me know if you have any questions. For additional information this link will be helpful.
https://www2.ed.gov/rms-training/human-subjects-research/story.html

[redacted]
Grants Policy Analyst
Office of Acquisition and Grants Administration
Office of Financial Operations

[redacted]

From: [redacted]
Sent: Monday, January 11, 2021 12:19 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Fort Wayne Magnets et al.

Hi [redacted],

This is an excellent analysis and email – thank you!

I agree with you regarding "tactics." The reasons I included other topics (e.g. historical non-compliance with 34 CFR 97) in the "Background" and "Description of HSR team's Duties" sections were:

- OGC probably lacks understanding of what we do **& how we do it**, and without proper context, OGC probably cannot adequately "apply the law to the facts" to give us practical, **actionable** legal advice – which is what we need.
- I want to avoid anyone "shooting the messenger" (in this case, us). It's clear to me that **the root problem is Program Offices occasionally making illegal funding decisions** (e.g. the Harvard and Fort Wayne grants), then sending us those "bad" grants – which we then probably have a **mandatory** obligation to report (clarification on this obligation is the primary purpose of the email). **We do not make funding decisions**, so it's clearly **not our fault** that some grants with illegalities get funded.

I agree it **may** be better to narrow the issues we ask OGC about. (Personally, I prefer "laying it all out" so OGC has a complete picture and can give us the best, most actionable advice possible – but **I think "tactical" decisions should be left to [redacted] discretion.** I am restricting my views to what is likely legal/illegal, subject to an official "second-opinion" by OGC.)

Regarding the substance of your email, I agree you make good points, [redacted]. However, it's important to note that **none of the excellent points you made in any way contradict the primary legal argument I made**: that Fort Wayne's admissions policy **explicitly** separates applicants based on race (African American in one "bucket" and everyone else in a separate "bucket"), which necessitates application of the "Strict Scrutiny" standard, regardless of any good reasons for separating based on race. **The law is clear on this point**, which is why I cited Grutter (2003) and Fisher (2013).

The legitimate points you made are basically arguments that "Fort Wayne's admissions policy does separate applicants based on race, yes, but there are some really good reasons for doing this, so it should be allowed." The problem is that similar arguments have been made in the past, and **current** Supreme Court precedent is clear, **regardless of what you or I may think of the wisdom of that precedent** (copying from the draft email):

"The U.S. Supreme Court stated that all admissions policies that use race as a factor are subject to the strict scrutiny standard, and for a racial admissions plan (e.g. affirmative action) to be constitutional, the plan must be narrowly tailored. The Court defined "narrowly tailored" by saying a school may consider race or ethnicity only as a "'plus' [factor] in a particular applicant's file," and **a school cannot establish quotas for members of certain racial or ethnic groups or put them on separate admissions tracks**."

It is entirely possible that your arguments may "win the day" by allowing Fort Wayne's admissions policy to "survive" the Strict Scrutiny standard. However, **that is a matter for OGC to consider and decide, not for us.**

(Although, **in my opinion**, I think surviving Strict Scrutiny here is unlikely. This is why I mentioned the [redacted] grant before the Fort Wayne grant; [redacted] application cited several Supreme Court decisions and explicitly stated it **only**

uses race as a "plus factor," consistent with current law. Fort Wayne, however, does **not** mention **ANY** Supreme Court precedent.)

(Furthermore, it does not matter that Fort Wayne **calls** its admissions policy "race-neutral"; separating applicants based on race necessitates the Strict Scrutiny standard. Fort Wayne is misusing the term "race-neutral," since it's admissions policy is more accurately described as "race-controlled" (per your reference to a randomized clinical/control trial, RCT, used for research purposes). There **may** in fact already be legal precedent stating that "an RCT for research purposes in a school setting is an exception to Grutter's holding and/or enables survival of Strict Scrutiny" – **but if that precedent exists, I am unaware of it.** If it exists, I'm sure OGC will find it.)

Additionally, there were other legal questions about Fort Wayne (e.g. the equity v. equality distinction) that I believe OGC needs to consider.

Thanks,

[redacted]

From: [redacted]
Sent: Monday, January 11, 2021 10:58 AM
To: [redacted]
Cc: [redacted]
Subject: Fort Wayne Magnets et al.

Hi [redacted]

Thank you for sharing a copy of your discussion draft of your possible note to OGC.

First, it covers several important but diverse topics. That surfaces the matter of strategy and tactics—including timing. The diverse topics may involve different OGC staff and some are only indirectly related to the others. The topics include alleged ED failures to staff and enforce 34 CFR 97 implementation, allegations of possible ED massive noncompliance, coverage of professional activities of lawyers, and so on. It can be argued either way. These can be rolled into a single communication (e.g. as in the current draft), or handled separately. Sometimes it is hard to know which approach is best in a context. As one experienced parent advised a new parent on key issues in child-raising, "Pick your battles".

It is important to be precise on details. For example, while there have been long periods when I was the only staffer implementing 34 CFR 97, there have also been periods when an additional staffer, or even two or three provided support—usually with multiple other tasks, some staffers with low "productivity". The situation has been much better since the function was moved to GPTD (although it sounds like the office may be drawing heat regarding the number of staff now providing 34 CFR 97 support on at least a part time basis)

And so on.

Turning to the "Fort Wayne Magnet Schools" grant, I know too little of the legal issues here to have a view on any legal issues that may be involved.

Some SCOTUS decisions such as the 2007 litigation involving admissions policies to "oversubscribed" schools in Seattle and Jefferson County suggest there may be problems. Other cases involving IHE admissions suggest that there can be a compelling state interest involved to warrant inclusion of race as one element in a tailored approach to school admissions.

Indeed, recent national events suggest that national interests for reduced segregation and real educational opportunity are vital to the nation's future.

At this time, Sandra Day O'Connor's timeline expectations for a "post-racial" society and implications for school admissions, etc. appear a tad over-optimistic.

The legal precedents continue to evolve, often along complex paths. SCOTUS decisions in Amistad, Dred Scott, Plessy, Brown, U of Tx etc. mark evolving SCOTUS readings and social realities on these and related issues. That is, the legal context for this grant is complex and evolving.

In the Fort Wayne Magnet Schools situation, the schools are open to all students, the funded application states that there are broad outreach activities for all segments of the community, etc.

For the subset of magnet schools that have more students apply than can be admitted, all students are included in an admissions lottery for those schools (and those students can if they choose attend other public, charter or private schools). **Such lotteries are widely used in education, e.g. in determining admissions to popular charter schools.**

That does raise the matter of the randomized lottery being used to inform the allocation of students to each oversubscribed magnet school.

From the project evaluation perspective ("Does this stuff work?") such randomization is highly valuable. While the randomization is exogenous to the research, it effectively creates a randomized controlled study. This design is extremely valuable. It allows statistically unbiased estimates of program effects. (E.g. much of the work on the educational effectiveness of charter schools relies on such randomizations of admissions.) Again, from the research methodology perspective, the dichotomization of the applicant pool is akin to stratification in research sampling because it helps ensure adequate statistical power in the sample to assess research evaluation issues (e.g. "Do programs like this work for all

students?") Without the randomization, credible evaluation is far more complex or impossible.

At the initial level, applicants are dichotomized into "African-American/Other". Since these magnet schools appear to have predominantly African-American enrollments, this appears to have the largest impact on ensuring access to magnet school admissions for "Other" students .

In this context, the result is that it helps provide equal opportunity for the "Other" students.

Note that this lottery is part of a broader more diversified effort to provide equal opportunity, e.g. the application states: *" Where needs are identified, such as the need for more female participants in STEM subjects and programs, the district will reach out to partners who are equipped with STEM curricula and programming".* The application also notes: *"Black student enrollment has increased as white student enrollment has decreased because o "white flight" to private schools, parochial, charters or other areas outside of the district."* Marketing and recruitment for magnet school enrollment is emphasized: *"Initiate and sustain a rigorous marketing and recruitmentstrategy that reaches students and families from all geographic locations / neighborhoods and from all socio-economic groups to inform constituents of magnet school options and the application procedures that determine entry into magnet schools, Marketing and recruitment for magnet school enrollment is emphasized:..." "Based on capacity, all applicants gain admission unless applications exceed school and/or grade level space. If applications exceed capacity, a random lottery system will determine placement."* And so on.

The application lists project goals as including:

- **GOAL 1: Increase racial and socio-economic diversity in segregated schools.**
- **Objective 1:** Magnet schools will reduce and prevent black student isolation in FWCS schools.
- **GOAL 2: Increase academic performance in underserved schools.**
- **Objective 2:** Magnet schools will provide challenging academic programs to all students.
- **Objective 3:** Magnet schools will promote systemic reform aligned with Indiana content standards.
- **GOAL 3: Create and sustain magnet schools that expand academic choices for students.**
- **Objective 4:** Magnet schools will increase diversity of academic options for students and families. *SEEK* programs will strengthen the diversity of our student populations and offer enrollment Opportunities

In sum, methodologically and as "compelling national interest", the approach in this ED-funded grant seems fully warranted. Current policy and legal determinations could, it appears to this layman, go either way on the concerns that you raise regarding the dichotimization of the randomized selection process.

There appear to be compelling national interests --as well as compelling interest in individual's opportunity-to-learn --for ED's selection and funding of this project. Add to this a "compelling methodological interest" for ED and the nation in identifying the ability of magnet programs to reduce racial segregation in schooling and to enhance (e.g. "What works?").

Best regards,

[redacted]

PS The funded application includes the following description of the grantee's admissions lottery:

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1. ***Step 4 – Lottery:*** *Utilize race-neutral lottery system to select students for enrollment in programs for which applicants exceed program capacity (school or grade level capacity). The following is a description of the lottery process and its role in the selection of students for enrollment in grade levels pre-kindergarten through twelve determined to be oversubscribed, meaning more applicants, than space available.*
   1. *Lottery applicants have been arranged in a student number sequence which will produce three separate listings for lottery selection. A Random Number Assignment Program will then assign three random numbers to each applicant according to ethnicity and priority groups.*
   2. *Applicants are initially divided into two ethnic groups for lottery processing: majority and minority groups. Majority groups include all ethnicities except African American.*
   3. *After random number assignments are completed, each applicant has been placed in one of the priority groups in the order shown on the next page. Three separate listings for lottery selection have been run arranging students in various sequence based on the assigned random number within each priority group.*
   4. *Prior to conducting the lottery, the number of openings in each oversubscribed grade level has been determined by space availability. When the lottery is conducted, an audience participant will choose one of the three listings for each ethnic group. The number of openings, at this time, is the cutoff point on the listing; those above the cutoff will be enrolled, and the students below the cutoff point are on the waiting list.*
   5. *During the announcement part of the lottery, it is only announced whether there is a lottery for each grade level, a waiting list, and so forth. Should a parent desire to know their child's application status, they would remain in the board room after the completion of the lottery and FWCS gladly answers any questions.*

Priority will be given to students from the following groups to ensure equal access and achievement of enrollment goals (see Project Design section for school enrollment projections):

1. *Students will be selected for admission into magnet schools (free / reduced lunch status as classification criteria) based on target enrollment balances for each participating school.*
2. *Applicant students with a sibling already enrolled in selected elementary school (all students who apply for placement in an elementary magnet school with a sibling enrolled in chosen school will be granted placement to promote family continuity and engagement).*
3. *Continuity of enrollment in theme-based Learning Pathways (for example, youth attending elementary STEM programs will be given priority placement in STEM middle programs).*

Fort Wayne Community Schools will manage and implement a MSAP grant program that offers high quality education programs to all students, regardless of race, color, religion, ethnicity, sexual orientation or national origin. Placement of students in magnet schools based on race-neutral procedures will ensure district compliance with all U.S. Department of Education regulations and Title VI of the Civil Rights Act of 1964 and its regulations while allowing FWCS to promote socio-economic diversity. Students from all socio-economic backgrounds and geographic areas of the district will be encouraged to apply to and will be selected to participate in magnets based on race-neutral procedures. Students and families will be supported in their efforts to make strong educational choices that provide Fort Wayne youth with opportunities to pursue excellent elementary, middle and high school educations. Diversity will allow students to grow in learning environments that reflect the demographic composition of school communities and beyond

The ED website includes the following description of the program:

About MSAP

The Magnet Schools Assistance program provides grants to eligible local educational agencies to establish and operate magnet schools that are operated under a court-ordered or federally approved voluntary desegregation plan. These grants assist in the desegregation of public schools by supporting the elimination, reduction, and prevention of minority group isolation in elementary and secondary schools with substantial numbers of minority group students. In order to meet the statutory purposes of the program, projects also must support the development and implementation of magnet schools that assist in the achievement of systemic reforms and provide all students with the opportunity to meet challenging academic content and student academic achievement standards.

Projects support the development and design of innovative education methods and practices that promote diversity and increase choices in public education programs. The program supports capacity development–the ability of a school to help all its students meet more challenging standards–through professional development and other activities that will enable the continued operation of the magnet schools at a high performance level after funding ends. Finally, the program supports the implementation of courses of instruction in magnet schools that strengthen students' knowledge of academic subjects and their grasp of tangible and marketable vocational skills.

The statute defines a magnet school as a public elementary school, public secondary school, public elementary education center, or public secondary education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds.

MSAP Regulations in 34 CFR 280

Types of Projects

Magnet schools offer a wide range of distinctive education programs. Some emphasize academic subjects such as math, science, technology, language immersion, visual and performing arts, or humanities. Others use specific instructional approaches, such as Montessori methods, or approaches found in international baccalaureate programs or early college programs. For more examples, see our past Awards.

[redacted].

From: [redacted]
Sent: Friday, January 8, 2021 2:43 PM
To: [redacted]
Cc: [redacted]
Subject: Draft questions for OGC - comments requested

Hi [redacted],

[redacted] asked me for an email she could forward to OGC. I'd appreciate comments on the following draft email, since it relates to the HSR Team's duties.

Thus far, I simply summarized the issues and listed some questions for OGC. If either of you think it wise, I could also include draft ACS and SOP edits for OGC review.

Thanks,

[redacted]

Hi [redacted],

Per your request, please find below a list of questions you can forward to OGC. Some questions apply to the entire HSR team and/or GPTD, while others apply only to me personally. I believe all these questions require OGC's input.

As always, standard disclaimer: I am simply a second-year law student, not a lawyer. This is not legal advice. I am always in favor of asking OGC for an actual legal opinion.

Thanks,

[redacted]

Necessary Background:

In 1991, fifteen Federal Departments and Agencies, including the Department of Education (ED), adopted a common set of regulations known as the Federal Policy for the Protection of Human Subjects or "Common Rule." Twenty Federal agencies have currently adopted the regulation. ED's version, codified at 34 CFR 97, includes two subparts: Subpart A, Basic Policy (a.k.a. the Common Rule), and Subpart D, Additional Protections for Children.

Per the regulation, all grants **and contracts** funded by ED that may include research covered by the Common Rule must receive Protection of Human Subjects in Research (HSR) clearance before any research covered by the Common Rule can commence.

However, since 1991, ED has historically allocated insufficient resources for implementation of this regulation. Until just recently, only a single staffer ([redacted], ED's Human Subjects Coordinator) implemented this regulation at ED. Due to insufficient staffing, most grants and nearly all contracts did not receive HSR clearance, meaning ED has historically not been in compliance with the regulation. This likely implies a significant risk of legal liability.

Currently, HSR staffing has expanded from one to four ([redacted], [redacted], [redacted], and [redacted]). This "HSR Team" currently reviews some grants from ED's program offices. However, ED currently remains out of compliance with the regulation because many grants and nearly all contracts still do not receive HSR clearance for various reasons, primarily because they are not referred to the HSR Team by the Program Offices.

The HSR team is currently within the Grants Policy and Training Division (GPTD) managed by [redacted] (GPTD Director), within the Office of Acquisition and Grants Administration (OAGA) managed by Phillip Juengst (DAS). There are currently two ACS Directives that address Human Subjects:

- Extramural Directive: https://connected.ed.gov/Documents/Protection%20of%20Human%20Subjects%20in%20Research%20Extramural%20Research.pdf
- Intramural Directive: https://connected.ed.gov/Documents/Protection%20of%20Human%20Subjects%20in%20Research%20Intramural%20Research.pdf

Currently, there are no written Standard Operating Procedures (SOP) for the HSR Team. The Team has been working on several draft SOP for the past few months and hopes to finalize a document soon.

Editing the ACS directives and drafting the SOP were/are assigned to Patrick, and OGC's input on the following questions is necessary.

Abbreviated Description of the HSR Team's Duties:

The HSR Team has one primary, two-part job:

1. To read a grant application (after a Program Office has already decided to fund that particular grant, then referred the grant application to the HSR Team for HSR clearance under 34 CFR 97), then
2. Based on various sections of that grant application, make an HSR determination of "not covered by the regulation," "covered but entirely exempt by the regulation," or "covered and nonexempt" – to keep ED in compliance with 34 CFR 97.

However, because the HSR Team reads some or all of a grant application, we occasionally notice some illegalities in a grant application, illegalities not related to 34 CFR 97. We are not actively looking for illegalities, we simply stumble upon them while performing our primary duty of reading grant applications.

As [redacted] has stated, GPTD (of which the HSR team is a sub-group) does **not** currently make funding decisions. A grant application is referred to the HSR Team by the Program Offices after those offices have already chosen to fund that particular grant (or, in principle but not yet in practice, that particular contract).

It is not the fault of the HSR Team/GPTD that some grant applications contain illegalities; that is obviously the fault of the program offices who make the funding decisions. Because of their mistakes in choosing to fund grant proposals containing illegalities, the HSR Team and the GPTD Director are put between a rock and a hard place. The following grant (U165A180062 for Fort Wayne Community Schools) is one example of our dilemma.

Example: the Fort Wayne grant

This grant was one of a "batch" of magnet school grants (governed by 34 CFR 280) referred to the HSR team for HSR clearance under 34 CFR 97. Part of this "batch," including the [redacted] and Fort Wayne grants, was assigned to [redacted] for reading then making HSR determinations.

[redacted] is a second-year law student, currently working as a Pathways Intern for the HSR Team. His primarily job is the same as that of [redacted], [redacted], and [redacted]: reading grant applications to make HSR determinations. He plans to join the DC bar exam in summer of 2022, then continue on with the HSR Team, in a full-time status rather than the current part-time status.

[redacted] reviewed the [redacted] grant application then made an HSR determination. He did not notice any irregularities. [redacted] application followed the law, did not use a racial quota system, and even quoted Supreme Court precedent to justify its admissions policy.

[redacted] next reviewed the Fort Wayne grant. He noticed the following irregularities:

1. Fort Wayne's Admissions Policy

Fort Wayne's application states about its admissions process, on page 39: "Applicants are **initially** divided into two ethnic groups for lottery processing: majority and minority groups. Majority groups include all ethnicities except African American" (emphasis added). The application further makes clear that there are two separate lotteries running simultaneously, which it labels a "race-neutral lottery system."

The applicable rule was articulated in Grutter v. Bollinger (2003). There, the U.S. Supreme Court stated that all admissions policies that use race as a factor are subject to the strict scrutiny standard, and for a racial admissions plan (e.g. affirmative action) to be constitutional, the plan must be narrowly tailored. The Court defined "narrowly tailored" by saying a school may consider race or ethnicity only as a "'plus' [factor] in a particular applicant's file," and **a school cannot establish quotas for members of certain racial or ethnic groups or put them on separate admissions tracks.** Grutter's holding was reaffirmed in Fisher v. UT Austin (2013).

Although Fort Wayne calls its admissions policy "race-neutral," it is likely that having two separate lotteries running simultaneously, one for African American applicants and one for everyone else, is the exact opposite of "race-neutral," instead being an unconstitutional racial quota system banned by Grutter (note: this is not legal advice; we should ask OGC for a legal opinion).

Fort Wayne likely has this admissions policy because it relied on a consent decree from 1990 then that decree was invalidated (at least in part) by Grutter in 2003, but Fort Wayne failed to update/change its admissions policies to reflect Grutter's holding. See, grant application, page 20: "The Court entered a consent decree in 1990, approving a settlement in which FWCS "agreed to and has racially balanced all FWCS elementary schools within a range of 10%-50% black enrollment." The settlement provided for the option of magnet schools and other programs to improve education for at-risk students. Since that time, Fort Wayne has opened nine magnet schools and programs and kept them viable for more than a quarter of a century."

Additionally, if Fort Wayne's admissions policy is indeed unconstitutional, funding this particular grant (absent revisions to the application) would run contrary to our current administration's position on this issue, as articulated by Secretary DeVoss and evidenced by the DOJ's ongoing lawsuit against Yale for its allegedly unconstitutional admissions policy.

2. The Application's Focus on "Equity"

The Fort Wayne application explicitly seeks to achieve "equity" in the sense of "equality of outcome" across categories of gender/race/etc. via its proposed STEAM program and across the category of race via its admissions policy. Reaching that goal of "equality of outcome" likely necessitates treating students differently based upon those categories of gender/race/etc. because every individual person (in this case, every child as a student and/or applicant) is different and unique. If you separate a single group of unique individuals into multiple groups based on a single category (or a few categories) of gender/race/etc., the only way to achieve "equity" between those groups in the "equality of outcome"

sense is by disparate treatment – which is likely unconstitutional and/or otherwise illegal, particularly in a school setting. (See generally, literature on the intricacies of disparate treatment and disparate impact.)

Additionally, magnet school grants are governed by 34 CFR 280, and the regulation mentions "equity" only twice:

- 280.1(f): "Ensuring that all students enrolled in the magnet school programs have **equitable access to high quality education**"; and
- 280.20(b)(7): "Will give **students residing in the local attendance area** of the proposed magnet school program **equitable consideration for placement in the program**, consistent with desegregation guidelines and the capacity of the applicant to accommodate students."

The regulation's mention of "equitable access to ... education" and "equitable consideration for placement" likely mean "equal access" or "equality of opportunity," not "equity" as it has recently been interpreted in popular use (and seems to be how Fort Wayne is using it) to mean "equality of outcome." "Equity" in Fort Wayne's sense is likely the **exact opposite** of what 34 CFR 280 requires.

Finally, the grant application includes a signed "Magnet Schools Assistance Program Assurances" statement, which Fort Wayne's admissions policy likely also violates.

Magnet Schools Assistance Program Assurances

In accordance with section 5305(b)(2) of the ESEA, the applicant hereby assures and certifies that it will—

(A) use grant funds under this part for the purposes specified in section 5301(b);

(B) employ highly qualified teachers in the courses of instruction assisted under this part;

(C) not engage in discrimination based on race, religion, color, national origin, sex, or disability in the hiring, promotion, or assignment of employees of the applicant or other personnel for whom the applicant has any administrative responsibility;

(D) not engage in discrimination based on race, religion, color, national origin, sex, or disability in the assignment of students to schools, or to courses of instruction within the schools, of such applicant, except to carry out the approved plan;

(E) not engage in discrimination based on race, religion, color, national origin, sex, or disability in designing or operating extracurricular activities for students;

(F) carry out a high-quality education program that will encourage greater parental decision-making and involvement; and

(G) give students residing in the local attendance area of the proposed magnet school program equitable consideration for placement in the program, consistent with desegregation guidelines and the capacity of the applicant to accommodate the students.

. . . . . .

If the applicant has an approved desegregation plan, the applicant hereby assures and certifies that it is implementing that desegregation plan as approved.

[redacted] 4/16/17

Signature of Authorized Representative — Date

Questions for OGC relating to the HSR Team/GPTD Director:

1. Is a staffer on the HSR Team (in the above example, Patrick) under any **mandatory** reporting obligations regarding any illegalities in a grant application that he/she may notice when reading an application for purposes of making an HSR determination under 34 CFR 97?
    a. 5 CFR 2635 - https://www.ecfr.gov/cgi-bin/text-idx?SID=cbc4cb852fb57bc6be7b2f1d538b90e5&mc=true&node=sp5.3.2635.a&rgn=div6
    b. ACS document OIG 1-102: "Cooperation with and Reporting to the Office of Inspector General" - https://www2.ed.gov/policy/gen/leg/foia/acsoig1102.pdf
    c. ED OGC's ethics guidance - https://www2.ed.gov/about/offices/list/om/onboard/ethics-training.html
    d. Other legal authorities?
2. If yes to (1), to which entities must the HSR staffer report any illegalities?
    a. His/her supervisor?
    b. OGC?
    c. OIG?
    d. Others?
3. If no to (1), is there anything preventing an HSR staffer from reporting any illegalities (a.k.a. if reporting is not mandatory, is it permissive)?
4. If an HSR staffer reports an illegality to his/her supervisor (e.g. sending an email to [redacted]), does that staffer qualify for protection under any "whistleblower" statutes?
    a. Whistleblower Protection Act - https://www2.ed.gov/about/offices/list/oig/hotlinewbedemployees.html
    b. Others?
5. If [redacted] relays that illegality to her supervisor (Phillip), is she similarly protected?
6. If [redacted] asks OGC for a legal opinion on that illegality, is she protected?
    a. 5 CFR 2635.107 "Ethics Advice" - https://www.ecfr.gov/cgi-bin/text-idx?SID=cbc4cb852fb57bc6be7b2f1d538b90e5&mc=true&node=sp5.3.2635.a&rgn=div6#se5.3.2635_1107
    b. Others?

Questions for OGC relating only to [redacted]

1. Is [redacted], as a second-year law student working with non-lawyers, currently bound by any Rules of Professional Conduct?
    a. Does ED even have a policy on this?
    b. DOJ policy - https://www.justice.gov/file/1147781/download
2. After [redacted] joins the DC bar in summer of 2022 and starts working at ED full-time, probably in a non-legal capacity, will he nonetheless be subject to the DC Rules of Professional Conduct, including any mandatory reporting requirements?
    a. My interpretation, based solely on my Professional Responsibility class, is "yes."
3. If yes to (2), which Rules in particular should Patrick, the HSR Team, and [redacted] be aware of?

[redacted]

From: [redacted]
Sent: Monday, January 25, 2021 2:32 PM
To: [redacted]
Cc: [redacted]
Subject: RE: New Assignment: New Executive Orders Review

Good morning,

I've read through the Executive Orders and my assessment and I concur with [redacted] notes. The points in bold are requirements that I'm not aware are currently in place, although they could be.

For the Executive Order on Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers, ED is required to

- provide evidence-based guidance to assist schools in reopening;
- provide advice to educational institutions regarding distance, blended, and in-person learning; and the promotion of mental health, social-emotional well-being, and communication with parents and families;
- develop **a Safer Schools and Campuses Best Practices Clearinghouse;**
- provide technical assistances to schools and higher ed institutions to ensure high-quality learning
- direct the Department of Education's Assistant Secretary for Civil Rights to deliver a **report as soon as practicable on the disparate impacts of COVID-19 on students**
- coordinate with the Director of the Institute of Education Sciences to **facilitate, consistent with applicable law, the collection of data necessary to fully understand the impact of the COVID-19 pandemic on students and educators,** including data on the status of in-person learning
- **consult with those who have been struggling for months with the enormous challenges the COVID-19 pandemic poses for education**

In addition, Executive Order on Ensuring a Data-Driven Response to COVID-19 and Future High-Consequence Public Health Threats states:
Sec. 2. Enhancing Data Collection and Collaboration Capabilities for High-Consequence Public Health Threats, Such as the COVID-19 Pandemic. (a) The Secretary of Defense, the Attorney General, the Secretary of Commerce, the Secretary of Labor, the Secretary of Health and Human Services (HHS), the Secretary of Education, the Director of the Office of Management and Budget (OMB), the Director of National Intelligence, the Director of the Office of Science and Technology Policy (OSTP), and the Director of the National Science Foundation **shall each promptly designate a senior official to serve as their agency's lead to work on COVID-19- and pandemic-related data issues. This official, in consultation with the COVID-19 Response Coordinator, shall take steps to make data relevant to high-consequence public health threats, such as the COVID-19 pandemic, publicly available and accessible.**

While not directly grants-related, this could mean changes in our work as well. Let me know your thoughts.

[redacted]

From: [redacted]
Sent: Friday, January 22, 2021 9:23 AM
To: [redacted]
Cc: [redacted]
Subject: RE: New Assignment: New Executive Orders Review

Hi [redacted],

I read through all the EOs currently listed on WhiteHouse.gov. **At this moment in time, only 2 EOs appear to be relevant to ED specifically and/or ED grants.**

(However, **some EOs contain additional non-grants-policy things related to department/agency heads generally**, which presumably includes the ED Secretary. Some EOs also instruct OMB to do certain things, including promulgating memos; **once OMB does those things, some may apply to ED.)**

https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-supporting-the-reopening-and-continuing-operation-of-schools-and-early-childhood-education-providers/

1) Executive Order on Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers

^ Instructs ED to do certain things. **Grants are NOT mentioned.**

https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/

2) Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

^ Thanks for emailing me this. **It does revoke EO 13950**, as you mentioned in your other email.

There is one particularly relevant section:

Sec. 2. Definitions. For purposes of this order: (a) The term "equity" means **the consistent and systematic fair, just, and impartial treatment of all individuals**, including individuals who belong to underserved communities that have been denied such treatment, such as ... [lengthy list of minority groups].

^ **Please note that President Biden has defined "equity" as the "impartial treatment of all individuals," meaning "equal treatment" under law.** This definition is consistent with both Supreme Court precedent and MLK's dream of a nation where people "will not be judged by the color of their skin but by the content of their character."

President Biden did NOT define "equity" as "equality of outcome," which is opposed to how Vice President Harris defined it during the campaign, how Fort Wayne defined it in its grant application, and how the "Progressive" and "Democratic Socialist" constituencies of the Democrat party (most notably Representative Ocasio-Cortez) frequently use the term "equity."

It seems to me this EO advances President Biden's more moderate and Constitutional perspective, and implicitly rejects his party's more radical and less Constitutional perspective on "diversity and equity."

--[redacted]

From: [redacted]
Sent: Friday, January 22, 2021 8:27 AM
To: [redacted]
Subject: New Assignment: New Executive Orders Review
Importance: High

Hi [redacted] and [redacted],

Please review the EOs and identify any new impacts on grants administration and policy. Send me your assessments by noon on Monday. Thanks!

[redacted]

From: [redacted]
Sent: Friday, January 22, 2021 8:22 AM
To: [redacted]
Subject: New Executive Orders

Good morning Team,

Please be advised a number of Executive Orders and Presidential Actions were signed yesterday which can be found at the link below.
https://www.whitehouse.gov/briefing-room/presidential-actions/

Thanks!

[redacted]

[redacted], *Director*
Grants Policy and Training Division
Office of Acquisition and Grants Administration
Office of Finance and Operations
U.S. Department of Education
[redacted]

Checkout the updated GrantsMAT, now including both the Formula and Discretionary sites!

Stay up-to-date on Department-wide grants administrative policy, guidance, & training by joining the *"Grant Connections Listerv"*
How to subscribe to the listserv? Address email to: listserv@listserv.ed.gov and write in the email message's body: subscribe Grant-Connection your name (For example: subscribe Grant-Connection [redacted] –**NOTE**: Listserv is internal to ED only. DON'T include any additional text in the email, such as your office, phone number, &/or automatic email signature or the listserv may not be able to understand your request.

[redacted]

From: [redacted]
Sent: Friday, January 22, 2021 8:09 AM
To: [redacted]
Subject: EO 13950 has been revoked - New Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Jan. 20, 2021

Good morning Team,

EO 13950 had been revoked. See link below for "EO on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government" – **Sec. 10**. (Jan. 20, 2021).

https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/

[redacted], *Director*
Grants Policy and Training Division
Office of Acquisition and Grants Administration
Office of Finance and Operations
U.S. Department of Education
[redacted]

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[redacted]

From: [redacted]
Sent: Tuesday, January 26, 2021 2:55 PM
To: [redacted]
Cc: [redacted]
Subject: Scope

Dear [redacted],

I understand what you are saying about the scope of my duties. I am not trying to exceed that scope.

The prior communications you are referencing are likely about my discussions of the Harvard and Fort Wayne grants. I am reasonably certain that my questions/interpretations/discussions with you and/or [redacted] for all 3 of these instances (Harvard, Fort Wayne, and President Biden's EO) are all within the scope of my duties.

Regarding the Harvard Grant: I was assigned this grant for HSR review. I noticed that it was likely within the scope of an OMB memo that GPTD recently considered. I emailed [redacted] my analysis and conclusions. I stayed within the chain of command (only discussing this with you and Jeff) the entire time. It later appeared that my analysis was indeed correct, as indicated by President Trump's EO, the second OMB memo, and both President Trump's and Secretary DeVos' public statements on the subject-matter of the Harvard grant.

Regarding the Fort Wayne grant: I was assigned this grant for HSR review. I noticed the admissions policy described therein almost certainly violated Supreme Court precedent. I emailed [redacted] my analysis and conclusions. Once again, I stayed within the chain of command. I asked you for clarification about mandatory reporting requirements. You said you asked a member of OGC, and according to them, if I (or anyone else at GPTD) suspects (on our own, subjectively) that there may be "waste, fraud, or abuse," then we can or should report it. (I am still unclear about this duty, whether it is permissive or mandatory, and who exactly should be reported to).

Regarding President Biden's recent EO: I was assigned to read this EO. I discussed the salient its salient parts and the implications. I stayed within the chain of command.

In all cases, I have stayed within the chain of command (you and [redacted]). I have given logical and detailed analyses, and I stand by my analyses. I have asked for clarification when necessary, often requesting we ask OGC for its opinion. However, I have never gone outside the chain of command (e.g. by asking OGC or OIG myself).

Simply put, I am reasonably certain that (thus far) I am in no way at fault, for two reasons:

1) My analysis of grants/other materials that I've been assigned is within scope, including observations of possible noncompliance with an EO/OMB memo/court precedent/other law by the grantee/other government actor, because:
    a. I was reading the grant application/EO/OMB/etc. in the normal course of my duties, and
    b. Those observations are within the scope of what can or should be reported (per numerous statutes/regulations/other legal authorities. See, e.g., the ED OIG website: https://www2.ed.gov/about/offices/list/oig/hotline.html).
2) Even if my analyses were out of scope (and I do not concede this; I believe they are within scope),
    a. I should be able to discuss them with you and/or [redacted], because they are germane to GPTD and/or ED generally, and

b. Because my analyses contain possible noncompliance with various legal authorities by grantees and/or government actors, my observations are permitted and protected under numerous "whistleblowing" statutes/regulations.

I have reported my observations/analyses only to you and/or [redacted], with the belief that you both are better able to judge whether something I've noticed should be brought-up to OGC, OIG, or someone else – and because I've always been mindful to stay within scope (e.g. my assignments, and things I notice while doing them). If you disagree with my analyses, you can choose to not bring it up with them: that is within you discretion as a supervisor, and I will not "go around" you (as, thus far, I have not).

If you are ordering me to no longer discuss with you possible noncompliance from grantees and/or government actors, then I will be forced to rely solely on my own judgment to determine whether or not I report something to OGC or OIG. I would prefer not having to do this, instead getting a "second opinion" first from you or [redacted].

Finally, I would like to emphasize this: possible noncompliance with an OMB memo, EO, or court precedent **does not** necessarily mean anyone is at fault. It is very possible that a grantee (e.g. Fort Wayne) can have an unconstitutional admissions policy simply because it did not update it's admissions process to reflect a new Supreme Court decision (e.g. Grutter and Fisher). It is very possible that the ED staff involved with diversity & inclusion did not understand the significance of President Biden's chosen definition for the term "equity."

I am **not** trying to get anyone into trouble. I am simply pointing out problems, then asking "How can we fix these problems?" (e.g. asking Fort Wayne to change its admissions policy, or perhaps speaking to whomever is responsible for creating ED's diversity & inclusion training about the various definitions for "equity," to prevent possible violations of President Biden's EO).

Thank you,

-[redacted]

From: [redacted]
Sent: Tuesday, January 26, 2021 1:18 PM
To: [redacted]
Cc: [redacted]
Subject: RE: OFO ALL EMPLOYEE NOTICE: OFO Employee Quick Updates - January 25, 2021

Good afternoon [redacted],

I am in receipt of your message below and have concerns with your continuous written assertions regarding ED officials. I have asked in prior communications (verbal and written) with you, to refrain from making assertions in areas that fall outside of Grants Policy and Training Division's (GPTD) purview as well as your assigned scope of work. You state in your message "I am concerned that **Denise may not understand this distinction, and may be misinterpreting President Biden's EO**. I suspect this misunderstanding (either by her, or by members of the Diversity & Inclusion office, or by others) may be intentional, as a means of advancing "equality of outcome" under the guise of "equal treatment under law," which would be in direct violation of President Biden's EO." Your assertion in this instance is inappropriate.

In addition, your assertions below are unwarranted and out of scope. You state in your message " I cannot be certain this is happening unless I participate in some future Diversity & Inclusion training offered by the Department, and evaluate that particular training myself." To be clear, in your position of Management and Program Analyst Pathways Intern, assigned to work in the GPTD, your evaluation of the application of equity

in the content of the training is once again out of scope. The development, delivery and application of staff training on diversity and inclusion is the responsibility of the Office of Equal Opportunity Services.

Your assertions demonstrate your continued disregard and failure to follow prior instructions to refrain from unwarranted and inappropriate characterizations of ED staff and officials. Your conduct as outlined herein is unacceptable. I will set-up a meeting so we can discuss further.

[redacted]

[redacted], *Director*
Grants Policy and Training Division
Office of Acquisition and Grants Administration
Office of Finance and Operations
U.S. Department of Education
[redacted]

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From: [redacted]
Sent: Tuesday, January 26, 2021 9:21 AM
To: [redacted]
Cc: [redacted]
Subject: FW: OFO ALL EMPLOYEE NOTICE: OFO Employee Quick Updates - January 25, 2021

Hi [redacted],

I noticed that Denise mentioned President Biden's new EO on Racial Equity. She stated that:

"This Executive Order, among other things, revoked EO 13950. Diversity and Inclusion (D&I) related training at the Department will resume."

As I mentioned in a previous email, the Definition Section of "equity" within that EO is clear:

"For purposes of this order: (a) The term "equity" means **the consistent and systematic fair, just, and impartial treatment of all individuals**, including individuals who belong to underserved communities that have been denied such treatment, such as ... [lengthy list of minority groups]."

^ President Biden has defined "equity" as the "impartial treatment of all individuals," meaning "equal treatment" under law. This definition is consistent with both Supreme Court precedent and MLK's dream of a nation where people "will not be judged by the color of their skin but by the content of their character."

President Biden did NOT define "equity" as "equality of outcome."

I am concerned that **Denise may not understand this distinction, and may be misinterpreting President Biden's EO.** I suspect this misunderstanding (either by her, or by members of the Diversity & Inclusion office, or by others) may be intentional, as a means of advancing "equality of outcome" under the guise of "equal treatment under law," which would be in direct violation of President Biden's EO.

I cannot be certain this is happening unless I participate in some future Diversity & Inclusion training offered by the Department, and evaluate that particular training myself. I'm just letting you know that we may want to consider informing the Diversity & Inclusion office of this "equity" definition distinction, so they can structure their trainings to avoid violating President Biden's EO.

--[redacted]

From: Carter, Denise <Denise.Carter@ed.gov>
Sent: Monday, January 25, 2021 7:23 PM
To: Carter, Denise <Denise.Carter@ed.gov>
Subject: OFO ALL EMPLOYEE NOTICE: OFO Employee Quick Updates - January 25, 2021
Importance: High

CUI//SP-BUDG/SP-PROCURE//FEDONLY

Office of Finance and Operations (OFO)
Employee Quick Updates
January 25, 2021

"There is no certainty; there is only adventure." – Roberto Assagioli

Awareness

- **Departmental Administration Transition Website:** Thanks to the collective effort of the connectED team and the OFO webmaster, the transition site is now live. You can access and review the site on connectED.

- On January 20, the President signed a **new Executive Order (EO) on** Protecting the Federal Workforce and Requiring Mask-Wearing. The EO provides ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID-19 pandemic.

- **Revocation of Executive Order 13950 on Combating Race and Sex Stereotyping. Resumption of Diversity and Inclusion related training at the Department.** On January 20, 2021, President Biden issued Executive Order Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Sec. 10). This Executive Order, among other things, revoked EO

13950. Diversity and Inclusion (D&I) related training at the Department will resume. For information concerning D&I related training, please contact [redacted] at [redacted] or [redacted]. For information on EO 13950 regarding federal contracting and grants administration, please contact Phillip Juengst, Deputy Assistant Secretary, Office of Acquisition and Grants Administration (OAGA), at 202-453-6396 or Phillip.Juengst@ed.gov

COVID-19 Latest Update

- The Department remains in **Phase 1** of our Workplace Reconstitution Transition Plan (WRTP). **Flexible Work and Telework** Schedules remain in effect. We will continue updating the WRTP and the companion COVID-19 FAQs (frequently asked questions) as we receive additional Centers for Disease Control guidance.

- **REMINDER: The Families First Coronavirus Response Act (FFCRA):** The FFCRA mandated paid leave provisions that went into effect on April 1, 2020, for Federal employees expired on December 31, 2020. More information about the expired FFCRA provisions can be found here https://connected.ed.gov/Pages/Emergency-Paid-Sick-Leave-Guidance.aspx. If you have specific questions about the impact on your situation, please contact the Office of Human Resource's Workforce Relations Division at benefitsandwork/life@ed.gov.

Office of Equal Opportunity Services ([redacted])

- **Celebratory Event – Dr. Martin Luther King, Jr. Day**
  Virtual Panel Discussion will be held on Tuesday, **January 26, 2021, from 12:00 – 1:00 p.m.** The 2021 Dr. Martin Luther King, Jr. Day theme is "Keep Moving Forward." The panel will feature Missouri's 2021 Teacher of the year Mr. Darrion Cockrell and Georgia's 2019-2020 Pre-K Teacher of the Year, Mr. Johnathan Hines. Both were featured on NBC News, acknowledging their roles for breaking down barriers and igniting the fire of students in their individual states. To participate in this event online via Microsoft Teams on your computer or mobile app, click here Dr. Martin Luther King Jr. Day Event or call-in phone number (audio only) 1-202-991-0393, phone conference ID: 131 806-52#. For more information, see connectED at Dr. Martin Luther King Jr. Day or contact [redacted] at [redacted] or 202-320-3393.

Budget Service ([redacted])

FY 2021 Budget Update:

- On December 27, 2020, the President signed the Consolidated Appropriations Act, 2021, into law.
- Budget Service submitted all apportionments for FY 2021 resources to the Office of Management and Budget (OMB), and has received approval back from OMB for most of them. Budget Service continues to issue funding allotments to Department principal offices accordingly.
- Budget Service is finalizing FY 2021 Salaries and Expenses (S&E) allocations for Department principal offices. The allocations will include resources for both pay (staff) and non-pay costs (contracts, travel, training, etc.). Budget Service will communicate office funding allocations via the Budget Formulation Database during the week of **January 25 – January 29**. Please direct any allocation questions you may have to [redacted], [redacted], or [redacted].
- Budget Service distributed a detailed summary of the provisions pertinent to ED contained within the Consolidated Appropriations Act, 2021. The bill provides discretionary appropriations of $73.5 billion to fund the Department through September 30, 2021, supplemental appropriations of $82 billion for the Department to help respond to the coronavirus emergency, and additional legislation affecting student aid and other programs.

Acquisition and Grants Management (Phillip Juengst)

- **Contract actions**: Thank you to Contracting Officer's Representatives (CORs) for engaging the Contracts and Acquisition Management Division early in the planning process and for submitting packages on-time. The status of packages for each program office can be found on the CAM Dashboard for CORs.
- **Grants updates:**
  - **Crosswalk Available for Regulatory Revisions (2 CFR 200).** Office of Management and Budget, in partnership with representatives from the Federal awarding community, developed a crosswalk document to support Federal awarding agencies and recipients in their implementation of the revisions to 2 CFR published on August 13, 2020, in 85 FR 49506. The crosswalk is available at the following link: 2 CFR Revisions (85 FR 49506) Crosswalk.
  - The Risk Management Services Division has posted an **updated Lead State Contacts List** for Risk Management Specialists available to assist program staff. The list can be found on ConnectED at: RMSD-Lead State Contacts List or on SharePoint at: Risk Assessment.
  - **Reminder: ED-Wide Risk Management State Briefings**
    - The Risk Management Services Division is hosting its next ED-Wide Risk Management Meeting on Thursday, **January 28**, via TEAMS, from 2:00 p.m. - 3:15 p.m. All ED staff are welcome to attend state briefings covering **Georgia, Oregon, and Virginia.**
- **Upcoming training events:**
  - **Conversations with Contracting Officer's Representatives (CORs) Training Series - Post Award Basics** course offered **January 28** from 1:00 - 2:00 p.m. Please register via FedTalent.
  - **Grants training reminders:**
    - Conducting A Risk Assessment/Evaluation: An Overview FY 2021 – **February 4**
    - Cost Analysis & Budget Review: New Award Focus – **February 9**
    - FY 2021 License Holder Annual Mandatory Training – **February 23**

Business Support Services ([redacted])

- **Hyperion System Implementation Status Update**: Upon adjudication and rejection of the vendor award protest, the Business Support Services team kicked off Phase 1 of the project with the contractor (CREOAL) on Friday, January 22.
  - The solution implementation will begin with a "lift and shift" of the current Performance Management (actual vs. planned) and Travel spend plan functionality to the Oracle Enterprise Performance Management Cloud environment. The migration will take six weeks with a planned completion date of **March 19**, followed by a transition to operations and maintenance by **March 31**.
  - The Salary and Expense Payroll Modeling project will begin in mid-March, with a planned implementation in January 2022.
- **Federal Government Organization/Vendor Identifier Change: DUNS to UEI:** GSA announced a new date for the transition from DUNS to new Unique Entity Identifier (UEI). By **April 2022**, the federal government will stop using the DUNS number to uniquely identify organization/vendor entities registered in the System for Award Management (SAM). At that point, entities doing business with the federal government will use a unique entity identifier created in SAM.gov. OBSS has already been preparing for this change and is renewing the development work to meet the new deadline.

Small and Disadvantaged Business Utilization (OSDBU) ([redacted])

- **Departmentwide Small Business Goals for Fiscal Year 2021:** The FY2021 Departmentwide prime small business goal is 14%, and subcontracting goal is 39%. Monthly progress toward the departmentwide small business goals and contracting totals can be viewed on the Small Business Dashboard.
- **First Quarter Small Business Goal Progress:** Small Business: 11.89%, Small Disadvantaged Business: 7.37%, Woman Owned Small Business: 7.65%, Service-Disabled Veteran Owned Small Business: 0.22%, Historically Underutilized Business Zone: 0.31%.

OFO Small Business Status Update

- **First Quarter Small Business Goal Progress:** Small Business: 11.89%, Small Disadvantaged Business: 7.37%, Woman Owned Small Business: 7.65%, Service-Disabled Veteran Owned Small Business: 0.22%, Historically Underutilized Business Zone: 0.31%.
- **Small Business Set-asides:** In general, if there are at least two small businesses that could meet contract needs at a fair price, the contract should be set aside exclusively for small businesses. If there are fewer than two, you may be authorized to create a sole-source contract or otherwise offer it for full and open competition. All acquisition packages over $250,000 are to be reviewed by OSDBU prior to the posting of solicitations. Small business specialists are available to assist you in conducting market research in addition to OSDBU's Small Business Customer Experience site.

Human Resources ([redacted]**)**

HR Reminders:

- **February 1 – 12** – Office of Personnel Management will begin releasing agency Federal Employee Viewpoint Survey (FEVS) results
- **February 19** – Deadline for Q1 Special Act awards above $2,500 and Cross-POC awards.
- **February 24** – Federal Employees Retirement *System* (*FERS*) Retirement and Benefits Seminar:
  - **Part 1**, 11:00 a.m. -12:00 p.m. – FERS System. Register here
  - **Part 2**, 2:00-3:30 – Thrift Savings Plan. Register here
- **February 25** - FERS Retirement and Benefits Seminar:
  - **Part 3**: 1:00 a.m. -12:00 p.m. – Federal Employees' Group Life Insurance (*FEGLI*). Register here
  - **Part 4**: 2:00 - 3:30 p.m. – Social Security and Planning. Register here
- **March 17** – Civil Service Retirement System (*CSRS*) Retirement and Benefits Seminar. Register here

Exhibit E
(Waste and 34 CFR 97 Noncompliance email packet)

[redacted]

From: [redacted]
Sent: Wednesday, July 8, 2020 12:11 PM
To: [redacted]
Subject: RE: Backlog?

Hi [redacted]

Thanks again for your initial review of the ED and related Common Rule sites. Very helpful feedback, and I look forward to working with you on that.

The "backlog" is an "interesting" question. As you may have detected from some details in this morning's GPTD meeting discussion of getting a FTE for a staffer to work on Common Rule issues, this is a challenging regulation in many ways.

The queries facing the current GPTD request for a Common Rule position has a long history. The function has often been understaffed, including a long period in which I was the only ED staffer working to implement the regulation. The resulting workload has meant that some studies remained waiting in the queue of incoming studies for too long, and in some cases were never reviewed to determine whether they include nonexempt human subjects research.

ED, along with many other Federal agencies, adopted the regulation in 1991. However, several years later a Presidential commission conducted a "survey" of the agencies to see what they were doing to implement the regulation. It turned out that ED and several other agencies (eg NSF) had adopted the reg but were doing little to actually implement it. The commission chair wrote to the President—and soon ED set up a point in the agency to implement the reg, adopt procedures for its implementation , etc.

However, the lawyer in OGC who handled the reg used to kid me that he was "my only friend in the Department"—because the program offices etc. would prefer to not have to deal with the regulation, prefer to view ED studies as uniformly harmless, etc. ("The biggest risks study subjects will face is papercuts and boredom").

More recently, while the function was located in the Office of Financial Management and I was the only one involved in implementing the reg at ED, I was frankly told by my supervisor that there was no interest in increasing staffing for the post beyond n=1-- that realistically nothing would happen to increase staffing until there was a crisis, until something "blew up".

Long story short, there is a large number of studies that need ED determinations of whether they include nonexempt research, and human subjects clearance for those that do. This is largely a function of long periods of under staffing for the work, and resulting staff overload.

ED tends to have periodic reorganizations. With the last reorganization, the function was moved from FMO to OGA/GPTD. The new supervisors were appropriately alarmed by the backlog and the potential risks it could pose to study subjects (and ED), and have put considerable effort into eliminating the backlog, moving staffers in (usually on a part time basis) to help with the work, etc. This has had problems of overloaded staffers moving in and out of the work and juggling diverse tasks.

So within the office the term "backlog" is being used to refer to that portion of the pending studies that were received for review and clearance prior to the April 1, 2019 reorganization of the office. It is a very high priority to eliminate that backlog—while staying current with the incoming studies. (As we approach the end of the fiscal year in September, there should be a considerable number of new grants and contracts received for review.)

While all team members are involved with this backlog work, [redacted] has asked that [redacted] give strong emphasis to eliminating that "backlog" of old studies. ([redacted] currently has hit a glitch with access to the funded applications in G5 that she/we need in order to review the studies. The documents are in the ED "G5" system for grants management—which she has had full access to for years. She was recently told that her access had been cut off, and that there are a series of training courses she needs in order to regain access. Hopefully her access will be restored soon.

While this regulation is "off the radar" for much of ED, failure to implement poses various risks not only to study subjects, but also to ED and the broader research enterprise.

Several years ago NIH funded a survey of college age twins in order to study some genetics issues. A father, whose daughter was away at college, routinely opened her mail to figure out what to toss as junk mail and what to forward to her on campus.

He opened the survey and was troubled by some questions that he thought unduly intrusive—including a question of whether the child's parent had had sustained bouts of depression. The father's job required a security clearance. He was concerned that if the response were disclosed he would lose his employment, etc.

He quickly complained to the researcher at Virginia Commonwealth University, but felt that the response he got was a brush off. He complained to his representatives in Congress and to what is now the Office for Human Research Protections (OHRP) at HHS. Congress was soon holding a hearing on intrusive research—and OHRP quickly went to VCU to look at how the study had been reviewed by the IRB—and as is their standard practice they reviewed a sample of other IRB reviews of other studies.

OHRP was concerned about the inadequate reviews it found and failure to fully comply with Common Rule requirements. So it suspended all covered human subjects research at VCU (over 1,000 studies, many of them biomedical) for several weeks while it looked into the matter. It required that most of the studies be rereviewed by an IRB, that the VCU provide adequate staffing and resources for its IRB, etc.

The point is that a single survey had hugely disruptive impacts on a large number of studies, many of them biomedical studies that involved notable risks. I suspect that ED would not want one of its minimal risk studies to trigger a similar shutdown. (Reports of ongoing or serious noncompliance and/or unanticipated risks can come from any source, and must go both to the funding agency and to OHRP , which issues FWAs and registers IRBs).

So violations have an interagency dimension, even if ED were to take no action. OHRP can suspend or terminate FWAs and IRB registrations. An institution cannot conduct any covered research without coverage by a FWA and approval by a registered IRB.)

More common at ED is a situation where an entity's regulatory compliance office or IRB reviews studies conducted by their researchers and come across a nonexempt research. The IRB can under its own authority under the regulation, suspend or terminate a study, require that any data collected while out of compliance cannot be used and any publications based on that data be withdrawn, remove the PI, etc. These corrective actions can be required by the IRB even if ED takes no action.

Finally, for the moment, there is the issue of how noncomplaince and research risks can impact public (and Congressional) trust in research and willingness to participate (and fund) future research. This is particularly sensitive in this social media epoch when even a few activist students, parents, advocacy groups can fuel concerns and debates across the nation and around the planet.

One example from a few years ago is the high profile "inBLOOM" initiative to create an infrastructure where schools, LEAs, and SEAs could store their students' data, which would generate "data dashboards" to inform teacher and principal practice, etc. This was a very high profile initiative, with funding from the Gates Fdn and other sources. The project had recruited several large states, large school districts, etc.

A handful of parents who were concerned about protection the privacy of data on their children, potential commercialization of that data and other uses fueled substantial public concerns about the project. This quickly spread on social media. Soon, under pressure, SEAs, LEAs and schools started to drop out of the project—and soon this landmark project with strong support from top levels in the educational community collapsed.

(Studies that raise concerns can have long lasting impacts. As a future lawyer, you may have come across the "Wichita jury" experience. The "American Jury" was a landmark study of the jury process in the US. Funded by the Ford Foundation (and perhaps additional sources) in the 1950s, it surveyed thousands of people about the US legal system). The researchers were based at the University of Chicago.

Various people questioned the accuracy of the survey data, so in relation to the larger American Jury study a focused study was conducted in Wichita. The researchers received agreement from the judge, the prosecuting and the defense attorneys to tape jury proceedings (e.g. as part of the survey data validation work). The researchers included data confidentiality protections that were relatively robust for the time.

Subsequently, I think it was at an ABA conference, the researchers discussed their findings. As part of the presentation they played a tape recording of a portion of a jury proceeding—which included no names, etc. However, an audience member recognized the case and quickly raised broad concerns about this study –and the risk of undermining public faith in the American way of justice.

Soon there were Congressional hearings--where strong concerns were raised that the American Jury study and its linked Wichita jury study were in reality an attack on the US Judicial system. Congress quickly passed legislation (which I think remains in effect today) that bans the recording of jury proceedings (eg for similar future research).

And so on.

So, in brief, the "backlog" studies are a subset of the total number of pending studies that need review and clearance. Eliminating this backlog is a very high priority.

I hope this is helpful. Please let me know if you need additional information, or if there are things that you'd like to chat about.

- *What is the best way to contact you by phone?*
- Any word on whether you have or will soon have access to the G5 systems for grants management? (In order to review proposed studies you will need access to the funded application and related materials in G5).
- Has [redacted] set you up with access to the human subjects log (HS.log) that we use to record incoming studies, their review, and their clearance?
- I'll follow up with you as soon as I can find a bit of time to discuss the ED human subjects website and potential improvements.
- *I have a conference call meeting with [redacted] (GPTD) and [redacted] (ED OGC) schedules for 10 am on Friday. I've previously shared a copy of the draft document with you. Are you available then and interested in "lurking" in the conversation to get a sense of the process, ED OGC etc? If so, I'll touch base with [redacted] and [redacted] to be sure they would have no concerns about you attending.*

Best regards,
[redacted]

[redacted]
Protection of Human Subjects Coordinator
US Department of Educationnt
Telephone: [redacted]
Fax: [redacted]
e-mail: [redacted]
e-mail for general queries: HumanSubjectsResearch@ED.gov
http://www.ed.gov/about/offices/list/ocfo/humansub.html

Training: Dept. of Education: Implementing the Common Rule
for the Protection of Human Subjects in Research (34 CFR 97)
https://www2.ed.gov/rms-training/human-subjects-research/story.html

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From: [redacted]
Sent: Wednesday, July 8, 2020 10:42 AM
To: [redacted]
Subject: Backlog?

Hi [redacted],

I'm wondering what the HSR "backlog" is, that was mentioned in the meeting just now? Is it something I'll learn about later?

Thanks,

[redacted]

[redacted]

From: [redacted]
Sent: Tuesday, November 3, 2020 3:41 PM
To: [redacted]
Cc: [redacted]; [redacted]; [redacted]
Subject: Summary of HSR team meeting (Nov. 3)

Importance: High

Hi [redacted],

Please find below a summary of this morning's HSR team meeting. It was revised a few times before getting to you. It will probably be helpful in preparation for tomorrow's GPTD meeting.

Thanks,

[redacted]

Summary of HSR team meeting (Nov. 3):

1) Significant noncompliance with Common Rule by ED

All grants **and contracts** involving research with human subjects **should** be referred to the HSR team for a determination of nonexempt/exempt only/not covered research. This **should** include all of the following:
A) All discretionary grants
B) All block grants to SEA/LEAs (per OGC's revised opinion)
C) All contracts (citation to 34 CFR 97 included at the end) *

Currently, **only a small fraction** of discretionary grants (A) are being referred to the HSR team – and only those that the program officers (with a limited working knowledge of the Common Rule) choose to send to us. Currently, **no block grants** (B) and **very few contracts** (C) are being referred to the HSR team.

The fact that program officers make the initial determination about a grant, and can/do choose to not send a grant to the HSR team, is a problem. Currently, there is no system for automatically sending grants to the HSR team. ([redacted]: I'm not sure this is true. The program office does not make this determination, at least not for IES grants. They do not have the training to make that determination.)

Up until OGC's recent revision, ED would block grant to an SEA/LEA, and that SEA/LEA **was supposed to** ensure compliance with the Common Rule (e.g. making an HSR determination, requesting & checking IRB approval certifications, etc.), so ED did not have that responsibility. However, in reality, most SEA/LEAs would completely ignore Common Rule requirements. Per OGC's revision, ED is now responsible for ensuring that sub-grantees comply with the Common Rule. However, there is currently no system/SOP for doing this.

Currently, grants use the G5 system – but contracts do not use G5. It seems contracts use a system called CPSS (Contract Purchasing Support System). [redacted], can you contact CAM, asking how one or all of us four HSR team members can get access? The HSR team is supposed to be reviewing contracts for compliance with the Common Rule. *

2) Specs for "G6"

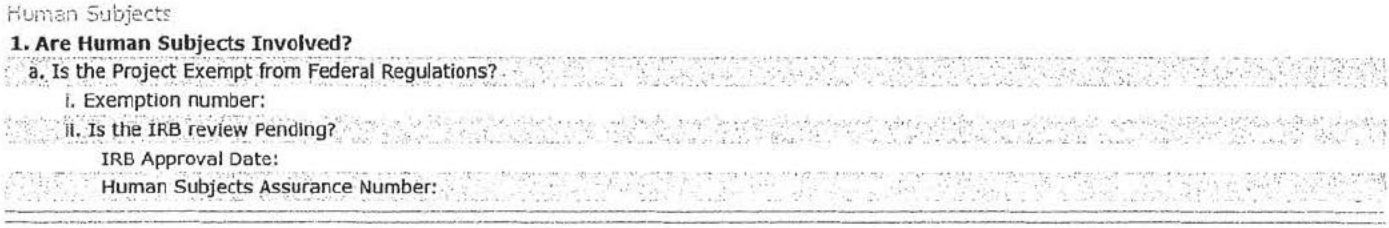
Even if all grants **and contracts** were sent to the HSR team, as they are supposed to be, the HSR team is **currently not equipped to handle** that enormous amount of work. What we need most is **an integrated system, containing both contracts and grants,** with certain functionalities/automation that would eliminate the need for all of the following:

- Manual forwarding of a grant/contract to the HSR team by email
- Manual contact emails to grantees ^
- Manual clearance emails to program offices ^
- Manually setting/removing reminders to follow-up on a grant after 30 days
- Etc.

[redacted] and [redacted], previously discussed the HSR team's requirements with [redacted] and gave her a list (months ago, before [redacted] joined the team). [redacted] will find that list, update it, and submit it to [redacted].

Additionally, it seems that the HSR team's requirements differ from those of the rest of GPTD. After updating our list of requirements, could one of us (either [redacted] or [redacted]) discuss our list with [redacted] (and [redacted], if she'd like to join) rather than with [redacted] only? If there are/will be recurring meetings abut this, could one of us HSR team members attend those as well?

^ [redacted]: G5 has an option that allows users to send emails, the only issue would be creating an email/emails related to HS and having the functional team add it to G5. I would suggest contacting the helpdesk before stating this option is not available in the current system.) [redacted], can you or one of us contact the G5 team and ask them to create/implement this feature for us? If you remember, Patrick had mentioned to you and Phillip that the HSR team would like to be able to update the following 6 "Yes/No" fields within G5 ourselves, in addition to sending automated emails via G5.


Human Subjects
1. Are Human Subjects Involved?
a. Is the Project Exempt from Federal Regulations?
i. Exemption number:
ii. Is the IRB review Pending?
IRB Approval Date:
Human Subjects Assurance Number:

3) Metrics for the HSR team

The HSR team's work is heavily reliant upon waiting for people outside the team to send us "stuff" (e.g. we cannot start a grant until a program officer emails us the grant number; after we make an HSR determination, if we determine that an IRB approval certification is necessary and email a grantee to request that, we cannot clear the grant until we receive that IRB document; etc.).

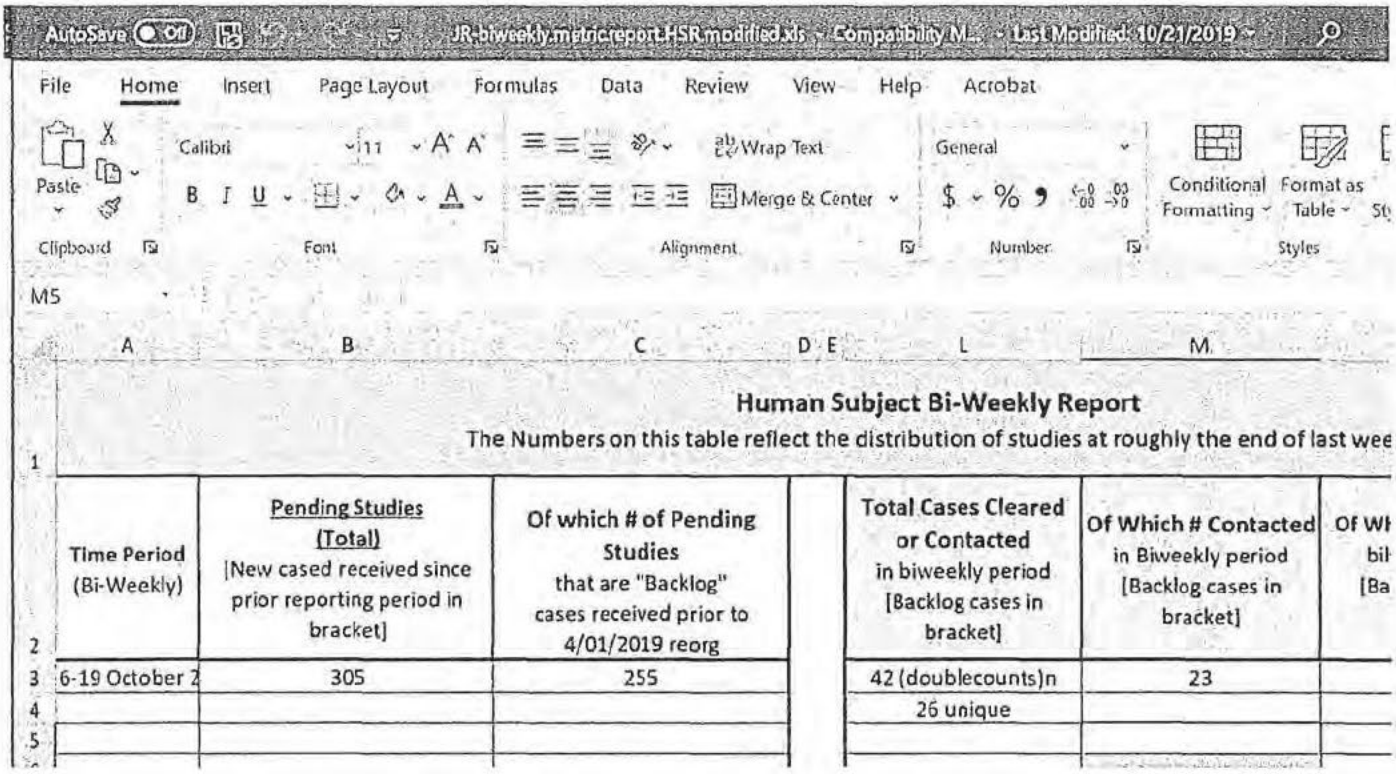
The only thing within our control is how long it takes between receiving a grant from a program officer and sending our contact/clearance email. That should be the primary metric.

Additionally, there are many cases where an HSR team member will email an IRB approval request to a grantee, but not hear back from that grantee within 30 days. Currently, many of those grants are "forgotten" because there is no system of "reminding" the HSR team to follow-up on those grants after 30 days have passed.

With ED's existing technology, there are very few ways to implement these "reminders," and those methods are "more trouble than they're worth." An example would be manually creating an Outlook Calendar reminder for 30 days after sending a contact email, then eliminating that reminder from the calendar if/when the grantee replies.

The HSR team needs a system to do this (and many other manual things), and needs it **before** 2025, when "G6" is projected to be operational.

(An example of metrics that [redacted] derived from our existing HS.log is shown below:)



AutoSave Off — JR-biweekly.metric.report.HSR.modified.xls — Compatibility M... — Last Modified: 10/21/2019

File Home Insert Page Layout Formulas Data Review View Help Acrobat

Paste | Calibri 11 | Wrap Text | General | Conditional Formatting | Format as Table

Clipboard | Font | Alignment | Number | Styles

M5

Human Subject Bi-Weekly Report

The Numbers on this table reflect the distribution of studies at roughly the end of last wee

Time Period (Bi-Weekly)	Pending Studies (Total) [New cased received since prior reporting period in bracket]	Of which # of Pending Studies that are "Backlog" cases received prior to 4/01/2019 reorg	Total Cases Cleared or Contacted in biweekly period [Backlog cases in bracket]	Of Which # Contacted in Biweekly period [Backlog cases in bracket]	Of Wh bil [Ba
6-19 October 2	305	255	42 (doublecounts)n	23	
			26 unique		

*** §97.101 To what does this policy apply?**

(a) Except as detailed in §97.104, this policy applies to all research involving human subjects conducted, supported, or otherwise subject to regulation by any Federal department or agency that takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by Federal civilian employees or military personnel, except that each department or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the Federal Government outside the United States. Institutions that are engaged in research described in this paragraph and institutional review boards (IRBs) reviewing research that is subject to this policy must comply with this policy.

*** §97.118 Applications and proposals lacking definite plans for involvement of human subjects.**

Certain types of applications for grants, cooperative agreements, or contracts are submitted to Federal departments or agencies with the knowledge that subjects may be involved within the period of support, but definite plans would not normally be set forth in the application or proposal. These include activities such as institutional type grants when selection of specific projects is the institution's responsibility; research training grants in which the activities involving subjects remain to be selected; and projects in which human subjects' involvement will depend upon completion of instruments, prior animal studies, or purification of compounds. Except for research waived under §97.101(i) or exempted under §97.104, no human subjects may be involved in any project supported by these awards until the project has been reviewed and approved by the IRB, as provided in this policy, and certification submitted, by the institution, to the Federal department or agency component supporting the research.

[redacted]

From: [redacted]
Sent: Monday, November 30, 2020 12:40 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Human Subjects Research and the Common Rule

Follow Up Flag: Follow up
Flag Status: Flagged

PS the figure for number of credible reports of unanticipated risks or serious noncompliance mentioned below is an annual figure.

From: [redacted]
Sent: Monday, November 30, 2020 12:37 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Human Subjects Research and the Common Rule

HI [redacted]

Thanks for sending this.

The reg applies to contracts that include covered research (as defined by the reg). Several years ago there was a meeting of contract staff that included my presentation on the Common Rule in the context of contracts.

Apart from IES SBIR contracts, the number of contracts received by ED HSR staff for review and clearance is nearly a null set. (E.g. we received one for review and clearance following ED receipt of allegations of noncompliance, possibly posed by a teacher or site). So the effective answer to your questions below is that it appears that ED contracts staff are determining that nearly no contracts are funding covered research, or that the function is not currently being attended to by contract staff.

It could be that ED funds almost no human subjects research via contracts. However, that appears unlikely. E.g. NCEE funds most of its evaluation research as contracts. Some of it is likely to involve covered research. There are press releases and other information for some studies that appear to involve HSR and contracts. ED contracts staff are probably the best source for the frequency data that you mention below.

Currently ED HSR staff handle the final ED determination of whether covered research is involved and handle the initial clearance.

From the perspective of streamlining ED organization and efficiency, it would appear that there should be a single ED office handling the HSR determination and initial clearance. It avoids duplication staffing, training needs, etc. However, that may not work well with the current ED organizational chart with its divide of grants/contracts operations.

(Overall, ED typically receives from about 2 to 11 credible reports of serious noncompliance or unanticipated risks. If my memory serves well, only a couple have involved contracts. In part that may reflect the defacto IRB review under contractors' own procedures. There is of course the "long tail risk" issue—that there are few reports of Common Rule problems received by our office, but some have significant potential, particularly in this social media epoch to quickly

flare to public and policy maker attention. E.g. allegations received a few years ago regarding alleged violations at a preschool that the President was visit the next day—with the allegations made by a medical researcher at a major university who had also contacted the media. Additionally, many of the issues may involve FERPA and/or PPRA issues that teachers, parents, etc. are more likely to be familiar with than with 34 CFR 97. Lines of communication between ED HSR staff and ED FERPA/PPRA staff regarding such problems need improvement.)

Best regards,
[redacted]

PS ED research contracts typically go to entities with significant research experience. Many of them have their own organizational procedures that require their staff to obtain approval or determination of exemption from the organization's IRB as a matter of their own organizational policies, even if they never hear from ED contracts or HSR staff.

[redacted]
Protection of Human Subjects Coordinator
US Department of Education
Telephone: [redacted]
Fax: [redacted]
e-mail: [redacted]
e-mail for general queries: HumanSubjectsResearch@ED.gov
http://www.ed.gov/about/offices/list/ocfo/humansub.html

Training: Dept. of Education: Implementing the Common Rule
for the Protection of Human Subjects in Research (34 CFR 97)
https://www2.ed.gov/rms-training/human-subjects-research/story.html

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Washington, DC 20202-4331

Checkout the updated GrantsMAT, now including both the Formula and Discretionary sites!

Stay up-to-date on Department-wide grants administrative policy, guidance, & training by joining the *"Grant Connections Listerv"*
How to subscribe to the listserv? Address email to: listserv@listserv.ed.gov and write in the email message's body: subscribe Grant-Connection your name (For example: subscribe Grant-Connection George Bailey) –NOTE: Listserv is internal to ED only. DON'T include any additional text in the email, such as your office, phone number, &/or automatic email signature or the listserv may not be able to understand your request.

From: [redacted]
Sent: Monday, November 30, 2020 11:46 AM

[redacted]

From: [redacted]
Sent: Wednesday, February 3, 2021 5:10 PM
To: [redacted]
Cc: [redacted]
Subject: RE: FIRST ROUGH DRAFT FOR YOUR FEEDBACK: Contract funded HSR

Hi [redacted],

Thanks!

Best regards,
[redacted]

From: [redacted]
Sent: Wednesday, February 3, 2021 1:09 PM
To: [redacted]
Cc: [redacted]
Subject: RE: FIRST ROUGH DRAFT FOR YOUR FEEDBACK: Contract funded HSR

Great job, [redacted]. I think you got all the questions we discussed after the meeting. I think it's good as-is.

I just thought of this now, that you may want to add one two-part question (and perhaps phrase it more diplomatically than I am now). Or not add it, since we can probably figure out the answer from the existing questions.

Assuming the contractors already submit a contracts version of the SF-424 form, and assuming the CORs already do HSR determinations (and we don't yet know answers for either):

- Do the CORs simply accept on face value a contractor's assertion/answer on a form that "no human subjects research is involved," or does the COR independently analyze each individual contract to reach his/her own independent conclusion?
- Similarly, if the contractor provides an IRB determination, does the COR simply accept that IRB determination on face value, or does the COR independently reach his/her own conclusion?

--[redacted]

From: [redacted]
Sent: Tuesday, February 2, 2021 1:55 PM
To: [redacted]
Cc: [redacted]
Subject: FIRST ROUGH DRAFT FOR YOUR FEEDBACK: Contract funded HSR
Importance: High

Hi [redacted] and [redacted] and [redacted] and [redacted],

Below is a first rough draft of an email to follow up on the meeting last Thursday with CAM on implementation of Common Rule in the context of contracts.

Please let me know by 1pm on this Thursday of your suggestions for improvement—deletions, additional points to address, clarifications, etc. I'd like to follow up with CAM this week if possible.

Thanks!

Bet regards

[redacted]

[redacted]
Protection of Human Subjects Coordinator
US Department of Education
Telephone: [redacted]
Fax: [redacted]
e-mail: [redacted]
e-mail for general queries: HumanSubjectsResearch@ED.gov
http://www.ed.gov/about/offices/list/ocfo/humansub.html

Training: Dept. of Education: Implementing the Common Rule
for the Protection of Human Subjects in Research (34 CFR 97)
https://www2.ed.gov/rms-training/human-subjects-research/story.html

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Hi [redacted],

Thank you for meeting with the ED Human Subjects Research team on January 28th to share information about current ED implementation of the Common Rule for the Protection of Human Subjects in Research (34 CFR 97) for ED contracts that may involve covered human subjects research.

It was a very helpful and productive meeting. We look forward to continuing to work closely with CAM for review and human subjects clearance of ED's contract funded research as required under 34 CFR 97 and the implementing ED ACS directives.

CONTEXT:

ED adopted the Common Rule in 1991. It applies to all contracts and grants and ED sponsored research. (E.g. it is not limited to IES studies).

The Secretary delegated determination of whether a study involves covered research and the initial study clearance to the ED human subjects research (HSR) team. This frees CAM staff from having to make the sometimes technical and complex determinations which require knowledge of the regulation and research and handling the initial clearance process—as well as dealing with any subsequent reports of noncompliance or unanticipated risks.

ED implementation is dependent on teamwork between the POC project officers, the CAM CORs (located in the respective POCs), and the HSR team. POC staff, drawing on information available to them from the RFP and the contract SOW make the initial determination of whether nonexempt research is proposed, and if so (or if not sure), forward the contract to ED HSR staff for an official determination and for handling the initial clearance process. POCs and CAM are responsible for ensuring that covered studies receive appropriate review and clearance, and for including the ED HSR clearance notice and Institutional Review Board (IRB) study approvals in the official contract file. No covered research can be initiated until the research has ED human subjects clearance. IRBs can require that the researcher take corrective actions, even if ED takes no action.

INFORMATION NEEDED:

The ED HSR team currently receive almost no contracts (with the exception of IES SBIR contracts) for protection of human subjects review and clearance, e.g. as specified by 34 CFR 97 and related ED ACS directives on human subjects research. That raises the question of whether ED is adequately implementing this regulation for contracts.

It may be that CORs are appropriately inserting the key HSR clauses in contracts and requiring IRB approvals and FWAs for contract-funded research and including that information in the official contract file-- but not currently providing that information to the HSR team for ED clearance of those studies (which usually entails IRB approval for covered research). If so, it would be helpful for the ED HSR team to regularly receive that information.

Relying on ED HSR staff to make that determination of coverage and handle clearance reduces the workload of CAM staff, and ensures that ED can point to appropriate review and clearance if something goes wrong. This is particularly helpful as determination of coverage requires working knowledge of the regulation, and research methodology including realities in the field. It also helps ensure consistent treatment of research risks in studies funded by grants and contracts. It also provides the ED HSR team with background knowledge to address reports of serious or continuing noncompliance or unanticipated risks received from the field.

FOLLOW-UP ON OUR MEETING:

Building on last week's meeting, some additional details and context is needed. Please provide information on the following:

1. **How many contracts include covered research annual**ly? What is their distribution across POCs?

2. **Forms?** Grantee applicants must submit a SF424 that indicates whether the applicant believes they are proposing human subjects research, and if so whether they believe it includes only exempt research. Is there a parallel form for contract proposals?

3. **Coordination**: In addition to interactions with ED HSR staff, how do CAM CORs coordinate implementation of this reg with the POC project officer?

4. **Staffing:** Do the same POC staffers (including CORs) handle both grants and contracts? Do the same ED staffers handle both project management and COR responsibilities for a study? How is consistency of review and management of potential conflicts of interest in promoting research/protecting research subjects managed?

5. **Process documentation ?** For contracts that include covered research, does the official grant file include information on on what basis the study was determined to include (or not) covered research, and a copy of the IRB approval(s) for the covered research?

6. **Does CAM currently verify that the contractor and any other entity "engaged" in conducting covered research under the contract is covered by a "Federal Wide Assurance" (issued by the HHS OHRP), and have IRB approval** ? This includes IRB continuation approvals if applicable. Is this information included in the official contract file?

7. **For contracts that include covered research, are the requisite HSR clauses included in the contract?** Is the clause often used with contracts that do not include covered HSR? (E.g. if a "census" of these clauses in contracts is not readily available, a random sample could provide the information.)

8. **As CORs review proposed contracts, to what extent do they review the study design and proposed research activities** to determine whether the pending activities would include covered research? How is this documented?

9. **How does CAM monitor and document receipt of IRB approvals and ED HSR clearances for covered** studies? Are copies of those texts routinely included in the official contract file?

10. **Technology:** Does CAM currently use automated text mining or other technology to identify contracts that include covered research and/or to manage the HSR clearance for contracts? What information technology resources would be helpful in this regard for future contracts and grants management systems?

11. **COR HSR SEMINAR?** Would CAM be interested in a "HSR seminar" training for CORs? The session should include basic information on the regulation and its implementation, and include substantial time for CORs to raise any questions or complexities that arise in the context of contracts. Estimate the average number of contracts likely to need review and clearance

Again, thank you for your assistance in clarifying how ED is now implementing 34 CFR 97 as it applies to contracts. We look forward to continuing to work closely with CAM to streamline and improve this process.

Best regards,

PS A former colleague would, when discussing 34 CFR 97 with program staff or grantees/contactors would summarize, "When in doubt, send it to us". It frees up program and CAM staff for other work, helps ensure knowledgeable and consistent review of ED funded research, etc.

[redacted]

From: [redacted]
Sent: Thursday, January 28, 2021 2:47 PM
To: [redacted]
Subject: RE: Notes from meeting - what should we send [redacted]?

OK, thanks [redacted]. Sending something next week sounds good.

Here are some points you may want to include (just my suggestions of what we may want to ask the CORs in the POs, in some future meeting with them, if we do that):

- According to [redacted], it appears the COR in each PO is responsible for all of the following:
  - Making an initial decision about whether a contract might include human subjects research, and
  - If yes, inserting language related to 34 CFR 97 into the contract, then
    - Either forwarding the contract to the HSR team for HSR review, or
    - Performing the HSR review function on his/her own (including making a HSR determination, asking for IRB review, and granting HSR clearance to the contract)
- Is there any documentation related to this (e.g. a questionnaire submitted by the contractor related to Human Subjects determinations)?
- If a PO handles both grants and contracts, is the COR (who apparently does this for contracts) also doing HSR referral to the HSR team or review/determination for the grants in that PO?
  - If not, does that mean there are instead 2 separate people performing this same function of initial HSR review (the COR for contracts, and a different person for grants)?
- Is every COR actually doing that initial HSR determination, to decide whether to forward a contract to the HSR team to review (or conduct the HSR review by him/herself)? Or is this task being skipped?

Thanks,

[redacted]

From: [redacted]
Sent: Thursday, January 28, 2021 2:32 PM
To: [redacted]
Subject: RE: Notes from meeting - what should we send [redacted]?

Hi [redacted],

Thanks! That was really fast!! It seems to have been a productive meeting.

Rather than sharing meeting notes with CAM at this point, perhaps it provides a clearer path if we build on the meeting notes in a followup email to CAM that notes the general discussion and identifies points for clarification, potential future steps (such as a training session), etc. I'll try to draft something soon and circulate the draft to you. (As I'm out tomorrow and Monday, it may not be until early next week. Let me know if there are points to emphasize, points not discussed that need to be, next steps, etc.

Best regards,
[redacted]

From: [redacted]
Sent: Thursday, January 28, 2021 2:26 PM
To: [redacted]
Subject: Notes from meeting - what should we send [redacted]?

Hi [redacted],

Here are my meeting notes. Should we edit them, or some something to [redacted]?

Thanks,

[redacted]

Meeting Notes – January 28, 2021

- [redacted] manages the IES portfolio (minus NCEE)
- He generally receives a "Statement of Work" from the COR (but not anything related to Human Subjects)
- There is a COR within each PO that makes an initial decision about whether a contract might be covered by the Common Rule
    - [redacted] did not remember ever seeing an IRB approval; so, presumably, the COR is responsible for looking at those (if that happens at all)
- [redacted] confirmed that contractors do submit materials, including questionnaires; he was unsure whether the contractor submitted anything related to Human Subjects (e.g. some sort of Human Subjects questionnaire indicating whether the contractor believes there to be "no covered research," "exempt research only," or "nonexempt research."
- [redacted] believed that only SBIR and NCEE contracts were likely to contain human subjects research
- Apparently, CAM's general attitude is "include more contract language rather than less," then on a case-by-case basis consider any contract language that a contractor asks about specifically.
    - [redacted] believed it likely that EDAR language relating to 34 CFR 97 is already included in most contracts by default, but that the COR within each PO decides whether to include it.
    - He mentioned that CAM no longer has "Contract Analysts" to review each contract for details including the Common Rule, due to staffing/funding cuts, meaning that those functions (including presumably Common Rule requirements) are currently being performed by the COR in each PO.

Next Steps

- Meet with the COR(s) from one or more Program Offices?

[redacted]

From: [redacted]
Sent: Monday, August 24, 2020 3:44 PM
To: [redacted]
Subject: FW: More grant assignments please

Hi [redacted],

Thanks for the update. The situation you describe is more or less what I suspected it might be. At any rate, thanks for your hard work, rising the issue, and exploring options.

It is "an amazing process". (Including amazement some days that anything works.)

If you have time and interest, please go ahead with your proposed demo of the program that you used and discussed with [redacted]. Tomorrow would be great, or a subsequent meeting if you need more time.

Best regards,
[redacted]

From: [redacted]
Sent: Monday, August 24, 2020 2:13 PM
To: [redacted]
Subject: More grant assignments please

Hi [redacted],

My meeting with [redacted] just finished. She was very nice and helpful, but the answers she provided were not what I had expected.

I joined the Skype call on both my work and personal laptop, then I did screenshare from my personal laptop, and I used that to show her the demonstration grants management system I created using the UNCTAD software (a guy I know at UNCTAD had created a developer training account for me). It included most of the stuff that you mentioned we need (e.g. automatic emails at each step of the process, grant applicants/program offices/HSR team using the same system and a single database, etc.). The entire thing took me 3 hours to create because it's a "no code" software development system.

I mentioned that the benefits included:

1) Non-coders (including existing federal employees) being able to create, expand, administer, and use the system without the need to consult IT experts or hire IT contracts.
2) Easy interfacing with existing system that currently do some parts of the process (e.g. pulling information from the Grants.gov system's database).
3) Easy duplication of all existing services (e.g. WebTA for timesheets, FedTalent, payroll processing, etc) across many (or all) departments and levels of government, to make sure the new system works before transitioning to it from old systems.
4) Implementation through a U.S.-based NGO (the Global Entrepreneurship Network) instead of through the UN, if that's easier to "sell" to people who don't like to UN. The State Department already used this method to fund the deployment of the UN's software in foreign countries as part of US foreign aid.

[redacted] told me a few things:

1) She is not the decision-maker; she is simply representing our office on a working group that is making the decision.
2) That working group has already decided that G5 will remain ED's "system of record," and that ED should hire a contractor to modify the code for G5 to add functionality that it's currently lacking. They have already decided to NOT replace G5 with a different system. They already considered "all" alternatives (including other "no code" and "low code" software, such as Appian) and decided that keeping G5 and paying a contractor to modify it was the best option.
3) That working group is currently creating a list of requirements for how the current G5 system should be modified.
4) That the Grants.gov system is the federal government's "system of record," and that applicants must continue to submit applications using that system.
5) That the two main benefits of the UNCTAD software (and of other "no code" commercial software), namely the time and money savings of allowing existing non-IT, non-coding-experienced federal employees to create and modify the system themselves, are not worth obtaining for ED because "it's our job to support small businesses" through contracts. Doing it ourselves and saving time and taxpayer money is not worth it, because we need to give out contracts instead.
6) That I would get nowhere by trying to convince people that, instead of G5, ED should use a "no code" or "low code" software (maybe the UN's software, maybe a commercial option such as Appian).

I realize that [redacted] is only a messenger, not a decision-maker – but I am surprised by the situation she described. I did not realize that giving contracts to small businesses was our most important concern, more important than saving time and taxpayer money. I did not realize that ED had already decided to not change G5 as our "system of record." I did not realize that ED had already considered "all" of the options and decided that paying an IT contractor to code new functionality into G5 was the best option, when nobody (including presumably that work group) had ever heard of the UN software.

I would like to show you the same short demo of the software that I showed [redacted]; it should take less than 15 minutes, assuming no tech difficulties. I could do it during our HSR team meeting tomorrow.

Additionally, I'd like to show [redacted], and hopefully someone who is actually making the decision about the G5 successor.

Regarding my current workload: I completed the 9 grants that [redacted] assigned me, and I think I asked for additional grant assignments in an email last week. I'd appreciate if you could assign me some.

Thanks,

[redacted]

From: [redacted]
Sent: Monday, August 24, 2020 12:33 PM
To: [redacted]
Subject: RE: Harvard - R305A200278

Hi [redacted],

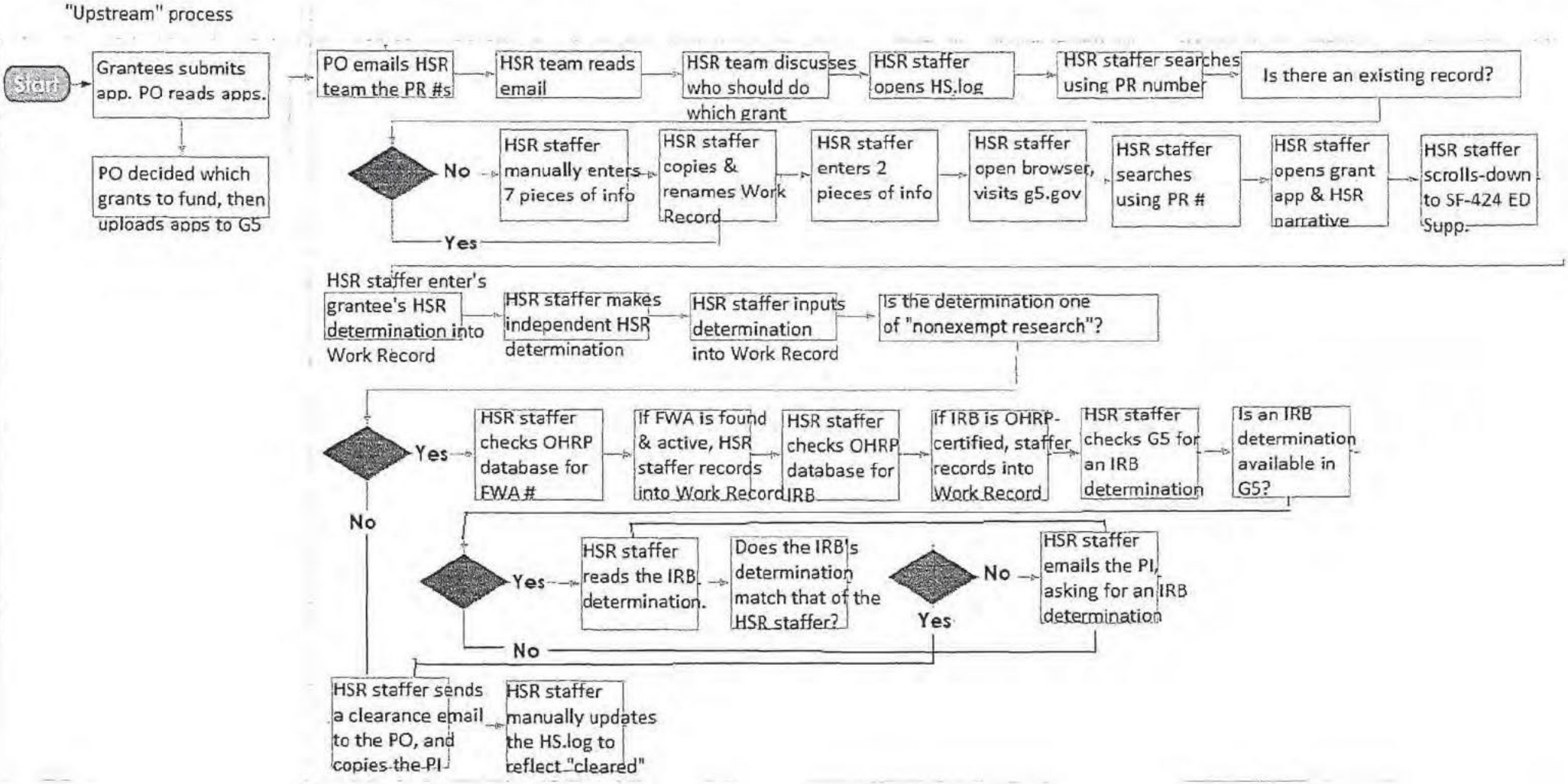
Thank you for sending the draft. I've made a couple of edits and sent it out. I'm recording it in the HS.Log as one that you did the review for and drafted the contact note. After a few more reviews, we'll shift to you doing the reviews and sending out the contact notes on your own, touching base with me or other team members if you have questions.

What is your current ED workload situation at this point (given the start of the school year)? Any points we need to chat about, additional studies needed for review, etc.?

Best regards,
[redacted]

Process Mapping "As Is"

Human Subjects Research Team Clearance Process



The HSR Team's Current method of work (demo) and Proposals for automation (demo)

HSR team's current method of work (taken from the draft SOP)

Standard Operating Procedures (SOP) for the Protection of Human Subjects in Research (HSR) Team

Grants Policy and Training Division (GPTD)
Office of Grants Administration (OGA)
Office of Finance and Operations (OFO)
U.S. Department of Education (ED)

Contents

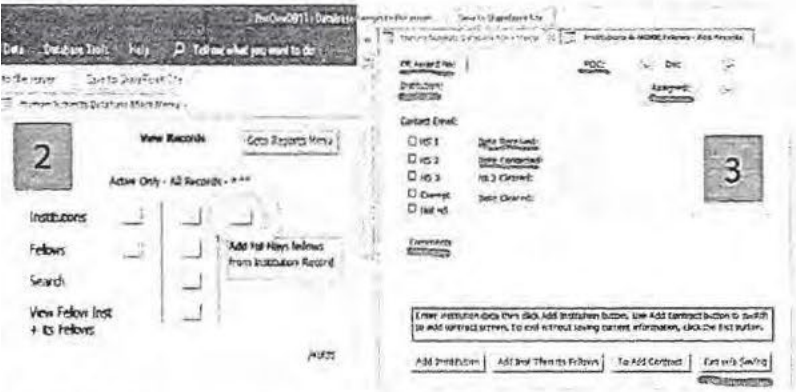
Overview 2
Procedural Steps 2
1) 2
2) 3
3) 3
4) 4
5) 4
6) 4
7) 5
8) 5
9) 5
10) 6
11) 6
12) 7
13) 8
14) 9
15) 9
16) 9
17) 10
Appendix 1 11
Appendix 2 12
Appendix 3 14

Yellow – Sending or receiving a manual email
Green – Manually entering data that already exists in G5 into the HSR.Log database
Purple – Manual steps that should be automated

Procedural Steps:

1 – HSR staffer receives a manually-typed email from a PO containing a PR Award Number for review
2 – HSR staffer opens the HSR.Log (MS.ACCESS database) and searches for/creates a new entry using PR Award #
3 – Manual data entry of 7 pieces of info into database
4 – Manual creation of a new folder named w/ PR Award #, then manual copying of Work Record template into folder
5 & 6 – Log into G5, search PR Award #, open GAN
7 – Copy 5 pieces of info into blank template
8 – Open Grant App, scroll down to SF-424 ED Supp., copy answers into Word Record template
9 – Determination of: No HSR, Exempt only, or Nonexempt
10 – If nonexempt, copy additional info to Work Record
11 – If nonexempt, check OHRP database for FWA reg.
12 – If nonexempt, check OHRP database for IRB reg.
13 – If nonexempt, type and send email to PI and cc/ PO
14 – If nonexempt, manually update HSR.Log
15 – If nonexempt, wait for & receive email from PI w/ IRB
16 – Send an email clearance (manually change template 3)
17 – Open and update the HSR.Log database
+ 3 MS.WORD templates that are manually edited

Procedural Steps (Screenshots)



PI/AWARD NUMBER:

RECIPIENT NAME:

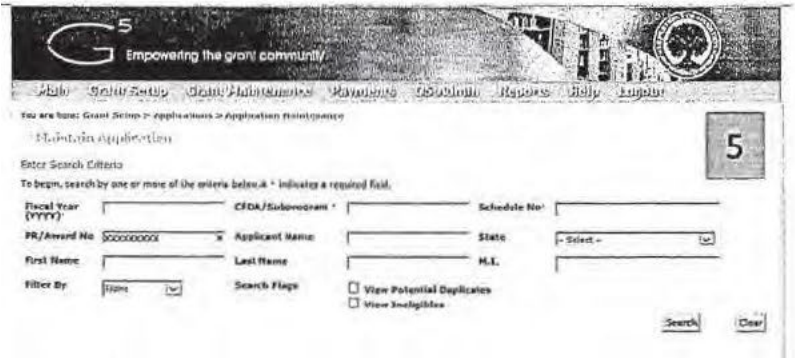
RECIPIENT PROJECT DIRECTOR (Principal Investigator):

EDUCATION PROGRAM CONTACT:

PROJECT TITLE:

PROGRAM OFFICE:

7



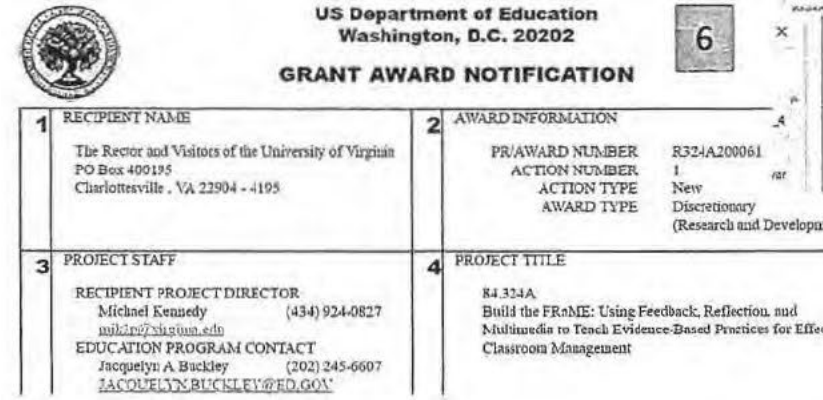
- Does grantee think research will involve human subjects? –
- Does grantee think research is exempt? –
  - Which exemptions? –
- IRB approval? –

Do I think there is covered Human Subjects Research?

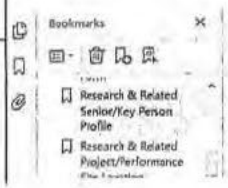
Collaborating institutions (active FWA?):

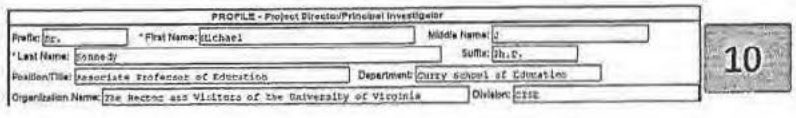
Is an IRB named? –
Is the named IRB registered? –
Is there a reliance agreement? –

Excerpts from Grant Application:

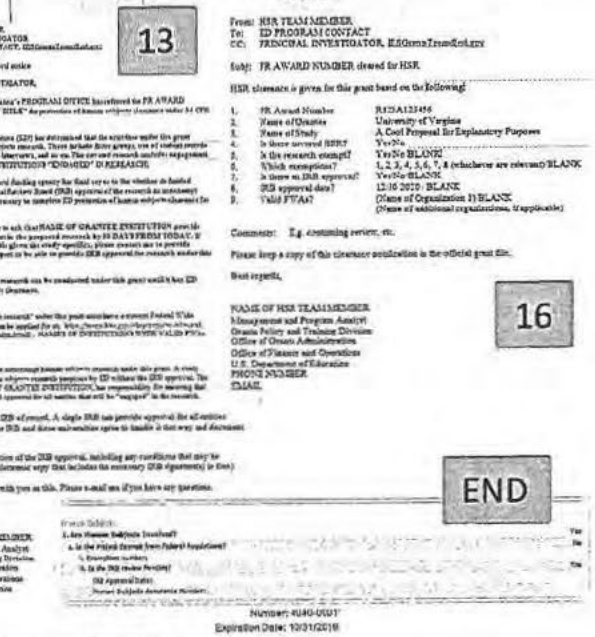






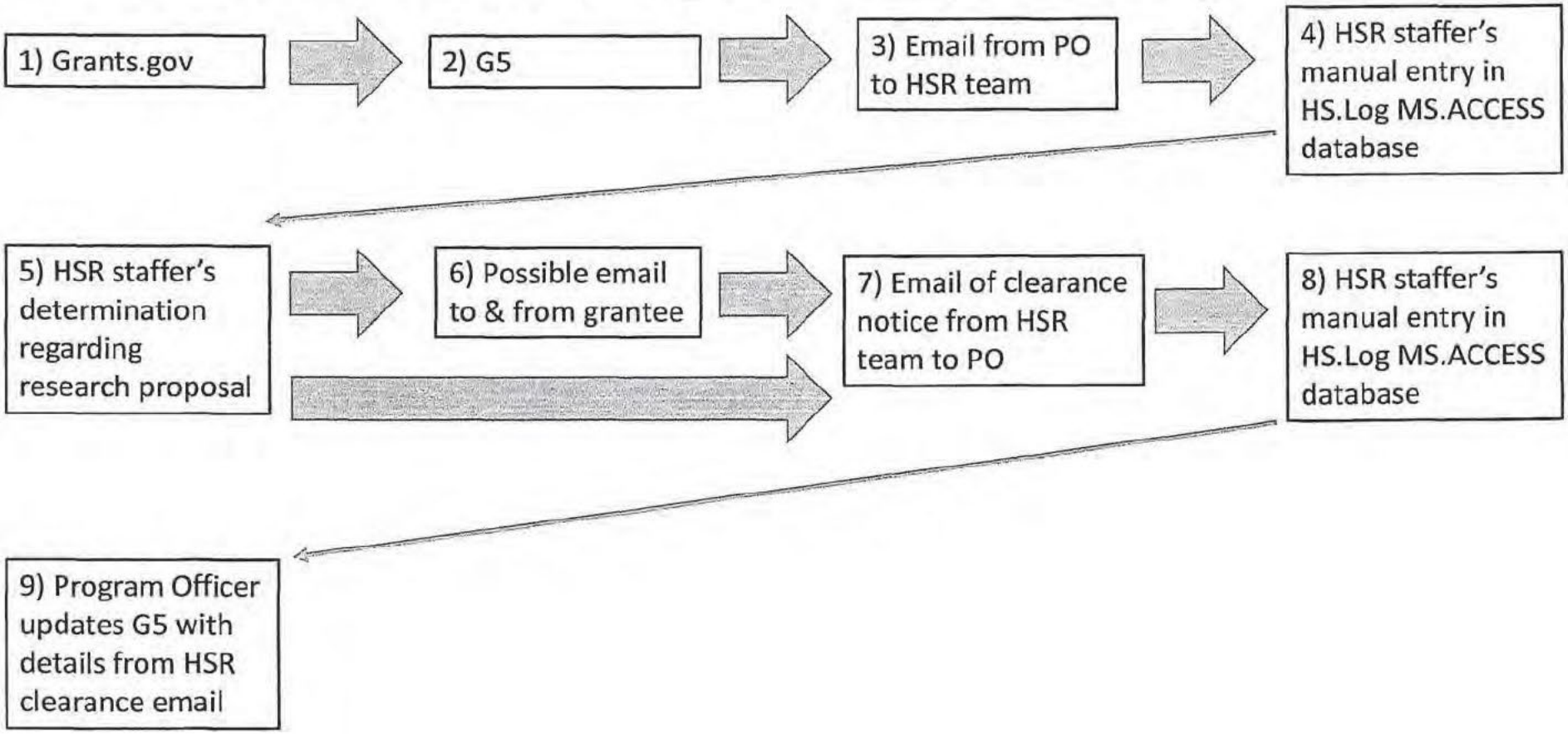




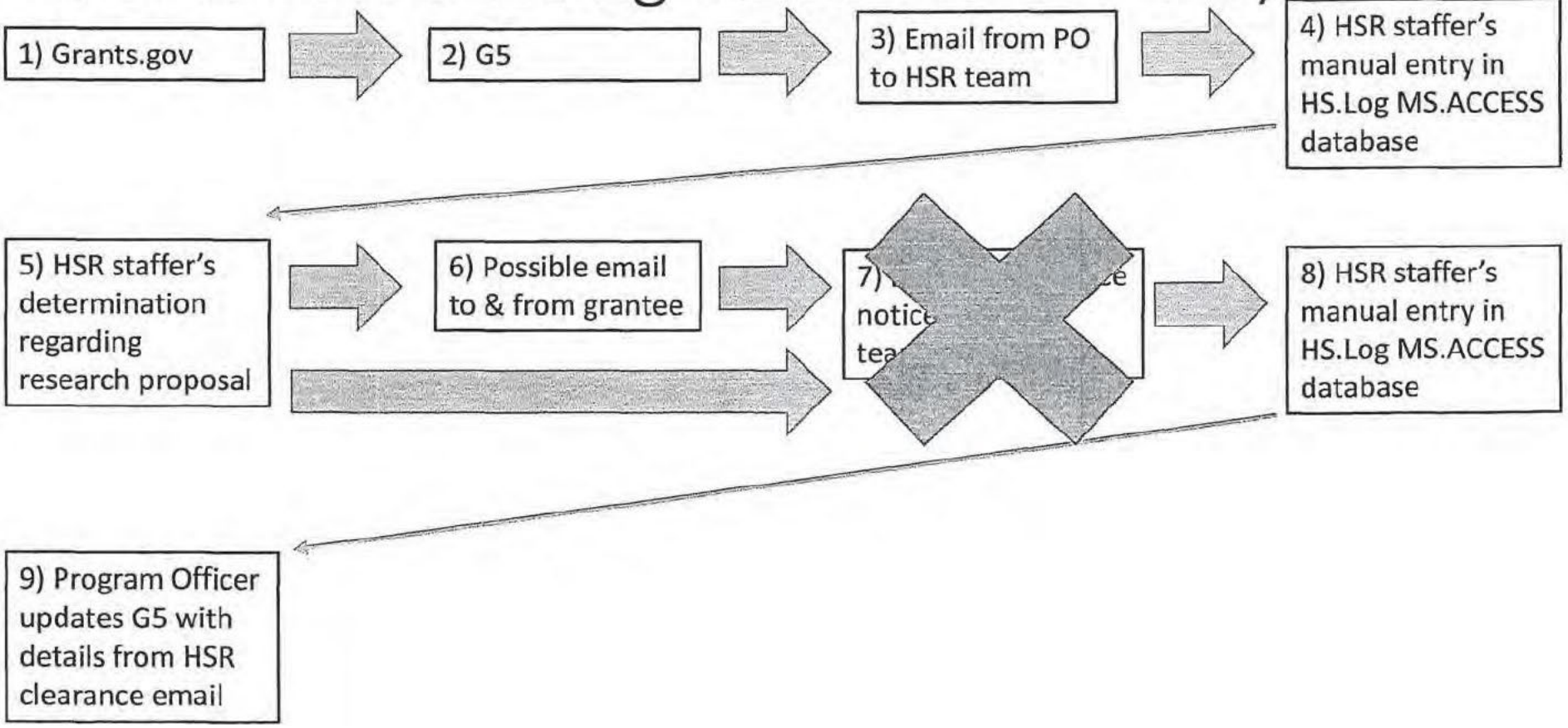


END

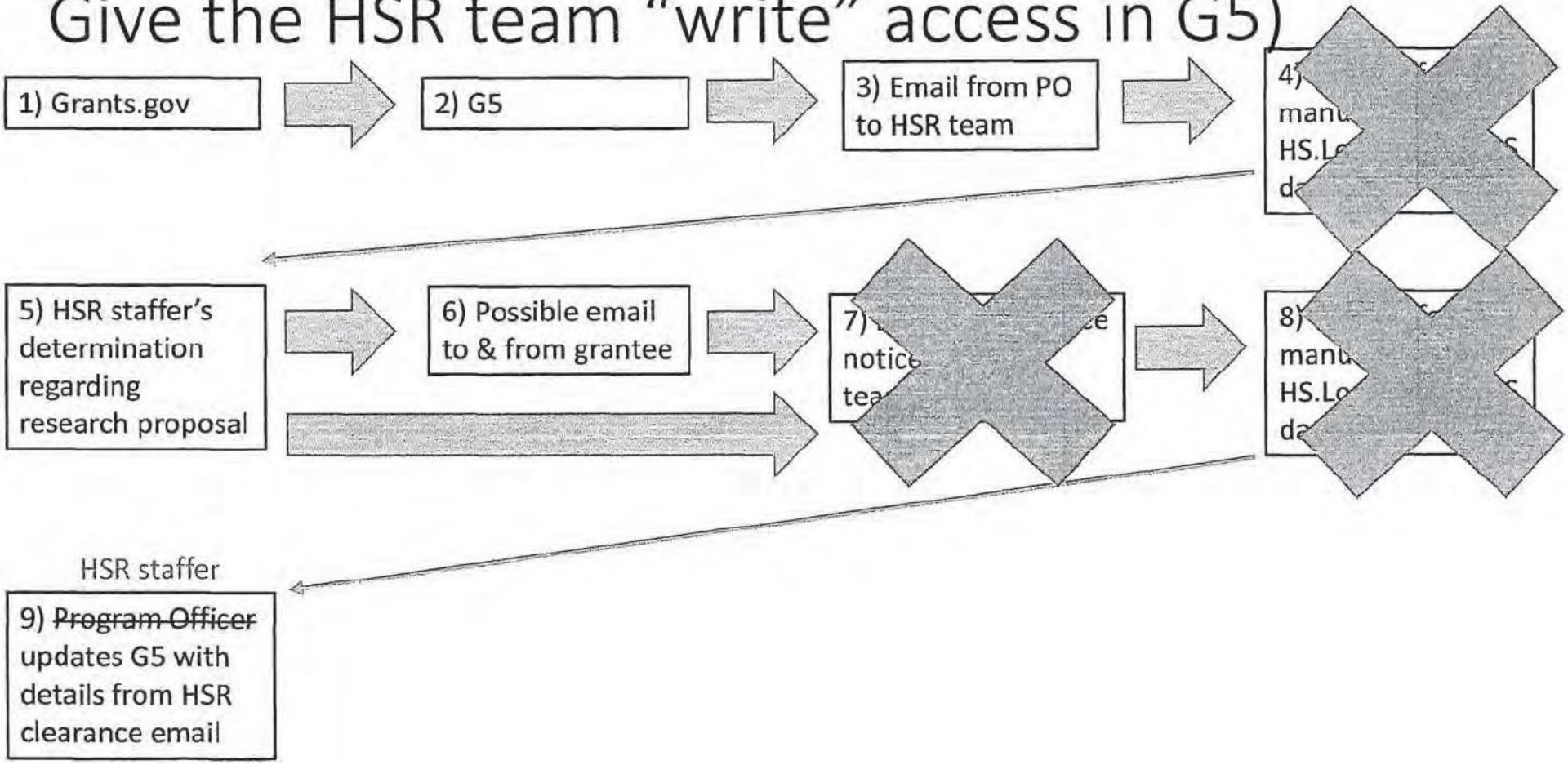
Flow chart of work process (current)



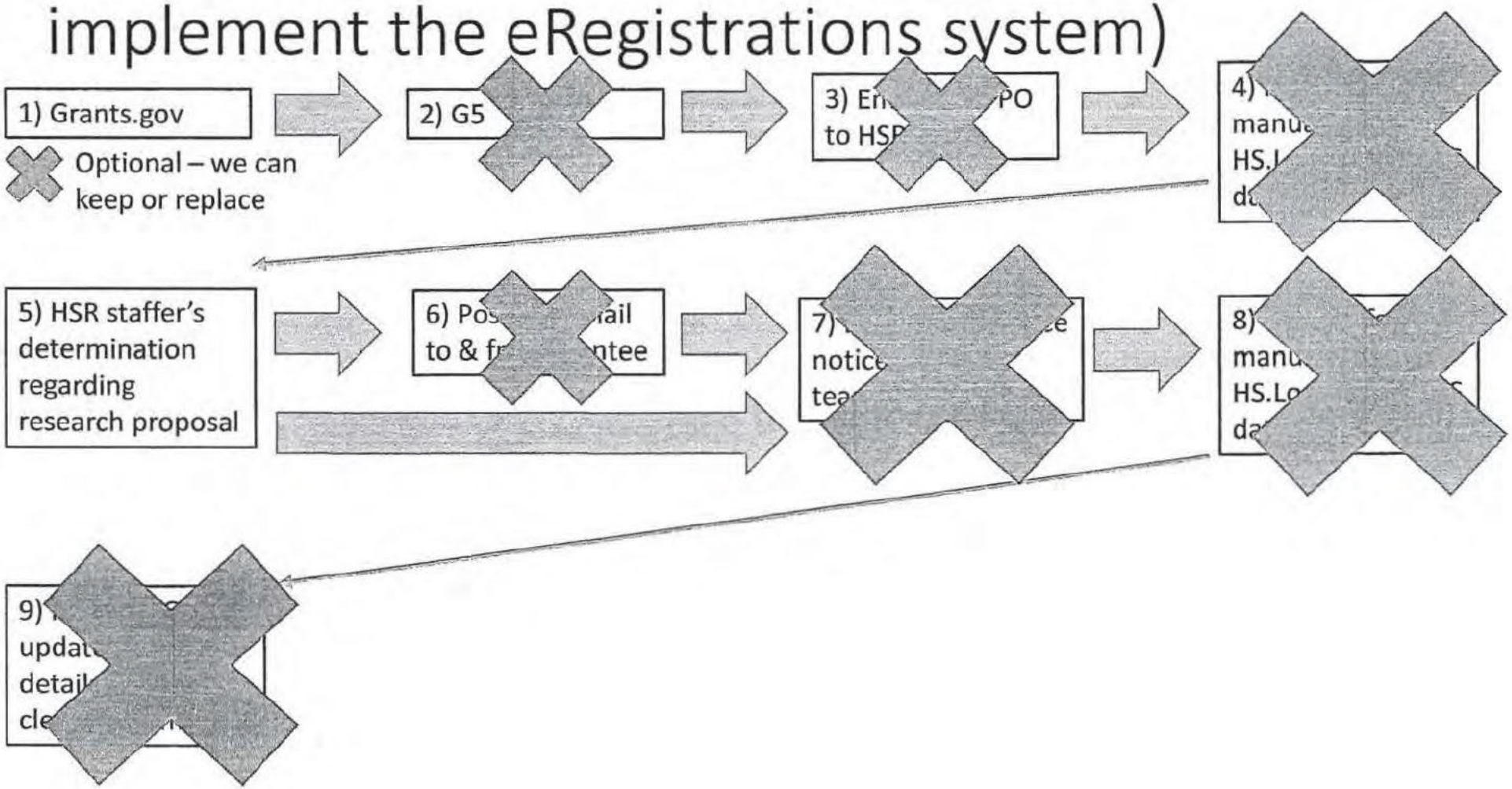
Flow chart of work process (Option 1: MS.ACCESS sending automated emails)



Flow chart of work process (Option 2: Give the HSR team "write" access in G5)



Flow chart of work process (Option 3: implement the eRegistrations system)



Comparison of approaches for building a system
Traditional v. "Low-code" v. "No-code"

- Creating/modifying/ administering a system requires years of coding expertise
- Due to this, only a few skilled people can create/modify/administer a system
- This results in those skilled people charging big fees
- Often, there is a mismatch between what the user/customer needs, and what the IT coders/ contractors deliver

Waterfall

- Creating/modifying/ administering a system requires only a small amount of coding experience
- More people can "do the job," so there is greater competition
- This results in lower fees being charged
- Almost always, a new system can be created/modified faster

Agile

- Creating/modifying/ administering a system does not require any coding experience
- Anyone can "do the job," even current federal employees with any coding/IT expertise
- This results in the fees charges being low-to-none
- Since anyone can potentially be assigned to create/modify the system, new systems are ready-to-use ASAP

Agile

ED already used "low code" (Appian) for its Civil Rights Data Collection (CRDC) process

- August 30, 2010: *"The Dept. of Education has issued an Authority to Operate (ATO) certification for its Appian Anywhere process solution built on Amazon Web Services (AWS). This is the first cloud-based business process management solution to be given an ATO by a federal agency. Its significance extends well beyond the Dept. of Education, because it assures other departments and agencies that Appian running on AWS meets the stringent requirements for federal information systems."*
  https://www.appian.com/blog/dept-of-education-issues-ato-to-appian-on-amazon-web-services/
  https://www.appian.com/blog/department-of-education-gets-high-marks-in-federal-it-reform-using-bpm-software-in-the-cloud/

- May 13, 2019: *"Appian (NASDAQ: APPN) today announced a partnership with Smartronix to deliver the speed and impact of low-code development to Federal Government and Department of Defense (DoD) agencies that require the stricter security standards of Impact Level 4 (IL4). The Appian Platform will be deployable as a Smartronix managed service in Amazon Web Services (AWS) or Microsoft Azure government clouds supported by Smartronix's IL4-certified managed services platform. This announcement is a major milestone in the evolution of low-code technology for government agencies that need high-security solutions."*
  https://investors.appian.com/news-releases/news-release-details/appian-available-managed-service-impact-level-4-secure-cloud

- August 28, 2020: *"Appian delivers a modern enterprise platform for digital transformation that is accelerating application delivery for the benefit of Government stakeholders. Appian's approach enables critical services at a lower cost than traditional software development methodologies. Deploy key initiatives with the Appian Accelerators, including: **Grants Management**, Constituent Case Management, Fleet Management, and Personnel Security and On-Boarding using our low-code platform, on-premises and in the cloud. The Appian Cloud is FedRamp 2.0 compliant."*
  https://www.appian.com/transform/government/

"Low-code" (e.g. Appian) is good, but "No-code" (e.g. eRegistrations) is better!

- eRegistrations can:
  - Interface with Grants.gov (if we want to keep that, rather than replacing it),
  - Be installed on existing, already-FedRAMPed AWS and Microsoft government clouds, or installed at ED as a "private cloud" (an exception to FedRAMP),
  - Be used by **anyone** (including our current federal employees), since **anyone** can learn to create, modify, and administer a system with just a few hours of training, **without any** prior coding or IT experience required.
  - Can easily be used for Grants (and Contracts) Management. It is currently used by many foreign governments (with funding from the U.S. State Dept.) as a "one stop shop" for online procedures, including business registration, patent & trademark registration, paying taxes, and doing payroll.

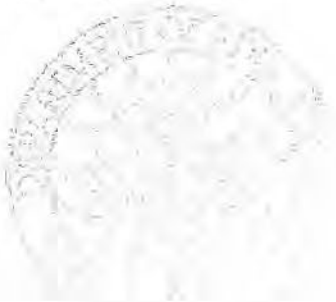
[eRegistrations Demo]

eRegistrations: the Best System at the Lowest Cost in the Fastest Time

- For a **one-time $50,000 fee**, GEN sells the software (meaning a non-expiring license) **and the source code** to national governments. The only contract is with GEN, not with UNCTAD directly. **There are no continuing fees.**
- The non-expiring license is valid for use by "the government of [country xxx]." If ED acquired the software, our license would be valid for **the entire U.S. government, at every level, in perpetuity.** ED would **never** have to renegotiate our contract or pay for a new license, even if the software was used by millions of people for every government procedure.
- For a **one-time $100,000 fee**, GEN sends its employees (who are already developers trained in using the eRegistrations software) to implement/build an online system for the purchasing government, and also trains that government's employees to use the software, so those government employees can expand and administer the system themselves in future, without the need to hire contractors.

ED Reform Plan

Department of Education
2/14/2018



Guiding Principles for ED Reform Steering Committee

- Reduce redundancy, maximize employee and organizational efficiency;
- Maximize transparency and employee involvement;
- Leverage ED colleagues' knowledge and expertise; and
- Maximize creative problem solving and teamwork while adhering to legal requirements.

Analytical Framework

- Customer Service
- Appropriate Federal role
- Alignment to mission
- Efficiency and effectiveness
- Duplication

From the Notes:

- Does the idea address a way to better meet the needs of the public and partners in a more accessible and effective manner? - YES
- Can the service, activity or function be better performed by another entity? – Better than renewing G5? YES
- Does the idea eliminate or restructure a service, activity or function that is not core to the agency's mission or is obsolete? - YES
- Does the idea eliminate, restructure or improve effectiveness of a service, activity or function that is ineffective or inefficient? - YES
- Does the idea eliminate or merge functions or programs that are redundant or duplicative? - YES

[redacted]

From: [redacted]
Sent: Wednesday, November 18, 2020 12:48 PM
To: [redacted]
Subject: RE: Automation suggestion

Following up on [redacted] email, perhaps a set of discussion sessions with POCs to identify their experiences with G5 and allow them to identify G5 (and successor) elements for automation in the grants process?

Best regards,
[redacted]

From: [redacted]
Sent: Wednesday, November 18, 2020 11:53 AM
To: [redacted]
Cc: [redacted]
Subject: Automation suggestion

Hi [redacted],

Following-up on one of the GPTD meeting topics just now...

The manual entry/verification of 4,500 DUNS numbers is something that can (and should) be automated, but that need is not being fully addressed by G5. This closely resembles the Human Subjects process, which also contains many steps that can (and should) be automated, and is also a need not fully addressed by G5.

I suspect it's not just that single program office we mentioned and the Human Subjects team that has this "lack-of-automation" type problem, that are not currently being alleviated by G5. There are probably many offices with these same difficulties.

Can we somehow make a list of all these requirements various offices have that are not being addressed by G5? I am suspect that, once we identify these reqs, we will discover an enormous need for automation that cannot wait until 2025 for "G6."

I hate to keep "beating a dead horse," but I think a low-code system like eRegistrations that can, from a technical viewpoint, be implemented in weeks (rather than years) and costs only $100,000 (rather than million(s) of dollars) is the best solution to fill these urgent automation needs. Perhaps we can get "buy-in" from all the other offices in need of automation, rather than waiting for/deferring to OCIO/the G5 team/whoever else has a vested interest in the current broken system...

Thanks,

[redacted]

Exhibit F
(PRIM&R and SACHRP email packet)

[redacted]

From: [redacted]
Sent: Thursday, July 9, 2020 10:11 PM
To: [redacted]
Subject: Thoughts on SACHRP materials

Hi [redacted],

I read through all four attachments. Thanks for sending me those.

I am concerned about two of them, the "Charge to SACHRP re Justice" and the "PRIMR justice transcript."

1) Regarding the Charge itself (which is divided into four parts, on page 3 of that document):

I read through the entire document, but just by reading the Charge alone, I could immediately identify the political leanings of whoever drafted the Charge. The Charge itself very clearly consists of leading questions. The ideological bias of the author(s) is readily apparent. This poses a methodological problem because, if someone formulates a question in order to reach a particular answer, the credibility of the answer reached could be called into question, and the answer itself might be inaccurate.

In this particular case, I am not opposed to the preordained answer the Charge's drafter seeks to reach. I am simply opposed to the fact that the answer is so obviously preordained, which opens this entire process up to criticism.

2) Regarding the transcript:

Reading through that email conversation, I had the unmistakable feeling of being in an ideological "echo chamber." There are similar echo chambers on all sides of the political spectrum, and regardless of which variety of echo chamber we find ourselves in, we should strive to break out of that chamber by listening to opposing views. There was a noticeable lack of anyone defending Belmont, and I would have appreciated reading through a different (and I think better) version of that transcript where someone adopted that point of view. Essentially, the transcript as-is seems to lack ideological diversity, or diversity of thought - an important and often neglected aspect of diversity.

Thanks,

[redacted]

From: [redacted]
Sent: Thursday, July 9, 2020 5:34 PM
To: [redacted]
Subject: FW: Materials for Thursday and Friday SAS-SOH calls

Hi [redacted]

The SACHRP (HHS Secretary's Advisory Committee on Human Research Protections) working group is meeting tomorrow from 11 to 1. The discussion will deal with this principle of "justice" in human subjects research, and the scope of the exemption for "public health surveillance".

Feel free to phone in and "observe" the proceedings (including spotting any elements particularly relevant to ED. I've forwarded an email that includes the link for the conference "call" separately.

Best regards,
[redacted]

[redacted]
Protection of Human Subjects Coordinator
US Department of Educationnt
Telephone: [redacted]
Fax: [redacted]
e-mail: [redacted]
e-mail for general queries: HumanSubjectsResearch@ED.gov
http://www.ed.gov/about/offices/list/ocfo/humansub.html

Training: Dept. of Education: Implementing the Common Rule
for the Protection of Human Subjects in Research (34 CFR 97)
https://www2.ed.gov/rms-training/human-subjects-research/story.html

From: [redacted] (HHS/OPHS) [redacted]
Sent: Wednesday, July 8, 2020 12:36 PM
To: [redacted] (NIH/OD) [E] [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted] (AHRQ/OEREP) [redacted]; [redacted]; [redacted]; [redacted] (AHRQ/OEREP) [redacted]; [redacted]; [redacted] (HRSA) [redacted] (CDC/DDPHSS/OS/OSI) [redacted]; [redacted]; [redacted]; [redacted] (FDA/OC) [redacted]; [redacted]; [redacted] (FDA/OC) [redacted]; [redacted] (USAID.GOV) [redacted]; [redacted]; [redacted]; [redacted]; [redacted] (HHS/OCR) [redacted]; [redacted]; [redacted] (CDC/DDPHSS/OS/OSI) [redacted] (HHS/OCR) [redacted]; [redacted] (IHS/HQ) [redacted]; [redacted] (NIH/OD) [E] [redacted]
Cc: [redacted]
(FDA/OC) [redacted] (FDA/OC) [redacted]
(HHS/OASH) [redacted] (HHS/OASH)

[redacted] (USAID.GOV) [redacted]

Subject: Materials for Thursday and Friday SAS-SOH calls

Please see attached materials for this week's SAS and SOH calls. Webex invitations were previously circulated.

SAS: Thursday, 7/9, 1:00 – 2:30
Topic: Risks to Non-subjects

SOH: Friday, 7/10, 11:00 – 1:00
Topics: Public Health Surveillance, Consideration of the Role of Justice as an Ethical Principle in 45 CFR Part 46 (see attached charge, and redacted PRIM&R thread on this topic)

Thank you.

[redacted]
Office for Human Research Protections (OHRP)
Office of the Secretary, DHHS
1101 Wootton Parkway, 218.6S
Rockville, MD 20852
[redacted]

Charge to SACHRP: Consideration of the Role of Justice as an Ethical Principle in 45 CFR Part 46

Background

The Belmont Report embraces Justice as one of its three principles, and recognizes the major role of injustice in the development of research ethics:

> Questions of justice have long been associated with social practices such as punishment, taxation and political representation. Until recently these questions have not generally been associated with scientific research. However, they are foreshadowed even in the earliest reflections on the ethics of research involving human subjects. For example, during the 19th and early 20th centuries the burdens of serving as research subjects fell largely upon poor ward patients, while the benefits of improved medical care flowed primarily to private patients. Subsequently, the exploitation of unwilling prisoners as research subjects in Nazi concentration camps was condemned as a particularly flagrant injustice. In this country, in the 1940's, the Tuskegee syphilis study used disadvantaged, rural black men to study the untreated course of a disease that is by no means confined to that population. These subjects were deprived of demonstrably effective treatment in order not to interrupt the project, long after such treatment became generally available.

These examples, particularly Nuremberg and Tuskegee, were the events that drove adoption of regulatory protections; absent issues of Justice, oversight had been entrusted to professional norms. Yet despite its recognition of the historical importance of these events, Belmont arguably avoids the underlying issue, suggesting Nazi victims were used for research because they were "unwilling prisoners" (*i.e.,* a population of convenience) and that rural black men were simply "disadvantaged." It may be more accurate to suggest that the reason why individuals were held in concentration camps, or were disadvantaged in the rural South, was also the reason these individuals were deemed suitable for research that was grossly unethical: the perception that such individuals belonged to populations that were intrinsically less deserving of the protections society affords its members, *i.e.,* racism.

The Belmont report ends with the admonition:

> One special instance of injustice results from the involvement of vulnerable subjects. Certain groups, such as racial minorities, the economically disadvantaged, the very sick, and the institutionalized may continually be sought as research subjects, owing to their ready availability in settings where research is conducted. Given their dependent status and their frequently compromised capacity for free consent, they should be protected against the danger of being involved in research solely for administrative convenience, or because they are easy to manipulate as a result of their illness or socioeconomic condition.

Some of these populations are sought as research subjects because of their aforementioned "availability in settings where research is conducted," but others are populations of moral, rather

than administrative, convenience, in the sense that moral codes based on common humanity have historically not been applied equally to all groups.

Regulatory Language

The Common Rule empowers the IRB to address issues of injustice in several ways. First, the criterion at §46.111(a)(3) states that research is only approvable if:

> Selection of subjects is equitable. In making this assessment the IRB should take into account the purposes of the research and the setting in which the research will be conducted. The IRB should be particularly cognizant of the special problems of research that involves a category of subjects who are vulnerable to coercion or undue influence, such as children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons.

Second, §46.111 closes with:

> (b) When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects.

It is worth noting that the eight criteria under §111(a) are preceded by the the description: "In order to approve research covered by this policy the IRB shall determine that all of the following requirements are satisfied:..."

Placing §111(b) outside this qualifier implies that the *research* must meet the §111(a) criteria, and that the "additional safeguards" are, at least potentially, outside the scope of the research itself. This construction leaves IRBs with ambiguity as to their role in upholding the rights of so-called "vulnerable" populations.

The Common Rule also addresses potential injustice through its requirements for IRB membership at §107(a):

> Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members (professional competence), and the **diversity of its members, including race, gender, and cultural backgrounds** and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. The IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments (including policies and resources) and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. **If an IRB regularly reviews research that involves a category of subjects that is vulnerable to coercion or undue influence, such as children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons, consideration shall be given to the inclusion of**

one or more individuals who are knowledgeable about and experienced in working with these categories of subjects.

Thus, the regulation embraces two structural approaches to address potential injustice: (1) representation, *i.e.,* diversity of membership; and (2) expertise and experience.

Charge to SACHRP

The committee is asked to consider whether additional interpretation or guidance is required to adequately ensure that research involving disadvantaged populations is ethical. In particular:

1. §46.111(a)(3) requires the IRB to take into account "the setting in which the research will be conducted." For much biomedical research, particularly research with the potential for direct benefit to participants (*i.e,* studying potentially therapeutic interventions) the setting in which research is conducted is the healthcare delivery system. There is ample data demonstrating that the current healthcare delivery system has structural inequities related to race, income and socioeconomic status. What is the role of the IRB in ensuring that research conducted in this setting appropriately protects the rights and welfare of research participants? In particular, how can research be conducted so that it does not implicitly inherit the injustices of the healthcare delivery system (*e.g.,* restricting participation to individuals who are insured and able to afford copays)?

2. §46.111(b) asks the IRB to ensure that "additional safeguards" are in place to protect research subjects "vulnerable to coercion or undue influence." What measures constitute adequate safeguards in these circumstances, and how should their adequacy be assessed? Should the requirement for such safeguards be limited to those "vulnerable to coercion or undue influence" (*i.e.,* populations with diminished autonomy), or are there concerns of social justice that should lead to a more expansive interpretation of vulnerability to exploitation?

3. §46.107(a) requires that the IRB "consider inclusion" of individuals who are "knowledgeable about and experienced in working with" disadvantaged populations if it regularly reviews research involving such groups. This language is often interpreted to apply when research targets a specific group, but given the diversity of the U.S. population, should the language be interpreted more broadly to require that inclusion of such members be the rule, rather than the exception? And, given the awareness of ubiquitous structural racism, is it sufficient to rely on expertise and experience rather than representation to "promote respect for (the IRBs) advice and counsel?"

4. Is there any additional guidance, training, or resources that can be helpful to IRBs in raising awareness of and responding to ethical issues involving disadvantaged populations in research?

PRIM&R justice email thread transcript

The following is a redacted transcript of an email conversation between members of the PRIM&R public policy committee. It begins with the following link to an article titled "Clinical Trials For COVID-19: Populations Most Vulnerable To COVID-19 Must Be Included."

Link to article (https://www.healthaffairs.org/do/10.1377/hblog20200609.555007/full/)

Participant One

There are some things that I think are superficial in the article. Vulnerable is covering a lot and that for me is where some of the arguments break down. I don't think that the nursing home residents and racial/ethnic minorities are coming from the same place.

Not sure that I agree that all research has to contribute to health in the proximal way in which they discuss it. What rubbed me the wrong way is to say that academic medical centers should collaborate with community type providers. There is often money to be made and I am not sure why the academic medical certain is to be privileged. In my Center we often help community practices to figure out the personnel that they may need to set up clinical trials themselves. One of the reasons for this is they are more likely to accrue a particular type of patient in larger numbers allowing one to see effects sometimes that won't occur when you have lower numbers.

So while there are some good points made in the article it is a bit too basic or superficial for me. I am surprised as Health Affairs is really tough.

Participant Two

I suggested SACHRP readdress justice as one of the principles underlying research ethics. From the email with that proposal:

> It has always seemed to me that Respect for Persons eclipses Justice and Beneficence in both Belmont and the regulations. Tuskegee was addressed through this lens, which was probably adequate for the times. In the ensuing 50 years, however, we have become increasingly aware of the social determinants of health and the structural inequities in our healthcare delivery system. While IRBs try to ensure ethical research in this setting, the reality is that biomedical research is increasingly conducted in the context of the healthcare delivery system, inheriting all of that systems structural inequities (both economic and racial). One could argue the extreme position that research conducted in this context is structurally unethical.
>
> The community has tried to address the scientific implications of disparities, as reflected in recent FDA guidance. But ethics is about more than the science. We craft informed consent documents to be responsive to Respect for Persons - they are not driven by science. Should we be taking a similar approach to Justice?

I know as a practical matter that practicing IRBs will not feel empowered to address Justice in this sense unless they have explicit guidance or recommendations to do so.

Another way to come at this is to look at Belmont as a response to the use of "populations of convenience," whether those were black sharecroppers or institutionalized children. The resulting regulatory constraints have essentially made more affluent white users of our healthcare system into a population of convenience, albeit one that potentially benefits from inclusion in research (at least partly because they have a more effective voice). We have turned exploitation into "mutually beneficial exploitation" rather than doing away with it.

All of this is way more "bioethical" than our usual topic, but I wonder if not addressing Justice at SACHRP in this moment sends its own message. The issue seems consistent with the committee's charge.

Participant Three

A few musings that might inform your thinking…it's interesting to me that the regulations do very little to "operationalize" justice as a principle. There are all of these VERY detailed requirement for informed consent, as an operationalization of respect for person (of course, one could argue that RfP should be operationalized in other ways as well, but leaving that aside) . And then some detail (though much less) about minimizing risk, balancing risks and benefits. But justice is basically: select subjects fairly, and protect those who are vulnerable to coercion or undue influence. So that's what IRBs think they are supposed to do—justice gets the least attention by IRBs by far. And no wonder. There are no way the tools they have now—Belmont's conception of justice, which is fairly distributing the risks and benefits of research, and then the very thin regulatory requirements—can address the fact that the research enterprise sits on top of, is intertwined with, is inseparable form, larger power structures that have systemic injustice—and racism—just baked in.

An IRB can ask about inclusion and exclusion criteria, for instance; but can it, should it, how would it, ask about who had a seat at the table to set research priorities in the first place, to take just one kind of example…Or, how does the IRB ask about how/whether data that is collected and shared from a study is going to be shared in a way that doesn't perpetuate bias. What tools does the IRB use to do this?

Participant Two

Thanks. These are really helpful perspectives. The other underlying observation is that the purpose of ethical review is to mitigate the impact of perceptions of "us and them" on research on human subjects ("on" chosen intentionally). While Tuskegee may have been the event that tipped the scales in the U.S., the Nuremberg trials certainly illustrate the same phenomenon of using a population that is deemed somehow "less human" as a means to an end. "Us and them," or "the other" raises its head in so many places in human subjects research, maybe most obviously in the

educational, socioeconomic and power divide between doctors/investigators and most of their patients/subjects.

Belmont does not turn a blind eye to this problem, but also seems to try to intellectualize it and avoid addressing deeper structural issues. Addressing structural racism and bias at the level of (1) facilitating informed consent, and (2) requiring that "whenever research supported by public funds leads to the development of therapeutic devices and procedures, justice demands both that these not provide advantages only to those who can afford them and that such research should not unduly involve persons from groups unlikely to be among the beneficiaries of subsequent applications of the research" seems like an attempt to put a Band-Aid on a gaping wound.

I'm still not sure what "duly" involving groups unlikely to benefit would mean.

I think some of this is rooted in the explicit formulations of justice that Belmont uses: "(1) to each person an equal share, (2) to each person according to individual need, (3) to each person according to individual effort, (4) to each person according to societal contribution, and (5) to each person according to merit." Each of these implicitly adopts justice as a function of how the individual is treated and relates to society, but there is really something bigger here.

Belmont closes with an admonition...

> One special instance of injustice results from the involvement of vulnerable subjects. Certain groups, such as racial minorities, the economically disadvantaged, the very sick, and the institutionalized may continually be sought as research subjects, owing to their ready availability in settings where research is conducted. Given their dependent status and their frequently compromised capacity for free consent, they should be protected against the danger of being involved in research solely for administrative convenience, or because they are easy to manipulate as a result of their illness or socioeconomic condition.

... but provides little guidance on how to operationalize. It's actually a bit odd as I read it again for the umpteenth time, since I would attribute the use of these groups not to "their ready availability in settings where research is conducted," but rather to our increased level of comfort putting them at risk because we see them as "not like us."

Participant One

I don't think that the issue of justice has been well developed and defined. I agree with what has driven a lot of the focus and also the basis for change which has often been that of respect for persons, second I think is beneficence and justice is last. I think there are reasons that need to be addressed and are a part of the tension in research ethics.

Respects for persons is at a much more individual level and we are comfortable and can reason or way through how this operates. Beneficence with our do no harm also aligns itself with how we practice medicine, what is a good should or ought and this principle is quite acceptable in our actions and systems of care. Justice is more scary. Justice begins to get at inequity and re-balancing in systems. In the regulations we think about justice as being fair to all or to provide

equal opportunity to all to participate, to be protected if there is vulnerability and to be treated like all others.

The problem is should we be thinking about justice that move beyond this given that we know particularly for vulnerable populations the differential value of their participation but yet the inequities in the health care system result in less benefit. An example is a drug company wants to test a new hypertension drug (I won't use BIDIL as an example but I could use it as an injustice). It is easy to get Blacks as participants if they provide community practices or community hospitals with payments. Yet once that drug is developed and released the value of the participation of that person is not relevant to the fact that the drug may be beyond their ability to afford (HIV is an example of some of the most vulnerable participated (tested in African countries) but then cannot afford or have access to the drug. It raises the tension of justice in how one is treated as a subject/participant and how justice is then not anywhere in the process of respect for that person's presentation outside of the subject process.

It would be great if SACHRP either worked with NAM or on its own began to rethink what justice means and how can the principle of justice be taken given that we have moved to the issue of people's data, blood etc., can be viewed as property. Having a meeting to flush out what justice means and to highlight if there is any aspect to the principle that ties into social justice and distributive justice. Think about the Henrietta Lacks case. Participants are giving things that have great meaning and value in what we know refer to as bioeconomy. I agree to participate in development of the Covid-19 vaccine and someone using my biomeasures will become rich yet I may not be able to get a test. We should update our thinking about what participation means within the context of current bioeconomies and what justice really is. If I still have access to talk on bioeconomy(https://ncvhs.hhs.gov/meetings/full-committee-meeting-4/) I will share it as something that makes one rethink about the value of data in various forms and what justice might need to mean.

Go to the slides on the bioeconomy. The talk is much better appreciated with the audio which I have somewhere.

These are just some thoughts but I do think the questions that you are raising are the right questions now and a way for the field of bioethics to contribute to signaling that Black Lives Do Matter by bringing a justice lens to how we think about biomedical research in the face of Tuskegee, Lacks and many other things that can be remembered that were unfair but yet have left a greater legacy of benefit for Whites than Blacks. John Hopkins unabashedly says on its website that it did not benefit from HeLa cells though it made lots of careers and increased funding for science which indirectly benefitted its faculty. HeLa cells are known to have contributed to cancer treatment, AIDS, leukemia and a host of other diseases and disorders that the benefit to African Americans has been less than that of Whites. Lets think a bit more about this as it raises a lot of issues. I appreciate you including me on it.

Participant Two

I really hope we have a chance to discuss. These issues deserve more than regulatory interpretation - they should really have something on the scale of Belmont. I have great respect and admiration for that document, but I think the issue of race was glossed over, either intentionally or reflecting the rational understanding of that time. I am really beginning to see research protections as a way to mitigate "us and them," whether that divide is one of power and education between a doctor and his/her patients, or whether it is because there are populations we see as less deserving of the rights we believe should be enjoyed by members of a society.

Among other issues, it has been personally frustrating for me to be an IRB chair and have to opine on protocols that are well designed, but which I know will be run on top of an inequitable system. So many research participants are expected to have ancillary care paid by their insurance, or have to pay their own copays, effectively limiting participation to those who are well off. This is an issue that simply will not be addressed on a protocol-by-protocol basis, or we wouldn't allow ANY research!

Participant Three

One other thing that occurs to me is how much justice as it has been understood in our research ethics framework is tied in with "vulnerability." I wonder if that is part of the "problem" as it were, in thinking about operationalizing justice well in research. In the current framework, it seems like justice is about protecting and/or including the "vulnerable," That may be part of justice, but it seems too limiting. Or else, "vulnerability" needs to be understood so broadly as to be almost meaningless as s concept. It seems we need to move beyond thinking that justice is about making sure the "vulnerable" are adequately protected or included, and to thinking about representation and inclusion in all aspects of research (and the systems that support it). I don't think I am expressing this well, but as long as we focus on justice ONLY in terms of making sure we've dealt adequately with the "vulnerable," it seems to me we can't step back and see broader social justice issues--who is at the table making decisions, where does funding go, who sets research priorities...

Participant Two

I keep going back to Belmont, and it is making me more and more uncomfortable. I wonder what the discussions were at those meetings, and what compromises were adopted. In particular, to characterize the specific populations of black farmers and concentration camp victims as simply "disadvantaged" and "unwilling prisoners," respectively, and to identify the ethical issue as being "vulnerable" to coercion and undue influence, seems akin to "pleading guilty to a lesser charge" to avoid discussing the real transgression. Given the individuals involved in drafting Belmont, I can't help but think this was intentional (and political?). I'm embarrassed not to have noticed this before.

Participant Three

And of course the revisions to the Common Rule actually **explicitly** narrowed vulnerability **just** to vulnerability to coercion and undue influence—as if that's all that IRBs need to look out for. It actually went in the wrong direction, in my opinion, when thinking about these issues… so even though I don't love the focus on vulnerability, to narrow it only to being vulnerable to being coerced or unduly influenced seems really problematic.

Participant Two

I agree. And I think vulnerability is the wrong approach, in any case. It suggests that the only issue is that of exploitation, when Justice also includes access...

Still thinking about Belmont.

It's seeming increasingly unlikely to me that Belmont's glossing over of racism was unintentional. I wonder if identifying black farmers as victims of racism in a context that included Jews in the Holocaust risked implying that the US Public Health Service had behaved in a way that could be reasonably compared to the Nazis. This comparison seems unavoidable if you juxtapose Nuremberg and Tuskegee. That may have been an unacceptable suggestion at the height of the Cold War, or might just reflect an unwillingness to condemn an otherwise proud US institution.

Yet another missed opportunity. And I'm frankly ashamed that it took the present events to make me even think about it.

I wonder what records were kept of the discussions of the National Commission...

[redacted]

From: [redacted]
Sent: Wednesday, December 2, 2020 4:54 PM
To: [redacted]
Cc: [redacted]
Subject: FW: The Urgency of Justice in Research - in press
Attachments: The Urgency of Justice in Research Nov 2020.pdf

FYI: OHRP/SACHRP has circulated the attached article that deals with issues of "Justice in Research" (a topic that SACHRP has under consideration to provide recommendations to OHRP/HHS). I've not checked, but I suspect the Consuelo who is a coauthor of the article may well be the Consuelo who is a member of SACHRP.

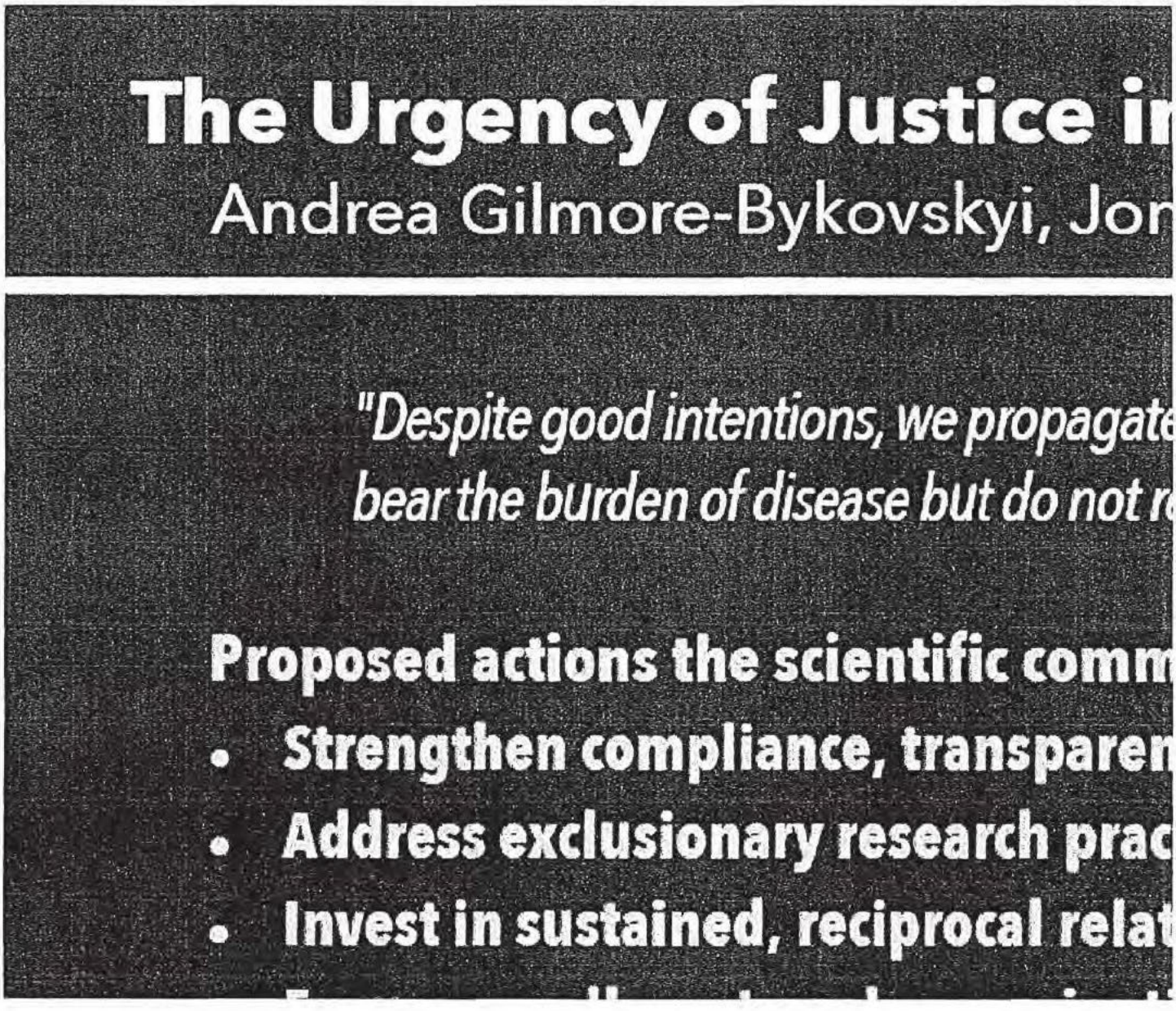
Best regards,
[redacted]

From: [redacted] (HHS/OPHS) [redacted]
Sent: Wednesday, December 2, 2020 1:08 PM
To: OS - OPHS OHRP <OHRP.OS@hhs.gov>; [redacted] (NIH/OD) [E] [redacted] (AHRQ/OEREP) [redacted] (HHS/OASH) [redacted] (CDC/DDPHSS/OS/OSI) [redacted] (HHS/OASH) [redacted] (FDA/OC) [redacted] (FDA/OC) [redacted] (USAID.GOV) [redacted] [redacted] (NIH/FIC) [C] [redacted] (HHS/OCR) [redacted] (CDC/DDPHSS/OS/OSI) [redacted] (HHS/OCR) [redacted] (IHS/HQ) [redacted] (HHS/OPHS) [redacted]
Cc: [redacted] (FDA/OC)

[redacted] (FDA/OC) [redacted]
(HHS/OASH) [redacted]
[redacted]
(HHS/OASH) [redacted]
[redacted]

Subject: FYI: The Urgency of Justice in Research - in press

Sharing this recent paper on justice in research, with SACHRP member [redacted] as author-



[redacted], MD, MSCI
Vice President for Health Equity
Associate Dean for Health Equity
Professor of Medicine
Vanderbilt University Medical Center

Please note my new email address: [redacted]

Trends in
Molecular Medicine

CellPress

Science & Society

The Urgency of Justice in Research: Beyond COVID-19

Andrea Gilmore-Bykovskyi,[1,*] Jonathan D. Jackson,[2,3] and Consuelo H. Wilkins[4,5]

The striking imbalance between disease incidence and mortality among minorities across health conditions, including coronavirus disease 2019 (COVID-19) highlights their under-inclusion in research. Here, we propose actions that can be adopted by the biomedical scientific community to address long-standing ethical and scientific barriers to equitable representation of diverse populations in research.

'Who ought to receive the benefits of research and bear its burdens? This is a question of justice...' - The Belmont Report

From 1932 to 1972, the US Public Health Service conducted the 'Tuskegee Study of Untreated Syphilis in the African American Male', wherein study leaders convinced local physicians to withhold proven treatment for syphilis from 600 Black men without informed consent. By the end of the study, 128 Black men had lost their lives to syphilis and related complications and 59 spouses and children were infected. Imbued with, and enabled by, systemic racism, study leaders executed a carefully conceived, well-resourced recruitment and retention plan by employing sociologists, field workers, local Black institutions, and other trusted persons.

Nearly 50 years after the end of the Tuskegee Syphilis Study, Black Americans are dying of COVID-19 at an age-adjusted rate 3.2 times that of white Americans[i], yet comprise just 4% of participants in Moderna's Phase I/II severe acute respiratory syndrome coronavirus 2 (Sars-CoV-2) vaccine trial[ii], with improvements promised for Phase III[ii] [1]. Similar trends exist for Latino and Indigenous Americans, with ~74 Latino deaths per 100 000 and 90 Indigenous deaths per 100 000[i]. Amid unprecedented urgency to accelerate the development of safe, effective SARS-CoV-2 vaccines, there is growing concern that trials will paradoxically fail to include those at greatest risk for contracting and dying from COVID-19 [2].

The time is long overdue to fulfill the Belmont Report's principle of justice: equitable distribution of risks and benefits of research[iii]. Despite good intentions, we propagate and maintain a system where non-white populations bear the burden of disease but do not reap the benefits of research advances. This phenomena is evident globally, whereby lower and middle income countries (LMICs), predominantly in Africa, Asia, and Latin America, experience higher burdens of disease and lower life expectancy yet remain under-represented in clinical trials [3]. In 2019, there were 27 461 trials registered in high-income countries, which represent 16% of the world's population, compared with 7743 trials in LMICs, which comprise the remaining 84% (Figure 1)[iv,v]. Conversely, therapeutic breakthroughs made possible by trials conducted in LMICs may remain inaccessible to segments of these populations despite their disproportionate disease burden; for example, despite ethically controversial studies on preventative interventions for vertical transmission of HIV conducted during the 1990s in Africa, regional disparities in access to antiretroviral medications persist[vi] [4]. Shifting demographics, both globally and within the USA, demonstrate that such imbalances are likely to accelerate because non-white US populations are projected to become majority demographics by 2044[vii].

The exploitation and neglect of non-white populations in biomedical research are not insular phenomena but rather a direct consequence of dominant social forces and the histories that shape them. Effectively addressing inequities in research participation requires us to acknowledge their existence as harmful and unethical, as addressable rather than immutable. We must question the status quo, which imposes an undeserved expectation for

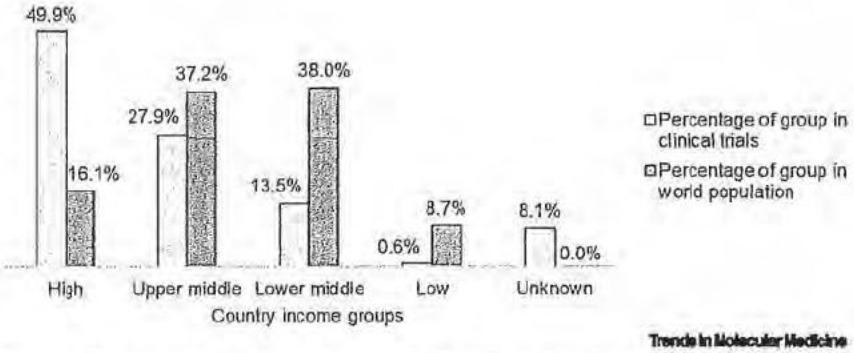


Figure 1. Clinical Trials and Population Density Globally by Country Income Groups in 2019. The graph compares the share of total clinical trials with the share of the world population across high, upper-middle, lower-middle, low, and unknown country income groups. Lower- and middle-income countries are located predominantly in Africa, Asia, and Latin America. Clinical trial data were obtained from the World Health Organization International Clinical Trials Registry Platform, whereas world population data was obtained from World Bank Open Data.

non-white populations to trust in, and contribute to, research overseen by systems that have consistently proven themselves inadequate in protecting their safety and promoting their health [5]. Here, we offer crucial first steps to move biomedical research towards the ethical imperative of justice in research.

Strengthen Compliance, Reporting, and Transparency

Research participation inequities persist despite over 25 years of mandated inclusion and reporting policies from the National Institutes of Health (NIH), the world's largest public funder of biomedical research [6,7] (Box 1). Major research reports often omit or delay reporting demographics and outcomes by subpopulation [7], contravening NIH requirements[vii,ix]. Similar omissions are observed globally and among studies not subject to NIH policies, such as a trial investigating the efficacy of dexamethasone in reducing mortality among hospitalized patients with COVID-19, which delayed reporting outcomes by race/ethnicity [8]. In a separate report evaluating hydroxychloroquine, all racial/ethnic minorities were grouped into a singular population [9], despite evidence indicating group-specific differences in outcomes across non-white demographics [10]. This illustrates the need for both improved engagement and inclusion, as well as broader adoption of transparent reporting and accountability structures, encompassing both appropriate detail and effective enforcement. Inequities often intersect, particularly across geographic and socioeconomic strata, yet measures of inclusivity often overlook socioeconomically disadvantaged or otherwise marginalized populations, such as disabled, unhoused, rural, older, institutionalized, hearing and vision impaired, justice system-involved persons, and sexual and gender minorities, each of which face distinct barriers to research accessibility. We must routinely measure and intervene upon intersecting, overlapping, and interacting dimensions of vulnerability to exclusion. Funding agencies, editors, reviewers, institutional review boards, and researchers all bear this responsibility.

Promoting accountability necessitates a shift away from assuming prospective participants as distrustful to assuming researchers and institutions must demonstrate trustworthiness. The Tuskegee Syphilis Study in particular is frequently invoked to rationalize under-enrollment of non-white populations, perpetuating a harmful narrative that blames non-white populations for their under-representation

Box 1. Reported Numbers for the Inclusion of Racial and Ethnic Minorities in NIH-Defined Extramural and Intramural Phase III Trials Reported for FY2018 Aggregated across All Institutes or Centers

Table I reports aggregated racial and ethnic minority enrollment data for Phase III trials as reported by all NIH Institutes and Centers. The data sources for enrollment numbers in Table I are individual NIH institute and center reports available at https://report.nih.gov/recovery/inclusion_research.aspx. The following list outlines the exceptions or missing data not represented in Table I:

- The Clinical Center (CC)/Intramural Research Program and National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK) only reported overall enrollment numbers by racial/ethnic group without gender distributions for NIH-defined Phase III clinical trials and, therefore, are not represented in Table I. Reported inclusion rates by group were: 2.3% American Indian/Alaska Native, 16.9% Asian, 10.4% Black, 0.0% Native Hawaiian/Pacific Islander, 35.9% white, 34.3% unknown or not reported, and 35.6% Hispanic for the CC/Intramural Research Program; and 5.7% American Indian/Alaska Native, 3.3% Asian, 16.8% Black, 0.6% Native Hawaiian/Pacific Islander, 64.9% white, 5.1% more than one race, 3.6% unknown or not reported, and 63.1% Hispanic for NIDDK.
- The following institutes or centers did not support NIH-defined Phase III clinical trials for FY2018: National Center for Advancing Translational Sciences (NCATS), National Institute of Arthritis and Musculoskeletal and Skin Diseases (NIAMS), National Institute of Biomedical Imaging and Bioengineering (NIBIB), National Institute on Minority Health and Health Disparities (NIMHD), and National Library of Medicine (NLM). National Human Genome Research Institute (NHGRI) reported zero enrollment of participants in NIH-defined Phase III clinical trials for FY2018. Eunice Kennedy Shriver National Institute of Child Health and Human Development (NICHD) reported supporting Phase III clinical trials in FY2018, but did not include the demographic breakdown for enrolled participants.
- Enrollment reports include an 'unknown' group, which is not reflected in Table I, because the median percentage for participants designated as gender unknown across each racial and ethnic group is 0%.

Table I. Aggregated Inclusion Rates for Racial and Ethnic Minorities in NIH-Defined Extramural and Intramural Phase III Trials Reported for FY2018

Racial or ethnic minority	Female	Male
	Median (range)	Median (range)
American Indian/Alaska Native	0.1% (0.0–0.4%)	0.2% (0.0–0.7%)
Asian[a]	1.0% (0.0–5.8%)	1.3% (0.0–8.0%)
Black or African American[b]	11.9% (4.2–49.8%)	8.8% (3.7–27.8%)
Hispanic	4.2% (0.0–30.6%)	4.8% (0.0–22.4%)
Native Hawaiian/Pacific Islander	0.1% (0.0–1.1%)	0.0% (0.0–1.5%)
White	29.1% (2.4–57.0%)	27.1% (5.3–62.4%)
More than one race	1.3% (0.1–9.5%)	0.9% (0.0–6.8%)
Unknown or not reported	1.6% (0.0–18.4%)	1.3% (0.0–25.8%)

[a]Fogarty International Center (FIC) reported one Phase III clinical trial for FY2018 with a 100% Asian enrollment rate, which is not included in the calculation for the medians and ranges in the table.
[b]National Institute of Allergy and Infectious Diseases (NIAID) and National Institute of General Medical Sciences (NIGMS) reported high enrollment rates for Black/African American (AA) participants, at 49.8% Black/AA female, 22.3% Black/AA male, 0.7% Black/AA unknown; and 37.0% Black/AA female, 27.8% Black/AA male, and 0.0% Black/AA unknown, respectively. Excluding these two agencies, the range for Black/AA enrollment is 4.2–23.1% for females, 3.7–20.0% for males, and 0.0–16.8% unknown.

[11]. Less often discussed is the fact that human subject violations continue to occur, such as over-representation of Black Americans in trials that do not require informed consent [12], and a recent large-scale malaria vaccine trial conducted across Africa that failed to obtain informed consent from parents of children who received the experimental vaccine [13]. Beyond these failings, the rhetoric of research participation itself, such as 'recruiting', 'retaining', and 'hard to reach', further objectifies non-white populations, many of whom have a long history of being pursued, retained, and reached at their peril.

Identify, Measure, and Systemically Address Exclusionary Research Practices

Just, rigorous research compels optimal participation from all without undue burden or exclusion. Indeed, many routinely applied statistical tests do not account for any selection bias due to recruitment factors. Yet, participation inequities are often normalized despite being scientifically immaterial, such as requiring English-language proficiency or health insurance. Exclusion criteria based on ever-growing lists of comorbidities may be designed out of an abundance of caution but disproportionately impact under-represented groups[x]. Returns of value for participants and communities are rarely considered, including provisions for emergent health needs, compensation, or reimbursement. Assumptions of flexible schedules and easy access to research spaces exacerbate inaccessibility. Clinicians may suffer from inexperience or bias, driving inappropriate diagnosis and failing to refer under-represented patients to research. These practices, designed for the convenience of the researcher, favor privileged populations, demonstrating that social determinants of health unnecessarily and unjustly serve as determinants of research participation.

Invest in Sustained, Reciprocal Relationships with Marginalized Communities

Research is appropriately understood as a form of relationship among researchers, institutions, participants, and their communities. However, researchers and institutional stakeholders typically unilaterally define research goals, questions, participation requirements, and offered benefits, if any. Unlike clinician–patient relationships, there are no standard mechanisms for research participants to offer feedback on their experience. Research relationships must become balanced, reciprocal, and community informed, without centering researcher and institutional priorities. When sustained over time, reciprocal relationships will foster the trust and empowerment needed to rapidly engage time-sensitive research endeavors, such as those imposed by COVID-19.

Beyond Proportional Representation

Proportional representation, or inclusion that parallels population demographics, is frequently referenced as an accepted definitional standard for inclusivity but is not a scientifically derived threshold for success. Proportional representation is often unable to detect meaningful differences across and within subpopulations, which represent heterogeneous cultures, languages, and histories, often violating statistical assumptions of homogeneity between groups [14]. Infectious disease outbreaks, such as COVID-19, where infections do not parallel population demographics, demonstrate the inadequacy of relying on proportional representation as a common rule. Scientific advancements capable of reducing health inequities compel moving beyond proportional representation and comparisons, which often center white populations as a referent group, toward mechanistically informed designs and frameworks that enable robust assessment of differential patterning of underlying exposures that contribute to disparate health outcomes.

Develop Empirically Derived, Applied Sciences of Research Participation and Inclusion

Scientists need evidence-based guidance to reliably inform decisions for individual study design, resource allocation, engagement, and meaningful community involvement. Long-term solutions must move beyond one-off recruitment and retention plans toward an ontologically quantified science of inclusion as a scientifically rigorous, necessary process. Anecdotal understandings of research participation are as inadequate in mitigating research participation barriers as anecdotes are in informing any other scientific process. This evidence base is also needed to guide interventions targeting participation barriers at individual and structural levels.

Concluding Remarks

The alarming imbalance between the high incidence, morbidity, and mortality among minority communities from COVID-19 and other diseases, and their limited access to research and investigative COVID-19 therapeutics, illustrates a complicated intersection of overlapping and overlooked crises: inequitable under-representation in research and the lack of readily available interventions or infrastructure to strengthen inclusion and ameliorate long-standing mistrust with health care and biomedical research. Unaddressed, research injustices will continue to translate into downstream disparities in the efficacy, safety, and accessibility of treatments and interventions developed with, and, thus, for, predominantly white, privileged populations for conditions that disproportionately impact minorities, as observed across many health conditions[xi,xii] [15]. We can and must address these crises to respond to all principles of the *Belmont Report* and finally, urgently, deliver on the promised principle of justice, by creating a research enterprise that is accessible and equitable for all.

Acknowledgments

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Resources

[i]www.apmresearchlab.org/covid/deaths-by-race

[ii]www.cnbc.com/2020/09/04/moderna-slows-coronavirus-vaccine-trial-t-to-ensure minority-representation-ceo-says.html

[iii]www.hhs.gov/ohrp/sites/default/files/the-belmont-report-508c_FINAL.pdf

[iv]https://data.worldbank.org/?locations=XP-XN-XT-XD

[v]www.who.int/research-observatory/monitoring/processes/clinical_trials_1/en/

[vi]www.unaids.org/sites/default/files/media_asset/JC2923_SFSFAF_2017progressreport_en.pdf

[vii]www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf

[viii]https://orwh.od.nih.gov/sites/orwh/files/docs/ORWH_BR_MAIN_final_508.pdf

[ix]https://orwh.od.nih.gov/sites/orwh/files/docs/NIH-Revitalization-Act-1993.pdf

[x]www.fda.gov/media/134754/download

[xi]www.nia.nih.gov/sites/default/files/2018-10/alzheimers-disease-recruitment-strategy-final.pdf

[xii]www.aafa.org/media/2743/asthma-disparities-in-america-burden-on-racial-ethnic-minorities.pdf

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The Department of Health and Human Services
Secretary's Advisory Committee on Human Research Protections
Tuesday, October 20
AGENDA

Tuesday, October 20, 2020

11:00 am -11:15 am	**Welcome, Remarks from the Chair** [redacted] SACHRP Chair [redacted] Director, OHRP
11:15 am – 12:45 pm	**Interpretation of Public Health Surveillance, 45 CFR 46.102(l)(2) and 46.102(k)** [redacted] SOH Co-chair
12:45 pm – 1:00 pm	**BREAK**
1:00 pm – 3:00 p.m.	**Consideration of the Role of Justice as an Ethical Principle in 45 CFR Part 46** [redacted] SACHRP Chair **Panelists:** [redacted] President, CEO Bridge Clinical Research [redacted] Professor of Law and Member, Center for Health Law Studies Saint Louis University School of Law [redacted] Professor of Medicine Harvard Medical School
3:00 pm – 3:15 pm	**BREAK**
3:15 pm – 4:00 pm	**Consideration of Risks to Non-Subjects in Human Subjects Research** [redacted] SAS Co-Chair
4:00 pm – 4:15 pm	**Public Comment**
4:15 pm – 4:30 pm	**Final Remarks, Adjournment**

[redacted]

From: [redacted]
Sent: Thursday, October 8, 2020 4:19 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Materials for tomorrow's SAS/SOH call
Attachments: Justice v.5.docx; [redacted], Why IRBs should protect bystanders in human research, 2020.pdf; New SAS.docx; Risks to Non-subjects10.08.2020.docx

FYI: The SACHRP working groups will be meeting on line tomorrow (Friday). If you are interested, the draft materials that will be discussed are attached.

(Tomorrow is a flex day for me, but depending on things here I may "attend" this Secretary's Advisory Committee on Human Research Protections' working group session tomorrow.).

Best regards,
[redacted]

From: [redacted]
Sent: Thursday, October 8, 2020 3:20 PM
To: [redacted] (NIH/OD) [E] [redacted] (AHRQ/OEREP) [redacted] (AHRQ/OEREP) [redacted] (HRSA) [redacted] (CDC/DDPHSS/OS/OSI) [redacted] (HHS/OASH) [redacted] (FDA/OC) [redacted] (FDA/OC) [redacted] (USAID.GOV) [redacted] (HHS/OCR) [redacted] CDC/DDPHSS/OS/OSI) [redacted] (HHS/OCR) [redacted] (IHS/HQ) [redacted] (NIH/OD) [E] [redacted]
Cc: [redacted] (FDA/OC) [redacted] (FDA/OC) [redacted]

(HHS/OASH) [redacted] (HHS/OASH)
[redacted] (USAID.GOV) [redacted]
Subject: Materials for tomorrow's SAS/SOH call

All,

A reminder to everyone about our October call tomorrow, **Friday, October 9th, 11:00 – 12:30.**

Please see attached:

1. Justice as an Ethical Concept in 45 CFR 46
2. Considerations for Risks to Non-subjects, and accompanying article by [redacted].

Also see NEW charges for discussion, courtesy of [redacted]:

1. IRB treatment of data gathered outside of regulatory or ethical standards
2. Sponsors involvement in recruitment and interaction with subjects in clinical trials.

Thanks all,
[redacted]

[redacted]
Office for Human Research Protections (OHRP)
Office of the Secretary, DHHS
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Rockville, MD 20852
[redacted]
[redacted]

Consideration of the Principle of Justice under 45 CFR part 46

The Belmont Report articulates "three principles, or general prescriptive judgements that are relevant to research involving human subjects:" Respect for Persons, Beneficence and Justice. The application to the research enterprise of Respect for Persons and Beneficence are clearly described; the former dictates treatment of individuals as autonomous agents, and mandates additional protections for those with diminished autonomy. Beneficence expands on the Hippocratic mandate to "do no harm," with the qualification that the nature of research means that harms are often unknown or potential, and can only be minimized, not eliminated. Applying these two principles to a specific research study requires understanding that study and the science behind it, but the principles themselves are straightforward.

Justice, the third Belmont principle, is less straightforward in its application. Belmont frames Justice as a question of fairly distributing the burdens and benefits of research but limits its application to subject selection within the context of an individual trial or institution. The report justifies this limitation by observing:

> Injustice may appear in the selection of subjects, even if individual subjects are selected fairly by investigators and treated fairly in the course of research. Thus, injustice arises from social, racial, sexual and cultural biases institutionalized in society. Thus, even if individual researchers are treating their research subjects fairly, and even if IRBs are taking care to assure that subjects are selected fairly within a particular institution, unjust social patterns may nevertheless appear in the overall distribution of the burdens and benefits of research. Although individual institutions or investigators may not be able to resolve a problem that is pervasive in their social setting, they can consider distributive justice in selecting research subjects.

The charge to SACHPR is explicitly to consider how institutions, investigators, IRBs and the research enterprise as a whole can help address "a problem that is pervasive in (our) social setting."

Consideration of distributive justice in the selection of research subject requires a clear articulation of the burdens and benefits of research. In biomedical research, the burdens are (1) the specific risks of harm consequent to participation in a particular study, and (2) economic and social burdens of participation, as well as opportunity costs. By definition, the benefits of research, defined as an activity intended to "to develop or contribute to generalizable knowledge"(45 CFR 46.102(l)), are safe and effective therapies or preventive strategies for disease, but specific biomedical studies may also hold out the possibility of a direct benefit to the participating individuals. In such studies, direct benefit accrues to individuals as a consequence of their participation, and therefore just distribution of such benefits requires just distribution of the opportunity to participate. In so far as these benefits are therapeutic, it seems natural to adopt the ethics of healthcare delivery. Hippocratic tradition dictates that medicine be practiced for the good of the patient, with the implication that the benefits of medical knowledge accrue to those in need. Similarly, the ninth ethical principle of the American Medical Association is "A physician shall support access to medical care for all people." Applying this ethic to research that offers

potential treatment leads to the assertion that access to the benefits of this research should be based on need, and it follows that opportunity to participate should also be based on need.

It is more difficult to articulate the application of distributive justice when there are no direct benefits to participation. In such cases, individuals assume the burdens of research, including the possibility of direct harm, with no anticipation of immediate personal benefit. Where the likely application of the knowledge gained benefits a specific population (i.e., those suffering from or likely to suffer from a particular disease), it seems reasonable to limit participation to this group so that others do not unfairly carry burdens. Such application aligns with the principle of beneficence, and it is not obvious that consideration of justice in these circumstances would add anything to an IRB's deliberations.

SACHRP's recommendations are often focused on biomedical research, perhaps because the nature of risk in this setting has made it the focus of both regulation and guidance. But considerations of justice apply equally to social behavioral research. In particular, research can still carry harms, economic and social burdens and opportunity costs, and it is unusual for such research to offer direct benefit to subjects (except as inducement to participate). The same arguments above apply: research should be open to members of populations that will be affected by the application of the knowledge gained (e.g., policy and program development).

Belmont examined justice in a different light: not that of opportunity to participate, but instead exploitation of vulnerable subjects. The report was primarily concerned with ensuring that those who would not benefit, those who did not represent a population that would benefit, or those that only represented a small portion of those who might benefit, were not chosen as research subjects simply because they were "readily available." The regulations address this concern in their consideration of vulnerable populations at 45 CFR 46.107, 111 and 116, as well as explicitly in subparts B, C and D. While these concerns remain, what is new today is the concern that individuals and groups will be deprived of both direct and future benefits by being inappropriately or unnecessarily excluded from participating in research, either because of study design or social circumstance. Such exclusions can deny benefit and can also lead to harms. Perhaps the most insidious of these harms arises from unacknowledged structural inequities, or structural racism. Racism is not based in science but in social and economic prejudice. Race, as a variable, has taken on disproportionate significance because of this history and because of a tendency toward genetic determinism. The use of race to define populations can be justified as a phenotypic marker, but the reality of social interactions and the mixing of communities suggests that any *assumption* that race reflects a relevant genotype must be met with skepticism. On the other hand, race is strongly correlated with the social determinants of health, and those determinants, by definition, are correlated with health outcomes. As part of the scientific community, IRBs must be vigilant for differences between correlation and causality; mischaracterizing race as causally related to biomedical or social findings risks reinforcing the circumstances that led to the correlation in the first place, potentially harming broad communities. Studies that have inclusion and exclusion criteria based on, and outcomes analyzed by, race should only be approved if they are rigorously justified; where race is used as a stand-in for the social determinants of health, these determinants should be explicitly recognized as the variables of interest, and race should not be used.

Lastly, it is worth noting that justice is only one principle that applies to subject selection. Beneficence requires that harm be minimized, and thus dictates the inclusion of a diverse population so that safety and efficacy can be appropriately generalized. Similarly, respect for persons requires that individuals vulnerable to coercion or undue influence be protected so that their participation remains voluntary.

Response to the Charge

§111(a)(3) requires the IRB to take into account "the setting in which the research will be conducted." For much biomedical research, particularly research with the potential for direct benefit to participants (i.e, studying potentially therapeutic interventions) the setting in which research is conducted is the healthcare delivery system. There is ample data demonstrating that the current healthcare delivery system has structural inequities related to race, income and socioeconomic status. What is the role of the IRB in ensuring that research conducted in this setting appropriately protects the rights and welfare of research participants? How can research be conducted so that it does not implicitly inherit the injustices of the healthcare delivery system (e.g., restricting participation to individuals who are insured and able to afford co-pays)?

As Belmont implies, it would not be realistic to expect the IRB to unilaterally change the circumstances of the current healthcare system. Problems of insurance, access to care, socioeconomic status and systemic injustice are interrelated and cannot be adequately addressed within the authority of the IRB, nor can they be addressed on a study-by-study basis. On the other hand, there are some areas in which the IRB can have an impact, particularly in reducing burdens of participation which may fall disproportionately on some groups. Accordingly, IRBs should consider:

- Individual study design and the burdens it places on participants. The impact of these burdens may vary depending on social and economic circumstances. Within the limits allowed by scientific integrity, the IRB should seek to have investigators, sponsors and institutions explicitly address and minimize such burdens. Approaches could include limiting number and duration of visits to the minimum necessary to achieve the study aims, considering remote access or home visits whenever feasible, reimbursing transportation/housing costs incurred by subjects to participate, and considering the impact on individuals with inflexible employment hours in research design. Absent such considerations, subjects in a study are likely to represent a population of convenience, albeit not one traditionally considered disadvantaged.
- Compensation, incentives and reimbursement. Belmont and the research regulations are primarily focused on avoiding exploitation, not on ensuring fair opportunity to participate (*i.e.,* access). Accordingly, IRBs have traditionally eschewed financial incentives, and even compensation, as representing possible "undue influence." SACHRP has previously released recommendations regarding paying research participants that question this approach. If the risks and potential benefits are appropriately balanced and so-called vulnerable populations

are protected, it is not clear what standard would establish a financial influence as "undue." SACHRP recommends that the framework of incentives, compensation and reimbursement described in its earlier recommendation should be embraced, and every individual protocol should describe how and why it is paying participants in all three categories.

- Compensation for injury. IRBs should ensure that provisions for compensation for research injury are weighted to participant protection, not minimizing institutional and sponsor liability. In particular, the cost and complexity of seeking legal redress makes that avenue more available to some than others, and relying on the right of a participant to individually seek redress through the courts should not be relied upon as a fallback for protections. Similarly, the informed consent document should not be designed to establish a legal defense against claims.

§46.111(b) asks the IRB to ensure that "additional safeguards" are in place to protect research subjects "vulnerable to coercion or undue influence." What measures constitute adequate safeguards in these circumstances, and how should their adequacy be assessed? Should the requirement for such safeguards be limited to those "vulnerable to coercion or undue influence" (i.e., populations with diminished autonomy), or are there concerns of social justice that should lead to a more expansive interpretation of vulnerability to exploitation?

IRBs have historically been concerned with exploitation, and this concern reflects the regulatory language around vulnerability, which is seen primarily as the inappropriate or not entirely voluntary inclusion of subjects. Social justice turns this concern "on its head," and forces us to ask if there are subjects who are inappropriately excluded, or, to use the language of vulnerability, are there individuals or populations that are "vulnerable" to "inappropriate exclusion?"

The history of scientifically unjustified exclusion of women and minority populations in research suggests that this is a valid concern. It is a matter of definition whether such exclusion is exploitation; the research community benefits in that excluding such individuals lowers their costs and burdens, while at the same time the excluded populations are denied the direct benefits of participation and, arguably, the longer term benefits to be gained by knowledge about their condition.

Inappropriate exclusions have two major consequences: first, such exclusions limit the scientific generalizability of results; second, they disenfranchise communities from contributing to the common good. It is tempting to justify inclusion primarily as a matter of scientific generalizability, and institutions and sponsors are already responding to this concern by actively seeking broader participation. At some point, however, broad inclusion cannot be justified based on science alone; for many trials, sufficient inclusion to *guarantee* generalizability is impractical or impossible for all subgroups. On the other hand, disenfranchisement is, on its face, difficult to justify, and contributes to loss of trust in, and support for, research and science in general.

To that end, SACHRP also recommends that the response to social circumstances that could lead to coercion or undue influence not be only to restrict such populations from participation in

research. This recommendation may raise practical challenges: for example, individuals may be unduly influenced if participation in research is the only way to gain access to medical care. In this case, the proper solution is to ensure that adequate care is available outside of research participation. Individual IRBs cannot change the current healthcare delivery system, but institutions conducting research could address inequities of access in their communities as part of the "price" of participating in the research enterprise.

§46.107(a) requires that the IRB "consider inclusion" of individuals who are "knowledgeable about and experienced in working with" disadvantaged populations if it regularly reviews research involving such groups. This language is often interpreted to apply when research targets a specific group, but given the diversity of the U.S. population, should the language be interpreted more broadly to require that inclusion of such members be the rule, rather than the exception? And, given the awareness of ubiquitous structural racism, is it sufficient to rely on expertise and experience rather than representation to "promote respect for (the IRBs) advice and counsel?"

Knowledge about, and experience in working with, disadvantaged populations cannot substitute for the lived experience of those populations. At the same time, the requirement that IRBs be of a manageable size and also include substantial expertise related to scientific disciplines, research methodologies and ethical analysis, makes it unrealistic to expect representation of all potentially involved communities at all IRBs during the review of all protocols. On the other hand, the mandate for single IRB review in multi-site studies suggests that there could be heightened requirements for such reviewing IRBs. Some of the administrative efficiencies that were the justification for the single IRB requirement could be invested in broader community representation on those boards. Accordingly, SACHRP recommends that OHRP provide guidance that IRBs serving as the single IRB in multi-site research of federally funded projects have robust community representation.

SACHRP also recognizes that simple representation may not be sufficient to guarantee a community voice. The voices of community members may not carry the necessary weight, and non-professional community members may be intimidated by the expertise and credentials of other members of the committee. Ensuring that voices are heard is the responsibility of the meeting Chair, and SACHRP recommends that OHRP develop guidance for what constitutes adequate training for IRB Chairs and standards for their evaluation, with particular attention to eliciting input from all members of the committee.

General considerations and the role of the IRB

An evolving understanding of the application of Justice to research involving human subjects raises practical concerns of how the research enterprise should fulfill its ethical duties. The IRB is not the seat of ethics in research; IRBs function as oversight bodies that detect and sanction ethical lapses and thus help motivate a primary concern for ethical investment, study design and execution among sponsors, institutions and investigators. While the IRB can be attentive to issues

of Justice, it cannot create a just research enterprise. On the other hand, sustaining such an enterprise *will* require ongoing attention.

If society demands, or institutions proactively commit to, such attention, the IRB seems like a natural entity to take on this responsibility. IRBs are already charged with ethical oversight, and Justice is within their mission. They are the only entities established by regulation and subject, themselves, to compliance oversight. On the other hand, IRBs are already criticized for "mission creep," and must deal with an increasingly complex research environment using rapidly evolving technology and social norms that are evolving equally quickly. They must compete with other institutional and population needs for resources at a time when healthcare and educational institutions are stretched, sometimes to the breaking point, by the COVID-19 pandemic. But the alternative, creating yet another institutional entity that would not have the well-developed community that supports IRBs, would be an inefficient use of resources and would risk a fragmented response to Justice concerns.

It is probably unrealistic to task IRBs with doing more than ensuring that duties arising from Justice are met. To this end SACHRP recommends that those duties be articulated as plainly and as unambiguously as possible, and that federal agencies develop formal guidance or regulation that gives them force. It is beyond SACHRP's scope and expertise to develop the specifics of such recommendations, which should be based on a national conversation that involves the research community, the public (as actual and potential research subjects and as the funders of research), and traditionally underserved or excluded communities.

Until such a conversation takes place, the research community cannot be complacent. While it may not be appropriate to articulate standards, as a start SACHRP recommends that IRBs encourage attention to Justice by requiring that research proposals include a discussion of Justice and access. Further, such discussions should be informed by formal consultation with affected or potentially affected communities. For institution-based research, community advisory bodies or other entities should be created that give served communities a voice in the development and execution of the research agenda. Industry sponsors, if they are not already doing so, should consider ways to elicit involvement of affected communities (representing potential customers) in both investment strategy and study design.

Lastly, SACHRP recognizes that the reasons for the systematic underrepresentation of some populations in research are complex. Many are related to the social determinants of health, and others may be cultural. IRBs, which operate in the context of individual research studies or research programs, do not have the reach or the tools to dismantle these established barriers. Yet both justices and beneficence demand that research be open to all members of society in so far as they are affected by the conditions, problems or diseases being studied. It is also far easier to identify problems than it is to craft solutions, and issues of injustice inspire demands for quick action. SACHRP recommends that HHS establish equity and justice to be a primary research program, not just an add-on consideration to existing research. Research into health equity and the social determinants of health, which would fall in both the biomedical and social behavioral domains, is methodologically feasible and likely to be less expensive than traditional interventional biomedical research. It is likely that policy informed by such research would have

a more immediate and profound impact on America's overall health than any individual therapeutic discovery, even a "breakthrough."

Application of the Principle of Justice

The Belmont Report articulates three principles, or **general prescriptive judgements** that are relevant to research involving human subjects: Respect for Persons, Beneficence and Justice. Each of these principles is meant to serve as an end itself; they do not require further justification (*e.g.,* Beneficence is not further justified because it will help research recruitment). Respect for Persons and Beneficence are clearly described; the former dictates treatment of individuals as autonomous agents, and mandates additional protections for those with diminished autonomy. Beneficence expands on the Hippocratic mandate to "do no harm," with the qualification that the nature of research means that harms are often unknown or potential, and can only be minimized, not eliminated. Applying these two principles to a specific research study requires understanding that study and the science behind it, but the principles themselves are straightforward.

Justice, the third Belmont principle, is less straightforward in its meaning and application. Belmont frames Justice as a question of distribution of the burdens and benefits of research. Social justice, on the other hand, is a broader principle that describes the relationship between individuals and communities with broader society, and involves both obligations for civic participation (what it means to be a "member" of society) and reciprocal obligations on the part of civil institutions toward individuals and communities. Social justice does not correspond neatly with Belmont's limited concept of Justice. In particular, the research community has resisted calls for mandatory participation, although this approach may be changing with the idea of the "learning healthcare system." Consequently, there can be no clear connection (based on Justice) between bearing the burdens and receiving the benefits of research, and there must be other bases for determining just distribution of those benefits.

In biomedical research, where the ultimate benefits are safe and effective therapies or preventive strategies for disease, it seems natural for research to adopt the ethics of healthcare delivery. The

Hippocratic tradition dictates that medicine be practiced for the good of the patient, with the implication that the benefits of medical knowledge accrue to those in need. Similarly, the ninth ethical principle of the American Medical Association is A physician shall support access to medical care for all people." Applying this ethic to research leads to the assertion that access to the benefits of research should be based on need, not on contribution, geography, membership in a particular group, socioeconomic status, etc.

How to distribute the benefits of social behavioral research is less clear, because the breadth of such research is very broad and the nature of the benefits themselves is not always obvious. For research whose primary benefit is simply knowledge, questions of Justice may not arise. On the other hand, when that knowledge is applied for the betterment of individuals (*e.g.,* to improve education, provide better access to social services, expand opportunities, improve the environment), Justice is clearly relevant. While it is tempting to base distribution of benefits on need, it is also easy to think of examples where such a distribution might not make sense, or might impose burdens that would make research impossible. For example, if a defined group or community funds and participates in a research project that is intended to address a problem that is seen as local, is there necessarily an obligation that the benefits of such a project be made available to society as a whole, even if others might benefit? A case for such an obligation can be made in the specific case where research is publicly funded, but is more difficult to justify in other circumstances.

The language of the common rule, and the specific charges to SACHRP, focus on equitable selection, vulnerability and representation. These are not necessarily issues of Justice. In particular, most of the concrete concerns addressed by the regulations affect research *participation.* The regulations themselves are largely silent as to distribution of benefits, *i.e.,* the application of the knowledge to be gained. In fact, §46.111(a)(2) of the Common Rule mandates that, when considering risks and benefits, "IRB should not consider possible long-range effects of applying knowledge gained in the research (e.g., the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility. However, participation does have an impact on distribution of benefits in a specific case: research that carries the

possibility of direct benefit. The circumstance most familiar to IRBs is biomedical research with possible therapeutic benefits. In this context, a consistent application of Justice suggests that participation in such trials be open to all *based on need.* Such a consideration is directly relevant to the first charge to the committee.

The second charge relates to vulnerable populations. If Justice dictates that access to potentially therapeutic research be based on need, that mandate must be balanced by the requirements of Respect for Persons that individuals be protected against exploitation. Such protections are necessary to ensure that research subjects are not drawn from a population of convenience, and are not forced to face the potential harms of research without the ability to freely choose. Blanket exclusions may be appropriate if there is no direct benefit to participation, but in the case where such benefit is possible the principles of Justice and Respect for Persons will need to be balanced on a case-by-case basis. This requirement for balance is explicit in Subpart B (§46.204) and in Subpart C (§46.306(a)), protecting the rights and welfare of fetuses and prisoners, respectively, but balance is left to the discretion of the IRB in most other cases.

In many instances, the principle of Beneficence must also be considered along with Justice. For research with the possibility of direct benefit, Justice argues for inclusivity and Beneficence may strengthen this argument, but the familiar justification for including a research population that mirrors those affected by the problem being studied is not primarily a matter of Justice but of Beneficence. Whether or not research holds out the possibility of direct benefit, Beneficence may require inclusion of a diverse population to minimize future harms. This requirement is most obvious in biomedical research involving new drugs or devices: if a population is not studied, the intervention cannot be determined to be safe or effective, and its later availability based on need will place patients at avoidable risk.

There are less obvious harms that can arise from research design, and of which the IRB must be aware. Perhaps the most insidious of these arise from unacknowledged structural inequities, or structural racism. Racism is not based in science but in social and economic prejudice. Race, as a

variable, has taken on disproportionate significance because of this history and because of a tendency toward genetic determinism. The use of race to define populations can be justified as a phenotypic marker, but the reality of social interactions and the mixing of communities suggests that any assumption that race reflects relevant genotype must be met with skepticism. On the other hand, race may be strongly associated with the social determinants of health, and thus appear to be causally related to diseases. As part of the scientific community, IRBs must be vigilant for differences between correlation and causality; mischaracterizing race as causally related to biomedical or social findings risks reinforcing the circumstances that led to the correlation in the first place, potentially harming broad communities. Studies that have inclusion and exclusion criteria based on, and outcomes analyzed by, race should only be approved if they are rigorously justified; where race is used as a stand-in for the social determinants of health, these determinants should be explicitly recognized as the variables of interest, and race should not be used

Response to the charge

§111(a)(3) requires the IRB to take into account "the setting in which the research will be conducted." For much biomedical research, particularly research with the potential for direct benefit to participants (*i.e,* studying potentially therapeutic interventions) the setting in which research is conducted is the healthcare delivery system. There is ample data demonstrating that the current healthcare delivery system has structural inequities related to race, income and socioeconomic status. What is the role of the IRB in ensuring that research conducted in this setting appropriately protects the rights and welfare of research participants? How can research be conducted so that it does not implicitly inherit the injustices of the healthcare delivery system (*e.g.*, restricting participation to individuals who are insured and able to afford co-pays)?

It is not realistic to expect the IRB to unilaterally change the circumstances of the current healthcare system. Problems of insurance, access to care, socioeconomic status and systemic racism are interrelated and cannot be adequately addressed within the authority of the IRB, nor

104 can they be addressed on a study-by-study basis. On the other hand, there are some areas over
105 which the IRB has direct control. These include:

106 • Individual study design and the burdens it places on individual participants. The impact of
107 these burdens may vary greatly depending on the social and economic circumstances of
108 research participants. Within the limits allowed by scientific integrity, the IRB should seek to
109 have investigators, sponsors and institutions explicitly address and minimize such burdens.
110 Study visits should be minimized in number and length to those necessary to achieve the
111 study aims, remote access or home visits should be considered whenever feasible,
112 transportation/housing costs incurred by subjects to participate should be reimbursed and
113 impact on individuals with inflexible employment hours should be considered in research
114 design.

115 • Compensation, incentives and reimbursement. SACHRP has previously released
116 recommendations regarding paying research participants. The framework of incentives,
117 compensation and reimbursement should be embraced, and every individual protocol should
118 describe how and why it is paying participants in all three categories.

119 • Compensation for injury. IRBs should ensure that provisions for compensation for research
120 injury are weighted to participant protection, not minimizing institutional liability. In
121 particular, relying on the right of a participant to individually seek redress through the courts
122 should not be relied upon as a fallback for protection, nor should the informed consent
123 document be designed to be used to establish a legal defense against claims.

124 • As a professional norm, SACHRP believes that IRB professionals have a duty to advocate
125 for justice, equity and access at the institutional and national level, both at the level of
126 research participation and healthcare delivery.

§46.111(b) asks the IRB to ensure that "additional safeguards" are in place to protect research subjects "vulnerable to coercion or undue influence." What measures constitute adequate safeguards in these circumstances, and how should their adequacy be assessed? Should the requirement for such safeguards be limited to those "vulnerable to coercion or undue influence" (i.e., populations with diminished autonomy), or are there concerns of social justice that should lead to a more expansive interpretation of vulnerability to exploitation?

SACHRP believes that regulatory guidance is necessary to disentangle the principles of Justice and Respect for Persons. Issues of Justice will be addressed indirectly or directly, depending on such guidance. As an example, part of the current framing of Tuskegee is one of exploitation, where the harm was that participants were not told about their participation or allowed to make an informed decision (putting aside other issues, including subsequent withholding of treatment when it became available). This framing leads to addressing racism by treating members of disadvantaged communities as vulnerable to coercion or undue influence." While ensuring the free exercise of individual autonomy is obviously a good, it fails to address the circumstances that create the vulnerability; circumstances which are not biological and fixed, but constructs of an unjust society.

Further, SACHRP notes that the research enterprise, as a whole, must be recognized as a social project. Research activities are undertaken by commercial entities, individual researchers, academic institutions and healthcare providers, but each of these is contributing to a larger project, the foundation of which relies on public support and, to a large extent, public monies. As a social project, research must be equally open to all members of society; equality of opportunity to participate in society is a fundamental American value. SACHRP believes that the research community, implicitly dedicated to the betterment of the human condition through science, must openly confront and do everything possible to address underlying inequities of opportunity, so that individual autonomy is preserved and that entire populations are not systematically disadvantaged.

Given the existing regulatory language, SACHRP recommends that OHRP develop clear but broad interpretations of "coercion" and "undue influence." In the setting of inequities in healthcare delivery and in the face of the social determinants of health, what influence is "undue" is likely to vary significantly based on populations and communities (for example, if participation in research is the only way to access medical care). Similarly, the threat implicit in "coercion" may be more subtle than the typically cited threat of loss of employment or educational status.

SACHRP also recommends that the response to situations that could lead to coercion or undue influence not be to restrict such populations from research. This response may raise practical challenges; if participation in research is the only way to access medical care, the proper solution is to ensure adequate care *outside* of research participation. Again, individual IRBs are unlikely to be able to change the current system, but institutions conducting research could address inequities of access in their communities as part of the "price" of participating in the research enterprise.

§46.107(a) requires that the IRB "consider inclusion" of individuals who are "knowledgeable about and experienced in working with" disadvantaged populations if it regularly reviews research involving such groups. This language is often interpreted to apply when research targets a specific group, but given the diversity of the U.S. population, should the language be interpreted more broadly to require that inclusion of such members be the rule, rather than the exception? And, given the awareness of ubiquitous structural racism, is it sufficient to rely on expertise and experience rather than representation to "promote respect for (the IRBs) advice and counsel?"

Knowledge about, and experience in working with, disadvantaged populations cannot substitute for the lived experience of those populations. At the same time, the requirement that IRBs be of a manageable size and also include substantial expertise related to scientific disciplines, research methodologies and ethical analysis, makes it unrealistic to expect representation of all potentially involved communities at all IRBs during the review of all protocols. On the other hand, the

mandate for single IRB review in multi-site studies suggests that there could be heightened requirements for such reviewing IRBs. Some of the administrative efficiencies that were the justification for the single IRB requirement could be invested in broader community representation on those boards. Accordingly, SACHRP recommends that OHRP provide guidance that IRBs serving as the single IRB in multi-site research of federally funded projects have robust community representation.

SACHRP also recognizes that simple representation may not be sufficient to guarantee a community voice. The voices of community members may not carry the necessary weight, and non-professional community members may be intimidated by the expertise and credentials of other members of the committee. Ensuring that voices are heard is the responsibility of the meeting Chair, and SACHRP recommends that OHRP develop guidance for what constitutes adequate training for IRB Chairs and standards for their evaluation, with particular attention to eliciting input from all members of the committee.

Is there any additional guidance, training, or resources that can be helpful to IRBs in raising awareness of and responding to ethical issues involving disadvantaged populations in research?

[redacted]

From: [redacted]
Sent: Wednesday, December 2, 2020 8:07 AM
To: [redacted]
Subject: FW: Is this conference normal?

Hi [redacted],

Thanks again for the tips and for the overview of the early session as I sorted out the Bill Gates vs Jeff Bezos (MS.Explorer/Google.Chrome) conflict and 13 digit access code issues.

You make important points in your email. Having missed a portion of these presentations, I don't have full context -- including for the full statement by the second speaker regarding consideration of "race" in research. (To state the obvious, "race" is empirically and culturally a problematic and loaded term that has a lot of baggage.)

As you correctly sum up there is growing evidence that medical effects (etc.) sometimes vary with genetic factors (often correlated with race), social context (income, education, etc.), so adequate samples, with adequate statistical power for subsample analysis is important.

Much of the Q&A for the session focused on the implementation challenges of recruiting diverse subjects, given patterns of who tends to go to what hospitals, who has insurance, levels of distrust, etc. They noted that this often involves "community ambassadors, etc, as well as avoiding biases once in the research site in who is asked to participate in research. These are important for achieving the necessary statistical power for a study (including for relevant "subpopulations") to detect what it is designed to study.

It also is relevant to "equity" as noted below. (The woman from Yale spoke of use of their hospital data bases to identify potential volunteers, the impact of various recruitment efforts, and so on—and of the "enthusiasm" of many people to participate in the Yale -based studies. It left me wondering whether there is such "enthusiasm" for many studies once you go beyond the Yale/New Haven university community).

We'll call this the "stat power" factor: in order to have valid and reliable findings a study must include large enough samples of the reference population to reliably detect those effects. This requires adequate subsamples of the population that the study findings are to apply to. A common example is the tradition of excluding women from many biomedical research so you'd not have factors such as pregnancy affecting the study findings. That "simplifies" the research, reduces required sample size, etc. but becomes problematic when the study findings are to apply to both men and women and there are in fact important differences (e.g. in how a drug is metabolized). In part this is a matter of the generalizability of the research findings to relevant populations and contexts. So inappropriate exclusion of portions of the target population that the study findings are likely to be applied to is a methodological problem (in addition to any equity/justice aspects).

Similarly, children are often excluded from studies and findings from those studies often applied to children. However, drug effects are often quite different in adults and children, so this limitation of the study design can lead to doctors prescribing drugs never tested on children, sometimes with serious side effects. So it's an issue of exactly what is being studied, and how are those findings to be applied. This is the methodological argument for why "diverse" participation is often necessary for good science. (Parallel issues operate in education research.) So "inclusion" of the relevant population(s) is methodologically vital for generalizability, validity, etc.

This includes for information collection. For example there is a substantial empirical literature on doctors' (and researchers') interactions with patients. For example, African American individuals often report that they are more likely to have medical visits with African American physicians, provide more details information, etc. The mirror image is that Caucasian doctors often differ in how they interact with Caucasian and African American patients, what medical interventions the physician recommends, and so on. Consequently these effects can impact what information a study collects, study validity, how the intervention is implemented, and so on.

(This is not limited to medical practice. For example the literature on survey research finds significant interview effects in study recruitment and responses. Among the elements in this is the concordance of the interviewer's race and cultural style with the survey respondent. Ditto for research on teacher effects, etc.)

You make these points in your email on "scientific method".

Perhaps the second speaker's comments on consideration of "race" in research and issues of equity involve elements in "stat power" regarding design, study recruitment, etc.—and the broader penumbra of the context in which that research is rooted, conducted and findings applied?

The Belmont Report (and its echoes in the Common Rule) uses the term "justice" in research ethics—that the vulnerable should not bear undue burdens from participating in research, and that those likely to benefit from the research should be participants.

This grows out of a long history of research being conducted on vulnerable subjects, often without consent. This includes some studies conducted in prisons, schools, the military, etc. (It's like the old military quip about being "volun-told" to participate.) Examples include the so called "monster study" in which a graduate student working with a major researcher conducted a study in an orphanage for the children of veterans. The intervention sought to test whether the children could be turned into studders. (Litigation was settled decades later with former study participants who alleged that the intervention turned them into life long studders with impacts on employment, families, etc.) Or the nutritional study conducted in Canadian residential schools for "Native Americans" (aka "First Peoples", ...). The study involved severe malnutrition—with major adverse developmental impacts on the children. And so on.

Research is embedded in this historical context where there are often good reasons for distrust, including in popular culture. (Cf. "Tuskegee 626" , Gil Scott Heron, https://www.youtube.com/watch?v=HX9dmQ3kuRo)

So in this context, "equity" in study design, recruitment, and implementation is important both for study validity and generalizability, but also in shaping the credibility and use of the research.

In sum, the "stat power" and "equity issues" are not as arbitrary or conflicting as they may initially appear. Research needs to be both "trusted—and trustworthy". This includes appropriate study design and use that reflects the full population that it is to generalize to, and broad inclusion in part to ensure the credibility of that research as it enters the public forum and is applied.

Again, thanks for the information and the insights.

Best regards,

[redacted]

PS Article in Dec 2, 2020 NYT by the Chair of the committee that advises Medicare on which medical treatments should be covered by Medicare, "Science under assault at Medicare and Medicaid" that has good examples of differences in effects by age group, "common sense" interventions that turned out not to work when credibly evaluated, etc. The online text follows:

Opinion

After 4 Years of Trump, Medicare and Medicaid Badly Need Attention

Science and objective analysis need to be revived.

By Peter B. Bach
Dr. Bach is the director of the Center for Health Policy and Outcomes at Memorial Sloan Kettering Cancer Center.

- Dec. 1, 2020

Seema Verma, administrator of the Centers for Medicare & Medicaid Services, with President Trump last month.Credit...Erin Schaff/The New York Times

President-elect Joe Biden has pledged to "marshal the forces of science" in his administration. Undoubtedly he needs to start by bolstering the credibility of the Food and Drug Administration and the Centers for Disease Control and Prevention.

But a third health agency, central to the lives of older Americans, low-income families and the disabled, is sorely in need of his attention. Science has also been under assault at the Centers for Medicare & Medicaid Services, which provides federal health insurance to more than 130 million Americans at a cost of more than $1 trillion, nearly twice the Pentagon's budget.

C.M.S. does more than just write checks for medical care. Its scientists and analysts determine which treatments should be offered — I am the chairman of the committee that advises Medicare on those decisions — and how best to care for the patients it serves.

Unfortunately, the Trump White House has steadily eviscerated the agency's dispassionate approaches to making those determinations.

Recently, for instance, the Trump administration set in motion a plan to strip C.M.S. of its ability to assess for itself whether new medical devices approved by the F.D.A. are appropriate for the older patients it covers. This is important because the benefits and risks of such devices and procedures, which range from implantable hips and cardiac stents to digital apps and laboratory tests, can vary widely based on patient age and disability.

The proposed rule requires Medicare to pay for any new device so long as the F.D.A. labels it a "breakthrough." And that word does not mean what you think it does.

The F.D.A. calls a device a "breakthrough" when it is expected — though not yet proved — to be helpful to patients with serious conditions. The designation has nothing to do with how the device works in older patients, or even if it was studied in that population at all. The proposed rule would also require Medicare to cover any new drug or device if at least one commercial insurer covers it for its members, even if its members are young and healthy.

Already, companies seldom generate enough data on their products for C.M.S. to assess their value for its patients. In 2019, for instance, data was insufficient in just under half of new F.D.A. drug approvals to assess benefits or side effects in older patients. The proposed rule would drain the last remaining motivation that companies have to study their treatments in the patients who are likely to ultimately receive them.

C.M.S. scientists and analysts do more than evaluate new treatments. They also test alternative ways to organize and pay for patient care. The agency has found, for example, that enrolling people at risk of diabetes in gym sessions reduced how often they were hospitalized. But some seemingly obvious ways to improve health care don't work: C.M.S. also found it could not reduce hospitalizations for cancer patients by paying their doctors to actively manage their patients' care.

The fact that so many promising ideas don't work as expected is the reason C.M.S. needs to double down on evaluations of how medical care is delivered to its patients.

This administration has gone in the other direction. Just before the election, the White House conjured up a plan to send older people a $200 prescription drug discount card in the mail. Research has already demonstrated that if you give people money to buy prescription drugs, they will buy more of them. The pharmaceutical industry knows this, too. That's why it hands out coupons worth billions of dollars.

These same studies also show that when people are indiscriminately given cash for medicines — instead of only those who need that money the most — it costs much more overall than it saves. No wonder the discount card giveaway would have cost around $8 billion. Fortunately, the president has yet to follow through with it.

In another troubling development, the administration announced on Nov. 20 that it would run an experiment in which reimbursements to physicians will be cut for dozens of high-cost drugs they administer in the office, such as chemotherapies and treatments for inflammatory diseases.

C.M.S. financial analysts warned that the cuts will lead many Medicare patients to lose access to these important treatments. Scientists should evaluate this prediction by including a comparison group of patients whose doctors would not receive a cut in payment. But the agency administrator made it clear that she didn't believe the warning. No comparison group is planned. That is no way to evaluate whether our nation's vulnerable would be helped or hurt by this significant policy change.

Another example of a poorly designed experiment involved taking Medicaid coverage away from able-bodied people who are not working or going to school, under an ill-founded theory that doing so would inspire them to seek employment. Such a study is best done narrowly, so that any harms are minimized. Instead, the administration invited multiple states in 2018 to test the outcome.

A Harvard study found that a work requirement in Arkansas led to a rise in the number of uninsured people and no significant changes in employment. Thousands of Medicaid beneficiaries in Michigan and New Hampshire were set to lose their coverage before work requirements in those states were ended. Given those results, the overall program should have been canceled. The administration broadened it.

Through its reliance on scientific evaluation of what it should pay for, and how, C.M.S. has remained financially viable for more than half a century. As the new president plans to fix the damage done by the current president, this vital agency demands his attention.

Peter B. Bach is a physician at Memorial Sloan Kettering Cancer Center. He served as a senior adviser to the administrator of the Centers for Medicare and Medicaid Services in 2005 and 2006.

The Times is committed to publishing a diversity of letters to the editor. We'd like to hear what you think about this or any of our articles. Here are some tips. And here's our email: letters@nytimes.com.

[redacted]

Protection of Human Subjects Coordinator

US Department of Education
Telephone: [redacted]
Fax: [redacted]
e-mail: [redacted]
e-mail for general queries: HumanSubjectsResearch@ED.gov
http://www.ed.gov/about/offices/list/ocfo/humansub.html

Training: Dept. of Education: Implementing the Common Rule for the Protection of Human Subjects in Research (34 CFR 97)
https://www2.ed.gov/rms-training/human-subjects-research/story.html

From: [redacted]
Sent: Tuesday, December 1, 2020 11:02 AM
To: [redacted]
Subject: Is this conference normal?

Hi [redacted],

I've been listening to this AER20 livestream since it began 50 mins ago, and thus far it's been 100% radical partisan ideology.

The first and second speakers both come from the same radical perspective, but they specify mutually exclusive grievances.

The first speaker stated it's a problem that not enough minorities are used in clinical trials, and she said that's a problem because new medications tested on white participants may not have the same effects when used on minorities. That makes sense, because there is scientific data indicating differences between racial groups (e.g. sickle cell anemia). The solution should be to add more minority participants to clinical trials, to assemble a large enough group that statistically-sound extrapolations can be drawn. But she went further, saying we need more minority participants for the sake of equity.

Then the second speaker condemned what he termed "racial correction," and said that differences between racial groups should not be considered at all in scientific research. He quoted a 200-plus-year-old unscientific belief from a white American that African ethnicities have smaller lung capacities than white immigrants (recent evidence in sports indicates the exact opposite), then he indicated nothing had changed in the past 200+ years, and that any suggestion of biological differences between racial groups was racist. Then he showed an image of the Black Panthers, then he stated we need equity in clinical trials, not for any scientific reason, but for the sake of equity.

It seems to me that these 2 speakers, although sharing the same radical ideology, are reaching conclusions that are both contradictory and unscientific.

Neither of them articulated the non-ideological, scientific perspective, which is as follows:

1) Are there biological differences between racial groups, and if yes, might those differences cause different reactions to new medications being tested in clinical trials?
    a. As far as I know, the answer is "yes, some biological differences have been documented in previous research (e.g. various comorbidities more prevalent in minorities groups in the COVID context), and "yes, those differences have, in some cases, caused different reactions between racial groups in clinical trials."
    b. This indicates that the second speaker is wrong.

2) If there are differences between racial groups that effect clinical trials, how can clinical trials be conducted differently to ensure medications are safer for everyone?
    a. Statistics indicate that clinical trials should ensure that large enough samples of racial minorities should be included in clinical trials that extrapolations to target patient demographics can be drawn with a high degree of confidence.
    b. This does not indicate that the participants in a clinical trial need to reflect the racial demographics of the general population. This does not indicate there needs to be equal numbers of white and minority participants. There does not seem to be any scientific rationale for doing either of these things, unless the statistical methodology used necessitates it.

The scientific perspective I just described should be obvious, should be common knowledge. The fact that, 50 mins into this conference, none of the three speakers thus far have articulated this perspective indicates that they are obviously motivated by political ideology, not by purely (or even primarily) scientific concerns.

Is this conference normal?

--[redacted]

[redacted]

From: [redacted]
Sent: Tuesday, December 1, 2020 11:23 AM
To: [redacted]
Subject: RE: Is this conference normal?

Are you listening to the same thing I am on the livestream right now?

The second speaker just explicitly stated in the Q&A that we should impose racial quotas on clinical trial participants, and IRB composition ("more than just one or two black and brown people"), and research personnel ("we need more black principal investigators") to address past discrimination and "implicit bias." He elaborated on it more, but I forget all of it.

He is openly advocating for racial discrimination in favor of minorities in the scientific research setting to remedy past racial discrimination against minorities. That is not a scientific perspective – it's a radical ideological perspective. And none of the other 3 speakers shown on-screen pushed back against that, or even questioned him about it. One of them spoke favorably, then ended the Q&A.

--[redacted]

From: [redacted]
Sent: Tuesday, December 1, 2020 11:06 AM
To: [redacted]
Subject: RE: Is this conference normal?

Finally sorted it out here. First was the Bill Gates vs Jeff Bezos challenge (ie Chrome needed). Secondly when I coped the access code I accidentally failed to copy the final digit in the 13 digit code.

More later.

Thanks!

Best regards,
[redacted]

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To: [redacted]
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Is this conference normal?

-[redacted]

Exhibit G
(Harvard grant application excerpts; highlighted by the whistleblower)

U.S. Department of Education
Washington, D.C. 20202-5335

APPLICATION FOR GRANTS UNDER THE

Education Research

CFDA # 84.305A

PR/Award # R305A200278

Gramts.gov Tracking#: GRANT12925804

OMB No. , Expiration Date:

Closing Date: Aug 29, 2019

PR/Award # R305A200278

Table of Contents

Form	Page
1. RR Standard Face Sheet (SF 424)	e3
2. RR Federal and Non-Federal Budget Form	e5
Attachment - 1 (1244-Budget_Justifcation_IES_Final)	e21
3. Grants.gov Lobbying Form	e26
4. Research & Related Senior/Key Person Profile	e27
5. Research & Related Project/Performance Site Location	e30
6. Form RR_OtherProjectInfo_1_4-V1.4.pdf	e31
Attachment - 1240-Bio_[redacted].pdf	e32
Attachment - 1238-Bio_[redacted].pdf	e34
Attachment - 1237-Human Subjects Narrative.pdf	e39
Attachment - 1241-Bio_[redacted].pdf	e44
Attachment - 1242-Bio_[redacted].pdf	e47
Attachment - 1243-Bio_[redacted].pdf	e51
Attachment - 1235-Project_Narrative_ACDE_FINAL.pdf	e57
Attachment - 1236-Bibliography.pdf	e108
Attachment - 1234-Project Summary-Abstract.pdf	e117
Attachment - 1239-Bio_[redacted].pdf	e118

This application was generated using the PDF functionality. The PDF functionality automatically numbers the pages in this application. Some pages/sections of this application may contain 2 sets of page numbers, one set created by the applicant and the other set created by e-Application's PDF functionality. Page numbers created by the e-Application PDF functionality will be preceded by the letter e (for example, e1, e2, e3, etc.).

APPLICATION FOR FEDERAL ASSISTANCE
SF 424 (R&R)

3. DATE RECEIVED BY STATE	State Application Identifier

1. TYPE OF SUBMISSION
☐ Pre-application ☒ Application ☐ Changed/Corrected Application

2. DATE SUBMITTED 08/29/2019

Applicant Identifier

4. a. Federal Identifier

b. Agency Routing Identifier NCERSocBeh

c. Previous Grants.gov Tracking ID

5. APPLICANT INFORMATION

Organizational DUNS: 0823596910000

Legal Name: President and Fellows of Harvard College
Department: Office for Sponsored Programs
Division:
Street1: 1033 Massachusetts Avenue 5th Floor
Street2:
City: Cambridge
County / Parish:
State: MA: Massachusetts
Province:
Country: USA: UNITED STATES
ZIP / Postal Code: 02138- 5369

Person to be contacted on matters involving this application
Prefix:
First Name: [redacted]
Middle Name:
Last Name: [redacted]
Suffix:
Position/Title: Grants and Contracts Specialist
Street1: Office for Sponsored Programs
Street2: 1033 Massachusetts Avenue 5th Floor
City: Cambridge
County / Parish:
State: MA: Massachusetts
Province:
Country: USA: UNITED STATES
ZIP / Postal Code: 02138- 5369
Phone Number: [redacted]
Fax Number:
Email: [redacted]

6. EMPLOYER IDENTIFICATION *(EIN) or (TIN):* 04-2103580N

7. TYPE OF APPLICANT: O: Private Institution of Higher Education
Other (Specify):
Small Business Organization Type ☐ Women Owned ☐ Socially and Economically Disadvantaged

8. TYPE OF APPLICATION:
☒ New ☐ Resubmission
☐ Renewal ☐ Continuation ☐ Revision

If Revision, mark appropriate box(es).
☐ A. Increase Award ☐ B. Decrease Award ☐ C. Increase Duration ☐ D. Decrease Duration
☐ E. Other (specify):

Is this application being submitted to other agencies? Yes ☐ No ☒ What other Agencies?

9. NAME OF FEDERAL AGENCY: Department of Education

10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: 84.305
TITLE: Education Research, Development and Dissemination

11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:
Developing and Testing Training Modes for Improving Teachers' Race-Related Competencies to Promote Student Learners' Academic Adjustment

12. PROPOSED PROJECT:
Start Date: 07/01/2020
Ending Date: 06/30/2024

13. CONGRESSIONAL DISTRICT OF APPLICANT
MA-005

Tracking Number:GRANT12925804 Funding Opportunity Number:ED-GRANTS-061919-004 Received Date:Aug 29, 2019 10:01:05 AM EDT

14. PROJECT DIRECTOR/PRINCIPAL INVESTIGATOR CONTACT INFORMATION

Prefix: Dr. First Name: [redacted] Middle Name:
Last Name: [redacted] Suffix:
Position/Title: Sara Lawrence-Lightfoot Endowed Professor
Organization Name: President and Fellows of Harvard College
Department: Graduate School of Education Division:
Street1: 14 Appian Way
Street2: Larsen 613
City: Cambridge County / Parish:
State: MA: Massachusetts Province:
Country: USA: UNITED STATES ZIP / Postal Code: 02138- 5369
Phone Number: [redacted] Fax Number:
Email: [redacted]

15. ESTIMATED PROJECT FUNDING

a. Total Federal Funds Requested	1,399,998.00
b. Total Non-Federal Funds	0.00
c. Total Federal & Non-Federal Funds	1,399,998.00
d. Estimated Program Income	0.00

16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?

a. YES ☐ THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON:
DATE:

b. NO ☐ PROGRAM IS NOT COVERED BY E.O. 12372; OR
☒ PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

17. By signing this application, I certify (1) to the statements contained in the list of certifications* and (2) that the statements herein are true, complete and accurate to the best of my knowledge. I also provide the required assurances * and agree to comply with any resulting terms if I accept an award. I am aware that any false, fictitious. or fraudulent statements or claims may subject me to criminal, civil, or administrative penalties. (U.S. Code, Title 18, Section 1001)

☒ **I agree**

The list of certifications and assurances, or an Internet site where you may obtain this list, is contained in the announcement or agency specific instructions.

18. SFLLL (Disclosure of Lobbying Activities) or other Explanatory Documentation

Add Attachment | Delete Attachment | View Attachment

19. Authorized Representative

Prefix: First Name: [redacted] Middle Name:
Last Name: [redacted] Suffix:
Position/Title: Sponsored Programs Officer
Organization: President and Fellows of Harvard College
Department: Office for Sponsored Programs Division:
Street1: 1033 Massachusetts Avenue 5th Floor
Street2:
City: Cambridge County / Parish:
State: MA: Massachusetts Province:
Country: USA: UNITED STATES ZIP / Postal Code: 02138- 5369
Phone Number: [redacted] Fax Number:
Email: [redacted]

Signature of Authorized Representative [redacted] **Date Signed** 08/29/2019

20. Pre-application Add Attachment | Delete Attachment | View Attachment

21. Cover Letter Attachment PR/Award # R305A200278 Add Attachment | Delete Attachment | View Attachment

Tracking Number:GRANT12925804 Funding Opportunity Number:ED-GRANTS-061919-004 Received Date:Aug 29, 2019 10:01:05 AM EDT

Summary of Comments on Exhibit F_excerpted Harvard grant application_FOIA_highlighted.pdf

Page: 4

Number: 1 Author: patricklow Subject: Highlight Date: 10/28/2022 5:53:06 PM -04'00'

Number: 2 Author: patricklow Subject: Sticky Note Date: 10/28/2022 6:09:01 PM -04'00'

It is important to note that the grantee (Harvard) certified compliance with all required assurances when submitting this grant application - and those assurances included compliance with anti-discrimination laws.
This is in addition to the same and/or similar assurances in the Grant Award Notice (GAN).

Number: 3 Author: patricklow Subject: Highlight Date: 10/28/2022 5:53:44 PM -04'00'

Number: 4 Author: patricklow Subject: Highlight Date: 10/28/2022 5:53:39 PM -04'00'

RESEARCH & RELATED Other Project Information

OMB Number: 4040-0001
Expiration Date: 10/31/2019

1. Are Human Subjects Involved? [1] ☒ Yes ☐ No

1.a. If YES to Human Subjects

[4] the Project Exempt from Federal regulations? ☐ Yes [2] ☒ No [3]

If yes, check appropriate exemption number. ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8

If no, is the IRB review Pending? [5] ☒ Yes ☐ No

IRB Approval Date:

Human Subject Assurance Number: FWA 000048

2. Are Vertebrate Animals Used? ☐ Yes ☒ No

2.a. If YES to Vertebrate Animals

Is the IACUC review Pending? ☐ Yes ☐ No

IACUC Approval Date:

Animal Welfare Assurance Number:

[7] Is proprietary/privileged information included in the application? ☐ Yes ☒ No [6]

4.a. Does this Project Have an Actual or Potential Impact - positive or negative - on the environment? ☐ Yes ☒ No

4.b. If yes, please explain:

4.c. If this project has an actual or potential impact on the environment, has an exemption been authorized or an environmental assessment (EA) or environmental impact statement (EIS) been performed? ☐ Yes ☐ No

4.d. If yes, please explain:

5. Is the research performance site designated, or eligible to be designated, as a historic place? ☐ Yes ☒ No

5.a. If yes, please explain:

6. Does this project involve activities outside of the United States or partnerships with international collaborators? ☐ Yes ☒ No

6.a. If yes, identify countries:

6.b. Optional Explanation:

7. Project Summary/Abstract 1234-Project Summary-Abstract.pdf Add Attachment | Delete Attachment | View Attachment

8. Project Narrative 1235-Project_Narrative_ACDE_FINAL.pdf Add Attachment | Delete Attachment | View Attachment

9. Bibliography & References Cited 1236-Bibliography.pdf Add Attachment | Delete Attachment | View Attachment

10. Facilities & Other Resources Add Attachment | Delete Attachment | View Attachment

11. Equipment Add Attachment | Delete Attachment | View Attachment

12. Other Attachments Add Attachments | Delete Attachments | View Attachments ☒

Page: 5

Number: 1 Author: [redacted] Subject: Highlight Date: 10/28/2022 5:54:54 PM -04'00'

Number: 2 Author: [redacted] Subject: Highlight Date: 10/28/2022 5:55:01 PM -04'00'

Number: 3 Author: [redacted] Subject: Sticky Note Date: 10/28/2022 6:09:55 PM -04'00'
It's important to note that the grantee itself (Harvard) stated that it believed its grant application included covered, non-exempt research.

Number: 4 Author: [redacted] Subject: Highlight Date: 10/28/2022 5:54:59 PM -04'00'

Number: 5 Author: [redacted] Subject: Highlight Date: 10/28/2022 5:55:08 PM -04'00'

Number: 6 Author: [redacted] Subject: Sticky Note Date: 10/28/2022 6:10:39 PM -04'00'
It's important to note that the grantee itself (Harvard) stated that proprietary/privileged information was not included in this grant application.

Number: 7 Author: [redacted] Subject: Highlight Date: 10/28/2022 5:56:09 PM -04'00'

Human Subjects Narrative

(1) **Human Subjects Involvement and Characteristics.**

a. Characteristics of Human Subjects. The purpose of this project is to develop two additional modes for training teachers on the Identity Project curriculum and to pilot the Identity Project curriculum among 9th and 10th grade students in three schools where teachers have participated in one of these three training programs. In Year 1, 10 teachers (approximately ages 25-65 years old) will be recruited to participate (via a community-based participatory research approach in which research participants become integrated members of the research team) in a generative 15-week course aimed at developing two additional modes for training teachers and participate in two focus groups. Criterion for inclusion is at least 2 years of prior experience as 9th or 10th grade educators; and the teachers cannot be employed by one of the three proposed sites for the pilot test in Years 2 and 3. In Year 2, approximately 45 teachers will be recruited to participate in training from three schools. Criterion for inclusion is teaching English or Social Studies to 9th or 10th grade students at these schools, selected for inclusion based on ethnic-racial diversity characteristics of the student population; there will be no other criteria for exclusion. The anticipated age range is 22-65 years old (i.e., adult participants). In Year 3, the same 45 teachers from Year 2 and approximately 1,800 students who are enrolled in the 9th or 10th grade (approximately ages 13-16 years old) will be recruited to participate in the pilot implementation of the Identity Project curriculum. Criterion for inclusion is participating in the training program in Year 2 (teachers) and being enrolled (students) at one of these three schools; there will be no other criteria for exclusion.

b. Rationale for Involving Special Classes of Subjects. Adolescent involvement in Year 3 of the pilot implementation is crucial to understanding differences in the three modes of teacher training, teacher fidelity based on these training opportunities, and potential benefits of the Identity Project curriculum to adolescent development when delivered by teachers.

(2) **Sources of Materials.**

a. Sources of research material will be obtained from individual identifiable living human subjects. Our CBPR approach to developing two additional modes of teacher training will include participants' on-going involvement in a generative course and in two focus groups during Year 1. Participation in this process will result in the creation of qualitative data in the form of field notes, focus group discussion notes, and focus group transcripts. Course sessions will be audio or video recorded to facilitate reviewing recommendations for program development and changes. These data will be used for development of the training and will not be analyzed based on individual participants' responses.

To assess teacher development throughout training and implementation of the Identity Project curriculum, three schools will be randomized into one of three teacher training conditions. Quantitative (i.e., survey) and qualitative (i.e., interview) data will be collected on seven occasions from teachers, with three assessments occurring in Year 2 and four assessments occurring in Year 3. Adolescents enrolled in 9th or 10th grade at each of the three schools will also complete quantitative survey assessments of their ethnic-racial identity, global identity

Page: 6

Number: 1 Author: [redacted] Subject: Highlight Date: 10/28/2022 5:58:01 PM -04'00'

Number: 2 Author: [redacted] Subject: Sticky Note Date: 10/28/2022 6:02:26 PM -04'00'

Audio and video recording, plus notes and transcripts of focus groups discussions. This alone means both that:
(1) This is covered research, and
(2) This is not "Normal Educational Practice" (Exemption category 1).

Number: 3 Author: [redacted] Subject: Highlight Date: 10/28/2022 6:00:46 PM -04'00'

Number: 4 Author: [redacted] Subject: Highlight Date: 10/28/2022 6:03:23 PM -04'00'

Number: 5 Author: [redacted] Subject: Sticky Note Date: 11/7/2022 5:21:42 AM

Same as previous comment. Here, collecting data from teachers and rating their implementation of the Identity Project curriculum both is NOT "normal educational practice" and is covered research.
Having student complete surveys about their ethnic-racial identity and similar intrusive topics/questions is also NOT "normal educational practice" and is covered research.

Number: 6 Author: [redacted] Subject: Highlight Date: 10/28/2022 6:03:34 PM -04'00'

cohesion, and measures of their academic adjustment in Year 3 on four occasions (~45 min surveys). Year 3 will also include assessments of the fidelity of teachers' implementation of the Identity Project curriculum via observational coders' real-time quantitative ratings of fidelity of implementation. Only the PIs and key research personnel (e.g., program manager) will have access to individually identifiable private information about human subjects. This information will be kept in a locked filing cabinet housed within a locked research lab and electronic forms of data will be stored in encrypted, password-protected secure servers.

b. Sources of data that will be obtained from existing records. Adolescents' school records will be obtained to provide information about their absences from school, their grade point average, and their standardized test scores.

(3) **Recruitment and Informed Consent.**

In Year 1, education professionals will be recruited to participate in a semester-long generative course and two focus groups to collaborate on the design of two additional modes of teacher training for the Identity Project curriculum. Educators who have teaching positions in the Boston metro area will be recruited through the professional development programs at HGSE and the investigative team's professional networks. Education professionals who express interest in the generative course will be sent a recruitment email with a link that will allow them to read the Adult Consent Form and provide a digital signature. The research project and consent will be discussed again verbally at the beginning of the course.

In Years 2 and 3, three schools will implement the Identity Project curriculum during the academic year. Teachers delivering this educational curriculum will be informed of the training by school district administrators and the potential for their voluntary participation in this research study (i.e., the completion of surveys and interviews). The researchers will receive the list of emails for teachers who are implementing this curriculum in their classrooms from each school. The researchers will then invite these teachers to participate in the research (i.e., surveys and interviews) via email. The recruitment email will not be sent to a group email or list serv. This email will include a hyperlink to an online consent form that includes the description of the study and consent information. Individuals will then be able to consent by digitally signing this form and providing their telephone number. Consent will be discussed again verbally before each interview begins by the interviewer.

With respect to students, letters will be sent home at the beginning of the school year to introduce the project and obtain informed consent from parents for completion of student surveys and release of student records. The investigative team will also hold parent/guardian information nights at each school to answer questions about the project and distribute/collect consent forms. Students who return consent forms (regardless of whether parents approved participation) will be entered into a raffle for a $25 Amazon gift card (30 gift cards will be raffled at each school). All students will be receiving the curriculum, as this has been adopted by the school curriculum and instruction administrator, but only students who provide parental consent and youth assent will complete surveys (i.e., the research).

Page: 7

Number: 1 Author: [redacted] Subject: Highlight Date: 10/28/2022 6:03:55 PM -04'00'

Number: 2 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:23:04 AM

Number: 3 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:23:23 AM

Number: 4 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:24:35 AM

Number: 5 Author: [redacted] Subject: Sticky Note Date: 11/7/2022 5:34:11 AM

"All students will be receiving the [Identity Project] curriculum ... but only students who provide parental consent and youth assent will complete surveys (i.e. the research)."

^ The potential for harm to the students is the illegally discriminatory curriculum itself, as well as the the surveys. It's not just the surveys. Adopting a new curriculum always has the risk of harm to the students, since (because it's new) it's not yet known how it will impact the student's learning or performance of standardized tests. It's very possible a new curriculum could result in less/slower student learning and lower test results.

This Harvard Identity Project curriculum has the additional risk of harming students' mental/emotional wellbeing because it's illegally discriminatory on the basis of race, in addition to not being "objective, secular, neutral, and nonideological and are free of partisan political influence and racial, cultural, gender, or regional bias." The racial-essentialism of this grant is very much a partisan ideology of the political Left.

We have not requested that the Institutional Review Board (IRB) authorize a modification or waiver of the elements of consent or the requirement for documentation of consent.

(4) **Potential Risks.**

Potential risks include: (1) possible violations of confidentiality, (2) possible adverse effects of the intervention, such as psychological distress that may arise during discussions of race and ethnicity; (3) possible dissatisfaction with the assessment procedures, and (4) possible dissatisfaction with the intervention activities. In the PI's prior work implementing the Identity Project curriculum, however, participants have enjoyed the intervention activities. In our past work, these risks were assessed to be extremely unlikely and minor in severity, particularly when weighing the demonstrated evidence for positive psychosocial and academic benefits produced by this curriculum.

(5) **Protection Against Risk.**

Confidentiality Safeguards. To ensure confidentiality, all information will be collected so that it cannot be associated with any individual. Data collection forms will have numeric research identification numbers (IDs) and will not include names. These forms will be scanned to produce electronic datasets, which will utilize the numeric ID and not include names, addresses, or other personal identifiers. After data collection is completed, the list matching participants and IDs will be in possession of the PI and will be secured in a locked office on a password-protected computer. The electronic datasets will be maintained on password-protected computers, housed in locked research offices, and only project research staff will have access to these computers and datasets. In addition, participants' names will be redacted from audio tapes and transcripts of the interviews; in publications, participants will be assigned pseudonyms and any reports created from these interviews will not contain information that is readily identifiable to single individuals (e.g., the inclusion of multiple, identifying demographic characteristics).

Safeguards for Professional Intervention to Address Potential Adverse Effects. In Years 2 and 3, each teacher who will be trained for implementation of the Identity Project curriculum will also be assigned a dedicated Identity Project Fellow (hereafter referred to as "fellows"), from a cohort of Master's-level research-practice practicum students, who will shadow their designated teacher once per week throughout the academic year. Fellows will be trained to (a) observe and evaluate fidelity of intervention implementation and teacher practice, and (b) document and report to a field supervisor any concerns during the 8-week teacher implementation of the Identity Project to further guard against potential adverse effects. During teachers' 8-week implementation of the Identity Project, fellows will be in residence at the school for an entire school day once per week (i.e., on the day that the Identity Project is delivered to students) and will video record all sessions. After the 8-week implementation, fellows will spend 2 hours/week in their teachers' classrooms for the remainder of the school year. While fellows are in the classroom, they will observe the teacher, take field notes, and complete quantitative assessments of teachers' engagement in culturally sustaining teaching.

We propose to guard against or mitigate potential adverse effects using a combination of proactive and responsive approaches. Given the various proactive strategies integrated into our

Page: 8

Number: 1 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:35:02 AM

Number: 2 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:34:51 AM

Number: 3 Author: [redacted] Subject: Sticky Note Date: 11/7/2022 5:40:28 AM

The possible adverse effects are mentioned but immediately down-played. Even if it's true that, in the past, "participants have enjoyed in the intervention activities," the problem is that the participants (i.e. the students) do not and cannot understand the long-term damage being done to them by the illegally discriminatory, racial essentialist, politically partisan, Leftist ideological indoctrination. The students' minds and views are being shaped in a way they cannot understand and thus cannot consent to, and the manner in which they are being shaped in very detrimental.

Number: 4 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:35:20 AM

Number: 5 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:41:21 AM

Number: 6 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:41:53 AM

Number: 7 Author: [redacted] Subject: Sticky Note Date: 11/7/2022 5:43:56 AM

Video recording, observation be a research fellow, having that fellow take notes, and having the teachers complete assessments all indicates this is non-exempt, covered research. Each and every one of these elements would put this research outside the scope of Exemption 1 (Normal Educational Practice).

design (described below), we do not anticipate iatrogenic effects. Nevertheless, we will also employ a safety monitoring protocol throughout the course of implementation that will enable us to immediately respond to any potential iatrogenic effects, should they arise. We describe our detailed plans below.

The overall purpose of the training is to ensure that teachers are adequately prepared to deliver the curriculum. Several aspects of the training are specifically designed to prevent iatrogenic effects. First, the training will include opportunities for teachers to practice responding to sensitive topics or "hot moments" (Warren & Center, 2006). In the 3.5-day training, teachers are guided in how to respond to these situations, have the opportunity to role-play these scenarios, deconstruct mini-cases, and discuss facilitation methods with their fellow teachers and the research team during the training, as well as examine specific challenges that may arise for them in the context of their classroom. Each of these strategies will be adapted to the additional modes of delivery to ensure all teachers are trained in these areas. Second, our design includes multiple assessments of teachers' readiness to implement the Identity Project, which will alert our team to any additional support needed. Specifically, our investigative team will gain additional insights into teachers' readiness based on multiple interviews and survey assessments. Our study design also includes an exit exam at the end of training to evaluate teachers' mastery of the primary objectives of the training program (e.g., ERI content knowledge, facilitation strategies, Identity Project curriculum objectives) to further assess their readiness to implement the Identity Project curriculum. The field supervisor and lead investigators will prepare individualized brief, actionable, and criteria-based feedback for teachers after training and prior to implementation. Fellows will discuss these recommendations with their teachers and communicate any additional support needed to the field supervisor, who will reach out to teachers to offer additional one-on-one guidance if deemed necessary. Further, the presence of a fellow in each classroom enables ongoing and immediate support for teachers if they have questions prior to or after their weekly implementation. In addition, this protocol offers teachers an immediate connection to the investigative team if they have questions or concerns after their weekly implementation of the curriculum.

As an additional safeguard, we will employ the following safety monitoring plan: Fellows will submit real-time weekly observations on teachers' implementation of the Identity Project in their classrooms. These fidelity assessments will be submitted by the fellow at the end of the day of implementation and will include a standard protocol for fellows to report any potential concerns and/or needs for additional support for their designated teacher. In the event a session is flagged for potential harm to students, the field supervisor will review the fellow's session notes and will watch the video of that session. The research team will discuss options for how the teacher should address the issue and proceed during the next session.

Discomfort with Assessment or Activity Procedures. During the course of participation in the research, a participant may have questions about the assessment procedures. For example, participants may be uncomfortable discussing issues of race/ethnicity or may become distressed when asked about systemic inequities or experiences of ethnic-racial discrimination. To address these concerns, (1) Subjects are informed prior to the assessment that they may choose to skip any question or procedure they find uncomfortable; and (2) Fellows and the field supervisor will be able to answer questions and address any issues regarding participant discomfort during the implementation of the Identity Project curriculum. The PI will be available by phone to answer

Page: 9

Number: 1 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:44:46 AM

Number: 2 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:44:51 AM

Number: 3 Author: [redacted] Subject: Sticky Note Date: 11/7/2022 5:55:56 AM

These "sensitive topics or 'hot moments'" are, essentially, times when the students instinctively reject the illegally discriminatory, politically partisan ideological indoctrination of this Identity Project. The students are still children, so they don't know how to properly articulate their visceral rejection of the illegal discrimination and racial essentialism they are being taught, because they don't yet have the education or vocabulary to express it properly - but they know it's wrong on a fundamental level, and that causes conflict with the teacher (i.e. "hot moments").

By saying the "teachers are guided in how to respond to these situations," what this means is that the researchers teach the teachers how to overcome the student's visceral rejection of illegal discrimination and racial essentialim via the teacher's higher level education. This grant is, essentially, perfecting the method of indoctrinating children into an illegally discriminatory, partisan ideology of the political Left.

Number: 4 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:45:23 AM

Number: 5 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:45:56 AM

Number: 6 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:46:23 AM

Number: 7 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:56:50 AM

Number: 8 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:56:57 AM

Number: 9 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:57:11 AM

Number: 10 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:57:56 AM

Number: 11 Author: [redacted] Subject: Highlight Date: 11/7/2022 5:58:15 AM

Number: 12 Author: [redacted] Subject: Sticky Note Date: 11/7/2022 6:01:22 AM

This is exactly the problem: "participants may be uncomfortable discussing issues of race/ethnicity or may become distressed when asked about systemic inequities or experiences of ethnic-racial discrimination."

But the problem is more than this: it's not only that the students and/or teachers "may become distressed," but that the curriculum itself is illegally discriminatory partisan political indoctrination. Which is why the curriculum is inherently distressing.

questions subjects may have about the assessment that the fellow or field supervisor is unable to answer.

(6) **Importance of the Knowledge to be Gained.** *Discuss the importance of the knowledge gained or to be gained as a result of the proposed research. Discuss why the risks to subjects are reasonable in relation to the anticipated benefits to subjects and in relation to the importance of the knowledge that may reasonably be expected to result.*

a. Importance of Knowledge Gained. In this study, we propose to develop and pilot two additional modes of teacher training for the Identity Project curriculum. The knowledge generated by this study will consist of increased understanding of teacher training for intervention implementation, of teachers' ability to enact culturally sustaining teaching for the benefit of their students, and of school-based interventions delivered by teachers to positively affect academic outcomes during adolescence. Intervening with teachers in this manner enables them to explore and better understand their own ERI, which theoretically will have significant ripple effects, impacting how they handle issues of ethnicity and race in the classroom and their preparedness for delivering curricula that promotes ERI development among their students, ultimately reducing the reproduction of ethnic-racial academic inequality. By focusing on the key developmental competency of ERI, the proposed project works to improve a system of education that historically has required students to shed their heritage language and other cultural markers in order to have a higher chance of academic success. The knowledge gained from this project includes better understanding how to (a) engage teachers in the process of their own ERI development, (b) improve teachers' understanding of and ability to explain societal inequities, (c) training them in the delivery of the Identity Project curriculum to be implemented with their students, and (d) teaching them specific instructional strategies to initiate and facilitate discussions with students regarding race and ethnicity, thereby equipping teachers to be a critical lever of change in reducing ethnic-racial academic inequalities.

b. Limited Risks to Subjects. Risks to participants are expected to be minimal, whereas benefits include participating in stimulating and enjoyable sessions that have been shown to relate to positive youth adjustment outcomes. More generally, the knowledge gained and disseminated from this study is likely to likely benefit other youth and educators.

(7) **Collaborating Site(s).** *N/A*

Page: 10

Number: 1 Author: [redacted] Subject: Highlight Date: 11/7/2022 6:02:22 AM

Number: 2 Author: [redacted] Subject: Highlight Date: 11/7/2022 6:02:32 AM

Number: 3 Author: [redacted] Subject: Highlight Date: 11/7/2022 6:02:42 AM

Number: 4 Author: [redacted] Subject: Highlight Date: 11/7/2022 6:02:57 AM

Number: 5 Author: [redacted] Subject: Sticky Note Date: 11/7/2022 6:05:54 AM

Enabling teachers "to explore and better understand their own ERI" means making teachers more race-conscious and less racially colorblind - which is stated more explicitly later-on in this grant application, and which is the purpose of this curriculum. Becoming more race-conscious and less colorblind means more treating students differently because of their race, which is illegal disparate treatment.

Number: 6 Author: [redacted] Subject: Highlight Date: 11/7/2022 6:06:48 AM

Number: 7 Author: [redacted] Subject: Sticky Note Date: 11/7/2022 6:08:12 AM

"Promot[ing] ERI development among their students" means causing the students to be more race-conscious and less colorblind, resulting in students treating each other differently because of race, which is illegal disparate treatment.

Number: 8 Author: [redacted] Subject: Highlight Date: 11/7/2022 6:09:10 AM

Developing and Testing Training Modes for Improving Teachers' Race-Related Competencies to Promote Student Learners' Academic Adjustment

A. SIGNIFICANCE

A.1. OVERVIEW

The ethnic-racial academic achievement gap is among the most egregious social inequalities of U.S. society (Bradbury, Corak, Waldfogel, & Washbrook, 2015). Compared to non-Latino White youth, Black and Latino youth are less likely to meet grade-level expectations in math and reading (NCES, 2018), get tracked into honors or advanced placement courses (Card & Giuliano, 2015), graduate from high school (McFarland, Stark, & Cui, 2016), and complete bachelor's degrees (NCES, 2018). These inequities in academic outcomes are explained, in part, by ethnic-racial minority (ERM) youths' experiences of ethnic-racial discrimination, which are consistently associated with poorer mental and physical health (Pascoe & Smart Richman, 2009), and can interfere with students' ability to concentrate on and excel in their schoolwork (Levy, Heissel, Richeson, & Adam, 2016). Given that ERM youth comprise more than half of U.S. public school students (NCES, 2018) and are driving the nation's population growth (U.S. Census Bureau, 2015), it is imperative to identify paths toward dismantling ethnic-racial inequalities in academic outcomes. Decades of theoretical (e.g., Neblett, Rivas-Drake, & Umaña-Taylor, 2012) and empirical research (e.g., Miller-Cotto & Byrne, 2016) suggest that supporting the ethnic-racial identity (ERI) development of ERM student learners is a promising avenue to pursue to reduce academic inequality. Moreover, findings from a randomized controlled trial (RCT) supported the efficacy of an ERI school-based curriculum (i.e., the Identity Project) for promoting students' ERI and, in turn, reducing mental health problems and increasing general well-being and academic adjustment (Sladek, Umaña-Taylor, Wantchekon, McDermott, & Updegraff, 2019, under review; Umaña-Taylor, Kornienko, Bayless, & Updegraff, 2018a). The next step is to identify the most efficient and effective method to prepare educators to engage with students on topics of ethnicity-race and effectively deliver this program in their classrooms. **Accordingly, the goal of this Development and Innovation (Goal Two) proposal is to develop and pilot test three different modes of delivery for a comprehensive training program designed to prepare educators to implement an evidence-based ERI development curriculum (i.e., the Identity Project) in their high school classrooms.**

The theory of change guiding this work indicates that the Identity Project training program increases teachers' ERI development, reduces their colorblind racial ideology, and increases their ERI content knowledge (i.e., race-related competencies); these changes along with their implementation of the Identity Project in their classrooms promotes their engagement in culturally sustaining pedagogical practices (CSP) and, in turn, promotes students' ERI development, psychological adjustment, and academic success (see Figure 1). Enactment of CSP requires that educators engage in regular self-reflection regarding issues of

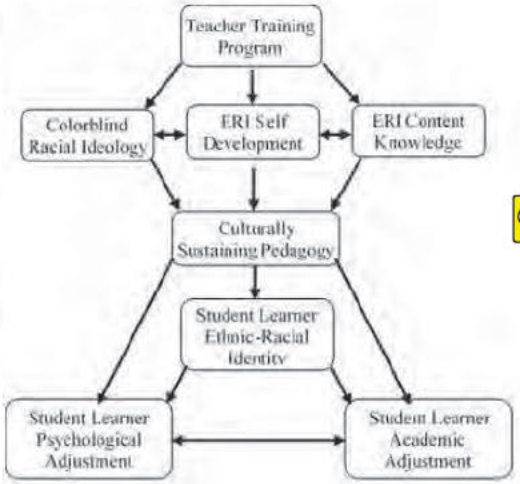

Figure 1. Theory of Change: Identity Project Training Promotes Students' Academic Success via CSP

Page: 11

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This is the premise of this Harvard grant: that ethnic-racial minority (ERM) students experience racism and that's why they are not performing well at school.
It is clearly a flawed premise, but the grant application just assumes it without justifying it.

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As stated above, the first assumption was that minority students are performing poorly in school because of racism.
This is the second assumption: that the solution to racism is to make students and teachers more race-conscious and less colorblind via development of their ethnic-racial identity (ERI).
This second assumption is even more absurd than the first, and (once again) this grant application does not justify it - it simply takes it as a given.

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Now we reach the purpose of this grant application: given the first two assumptions (that minority students are doing poorly in school because of racism, and that the solution is making the students more race-conscious and less colorblind), what is the best/most effective method of delivering a curriculum (the Identity Project) that makes the students and teachers more race-conscious and less colorblind (i.e. develops their ethnics-racial identities (ERI))?

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Here we go, right on page 1: "The theory of change guiding this work indicates that the Identity Project training program increases teachers' ERI development, reduces their colorblind racial ideology..."
By reducing teachers' "colorblind racial ideology," this Identity Project encourages teachers to "see race" regarding their students, which causes teachers to treat students differently based on the race of their students, which is illegal disparate treatment.
Why, you ask? The grant application says it explicitly: to reduce "inequities in academic outcomes" - which means to achieve equality of outcome (equity) between racial groups of students in education, via illegal disparate treatment of students based on race.

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"Educators engage in regular self-reflection regarding issues of race and ethnicity, recognize and continuously check their implicit biases" - why?
Because, according to this grant application, the teachers are implicitly biased against minorities, including minority students. The teachers are racist! Therefore, they need to constantly "check their implicit biases." It's not that some students do worse than other students for any number of reasons - nope, nothing reasonable like that: it's that the teachers are racist, according to this grant.
Finally, the teachers must "practice constant self-awareness regarding the impact of their actions of ERM students": this is disparate treatment on the basis of race, giving special attention to minority students because they are minorities.

race and ethnicity, recognize and continuously check their implicit biases, and practice constant self-awareness regarding the impact of their actions on ERM students (Hammond, 2015; Ladson-Billings, 2009; Utt & Tochluk, 2016). The process of enacting CSP in classrooms supports students' ERIs and has positive implications for students' academic outcomes (Byrd, 2016; Dickson, Chun, & Fernandez, 2016). CSP is theorized to promote academic adjustment directly and indirectly via its positive effects on student learners' ERI development and psychological adjustment (Lee, 2017; Paris, 2012).

A major barrier to disseminating this important curriculum on a large scale in U.S. schools is the feasibility of training teachers to engage in CSP and, specifically, discuss issues of ethnicity and race with students in a manner that promotes their ERI development. Through an iterative process, and in partnership with educators in distinct school settings (e.g., predominantly White students, predominantly ERM students), the research team is currently engaged in refining an in-person, 3.5-day intensive training program designed to engage teachers in their own ERI development, prepare them to effectively engage in CSP practices, train them to implement the Identity Project curriculum with their students, and positively impact the academic adjustment of ERM students. **The proposed project would support the investigative team's efforts to develop two additional modes of delivering the Identity Project training program and to pilot test and further refine all three modes of delivery in preparation for a future full-scale efficacy trial.** Accordingly, we propose the following specific aims:

(1) Partner with educators to develop two additional effective modes of delivery (i.e., in-person professional development time throughout the school year; remote, self-administered online professional development) for what is currently a 3.5 day, in-person teacher training program designed to increase teachers' race-related competencies.

(2) Pilot test the three modes of delivery for the Identity Project training program to (a) examine feasibility of implementation, (b) identify factors that may challenge implementation and necessary program modifications for scale up; and (c) evaluate the preliminary effectiveness of the three modes of delivery on increasing teachers' ERI, teachers' enactment of CSP, increasing students' ERI, and promoting students' adjustment.

(3) Revise the modes of delivery and training materials and develop a proposal for a full-scale efficacy trial that will enable experimental comparison of modes of delivery.

A.2. BACKGROUND

A.2.1 Why Train Teachers to Intervene in ERI?

ERI development includes the process by which adolescents explore and develop an understanding of their ethnic-racial background (Umaña-Taylor et al., 2014a). 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. We focus on ERI because engaging in this developmental process has been consistently positively associated with adolescents' academic adjustment, as noted by a recent meta-analysis of 47 empirical studies (Miller-Cotto & Brynes, 2016). Furthermore, this proposal builds on a prior successful RCT that tested the efficacy of the

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This Harvard grant is only the start, involving only three public schools. The researchers are preparing to implement this Identity Project "on a large scale in U.S. schools," the next step being "a future full-scale efficacy trial."

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Identity Project – a school-based universal intervention program to provide adolescents with tools and strategies for engaging in ERI development (Umaña-Taylor & Douglass, 2017). Comprising a series of activities and assignments over an 8-week period, the Identity Project curriculum directly engages students and teachers in practices that promote ERI development via a CSP-centered curriculum (as elaborated in section A.2.2.).

The theory of intervention guiding the Identity Project curriculum is grounded largely in psychosocial theories of development (Erikson, 1968; Marcia, 1980) and subsequent iterations of these theoretical notions that have been applied to ERI development (Phinney, 1993; Umaña-Taylor et al., 2014a). From a developmental perspective, successful engagement in the process of identity formation is conceptualized as an in-depth exploration of one's values, beliefs, ideas, and history – essentially, an extensive consideration of one's past, present, and future (Erikson, 1968). In addition, optimal identity development is believed to be achieved when in-depth exploration results in a greater sense of clarity and resolve regarding the meaning of one's identity and one's sense of belonging and connection to that identity (Erikson, 1968; Marcia, 1980). Furthermore, developmental theory suggests that engaging successfully in the process of global identity formation has positive psychosocial implications by promoting a more confident sense of self, thereby facilitating individuals' decision-making, positive self-concept, and positive interpersonal relationships (Erikson, 1968). Moreover, the psychosocial benefits of a secure and confident sense of self have been linked with better academic adjustment and mental health among adolescents (Crocetti, 2017; Meeus, 2011).

Support for these theoretical notions has emerged in various empirical studies of ERI. For example, researchers examining adolescents' ERI exploration and resolution have found positive associations with academic adjustment (e.g., Miller-Cotto & Byrnes, 2016), positive self-concept (e.g., Knight, Carlo, Streit, & White, 2017), coping strategies that promote adjustment in the face of cultural stress (e.g., Umaña-Taylor, Vargas-Chanes, Garcia, & Gonzales-Backen, 2008), and peer social competence (e.g., Umaña-Taylor et al., 2014b). Moreover, our own *experimental* test of these conceptual notions has also provided support for a theory of intervention that is grounded in this developmental frame (Umaña-Taylor et al., 2018a; Umaña-Taylor, Douglass, Updegraff, & Marsiglia, 2018b). First, results from an RCT indicated that adolescents who were randomly assigned to the Identity Project intervention reported significant increases in ERI exploration and those increases resulted in subsequent increases in ERI resolution; these changes were not evident among adolescents assigned to the attention control group (Umaña-Taylor et al., 2018b). Furthermore, program-induced changes in ERI exploration and ERI resolution significantly predicted increases in global identity cohesion, self-esteem, and grades, and decreases in depressive symptoms one year later (Umaña-Taylor et al., 2018a). Recent follow-up analyses with an additional wave of data collected two years post-intervention indicated the effects of the intervention continued to cascade, resulting in significantly improved academic engagement, academic efficacy, school belonging, self-esteem, and depressive symptoms via increases in students' global identity cohesion (Umaña-Taylor, Sladek, & McDermott, 2019; see Figure 2).

Page: 13

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This Identity Project is engaging in "an in-depth exploration of [the students'] values, beliefs, ideas, and history." Two issues arise:
(1) Should the researchers actually be doing this at all? This is the domain of parents, not teachers. Having teachers and researchers do this could have significant negative effects on students; and
(2) Even if teachers and/or researchers are doing this, is teaching the Identity Project the right thing to be teaching? Is illegal discrimination and racial essentialism what should be taught? Obviously not.

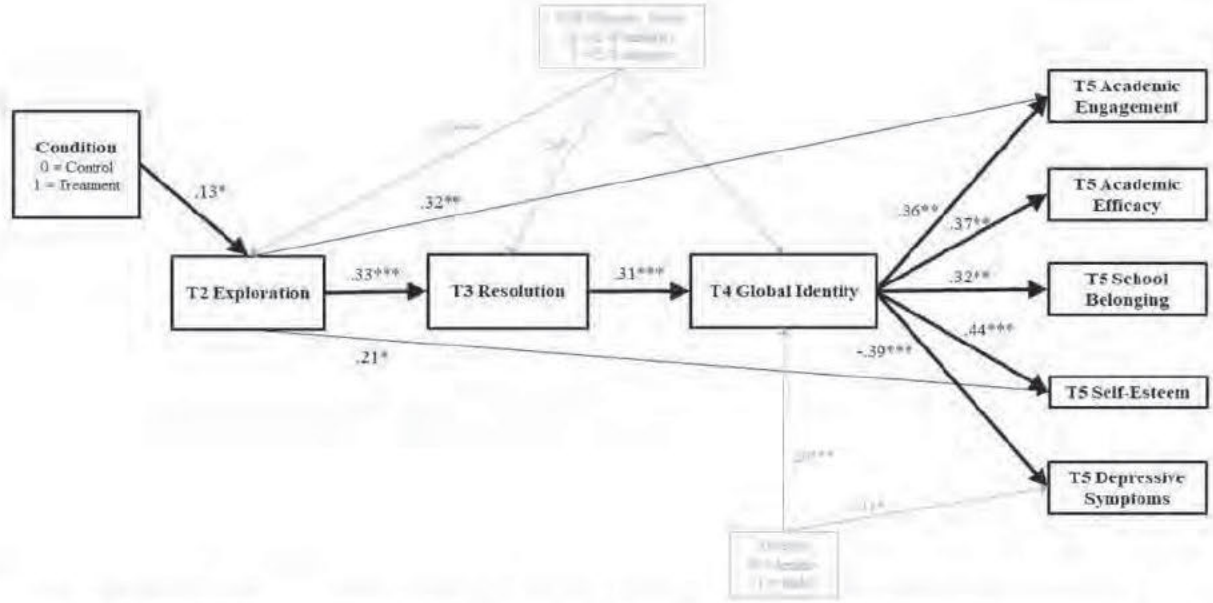

Figure 2. Note. $N = 215$ (treatment $n = 114$, control $n = 101$). Model fit: $\chi^2(5) = 3.26$, $p = .66$, RMSEA = .000 90% CI RMSEA (.000, .075), CFI = 1.000, TLI = 1.047, SRMR = .017. Direct effects of condition, T2 Exploration, and T3 Resolution on each dependent variable were estimated. Non-significant paths ($p > .05$) omitted from the figure. E-R Majority Status and Gender included as controls. Estimates are standardized. Non-significant covariances among exogenous variables fixed to zero. Bolded black lines indicate significant indirect effects; gray lines indicate significant paths from control variables. $^{***}p < .001$. $^{**}p < .01$. $^{*}p < .05$ (all two-tailed).

After successful implementation of the Identity Project by researchers, and promising results of its positive impacts on student achievement, we turned our efforts toward working with teachers as experts to develop a training program to prepare teachers to effectively implement this curriculum in their 9th and 10th grade classrooms. Our focus on teachers was guided by both practical and theoretical reasons. First, adolescents spend a significant amount of time in the school setting (Larsen & Verma, 1999) and teachers are significant socialization agents during this stage of development (Wang & Eccles, 2012; Wentzel, 1998). Second, theorists suggest that teachers' engagement in CSP supports and sustains the identities of ERM students in a manner that is promotive for their academic success (e.g., Delpit, 2006; Hammond, 2015; Lee 2017); thus, engaging teachers in the implementation of an efficacious *ERI-based* curriculum, which has been demonstrated to promote academic success, may be even more impactful for student outcomes because it facilitates teachers' efforts toward implementing CSP practices in their classrooms. This approach to change instruction via the introduction of new curriculum materials that provide concrete support for enacting broad abstract principles and are developed in collaboration with teachers has been effectively used in other fields (e.g., math and science) and is seen as an exemplar (Ball & Cohen, 1996; Powell & Anderson, 2002).

Education scholars have noted that teachers' engagement in CSP represents a key lever of change to reduce ethnic-racial academic inequalities (Delpit, 2006; Hammond, 2015). CSP (Paris, 2012) evolved from revolutionary models of culturally *relevant* (Ladson-Billings, 1995) or *responsive* (Gay, 2000) pedagogy, which emphasized the importance of creating a classroom context in which students can affirm and accept their cultural identities, while also developing the ability to think critically about social institutions (such as schools) that reproduce and perpetuate social inequities (Ladson-Billings, 1995). Moreover, CSP emphasizes the need for educators to move beyond teaching in ways that are relevant or responsive to students' cultural experiences and toward creating learning environments that support and sustain the cultural

Page: 14

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"Developing the ability to this critically about social institutions (such as schools) that reproduce and perpetuate social inequities" - to translate, this means teaching the students that social institutions (including but not limited to schools) are systemically racist.

identities of learners (Paris, 2012). By making ERIs salient and viewing differences from a strengths-based perspective, educators can sustain the identities of learners and minimize discontinuities between home and school contexts (Lee, 2017; Tyler et al., 2008).

These notions are consistent with a cultural-ecological framework, which suggests that development unfolds as a function of dynamic interactions between youth and the multiple contexts in which they develop (Bronfenbrenner & Morris, 2006). New iterations of this theoretical framework place culture at the center of human development and in a manner that permeates all levels, including the proximal processes and social interactions of microsystems (Vélez-Agosto, Soto-Crespo, Vizcarrondo-Oppenheimer, Vega-Molina, & García Coll, 2017). This revised ecological model acknowledges that culture informs teachers' individual practices and youths' individual characteristics and development, and it situates interactions between youth and teachers (both as *cultural actors*) as embedded within a broader culturally based school context that shapes youths' development and adjustment (Vélez-Agosto et al., 2017). Thus, rather than positioning culture as a macro-level influence, these revisions recognize that culture is embedded in each level – beginning with the individual – and continues to permeate throughout all contexts. In line with these notions, prior work notes that teachers' cultural competencies, including their self-reflections regarding identity, play a significant role in promoting student learning and development (e.g., Aronson & Laughter, 2016; Darling-Hammond, 2006; Gay, 2013; Kahn, Lindstrom, & Murray, 2014). However, previous research (e.g., Kohli, Lin, Ha, Jose, & Shini, 2019; Ladson-Billings, 2001), including our insights from field work, notes significant variability in teachers' cultural competencies. Indeed, some teachers' ability to serve as effective and culturally sustaining facilitators of the Identity Project curriculum may be limited by personal concerns, discomfort, and, for some, a lack of awareness regarding their own ERI formation. Thus, teacher training is an essential component of preparing teachers to implement an ERI-based curriculum, and implementation of such curriculum will provide teachers with concrete and manualized lesson plans to enact CSP in their classrooms.

A.2.2. The Identity Project Intervention

The Identity Project curriculum is consistent with CSP theories in its emphasis on embedding and supporting students' identities in the classroom (Gay, 2013; Ladson Billings, 1995; Lee, 2017). Grounded in developmental theory (Phinney, 1993; Umaña-Taylor, Yazedjian, & Bámaca-Gómez, 2004), the Identity Project curriculum was designed to provide students with time and adult-facilitated space during the school day to learn tools and strategies to learn more about their ethnic-racial background and explore this aspect of themselves as a meaningful part of their global identity (Umaña-Taylor & Douglass, 2017). The concept of global identity cohesion (Erikson, 1968), on which the Identity Project is grounded (Umaña-Taylor & Douglass, 2017), suggests that a sense of inner identity and synthesis of one's past, present, and future identities is essential for developing a secure sense of self that promotes positive psychosocial and academic functioning for adolescents. Specifically, engaging in greater exploration of one's ERI and gaining a sense of resolution regarding how this aspect of identity informs one's general sense of self is expected to provide adolescents with a clearer sense of who they were, who they are, and who they can become - key elements of psychosocial development that support youth (particularly those who are minoritized) to succeed in school (Miller-Cotto & Byrnes, 2016; Williams, Chapman, Wong, & Turkheimer, 2012). In other words, the theory of intervention guiding the development of the Identity Project suggests that a curriculum that promotes youths' exploration and resolution of their ethnic-racial background and engages them in the process of

Page: 15

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To translate: this means that the Identity Project researchers will 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.

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considering and understanding how their ERI fits into their global identity will result in less identity confusion, and greater identity cohesion and self-confidence; in turn, this more secure sense of self, particularly in relation to one's ethnic-racial background, will promote increases in adjustment in areas that are especially important and salient during adolescence, such as academic achievement (Umaña-Taylor & Douglass, 2017). Specific to ERM youth, increased knowledge of one's ethnic-racial background and a greater sense of clarity with respect to the role of ERI in one's life can strengthen youths' individual assets (e.g., coping with discrimination, secure ethnic-racial self-concept, adaptive cognitive appraisal; Neblett et al., 2012) to combat and contend with ethnic-racial-based threats that often pervade the school context (Douglass, Mirpuri, English, & Yip, 2016; Quintana & Mahgoub, 2016) and are deleterious to academic outcomes (Heissel, Levy, & Adam, 2017; Huynh & Fuligni, 2010). Moreover, theories of CSP note that integrating students' cultural identities into the classroom positively impacts their academic outcomes by engaging available sources of knowledge from both their home and school communities (Byrd, 2016). Specifically, CSP includes (a) fostering cultural pluralism in schooling for social transformation, (b) employing strength-based approaches that draw from and bring into the classroom practices of minoritized communities, (c) and valuing and sustaining diverse ways of life among communities of color that have often been marginalized in schools (Paris & Alim, 2017).

The Identity Project curriculum was developed to be relevant to youth from diverse backgrounds, rather than one specific group, because the long-term goal to scale up is more feasible for a program that can be transported to the many diverse school settings in which ERM students are embedded. The primary objectives of the Identity Project curriculum are to: (a) help students understand that their identities are multifaceted and their ethnic-racial background is one part of their identity; (b) expose students to strategies they can use to learn more about their background, and engage them in the use of these strategies; (c) increase students' understanding of the existence and harm of stereotypes and discrimination for members of different groups and connect these understandings to their own experiences and the experiences of their peers; (d) provide a sociohistorical perspective by presenting factual stories of discrimination and marginalization of specific groups in the context of U.S. history; (e) expose students to the notion that diversity exists both within and between groups, and that within-group differences are oftentimes larger than between-group differences; and (f) increase students' understanding of ERI development as a journey that does not follow a similar course for everyone, and understanding that their ERI can change over time and become more or less meaningful to them depending on their social context and age.

These objectives are achieved via an 8-week curriculum that includes eight 55-minute sessions implemented by a single facilitator once per week. Sessions include didactic instruction, small group activities (e.g., think-pair-share), large group activities, and large group discussion (see Appendix D for sample lesson from manualized curriculum). Although most work takes place in the classroom, certain activities require students to gather information outside of school to complete classroom assignments, which prompts discussion with parents, caregivers, and extended family regarding their ethnic-racial background. Many of the class activities involve peer dyadic and large group discussions because our qualitative work with students during curriculum development revealed that youth learned about their own ERI by learning about others' backgrounds (Umaña-Taylor & Douglass, 2017). With training, teachers learn to affirm students' engagement in the ERI development process, model openness and curiosity, encourage

Page: 16

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"ethnic-racial-based threats that often pervade the school context" - again, according to this grant application, the schools are systemically racist.

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peer-to-peer exchanges, and model perspective-taking in a manner that promotes students' understanding and respect of diverse perspectives.

In line with these theoretical and applied considerations, the Identity Project curriculum is comprised of a series of activities and assignments covered over an 8-week period that directly engage students and teachers in practices that promote ERI and enable key aspects of CSP. For example, Session 4 of the Identity Project engages students in a process of exploring the symbols, rites of passage, and traditions related to their ethnic-racial backgrounds and sharing their findings with their peers during the school day. This helps to foster students' sustained connection to their own background and awareness of others' in their classrooms through a strengths-based (rather than deficit) lens. Through activities such as these, the Identity Project curriculum provides structured opportunities for teachers to infuse CSP into their practice by (a) illuminating cultural pluralism in the classroom, (b) focusing on students identifying, examining, and sharing their cultural assets/strengths, and (c) providing dedicated class time to exploring ways of being and traditions that otherwise may not be acknowledged or privileged in school contexts. Our proposed theory of change (Figure 1) integrates these conceptual frameworks and suggests that training teachers to implement an ERI-based curriculum with their students increases their engagement in CSP and, in turn, promotes students' ERI development and improves their academic outcomes.

A.3. What does the Teacher Training entail?

The Identity Project training program is designed to prepare educators to effectively deliver an ERI curriculum (i.e., Identity Project) to students. The training is grounded in existing theoretical and empirical work (e.g., Ladson-Billings, 1995; Paris, 2012; Umaña-Taylor et al., 2014a) and is currently being refined via community-based participatory research (CBPR; Lucero et al., 2018; Muhammad et al., 2015), an iterative process in which our investigative team is working with school partners to finalize in-person training sessions that take place during the summer. The training brings teachers to the Harvard Graduate School of Education (HGSE) campus over a period of 4 days to engage in activities and lessons designed to further their learning in four intersecting domains: (a) gaining ERI content knowledge, (b) engaging in self-reflection regarding their own ERI, (c) understanding systemic inequities and how they contribute to ethnic-racial stereotypes and threats faced by members of ERM groups, and (d) learning strengths-based facilitation strategies for discussing issues of race and ethnicity in the classroom. Through a series of individual reflection opportunities, small group activities, and large group discussions, the training engages teachers in the process of their own ERI development, guides their understanding of and ability to explain societal inequities, trains them in the content and delivery of the Identity Project curriculum, and teaches them specific instructional strategies to initiate and facilitate discussions with students regarding race and ethnicity.

The conceptualization of the Identity Project training program is informed by the developmental needs of adult learners and, in particular, the Immunity to Change framework (Kegan & Lahey, 2009). First, the training provides teachers with a sense of control over their learning. Specifically, the training asks teachers to identify goals for their students' and their own learning during the Identity Project, the barriers and roadblocks to attaining those goals, and provides space for self-exploration and self-awareness. For example, the learning goals for the first day of the training are to introduce the science that informed the Identity Project (e.g., ERI development, adolescent development), provide a brief overview of each session, introduce the

Page: 17

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core learning themes of the training (i.e., personal identity development, ERI content knowledge, structural inequities, and facilitation strategies), and to build a sense of community/trust. To meet these learning goals, teachers integrate lessons from Session 1 of the Identity Project curriculum to establish community norms and engage in self-reflection about their own ERI, establish learning goals, and draw on their expertise as teachers to brainstorm facilitation strategies. By acknowledging that teachers have great capacity in their practice and ability to learn, introducing choice, and bringing teachers into the process of naming potential solutions and strategies in conjunction with the training program facilitators who are experts in ERI, we have designed this training to help manage the anxiety that comes with change, as is central to creating positive change in the Immunity to Change framework (Kegan & Lahey, 2009). Moreover, our approach in the training is designed to illuminate problems (e.g., structural inequality; barriers in their school), alert teachers to the limits of their current ways of being, increase the importance of CSP in their teaching practice, and provide them with sufficient support to not be overwhelmed by the task (Kegan & Lahey, 2009). In combination with our CBPR approach, this process for engaging teachers in the development process will ensure that our programs are ideally suited to their unique needs and aligned with contemporary approaches to adult learning (e.g., Kegan & Lahey, 2009).

The Identity Project training focuses on four key elements of teacher development (i.e., supporting their own ERI development; ERI content knowledge, learning facilitation strategies for implementing an ERI curriculum, and learning about ethnic-racial systemic inequities). Teachers' own ERI development is a crucial component to the successful implementation of the curriculum and to fostering adolescents' academic outcomes. Education scholars have found that teachers' engagement in 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). The integration of teachers' own ERI development as an aspect of training before implementing the Identity Project curriculum is essential because intervening in teachers' developmental processes capitalizes on the benefits of *their* ERI for students' outcomes (Peifer, Lawrence, Williams, & Leyton-Armakan, 2016) and works to inform teachers' mindsets with a focus on CSP (Hammond, 2015). Furthermore, CSP 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 students (Hammond, 2015; Ladson-Billings, 2009; Utt & Tochluk, 2016), theoretically resulting in systemic change in students' developmental and academic outcomes.

By engaging teachers in their own ERI development process, and by increasing their own exploration and resolve regarding this aspect of their identity, they are better positioned to engage their students in a curriculum focused on student ERI development. Although no studies, to our knowledge, have directly examined the associations between secondary teachers' ERI and changes in students' ERI, one study found that college student mentors' ERI exploration and resolution were positively associated with the ERI exploration of their ERM *middle-school student* mentees – and this association emerged regardless of whether the mentors were White or members of an ERM group (Peifer et al., 2016). The authors suggest that mentors who are engaged in their own ERI development may model this process to their mentees, thereby promoting ERM mentees' ERI exploration. We expect that a similar process will unfold for teachers and students. However, although teachers of all backgrounds vary in their own ERI formation and attitudes toward discussing racial issues, White teachers in particular (currently

Page: 18

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The "anxiety" is not coming only from change; it's likely that any anxiety experienced by teachers is because of the illegal discrimination and race essentialism of the Identity Project.

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The premise is that White teachers have "white privilege", which is a flawed premise and flawed concept.
Also, this line evidences illegal disparate treatment since it (1) singles-out "White teachers in particular," then (2) treats them differently from non-White teachers by ascribing negative characteristics to the "White teachers in particular" (specifically, alleging that they "struggle with acknowledging their own privilege and recognizing racism").

80% of K12 educators; NCES, 2019). Struggle with acknowledging their own privilege and recognizing racism, which can hinder productive conversations about race with students (Tatum, 1992; Utt & Tochluk, 2016). These challenges can result in teachers acting on their racial biases, adopting a colorblind approach that can create a hostile learning environment for ERM students, and hindering teachers' ability to establish strong relationships with their ERM students (Castro Atwater, 2008). On the other hand, intervening with educators in a manner that enables them to explore and better understand their own ERI can have significant ripple effects, impacting how they handle issues of ethnicity and race in the classroom and their preparedness for delivering curricula that promotes ERI development among their students, which may reduce inequities in academic achievement for ERM students. In addition, given the reciprocal nature of human development in context (Bronfenbrenner & Morris, 2006), teachers' ERI may be further informed by their interactions with their students as they implement the Identity Project curriculum in their classrooms and increasingly engage in discussions about race and ethnicity with their students.

The training is also designed to address ethnic-racial systemic inequities. Activities and training content will prepare teachers to understand and be able to explain how institutional racism has resulted in an educational system and practices that reproduce social inequalities and result in symptoms such as the academic achievement gap. Educators will be able to explain and provide at least one specific example of how institutional racism plays out in the U.S. education system in a manner that reproduces ethnic-racial inequalities in academic outcomes (e.g., by reifying the notion that Whites do not have an ethnic-racial identity and therefore are the "norm," thereby othering youth from ERM backgrounds). This component of the training will involve exposure to the national and local historical context. Furthermore, educators will be able to contrast a *contextual theory of difference* (i.e., social-group differences are the result of individuals' participation in and adaptation to the sociocultural context) and an *essentialist theory of difference* (i.e., social-group differences are biologically rooted and relatively fixed traits) and explain how these different frames can facilitate or impede CSP, respectively (Stephens, Hamedani, & Townsend, 2019).

Given that the focus of the Identity Project curriculum is students' ERI development, an important component of the training will pertain to gaining ERI content knowledge. The training will enable teachers to identify and be able to explain the social and cognitive developmental changes during adolescence that make the identity formation process salient during this developmental period and consequential for youths' adjustment (Umaña-Taylor, 2016). They will connect these theoretical understandings to ERI development and, specifically, be able to identify different aspects of ERI process and content and explain why and how they are linked with student achievement. This learning goal will overlap considerably with becoming proficient in the Identity Project curriculum and being able to explain how the activities in the curriculum target different aspects of youths' ERI development.

The final area we target in the training program is pedagogical and facilitation strategies. Teachers will analyze and apply classroom tools that promote in-depth examination of ethnicity-race and identity, including facilitation strategies specific to discussing issues of ethnicity-race with students. Teachers will develop a repertoire of facilitation tools to address student comments, classroom situations, and course content that create a hostile ethnic-racial climate for students of color and hinder a productive learning environment for all students. Furthermore, they will gain competency in flexibly applying these strategies to a variety of situations. For example, teachers will practice "marking the moment" when microaggressions occur in the

Page: 19

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This grant is saying that when teachers "adopt[] a colorblind approach" (meaning, when teachers treat their students equally, regardless of race), this "can create a hostile learning environment for ERM [meaning minority] students." This is both illegally discriminatory and patently false. By opposing a "colorblind approach," this grant is advocating for having teachers treat their students differently based on the race of their students - which is to say, this grant is advocating for illegal disparate treatment.

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The premise of this first illegally discriminatory statement is that the U.S. education system is systemically racism, which is false.
The latter statement, that "Whites do not have an ethnic-racial identity," is both illegally discriminatory and false.

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classroom, or "circling back" when there has been a missed opportunity to directly address ethnic-racial bias (see Appendix D for sample activity). These strategies focus on preparing educators to recognize, respond, and redress biases (Gorski, 2017). This aspect of the training will help teachers become proficient in preparing and facilitating classroom discussions about race and ethnicity in a culturally sustaining manner (e.g., Singleton, 2014).

In sum, in order to train teachers to deliver a curriculum focused on youths' ERI, it is essential to work with teachers on understanding their own ERI in addition to guiding their understanding of ethnic-racial systemic inequities, ERI content knowledge, and specific facilitation strategies to initiate and facilitate discussions with students regarding race and ethnicity. The Identity Project training is designed to achieve these aims and the current project will enable the development of multiple effective modes of delivery for this training, which will increase the feasibility of meeting the training needs of educators across the nation.

A.4. The Need for Identifying Multiple Effective Modes of Training Teachers.

For the past 5 years, the PI and her team have been involved in various research collaborations that involve bringing the Identity Project into schools. This work has involved identifying the training needs for facilitators of the Identity Project (i.e., the PI, postdoctoral fellows, and graduate research assistants), including the amount of time and ERI content knowledge necessary for fidelity of implementation. This work with graduate-level psychologists and researchers suggests that approximately 4 days of training are needed to comprehensively prepare facilitators. In the past year, however, the PI has been engaged in a CBPR process working closely with a school partner to identify best strategies for training certified *teachers* to serve as facilitators of the Identity Project curriculum with their students. Our collaboration has revealed that requiring teachers to attend a 4-day in-person, summer intensive training is feasible for some teachers, but not all. This finding is supported by the research literature which suggests that teachers have many competing demands on their professional development time (Hill, 2007), that teacher professional development has shifted in recent years to place more emphasis on job-embedded learning (e.g., through intentional teacher collaboration, coaching, and informal mentorship; Banilower et al., 2018; Hill, Lovison & Kelley-Kemple, 2019), and that some forms of professional development (e.g., online content) may be preferable in contexts where professional development opportunities are limited (Erickson, Noonan, & McCall, 2012).

Thus, consistent with a CBPR approach (Lucero et al., 2018; Muhammad et al., 2015), we will achieve the goals of the proposed project by engaging with educators as both collaborators and research participants to co-create, refine, and test additional modes of delivery for the Identity Project training program. It is important to note we will not change the content or contact time of the training; these elements will remain consistent across modes of delivery. However, we will modify the methods and timing by which the training takes place. Furthermore, we are engaging in this process at the initial stages of program development, as the Identity Project training program has not yet been tested in a full-scale trial. This is consistent with best practice recommendations regarding when and how to develop and rigorously test professional development designs (Hill, Beisiegel, & Jacob, 2013).

A.5. Summary

In sum, ethnic-racial-based threats to ERM youths' identities (e.g., discrimination) undermine students' academic success (e.g., Levy et al., 2016) and contribute to one of the most significant social inequalities of our society – the ethnic-racial academic achievement gap. ERM

Page: 20

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Youth consistently experience ethnic-racial threats in the school context (e.g., Card & Giuliano, 2015; Rocque & Paternoster, 2011; Umaña-Taylor, 2016). However, the school context does not have to be an additional risk in the lives of ERM youth, and teachers' engagement in CSP practices can promote positive adjustment among student learners from ERM backgrounds (Lee, 2017; Paris, 2012). Teachers' engagement in CSP integrates students' varied identities into the classroom, thereby giving voice and power to diverse perspectives that are typically underrepresented in the mainstream educational system. CSP creates a supportive context within which students can more freely explore and gain clarity regarding their ERIs, thereby promoting a more cohesive sense of self. The proposed project will enable the development, feasibility testing, and refinement of multiple modes of delivery for the Identity Project training program that prepares teachers to engage in CSP via the implementation of an ERI-focused intervention curriculum. Our ultimate goal is to develop three modes of delivery that are equally effective.

B. RESEARCH PLAN

B1. OVERVIEW

This mixed-method project incorporates a CBPR approach, qualitative and quantitative data collection and analysis, and a pilot with teacher and youth pre-test and repeated longitudinal post-tests. Our design will be carried out over 4 years and includes two different samples of teachers and one sample of adolescent participants from a total of three high schools in the Boston metro area (see Table 1 for project timeline and Figure 3 for overview of project design).

Table 1. Project Timeline	Year 1 7/1/2020-6/30/2021				Year 2 7/1/2021-6/30/2022				Year 3 7/1/2022-6/30/2023				Year 4 7/1/2023-6/30/2024			
1=July-Sept; 2=Oct-Dec; 3=Jan-Mar; 4=Apr-Jun	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4
Development and Refinement																
Generative Teacher Course – 3 credits [10	X	X														
Refinement of Training Programs		X	X													
Focus Groups			X	X												
Finalizing training materials - three modes			X	X												
Advisory Board Meetings					X	X	X	X	X	X	X	X	X	X	X	X
Implementation																
Randomization of 3 schools				X												
Teacher Surveys (TS) [TS1 through TS7]				X		X		X	X	X	X	X				
Teacher Interviews (TI) [TI1 through TI7]				X		X		X	X	X	X	X				
In-person Training Across School Year					X	X	X	X								
Self-paced Online Training					X	X	X	X								
3.5 Day In-Person Summer Training								X	X							
Fellows Training									X							
Student Assessment (SA) [SA1, SA2, SA3, SA4]									X	X	X	X				
Teacher Implementation of Identity Project									X	X						
Data Cleaning and Preparation				X	X	X	X	X	X	X	X	X	X			
Refinement, Dissemination, and Planning																
Refinement of training materials													X	X	X	X
Analyses, Dissemination, Grant Prep											X	X	X	X	X	X

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As one of the most racially diverse *and* racially segregated areas in the U.S., the Boston metro area is an ideal setting for this research (Kent & Frohlich, 2015). Moreover, in Massachusetts, nearly 90% of teachers are White, whereas 41% of K12 public school students are ERM (Massachusetts Department of Elementary and Secondary Education, 2019a, 2019b), highlighting the need for CSP to address this structural inequality and support student learning.

We will follow a CBPR approach to extend existing and build new school partnerships to refine a teacher training program grounded in teachers' perspectives, existing theory, and empirical evidence designed to increase teachers' race-related competencies and prepare them to implement an ERI-based curriculum with their students. A CBPR approach emphasizes that incorporating community cultural values and ways of being/knowing into intervention research is critical to reduce inequality (Lucero et al., 2018) and aims to combine the knowledge and action of all partners to create social change (Wallerstein & Duran, 2006). We will actively engage in this process via a semester-long generative course at the Harvard Graduate School of Education (HGSE) for 10 educators during the Fall semester of Year 1. This strategy enables teachers to receive tangible benefits (e.g., graduate-level course credit) from joining our collaboration, which will facilitate recruitment and retention, and also provides weekly ongoing structured time for group meetings, which is essential for developing the modes of training.

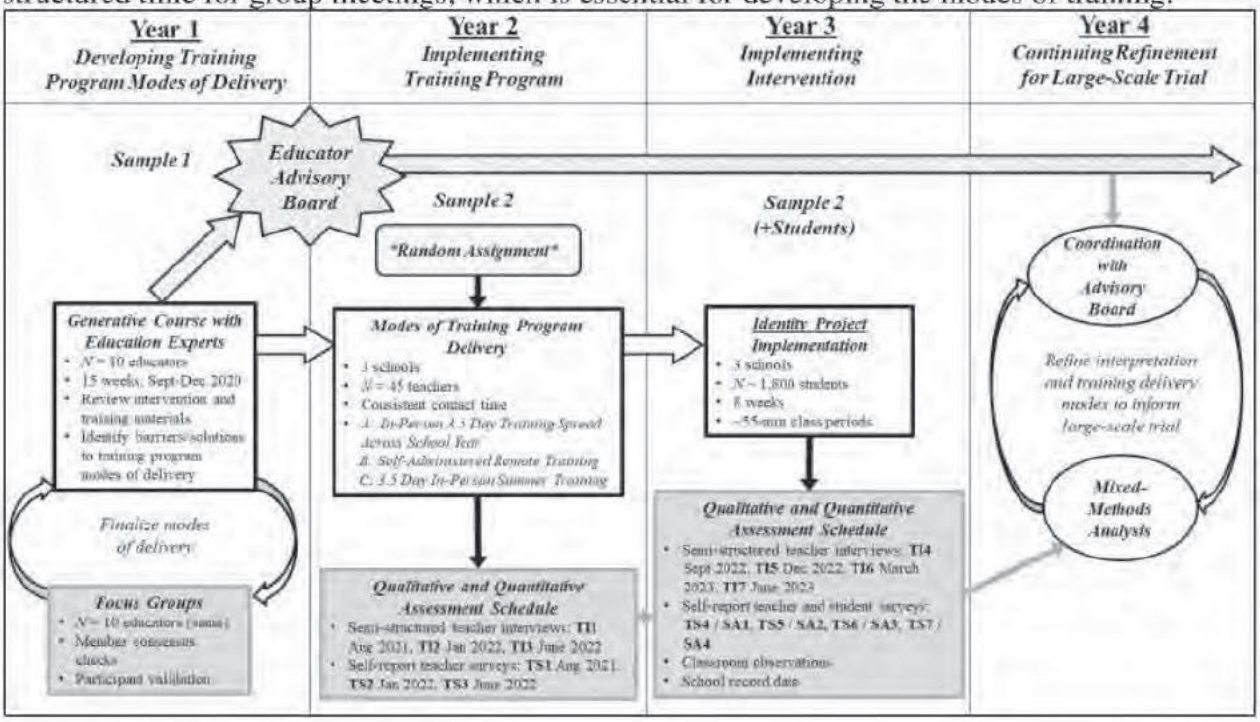

Figure 3. **Overview of Project Design**

The aims of the course will be to involve teachers in the adaptation of an existing 3.5-day training offered as a *summer camp intensive* on the Identity Project curriculum. Throughout the semester, participants in the class will learn about ERI development, the content of the Identity Project curriculum, and existing training activities in order to adapt this content to two additional modes of delivery: (1) in-school professional development sessions dispensed over time, and (2) remote, self-administered online professional development sessions. We focus on these three modes of delivery (i.e., summer camp intensive, in-school professional development, and online training) based on conversations with our school partners and on prior implementations of the

Page: 22

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The premise is that White teachers cannot effectively teach minority students because the teachers are White, and thus Culturally Sustaining Pedagogy (CSP) such as the Identity project is necessary, to teach White teachers how to teach minority students.
This premise is both illegally discriminatory and false.

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Identity Project curriculum. However, the collaborative process with educators throughout Year 1 will be used to further develop and refine these modes of delivery. Our team includes a web designer who will work closely with the investigators and teacher participants to build and modify course content for the two additional modes of delivery. In Spring of Year 1, we will then conduct member-check focus groups with the course participants from the Fall to examine the refined modes of delivery and elicit reactions via a set of two focus group interviews with all 10 participants. The three modes of training will be finalized based on data gathered during focus groups. Participants from Year 1 will also be invited to participate in the remaining 3 years of the project as members of the advisory board.

In Year 2, we will implement the three modes of Identity Project training to begin feasibility testing across three school sites, with a total of 45 teachers randomly assigned to one of three modes of delivery. Teachers in all conditions will complete surveys and interviews following the same schedule. Pre-test will take place before any training content is delivered. The in-school professional development and self-paced online trainings will begin in September of Year 2. The summer camp intensive will be delivered in August of the following summer (see Project Timeline, above). In Year 3, teachers across the three school sites will implement the Identity Project curriculum. Finally, Year 4 will focus on final analyses, dissemination of results to school partners and scholars, revising the training materials and online programming based on results and lessons learned during implementation, and preparation of an IES proposal to support a full-scale RCT that will enable testing program efficacy across multiple modes of delivery. In keeping with our CBPR approach, we will continue to work with teachers on our advisory board to interpret findings throughout all years of the project.

Our developmental period of focus is adolescence, given that the process of identity formation takes on increased salience and significance during this period of the lifespan (Erikson, 1968). The increased "identity work" during adolescence emerges as a function of significant changes in brain maturation during this period that lead to advanced cognitive abilities, such as the ability to reason and think about abstract concepts such as ethnicity and race, institutional racism, and stereotypes (Umaña-Taylor, 2016). The cognitive changes in adolescence are accompanied by significant social changes (e.g., school transitions into larger more diverse settings; greater exposure to non-familial contexts) that often lead to increased contact with outgroup members and prompt identity exploration processes (Umaña-Taylor, 2016). The interface of these cognitive and social changes that characterize the developmental period of adolescence result in a developmental setting that is ripe for individual maturation and meaning-making surrounding one's ERI. Consistent with the target age group for which the Identity Project was developed (Umaña-Taylor et al., 2018b), the current proposal focuses on **9th and 10th grade students** – representing youth who are in the period of middle adolescence.

This pilot implementation will enable us to examine whether any of the following vary as a function of training mode of delivery: (a) the efficacy of the training program to improve teachers' ERI and CSP, (b) the efficacy of the teacher-implemented Identity Project curriculum to support youth's ERI development, and (c) the intervention's effects on youths' academic adjustment. This design mirrors the PI's prior methodology for developing the Identity Project curriculum (Umaña-Taylor & Douglass, 2017).

B.2. Procedure

Year 1 activities include a generative, CBPR-based approach to develop two additional modes of delivering the Identity Project training. First, 10 teachers will be invited to participate

Page: 23

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"Institutional racism" explicitly mentioned here.

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in a semester-long course at HGSE (September-December). Given the disproportionately White teaching force in the Boston metropolitan area (Massachusetts Department of Elementary and Secondary Education, 2019a), we will oversample for ERM teachers to ensure the inclusion of diverse and representative teacher perspectives in the qualitative data (Morgan, 1997). The focus of the course will be to adapt the 3.5-day summer intensive training for the Identity Project curriculum to two additional formats: an in-school professional development and an online self-paced training. Participants in the course will be recruited through existing networks, including HGSE, professional development programs at HGSE, and existing school partnerships. The course will serve as a generative process in which education professionals collaborate with our research team to adapt, develop, and create these new modes of training. We will use an iterative approach that draws on teachers' expertise to refine the training modes of delivery, ensuring that challenges raised by teachers from different ethnic-racial backgrounds and in different types of school settings are addressed and incorporated into the training so the final product is applicable in diverse settings (Wallerstein & Duran, 2006). All class sessions will be video recorded to enable the research team to refer back to these conversations during the revision process. Teacher participants will receive graduate-level course credit and will be invited to participate in the advisory board. Inclusion criteria will be: 9th or 10th grade teacher, current teacher in the greater Boston area, and not employed by one of the three partner schools that will serve as the pilot test sites. In line with best practices in participatory research (Thomas, 2017), information provided to teachers during recruitment will include information about participating in both the generative coursework and member-check focus groups.

In the spring of Year 1 (January-April) the research team will continue to refine the modes of delivery based on the work from the course. Then, teachers who participated in the generative coursework will be invited to participate in member-check focus groups to ensure that the program is responsive to teacher recommendations throughout its refinement (April-May). The purpose of the member-check focus groups will be to present the revised Identity Project training programs and allow teachers to comment on the interpretations, adjustments, and conclusions drawn from the generative coursework. These member checks will enhance the credibility of findings by allowing participants to comment on and critically assess the different modes of the Identity Project training program (Thomas, 2006). Focus groups with 10 participants will be held at HGSE and will last approximately 2 hours. Focus groups will be facilitated by the PI (Latinx female) and a co-Investigator (White male), who both have extensive experience conducting qualitative research and facilitating focus group discussions in school settings. Teachers will be paid $50 for participating in the focus group and refreshments will be served. All focus groups will be audio-recorded and transcribed. Given that the purpose of these focus groups is to member-check the changes made to the Identity Project training program, a semi-structured approach will be used to include both free discussion of ideas and general structured questions to prompt responses to the training plan (Morgan, 1997). In the event a member of the generative course prefers not to participate in a group discussion, we will follow up individually and invite them to share their responses in a manner that is comfortable for them (e.g., phone call, in person via one-on-one interview). Data gathered during the focus groups will be used in conjunction with prior research to refine the Identity Project training program to meet the diverse needs of teachers in the summer of Year 1.

During **Year 2**, we will implement the three modes of Identity Project training at three schools with approximately 45 teachers (15 from each school). School criteria for inclusion are: Located in the Boston metro area, have a 9th grade class of over 300 students, and have a student

Page: 24

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Why is "Latinx female" and "White male" mentioned? Because it matters to the researchers who wrote this grant application, and it matters to the racially-essentialist and illegally discriminatory Identity Project.

population that is numerically balanced in terms of ethnic-racial composition. Each school will be randomly assigned to a different mode of training delivery. Although teachers will receive one of these three modes, the contact time (i.e., training hours) across all three conditions will be identical. These three conditions include:

1. An in-school professional development integrating in-person training sessions into the regularly scheduled professional development throughout the school year.

2. A self-paced online training that follows the instructional design of Massive Open Online Courses (MOOCs; Reich, 2015). Teachers will begin online coursework at start of school year and self-progress. Content will be built using a Canvas course website hosted by HGSE. A web designer will work closely with the investigative team and advisory board members to develop and bench test the content (see example online content already developed by the research team and currently used at HGSE; Appendix D).

3. A summer camp intensive which includes in-person training sessions across 3.5 consecutive days at HGSE prior to the start of the school year.

For all three modes of training, plans are preliminary because they will change based on the CBPR design. Current plans for the training focus on fostering teachers' own ERI and training them to deliver the Identity Project curriculum. Specifically, the training focuses on: content knowledge regarding social systemic inequities (e.g., how institutional racism has shaped U.S. youths' schooling experiences); ERI content knowledge (including the content of the Identity Project curriculum); teachers' awareness, reflection, and examination of their own ERI development; and pedagogical strategies for facilitating discussions about ethnicity-race with youth (e.g., CSP practices). Teachers will receive $600 for their participation in the Identity Project training program. Teachers will complete surveys (Teacher Surveys; TS) and interviews (Teacher Interviews; TI) in August, January, and June of Year 2. Survey data from teachers will be collected via online 30-min surveys administered on these three occasions (TS1-TS3). Interviews will be conducted by members of the research team via phone or in person based on feedback from our partners and will last 60 minutes (TI1-TI3). For participation in surveys, teachers will be compensated $20 at TS1, $25 at TS2, $30 at TS3, with increasing incentives designed to maintain study motivation and reduce attrition. A similar incentive structure will be followed for interviews: $25, $30, and $35, for TI1 – TI3, respectively.

In **Year 3**, the Identity Project curriculum will be implemented in all three schools, and data will be collected from 9th and 10th grade teachers and their students to pilot test the feasibility of the three modes for delivering the Identity Project training. Year 3 procedures involve collecting data via quantitative surveys and interviews from teachers as well as quantitative surveys (Student Assessment; SA) and school record data from students in all three schools on four occasions (TS4-TS7; TI4-TI7; SA1-SA4). In addition, we will monitor the fidelity of the Identity Project curriculum in all three schools through direct observation and video recording.

Teachers will complete a pre-implementation assessment (TS4, TI4) and 3 follow-up assessments (TS5-TS7; TI5-TI7) following the training program (in September, December, March, and June, reflecting pre-intervention, post-intervention, the middle of the following semester, and end of school year, respectively). Data from teachers will be collected via online

Page: 25

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Another mention of "institutional racism"

30-min surveys administered on these four occasions; they will receive $35, $40, $45, and $50 for participation in TS4-TS7, respectively. Interviews (60-minute) will be conducted by research staff via phone or in person, based on feedback from our research partners. Teachers will be compensated for participation in these interviews as follows: $40 at TI4, $45 at TI5, $50 at TI6, and $55 at TI7, again with increasing incentives over time.

In Year 3, when teachers are implementing the Identity Project in their classrooms, each teacher will be assigned a dedicated Identity Project Fellow (hereafter referred to as "fellows"), from a cohort of Master's-level research-practice practicum students, who will shadow their designated teacher once per week throughout the academic year. Approximately 45 fellows will be trained to (a) observe and evaluate fidelity of intervention implementation and teacher CSP, and (b) document and report to a field supervisor any concerns during the 8-week teacher implementation of the Identity Project. During teachers' 8-week implementation of the Identity Project, fellows will be in residence at the school for an entire school day once per week (i.e., on the day that the Identity Project is delivered to students) and will video record all sessions. After the 8-week implementation, fellows will spend 2 hours/week in their teachers' classrooms for the remainder of the school year. While fellows are in the classroom, they will observe the teacher, take field notes, and complete quantitative assessments of teachers' engagement in CSP. Videos (20%) will be coded by the investigative team to evaluate fidelity of implementation and to improve the Identity Project training protocol.

With respect to students, letters will be sent home at the beginning of the school year to introduce the project and obtain informed consent from parents for completion of student surveys and release of student records. The investigative team will also hold parent/guardian information nights at each school to answer questions about the project and distribute/collect consent forms. Students who return consent forms (regardless of whether parents approved participation) will be entered into a raffle for a $25 Amazon gift card (30 gift cards will be raffled at each school). Trained teachers will then deliver the 8-week Identity Project curriculum to all 9th and 10th graders enrolled in a Social Studies or English class, given that these subjects are required of all students.

Students who provide parental consent and youth assent will complete surveys (N ~ 1,800; 600/school at three schools). In prior implementations using this same approach, 79% of enrolled students provided consent and assent (Umaña-Taylor et al., 2018a). Consistent with the PI's prior work, student surveys will be scantron and self-administered during the course of the school day. Student surveys include a pre-test at baseline and three follow-up assessments following the training program (in September, December, March, and June, reflecting pre-intervention, post-intervention, spring of the following semester, and the end of school year. At the final assessment, an additional set of gift cards will be raffled as a participation incentive (i.e., 30 $25 Amazon gift cards/school).

Students will be tracked across waves by use of an identifier key. Attrition may vary across schools, given different rates of mobility in different contexts; however, the research team will follow up with students who are absent on the day of data collection to minimize missing data. Official records will be used to verify if students are not enrolled in the school at any subsequent wave. The PI has considerable success tracking highly mobile populations; for example, her team achieved an 88% retention rate across a 6-year period among a sample of Mexican-origin adolescent mothers and their families (Derlan, Umaña-Taylor, Jahromi, & Updegraff, 2018). Given that this study is school-based, which facilitates tracking of research participants, we expect minimal attrition.

Year 4 will involve continued meetings with the advisory board. Through the iterative process of analyzing data, reviewing findings, and collaborating with the advisory board, we will revise the modes of delivery and prepare a grant proposal for a future full-scale efficacy trial.

B.3. Measures/Instruments/Data Sources

Generative course. The generative course is designed to present the information that education professionals will need to fully collaborate in developing the in-school professional development and online Identity Project training modes. Specifically, the course will cover information on ERI development, review the Identity Project curriculum and existing manual, and examine best practices in teacher professional development from the research literature and their own experiences (see Appendix C, Table 2). Then, the course will focus on presenting specific activities from each day of the 3.5-day summer camp intensive and using 2 weeks of course meetings for participants to generate ideas and adapt the content to be delivered via two additional modes of training. This portion of the course will focus on eliciting participants' suggestions for creating effective professional development opportunities based on the research literature and on their own experiences.

Member-check focus groups. The member-check focus group protocol is designed to present the revised Identity Project training protocol and elicit participants' reactions to the training plan. Member check focus groups will include the same educational professionals that participated in the generative coursework. Participants will be invited back to the HGSE campus and presented with the adapted training program modes of delivery to elicit feedback on the revisions made by the research team. We include general guides for these discussions, acknowledging that this CBPR-informed protocol will be generated based on data from the generative focus groups and that focus group discussions should be flexible to facilitate breadth and depth of conversation (Morgan, 1997). First, the group facilitator will provide a generalized introduction to the session and set ground rules (e.g., respect, one person speaking at a time; Morgan, 1997). Next, the PI will present the revised Identity Project training to the focus group participants. Following this presentation, a semi-structured focus group protocol will be used to ask participants to reflect on whether the training would support their implementation of the curriculum, and if it is consistent with their vision. Because discussions of race-ethnicity may be sensitive, the research team's expertise in psychology and educator training will be drawn on to increase participant comfort and facilitate conversation (Stewart & Shamdasani, 1990). Strategies for facilitating these conversations include asking participants to give specific examples from their own personal experiences to elicit depth and avoid vague generalities, as well as writing down their initial thoughts to share before moving into a broader conversation with the group (Morgan, 1997).

Identity Project Training Program. The three modes for the Identity Project training program will be fully generated via the research process. Based on prior implementations of the Identity Project curriculum and on-going school partnerships, we envision there will be three modes of delivery for the Identity Project training. For all three modes, the content for these trainings will focus on four key and intersecting learning goals described previously: personal ERI development, ethnic-racial systemic inequities, ERI content knowledge, and facilitation strategies for discussing race and ethnicity with students.

We envision that each version of the Identity Project training program will include some didactic instruction, but a significant portion of learning will take place via rehearsal (Lampert et al., 2013) and other active learning approaches (e.g., educators reflect on questions, share their

Page: 27

Number: 1 Author: [redacted] Subject: Highlight Date: 11/7/2022 7:33:51 AM

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Focus groups are another reason for why this grant application is nonexempt, covered research, and for why it does not qualify for Exemption 1 (Normal Educational Practice).

ideas with a partner, and engage in facilitated large and smaller-group discussions to process the information). We will work closely with our research partners to develop the online training to achieve these goals via the use of discussion boards and other tools that engage participants in dialogue. The final version for each mode will be created through our iterative CBPR approach in Year 1. Activities tailored toward achieving the four learning goals described above will be interwoven throughout the lessons. For example, while they are learning the content of the Identity Project curriculum, teachers will be engaging as active participants in the very activities they will be implementing with their students to promote ERI exploration (e.g., creating a personal storyboard focused on ethnicity-race; developing a family pyramid with attention to ethnicity-race). Thus, across all three modes of training, teachers will engage in personal ERI self-reflection throughout the training as they are learning the curriculum for their students, and they will produce several personal projects to use as examples when they implement the Identity Project curriculum with their students.

Quantitative Assessments. Teacher surveys will include demographics (e.g., gender, years in service, ethnic-racial background, SES), measures of ERI (Douglass & Umaña-Taylor, 2015; Umaña-Taylor et al., 2004), and measures assessing multiple indices of culturally sustaining pedagogy (Dickson et al., 2016), colorblind racial ideology (Neville, Lilly, Duran, Lee, & Browne, 2000), ethnocultural empathy (Wang et al., 2003), and multicultural teaching competence (Spanierman et al., 2011). The student survey will assess: demographics; key ERI intervention targets of ERI exploration and resolution (Umaña-Taylor et al., 2004), and global identity cohesion (Rosenthal, Gurney, & Moore, 1981); and key academic outcomes such as academic efficacy (Midgley et al., 2000), academic engagement (Skinner, Furrer, Marchand, & Kindermann, 2008), school belonging (Gillen-O'Neel & Fuligni, 2013), and academic achievement (i.e., self-reported grades). Academic outcomes will also be assessed via the following school records: standardized test scores, unweighted grade point average, and absences. Youth ethnic-racial background will be determined based on youth report. See Appendix C (Table 1) for psychometric details of all self-report measures.

Individual Interviews. The protocol for teacher individual interviews during Years 2 and 3 will draw on survey items in the quantitative assessments, enabling the qualitative data to contextualize and offer insights into the quantitative findings. Furthermore, interviews will provide qualitative assessments of teachers' engagement with and reflections on the training, their ERI, their perceived ability to enact (i.e., self-efficacy) and engagement in CSP, and their perceptions of challenges, victories, and concerns regarding their ability to engage with students around issues of race and ethnicity (see Appendix C for sample interview protocol).

Fidelity Monitoring. The protocol for fidelity monitoring asks fellows to video record all sessions, report general information about the session (e.g., teacher, class time, number of students), ratings of the room and equipment, teachers' adherence to the curriculum, teachers' engagement in and preparation for the curriculum, and whether the observer had any concerns about the delivery of the curriculum or the teachers' need for additional supports based on the session (see Appendix C).

B.4. Three-Phase Development, Implementation, and Analysis Plan

B.4.1. Overview

We propose a mixed-method, three-phase, CBPR project that will integrate qualitative and quantitative analytic approaches to leverage the strengths of assessments from multiple informants and varied epistemological traditions (Morgan, 2013; Small, 2011; Yoshikawa,

Weisner, Kalil, & Way, 2008). These multiple forms of analysis will be used in tandem to contextualize and triangulate findings in order to confirm and contradict conclusions of a single analysis, thereby advancing a more thorough understanding of feasibility to maximize effectiveness of varied training program modes of delivery for future large-scale trials. Further, CBPR provides our community partners several occasions for consensus checks of this analysis, opportunities for collective interpretation, and input into analytic decision-making to further their own questions of interest (Lucero et al., 2018; Wallerstein & Duran, 2006).

The Specific Aims guiding our work are:

(1) Partner with educators to develop two additional effective modes of delivery (i.e., in-person professional development time throughout school year; remote, self-administered online professional development) for what is currently a 3.5 day, in-person Identity Project training program designed to increase teachers' race-related competencies.

(2) Pilot test the three modes of delivery of the Identity Project training program to (a) examine feasibility of implementation, (b) identify factors that may challenge implementation and necessary program modifications for scale up; and (c) evaluate and compare preliminary effectiveness of the three modes of delivery to increase teachers' ERI and CSP practices and students' ERI.

(3) Revise the modes of delivery and training materials and develop a proposal for a full-scale efficacy trial that will enable experimental comparison of modes of delivery.

B.4.2. Phase 1

Phase 1 takes place during Year 1 and involves consulting with our research participant partners to co-create, revise, refine, and finalize three modes of delivery for the Identity Project training program. Activities in Phase 1 directly address Specific Aim 1 and are focused on refining and building content for our new modes of delivery. Analyses in Year 1 focus largely on evaluating data gathered during the member-check focus groups to refine our training materials. Specifically, focus group discussions in Year 1 will be used to review proposed format options for the Identity Project training program for consensus checks and inform the further revisions of the Identity Project training program modes of delivery. Following best practices in qualitative focus group methodology (Hollander, 2004; Lincoln & Guba, 1985; Morgan, 2010; Verdinelli & Scagnoli, 2013), open-ended questions for reflection and visual data displays will be used to present training modes of delivery to participants and allow them to critically discuss, refute, and confirm their ideas about effective modes of delivery for the training program. Member checking, also known as participant validation, enhances credibility and trustworthiness of results to confirm that conclusions resonate with participants' lived experiences while allowing them to correct misinterpretation or biases of the research team (Birt, Scott, Cavers, Campbell, & Walter, 2016; Thomas, 2017). Audio recordings from focus groups will be transcribed verbatim. Review of these follow-up group discussions will be used by the research team to refine the three modes of delivery for the Identity Project training program in order to address partner concerns and support partner-identified solutions. Participants of these focus groups will be invited to join an advisory board for the duration of the project, maintaining regular communication between the research team and these community partners once our team has finalized training program modes of delivery.

B.4.3. Phase 2

Phase 2 involves implementing the multiple modes of delivery for the training program (Year 2), and teachers' implementing the Identity Project curriculum with their students (Year 3). Specific activities include meetings with our advisory board members, implementing training programs, implementing the Identity Project curriculum by teachers, and data collection with teachers and students. Evaluation activities in Phase 3 will include examining the feasibility of the different modes of delivery for the training, fidelity of teacher implementation of the Identity Project, changes in teachers' ERI and CSP, and changes in students' ERI and academic adjustment. For all of the above, we will examine variability in the outcome of interest as a function of mode of delivery. For instance, our evaluation of pilot test data will enable us to answer questions such as: Do patterns of change in teachers' ERI and CSP vary as a function of mode of delivery? Does the effect size for change in teachers' ERI and CSP vary as a function of mode of delivery? Does students' process of change vary as a function of mode of delivery? Below we describe how we will triangulate data from qualitative and quantitative sources to answer these questions.

B.4.3.1. Do Increases in Teachers' ERI and CSP vary as a Function of Mode of Training?

Longitudinal qualitative assessments of teachers' growth in ERI and CSP (Teacher Interviews 1 to 7; TI1-TI7) will be analyzed in tandem with corresponding quantitative assessments from teachers (Teacher Surveys 1 to 7; TS1-TS7), students (Student Assessments 1 to 4; SA1-SA4), and classroom observations to triangulate patterns of change in teachers' ERI and CSP as a function of varying modes of training delivery. For example, one source of data (e.g., teachers' interview responses) can be used to contextualize and better understand the perspective on this same construct from another source (e.g., students' reports; fellows' observational data).

Qualitative analysis. Audio recordings from semi-structured interviews with teachers will be transcribed verbatim. The investigators will lead a coding team of graduate students to identify themes from these group discussions using standard content analysis (Morgan, 2013; Smith, 2015). This analytic approach was selected to enable the research team to identify patterns of meaning across interviews, moving beyond similarities across participants' responses to specific questions in order to focus on generating more holistic themes from the richness of each conversation. A priori expected themes from available literature, Year 1 discussions, and advisory board input will be supplemented with emergent themes from an initial review of the transcripts. During theme generation and coding operationalization, attention will be paid to similarities and differences that emerge in teachers' ERI development and understanding and adoption of CSP across time by varying modes of training program delivery, as well as individual differences that may influence variability in this growth process (e.g., ethnic-racial background, initial ERI levels, initial colorblind attitudes). For example, interviews with teachers who completed in-person training across the school year will be analyzed relative to teachers who completed self-administered online training and the 3.5 day in-person summer training to elucidate timing and depth of changes as a function of varying training modalities. Content analysis of longitudinal teacher interviews will be used to ground our understanding and interpretation of quantitative outcomes (see below) in teachers' experiences and perspectives as they evolve throughout the course of training, implementation, and the subsequent school year. The benefits of incorporating semi-structured interviews with teachers in conjunction with

Page: 30

Number: 1 Author: [redacted] Subject: Sticky Note Date: 11/7/2022 7:39:06 AM

It states "initial colorblind attitudes" because the purpose of the Identity Project is to eliminate those colorblind attitudes, so they will not exist by the end of the project/training. The project seeks to replace those initial colorblind attitudes with racial essentialism, which constitutes and will lead to illegal disparate treatment.

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quantitative surveys include clarifying nuances in the progression of growth in teachers' ERI and CSP over time and providing critical insight into areas for improving each mode of training delivery to maximize benefits to teacher and student outcomes.

Dedoose qualitative analysis software will be used to assist in organizing and coding the data. Following theme generation, nine of the 45 interviews at each assessment occasion (i.e., 20% of the data) will be coded by at least two independent coders following standard practice for assessing reliability. In an iterative process, the coding scheme will be refined based on assessments of interrater reliability, using *kappa* ≥ .60 to indicate substantial agreement (Hallgren, 2012). Reliability coefficients below this threshold will be addressed via group consensus discussions, and any themes with low reliability will be coded again following discussion. Finally, the same team will code the remaining transcripts independently once reliability is achieved for all themes.

Quantitative analysis. Preliminary quantitative data processing steps will include screening for entry errors, inconsistent responses, and any missing data, as well as examination of measure internal consistency, means, standard deviations, and distributional assumptions. All measures have previously been used with ethnic-racially diverse samples (Appendix C; Table 1). Psychometric properties will also be examined in the current sample. Full Information Maximum Likelihood estimation in M*plus* version 8.3 or above (Muthén & Muthén, 2017) will be used to address data considered missing at random, and type of missingness will be examined to test for differential attrition across longitudinal measures (Little, 1988). Exploratory longitudinal growth curve models that are non-linear with respect to time (e.g., quadratic, cubic patterns) and in the parameters (e.g., spline, latent basis; Cudeck & Klebe, 2002; Grimm, Ram, & Estabrook, 2017) will be used to identify growth trajectories in teachers' ERI (exploration and resolution, examined separately and in coordination) and CSP across time (TS1-TS7). This inherently exploratory, data-driven approach provides strong flexibility to address nuances in growth from multiple longitudinal assessments (analytic $N = 315$ observations; 45 teachers, seven observations each). Furthermore, effect sizes (i.e., slope estimates) in change rates will be compared across the three modes of delivery to understand variation in potency of in-person summer intensive, in-person time-release across school year, and self-administered remote training. Following a multi-informant approach, qualitative data (above) and quantitative data from classroom observations and students' reports of teachers' CSP will be used to validate teachers' self-reports, underscoring potential discrepancies and sources of agreement in the process of teachers' change due to the training. We have applied a similar analytic approach in our previous work to isolate the nature of change processes in the Identity Project RCT (Sladek et al., 2019); prior intervention work has also adopted these flexible growth trajectory analyses to explore and more rigorously model non-linear change processes (e.g., Mehlum et al., 2016; Ram & Grimm, 2007).

B.4.3.2. Do Changes in Students' ERI and Academic Adjustment vary as a Function of Teachers' Mode of Training?

Student intervention analyses mirror the PI's prior methodology in the Identity Project RCT (Umaña-Taylor et al., 2018a, 2018b), which

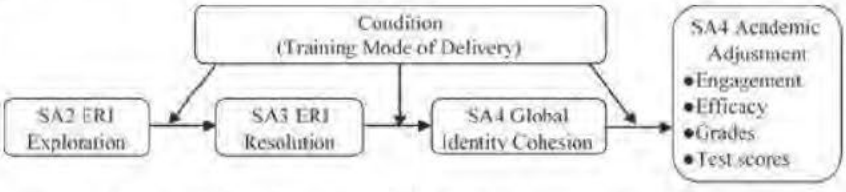

Figure 4. Hypothesized model to test variability in program outcomes by mode of delivery.

follow established procedures for testing intervention developmental cascade models (e.g., Patterson, Forgatch, & DeGarmo, 2010). This enables us to compare effect sizes from a chain sequential mediation model (Figure 4) across schools randomly assigned to varying training modes of delivery, informing optimal modes of training for student outcomes in subsequent trials of the Identity Project on a larger scale. Specifically, SA2 ERI exploration will be used as a predictor of SA3 ERI resolution, which will be used as a predictor of SA4 global identity cohesion and indices of academic adjustment (e.g., academic engagement, GPA). Bias-corrected bootstrapping will be used to obtain unbiased confidence intervals for the indirect effects (MacKinnon, Lockwood, & Williams, 2004).

This analytic plan enables us to test the hypothesis that, consistent with the theory of intervention, increases in ERI exploration and subsequent increases in ERI resolution will predict increases in global identity cohesion, which in turn, will be associated with better academic adjustment (increased grades, higher academic engagement, higher academic efficacy, higher standardized test scores). Multiple outcomes will be modeled simultaneously using one multivariate structural equation model, which reduces the chance of false positive results by addressing covariation between multiple outcome measures and minimizes error inflation for multiple significance tests (Baldwin, Imel, Braithwaite, & Atkins, 2014; Kline, 2016). Instead of placing overreliance on *p* values in these analyses, we will follow recommendations to examine confidence intervals and effect sizes (Cohen, 1994; Wasserstein & Lazar, 2016) as preliminary evidence for uniformity or discrepancies in efficacy across training program modes of delivery to inform future larger scale effectiveness trials and cost-benefit analyses. In addition, qualitative assessments and classroom observations of teachers and students during intervention implementation will also help to clarify qualitative improvements to teachers' CSP in conjunction with student-level change.

B.4.4. Phase 3 - Refinement and Planning

The third phase of our project focuses on Specific Aim 3: Revise the modes of delivery and training materials and develop a proposal for a full-scale efficacy trial that will enable experimental comparison of modes of delivery. In Year 4, we will work closely with the members of the advisory board to review the findings, explore the qualitative data, and consider revisions and refinements necessary to the different modes of delivery for the training program. This phase will include finalizing the training manuals, continuing to disseminate our research findings, and working collaboratively to design a full-scale efficacy trial to rigorously test the different modes of delivery and prepare a Goal 3 (efficacy trial) grant proposal to IES.

B.5. Cost-Benefit Analysis

We will conduct a detailed cost analysis of the Identity Project for each mode of training using a Resource Cost Model approach (Chambers, 1999). The main direct costs associated with implementing the Identity Project are the training time for the investigative team and facilitators and preparing printed materials for delivering the curriculum in classrooms. If the remote training option appears feasible, costs will be explored with respect to web hosting and any program maintenance. Our analyses will be conducted in a manner that distinguishes start-up costs and ongoing maintenance costs. We will also examine how total costs convert to costs per student, per teacher, and per school.

C. PERSONNEL

The team will be led by [redacted] (Principal Investigator; PI), a developmental and cultural psychologist and an expert in ERI development during adolescence. She developed the Identity Project and led its efficacy testing ([redacted]). She will lead the conceptualization and design of the study, establish school partnerships, convene advisory board meetings, lead the development of the Identity Project training program, lead manuscript development, and contribute to all dissemination efforts. [redacted] (co-Investigator) has written extensively about teacher professional development, teaching quality, and about the relationship between teacher characteristics and teaching quality. She has experience conducting large-scale cluster randomized trials of teacher professional development and coaching, as well as more exploratory studies involving observations of teacher professional learning settings. Furthermore, she brings extensive experience developing online training programs for educators. She has also developed a program, MQI Coaching, that is widely available to U.S. school districts. [redacted] (co-Investigator) brings extensive expertise on the interaction of literacy learning and culture as well as school-wide implementation and evaluation of educator training using both qualitative and quantitative methods. She served as a school principal in urban and suburban districts in the Boston area from 1987-2006 and has directed the HGSE Master's program in language and literacy and the Jeanne Chall Reading Lab since 2006. [redacted] also developed and currently chairs three on-campus and two online professional education programs at HGSE for K-12 teachers, literacy coaches, and principals focused directly on integrating CSP approaches in the classroom. [redacted] will provide conceptual oversight for developing and refining the Identity Project training program, consult on implementation, and will collaborate with the investigative team on dissemination efforts. [redacted] (co-Investigator) holds a PhD in Curriculum and Teacher Education, previously served as Co-Director of the Harvard Teacher Fellows Program and is an expert in teacher preparation. He will provide conceptual oversight for developing and refining the Identity Project trainings/professional development, consult on recruiting and retaining teacher participants, and on the implementation of the Identity Project training program. [redacted] (co-Investigator) is a developmental psychologist and Postdoctoral Fellow in the Harvard Graduate School of Education (HGSE) and has worked closely with the PI for the past two years to manage a multi-site, large-scale survey research study with approximately 6,000 high school students. She will serve as field supervisor and be responsible for coordinating data collection, fellow placement, preparing all surveys, coordinating fidelity checks for intervention delivery, and training and supervising graduate students and research staff. [redacted] (co-Investigator) is a developmental psychologist and Postdoctoral Fellow in HGSE and brings expertise in mixed-method, interdisciplinary ERI research ([redacted]) and contextualizing the everyday experiences of diverse adolescents and adults via interview, observational, and survey methods ([redacted]). He has worked with the PI for the past year leading the data management of a mixed-method study involving 24 individual interviews and a large-scale quantitative survey of almost 500 Colombian adolescents focused on ERI development. [redacted] will lead the data management and analysis team, including coordinating and facilitating teacher interviews and focus groups, and connecting qualitative and quantitative analytic approaches to inform the development of the Identity Project training program. All members of the team will contribute to the conceptualization of the training programs, and all dissemination efforts. By bridging the disciplines of Developmental Psychology, Cultural Psychology, Education, and Public Policy, this team is uniquely qualified to lead this project and to merge the latest theoretical and design innovations in teacher

training/professional development with substantive program content that is grounded in developmentally and culturally appropriate theory and methods.

In addition to the PI and Co-Investigators, collaborators will include paid and volunteer graduate research assistants, including doctoral-level research assistants who already have fully funded fellowships that require involvement in faculty research via an apprenticeship model at HGSE. In addition, master's-level students regularly join the PI's lab to earn supervised research experience credit, in preparation for applying to PhD programs. For instance, in the past two years the PI has mentored six students in this capacity. The involvement of these students would come at no additional cost to the grant and would support the training and mentorship of emerging scholars – a majority of whom are ERM students. Master's- and doctoral-level graduate research assistants will be trained and involved in all aspects of the project, including program development, data collection, data management, analyses, manuscript preparation, conference presentations, and other dissemination efforts. Students will gain valuable skills related to managing a multi-phase, mixed-method, experimental, and survey research design, collaborating with school partners, and developing research- and practice-based products of research dissemination. The involvement and collaboration of master's and doctoral students, postdoctoral scholars, faculty practitioners, and senior faculty provides an ideal research and learning context.

Finally, the investigative team will include at least 10 teachers who comprise the advisory board. Advisory board members will meet with the team quarterly, advise on implementation and program content, discuss research findings with the team and offer insights that will be incorporated into modifications of the training program and dissemination efforts. In sum, our investigative team is uniquely positioned to learn from and work with education practitioners, implement and rigorously examine the different modes of training delivery, and analyze, interpret, and translate these findings to inform a future large-scale efficacy trial.

D. RESOURCES

In addition to faculty assigned offices, Principal Investigator [redacted] maintains two separate, secure research spaces in the same building as her office that can be devoted to research projects, and two additional spaces that serve as research staff office space. This laboratory space is designed to house password-protected computers that will run the qualitative and quantitative statistical software packages necessary to conduct the analyses for the proposed project (e.g., dedoose, Mplus, SPSS). The lab space also has locking file cabinets that can securely store project data. The PI and co-Investigators are all equipped with laptop computers that are programmed to enable remote access to servers via VPN-secured systems to ensure secure connections and facilitate off-campus access and productivity.

The research activities will primarily be conducted at and supported by the Harvard Graduate School of Education (HGSE) and, as such, will benefit from HGSE's range of physical spaces (including offices, classrooms, and meeting spaces), modern and well-maintained technological infrastructure, and expansive research and outreach support network. HGSE-managed meeting spaces will be available for the summer intensive in person training, as well as to house the quarterly advisory board meetings.

The Principal Investigator has administrative staff, including a grant administration officer, dedicated to supporting the PI's external awards. Furthermore, the PI has access to staff support for sponsored account management that includes research-related human resources for

hiring paid project staff, purchasing, travel management and reimbursement, database management, accounting and budget forecasting, and participant payments.

HGSE's Information Technologies Center's (ITC) facilities include a Multimedia Development Lab and a Video Editing suite. These facilities are available for instructional and research-related projects, including audio and video editing, slide scanning, flat-bed scanning and color printing. The ITC also has duplication facilities and some graphic production equipment. Digital video cameras are available to checkout for usage in field settings. Video editing facilities in the ITC include several options for use by members of the HGSE community to produce video programs. Sources in this system also include DVD, VHS, audiocassette, CD, and microphone. The Multimedia Development Lab also offers digital nonlinear editing on Windows and Macintosh workstations using iMovie, Final Cut Pro, and Premiere. Video conferencing capabilities include several locations that support multipoint video conferences using ISDN lines, or the Internet.

HGSE also houses the Teaching & Learning Lab (https://tll.gse.harvard.edu/about), which includes a team of learning designers, educational developers, learning technologists, and media specialists who can support the development of and consult with the investigative team on online experiences. Their mission includes helping HGSE faculty create, implement, and evaluate innovative teaching techniques. Furthermore, they work with faculty to design courses in a manner that leverages instructional technology and best assesses student learning. Access to this expertise will be valuable for the development of new modes of delivery for the Identity Project training.

Finally, Harvard has an expansive network of over 90 libraries. Besides its physical collections, the Harvard library system provides electronic access to virtually all journal, newspaper, and research database subscription services.

OMB Approval No. 0348-0040

ASSURANCES - NON-CONSTRUCTION PROGRAMS

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NOTE: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant, I certify that the applicant:

1. Has the legal authority to apply for Federal assistance and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project cost) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States and, if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§4728-4763) relating to prescribed standards for merit systems for programs funded under one of the 19 statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. §§290 dd-3 and 290 ee 3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and, (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally-assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

8. Will comply, as applicable, with provisions of the Hatch Act (5 U.S.C. §§1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§276a to 276a-7), the Copeland Act (40 U.S.C. §276c and 18 U.S.C. §874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§327-333), regarding labor standards for federally-assisted construction subagreements.

10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§1451 et seq.); (f) conformity of Federal actions to State (Clean Air) Implementation Plans under Section 176(c) of the Clean Air Act of 1955, as amended (42 U.S.C. §§7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended (P.L. 93-523); and, (h) protection of endangered species under the Endangered Species Act of 1973, as amended (P.L. 93-205).

12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. §470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. §§469a-1 et seq.).

14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.

15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. §§2131 et seq.) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.

16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§4801 et seq.) which prohibits the use of lead-based paint in construction or rehabilitation of residence structures.

17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act Amendments of 1996 and OMB Circular No. A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE
[redacted]	Sponsored Programs Officer
APPLICANT ORGANIZATION	DATE SUBMITTED
President and Fellows of Harvard College	8/29/2019

Standard Form 424B (Rev. 7-97) Back

Exhibit H
(Harvard grant online resources)

IES Grant

TITLE:	**Developing and Testing Training Modes for Improving Teachers' Race-Related Competencies to Promote Student Learners' Academic Adjustment**		
CENTER:	NCER	**YEAR:**	2020
PRINCIPAL INVESTIGATOR:	[redacted]	**AWARDEE:**	Harvard University
PROGRAM:	Social and Behavioral Context for Academic Learning [Program Details]		
AWARD PERIOD:	4 years (07/01/2020 - 06/30/2024)	**AWARD AMOUNT:**	$1,399,993
TYPE:	Development and Innovation	**AWARD NUMBER:**	R305A200278

DESCRIPTION:

Purpose: This project will develop and test three modes of delivery for a program designed to prepare educators to implement the Identity Project curriculum, a school-based curriculum that aims to build students ethnic-racial identity (ERI) to improve academic outcomes. Compared to non-Latino White youth, Black and Latino youth are less likely to meet grade-level expectations in math and reading and to graduate from high school. These inequities are explained, in part, by ethnic-racial minority youths' experiences of ethnic-racial discrimination, which can interfere with students' ability to concentrate on and excel in their schoolwork. Existing work, however, suggests that supporting the ERI development of these students could reduce academic inequality. Findings from a randomized controlled trial found that the Identity Project promoted students' ERI and, in turn, increased their academic adjustment. The next step is to identify the most efficient and effective method to prepare educators to engage with students on topics of ethnicity-race and effectively deliver this program in their classrooms.

Project Activities: The researchers will iteratively develop and refine different professional development approaches to support teachers' ability to implement the Identity Project curriculum. They will conduct usability and feasibility tests and run a pilot study that compares the different modes to determine which may be most effective. They will also analyze the cost of the different approaches.

Products: This project will develop modes of professional development and their cost and prepare peer-reviewed publications, presentations, and additional dissemination products (e.g., research briefs) that reach education stakeholders such as practitioners and policymakers.

STRUCTURED ABSTRACT

Setting: The academic settings for the research include high schools in the greater Boston metro area.

Sample: The first qualitative sample includes 10 teachers, and the second qualitative sample includes 45 teachers recruited from 3 high schools. Approximately 1,800 students (half 9th grade, half 10th grade) will be recruited from 3 high schools (same schools as 45 teachers), the majority of students are likely to be racial/ethnic minorities.

Intervention: The Identity Project is a school-based universal intervention program that provides adolescents with tools and strategies for engaging in ERI development. The lessons engage students and teachers in practices that promote ERI development via a curriculum centered around culturally sustaining pedagogical practices (CSP). The Identity Project training program engages teachers in activities and lessons designed to further their learning in four intersecting domains: (a) gaining ERI content knowledge, (b) engaging in self-reflection regarding their own ERI, (c) understanding systemic inequities and how they contribute to ethnic-racial stereotypes and threats faced by members of ethnic-racial minority groups, and (d) learning strengths-based facilitation strategies for discussing issues of race and ethnicity in the classroom. The training currently consists of a 3.5-day intensive summer camp. This project will develop two additional modes of delivery for the training.

Research Design and Methods: The researchers will use a community-based participatory research approach, including qualitative and quantitative data collection and analysis (seven qualitative and

quantitative assessments for teachers; four quantitative assessments for students). Phase 1 of the iterative development will focus on gathering data via focus groups to refine the training materials and conducting member checks to confirm or refute the researchers' assumptions. Phase 2 begins the pilot study that utilizes random assignment of condition and examines the impact of the multiple modes of delivery for the professional development intervention on teacher outcomes. In Phase 3 (the following school year), teachers will be implementing the Identity Project curriculum with their students. Researchers will examine the impact of the professional development intervention on student outcomes as well as teacher outcomes such as classroom practice and implementation of the curriculum.

Control Condition: The researchers will compare the three modes of professional development: (1) in-person training spread throughout the school year; (2) remote, self-administered online professional development training; and (3) a 3.5 day, in-person professional development training delivered in one summer week.

Key Measures: Key outcome measures include ethnic-racial identity (teachers and students), teachers' culturally sustaining pedagogy and colorblind racial ideology, students' global identity cohesion and key academic outcomes (i.e., academic efficacy, academic engagement, school belonging, standardized test scores, unweighted grade point average, and absences).

Data Analytic Strategy: The researchers will use longitudinal growth curve models that are non-linear with respect to time (e.g., quadratic, cubic patterns) and in the parameters (e.g., spline, latent basis) to identify growth trajectories in teachers' ERI and CSP across time. They will use multigroup structural equation models to examine variability in mediational processes for student outcomes as a function of mode of delivery. Following a multi-informant approach, qualitative data and quantitative data from classroom observations and students' reports of teachers' CSP will be used to validate teachers' self-reports, underscoring potential discrepancies and sources of agreement in the process of teachers' change due to the training.

Cost Analysis: The researchers will conduct a detailed cost analysis of each mode of training using a Resource Cost Model approach. They will explore start-up costs versus ongoing maintenance costs and will examine how total costs convert to costs per student, teacher, and school.

Back

IES Institute of Education Sciences

Explore the Institute of Education Sciences

IES
Home
About
Publications
Data
Funding
News

IES Centers
NCEE
NCER
NCES
NCSER

IES Policies and Standards
IES Diversity Statement
NCES Statistical Standards
Peer Review Process
Privacy and Security Policies
Public Access Policy

Contact Us

U.S. Department of Education

Additional Resources
ERIC
Organizational Chart

The Identity Project Fellowship

Contact

HOME /

Overview

What is the Identity Project (IP) Fellowship?

The IP Fellowship is a year-long research-practice internship that is integrated into your HGSE program experience. You will engage in graduate coursework and applied research tailored toward race-based equity in schools. This fellowship provides advanced, hands-on training and coursework in adolescents' ethnic-racial identity (ERI) development, culturally sustaining pedagogy, implementation of a school-based intervention, and research methods.



IP Fellows become integral members of an ongoing research-practice project. You will be placed in a local high school classroom to support a teacher (and their students) as they lead the *Identity Project. The Identity Project* is an evidence-based curriculum that provides students with opportunities to explore and better understand their own ethnic and racial-related identities. IP Fellows will be trained in the *Identity Project* curriculum and the *Equipping Educators for Equity Through Ethnic-Racial Identity* (E^4) professional development program designed collaboratively with local educators to prepare teachers to engage with students on issues of race, ethnicity, and identity. Finally, as an IP Fellow, you will be trained and actively involved in qualitative, quantitative, and observational data collection. In addition to advanced coursework and training in research methods, field experience working closely with an educator implementing the *Identity Project*, and the opportunity to work and learn with a large research team, IP Fellows receive a $3,000 fellowship stipend ($1,500 in Fall/$1,500 in Spring). This stipend is considered an award and will not affect financial aid eligibility.

- Return to Homepage

The Identity Project Fellowship

Contact

HOME /

Become a Fellow

Is the IP Fellowship for me?

This opportunity is ideal for you if you are interested in:

- teacher professional development in the service of more just and equitable classrooms
- school-based interventions with adolescents
- ethnic-racial identity development in teens and/or teachers
- gaining research experience for applying to future doctoral programs
- joining a cohort of like-minded educators and researchers dedicated to racial justice
- an opportunity to directly engage in the work of disrupting racism in schools

Who is the ideal IP Fellow candidate?

We are seeking a cohort of IP Fellows with a wide range of personal and professional experiences and skills. Candidates from all HGSE residential programs who are enrolled full-time are eligible. Prerequisites for acceptance include the following:

- availability to travel to assigned Massachusetts school site within a 60-mile radius of Harvard (via public transport or car) 1 day/week in the Fall semester; 2 days/month in the Spring semester
- understanding of historical and current racism and white supremacy, as well as privilege, power, and systemic inequities within the U.S. context as well as being curious and committed to learning and engaging more with these topics

Relevant experiences and training that would support you in being successful in this fellowship include any of the following*:

- Experience with the classroom setting/population
  - Experience teaching middle school or high school
  - Experience or training in culturally relevant/responsive/sustaining instructional approaches
  - Experience working with or supporting K-12 educators
  - Experience working with students of color in K-12 settings, community-based programs, or other formal or informal teaching contexts
- Experience with the substantive topic of equity, inclusion, race/ethnicity,

ethnic-racial identity
  - Work experience/training related to equity and inclusion
  - Experience/training related to ethnic-racial identity
  - Familiarity with issues of race, racism, and systemic inequity in the context of the U.S.
- Experience with research methods
  - Experience with experimental designs, survey research, or observational coding
  - Experience conducting human subjects research
  - Research experience as a participant observer
  - Experience evaluating classrooms

*Note: Some successful candidates may have in-depth experience in only one of these areas, while others may have experience in several of them. Everyone's past experience and expertise will be different and you should not be deterred if you only have one of these! You will also be gaining many of these skills and experiences through the Identity Project Fellowship.

If you are interested in applying to the IP Fellowship:

You can express interest in applying by signing up here ! We will follow up with information about the application process and next steps.
If you have any questions you can contact us at: mfreiman@g.harvard.edu . Please write "IP Fellows Program" in the subject field of your email.
Reminder: The application deadline for HGSE Ph.D. Programs is December 1, 2021 (11:59pm ET) and for HGSE EdM Programs is Jan 5, 2022 (11:59pm ET).

Return to Homepage

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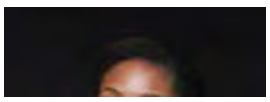



Kristia Wantchekon
kwantchekon@g.harvard.edu

Identity Project: An Intervention Targeting Adolescents' Ethnic-Racial Identity Development



During adolescence, the question “Who Am I?” is constantly on teens’ minds as they develop their identities and figure out who they are and who they will become. Teens sometimes think about their race, ethnic heritage, or culture when answering this question; more specifically, this is referred to as teens’ *ethnic-racial identity*. Understanding how their ethnic-racial identity fits into their larger sense of self is important for many teens. In fact, ethniracial identity has implications for many different parts of adolescents’ lives, including psychological well-being, academic performance, and peer relationships. Specifically, research studies have shown that when adolescents have thought about their ethnic-racial identity and have tried to understand more about their background, they fare better in each of these domains.

The development of ethnic-racial identity is a complex process, as teens explore what their race and ethnicity mean to them, try to understand the role of their race and ethnicity in their everyday lives, and decide how they feel about that aspect of themselves. The Identity Project curriculum was designed to provide adolescents of any ethnic-racial background with tools and strategies that help them explore and understand their constantly evolving identity in relation to their race and ethnicity.

What do teachers have to say about the program?

"I knew in my heart from the beginning the students would benefit from the project and was fortunate to have the opportunity to share this experience with them. I thoroughly enjoyed meeting you and Sara and supporting your research. It is good to hear that your efforts have continued to develop and show positive results."

– Department Head and Teacher from Arizona partner school

We also asked Massachusetts educators what they believe the Identity Project has to offer their students and the value they feel the Identity Project has for their students.

Educators shared that the Identity Project offers students opportunities to **build self-**

confidence and explore identity;
to gain knowledge about race, ethnicity, and identity;
to connect to family;
and to build classroom community.

Implementing the Identity Project

The Identity Project is an evidence-based curriculum that is currently being implemented in the U.S. and in five countries in Europe. In the U.S., it has been implemented in Arizona, Illinois, and Massachusetts high schools. We are currently developing a teacher training program for the Identity Project curriculum.
To support educators in navigating discussions about race, ethnicity, and identity with their students, we offer "You May Be Wondering" sheets as resources to guide their conversations. Please visit the **ERI Resources** page to review these materials.
If your school district is interested in partnering with us to bring the Identity Project to your school, please contact: **Adriana Umaña-Taylor**

Publications

Umaña-Taylor, A.J. (2018). Intervening in cultural development: the case of ethnic-racial identity. *Development & Psychopathology*, *30*, 1907-1922. doi:10.1017/S0954579418000974
The literature on developmental psychopathology has been criticized for its limited integration of culture and, particularly, the lack of research addressing cultural development in relation to psychopathology. In this paper, I present how the study of ethnic–racial identity provides a heuristic model for how culture can be examined developmentally and in relation to psychopathology. In addition, I introduce the Identity Project intervention program and discuss how its findings provide empirical support for the notions that cultural development can be modified with intervention, and that such modifications can lead to psychosocial benefits for adolescents. Finally, I discuss existing challenges to advancing this work and important future directions for both basic and translational research in this area.
Umaña-Taylor, A. J., Kornienko, O., Douglass, S., & Updegraff, K. A., (2018). A Universal Intervention Program Increases Ethnic-Racial Identity Exploration and Resolution to Predict Adolescent Psychosocial Functioning One Year Later. *Journal of Youth & Adolescence, 47, 1-15.*
Ethnic-racial identity formation represents a key developmental task that is especially salient during adolescence and has been associated with many indices of positive adjustment. The *Identity Project* intervention, which targeted ethnic-racial identity exploration and resolution, was designed based on the theory that program-induced changes in ethnic-racial identity would lead to better psychosocial adjustment (e.g., global identity cohesion, self-esteem, mental health, academic achievement). Adolescents (*N* = 215; *M*age = 15.02, SD = .68; 50% female) participated in a small-scale randomized control trial with an attention control group. A cascading mediation model was tested using pre-test and three follow-up assessments (12 weeks, 18 weeks, and 67 weeks after baseline). The program led to

increases in exploration, subsequent increases in resolution and, in turn, higher global identity cohesion, higher self-esteem, lower depressive symptoms, and better grades. Results support the notion that increasing adolescents' ethnic-racial identity can promote positive psychosocial functioning among youth.

Umaña-Taylor, A. J., Douglass, S., Updegraff, K. A., & Marsiglia, F. (2018). Small-scale randomized efficacy trial of the Identity Project: Promoting adolescents' ethnic-racial identity exploration and resolution. *Child Development, 89*(3), 862-870. DOI: 10.1111/cdev.12755

Adolescents' ethnic–racial identity (ERI) formation represents an important developmental process that is associated with adjustment. The *Identity Project* intervention, grounded in developmental theory, was designed to engage adolescents in the ERI processes of exploration and resolution. The current small-scale efficacy trial involved an ethnic–racially diverse sample of adolescents (N = 215; M_{age} = 15.02, SD = .68) from eight classrooms that were randomly assigned by classroom to the intervention or attention control group. Differences between conditions in ERI exploration at Time 2 were consistent with desired intervention effects; furthermore, higher levels of ERI exploration at Time 2 predicted increases in ERI resolution at Time 3 only for youth in the treatment condition. Findings provide preliminary evidence of program efficacy.

Douglass, S., & Umaña-Taylor, A. J. (2017). Exam ining discrimination, ethnic-racial identity status, and youth public regard among Black, Latino, and White adolescents. *Journal of Research on Adolescence*, *27*, 155-172. doi: 10.1111/jora.12262

How positively adolescents believe others feel about their ethnic-racial group (i.e., public regard) is an important part of their ethnic-racial identity (ERI), which is likely informed by contextual and individual factors. Using cluster analyses to generate ERI statuses among Black, Latino, and White adolescents (N = 1,378), we found that associations between peer versus adult discrimination and public regard varied across ERI status and ethnic-racial group. However, among all adolescents, an achieved ERI (i.e., having explored ethnicity-race and having a clear sense about its personal meaning) buffered the negative association between adult discrimination and public regard, but not between peer discrimination and public regard. Implications for understanding the interplay between contextual and individual factors for public regard are discussed.

Umaña-Taylor, A. J., & Douglass, S. (2016). Developing an ethnic-racial identity intervention from a developmental perspective: Process, content, and implementation. In N. J. Cabrera & B. Leyendecker (eds.), *Handbook of Positive Development of Minority Children and Youth* (pp. 437-453). Cham, Switzerland: Springer.

The current chapter describes the process of developing an intervention grounded in developmental theory and focused on increasing adolescents' ethnic-racial identity exploration and resolution. We begin by describing the impetus for the focus on ethnic-racial identity as a target for intervention, which includes a brief overview of existing basic research identifying consistent associations between developmental features of ethnic-racial identity and adolescents' positive adjustment. We then review existing intervention efforts focused on identity, generally, and ethnic or cultural identity, specifically. In the second part of the chapter we present our approach for working with a community partner toward the

development of the Identity Project intervention, discuss the mixed method (i.e., quantitative and qualitative) approach we used to develop the curriculum, and describe the curriculum. The chapter ends with a discussion of considerations for implementation, including the universal nature of the program and ideas regarding transportability.

Douglass, S. & Umaña-Taylor, A. J. (2015). A brief form of the Ethnic Identity Scale: Development and empirical validation. *Identity: An International Journal of Theory and Research*, *15*(1), 48-65. doi:10.1080/15283488.2014.989442

Theory and research have long indicated that ethnic-racial identity is a complex and multifaceted construct. However, there is a paucity of brief, easily administered measures that adequately capture this multidimensionality. Two studies were conducted to develop an abbreviated version of the Ethnic Identity Scale (EIS) and to explore its psychometric properties in the United States. In Study 1, the use of item-reduction techniques with a sample of adolescent Latinos (n = 323) resulted in a 9-item brief version of the EIS (EIS-B), including subscales of Exploration, Resolution, and Affirmation; furthermore, longitudinal analyses provided initial support for the construct validity of the subscales. In Study 2, the factor structure of the EIS-B was examined among an ethnically diverse sample of college students (n = 9,492), and findings provided support for strong measurement invariance across ethnic groups for the EIS-B. Together, findings from both studies provided preliminary evidence for the validity and reliability of the EIS-B as a brief measure of the multidimensional construct of ethnic-racial identity, and indicated that the EIS-B assessed ethnic-racial identity in a comparable manner to the original version of the scale.

Presentations

Fuentes, S., Umaña-Taylor, A.J., Douglass, S., & Updegraff, K. (2016, March). Is an American Identity Synonymous with an Ethnic-Racial Identity for Some Youth, but not Others? Poster presented at the Society for Research on Adolescence Biennial Meeting, Baltimore, MD.

Douglass, S. & Umaña-Taylor, A. J. (2014, June). *A brief form of the Ethnic Identity Scale: Development and empirical validation.* Paper presented at the APA Division 45: Society for the Psychological Study of Culture, Ethnicity and Race 2014 Annual Meeting, Eugene, OR.

See also: **Research Project**

Equipping Educators for Equity Through Ethnic-Racial Identity | E4

Equipping Educators for Equity Through Ethnic-Racial Identity (E^4) is our professional development (PD) program built in partnership with educators in the Boston metro area. E^4 provides all necessary training for educators to teach **the Identity Project** and use the manualized curriculum in their classrooms. Our program builds teachers' competencies in the following areas, in support of diverse student learners and their engagement with the Identity Project:

Gaining ethnic-racial identity content knowledge: Teachers learn key concepts related to ethnic-racial identity. They understand key developmental changes that occur during adolescence and why these are important for students' ethnic-racial identity development and adjustment.

Understanding systemic inequities: Teachers acknowledge the part we play in inequitable systems that disproportionately pose threats to ethnic-racial minoritized students. They learn why fostering students' ethnic-racial identity development in school can help to disrupt the reproduction of ethnic-racial inequities in the education system.

Engaging in self-reflection regarding ethnic-racial identity: Teachers explore and examine their own ethnic-racial identity development in order to build capacity to support their students' development.

Learning and practicing strengths-based facilitation strategies: Teachers build upon their current toolkit of facilitation strategies to facilitate conversations on issues of race and ethnicity in the classroom.



We currently have a field research project in which different groups of teachers are experiencing the E^4 training virtually vs. in person. We seek to examine whether the efficacy of the E^4 training is equivalent across these two training modes.

Why E^4?

We've asked Massachusetts educators who have received the E^4 training to reflect on the benefits of the program. Here's what they have to say:

What have you appreciated most about the E4 training?

"I think conversations about diversity, identity and race are crucial in education but many teachers don't know how to lead these discussions. I really appreciate how the...E4 training gave me concrete ways to have these conversations with my students. The project and lessons helped to build the vocabulary, understanding and confidence that I think teachers want and need. I also really like that this program acknowledges that all people have a culture and race – I think that it is really important that there isn't one race or culture that is seen as the standard or the norm."

– 9th grade English teacher in Boston

"I appreciated that I was able to do the work on developing my own ERI in a space that was constructive and would mitigate the harm I, as a white man, might inflict on my students. If I were to do this in the presence of my students or not engage with it at all, the likelihood of causing harm would be high. The support and coaching in the E4 program allowed me to grow, challenge my assumptions, and continue my journey in a safe and constructive environment."

– 11th grade English teacher in greater Boston

What are the short-term and long-term benefits of the E4 training for educators?

"Short-term, the training helps teachers begin and/or continue their identity journey with new activities and tools for reflection. Long-term, I believe this training has made me more thoughtful in how I plan my lessons around student needs while being more culturally responsive. Additionally, the training supports life-long growth through identity development, which has positive impacts on our own sense of community and belonging."

– 11th grade English teacher in greater Boston

"Short term, I think this will really help with learning how to build relationships and how to handle "hot" moments in class. Long term, I think that learning about yourself, especially because teachers have to do the IP is great because it allows us to think about our own identities and how it has shaped our experiences. It helped me to also reassess how and why I do things and how it may affect students and my classroom."

– 9th grade English teacher in Boston

The E4training is a robust program that requires time and resources. After having experienced the training yourself, do you think that the time and resources invested in the program are worthwhile?

"I do believe that they are worthwhile because the training is a powerful tool in identity development for all educators. The E4 model creates a cohort of educators that have similar goals and a strong foundation of the Identity Project. The discussions and conversations were impactful for all participants and allowed us to work through our own biases."

– 9th – 11th grade English teacher in greater Boston

"It was definitely worthwhile! The training helped me begin my identity journey and has supported the work in my classroom to be more student-centered."

–11th grade English teacher in greater Boston

"…the E4 program helps build that relationship between teachers as well as students. I also think that building stronger teacher connections and relationships is something all schools have neglected and need to prioritize and this program and training could be integral to that end. I have learned so much from the other teachers I did the training with and it was important and illuminating to hear their stories and experiences, as well as their questions."

– 9th grade English teacher in Boston

What has been most valuable about participating in the E4 training?

"Working with a core group of educators that are all striving to effect positive change and growth in the lives of our students. It was a wonderful experience to work with all of the teachers and Harvard research team. I gained invaluable curricular and personal resources."

– 9th – 11th grade English teacher in greater Boston

"The benefits are not limited to my career, they're applied to my personal life as well. Doing the reflective, in-depth personal work to understand my own ERI in a safe, constructive environment has allowed me to be a more mindful, supportive, and thoughtful teacher. What's more is that I feel I'm engaging with my community in more productive ways as an advocate, volunteer, and neighbor because I understand how I belong and what resources I have to offer throughout my community."

– 11th grade English teacher in greater Boston

In addition, educators have shared that the E4 training and Identity Project curriculum meet

pedagogical goals**, including:**

Culturally Sustaining Pedagogy	Student-Centered Learning	Critical Thinking
Building Strong Classroom Culture	Facilitating Discussions	Equity in Education
Student Ownership of Learning	Classroom Engagement	

See also: **Research Project**

ERI Resources

Resources on Ethnic-Racial Identity

"The Need to Foster Ethnic-Racial Identity in School"

https://www.aft.org/ae/fall2019/rivas-drake_umana-taylor
American Educator; Rivas-Drake, D. & Umaña-Taylor, A. J.
This article excerpts from *Below the Surface: Talking with Teens about Race, Ethnicity, and Identity*, a book by Rivas-Drake and Umaña-Taylor on current ethnic-racial disparities and tensions in the US with focus on youth. They conclude by suggesting "that not only can youth have a strong ethnic-racial identity and still view other groups positively, but having a strong ethnic-racial identity actually makes it possible for youth to have a less superficial or more genuine understanding, and therefore value, for other groups."

Resources to Manage Classroom Dynamics around Ethnic-Racial Identity

Exemplar Factsheets about Race, Ethnicity, and Ethnic-Racial Identity Development

Understanding Ethnic-Racial Identity Development *by Gabe Murchison*
Race & Ethnicity in the Classroom *by Olivia Wheeler*
Ethnic Identity (Spanish) for Parents *by Michael Vazquez*
The above factsheets were created by students in Dr. Umaña-Taylor's H608 Ethnic-Racial Identity Development course at Harvard Graduate School of Education.

Through our research, we have learned that a strong sense of ethnic-racial identity can lead to positive outcomes for adolescents, especially those who experience ethnic- or race-based discrimination. The development of ethnic-racial identity is a complex process, as teens explore what their race and ethnicity mean to them, try to understand the role of their race and ethnicity in their everyday lives, and decide how they feel about that aspect of themselves. The Identity Project curriculum was designed to provide adolescents of any

ethnic-racial background with tools and strategies that help them explore and understand their constantly evolving identity in relation to their race and ethnicity. However, for educators, it can be difficult to navigate these conversations that may arise during the Identity Project without guidance and support. We offer educators and other adults supporting youth ethnic-racial identity development the below **"You May Be Wondering"** sheets to offer practical guidance and tools to best navigate conversations about race, ethnicity and identity.

Addressing Racial Jokes

Should we address all racial jokes?

How do I respond if students make jokes about "acting White"?

Addressing Stereotypes

Not all stereotypes are bad, right? I've heard people say that Asian students are all hard working and high-performing. How can a stereotype like that be harmful?

Why is it so difficult to think of sterotypes for White people?

Addressing Race and Racism at School

Will the Identity Project bring up race issues that don't exist in our school and actually create tensions that aren't there?

Will the topic of ethnic-racial inequities in the Identity Project lead students to wonder or compare which ethnic-racial groups in the U.S. 'have had it worse'?

Supporting Students and Perspective Taking

- How can I support students with their handling of potentia difficult content in the Identity Project after they leave m classroom?
- What should I do if, when covering examples of common cul symbols, students say that a symbol is offensive?
- How might highly publicized racial violence be impacting r students and what can I do to support them?

Addressing Student Questions

- 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?
- How do I respond to students who are unsure about who to include in their family map?

You may be wondering ...

Should we address all racial jokes?

If you think long enough, you can probably think of a time when you heard a joke that was specifically about an ethnic-racial group or that had ethnic-racial undertones. It is logical to think that context is all that really matters in terms of the effects that these types of jokes can have on youth. You might hear students say that telling jokes with ethnic-racial undertones is OK as long as these jokes are "between friends," between people who are comfortable with each other, between people who trust each other enough to know that "it's just a joke," or between people who are of the same ethnicity or race and/or of the ethnic-racial group that is being joked about. What research shows, however, is that these types of jokes are, in fact, harmful for adolescents' psychosocial well-being.

Jokes Have Consequences

Although teasing is a common occurrence among adolescents[1], jokes about racial stereotypes can cause increased anxiety among targeted adolescents[2]. Forming friendships with peers is very important for adolescents[3] and having an ethno-racially diverse group of friends has been linked with numerous positive benefits. Talking about race and ethnicity with peers, however, can be challenging. One way to reduce discomfort is to use humor[4]. Next time you hear youth making these types of jokes, consider that this may actually be a sign of their discomfort with issues of race and ethnicity.



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And even more importantly, keep in mind that although these jokes may seem harmless, especially if they are between friends, research shows that these jokes can negatively impact students' development. In one study with 11th and 12th graders from two New York City high schools, comments such as "You loud Dominican you" or "I can't see you Shauna, where are you Shauna?" to a Black friend when a group of friends were out at night led to a spike in anxiety 24 hours later, and this was the case even if adolescents who were the focus of these jokes explained that their friends were "only joking"[2].

IN THE CLASSROOM

Conversation Starters

Jokes about ethnic-racial stereotypes may come up during Session 2 of the Identity Project, as this session addresses the topic of stereotypes. It is important to address all jokes when they occur, as failure to do so could result in more tolerance of racist statements[5].

The next page contains a selection of conversation starters [6,7]. Engaging students in this dialogue can put them on a path toward learning how to take someone else's perspective, which is important to create a more inclusive classroom. Encourage students to consider the effects of race-based jokes and to understand their impact on others in the classroom[7,8]. You might also find it helpful to tell students about what research on young people has discovered with respect to the effects of ethnic-racial jokes "between friends."

The development of this resource was supported by a grant from the William T. Grant Foundation [redacted].

Consider these prompts to start a conversation in your classroom:

How would you feel if someone said something hurtful to you about your ethnic-racial group but said it was a joke?

What kind of environment would we like to create in the classroom?

Can you see how some people may not think that's funny?

What is underlying these jokes?

How can the joke affect people who hear it?

Key Takeaway:

Ethnic-racial jokes have consequences. Even if students who are the victims of these jokes are shrugging them off and saying that they don't really mind these jokes and perhaps even find them funny, it's clear from the research that even jokes "among friends" can be harmful to students' mental health.

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You may be wondering ...

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?

Here we highlight some key talking points (in no particular order), some background research to keep in mind, and some potential conversation starters to open and continue a dialogue with your students.

Talking Points	What Does the Research Say?	Conversation Starters
Validate 	Your student is not in the wrong. Research shows that students of color benefit when they have educators and mentors who look like them.[1] However, there is a long and unfair history of White educators making decisions about what's "best" for students of color. Therefore, acknowledging racial biases in the education system can be one important step to better understand and reduce ethnic-racial disparities in education.[2]	*"You're right. I will not be able to know your experiences..."* *"That's a great point. My role in this process will <u>not</u> be to give you answers about your own identity, but rather to help guide our class as we each go through our individual process of learning more..."*
Recognize Trust 	With a statement like this, your student is demonstrating that they trust you enough to not let this go unsaid. Trust is a key ingredient for building quality relationships with your students. Research shows that behavior problems (as reported by students and teachers) are lower when students of color report that their teachers are trustworthy authority figures.[3]	*"I know that might have been hard to share, so thank you for trusting me with that..."* *"Thank you. I appreciate you trusting me enough to say that..."*

The development of this resource was supported by a grant from the William T. Grant Foundation (PI: Umaña-Taylor).

Talking Points	What Does the Research Say?	Conversation Starters
Your Own Journey 	This student's comment is a useful reminder: No one's ethnic-racial identity journey is the same. Research shows that educators who have explored more about their ethnic-racial identity, including White educators, are better positioned to support their students in this process.[4] This conversation can be used as an opportunity to reiterate that everyone is on their own journey and every journey is unique.	*"When it comes to learning about your identity, you're going to be the expert. My role is to support you..."* *"I'm creating time for us to explore what our own ethnic-racial backgrounds mean to each of us on our own and then share this with each other..."*

Critical Consciousness

We don't want to take away from the fact that being confronted with this information will be hard. Despite the challenges you may feel, keep in mind that students who are raising these valid concerns are demonstrating a level of *critical consciousness* (i.e., becoming aware of and challenging injustices) that can be beneficial for their academic success. In fact, research shows that developing *critical consciousness* positively predicts later standardized test scores and grades for students of color.[5]

Key Takeaway:

While it can be difficult to hear your students question your role as a White educator leading the Identity Project, their question is a sign of trust in you as their teacher and a sign that they are becoming aware of systemic injustice. It is important to validate your students, express your commitment to supporting them on their ethnic-racial identity journeys, and continuing on your own so that you may continue to model this difficult but necessary work to understand our ethnic-racial backgrounds.

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You may be wondering ...

Why is it so difficult to think stereotypes for White people?

During the Identity Project, some students have asked about stereotypes for White Americans and the differences between stereotypes for different groups. Here is some guidance for engaging students in these discussions.

A Historical Perspective

When White Europeans founded the U.S., their values and cultural practices ("Whiteness") were incorporated into national customs and institutions. This contributed to a social and political system that prioritizes "Whiteness" and places other groups in a lower status. Today, the effects of that system create an ethnic-racial hierarchy where Whiteness is considered *normal* and other groups are *other.*[1] As a result, negative ideas about White Americans rarely stick, or do not have the same effects as negative ideas about other groups.

Everyday "Whiteness"

The everyday experiences of Whiteness create an "Invisible Knapsack" of white privilege or experiences and assumptions that come with being a White American. Some of these privileges are small, like easily finding "flesh" color bandages, while others are more significant, like assuming medical professionals will not treat you differently based on your race.[3] These experiences are so deeply embedded in our lives they can become "invisible." When these privileges are not seen, they are not questioned or challenged. If those living with these privileges do not change the conditions that produce them, they will continue to exist.

Everyday Examples of Whiteness as normal[2]

- What do most people in positions of power look like in the U.S.?
- What do most families look like in television shows?
- What cultures have special aisles in the grocery store?
- What does the term "ethnic" signal when describing clothing, music, physical features, etc.?
- What do most children's book characters look like?

IN THE CLASSROOM

What if students use the stereotype "White people are racist"? [4]

During Session 2 of the Identity Project, students distinguish between themselves and stereotypes. Someone might say, *"I am White, but I am not racist."* Although this is a valid feeling for the student, it can offend students of color who regularly contend with discrimination as a result of racism. The statement can be perceived as allowing White students to avoid acknowledging that racism is pervasive in U.S. society and impacts everyone. Consider using this opportunity to discuss definitions of *racism* and *racist:*

(1) **Racism** happens on a systemic level (e.g., school segregation and voting rights laws), not just on an interpersonal level (e.g., comments on social media).

(2) A person's actions, words, or ideas can be **racist** based on the impact and implications, regardless of the person's personal beliefs or intentions.

The development of this resource was supported by a grant from the William T. Grant Foundation (PI: Umaña-Taylor).

Why do the stereotypes of people of color often seem more harmful?

Stereotypes often dehumanize ethnic-racial minority groups and justify the mistreatment of these groups. **Although stereotypes exist for all groups, the seriousness of the consequences of these stereotypes is dependent on power and prejudice.**[5] If those in power hold prejudice against some groups, these prejudices can shape policies and practices that have serious consequences. Due to generations of discrimination, White Americans tend to have that power. Thus, in the U.S., people of color contend with the consequences of these stereotypes at interpersonal and community-wide levels.

POWER: Institutional power often held by the dominant group to enact policies and practices

+

PREJUDICE: Existing prejudice against a group that might be expressed through stereotypes

=

CONSEQUENCES OF STEREOTYPES

IN THE CLASSROOM

If students struggle to identify inequitable impacts of stereotypes for different groups, have them brainstorm (a) common stereotypes for different groups and (b) the potential consequences of those stereotypes. See the chart below for examples.

Stereotypes	Consequences
White people cannot dance	Discrimination when applying for school dance team
Latinx people are all undocumented	Police more frequently ask for citizenship documentation
Black people are more violent and criminal	Excessive force more frequently used during arrests

Key Takeaways:

(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. This is largely the result of the institutional power and authority that privileges Whiteness and creates policies and practices shaped by negative stereotypes of non-dominant groups.

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You may be wondering ...

How might highly publicized racial violence be impacting my students and what can I do to support them?

Any time there is a highly publicized incident of racial violence, students may be experiencing a form of trauma as a result of witnessing violence towards another individual. Adolescents between the ages of 12 and 17 have the cognitive capacities to understand racialized violence and may be exposed to an incident repeatedly via social media.[1]

What is trauma?

A **traumatic event** occurs when an individual perceives something as dangerous to themselves or their caregivers, or when an individual experiences violation of personal physical integrity. For children, **traumatic stress** occurs when their exposure to traumatic events overwhelms their ability to cope with their experiences.[1] Trauma and resulting traumatic stress can be both an **individual** experience and a **collective** experience, something that affects a group of people.[2] Trauma can take many forms. For example:

- **Historical trauma** refers to emotional or psychological wounds that result from a group's traumatic experiences and can be transmitted through families across generations.[1,3]
- **Secondary trauma,** or **vicarious trauma,** refers to the stress that occurs when an individual witnesses trauma that someone else directly experiences. This type of trauma can also affect the perpetrators of racial trauma, or those who inflict harm on another individual.[3]
- **Racial trauma** refers to the stress that can occur from directly experiencing or witnessing discrimination or racism at either the interpersonal or institutional levels. **Race-based traumatic stress** refers to the impact or pain that can result from an individual's experiences with racism and discrimination.[1]

Where does trauma come from?

Traditionally, trauma has been viewed through a **medical model,** which suggests that trauma results from problems with an individual's mental health or behavior. However, there are also **social and ecological factors** that contribute to trauma and traumatic stress, including social inequities, institutional inequities, and living conditions.[2] By understanding these social and ecological factors, we avoid placing the blame for trauma responses on individuals, and we can better understand historical trauma and trauma that is perpetuated through inequitable systems.[2] It is important to be aware that schools can be a place where historical harm and trauma is replicated through systems, policies, and practices that harm youth of color.

Factors Contributing to Trauma[2]

Medical Model	Social Ecological Model
Mental Health Risks (e.g. depression, anxiety)	**Social and Institutional Inequities** (e.g. bias related to race, social class, sexual orientation, immigration status)
Behavioral Health Risks (e.g. substance abuse, violence)	**Living Conditions** (e.g. physical and economic environment)

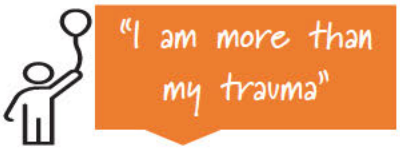
How might this trauma impact students?

Students can display a range of responses to direct or indirect experiences of trauma. Some of these responses may not be recognizable as trauma responses, such as difficulty concentrating, substance abuse, or alienation from peers.[4] Students may become fixed or hyper-focused on a traumatic incident as a way of addressing the anxiety they may be feeling.[1] Furthermore, research has demonstrated that identity-based discriminatory experiences, such as bullying related to ethnicity and race, are linked to lower academic motivation, engagement, and achievement.[6] These effects of racial trauma are detrimental to student learning, achievement, and well-being. It is important to note, however, that ethnic-racial identity can be a protective factor in the face of this risk. Researchers found that ethnic-racial identity resolution, or a clearer sense of the meaning of race and ethnicity for one's self-concept, is linked with adolescents utilizing healthier coping behaviors[7] and demonstrating fewer depressive symptoms when experiencing discrimination online and in person.[8]

The development of this resource was supported by a grant from the William T. Grant Foundation (PI: Umaña-Taylor).

IN THE CLASSROOM

A Healing-Centered Approach



A **healing-centered approach**:

- Involves addressing the social-ecological and systemic causes of trauma
- Views culture and identity exploration as a means to experience healing
- Is asset-driven, or focused on youths' existing capacity to develop their well-being[5]

The importance of identity exploration as a means of healing connects to the Identity Project's focus on ethnic-racial identity development, which further highlights the strength of the work you are doing to implement the Identity Project curriculum with your students. **There are many steps we can take to incorporate a healing-centered approach into our classroom when there has been a highly publicized incident of racial violence. Holding space for these incidents can be challenging for educators, as you may be processing your own responses to these events. However, not acknowledging these highly visible incidents could have the unintended effect of communicating to students that their pain is not recognized. As you navigate these conversations, keep the following tips in mind[1, 5]:**

- To foster a sense of psychological safety for your students, **provide clear directions** for managing overwhelming emotional responses.
- **Recognize when you need help** and call upon supports in your context.
- **Validate students' emotions.** Some students may have difficulty expressing their emotions.
- **Engage authentically** with your students. Remember that you do not need to have all the answers.
- Honor and respect that *all students may have different reactions, responses, and perspectives.*
- **Build empathy.** You might start by sharing your own emotions while centering marginalized voices or experiences, which may allow young people to feel safe sharing their experiences. Provide opportunities for youth to name and respond to their emotions.
- **Encourage your students to dream and imagine.** Allow your students space to think about who they want to be in the future. *Remember that their traumas do not define them*.
- **Build critical reflection.** Understand the ways that systemic racism impacts your students. *Use this knowledge* to discuss the potential for leadership and transformation in your community. Take informed action.

BEFORE THE CLASSROOM

Take Care of Yourself

Adults need healing too. Make sure that you have taken the time to process your own reactions and responses. Your own healing can take place individually and in community with colleagues.

- You might set a timer and take 10 minutes to journal before engaging with your students.
- You might take 10 minutes before the school day to talk with co-conspirators in your building and draw upon your community of educators working to support youth and their well-being. When engaging your community of educators, take care not to place undue burdens on educators of color at your school.

Key Takeaway:

Highly publicized incidents of racial violence can be traumatic for youth and adults. By understanding trauma and healing-centered engagement, we can support youth as they navigate these moments. The Identity Project facilitates youths' exploration and resolution of their ethnic-racial identity, which is an important part of activating healing.

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UNDERSTANDING ETHNIC-RACIAL IDENTITY DEVELOPMENT

Fact sheet created by: Gabe Murchison

Key Terms

Race



A system where people are **categorized by appearance** (including skin color), often to justify differences in power and privilege.

Ethnic-racial identification



How someone **labels** their race and/or ethnicity. Examples: Latinx, Vietnamese, White, or Navajo.

Ethnicity



Includes the **languages, values, beliefs, and traditions** to which people are connected through their ancestry, nationality, and/or family.

Ethnic-racial identity



A person's **thoughts and feelings** about their race and ethnicity and the **process** of developing those thoughts and feelings.

Dimensions of Ethnic-Racial Identity

Ethnic-racial identity (ERI) is **multidimensional** [1], meaning it includes several related concepts (dimensions). Each dimension is related to either ERI content (thoughts and feelings) or the ERI development process [1].

Content Dimensions

The content of someone's ERI could include: [1]

- **Affirmation:** How good or bad someone feels about being part of their ethnic/racial group(s)
- **Public regard:** How positively someone believes other people view their ethnic/racial group(s)
- **Centrality:** How important someone feels their race/ethnicity is to their whole identity
- **Salience:** How important someone feels their race/ethnicity is in a particular situation

Why does content matter?

ERI **affirmation** is believed to be especially important because positive feelings about being part of an ethnic/racial group help youth feel good about themselves. These feelings are thought to be **protective** against the effects of negative stereotypes and discrimination [2], so they may be especially (though not exclusively) important for youth of color.

The idea that ERI content (especially affirmation) is important is based on Henri Tajfel's **Social Identity Theory** [3], which argues that feeling good about the groups one belongs to is an important way of feeling good about oneself [2,3] and counteracts negative treatment by other groups



Process Dimensions

- Many people engage in **exploration** of their ERI. This might include cultural activities, learning more about their background, or discussing race and ethnicity with others
- People also differ in how certain they feel about what their ethnic-racial identity means to them. This certainty is known as **resolution**.
- The ERI development process can be measured in terms of these two dimensions [4]

Why does process matter?

Exploring and resolving one's ERI can give young people more self-confidence. This process is thought to be **universal,** meaning it is relevant regardless of one's ethnic or racial background [5]. It is also **promotive** [2], meaning that it is helpful regardless of whether youth experience adversity

Research on the ERI development process builds on research by Jean Phinney. Phinney's work **emphasizes adolescence** as an important stage for ERI, both because younger children lack the cognitive abilities to truly explore their ERI and because adolescents are often exposed to more diverse environments, making them more aware of their own race and ethnicity [6].

Promoting ERI development in schools

Modeling Openness

- Acknowledging students' positive and negative experiences with race and ethnicity supports identity development and student-teacher relationships
- Some educators find it helpful to practice these conversations in affinity groups, such as a race/ethnicity discussion group for White educators.

Does promoting ethnic-racial identity harm relationships with other groups?

For youth of color, research indicates that it doesn't! [8] But identifying more strongly as White is linked to more avoidance of people of color [8]—so it is important for White youth to explore their identities in a context that emphasizes diversity and tolerance.

Affinity Groups

- Affinity groups give students an opportunity to discuss race and ethnicity with others who share similar experiences.
- Some schools offer an affinity group for White students, focused on understanding White privilege and developing positive, anti-racist White identities.
- Groups for older students may be youth-led, with support from an adult advisor, and may engage in advocacy and activism as well as social support.

Formal Curricula

- In a randomized, controlled trial, participating in the Identity Project, an ethnic-racial identity curriculum, resulted in higher self-esteem, fewer depressive symptoms, and better academic performance among 9th-graders of various ethnicities [5].
- The curriculum, designed by experts in adolescent ethnic-racial identity development, is appropriate for both White youth and youth of color, and encourages youth to share their cultures with their peers.

Benefits

For adolescents and young adults, ERI affirmation (positive feelings), and/or the process of exploring and resolving one's ERI, are associated with...[3,7]

- Lower levels of depressive symptoms
- Fewer health risk behaviors
- Higher self-esteem
- More positive academic outcomes and attitudes
- Better social functioning

Key Takeaways

- All youth (including White youth) have an ethnic-racial identity and can benefit from exploring it.
- Positive feelings about one's race and ethnicity are important, but so is the process of exploring and coming to conclusions about that identity.
- Educators can foster ethnic-racial identity development by creating formal and informal opportunities to discuss students' experiences with race and ethnicity.

Further reading

- **For more information on ethnic-racial identity in specific groups, such as multiracial youth,** see Giraud, M., & Grant-Thomas, A. (2017, June 1). Understanding Racial-Ethnic Identity Development. [Blog post]. Retrieved from https://www.embracerace.org/blog/recording-and-resources-understanding-racial-ethnic-identity-development
- **For advice on addressing race and ethnicity in schools that are mostly or entirely White,** see National Association for Multicultural Education (n.d.). *Relevant in an All-White School?* Retrieved from https://www.nameorg.org/learn/relevant_in_an_all-white_schoo.php
- **For more information about affinity groups in K-12 schools,** see Parsons, J., & Ridley, K. (2012, Winter). Identity, affinity, reality. *Independent School.* Retrieved from https://www.nais.org/magazine/independent-school/winter-2012/identity,-affinity,-reality/
- **For guidance on building skills to discuss race with students, particularly for White teachers,** see Watson, A. (2017, March 19). 10 things every white teacher should know when talking about race. [Blog post]. Retrieved from https://thecornerstoneforteachers.com/truth-for-teachers-podcast/10-things-every-white-teacher-know-talking-race/
- **To learn more about the Identity Project,** see Shafer, L. (2018, February 23). Exploring ethnic-racial identity. [Blog post]. Retrieved from https://www.gse.harvard.edu/news/uk/18/02/exploring-ethnic-racial-identity

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[3] Tajfel, H., & Turner, J. (1986). The social identity theory of intergroup behavior. In W. Austin & S. Worchel (Eds.), Psychology of intergroup relations (2nd ed., pp. 7-24). Chicago, IL: Nelson-Hall.

[4] Umaña-Taylor, A. J., Yazedjian, A., & Bámaca-Gómez, M. (2004). Developing the ethnic identity scale using Eriksonian and social identity perspectives. Identity: An International Journal of Theory and Research, 4(1), 9-38.

[5] Umaña-Taylor, A. J., Douglass, S., Updegraff, K. A., & Marsiglia, F. F. (2018). A small-scale randomized efficacy trial of the Identity Project: promoting adolescents' ethnic-racial identity exploration and resolution. Child Development, 89(3), 862-870. doi:10.1111/cdev.12755

[6] Phinney, J. S. (1989). Stages of ethnic identity development in minority group adolescents. The Journal of Early Adolescence, 9(1-2), 34-49.

[7] Rivas-Drake, D., Syed, M., Umaña-Taylor, A., Markstrom, C., French, S., Schwartz, S. J., & Lee, R. (2014). Feeling good, happy, and proud: a meta-analysis of positive ethnic–racial affect and adjustment. Child Development, 85(1), 77-102.

[8] Wantchekon, K.A., Umaña-Taylor, A.J., McDermott, E.R., Rivas-Drake, D., Medina, A.C. Comparing relations between ethnic and public regard, centrality, and other group orientation among diverse adolescents. (in progress).

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Exhibit I
(Fort Wayne grant application excerpts; highlighted by the whistleblower)

U.S. Department of Education

Washington, D.C. 20202-5335

APPLICATION FOR GRANTS UNDER THE

84.165A Magnet Schools Assistance Program

CFDA # 84.165A

PR/Award # U165A170062

Gramts.gov Tracking#: GRANT12385912

OMB No. , Expiration Date:

Closing Date: Apr 11, 2017

Table of Contents

Form	Page
1. Application for Federal Assistance SF-424	e3
2. Standard Budget Sheet (ED 524)	e6
3. Assurances Non-Construction Programs (SF 424B)	e8
4. Disclosure Of Lobbying Activities (SF-LLL)	e10
5. ED GEPA427 Form	e11
Attachment - 1 (1235-FINAL FWCS GEPA 427 Statement 2017)	e12
6. Grants.gov Lobbying Form	e13
7. Dept of Education Supplemental Information for SF-424	e14
8. ED Abstract Narrative Form	e15
Attachment - 1 (1234-FINAL FWCS Magnet Abstract 2017)	e16
9. Project Narrative Form	e17
Attachment - 1 (1238-FINAL FWCS Magnet TofC Narrative 2017)	e18
10. Other Narrative Form	e161
Attachment - 1 (1237-FINAL FWCS Magnet Appendix 2017)	e162
11. Budget Narrative Form	e388
Attachment - 1 (1236-1 FINAL FWCS MSAP17 5 YR Budget)	e389

This application was generated using the PDF functionality. The PDF functionality automatically numbers the pages in this application. Some pages/sections of this application may contain 2 sets of page numbers, one set created by the applicant and the other set created by e-Application's PDF functionality. Page numbers created by the e-Application PDF functionality will be preceded by the letter e (for example, e1, e2, e3, etc.).

ASSURANCES - NON-CONSTRUCTION PROGRAMS

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0040), Washington, DC 20503.

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.

NOTE: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant, I certify that the applicant:

1. Has the legal authority to apply for Federal assistance and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project cost) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States and, if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§4728-4763) relating to prescribed standards for merit systems for programs funded under one of the 19 statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

6. Will com_l_ with all Federal statutes relatin_ to nondiscrimination. These include but are not limited to: _a_ Title VI of the Civil Ri_hts Act of 1964 _P.L. 88-352_ which prohibits discrimination on the basis of race, color or national ori_in; _b_ Title IX of the Education Amendments of 1972, as amended _20 U.S.C._ _1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. §§290 dd-3 and 290 ee- 3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financin_ of housin_; _i_ an_ other nondiscrimination _rovisions in the s_ecific statute s_ under which application for Federal assistance is being made; and, (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally-assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

8. Will comply, as applicable, with provisions of the Hatch Act (5 U.S.C. §§1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§276a to 276a-7), the Copeland Act (40 U.S.C. §276c and 18 U.S.C. §874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§327-333), regarding labor standards for federally-assisted construction subagreements.

10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§1451 et seq.); (f) conformity of Federal actions to State (Clean Air) Implementation Plans under Section 176(c) of the Clean Air Act of 1955, as amended (42 U.S.C. §§7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended (P.L. 93-523); and, (h) protection of endangered species under the Endangered Species Act of 1973, as amended (P.L. 93-205).

12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. §470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. §§469a-1 et seq.).

14. Will com_l_ with P.L. 93-348 re_ardin_ the_rotection of human sub ects involved in research, develo_ment, and related activities supported by this award of assistance.

15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. §§2131 et seq.) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.

16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§4801 et seq.) which prohibits the use of lead-based paint in construction or rehabilitation of residence structures.

17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act Amendments of 1996 and OMB Circular No. A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

18. Will com_l_ with all a_ _licable re_uirements of all other Federal laws, executive orders, regulations, and policies governing this program.

19. Will comply with the requirements of Section 106(g) of the Trafficking Victims Protection Act (TVPA) of 2000, as amended (22 U.S.C. 7104) which prohibits grant award recipients or a sub-recipient from (1) Engaging in severe forms of trafficking in persons during the period of time that the award is in effect (2) Procuring a commercial sex act during the period of time that the award is in effect or (3) Using forced labor in the performance of the award or subawards under the award.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE
[redacted]	Superintendent
APPLICANT ORGANIZATION	DATE SUBMITTED
Fort Wayne Community Schools	04/11/2017

Standard Form 424B (Rev. 7-97) Back

U.S. DEPARTMENT OF EDUCATION
SUPPLEMENTAL INFORMATION
FOR THE SF-424

1. Project Director:

Prefix:	First Name:	Middle Name:	Last Name:	Suffix:
Dr.	[redacted]		[redacted]	

Address:

Street1: [redacted]
Street2:
City: [redacted]
County:
State: [redacted]
Zip Code: [redacted]
Country: [redacted]

Phone Number (give area code): [redacted]
Fax Number (give area code):

Email Address: [redacted]

2. Novice Applicant:

Are you a novice applicant as defined in the regulations in 34 CFR 75.225 (and included in the definitions page in the attached instructions)?

☐ Yes ☐ No ☒ Not applicable to this program

3. Human Subjects Research:

a. Are any research activities involving human subjects planned at any time during the proposed Project Period?

☐ Yes ☒ No

b. Are ALL the research activities proposed designated to be exempt from the regulations?

☐ Yes Provide Exemption(s) #: ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6

☐ No Provide Assurance #, if available:

c. If applicable, please attach your "Exempt Research" or "Nonexempt Research" narrative to this form as indicated in the definitions page in the attached instructions.

Add Attachment | Delete Attachment | View Attachment

TABLE OF CONTENTS

Part I: Application for Federal Assistance
- Application for Federal Assistance (Form 424)
- Abstract.....**i**
- Table of Contents.....**ii**

Part II: Budget Form and Information
- Budget Form 524……...…… **iii**
- School Project Budgets…… **iv**

Part III: Program Narrative Addressing:
- Competitive Preference Priority 1: Need for Assistance **1-10**
- Competitive Preference Priority 2: New or Revised Magnet Schools.....**11-13 + Appendix**
- Competitive Preference Priority 3: Selection of Students.....**Appendix**
- Competitive Preference Priority 4: Increasing Integration / Diversity **13-16**

- MSAP Selection Criteria
  - (a) Desegregation.....**16-34**
  - (b) Quality of Project Design.....**34-107**
  - (c) Quality of Management Plan.....**107-118**
  - (d) Quality of Personnel ……....**118-129**
  - (e) Quality of Evaluation……...…….**129-142**

Part IV: Assurances and Certifications vi
- Magnet Schools Assistance Program Assurances
- Assurance-Non-Construction Programs
- Certifications Regarding Lobbying Debarment; Suspension, and other Responsibility Matters; and Drug Free Workplace Requirements
- Certifications Regarding Debarment; Suspension; Ineligibility; and Voluntary Exclusion – Lower-Tier Covered Transactions
- Disclosure of Lobbying Activity

Part V: Desegregation Plan & Other Required Information vii
- Desegregation Plan Information Form and Attachments
- Table 1 Information – District-Level Student Enrollment Information
- Table 2 Information – Initial Year of Implementation for Existing Magnet School
- Table 3 Information – Student Enrollment Information for Proposed Magnet Schools
- Table 4 Information – Student Enrollment Information for Feeder Schools
- Table 5 Information – Competitive Preference # 3
- Table 6 Information – Competitive Preference # 2 / Strength of Evidence Studies

Part VI: Other information viii
- GEPA 427 Statement
- Principal Memoranda of Understanding (MOU)
- Job Descriptions
- Resumes of Key Personnel
- References Cited
- Proof of Indirect Cost Rate
- Survey Ensuring Equal Opportunity for Applicants

COMPETITIVE PREFERENCE PRIORITY 1: NEED FOR ASSISTANCE.

Fort Wayne Community Schools (FWCS – applicant and fiscal agent) educates nearly 29,500 students attending 50 schools in Fort Wayne, Indiana. The district has served Fort Wayne children and their families since 1857 and continues to be the heart of the greater Fort Wayne community. Fort Wayne Community Schools is the largest district in the state and struggles to overcome issues common to large urban and urban fringe school systems, including low academic achievement, racial group isolation and insufficient funds to meet the academic needs of underserved students and families. FWCS requests MSAP funding through this application called ***SEEK: Successful Equity, Excellent Kids!*** to reduce black student isolation, improve equity and access for students, and offer rigorous educational options at five high-need urban schools:

***SEEK* Magnet Schools and Themes 2017 - 2022**		
School	**Grades**	**Magnet Theme**
Irwin Elementary STEM Magnet School	K - 5	STEM
Whitney Young Early Childhood Center for the Arts	PreK - K	STEAM
Weisser Park Elementary School of the Arts	K - 5	STEAM
Memorial Park Middle School of the Arts	6 - 8	STEAM
South Side High School Academy of the Arts	9 - 12	STEAM

Since the first boycott of its schools in the mid-1960's and several investigations in the late '60s and '70's, culminating in a private lawsuit in 1977 that claimed minority students wrongly bore an unequal burden for desegregating Fort Wayne's schools (data submitted to the U.S. Civil Rights Commission showed that three inner-city schools with minority populations of 89.4% to 93.5% were closed to "balance" the district's schools), FWCS has found itself facing tough questions about desegregation. In 1979 (38 years ago), two principals were appointed - at Young School (K-5) and Memorial Park (6-8) - and the first two FWCS magnet schools were born. The schools would prove to be too little too late as black and white parents and their students formed a group called Parents for Quality Education with Integration, Inc. (PQEI) and formally brought a lawsuit against FWCS and "State Defendants" (state of Indiana, the Attorney General's office, State Superintendent of

Public Instruction and Indiana Department of Education) on behalf of present and future children and parents who resided within the boundaries of FWCS. The complaint charged that FWCS and State Defendants established and maintained a racially segregated public school system. The FWCS Defendants and State Defendants denied liability. The Court entered a consent decree in 1990, approving a settlement in which FWCS "agreed to and has racially balanced all FWCS elementary schools within a range of 10%-50% black enrollment." The settlement provided for the option of magnet schools and other programs to improve education for at-risk students. Since that time, Fort Wayne has opened nine magnet schools and programs and kept them viable for more than a quarter of a century. That said, a recent study commissioned by the FWCS Board of School Trustees and conducted by DeJong-Richter, a well-respected school facilities planner, found that 25 of 50 FWCS schools, ie: - one of every two of the district's schools - would be out of balance if they reverted back to neighborhood schools. Beginning with the 2015-2016 school year, a severe decline in education funding necessitated FWCS enforce No Transportation Zones. Students living within established proximities to schools [1 mile for elementary; 1.5 miles for middle and 2 miles for high school], as well as those attending a school other than their geographically-assigned school are no longer transported by FWCS yellow buses. This rule does not impact students attending magnet schools and high school programs of study. In just one year since its implementation, we can see changes in the balance in our schools and realize we must be proactive in safeguarding the heterogeneity of our student population in every corner of our diverse and well-respected pillar of the community. Magnet schools offer positive solutions to real challenges and this is our story.

Magnitude of Need: To identify schools and programs for this grant, FWCS's Magnet Design Team—an experienced partnership of administrators, teachers, higher education partners, community/business leaders and parents—conducted a needs assessment that focused attention on three primary indicators that have resulted in the pursuit of magnet alternatives: 1) Vulnerable Communities; 2) Complex Schools; and 3) Learning Pathways **(1) Vulnerable Communities:** FWCS serves students living and learning in vulnerable communities impacted by significant risk factors, exacerbated by a tough economy, that reduce school readiness and motivation to learn:

Fort Wayne Community Schools, LEA & fiscal agent

Community Risk Indicators	Target Area	Indiana	Nation
Free/Reduced Lunch Rate	65%	48%	48%
Per Capita Income	$22,166	$26,396	$29,979
% Children Living in Poverty	33.2%	20.4%	20.7%
% Children in Single Parent Homes	44.6%	35%	35%

Source: U.S. Census, 2010; Labor, 2015; IN ED, 2017; FWCS Data Warehouse, 2017.

Poverty: Poverty and community risk indicators demonstrate widespread hardship for Fort Wayne families. While composite indicators are compelling, the district is impacted by social gaps that further divide local communities into "haves" and "have nots." Combined with a history of racial tension in public schools, the growing economic disparity that compartmentalizes segments of the Fort Wayne community perpetuates cycles of de facto segregation in schools (FWCS indicators suggest race and economic status are linked and segregation across racial subgroups is analogous to segregation across economic subgroups). Magnet school efforts will help reduce racial group isolation and increase socio-economic diversity in schools. **(2) Complex Schools:** Challenging social conditions negatively impact student performance and FWCS schools are rebounding from a prolonged cycle of academic underperformance that, in 2008, led to 13 schools being designated as federal *Persistently Lowest Achieving Schools Tier I, II or III*. Today, seven schools are Priority or Focus schools. Fort Wayne Community Schools serves a diverse population of learners seeking to overcome school and community risk factors that impede success. Our student body is comprised of youth from low-income, inner city neighborhoods and economically stagnant suburban communities. FWCS enrollment is becoming increasingly diverse given a rapidly growing minority population with students speaking 79 different languages (8% speak English as a second language). FWCS serves a significant Special Education population as well (22%). Fort Wayne celebrates its diversity and seeks to implement programs that best meet the changing needs of our schools, students and families. The chart summarizes district performance data by ethnicity and poverty:

% Students Below Proficiency 2015-16						
District Grade Level Scores	**ELA - Black**	**ELA – F/R Lunch**	**ELA - White**	**Math - Black**	**Math– F/R Lunch**	**Math - White**
Elementary - Grade 5	64.2%	54.0%	38.7%	64.4%	50.3%	32.2%
Middle - Grade 8	67.2%	57.5%	38.5%	77.9%	68.3%	49.4%
High - Grade 10	67.6%	59.1%	38.8%	91.2%	84.8%	71.8%

Source: Indiana Department of Education, ISTEP, End of Course Results, Spring 2016.

Achievement rates highlight large gaps in all subjects, across racial and socio-economic categories, especially at the secondary level; proposed SEEK school test results mirror deficiencies at all levels:

% Students Below Proficiency 2015-16							
***SEEK* Schools**	**Total Enrollment**	**F / R Lunch**	**ELA**	**Math**	**Science**	**Social Studies**	**Graduation Rate**
Irwin K-5	285	60.43%	28.3%	31.0%	34.7%	38.3%	-
Whitney Young PreK-K	241	60.34%	-	-	-	-	-
Weisser Park K-5	562	60.51%	33.9%	37.9%	38.9%	53.4%	-
Memorial Park 6-8	599	64.53%	37.5%	42.0%	39.4%	40.6%	-
South Side 9-12	1410	79.80%	61.9%	89.2%	64.3%	-	84.7%
TOTALS / Averages	**3,097**	**65.12%**	**40.4%**	**50.0%**	**44.3%**	**44.1%**	**84.7%**

Source: Indiana Department of Education, ISTEP, End of Course Results, Spring 2016.

***SEEK* Magnet Schools**	**% Students Below Proficiency 2015-2016**			
Average Scores	**Math - Black**	**Math - White**	**Science-Black**	**Science-White**
ISTEP - State Standardized Exam	68.3%	39.6%	66.2%	33.8%
End of Course Exam	91.2%	71.8%	77.3%	41.9%

Source: Indiana Department of Education, ISTEP, End of Course Results, Spring 2016.

Poor performance in math and science in proposed *SEEK* magnet schools demonstrates a significant achievement gap that distinguishes racial subgroups. With anywhere from a 19 to a 35 point difference in Math and Science scores between blacks and whites in *SEEK* schools, reducing the achievement gap must be an important outcome when searching for equity and balance through magnet programs. While FWCS continues to close the achievement gap at a faster rate than other districts in Indiana, the remaining gap is still too large. FWCS will rectify this disparity through expanded academic choice in magnet schools, particularly in STEM / STEAM subjects.

(3) Learning Pathways: One of the daily challenges in Fort Wayne Community Schools is creating the feeling of family. From the district's logo *We Are Your Schools* to the Superintendent's Message: *We take seriously the trust and relationship we have with our community*, FWCS works to nurture and support every one of its future graduates. While the district has created magnet schools in the past and Programs of Study at its high schools, it has not been diligent in mapping out pathways for students who want to pursue a given college or career tract upon graduation. Oftentimes, a student finds themselves on a path without clear direction to the next stage of their journey. One of the tasks charged to SEEK planners was to examine program offerings throughout the district and connect them in ways that assist our students to achieve their dreams and goals. Assisted by comments from parent and student surveys, planners noted many shortcomings. One of the most stark was from parents of students who graduate from eighth grade with an interest in the arts and no clear pathway to pursue those interests. In the natural progression, students who leave Memorial Park Middle School would matriculate to South Side High School. South Side currently has an International Baccalaureate Diploma Program of Study. This challenging program is not for everyone and many students who have enjoyed and pursued the arts feel they have no home at South Side so they go elsewhere. Per the survey, many of these students are leaving the district altogether. In the meantime, South Side High School has become out-of-balance. The current breakdown at South Side is: 19% white, 36% black and 30% Hispanic. District averages are: 45% white, 24% black and 16% Hispanic. South Side's white students are 12 points below the "plus/minus 15 points above or below the district average" cutoff for racial balance. Black students are 3 points from being out of balance and Hispanics are 1 point from being out of balance with district targets set during voluntary desegregation efforts. With the creation of a PreK - 12 STEAM Arts Magnet Pathway from Whitney Young (PreK-K) to Weisser Park (K-5) to Memorial Park (6-8) to South Side (9-12), a complete and consistent STEAM pathway will be created for some of the district's highest need students. Professional learning for educators to integrate the arts into core and STEM subjects promises to add the missing rigor to a long unsolved puzzle in south Fort Wayne. In addition, the creation of a STEM magnet school at Irwin Elementary will be the

beginning of a K-12 STEM Learning Pathway from Irwin (K-5) to Portage (6-8) to Wayne High School (9-12). The five magnets being proposed in SEEK - four revised whole school magnets and one school-within-a-school magnet academy - will bring working solutions to FWCS stakeholders and will get students one step closer to clear STEM / STEAM paths on the way to college and careers. In the search for answers, magnet schools have proven to offer positive choices that the community can understand, approve and rally behind. FWCS has a critical need for funds to retool worn out magnets. To this end, the district submits ***SEEK—Successful Equity, Excellent Kids!***

(a) The costs of implementing project as proposed.

Fort Wayne Community Schools requests a total of $14,993,841 to serve 29,473 current students, PreK - 12. Federal funds will support implementation of magnet schools designed to reduce minority student isolation in south Fort Wayne and expand academic choice for all students. *Magnet Schools Assistance Program* funds will cover the following costs:

- Development of magnets that improve interaction among a diverse student population;
- Implementation of innovative, thematic, career-connected curricula and aligned student assessments across five magnet schools – with particular focus on STEM / STEAM content;
- Recruiting and marketing efforts to ensure diverse participation in magnet programs;
- Staff development focused on both content knowledge and pedagogy;
- Technology integration across all grade levels, themes and curricular subjects;
- Parental and community involvement activities, and
- Administration and evaluation of grant-funded programs.

By supporting the development of five excellent magnet options (1 early childhood center, 2 elementary schools, 1 middle school and 1 high school) – each focused on specific school-to-career connection in a themed magnet setting – MSAP funding will help FWCS demonstrate to the community that the magnet school concept is a viable and powerful means of reducing racial isolation in targeted schools and the district. Enhanced community confidence will help to sustain meaningful integration, in spite of transportation and other fiscal challenges. Magnet funds will be used to acquire appropriate teaching and learning materials that facilitate interactive, technology-

based, career-driven education. The broad scope of the project requires: 1) rigorous approach to education that highlights advanced STEM / STEAM and Arts content; 2) use of updated learning materials, technology and equipment; and 3) comprehensive teacher quality enhancement to ensure students receive exceptional instruction in an environment driven by high expectations for all. Significant start-up costs are beyond the district's tight budgets:

***SEEK* Schools**	**Current Attendance**	**Magnet Capacity**	**Magnet Theme**	**Total Budget**	**Total Cost / Student**	**Annual Cost / Student**
Irwin	285	306	STEM	$2,177,413	$7,116	$1,423
Young	241	342	STEAM	$2,871,222	$8,395	$1,679
Weisser	562	565	STEAM	$3,178,556	$5,626	$1,125
Memorial	599	823	STEAM	$3,647,266	$4,432	$886
South	1413	400	STEAM	$3,119,384	$7,798	$1,560
TOTALS	**3,100**	**2,436**		**$14,993,841**	**$6,673**	**$1,335**

(b) The resources available to applicant if funds not provided.

Successful magnet school programs attract students of all races through quality academic programs of high interest to students and their families. Yet, such enticing, high-quality programs come with the substantial costs of designing and aligning innovative curricula, providing staff development, acquiring appropriate materials to deliver theme-based curricula and aggressively marketing magnet programs to motivate students to leave neighborhood schools and attend magnets. Only when resources are available to support the vision can the concept become viable and then, with demonstrated effectiveness, self-supporting. Fort Wayne Community Schools has committed significant district funds over the last four decades, initiating magnet schools and programs embedded in current elementary and middle / intermediate schools and *Programs of Study* in high schools. These programs have stretched FWCS budgets to the limit. Funding is decreasing during tough economic times and community confidence in public education is waning as charter schools, parochial schools and voucher programs compete to enroll FWCS students. District enrollment has declined 2,963 students since the first charter school was opened in Allen County in 2002. In spite

of the challenges, FWCS resources will continue to be used to support: (a) data-driven improvement for schools; (b) tutoring, credit recovery and intervention programs for low-performing students; (c) technology-infused instruction to support achievement, including equipment acquisition, staff development and technical support; (d) teacher quality improvement that focuses on content knowledge and pedagogy; (e) assessment initiatives that support student achievement in a standards-based learning environment; and (f) a comprehensive administrator / teacher effectiveness assessment protocol to ensure all students are taught by effective and highly effective educators. FWCS lacks resources to fund a MSAP project of the scope proposed. Funds obtained from this grant will address school and community stakeholder needs while demonstrating commitment to reducing black student isolation, closing achievement gaps and increasing student achievement.

(c) The costs of the project exceed applicant resources.

Planning, startup and implementation costs to establish new and much-needed magnet schools (see budget) far exceed the availability of Fort Wayne Community Schools resources. The costs of launching and sustaining effective magnet programs are simply too prohibitive for the district to bear given the breadth of current school improvement initiatives, new teacher and administrator performance-based compensation directives and dwindling resources compounded by a declining local economy and tax base. MSAP funds are the only way that FWCS can afford to put these plans into action at a level of implementation that will yield meaningful results. The proposed magnet program is a necessary step toward achieving full equity in education and sustaining ongoing racial balance efforts. FWCS has exhausted limited financial resources needed to initiate new *Magnet Schools and Programs* in south Fort Wayne in an attempt to comply with voluntary, good faith, choice initiatives. Further, district buildings are in disrepair. On May 8, 2012, voters in the FWCS district overwhelmingly approved a $119 million building plan to renovate 36 of the district's buildings. Phase I of the project has been completed and Phase II is underway. The Board of School Trustees recently found out that 25 district schools would be out of balance if they reverted back to neighborhood schools. The pressure is great to maintain the integrity of current efforts and expand rigorous, high-quality magnet options by: 1) Creating comprehensive PreK-12 Learning

Pathways so that every FWCS elementary school student will know what high school they are attending when pursuing a particular field of study or type of diploma; 2) Designing an aggressive marketing plan that allows FWCS to recapture students who've been lost to charter schools, parochial schools and the voucher program (Indiana has the most aggressive voucher legislation in the country). Traditional public school districts can no longer afford to react after they've lost students. Once a student and their family leaves the district for an alternative choice, it is significantly harder to get them to return. Without MSAP funding, FWCS will not be able to offer the comprehensive magnet schools and programs needed to remain competitive while promoting district improvement and diversity among a heterogeneous community of learners.

(d) The difficulty of effectively carrying out the approved plan.

Despite its voluntary status, FWCS continues to grapple with racial balance issues and low performance in racially and economically identifiable schools. Considering local funding limitations, it has been impossible to launch sufficient new programs to prevent the increase of (and reduce current levels of) black student isolation – district funds are allocated to maintaining current schools and cannot support development of new/improved choice options. The following factors undermine attempts to reduce black student isolation in Fort Wayne district schools:

- Community housing patterns are largely shaped by racial and/or economic characteristics.
- Black student enrollment has increased as white student enrollment has decreased because of "white flight" to private schools, parochial, charters or other areas outside of the district.
- Dwindling state and local funds do not meet the rising costs of education and an antiquated state funding formula allocates much less per FWCS student than in many other Indiana districts.
- Statewide, Indiana's voucher program (Choice Scholarship) served 34,299 students this academic year; nearly 14% of those were FWCS students (4,684). Since its inception in 2011, FWCS has lost 13,049 students to vouchers, per IN Finance Office Annual Report (2016).
- FWCS is launching new performance-based compensation and teacher assessment protocols – in compliance with state initiatives – that limits availability of funds to support new magnets.

To meet the challenge of fully balancing schools, FWCS must recruit and retain non-minority students into racially identifiable schools while providing quality programming to keep students at racially balanced schools (current districtwide racial balance: 45% white; 24% black; the greater Fort Wayne community is 74% white and 15% black). Current research regarding magnet schools indicates that it is often easier to attract students to a magnet at the elementary and middle school levels, before social groups become a major influence in school selection. Four of the five proposed magnet sites are designed to attract students in early grades and to provide sustained programming in subsequent years through multi-grade level Learning Pathways (see *Plan of Operation*). However, since the project relies on new recruitment and voluntary student transfer based on thematic and career interests, it must address in its early promotional phase the following issues: 1) lack of public confidence in lower-performing schools; 2) transportation to non-neighborhood schools; and 3) perception of threat to personal safety outside of familiar neighborhoods. MSAP grant funds will enable FWCS to create and implement high quality, standards-based, thematic programs that help change prevailing community biases. Only with quality programs, quality staff and quality materials will public confidence rise to the levels needed to implement the approved plan and the proposed project. Resources from MSAP will enable Fort Wayne Community Schools to effectively implement its voluntary, state-monitored desegregation plan through the development of five quality magnets (4 revised whole school and 1 new academy), each holding the promise of reversing the ever-present trend toward increased minority group isolation. Four of the schools will create a PreK-12 Arts Pathway in a city that is known for its many contributions to the art world - whether acting (Shelly Long, Carole Lombard, Dick York), music (Heather Headley, Joey Allen, Petra), fashion design (Bill Blass), writing (Stephen King, Charlie Savage), architecture (Eric Kuhne, Alvin Strauss, Brentwood Tolan), drawing (Gray Morrow, Dick Moores, John Hambrock and Richard "Grass" Green), photography (David & Peter Turnley), communication (Nancy Snyderman, Chris Schenkel, Hilliard Gates) and more. Through implementation of ***SEEK: Successful Equity, Excellent Kids!***, FWCS will increase academic rigor, provide outstanding educational experiences across PreK – 12 Learning Pathways and promote equal access for all.

	content or teacher metacognition alone" promotes positive outcomes.
Relevance to Project	• FWCS proposes five magnet schools (one STEM and four STEAM schools linked across vertically aligned Learning Pathways [see *Project Design*]) to promote transfer of youth to rigorous magnets and improve instruction in low-performing Priority and Focus Schools (see *Competitive Priority # 1*). Implementation of STEM and STEAM magnet schools will include extensive professional development (more than 30 hours per year) for educators across schools in science, technology, engineering, mathematics, arts and validated, research-based instructional models with a strong STEM and STEAM framework. Rigorous, sustained professional development – linked to educator effectiveness evaluation protocols and annual Individual Growth Plans (see *Project Design* / *Personnel*) – will promote educator quality improvement, enhanced classroom instruction and increased student achievement in core subjects and state assessments. *SEEK* educators will utilize evidence-based *Northwest Evaluation Association Measures of Academic Progress* assessment to measure student performance and align instruction to student learning needs.

COMPETITIVE PRIORITY 3 – see required Table 5 in Appendix.

PRIORITY 4 – INCREASING RACIAL INTEGRATION/SOCIOECONOMIC DIVERSITY

Fort Wayne Community Schools has struggled with school desegregation since efforts promoting integration gained widespread public and legal support, decades ago. The school community, Board of Education, district administrators, teachers and staff are dedicated to providing all students with equal access to high-quality education experiences, yet patterns persist in Fort Wayne communities that impede integration of schools through family mobility. Ongoing de facto segregation of historically black schools is the result of persistent racial isolation in neighborhoods across Fort Wayne. Historic housing patterns and longstanding economic factors limiting the social mobility of low-income families overwhelmingly represented by black families impacted by generations of oppression and limited opportunity – continue to influence enrollment in Fort Wayne Community Schools, particularly schools targeted for *SEEK* magnet programs. FWCS recognizes the need to break cycles of de facto segregation and seeks to diversify *SEEK* magnet schools and feeder schools through implementation of magnet programs that motivate students and families to alter neighborhood school enrollment in favor of

appealing academic choices aligned to student learning interests and academic goals. **Racial Integration:** Research is clear that racial integration of schools leads to positive outcomes for students of all races (Wells, Fox & Cordoco-Cobo, 2016). Racially diverse learning environments have positive impacts on academic achievement for students of all races and students of color achieve at higher levels in racially diverse schools than in segregated schools (Hallinan, 1998; Linn & Welner, 2007). In addition to promoting positive learning outcomes, racially diverse schools increase positive interactions among diverse groups that lead to increased comfort with peers from different racial and ethnic backgrounds (Pettigrew & Tropp, 2006). Attending racially diverse schools also increases positive life outcomes, including increased education and career attainment, higher college quality, higher earnings, reduced likelihood of incarceration and improved health (Johnson, 2011). The benefits of racial integration are clear; Fort Wayne Community Schools will improve racial diversity in racially identifiable schools through magnet choice options. **Socio-economic Integration:** Research demonstrates that, like racial segregation, socio-economic segregation in schools leads to negative outcomes for students attending high-poverty schools. (Ayscue, Frankenver & Siegel-Hawley, 2017). Results of a randomized control study demonstrate that low-income students randomly assigned to attend high-income schools outperformed low-income peers attending low-income schools (Schwartz, 2010). Similarly, high-income students who attend low-income schools attain lower academic achievement standards than high-income students attending high-income schools (Rumberger & Palardy, 2005). Students attending high-income schools are 70% more likely to enroll in four-year colleges than students enrolled in high-poverty schools (Palardy, 2013). Socio-economic status is a strong indicator of potential academic success and education attainment; students enrolled in unbalanced, high-poverty schools are more likely to achieve lower standards of academic success than peers attending higher-income or socio-economically diverse schools (Ayscue, Frankenver & Siegel-Hawley, 2017). The benefits of socio-economic diversity in schools are clear; Fort Wayne Community Schools will promote increased socio-economic diversity in five schools to reduce equity gaps distinguishing low income and high income students. ***SEEK* Desegregation Strategies:** In response to research confirming the well-documented assertions that both racial and socio-economic segregation in schools leads to achievement gaps among subgroups, FWCS proposes

an MSAP grant to minimize the negative impact of school segregation through academic choice driven by race-neutral targeted recruitment efforts (see Desegregation and Competitive Priority # 3). *SEEK* will launch and sustain magnet schools designed to increase racial and socio-economic diversity, help targeted schools maintain voluntary desegregation plan goals compared to district racial balance (+ / - 15% of district enrollment composition of 16% Hispanic, 24% black, 45% white students) and improve academic choice options for students and families:

- **Irwin Elementary School:** proposed *SEEK* magnet school is racially (black student 52% enrollment) isolated compared to the racial balance formula guiding the FWCS Voluntary Desegregation Plan.
- **South Side High School:** proposed *SEEK* magnet school is racially unbalanced for white students (19% white enrollment) and nearing enrollment imbalance for both black and Hispanic students (36% black / 30% Hispanic) compared to the FWCS Voluntary Desegregation Plan.
- **South Side High School:** proposed *SEEK* magnet school is socio-economically isolated compared to average district Free and Reduced Lunch eligibility rate (South Side High School 79.8% F / R Lunch rate compared to FWCS 65% F / R Lunch rate).
- **Memorial Park Middle School:** proposed *SEEK* magnet school a higher performing *SEEK* magnet – is both racially balanced and socio-economically balanced and will serve as a higher-performing alternative for students zoned to attend either racially or socio-economically isolated / identifiable schools and provides balanced school vertically aligned to unbalanced South Side High through STEAM Learning Pathway to promote balance in upper grade levels.
- **Weisser Park Elementary School:** proposed *SEEK* magnet school a higher performing *SEEK* magnet is both racially balanced and socio-economically balanced and will serve as a higher-performing alternative for students zoned to attend either racially or socio-economically isolated / identifiable schools and provides balanced school vertically aligned to unbalanced South Side High through STEAM Learning Pathway to promote balance in upper grade levels.

- **Whitney Young Early Childhood Center:** proposed *SEEK* magnet early childhood center is both racially balanced and socio-economically balanced and is vertically aligned to unbalanced South Side High through STEAM Learning Pathway to promote balance in upper grade levels.

Implementation of *SEEK* will launch and sustain innovative, high-quality magnet schools in racially segregated and socio-economically segregated schools to promote intra-district transfer of students leading to increased racial and socio-economic diversity in Fort Wayne schools. Efforts to diversify schools reflects the intentions of FWCS stakeholders to reduce equity gaps distinguishing racial and socio-economic subgroups and increase positive academic / social outcomes for all Fort Wayne youth.

(A) DESEGREGATION.

It was 1971 and everything was about to change in Fort Wayne Community Schools. That was the year the FWCS board yielded to pressures from many in the black community to end de facto segregation in the city's high schools. The board closed Central High School where all but a few of the minority students attended, and opened Northrop and Wayne high schools. District lines were redrawn and busing began. Later would come pressure to do something about the elementary and middle schools, leading to the implementation of magnet schools to voluntarily achieve racial balance. Starting At the Beginning: When Central opened in 1864 as Fort Wayne High School, it was the only public high school, competing with dozens of private schools, mostly parochial. Throughout the latter part of the nineteenth century, the school was not just an educational institution, it was a social and cultural hangout as well. As parochial schools lost their influence, attendance at Central High School soared. Instead of taking three years to add 200 students, Central was doing it every year. The school was bulging at the seams when South Side was opened in 1922 and North Side joined the mix in 1927. Athletic rivalries grew among the schools and school spirit was born. This lasted for approximately 30 years and then in the early 1960s, things started to change. People left the inner city for homes in quickly-growing suburbs. Central's enrollment started shrinking. In 1964, Central High School was half black and half white. There were only a few blacks at the other high schools, mostly South Side. During this time, many in the civil rights community were calling for integration. By 1968, Central's enrollment had dropped to just over 900 students (56% black) and the unrest was coming to a head. In September 1969, black residents

boycotted four central-city schools. Classrooms had as few as one student per class because black parents took their children out to attend 'Freedom Schools' in six black churches. The action resulted in the state superintendent for education coming to Fort Wayne to negotiate a settlement. When the Board of School Trustees decided, in 1971, that they wanted a vocational school, they closed Central and reopened it as the Anthis Career Center. In addition, they opened two brand new, identical high schools, Northrop on the north side of Fort Wayne and Wayne High School on the south. The transition year was a tough one for Central students who were in the minority and felt unwelcomed in their new schools; disturbances broke out at Wayne, North Side and Northrop. While things were tense in FWCS, it could have been much worse. Nationally, the attempts to bring black and white students together by forcing racial balance were met with resistance on both sides. The country was shocked when violent confrontations over school integration took place, not in the deep South, but in Boston. In 1977, the FWCS Board of School Trustees reached an out of court settlement with black parents over first-phase desegregation plans, agreeing to open magnet schools in the central city. The Indiana Advisory Committee advised the U.S. Commission on Civil Rights that FWCS had successfully desegregated its junior and senior high schools. A new initiative, *The Summit Program*, would offer special classes to bring whites into the inner city. However, at the close of the 1978-79 school year, FWCS had failed to open the magnet schools required in the 1977 agreement. In 1979 (38 years ago), two principals were appointed - at Young School (K-5) and Memorial Park (6-8) - and the first two FWCS magnet schools were born. The schools would prove to be too little too late as black and white parents and their students formed a group called Parents for Quality Education with Integration, Inc. (PQEI) and formally brought a lawsuit against FWCS and "State Defendants" (state of Indiana, the Attorney General's office, State Superintendent of Public Instruction and Indiana Department of Education) on behalf of present and future children and parents who resided within the boundaries of FWCS. The complaint charged that FWCS and State Defendants established and maintained a racially segregated public school system. The FWCS Defendants and State Defendants denied liability. The Court entered a consent decree in 1990, approving a settlement in which FWCS "agreed to and has racially balanced all

FWCS elementary schools within a range of 10%-50% black enrollment." The settlement provided for magnet schools and for programs to improve education for at-risk students. Since that time, Fort Wayne has opened, with a combination of 1991, 1993 and 2001 MSAP grant funds and district general funds which have kept the majority of these magnet schools and programs viable for more than a quarter of a century - Bunche (Montessori); Young (Arts); Croninger (Communications); Irwin (Math & Science); Weisser Park (Arts); Towles (Montessori - 2006); Memorial Park (Arts); Brentwood (Latin); Franke Park (NASA Explorer) and Lindley (Spanish Immersion). Fort Wayne Community Schools has not requested MSAP funding since 2001. A recent study commissioned by the FWCS Board of School Trustees and conducted by DeJong-Richter, a well-respected school facilities planner, found that 25 of 50 FWCS schools, ie: - one of every two of the district's schools - would be out of balance if they reverted back to neighborhood schools. Beginning with the 2015-2016 school year, a decline in funding caused FWCS to enforce No Transportation Zones. Students living within established proximities to schools [1 mile for elementary; 1.5 miles for middle and 2 miles for high school], as well as those attending a school other than their geographically-assigned school are no longer transported by FWCS yellow buses. This rule does not impact students attending magnet schools and high school programs of study. In just one year since its implementation, we can see changes in the balance in our schools. Fort Wayne Community Schools has a critical need for funds to refurbish four worn out, whole school magnets and create one school-within-a-school high school academy that completes a popular STEAM Arts Pathway for three of the other four magnets. ***SEEK: Successful Equity, Excellent Kids!*** will help FWCS ensure equal access to high quality education for all students and promote racial and socio-economic diversity in schools. The chart below identifies current racial balance in Fort Wayne Community Schools; individual schools that deviate + / - 15% from district enrollment balances are considered racially-identifiable and out of compliance with provisions of the FWCS Desegregation Plan:

Fort Wayne Community Schools Racial Subgroup Enrollment Balance (October 2016)						
%American Indian /	**% Asian**	**%Black or African**	**%Hispanic**	**% Native Hawaiian / Pacific Islander**	**% White**	**% Two or More**

Fort Wayne Community Schools, LEA & fiscal agent

Alaskan Native		American				Races
0.9%	5%	24%	16%	0.1%	45%	9%

(1) The effectiveness of its plan to recruit students from different social, economic, ethnic, and racial backgrounds into the magnet schools.

Fort Wayne Community Schools seeks *Magnet Schools Assistance Program* grant funds to launch and sustain five, high-quality, rigorous, STEM / STEAM focused magnet schools that diversify learning options for Fort Wayne students (see *Project Design* for Project Goals and School Profiles).

***SEEK* Magnet Schools, Themes and Enrollment Projections 2017-2022**					
***SEEK* School**	**Magnet Theme**	**Grades**	**Status**	**Current Black / Free & Reduced Enrollment**	**2022 Black / Free & Reduced Enrollment**
Irwin*	STEM: *Project Lead the Way*	K - 5	Whole School	Black: 51.6% F/R Lunch: 60.4%	Black: 38.6% F/R Lunch: 47.9%
Young	STEAM: *Artful Learning*	PreK - K	Whole School	Black: 30.3% F/R Lunch: 60.3%	Black: 27.8% F/R Lunch: 58.1%
Weisser	STEAM: *Artful Learning*	K – 5	Whole School	Black: 32.7% F/R Lunch: 60.5%	Black: 33.5% F/R Lunch: 60.6%
Memorial	STEAM: *Artful Learning*	6 – 8	Whole School	Black: 25.9% F/R Lunch: 64.5%	Black: 24.5% F/R Lunch: 59.9%
South**	STEAM: *Artful Learning*	9 – 12	Academy	Black: 36.9% F/R Lunch: 79.8%	Black: 29.3% F/R Lunch: 72.5%

*Irwin will strive to reduce Black student enrollment;

**South Side will strive to reduce Black and Hispanic enrollment.

SEEK will provide FWCS the resources to further voluntary desegregation goals, increase student access to high-quality education choices and equip youth with the skills to succeed in postsecondary education and careers. The *SEEK* Planning Team designed two strategies to promote diversity: 1) Marketing, Recruitment and Placement Plan; and 2) Targeted Recruitment from Feeder Schools.

(1) *SEEK* Marketing, Recruitment and Placement Plan: The district marketing, recruitment and placement strategy includes the following steps to recruit students from different social, economic, ethnic and racial backgrounds into proposed magnet schools:

Step 1 – Marketing and Recruitment: Initiate and sustain a rigorous marketing and recruitment strategy that reaches students and families from all geographic locations / neighborhoods and from all socio-economic groups to inform constituents of magnet school options and the application procedures that determine entry into magnet schools, including:

1. Monthly presentations in critical neighborhoods to generate diverse interest among students and parents for magnet school applications, enrollment (beginning Fall 2017 & ongoing in majority white communities to decrease black student isolation in racially-identifiable schools and in affluent communities to increase socio-economic diversity in low-income Title 1 schools).
2. School open house programs highlighting the unique instructional methods utilized to infuse theme-based instruction in all core subjects and school programs (Fall and Spring).
3. Presentations to leadership and civic organizations that inform parents and community of the methods, strategies and benefits of *SEEK* academic options (quarterly).
4. Social media outreach to generate positive community perceptions of *SEEK* magnet schools across FWCS communities, increase applications for admissions, entice families with students enrolled in charter/private/parochial schools to consider enrollment in FWCS magnet programs.
5. Media education including newspaper articles, public service announcements on local radio/ television outlets and billboards (ongoing – media outreach will begin during winter 2017).
6. Annual *FWCS School Choice Fair* – highlighting magnet school application process for district- and MSAP-funded options (January of each year).
7. Branding campaign utilizing school-specific logos and brochures to increase visibility of school themes and provide parents with culturally-relevant materials that reflect unique opportunities.

Step 2 – Student Application: Facilitate the successful application of all interested youth and families regardless of race, color or national origin to ensure equal opportunity to participate in FWCS *SEEK* magnet schools (FWCS will utilize online application procedure for all magnets).

1. All students who wish to attend FWCS magnet schools must complete online applications.
2. Families that do not have access to the Internet at home may complete applications at the FWCS Schools-of-Choice Office or any school library, where they can receive assistance as needed to complete/submit enrollment applications (some parents unable to see, read, use computers, etc.).
3. Parents, caregivers and / or applicant students are required to disclose eligibility status for free or reduced lunches – responses are mandatory in order to be considered for placement.

Step 3 – Student Placement: Place students in schools as indicated on applications to the extent of program capacity. If the number of applicants for a magnet program exceeds capacity at a chosen school, FWCS will employ random lottery system to assign youth to selected schools.

1. Based on capacity, all applicants gain admission unless applications exceed school and/or grade level space. If applications exceed capacity, a random lottery system will determine placement.
2. In order to preserve the integrity of the student placement process and to protect parents, caregivers and students, free or reduced lunch status is never requested via phone or in person. Applicants only designate status on the online application form. Further, lists are never publicized or referred to as "Free/Reduced Group" and "Non-Free/Reduced Group."
3. Upon placement, students will remain in chosen schools unless they apply to an alternative.

Step 4 – Lottery: Utilize race-neutral lottery system to select students for enrollment in programs for which applicants exceed program capacity (school or grade level capacity). The following is a description of the lottery process and its role in the selection of students for enrollment in grade levels pre-kindergarten through twelve determined to be oversubscribed, meaning more applicants, than space available.

1. Lottery applicants have been arranged in a student number sequence which will produce three separate listings for lottery selection. A Random Number Assignment Program will then assign three random numbers to each applicant according to ethnicity and priority groups.
2. Applicants are initially divided into two ethnic groups for lottery processing: **majority** and **minority** groups. Majority groups include all ethnicities except African American.

3. After random number assignments are completed, each applicant has been placed in one of the priority groups in the order shown on the next page. Three separate listings for lottery selection have been run arranging students in various sequence based on the assigned random number within each priority group.
4. Prior to conducting the lottery, the number of openings in each oversubscribed grade level has been determined by space availability. When the lottery is conducted, an audience participant will choose one of the three listings for each ethnic group. The number of openings, at this time, is the cutoff point on the listing; those above the cutoff will be enrolled, and the students below the cutoff point are on the waiting list.
5. During the announcement part of the lottery, it is only announced whether there is a lottery for each grade level, a waiting list, and so forth. Should a parent desire to know their child's application status, they would remain in the board room after the completion of the lottery and FWCS gladly answers any questions.

Priority will be given to students from the following groups to ensure equal access and achievement of enrollment goals (see *Project Design* section for school enrollment projections):

1. Students will be selected for admission into magnet schools (free / reduced lunch status as classification criteria) based on target enrollment balances for each participating school.
2. Applicant students with a sibling already enrolled in selected elementary school (all students who apply for placement in an elementary magnet school with a sibling enrolled in chosen school will be granted placement to promote family continuity and engagement).
3. Continuity of enrollment in theme-based Learning Pathways (for example, youth attending elementary STEM programs will be given priority placement in STEM middle programs).

Fort Wayne Community Schools will manage and implement a MSAP grant program that offers high quality education programs to all students, regardless of race, color, religion, ethnicity, sexual orientation or national origin. Placement of students in magnet schools based on race-neutral procedures will ensure district compliance with all U.S. Department of Education regulations and Title VI of the Civil Rights Act of 1964 and its regulations while allowing FWCS to promote socio-

economic diversity. Students from all socio-economic backgrounds and geographic areas of the district will be encouraged to apply to and will be selected to participate in magnets based on race-neutral procedures. Students and families will be supported in their efforts to make strong educational choices that provide Fort Wayne youth with opportunities to pursue excellent elementary, middle and high school educations. Diversity will allow students to grow in learning environments that reflect the demographic composition of school communities and beyond.

(2) Targeted Recruitment from Feeder Schools: During project planning, the *SEEK* Planning Team reviewed district enrollment data and future enrollment projections in relation to voluntary desegregation goals and academic performance measures to select *SEEK* Magnet Schools and targeted feeder schools from which students will be actively recruited. Selection of both magnet and feeder schools will help FWCS further desegregation efforts and improve academic achievement in lower-performing, complex schools. While FWCS is an open enrollment district (students from any school can apply to attend any School-of-Choice or Magnet program), the following chart identifies *SEEK* Magnets and targeted feeder schools:

***SEEK*: Plan of Operation Targeted Feeder Schools**		
Magnet	**Feeder School**	**Feeder School Rationale**
• Irwin Elementary	• Croninger and Shambaugh (recruit white, non-F/R lunch applicants)	• Targeted marketing and recruitment efforts for Irwin will increase white and non-free / reduced lunch applicants to diversify the socio-economic and racial profiles of *SEEK* magnet schools impacted by ongoing black student isolation across south Fort Wayne and chronic low performance (Irwin: 51.6% black; 60.4% F/R Lunch).
• Whitney Young Early Childhood Center	• Arlington and St. Joe Central • (recruit white, non-F/R lunch applicants)	• Targeted marketing/recruitment efforts for Whitney Young ECC will increase white and non-free / reduced lunch applicants to diversify the socio-economic / racial profiles of *SEEK* magnets impacted by black student isolation across south Fort Wayne and low performance (Whitney Young ECC: 30.3% black; 60.3% F/R Lunch).
• Weisser	Maintain racial	• Targeted marketing/recruitment efforts for Weisser Park will

Park Elementary	and socio-economic balance and serve as higher performing magnet	work to maintain the existing socio-economic / racial balance of this south Fort Wayne school and serve in *SEEK* as a higher performing magnet school to attract diverse students (Weisser Park: 32.7% black; 60.5% F/R Lunch).
• Memorial Park Middle School	• Blackhawk and Jefferson (recruit white and non-F/R lunch applicants)	• Targeted marketing/recruitment efforts for Memorial Park Middle School will increase white and non-free / reduced lunch applicants to diversify the socio-economic / racial profiles of *SEEK* magnets impacted by black student isolation across south Fort Wayne and low performance (Memorial Park Middle: 25.9% black; 64.5% F/R Lunch).
• South Side High School	• Northrop and Snider (recruit white, non-F/R lunch	• Targeted marketing/recruitment for South Side High School will increase white and non-free / reduced lunch applicants to diversify the socio-economic / racial profiles of *SEEK* magnets impacted by black student isolation across south Fort Wayne and chronic low performance (South Side High School: 36.9% black; 79.8% F/R Lunch).

Implementation of a comprehensive marketing / recruitment plan will help FWCS achieve goals and objectives of the project by ensuring sufficiently diverse applicant pools of prospective magnet school students enter the random lottery placement process and ultimately enroll in magnets. These strategies will increase socio-economic and racial diversity in all Fort Wayne schools, reduce black student isolation and promote increased achievement rates across the district.

(2) Interaction among students of different social, economic, ethnic, and racial backgrounds in classroom activities, extracurricular activities, or other activities in the magnet schools.

Through implementation of *SEEK*, which will build upon the success of previous *Magnet Schools Assistance Program* grants, FWCS will launch three design strategies to promote desegregation and increased interaction among students of diverse racial and socio-economic backgrounds: (a) High-quality Academic Programs and Choice; (b) Comprehensive Marketing and Recruitment and (c) Collaborative Learning Environment. **(a) High-quality Academic Programs and Choice:** Implementation of *SEEK* will create K – 12 Learning Pathways that offer rigorous curricula in historically segregated schools in an effort to improve instruction for all students and reduce black

student isolation (see *Project Design* for Learning Pathway details). All proposed magnet schools were approved by the FWCS Board of Education and the district's attorney to ensure compliance with voluntary desegregation plan (see *Appendix* for Board Resolution).

***SEEK* Magnet Schools and Themes 2016-2019**			
School	**Magnet Theme**	**Grades**	**Status**
Irwin Elementary	STEM: *Project Lead the Way*	K – 5	Whole School
Whitney Young ECC	STEAM: *Artful Learning*	PreK– K	Whole School
Weisser Park Elementary	STEAM: *Artful Learning*	K – 5	Whole School
Memorial Park Middle	STEAM: *Artful Learning*	6 – 8	Whole School
South Side High School	STEAM: *Artful Learning*	9 – 12	Academy

High-quality learning options will encourage students and families to pursue enrollment in schools that best meet their interests, skills and academic goals, regardless of location in the district, historical enrollment patterns and dated community perceptions. High-quality academic programs taught by highly effective educators will serve as catalysts for change, reduce minority group isolation by promoting inter-district transfer of students to *SEEK* schools aligned to academic preferences and foster interaction among a more racially and socioeconomically diverse student body enrolled in proposed magnets. Implementation of *SEEK* magnet programs will promote increased diversity in schools and increased interaction among students from different social, economic, ethnic, and racial backgrounds through school choice. **(b) Comprehensive marketing and recruitment.** *SEEK* will offer students exciting, rigorous academic options supported by a comprehensive and effective marketing, recruitment and placement plan to generate and sustain student / family interest in choices. *SEEK* continues an effective strategy that was developed to settle a 1977 lawsuit. The FWCS Marketing, Recruitment and Placement Plan (see *Desegregation (1)* section and *Competitive Priority #3*) includes multiple components to reduce black student isolation in *SEEK* schools and increase interaction of students from diverse backgrounds through increased heterogeneity of students enrolled in *SEEK* schools, including *SEEK* Marketing; *SEEK* Recruitment; *SEEK* Application and *SEEK* Student Selection:

- ***SEEK* Marketing:** To promote racial and socio-economic diversity in *SEEK* magnets, FWCS will complete a comprehensive marketing effort to ensure all FWCS school stakeholders are fully informed of *SEEK* education options. A Marketing and Recruitment Specialist, paid by district with

General Funds, will develop culturally-appropriate materials that inform stakeholders of new choice options; disseminate materials in all FWCS schools and throughout the community; create and update social media accounts that include extensive descriptions of magnet programs / application procedures / student placement protocols; organize and host community information events / Magnet Fairs in Fort Wayne neighborhoods in collaboration with key community partners (churches, community centers, Boys and Girls Club, United Way, IPFW) and promote equal access by translating materials from English to Spanish, Chinese, Vietnamese, Arabic and multiple other languages, as needed, to reduce cultural barriers impeding participation.

- ***SEEK* Recruitment:** Recruitment of student applicants for *SEEK* magnets will include both universal and targeted strategies. Universal Recruitment: FWCS will implement district-wide recruitment efforts to maximize the number of Fort Wayne students and families who apply for enrollment in *SEEK* magnet schools. Universal strategies will include the annual *Winter Showcase* Magnet Fair, social media outreach, web / print / broadcast media marketing, placement of recruitment materials in school newspapers and parent newsletters and dissemination of magnet school information during parent-teacher conferences and school events. Targeted Recruitment: The *SEEK* Marketing and Recruitment Specialist will collaborate with Focus Teachers (see *Personnel* section) to conduct targeted recruitment in priority neighborhoods and schools throughout the district to maximize the number of student applicants for magnet schools from specific racial and socio-economic groups aligned to voluntary desegregation goals. Targeted recruitment will occur in majority white schools across the district and neighborhoods where students predominantly attend charter or non-public schools to encourage white student applicants for enrollment in *SEEK* magnet schools (one of five *SEEK* schools exceed black student enrollment thresholds and are impacted by black student isolation). Targeted recruitment activities will also seek to increase the number of non-free / reduced lunch eligible students who apply for magnet enrollment in an effort to increase socio-economic diversity and increase academic performance in impoverished, low-performing schools.
- ***SEEK* Application:** FWCS implements a district-wide Schools-of-Choice application process that provides students and families access to all district funded Schools-of-Choice and all federally funded Magnet Schools. The district will extend this tested, revised and community-accepted

process to proposed *SEEK* magnets to promote consistency and maintain familiarity with application protocols. The application was developed by the district as a way to facilitate desegregation in racially identifiable schools, reduce black student isolation and promote racial and socio-economic diversity across the district. Student enrollment for all *SEEK* magnet schools will be race neutral and will not be impacted by prior academic performance placement will be based on a random student lottery.

- ***SEEK* Student Selection:** Student selection for *SEEK* magnets will follow a multi-step process (see *Competitive Priority # 3*) based on factors including school capacity and a random lottery that is both race neutral and free from academic performance eligibility standards. Achievement of race and socio-economic diversity objectives will be facilitated through targeted marketing / recruitment in critical feeder school communities to ensure applicant pools for magnets reflect enrollment targets.

The comprehensive FWCS plan to ensure diverse enrollment in *SEEK* magnet schools will increase interaction among students from different backgrounds by reconfiguring enrollment balances in target schools / feeder schools and enhance equitable access to high quality education programs.

(c) Collaborative Learning Environment: Implementation of *SEEK* will transform proposed magnet schools into centers for rigorous and advanced learning that promote student success and create learning environments that celebrate diversity. Each proposed magnet school includes instructional methodologies driven by project-based and inquiry-based principles that succeed only through sustained student participation in critical thinking, questioning, group study and peer-assisted learning. Proposed instructional strategies (*Artful Learning*, *Project Lead the Way*, *Engineering is Elementary*, *Discovery Education*, Buck Institute Project-Based Learning) help schools and teachers create learning environments that encourage students to share ideas, thoughts, solutions to problems and creative expression. All students will engage in interactive learning and all students will be encouraged to learn from their peers and to develop bonds with peers through shared education experiences. Extracurricular and enrichment activities (Robotics Clubs, Dance / Music Groups, Technology Clubs, Field Study Excursions, etc.) will engage students in group learning and social interactions that break down racial and socio-economic barriers and promote diversity through respect. Creative expression through the

arts will increase student self-confidence and help students find common ground despite differences and learn from each other during positive classroom and social interactions because of their differences. Through *SEEK*, FWCS will attract diverse students to racially and socio-economically unbalanced schools and then create learning environments in magnet schools that promote the interaction of students and educators from diverse social, economic, ethnic, and racial backgrounds in shared learning.

(3) Equal access for those traditionally underrepresented in courses / activities offered as part of magnet: women and girls in mathematics, science, or technology courses and disabled students.

Fort Wayne Community Schools has struggled with racial inequality for much of its history. Ensuring equal access is critical to district sustainability and to serving the best interests of students and families. FWCS will take all steps necessary to ensure barriers that impede equitable access or participation by gender, race, national origin, color, disability, religion, sexual orientation, gender identity, veteran status, age or other protected class do not prohibit or limit the access of any individual – student, parent, staff or community partner – to district-sponsored magnet programs and / or other district-funded services and activities.

- Students are accepted to district magnet schools through a purely random lottery process.
- The district will provide targeted recruitment activities, including Magnet Fairs, parent nights, booths at community events and gathering places and strategic advertising to reach all facets of the Fort Wayne community and generate diverse interest in magnet schools.
- The FWCS Public Information Office communicates all school events, programs, and parent / family activities to a wide audience using local and regional media and district web portal.
- Printed information is available in multiple languages (English, Spanish, Vietnamese, Chinese, Arabic) to serve the needs of multi-cultural students and families – FWCS has the largest Burmese settlement in the country and many families speak English as a second language.
- Through careful disaggregation of state assessment and academic performance data, student needs will be identified and unacceptable gaps in performance that distinguish race, gender and socio-economic subgroups will trigger appropriate intervention responses.

The district is seeking support through MSAP to enhance its efforts to eliminate minority group (black student) isolation by offering greater choice options for students and their parents and providing

curricula that is both challenging and engaging for all students. Fort Wayne schools are committed to help all students meet and exceed high standards that promote growth and success. Efforts to ensure equal access to services will include:

Strategy	Equal Access Approach
Advisory Board Subcommittee	• Equal Access Subcommittee – comprised of district administrators, school principals, counselors, teachers, support personnel, students and parents – will publish district-wide equity statement to ensure uniform enforcement of equal access expectations and will develop complaint process to deal with grievances. • Subcommittee will conduct surveys to assess educator, student, parent perceptions of equity in learning, identify equity gaps if they exist and propose strategies to close gaps.
Participant Recruitment	• Recruitment for participation in project services (student, educator, family) will provide equal access regardless of social, economic or demographic characteristics.
Project Marketing	• Fort Wayne Community Schools will disseminate all project materials in English, Vietnamese, Chinese, Spanish, etc. to eliminate language comprehension as a barrier to participation.
Closing Gender Equity Gaps	• Grant managers will work to ensure that *SEEK* programming reflects equity in technology, literacy, STEM and other content, engaging all genders in all activities. • Professional development will provide intentional focus – through validated curriculum framework (*Project Lead the Way, Engineering is Elementary, Artful Learning*) – on the engagement of girls in the study of STEM concepts and the role women have historically played and continue to play in emerging STEM and STEAM fields / careers. • Partnership with Indiana Purdue Fort Wayne (IPFW) will expose students to positive female role models engaged in STEM disciplines as researchers, professors and students to reduce perceived barriers to the success of girls and women in STEM study and careers. • FWCS will encourage female educators, to the extent possible, to lead extra-curricular and enrichment programs related to STEM and STEAM content to demonstrate to girls that women can and do lead in fields in which they are traditionally under-represented. • Magnet school principals and teachers will complete professional development offered by the

	Equity Assistance Center at The Education Alliance at Brown University to provide skills needed to engage traditionally under-represented students in learning and close gender equity gaps in academic programs and career pathways.
Closing Racial Equity Gaps	• Grant managers will work to ensure that *SEEK* programming reflects equity in technology, literacy, STEM and other content, engaging all genders in all activities. • Professional development will provide intentional focus – through validated curriculum framework (*Project Lead the Way, Engineering is Elementary, Artful Learning*) – on the engagement of minorities in the study of STEM concepts and the role minorities have historically played and continue to play in emerging STEM fields / careers. • Partnership with IPFW will expose students to positive minority role models engaged in STEM disciplines as researchers, professors and students to reduce perceived barriers to the success of minorities in STEM / STEAM study and careers. • FWCS will encourage minority educators, to the extent possible, to lead extra-curricular and enrichment programs related to STEM and STEAM content to demonstrate to youth that minorities can and do lead in fields in which they are traditionally under-represented. • Magnet school principals and teachers will complete professional development offered by the Equity Assistance Center at The Education Alliance at Brown University to provide skills needed to engage traditionally under-represented students in learning and close racial equity gaps in academic programs and career pathways.
Closing Special Ed Equity Gaps	• SE teachers will participate in professional development activities to ensure youth with special needs benefit from innovative education efforts. • Specialized equipment will be available in all classrooms to ensure full participation of students with physical, social, emotional and learning disabilities in academic programs. • Magnet school principals and teachers will complete professional development offered by the Equity Assistance Center at The Education Alliance at Brown University to provide skills needed to engage traditionally under-represented students in learning and close Special Education equity gaps in academic programs and career pathways.

Closing ELL Equity Gaps	• Teachers will participate in professional development activities to ensure youth with English Language Learners benefit from innovative education efforts. • Curriculum materials will be available in Spanish and other languages to increase access. • Magnet school principals and teachers will complete professional development offered by the Equity Assistance Center at The Education Alliance at Brown University to provide skills needed to engage traditionally under-represented students in learning and close English Language Learner equity gaps in academic programs and career pathways.

Cultural Appropriateness: FWCS will encourage culturally competent and linguistically appropriate exchanges and collaborations among families, professionals, students and communities – fostering equitable outcomes for all students and resulting in services that are responsive to issues of race, culture, gender, and social / economic status. The implementation Advisory Board (see *Personnel* section) will address issues of inequity and promote solutions to ensure open access to all services by breaking down cultural, social, economic, race and language barriers that impede participation. Because of high levels of limited English proficiency / illiteracy in impoverished Fort Wayne communities, all curricular and outreach programs will be available in multiple languages, including English, Spanish, Vietnamese, Chinese, et al – curriculum specialists will select culturally-appropriate versions of published curricula to ensure materials reflect the social, racial and cultural composition of schools. Culturally appropriate activities will include:

- Infusing the study of science, technology, engineering and math with gender inclusive content / examples to increase accessibility for girls and women and encouraging girls and women to pursue these fields in which they are traditionally underrepresented.
- Ensuring all programs make appropriate accommodations for participants with special physical, emotional and / or mental needs to promote equal access and full participation.
- Conducting outreach with community groups to assess education barriers with emphasis on outreach to black / impoverished neighborhood churches / community centers; and
- Assessing the needs of critically underserved populations, with input from the participants, to determine relevant activities that will generate student and family interest.

SEEK is designed to increase racial and socio-economic diversity in FWCS schools. All efforts will be made to ensure equal access to all FWCS schools and programs – promoting diversity and ensuring equity is critical to the success of *SEEK* and FWCS is dedicated to the success of *SEEK* and the success of Fort Wayne students.

(4) Effectiveness of other strategies for elimination, reduction, prevention of minority group isolation.

FWCS administrators, principals, educators, parents and elected members of the FWCS Board of Education collaborated to identify proposed magnet schools and carefully considered instructional theme options before finalizing *SEEK* strategies. Collaborative planning and decision-making ensured a diversity of perspectives were considered and increased stakeholder agreement of proposal details. During the planning process, stakeholders identified several structural and curricular alternatives. Alternatives were compared to identify options most likely to help FWCS achieve its Voluntary Desegregation Plan goals of reducing black student isolation and increasing socio-economic diversity in schools. Key voluntary desegregation strategies embedded in *SEEK* – supplementary to recruitment, marketing and placement protocols – include:

- **Strong Academic Record:** The Planning Task Force identified one Fort Wayne school – Weisser Park – that outperforms other district sites to provide students enrolled in lower-performing schools the option to attend rigorous magnet programs in schools supported by strong academic records. Weisser Park is supported by widespread community confidence in the quality of the school. Weisser Park is a racially-balanced school with free and reduced lunch rates below district-wide averages. Based on the need to maintain diversify and based on their strong reputation for school quality within the community, Planning Task Force members are eager to reinvigorate a rigorous magnet school that will offer desirable enrollment options for families throughout the district while diversifying sites currently out of balance compared to FWCS indicators.
- **Career-Aligned Magnet Themes:** The Planning Task Force researched effective magnet schools and researched current and projected demand in postsecondary education and career fields to ensure *SEEK* magnet themes are relevant today and will remain relevant in the future. Two content themes that fill gaps in current FWCS Schools-of-Choice options and align to postsecondary education and

high-demand careers will increase choice in Fort Wayne schools. *SEEK* themes – STEAM and STEM – reflect stakeholder interests and will offer high-quality, innovative programs that increase academic achievement and motivate youth to seek enrollment in proposed magnets. The appeal of instructional themes was identified by the Task Force as a critical factor impacting the success or failure of a magnet school and the success or failure of efforts to diversify student enrollment through choice. Themes that fail to excite students about learning will ultimately fail to generate sufficient applicants to fill magnet capacity and impact school enrollment profiles. Both STEAM and STEM promise to: (1) engage students in innovative, technology-rich, creative learning experiences; (2) motivate students and families to enroll in proposed magnet schools thereby promoting the achievement of Voluntary Desegregation Plan goals; (3) prepare youth to succeed in school and (4) encourage students to pursue postsecondary education and successful careers.

- **Learning Pathways:** The Planning Task Force identified magnet themes that will best meet the educational needs of students, increase academic achievement and promote diversity. *SEEK* will create vertically aligned Learning Pathways – a concept FWCS has been committed to since the inception of its Schools-of-Choice initiative – that provide students with the option to follow thematically and instructionally linked schools across multiple grade levels. *SEEK* schools are connected through two Learning Pathways – STEAM and STEM. The four schools linked together through the STEAM Pathway (Whitney Young Early Childhood - Weisser Park Elementary - Memorial Park Middle - South Side High) share a common need to maintain or decrease black student enrollment and economically disadvantaged student enrollment. The targeted elementary school - Irwin - proposed to join multiple STEM Pathways (Blackhawk STEM Middle to PLTW Snider or Northrop High OR Portage STEM Middle / Towles Intermediate New Tech to Wayne High School New Tech) shares a common need to increase both white student enrollment and non-economically disadvantaged student enrollment. The Learning Pathway approach allows students and families to complete multi-grade level educational experiences with vertically aligned content and learning strategies while simultaneously increasing the likelihood that FWCS can promote diversity in schools by attracting youth to Learning Pathways that connect schools with common diversity goals and academic offerings.

By offering high-quality academic programs in racially unbalanced schools and by adopting multiple strategies designed to attract students of diverse social, economic, ethnic and racial backgrounds to enroll in magnets, FWCS seeks to reduce black student isolation, promote socio-economic diversity, improve achievement and expand choice for all youth and families.

(B) QUALITY OF PROJECT DESIGN.

(1) Improving student academic achievement in the instructional areas offered by school.

Fort Wayne Community Schools proposes ***SEEK: Successful Equity, Excellent Kids!*** to reinvigorate four - create and sustain one: five magnet schools total - serving at-risk students in Fort Wayne, Indiana. Implementation of the project will promote socio-economic and racial diversity in FWCS by expanding choice options for youth enrolled in all district schools (FWCS is an open enrollment district – all students are eligible to apply for and enroll in any district school). Implementation of *SEEK* will meet the statutory requirements of the *Magnet Schools Assistance Program* as amended in the Every Student Succeeds Act (ESSA). Fort Wayne Community Schools – utilizing magnet schools serving Grades PreK through 12 – will promote desegregation of racially identifiable schools and increase interaction among students of different social, economic, ethnic and racial backgrounds [34 CFR 280.31]; improve academic achievement for all students across instructional programs at each magnet [4405(b)(1)(E)(i) and 4405(b)(1)(B) of ESSA]; implement high quality activities that support rigorous academic standards in core subjects; expand district efforts to improve teacher quality [34 CFR 75.210] and promote enhanced parent involvement in academic choice and decision-making [34 CFR 75.210].

***SEEK* Magnet Schools and Themes 2017 - 2022**			
School	**Magnet Theme**	**Grades**	**Status**
Irwin	STEM: *Project Lead The Way*	K - 5	Whole School
Whitney Young	STEAM: *Artful Learning*	PreK - K	Whole School
Weisser Park	STEAM: *Artful Learning*	K - 5	Whole School
Memorial Park	STEAM: *Artful Learning*	6 - 8	Whole School
South Side	STEAM: *Artful Learning*	9 - 12	School Within a School

SEEK will provide Fort Wayne Community Schools with the opportunity to improve academic achievement for students enrolled in proposed magnet schools and students from feeder schools seeking educational alternatives to zoned neighborhood schools. *SEEK* strategies to expand educational choice,

facilitate attainment of voluntary desegregation goals and increase student achievement for all students include: (a) Measurable Project Goals, Objectives and Outcomes; (b) Design Reflects Needs; (c) Design Reflects Purpose of MSAP Program; (d) Design Supported by Evidence of Promise and Research; and (e) Design Promotes Academic Achievement

(a) Measurable Project Goals, Objectives and Outcomes: Implementation of *SEEK* during the five-year grant period (October 2017 to September 2022) will help the district and individual schools meet and exceed three programmatic goals aligned to broader FWCS School Improvement Plans and teaching and learning priorities.

- ***SEEK* Goals and Objectives:** The planning Task Force identified three project goals and corresponding objectives that align with the intention of the MSAP initiative, reflect the needs of targeted schools, students and families and will promote improved academic outcomes for underserved, low-income students:

GOAL 1: Increase racial and socio-economic diversity in segregated schools.
Objective 1: Magnet schools will reduce and prevent black student isolation in Fort Wayne schools.
GOAL 2: Increase academic performance in underserved schools.
Objective 2: Magnet schools will provide challenging academic programs to all students.
Objective 3: Magnet schools will promote systemic reform aligned with Indiana content standards.
GOAL 3: Create and sustain magnet schools that expand academic choices for students.
Objective 4: Magnet schools will increase diversity of academic options for students and families.

Evaluation of *SEEK*, conducted by an experienced external evaluation team, will focus on project-specific indicators and required performance measures (see *Evaluation* section for methods).

- **Performance Measures:** The United States Department of Education has identified three annual and two long-term measures all grantees are required to assess. Fort Wayne Community Schools will collect annual data for the following required measures (see *Evaluation* for project-specific indicators) and report annual progress per MSAP mandates:
  - **Annual Measure 1:** The number and percentage of magnet schools receiving assistance whose student enrollment reduces, eliminates, or prevents minority group isolation.

- **Annual Measure 2:** The percentage increase of students from major racial and ethnic groups in magnet schools receiving assistance who score proficient or above on State assessments in reading/language arts as compared to previous year's data.
- **Annual Measure 3:** The percentage increase of students from major racial and ethnic groups in magnet schools receiving assistance who score proficient or above on State assessments in mathematics as compared to previous year's data.
- **Long-Term Measure 4:** The percentage of magnet schools that received assistance that are still operating magnet school programs three years after Federal funding ends.
- **Long-Term Measure 5:** The percentage of magnet schools that received assistance that meet the State's annual measurable objectives and, for high schools, graduation rate targets at least three years after Federal funding ends.

- **Measureable and Quantifiable** – *SEEK* schools will implement themes, improve curriculum and expand supplementary enrichment that meet the above goals, performance measures and Competitive Preference Priorities 1 – 4 (see *Project Design*, below, for magnet School Profiles). *SEEK* is designed to produce outcomes that will improve the overall quality and diversity of academic experiences available in FWCS while implementing strategies aligned to the district's voluntary desegregation plan (see *Project Design*, below, for Logic Model). Key outcomes include:
  - **Outcome 1:** Reduce minority group (black student) isolation in racially unbalanced schools;
  - **Outcome 2:** Improve academic achievement in chronically low-performing schools; and
  - **Outcome 3:** Expand academic choice for FWCS students and families.

  To determine progress toward achieving primary outcomes, FWCS, in collaboration with an experienced external evaluation team, will assess performance indicators (see *Evaluation Section* for measures and methodology) that are both measureable and quantifiable.

***SEEK* Outcomes: Measurable and Quantifiable**
Reduce Minority Student Isolation (Goal: 1; Objective: 1; Required Measure: 1; Outcome: 1.1 & 1.2)
• **Measurable:** FWCS administrators and evaluators will track student enrollment across racial subgroups at *SEEK* magnets to measure change in black student isolation.

Fort Wayne Community Schools, LEA & fiscal agent

• **Quantifiable:** FWCS will compare annual subgroup enrollment to 2016-17 baseline to determine magnitude of change – difference between baseline and annual enrollment will equal % change.
• **Measurable:** FWCS administrators / evaluators will monitor applications for magnet school enrollment across demographic subgroups to assess progress toward proposed racial balances. • **Quantifiable:** FWCS will compare subgroup applicants to 2016-17 baseline enrollment rates to determine magnitude of change in enrollment based on applicant pool data applicant pool data compared to proposed black student isolation outcomes will drive marketing / recruitment strategies.
Improve Achievement (Goal: 2; Objectives: 2&3; Required Measure: 2&3; Outcome: 2.1, 2.2, 3.1 & 3.2)
• **Measurable:** FWCS administrators and evaluators will collect academic performance data on state assessments (ELA, Math, Science) to determine impact of magnet programs on student achievement. • **Quantifiable:** FWCS will compare annual ELA / Math / Science / Graduation Rate performance to 2016-17 baseline to determine magnitude of change across school-wide and subgroup scores – annual difference from baseline will equal growth indicators (subgroup comparisons will be used to quantify achievement gaps across racial groups, socio-economic groups and gender to assess equity in learning).
Expand Academic Choice (Goal: 3; Objective: 4; Required Measure: 4, 5 & 6; Outcome: 4.1 & 4.2)
• **Measurable:** FWCS administrators and evaluators will monitor operational capacity of four magnet schools and one academy to maximize number of students who can apply for and enroll in *SEEK* magnet programs. • **Quantifiable:** FWCS will track applications and student placements per magnet school to determine growth of enrollment across subgroups and school-wide aggregates for each magnet – enrollment rates will be compared to academy capacity to drive marketing / recruitment strategies.

Evaluation of *SEEK* will be ongoing throughout the grant period to ensure a steady flow of data needed to inform stakeholders of progress toward outcomes. Outcomes are both measurable and quantifiable to ensure that annual evaluation activities and data collection procedures will produce consistent and reliable data and feedback to promote continuous project improvement (see *Evaluation Section* for specific performance indicators).

(b) Design Reflects Needs: The *SEEK* Planning Task Force (see *Personnel* section) collaborated with administrators, teachers, counselors, parents, community partners and students to assess the capacity and

quality of district programs and identify unmet needs impacting schools (see *Competitive Priority # 1*). After analysis of programs and review of the approved voluntary desegregation plan guiding FWCS school choice initiatives, the Task Force identified the following needs – aligned to *SEEK* goals (see *Evaluation* section for objectives / measures) – and proposed solutions that will improve racial balance in schools, improve academic achievement across grade levels and strengthen community / parent support for education initiatives. The following table summarizes needs and proposed solutions:

District Need / Goal	Proposed Solution / Aligned Project Components
Need 1: Fort Wayne Community Schools is in voluntary desegregation (Goal 1).	• FWCS proposes five magnets - two in racially identifiable schools out of compliance with balance thresholds to reduce black student isolation. • Proposed magnets comply with district-approved desegregation plan. • Proposed magnets will recruit students from all areas of district to increase interaction among students of different backgrounds.
Need 2: FWCS lacks funds to establish innovative magnet schools needed to address desegregation (Goal 1, 3).	• MSAP funds will enable FWCS to offer new / expanded magnets that serve all grade levels, PreK – 12, and build or expand Learning Pathways to diversify academic choices for students. • Funding will provide resources to address: desegregation, curricular improvement, expanded interventions, professional development and parent / community outreach and services – to improve academic options.
Need 3: Fort Wayne schools need innovative curricula to engage at-risk students (Goal 2, 3).	• Magnet themes are linked to career / postsecondary education outcomes. • Proposed magnets initiate or expand Learning Pathways that increase continuity of learning and real-world relevance through validated curricula (STEM, STEAM, *Project Lead the Way*, *Artful Learning*).
Need 4: Fort Wayne schools need to expand availability of academic interventions to support low-performing students	• FWCS will utilize formative assessments to promote early detection of student failure and link assessment data to use of research-based academic interventions in middle / high school grade levels (*NWEA MAP*). • FWCS will expand access to technology-based, adaptive learning interventions proven to help students performing below grade level achieve state standards in

(Goal 2).	core subjects (*Fast ForWord, SuccessMaker*).
Need 5: Fort Wayne teachers need professional development to integrate magnet themes across subjects and increase use of strategies backed by Evidence of Promise (Goal 2, 3).	• *SEEK* magnets will provide professional development opportunities designed to increase educator effectiveness, integration of themes across core subjects, and mastery of proven instructional strategies (*Artful Learning*, *Project Lead The Way*, *Discovery Education*, Project-based Learning, Object-based Learning). • Professional development, provided by experts in instructional models and practices, will improve teacher and administrator quality in magnet schools (*Discovery Education, Buck Institute, Project Lead The Way, Brown University Equity Assistance Center, Leonard Bernstein Center*).
Need 6: Fort Wayne schools need expanded parent / community participation in K – 12 education (Goal 1,2,3).	• School Advisory Boards will include parents / partners to ensure diverse stakeholder involvement in magnet planning, design and implementation. • *SEEK* will include parent education / support opportunities to increase family commitment to learning (family enrichment programs, postsecondary education planning workshops, computer literacy programs, access to academic interventions, volunteer opportunities).

The Planning Task Force was deliberate in its planning and proposal to ensure that *SEEK* reflects the broad needs of all stakeholders while facilitating the achievement of desegregation goals. By aligning project activities to the needs of students and project participants, the Task Force hopes to improve a diverse spectrum of education services and increase academic achievement and social outcomes for students, families, teachers and schools.

(c) Design Reflects Purpose of MSAP Program: Successful *SEEK* magnets will provide FWCS the resources it needs to accomplish the purposes of the *Magnet Schools Assistance Program* by: (1) reducing black student isolation in racially unbalanced schools; (2) increasing academic rigor and curricular diversity through theme choice; (3) providing exciting choices for families in high-needs schools, including reading and math interventions for students and parents; (4) creating / enhancing Learning Pathways to post-secondary education and careers; and (5) improving district marketability to stem the flow of students leaving the district for private / charter / parochial school alternatives.

- **Reducing Black Student Isolation (Goal 1; Objective 1):** In the last ten years, racial balances have shifted toward higher minority (black) enrollment rates as white, affluent families leave FWCS schools for alternative options. Currently, district racial balance is approximately: 45% white; 24% black vs. community at large rates of 74% white, 15% black. To curb white flight, innovative programming is needed to entice families to return to Fort Wayne schools. Proposed magnets offer the rigor, excitement and choice to appeal to diverse families while restoring racial balances that better reflect the demographic profile of Fort Wayne. The following table provides current % black enrollment for each proposed magnet and the reduction of black student isolation during the five-year grant (2017-2022). Two proposed magnet schools are racially identifiable and out of compliance with the FWCS desegregation plan **(+ / - 15% variation from district white student enrollment rate of 45%, ie: 30% - 60%)** districtwide balance indicator (Irwin and South Side). The other three schools (Young, Weisser and Memorial) need MSAP funding to maintain current balance while improving academic and enrichment offerings to keep families at the school and attract others. Also, students from the Arts Pathway will feed into the Academy of the Arts at South Side, helping to improve balance at the high school and stopping the exodus of Art students and their parents from the district after they complete eighth grade and don't find a ninth grade arts path.

Five Year Increase in White Student Enrollment (to decrease Black / Hispanic Isolation)								
FWCS District Average White (45%) Student Enrollment Rate (October 2016)								
FWCS Average Black (24%) / Hispanic (16%) Student Enrollment Rates (October 2016)								
School	**Grades**	**Baseline**	**Yr 1 17-18**	**Yr 2**	**Yr 3**	**Yr 4**	**Yr 5**	**% Change**
Irwin	K-5	26.3	28.5	30.0	31.5	33.6	35.0	+8.7
Young	PreK-K	39.4	38.8	37.2	36.0	35.4	35.4	-4.0
Weisser	K-5	39.5	39.1	39.4	39.3	39.4	39.3	-0.2
Memorial	6-8	36.4	35.8	35.4	35.1	34.9	34.9	-1.5
South	9-12	19.0	19.2	22.0	24.7	27.3	30.0	+11.0

FWCS has demonstrated success implementing strong marketing / recruitment efforts to attract families to magnets. Past success in reducing racial isolation through choice promises positive

outcomes for students of diverse racial, ethnic and socio-economic backgrounds as FWCS deconstructs barriers that perpetuate social bias, intolerance and inequity in education.

- **Increasing Academic Rigor and Curricular Diversity (Goal 2; Objectives 2 and 3):** The addition of the *Project Lead the Way* STEM and STEAM magnets gives Fort Wayne students five rigorous, research-based academic choices at five magnet school locations. Combined with existing magnets/programs of study that offer Montessori, STEM, Health / Biomedical, Engineering, World Languages Immersion, IB and Visual and Performing Arts, the district provides appealing options for diverse learners. Five new/improved magnet themes will bring excitement and rigor to chronically low-performing schools. Targeted professional development by experts in STEM / STEAM thematic instruction, validated curriculum models, project-based learning, object-based learning and technology will infuse fresh ideas into Fort Wayne classrooms and catalyze learning for both students and educators.
- **Expanding Academic Choices for Families in High-Needs Schools (Goal 3; Objective 4)**: *SEEK* will establish new academic options to diversify choice for students and families. By offering improved programming, the *SEEK* Planning Task Force aims to provide compelling options for parents that will entice students from across Fort Wayne to enroll in magnets, reduce black student isolation, increase socio-economic diversity and improve schoolwide achievement rates while providing students enrolled in underserved schools with new educational strategies proven to generate positive outcomes. In addition to themed-academic choices, *SEEK* programming will include reading and math interventions for students performing below Indiana grade level standards. Differentiated, technology-based reading / language arts (*Fast ForWord*) and mathematics (*SuccessMaker*) interventions will help failing students meet standards, catch up to higher-performing peers and eliminate achievement gaps that distinguish racial and socio-economic subgroups across the district. *SEEK* will also provide learning opportunities for parents by offering a General Education Diploma (GED) program and English as a Second Language (ESL) program at the district's Family And Community Engagement (FACE) center (available to all magnet student parents) and opportunities for caregivers to increase functional reading and math skills by using *Fast ForWord / SuccessMaker* interventions during extended library and computer learning center hours.

By offering a chance to experience a school climate that has resulted in measurable academic success, as well as specific interventions to bring students to grade level and give parents a chance to improve skills, *SEEK* offers genuine options for highest risk students and their families.

- **Creating / Enhancing Learning Pathways (Goals 2 and 3; Objectives 2, 3 and 4)**: Fort Wayne seeks to reinvigorate district schools by creating PreK–12 Academic and Career Learning Pathways. Learning Pathways will offer students coordinated, vertically-aligned academic programs that promote student development of critical skills and knowledge through integrated PreK – 12 theme-based learning experiences. Multiple Pathway options – linked to Indiana grade level standards and state-approved educator effectiveness evaluation systems – will increase diversity of academic opportunities of study that prepare youth to enroll in postsecondary education or pursue rewarding careers. Enhanced and / or expanded Academic Learning Pathways include:
  - STEM Pathway – Irwin STEM will expand an existing 6 – 12 STEM Pathway that will link Irwin to multiple middle and high school options that explore diverse STEM disciplines, including New Tech, biomedical, computer science, health, earth sciences, physics and engineering. STEM Learning Pathway options allow students to gain expertise and develop knowledge / skills connected to diverse postsecondary education fields of study and careers that will greatly impact all facets of life, from healthcare to energy to communications to entertainment. Implementation of the *Project Lead the Way* and *Engineering is Elementary* platforms at Irwin will facilitate student acquisition of vital technology competencies, engage youth in inquiry-based learning strategies they will encounter in secondary and postsecondary education and expose students to enhanced curricular content and enrichment experiences that will shape future education and career choices. FWCS STEM Pathways will prepare students for diverse study and careers available in Fort Wayne as well as equip students with the skills and confidence to succeed beyond the confines of local communities in an increasingly competitive world.
  - STEAM Pathway – Whitney Young, Weisser Park, Memorial Park and South Side High School will comprise a full PreK – 12 STEAM Arts Pathway that links existing elementary and middle school Arts programming to a high school academy. STEAM disciplines, including biomedical,

health, physics, earth sciences, environmental sciences, engineering, information technology, media arts, design, visual arts and performing arts will allow students to explore content linked to postsecondary education and careers that prepare them to succeed in an increasingly technical, creative and competitive world. STEM concepts integrated with the arts will promote innovation, creativity and acquisition of the technical knowledge students will need to succeed in postsecondary study and careers. The FWCS STEAM Arts Pathway reflects the broader Fort Wayne community and its unique convergence of arts, culture and creativity prevalent in northeast Indiana with a technology and STEM driven economy linked to health care, manufacturing and information technologies.

The Learning Pathways approach to magnet planning, design and operation is both logical and feasible. FWCS is dedicated to expanding magnet programs to reduce minority group isolation and improve academic achievement. Creation of Learning Pathways that reflect student interests while preparing youth for postsecondary fields of study and careers is the first step in initiating long-range planning for future magnets while rationalizing the selection of proposed schools and themes.

- **Increasing District Marketability (Goals 1, 2, 3; Objectives 1, 2, 3 and 4)**: By creating high quality, academically rigorous magnets in both low performing and higher performing schools, FWCS hopes that parents will reevaluate the quality of available academic choices in Fort Wayne Community Schools and commit to Learning Pathways linked to positive career and postsecondary education outcomes. Cutting-edge programming that emphasizes science, technology, engineering, mathematics, arts and multiple STEM-related disciplines at the primary and secondary level will entice families who have left Fort Wayne schools for private / charter / parochial options to give FWCS their consideration. The district believes it has created the quality options needed to reinvigorate programs and motivate families to enroll in and succeed in schools with strong reputations for quality and equity. Through widespread marketing of *SEEK* initiatives, FWCS will generate the excitement needed to attract higher income families who have left the district for alternative education options to re-enter FWCS. By attracting families currently enrolled in regional charter / private schools to enroll in magnets, FWCS will increase inter-district, regional recruitment and therefore increase the socio-economic and racial diversity of its schools.

(d) Design Supported by Evidence of Promise and Research: Throughout the planning, development and design process, the *SEEK* Planning Task Force conducted a thorough literature review, investigated successful magnet schools across the state and country and researched effective practices in school choice / magnet programs / desegregation strategies and academic programs. *SEEK* reflects research and evidence of promise across the following design and content layers: (1) Project Design and (2) Evidence-based Programs.

- **Project Design:** After review of proven strategies that reduce racial / socio-economic group isolation and improve academic achievement for low-performing youth, the Task Force adopted a research-validated approach – supported by *What Works Clearinghouse* Strong Evidence of Support ([Bifulco, Cobb and Bell, 2009] and [Heller et al, 2011]; see *Competitive Preference Priority # 2*) – to initiating new magnet schools described in the U.S. Department of Education Report *Creating Successful Magnet Schools Programs* (USDOE, 2004) and *Blueprint for Understanding and Operating Successful Magnet and Theme-based Schools* (Brooks et al., 2004). These documents, augmented by supplementary research aligned to the needs of FWCS, guided development of *SEEK*: (1) Magnet Planning; (2) Theme Selection and (3) Plan of Operation.
    - **Magnet Planning:** FWCS completed a structured approach to magnet schools development as recommended by leaders in the field of theme-based academic programming (USDOE, 2004; Brooks et al, 2004; Pucel, 2001; Bennett, 1988) that included the following steps: (1) assess the purpose / intent of approved desegregation plan and specified racial / socio-economic balance goals; (2) evaluate school and community needs across diverse stakeholder groups; (3) convene advisory committee to collaboratively plan project; (4) identify faculty committed to magnet school instructional strategies; (5) link magnet initiative to complementary school improvement efforts / plans; and (6) empower site-based oversight committee.
    - **Theme Selection:** Selection of magnet themes is a critical step in building and promoting successful options; magnet themes must appeal to targeted audience in order to generate positive outcomes (Cullen et al., 2003; Ballou, Goldring and Liu, 2006). The FWCS Planning Task Force implemented a research-based process for theme identification and selection, including: (1) identify target enrollment populations based on desegregation plan (racial groups, socio-

economic groups, ethnic subgroups); (2) assess student and family interest across targeted enrollment subgroups to prioritize culturally-relevant themes; (3) evaluate potential partnerships to gauge availability of community support (*Giving Parents Options* - USDOE, 2007); (4) convene committee to solicit feedback from stakeholders and build consensus for appropriate academic themes (USDOE, 2004; Brooks, et al, 2004) and (5) inform school community of selected themes and specialized, theme-based learning options to generate prior support.

- **Plan of Operation:** Upon determining the location of magnet schools, selection of themes and identification of enrollment balances based on desegregation goals, the Task Force organized a strong plan of operation that includes the following key elements (Hoxby and Rockoff, 2005; Howell and Peterson, 2002): (1) magnet schools will be staffed by committed faculty and school leaders who believe in the thematic approach of the school (Massucci, 2004, Poppell and Hague, 2001); (2) magnet school curricula will be developed to reflect required content standards and regularly reviewed to assess effectiveness of theme-based approach (Ballou, Goldring and Liu, 2006; Cullen et al., 2003); (3) academic achievement goals will be rigorous and attainable through structural support for students in need of supplementary assistance (Ballou, Goldring and Leu, 2006); (4) targeted recruitment will employ culturally-relevant approaches connecting with and educating potential clients about the diversity of academic options available and the desired racial and socio-economic balances needed to ensure equal access to opportunities (USDOE, 2007; Brooks et al, 2004; Christenson et al, 2003; Eubanks, 1990) and (5) magnet schools will implement complementary strategies that appeal to diverse stakeholders to generate positive social and academic outcomes (Ballou, Goldring & Liu, 2006; Nelid, 2004).

The above research findings prompted the deliberate and collaborative development of *SEEK* during an open and inclusive planning process. By grounding project elements in a strong research base and supplementing the magnet design with validated school improvement models (*Artful Learning, Project Lead the Way*), formative academic assessments (*NWEA MAP),* proven learning interventions (*Fast ForWord, SuccessMaker, ACT Mastery Prep*) and extensive outreach to improve parent and community support for and involvement in school programming, FWCS plans to launch and sustain high-quality magnet schools that will yield positive academic and social results.

and the mathematics enabling critical advancements in all fields depend upon a highly educated, technologically literate workforce ready to move America forward (Carnevale, Smith & Melton, 2011). STEM education equips students with the skills needed to succeed in postsecondary education and diverse careers, including health sciences, engineering, technology, transportation, business and energy. STEM is critical to our collective success and new experts are needed to meet the demands of careers yet to be conceived (Rosser, 2012). Further, rigorous and innovative STEM magnets are perceived to be the most sought after options in the Fort Wayne community and offer the district its greatest opportunity to generate positive desegregation and academic outcomes.

- **Science, Technology, Engineering, Arts and Mathematics (STEAM) Theme:** STEAM is an expansion of STEM learning with an emphasis on arts integration throughout core subjects and the integration of arts into STEM disciplines. Communities face a growing need for individuals who possess mastery of STEAM-based knowledge that combines creativity and technical understanding to solve new and future problems that impact all (Smith, King & Gonzalez, 2015). Arts-integrated STEM learning prepares students across grade levels and achievement levels to tackle future challenges, both in learning and in life, with increased creativity, innovation and problem-solving skills (Tillman, An & Boren, 2015). FWCS will invest in STEAM instructional models to develop creativity and self-expression and help students direct creative talents toward innovative approaches to learning that prepare them to excel in education and careers. Integration of arts throughout STEM disciplines will help FWCS deconstruct gender and racial barriers that often limit the number of girls and minorities who pursue study in science, technology, engineering and mathematics.

SEEK will respond to peer reviewed research and community needs by creating one STEM magnet and four STEAM magnets that focus study across multiple disciplines to appeal to the broadest range of students and families. *SEEK* will provide increased access to enhanced STEM / STEAM coursework that reflects the growing need for well-educated youth prepared to succeed in highly competitive, technology driven, postsecondary education environments and careers.

Theme Focus	Theme Focus Rationale
STEM	• STEM education develops creative thinking skills that better prepare students for the

	world of industry and innovation (Newbill & Baum, 2013). • Engineering challenges increase rigor and real-world relevance of STEM content and promote critical thinking / problem-solving skills in students of all ages, genders and socio-economic backgrounds (Householder & Hailey, 2012). • Grounding STEM concepts in inquiry-based education promotes increased engagement in STEM through linkages with social perspectives to appeal to students with diverse interests (Kim, 2011). • Integration of engineering concepts across core subjects improves student achievement in math and science (Bagiati, Yoon & Ngambeki, 2010).
STEAM	• Arts enhanced STEM promotes the development of student creativity needed to ensure the growth of future STEM innovators (Coxon, 2012). • Learning through the arts increases STEM relevancy by appealing to the digital literacy and creative interests of 21st Century students (Bevins, 2012). • Integration of arts and STEM can reduce gender gaps in STEM engagement while increasing accessibility of complex science, technology, engineering and mathematics concepts in learners from diverse backgrounds (Sharapan, 2012). • Arts education increases communication skills needed to convey complex STEM concepts / content across core subjects (Nichols, 2012).
Theme Focus	**Theme Access to Expanded Learning**
STEM	• Project Lead the Way: *SEEK* will launch and sustain elementary school implementation of the *Project Lead the Way* Launch program (Irwin) that integrates technology and STEM principles across all core and non-core subjects through inquiry- and project-based learning strategies. • Discovery Education: Irwin will supplement *Project Lead the Way* methodologies with content rich *Discovery Education* Techbooks to expand classroom access to innovative teaching tools and standards-aligned content. • JASON Project: Classroom teachers will link students, through real-time streaming, to

materials from English into Spanish, Vietnamese, et al, to increase parent access to information that describes the breadth of academic choices available to youth.

- **Targeted Recruitment Activities:** Because Fort Wayne Community Schools is implementing a voluntary desegregation plan, student placement strategies and protocols will remain race-neutral to comply with applicable civil rights regulations. Recruitment activities, however, can and will target both economically segregated and racially identifiable neighborhoods to ensure diverse enrollment in proposed magnet schools. The Marketing and Recruitment Specialist will partner with prominent community partners (Boys and Girls Club, YMCA, churches, Rotary, Lions Club, Big Brothers Big Sisters) to reach all demographic groups of the Fort Wayne community. Presentations at local fairs, cultural events and community festivals will broaden the reach of marketing and confirm to parents that rigorous academic programs can promote success for ALL Fort Wayne youth. Targeted recruitment will include social media, print and broadcast outreach in media outlets serving the entire community and in specialized media outlets that target priority subgroups in Fort Wayne.
- **Parent Volunteer Opportunities:** Parent involvement in FWCS magnet schools will not be limited to helping students make appropriate choices and supporting them during enrollment. Parents served as members of the Planning Task Force and their input was instrumental in the selection of targeted schools and proposed themes. Parents will continue to provide valuable input and implementation guidance as members of magnet school Advisory Boards, will offer evaluation feedback through survey tools and serve as volunteers at existing and / or expanded homework assistance centers, tutoring programs and special school events (open houses, academic / college fairs, theatrical productions, sporting events, etc.).

Meaningful and sustained parent involvement in FWCS magnet schools will promote diverse enrollment, provide out-of-classroom support for students engaged in rigorous academic study and facilitate strong community commitment to learning and growth. Parents will be encouraged to become advocates for Fort Wayne students and will be supported through adult education that expands academic, career and personal growth opportunities for parents and families.

engagement in education. The Project Director will oversee all aspects of *SEEK*, including: 1) Manage grant funds; 2) Supervise *SEEK* personnel; 3) Coordinate and lead *SEEK* Advisory Board; 4) Manage curriculum development and alignment across five magnet schools and Learning Pathways; 5) Monitor implementation progress to ensure all schools are operational in compliance with *SEEK* Timeline; 6) Sustain and strengthen *SEEK* partnerships; 7) Coordinate professional learning activities to improve teacher effectiveness; 8) Manage marketing, recruitment, application and student placement procedures; 9) Collaborate with external evaluation team to conduct thorough evaluation of *SEEK*; and 10) Solicit feedback and disseminate outcomes to promote continuous project improvement.

(1b) Other key personnel are qualified to manage the project.

The *SEEK* Project Director will receive implementation support from key personnel throughout the grant period, including (see *Appendix* for all Job Descriptions): 1) Marketing and Recruitment Specialist; 2) Focus Teachers; 3) Administrative Assistant. **Marketing and Recruitment Specialist:** FWCS will provide a full-time professional (1.0 FTE) to oversee all marketing and recruitment activities designed to generate enthusiasm for magnet schools, promote application for enrollment and ultimately sustain student and parent commitment to magnet options. Duties: The Marketing and Recruitment Specialist will collaborate with school / district administrators and educators to develop branding strategies for *SEEK* schools and actively disseminate information about each proposed magnet school to students, parents and the community to generate and sustain enrollment interest. The Specialist will organize and complete outreach presentations across the community – with emphasis on targeted recruitment to diversify magnet school applicant pools for each school – to increase likelihood that applicant and enrollment outcomes help *SEEK* schools meet proposed socio-economic and racial diversity targets. The Recruitment and Marketing Specialist will ensure the district adheres to a structured, fair and transparent enrollment procedure that provides equal access to magnet schools for all youth and families. Specialist will work with FWCS administrators and data specialists to ensure enrollment goals reflect voluntary desegregation plans; recruitment and placement will help racially identifiable schools increase socio-economic and racial diversity in schools. Targeted marketing and recruitment activities (see *Desegregation* for Marketing and Recruitment Plan), initiated and sustained by the Specialist with assistance from the Project Director and Focus Teachers, will include multiple

strategies to ensure a diverse pool of student applicants that reflect the community demographics of Fort Wayne, Indiana. In collaboration with external evaluators, the Marketing and Recruitment Specialist will participate in evaluation protocols, collect data, share data with external evaluators and provide feedback to grant personnel and evaluators to facilitate continuous project improvement. The Specialist will be a key member of the *SEEK* team and will report to the Project Director. Recommended qualifications include: 1) Master degree in marketing, public affairs or related field; 2) Experience in marketing / public relations in agency or school setting; 3) Expertise / experience in web design and social media outreach; 4) Experience developing promotional materials such as newsletters and brochures; 5) Prior experience working with Magnet Schools and / or in an education setting implementing court-ordered or voluntary desegregation plans, preferred; and 6) Ability to work effectively with parents, community representatives, business and higher education partners. **Focus Teachers:** FWCS will supply specialized Focus Teachers [1.0 FTE per magnet school - total of five educators serving five school sites (5.0 FTE) - two will be hired with SEEK grant funds; the other three will be paid from the General Fund] for each magnet school to provide curriculum guidance, coaching and theme-based instruction in classrooms. Duties: Focus Teachers will be primary theme-based experts at each site and will facilitate thorough integration of magnet themes across proposed grade levels and core subjects. Focus Teachers will possess advanced content knowledge and expertise in topics that reflect proposed themes and will serve as resources for administrators and classroom teachers at magnet schools as well as provide outreach in collaboration with the *SEEK* Marketing and Recruitment Specialist to generate and sustain enrollment in proposed schools. Focus Teachers will provide instruction to students – in partnership with classroom teachers and other faculty – to facilitate theme integration across all learning experiences. Focus Teachers will work with curriculum specialists and school instructional teams to develop theme-based curricula and identify theme-specific professional learning needs to promote effective implementation of programming. Focus Teachers will complete extensive professional learning, with classroom educators, to improve instruction and promote thorough implementation of proposed teaching and learning models / curricula. Focus Teachers will serve on both district and individual school Advisory Boards. In collaboration with external evaluators, Focus Teachers will facilitate school-based implementation of evaluation protocols, collect data, share

***SEEK:* Goals, Outcome Objectives & Project Measures** **October 1, 2017 - September 30, 2022**	**Evaluation Tool / Indicator**
Annual Measure 1: The number and percentage of magnet schools receiving assistance whose student enrollment reduces, eliminates, or prevents minority group isolation.	
Annual Measure 2: The percentage increase of students from major racial and ethnic groups in magnet schools receiving assistance who score proficient or above on State assessments in reading/language arts as compared to previous year's data.	
Annual Measure 3: The percentage increase of students from major racial and ethnic groups in magnet schools receiving assistance who score proficient or above on State assessments in mathematics as compared to previous year's data.	
Long-Term Measure 4: The percentage of magnet schools that received assistance that are still operating magnet school programs three years after Federal funding ends.	
Long-Term Measure 5: The percentage of magnet schools that received assistance that meet the State's annual measurable objectives and, for high schools, graduation rate targets at least three years after Federal funding ends.	
Goal 1: Increase racial and socio-economic diversity in segregated schools.	
Objective 1: Magnet schools will reduce and prevent black student isolation in Fort Wayne schools.	
Outcome Measure 1.1: Irwin Elementary and South Side High School will increase white student enrollment a minimum of 10% by end of grant period, 10/1/17 9/30/22.	Enrollment Data
Outcome Measure 1.2: Applications for magnets will increase 10% per year, 10/1/17 – 9/30/22.	Application Data
Goal 2: Increase academic performance in underserved schools.	
Objective 2: Magnet schools will provide challenging academic programs to all students.	
Outcome Measure 2.1: The % of magnet students achieving proficient or above on ISTEP ELA assessment measures will increase by 2% per year, 10/1/17 – 9/30/22.	IN State Assessments
Outcome Measure 2.2: The % of magnet students achieving proficient or above on ISTEP Math assessment measures will increase by 2% per year, 10/1/17 – 9/30/22.	IN State Assessments

magnet schools and students served by Fort Wayne Community Schools. Costs are reasonable in relation to the significance of project services and the potential impact and importance of objective project evaluation.

- *SEEK* will help FWCS increase racial and socio-economic diversity in schools impacted by black student isolation and unequal distribution of poverty (see *Competitive Priority # 4*). While costs across five targeted magnet schools averages $599,754 per year, the costs are reasonable considering the number of feeder schools and students benefiting from expanded academic choice and increased equity in education. FWCS is an open enrollment district and ALL students enrolled in appropriate grade levels are fully able to apply for enrollment in *SEEK* magnet schools; the cost per FWCS student of *SEEK* programs averages $20 per student per year based on total district enrollment of 29,473 students.
- Evaluation of *SEEK* promises to yield valuable data that adds to the body of knowledge pertaining to the impact magnet school programs have on racial desegregation, socio-economic diversification of schools and on the academic achievement of participating magnet students. The value of expanded knowledge in the field of education equity as well as the value of testing the impact of specific interventions / instructional strategies on student achievement promises to yield significant benefits for communities, school districts and schools seeking to implement similar projects serving students and families impacted by racial and socio-economic isolation in public schools outside of Fort Wayne, Indiana. The average cost per school of *SEEK* evaluation is $50,000 per year; the cost of evaluation compared to the number of communities, districts, schools, families and students that may benefit from expanded knowledge of effective magnet school initiatives is unquantifiable yet reasonable, considering the number of school systems impacted by similar educational challenges.

balance goals within the standards outlined in the Agreement.

6. Racial Balance Range

The system-wide racial balance goal is 15 percent to 45 percent black (and 55 percent to 85 percent white) but full compliance and performance will be deemed to exist so long as no school falls below the 10 percent black range and no more than three schools fall into the 45 percent to 50 percent black range.

7. (a) Implementation Schedule

FWCS will fully implement this Agreement including if necessary the obligatory back-up provision of Section 3, by the commencement of the 1991-92 school year, as follows:

Fall 1988:

MAP 1. Croninger and Young converted to magnet schools; magnet programs instituted at Waynedale and Franke Parke; Memorial Park closed.

Fall 1989:

MAP 2. Irwin converted to magnet school, and magnet programs instituted at Price, Holland and Washington Center schools.

Fall 1990:

Map 3. Bunche or Ward converted to a magnet school, and three magnet schools or programs instituted at predominantly white schools.

Fall 1991:

MAP 4. Remaining predominantly black school, Ward or Bunche, converted to magnet school, and additional magnet programs instituted at remaining predominantly white schools, as necessary to meet the racial balance goals specified in Section 6.

7. (b) Duration of Agreement

From the 1991-92 school year when the plan is fully implemented through the 1996-97 school year, FWCS will continue to meet the system-wide racial balance standards described in Section 6, making any annual adjustments in student assignments needed to maintain the standards. The monitor, appointed pursuant to Section 11, will continue to perform his or her duties until the conclusion of the 1996-97 school year.

7. (c) Duration of Obligation

Subsequent to the 1996-97 school year, FWCS will no longer be required to maintain racial balance ratios such as those set forth in Section 6 of this agreement or to pursue the methods of racial balance set forth in Sections 3 and 7 of the Agreement; provided, however, that FWCS will continue to maintain a racially integrated school system. All decisions involving school attendance areas, programs, staffing, allocations of resources, school buildings, and the like, will be taken in accordance with the requirements of the equal protection clauses of the United States and Indiana constitutions and applicable federal and state civil rights laws.

8. (a) Isolation Within Schools

The parties recognize the importance of avoiding racial isolation in classrooms and other facilities within the schools. To this end, FWCS has agreed to the 15 percent to 45 percent racial balance range described in Paragraph 6 which will minimize racial isolation. In addition, FWCS will avoid procedures or practices which result in separation of students by race within school

Table 5: Selection of Students-Competitive Preference 3

Instructions: Please complete a separate Table 5 form for each magnet school included in the project by answering the following questions.

Name of magnet school: Irwin Elementary STEM Magnet School

Check the appropriate box that applies to this magnet school.

X Student academic performance is not a criterion in the magnet school student selection process.

☐ Student academic performance is a criterion in the magnet school student selection process.

Please check the appropriate box for each criterion used to automatically admit students.

☐ Sibling of enrolled student

☐ Reside in attendance zone

☐ Parent/guardian's place of employment/district employee

☐ Other, please specify: _____

X None

Check the appropriate box that applies to this magnet school.

☐ Students not automatically admitted to the magnet school will be selected on a first come, first served basis.

X Students not automatically admitted to the magnet school will be selected using a random lottery.

If a random lottery is used, will it be a weighted lottery?

X Yes

☐ No

If a weighted lottery is used to select students not automatically admitted to the magnet school, please check the appropriate box for each criterion used to weight the lottery.

- ☐ Racial composition of geographic area
- ☐ Socioeconomic status of geographic area
- ☐ Race of student
- X Socioeconomic status of student
- X Sibling of enrolled student
- ☐ Reside in attendance zone
- ☐ Reside outside of the attendance zone
- ☐ Parent/guardian's place of employment
- X Magnet theme articulation
- ☐ Other, please specify: _____

Provide a step-by-step description of the student selection process, explaining when and how the criteria and elements selected above (i.e., academic performance, student preferences, and selection procedures) will be used to select students for this magnet school.

(1) *SEEK* Marketing, Recruitment and Placement Plan: The district marketing, recruitment and placement strategy includes the following steps to recruit students from different social, economic, ethnic and racial backgrounds into proposed magnet schools:

Step 1 – Marketing and Recruitment: Initiate and sustain a rigorous marketing and recruitment strategy that reaches students and families from all geographic locations / neighborhoods and from all socio-economic groups to inform constituents of magnet school options and the application procedures that determine entry into magnet schools, including:

1. Monthly presentations in critical neighborhoods to generate diverse interest among students and parents for magnet school applications, enrollment (beginning Fall 2017 & ongoing in majority white communities to decrease black student isolation in racially-identifiable schools and in affluent communities to increase socio-economic diversity in low-income Title 1 schools).

2. School open house programs highlighting the unique instructional methods utilized to infuse theme-based instruction in all core subjects and school programs (Fall and Spring).

3. Presentations to leadership and civic organizations that inform parents and community of the methods, strategies and benefits of *SEEK* academic options (quarterly).

4. Social media outreach to generate positive community perceptions of *SEEK* magnet schools across FWCS communities, increase applications for admissions, entice families with students enrolled in charter/private/parochial schools to consider enrollment in FWCS magnet programs.
5. Media education including newspaper articles, public service announcements on local radio/ television outlets and billboards (ongoing – media outreach will begin during winter 2017).

6. Annual *FWCS School Choice Fair* – highlighting magnet school application process for district- and MSAP-funded options (January of each year).

7. Branding campaign utilizing school-specific logos and brochures to increase visibility of school themes and provide parents with culturally-relevant materials that reflect unique opportunities.

Step 2 – Student Application: Facilitate the successful application of all interested youth and families regardless of race, color or national origin to ensure equal opportunity to participate in FWCS *SEEK* magnet schools (FWCS will utilize online application procedure for all magnets).

1. All students who wish to attend FWCS magnet schools must complete online applications.
2. Families that do not have access to the Internet at home may complete applications at the FWCS Schools-of-Choice Office or any school library, where they can receive assistance as needed to complete/submit enrollment applications (some parents unable to see, read, use computers, etc.).
3. Parents, caregivers and / or applicant students are required to disclose eligibility status for free or reduced lunches – responses are mandatory in

order to be considered for placement.

Step 3 – Student Placement: Place students in schools as indicated on applications to the extent of program capacity. If the number of applicants for a magnet program exceeds capacity at a chosen school, FWCS will employ random lottery system to assign youth to selected schools.

1. Based on capacity, all applicants gain admission unless applications exceed school and/or grade level space. If applications exceed capacity, a random lottery system will determine placement.
2. In order to preserve the integrity of the student placement process and to protect parents, caregivers and students, free or reduced lunch status is never requested via phone or in person. Applicants only designate status on the online application form. Further, lists are never publicized or referred to as "Free/Reduced Group" and "Non-Free/Reduced Group."
3. Upon placement, students will remain in chosen schools unless they apply to an alternative.

Step 4 – Lottery: Utilize race-neutral lottery system to select students for enrollment in programs for which applicants exceed program capacity (school or grade level capacity). The following is a description of the lottery process and its role in the selection of students for enrollment in grade levels pre-kindergarten through twelve determined to be oversubscribed, meaning more applicants, than space available.

1. Lottery applicants have been arranged in a student number sequence which will produce three separate listings for lottery selection. A Random Number Assignment Program will then assign three random numbers to each applicant according to ethnicity and priority groups.
2. Applicants are initially divided into two ethnic groups for lottery processing: **majority** and **minority** groups. Majority groups include all ethnicities except African American.
3. After random number assignments are completed, each applicant has been placed in one of the priority groups in the order shown on the next page. Three separate listings for lottery selection have been run arranging students in various sequence based on the assigned random number within each priority group.

4. Prior to conducting the lottery, the number of openings in each oversubscribed grade level has been determined by space availability. When the lottery is conducted, an audience participant will choose one of the three listings for each ethnic group. The number of openings, at this time, is the cutoff point on the listing; those above the cutoff will be enrolled, and the students below the cutoff point are on the waiting list.
5. During the announcement part of the lottery, it is only announced whether there is a lottery for each grade level, a waiting list, and so forth. Should a parent desire to know their child's application status, they would remain in the board room after the completion of the lottery and FWCS gladly answers any questions.

Priority will be given to students from the following groups to ensure equal access and achievement of enrollment goals (see *Project Design* section for school enrollment projections):

1. Students will be selected for admission into magnet schools (free / reduced lunch status as classification criteria) based on target enrollment balances for each participating school.
2. Applicant students with a sibling already enrolled in selected elementary school (all students who apply for placement in an elementary magnet school with a sibling enrolled in chosen school will be granted placement to promote family continuity and engagement).
3. Continuity of enrollment in theme-based Learning Pathways (for example, youth attending elementary STEAM programs will be given priority placement in STEAM middle programs).

Fort Wayne Community Schools will manage and implement a MSAP grant program that offers high quality education programs to all students, regardless of race, color, religion, ethnicity, sexual orientation or national origin. Placement of students in magnet schools based on race-neutral procedures will ensure district compliance with all U.S. Department of Education regulations and Title VI of the Civil Rights Act of 1964 and its regulations while allowing FWCS to promote socio-economic diversity. Students from all socio-economic backgrounds and geographic areas of the district will be encouraged to apply to and will be selected to participate in magnets based on race-neutral procedures. Students and families will be supported in their efforts to make strong educational choices that provide Fort Wayne youth with opportunities to pursue excellent elementary,

middle and high school educations. Diversity will allow students to grow in learning environments that reflect the demographic composition of school communities and beyond.

Check the appropriate box that applies to this magnet school.

☐ The student selection process will not be different if the school receives fewer applications than available seats.

X The student selection process will be different if the school receives fewer applications than available seats

If the student selection process will be different if the school is undersubscribed, please explain:

If fewer applicants are received than the number of available seats at proposed magnet school at end of application period, all students will be admitted.

Exhibit J
(online materials produced by the Indiana University grant)

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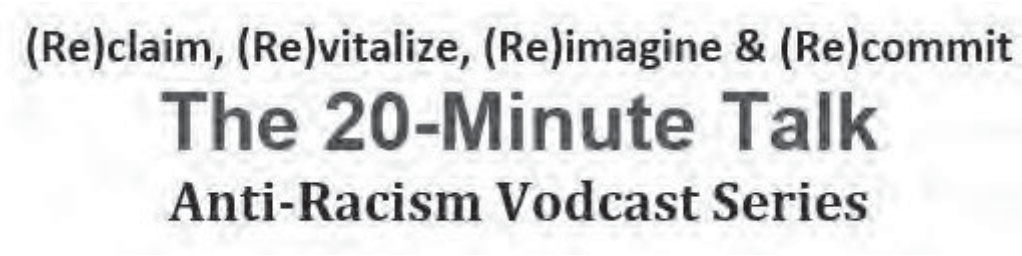
Anti-Racism Vodcast Series



The 20-Minute Talk provides an opportunity to understand and examine how educational stakeholders within the Midwest and Plains Equity Assistance (MAP) Center's 13-state region define and frame intersectional, anti-racist educational practice; how their own identities shape their understandings of anti-racist leadership; as well as provide key and unapologetic insights on what is required, beyond platitudes and toward concrete policies and practices, to realize racially just school communities. **All vodcast recordings are closed captioned.**

Episode One - February 2021: *Introduction to the MAP Center's Anti-Racism Vodcast Series* (https://www.youtube.com/watch?v=LUDsIiXE7IE)

Episode Two - March 2021: *Antiracism in the Age of COVID-19* (https://youtu.be/0bPRhenMTPY)

Episode Three - April 2021: *A Conversation with Antiracist Leaders* (https://www.youtube.com/watch?v=XrF6W6AUZXw)

Episode Four - May 2021: *Antiracism at the Intersections* (https://www.youtube.com/watch?v=I-7hJ2Me2IU)

Session Five - June 2021: *The Antiracist Imaginary for School Communities* (https://www.youtube.com/watch?v=pBoLE0kRkBo)

Session Six - August 2021: *Hope, Healing, and Harmony for Antiracism* (https://www.youtube.com/watch?v=-HWjdnvS9mo)

Click here to s (https://www.youtube.com/channel/UCa3tDq7DcG45n6yv2jDAv5g)**ubscribe to Our Anti-Racist Vodcast Series YouTube**

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Featured Guests

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Kathleen King Thorius, Ph.D.

Executive Director, GLEC Center; Associate Professor IUPUI School of Education; Editor, Multiple Voices, Episode 1 (https://www.youtube.com /watch?v=LUDsliXE7IE)



Seena Skelton, Ph.D.

Director of Operations, MAP Center; Editor, Multiple Voices, Episode 1 (https://www.youtube.com /watch?v=LUDsliXE7IE)



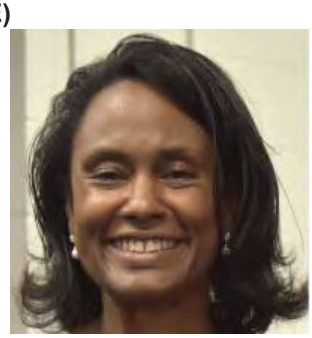
Perry Wilkinson, M.Ed.

Education Equity & Systems Data Specialist at SE/Metro Regional Center of Excellence, Southeast Service Cooperative, MN, Episode 2 (https://youtu.be



Toia Jones, M.Ed.

Principal, Boulder Hill Elementary, Community Unit School District 308, IL, Episode 2 (https://youtu.be /0bPRhenMTPY)



Jerry Anderson, Ph.D.

Principal, Homewood Flossmoor High School, IL, Episode 3 (https://www.youtube.com /watch?v=XrF6W6AUZXw)



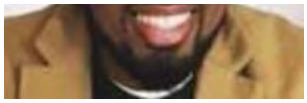
Anthony Lewis, Ph.D.

Superintendent of Schools, Lawrence Public Schools, KS, Episode 3 (https://www.youtube.com /watch?v=XrF6W6AUZXw)









Robert A. Lampley, Esq.

Attorney, OH, Episode 4 (https://www.youtube.com/watch?v=l-7hJ2Me2lU)



Gilmara Vila Nova-Mitchell, M.S.E.

Equity Consultant, Heartland Area Education Agency, IA, Episode 4 (https://www.youtube.com/watch?v=l-7hJ2Me2lU)



Beryl New, Ph.D.

Director of Certified Personnel and Equity at Topeka Public Schools, KS, Episode 5 (https://www.youtube.com/watch?v=pBoLE0kRkBo)



Anthony Jones, Ph.D.

Director of Equity, Ames Community School District, IA, Episode 5 (https://www.youtube.com/watch?v=pBoLE0kRkBo)



Courtney Reed Jenkins, J.D., C.P.M.

Assistant Director, Special Education, Wisconsin Department of Public Instruction, WI, Episode 6 (https://www.youtube.com/watch?v=-HWjdnvS9mo)



Rev Hillstrom, Ed.D.

Director of Educational Equity, Osseo Area Schools, MN, Episode 6 (https://www.youtube.com/watch?v=-HWjdnvS9mo)



Chrishirella F. Warthen, Ph.D.

Director of Family & Community Engagement, Racine Unified School District, WI, Episode 6 (https://www.youtube.com/watch?v=-

HWjdnvS9mo)

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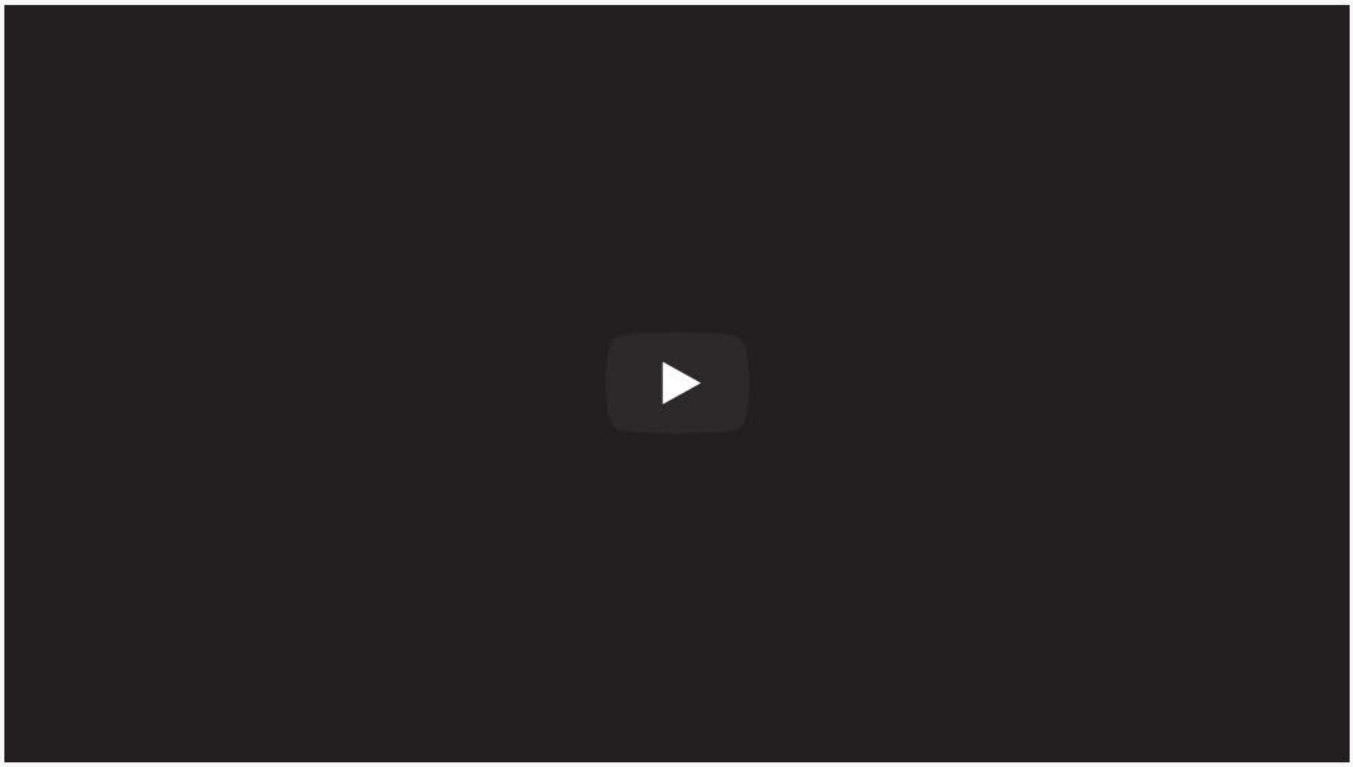

Episode One--The 20-Minute Talk: Introduction to the MAP Center's Anti-Racism Vodcast Series

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Episode One is an introductory discussion of the purpose of the Anti-Racism Vodcast Series, featuring guests Dr. Seena Skelton, Director of Operations of the Midwest and Plains Equity Assistance Center, and Dr. Kathleen King Thorius, Executive Director of the Great Lakes Equity Center and the Midwest and Plains Equity Assistance Center.

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Episode One--The 20-Minute Talk: Introduction to the MAP Center's Anti-Racism Vodcast Series
https://www.youtube.com/watch?v=LUDsIiXE7lE

Co-hosts:
- Tiffany Kyser, Ph. D., Associate Director of Engagement and Partnerships, Midwest & Plains Equity Assistance Center
- Nickie Coomer, M. Ed., Doctoral Assistant, Midwest & Plains Equity Assistance Center

Guests:
- Kathleen King Thorius, Ph. D., Executive Director and Principal Investigator (PI), Midwest and Plains Equity Assistance Center; Executive Director, Great Lakes Equity Assistance Center
- Seena M. Skelton, Ph. D., Director of Operations, Midwest and Plains Equity Assistance Center

Starting @ 0:00
"The Midwest and Plains Equity Assistance Center (MAP) is one of four regional Equity Assistance Centers, funded by the United States Department of Education under Title IV of the 1964 Civil Rights Act. The MAP Center provides technical assistance and training, upon request, in the areas of race, sex, national origin, and religion to public school districts and other responsible governmental agencies to promote equitable educational opportunities and work in the areas of civil rights, equity, and school reform. The Center serves 13 state education agencies, 7,025 public school districts, and 11,249,050 public school students. You can find our website at greatlakesequity.org.

"The following Anti-racist Vodcast Series aims to advance anti-racist efforts and action within school communities in our 13-state region and beyond with a succinct, 20-minute discussion with anti-racist school practitioners."

Starting @ 10:40 (Kathleen King Thorius)
"[A]s a white, non-disabled, cis[gender] woman, I and white people are socialized into racialized belief systems and racist policies, practices, and belief systems. […] We need resources to be able to sustain our attention to how we've benefitted from those as white people, how we have perpetuated, and how we need to sustain our efforts to disrupt those kinds of our racist systems in our schools and in our society, in our communities and in our families."

Starting @ 18:55 (Nickie Coomer)
"And before we close out, though, I do want to point to a few of our resources that we've developed at the MAP Center that are related to antiracism. So I encourage our viewers to stop by our website at greatlakesequity.org and visit our online equity resource library. They'll find there a few different titles on our antiracism webpage, one of which is our Equilearn webinar, "Ensuring Every Student Succeeds: Understanding and Redressing Intersecting Oppressions of Racism, Sexism, and Classism", as well as our Equity Digest entitled "Race Matters in School"."

Starting @ 21:00
"The Midwest and Plains Equity Assistance Center, a project of the Great Lakes Equity Center, is funded by the United States (U.S.) Department of Education to provide technical assistance, resources, and professional learning opportunities related to equity, civil rights, and systemic school reform throughout the 13-state region. 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. This product and its contents are provided to educators, local, and state education agencies, and/or non-commercial entities for educational training purposes only. […] [T]he Midwest and Plains Equity Assistance Center would like to thank the Indiana University School of Education-Indianapolis (IUPUI), as well as Executive Director *Dr. Kathleen King Thorius*, Director of Operations *Dr. Seena Skelton*, and Associate Director *Dr. Tiffany Kyser* for their leadership and guidance in the development of all tools and resources to support the region." (italics in original)

The 20-Minute Talk: Episode 2--Antiracism in the Age of COVID-19
https://www.youtube.com/watch?v=0bPRhenMTPY

Co-hosts:
- Tiffany Kyser, Ph. D., Associate Director of Engagement and Partnerships, Midwest & Plains Equity Assistance Center
- Nickie Coomer, M. Ed., Doctoral Assistant, Midwest & Plains Equity Assistance Center

Guests:
- Perry Wilkinson, Education Equity and Systems Data Specialist, Southeast Metro Regional Center of Excellence, Southeast Service Cooperative
- Toia Jones, Principal, Boulder Hill Elementary, Community Unit School District 308

Starting @ 0:00
"The Midwest and Plains Equity Assistance Center (MAP) is one of four regional Equity Assistance Centers, funded by the United States Department of Education under Title IV of the 1964 Civil Rights Act. The MAP Center provides technical assistance and training, upon request, in the areas of race, sex, national origin, and religion to public school districts and other responsible governmental agencies to promote equitable educational opportunities and work in the areas of civil rights, equity, and school reform. The Center serves 13 state education agencies, 7,025 public school districts, and 11,249,050 public school students. You can find our website at greatlakesequity.org.

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Starting @ 5:30 (Perry Wilkinson)
"[A]re we really recognizing the oppression and the barriers that we're putting up as really a white system?"

Starting @ 6:55 (Perry Wilkinson)
"Just how are we really making the invisible visible? Right? So those below the line things that we talk about when it comes to the cultural iceberg or the white supremacy culture things. Like, what are those things that are invisible that we can start bringing to the surface? And I think that's our job as antiracist educators during this time – or all the time, but especially during this time."

Starting @ 16:58 (Nicki Coomer)
"I just want to remind our viewers to stop by our online equity resource library at www.greatlakesequity.org for an array of resources and supports related to anti-racist practice."

Starting @ 18:19
"The Midwest and Plains Equity Assistance Center, a project of the Great Lakes Equity Center, is funded by the United States (U.S.) Department of Education to provide technical assistance, resources, and professional learning opportunities related to equity, civil rights, and systemic school reform throughout the 13-state region. 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. This product and its contents are provided to educators, local, and state education agencies, and/or non-commercial entities for educational training purposes only. […] [T]he Midwest and Plains Equity Assistance Center would like to thank the Indiana University School of Education-Indianapolis (IUPUI), as well as Executive Director *Dr. Kathleen King Thorius*, Director of Operations *Dr. Seena Skelton*, and Associate Director *Dr. Tiffany Kyser* for their leadership and guidance in the development of all tools and resources to support the region." (italics in original)

[Episode 3 of the 20-Minute Talk] Antiracist Leaders: A Conversation
https://www.youtube.com/watch?v=XrF6W6AUZXw

Co-hosts:
- Tiffany Kyser, Ph. D., Associate Director of Engagement and Partnerships, Midwest & Plains Equity Assistance Center
- Nickie Coomer, M. Ed., Doctoral Assistant, Midwest & Plains Equity Assistance Center

Guests:
- Jerry Anderson, Ph. D., Principal, Homewood-Flossmoor Community High School
- Anthony Lewis, Ph. D., Superintendent, Lawrence Public Schools

Starting @ 0:00
"The Midwest and Plains Equity Assistance Center (MAP) is one of four regional Equity Assistance Centers, funded by the United States Department of Education under Title IV of the 1964 Civil Rights Act. The MAP Center provides technical assistance and training, upon request, in the areas of race, sex, national origin, and religion to public school districts and other responsible governmental agencies to promote equitable educational opportunities and work in

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Starting @ 10:45 (Anthony Lewis)
"And I like the way, I think, Dr. Kyser and Dr. Anderson both said, dismantle these systemics of oppression. You know, some people say we want to disrupt, you know if I disrupt the room I can put the room back together, but I want to totally dismantle these systemics of oppression. And in really examining yourself and educating yourself, really truly understanding the historical context of how we got here, really understanding from our Native American perspective, from our African-American perspective, in terms of being dehumanized, truly understanding that foundation of work of why and how America was built with these racist ideologies, with these racist practices."

Starting @ 17:09 (Nicki Coomer)
"Thanks so much Dr. Anderson and Dr. Lewis. I just wanted to add something that I heard from both of you. If there's a reason not to be liked, that's the reason not to be liked. And I think that ties in really importantly with the idea of being a co-conspirator and an accomplice. That means that you're giving something up in order to resist a system that is harmful, to be a co-conspirator, to be an accomplice means that you're read to get into the work and you're ready to be un-liked, you're ready to get in trouble, to get in good trouble, to not only be disruptive, but to dismantle. And I think, again, to really call white colleagues to the table, when you know that you're positioned in a way where you get a benefit of a doubt that your Black colleagues do not get, acknowledge that publicly and say it out load, and engage in that anti-racist work as well, to your detriment, and then prepare to bear the consequences of that."

Starting @ 18:58 (Nicki Coomer)
"Don't forget to stop by our online equity resource library at www.greatlakesequity.org for an array or resources and supports to anti-racist practice."

Starting @ 20:32
"The Midwest and Plains Equity Assistance Center, a project of the Great Lakes Equity Center, is funded by the United States (U.S.) Department of Education to provide technical assistance, resources, and professional learning opportunities related to equity, civil rights, and systemic school reform throughout the 13-state region. 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. This product and its contents are provided to educators, local, and state education agencies, and/or non-commercial entities for educational training purposes only. […] [T]he Midwest and Plains Equity Assistance Center would like to thank the Indiana University School of Education-Indianapolis (IUPUI), as well as Executive Director *Dr. Kathleen King Thorius*, Director of Operations *Dr. Seena Skelton*, and Associate

Director *Dr. Tiffany Kyser* for their leadership and guidance in the development of all tools and resources to support the region." (italics in original)

The 20-Minute Talk: Episode 4--Antiracism Conversations at the Intersections
https://www.youtube.com/watch?v=l-7hJ2Me2lU

Co-hosts:
- Tiffany Kyser, Ph. D., Associate Director of Engagement and Partnerships, Midwest & Plains Equity Assistance Center
- Nickie Coomer, M. Ed., Doctoral Assistant, Midwest & Plains Equity Assistance Center

Guests:
- Gilmara Vila Nova-Mitchell, M.S.E., Equity Consultant, Heartland Area Education Agency, Iowa
- Robert A. Lampley, J.D., Civil Rights Attorney, Ohio

Starting @ 0:00
"The Midwest and Plains Equity Assistance Center (MAP) is one of four regional Equity Assistance Centers, funded by the United States Department of Education under Title IV of the 1964 Civil Rights Act. The MAP Center provides technical assistance and training, upon request, in the areas of race, sex, national origin, and religion to public school districts and other responsible governmental agencies to promote equitable educational opportunities and work in the areas of civil rights, equity, and school reform. The Center serves 13 state education agencies, 7,025 public school districts, and 11,249,050 public school students. You can find our website at greatlakesequity.org.

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Starting @ 9:32 (Gilmara Vila Nova-Mitchell)
"There are beliefs I have about how we go about antiracist work in our own lives. One is, there is no neutral on this bus. So even if you are an individual filled with good intentions, as I believe most people are, if you're not actively acting, you are helping oppressive systems stay in place. And there is no neutral on this bus. Or you are being antiracist or you're not doing something to disrupt systems of inequity and racism."

Starting @ 11:08 (Gilmara Vila Nova-Mitchell)
"And so the first step I always recommend to people, and I try to do it myself, is to learn about history, the history of race in this country, white supremacy history and understand how we have been dealing with these systemics of oppression for hundreds of years and how they have been interwoven in everything that is part of our existence, such as voting and the way we structure our political system and our educational system and our healthcare system. And so, really -- and our land possession opportunities, you know. And understanding those things really help you position yourself in a way that you can make informed decisions when you are being a citizen,

when you are voting, when you are trying to work with your banks, with your healthcare organizations as a patient. You know, when you are attending school events for your families' kids. And so I do think that understanding the historical context of race, oppression, and white supremacy is the number one step. Then, as I said, understanding what you bring to the table in terms of racism and how do you exclude people from different races than yours? […] Maybe I am racist, you know, and maybe I don't even know about it. […] That's not easy work to do, but there are lots of resources out there to identify your implicit bias. There's the implicit association test that Harvard has that is completely free that you can take."

Starting @ 19:17 (Nicki Coomer)
"So, as we move forward to wrap up our conversation, I just want to highlight some resources that are in our online equity resource library at greatlakesequity.org for an array of resources and supports related to antiracist practice."

Starting @ 21:05
"The Midwest and Plains Equity Assistance Center, a project of the Great Lakes Equity Center, is funded by the United States (U.S.) Department of Education to provide technical assistance, resources, and professional learning opportunities related to equity, civil rights, and systemic school reform throughout the 13-state region. 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. This product and its contents are provided to educators, local, and state education agencies, and/or non-commercial entities for educational training purposes only. […] [T]he Midwest and Plains Equity Assistance Center would like to thank the Indiana University School of Education-Indianapolis (IUPUI), as well as Executive Director *Dr. Kathleen King Thorius*, Director of Operations *Dr. Seena Skelton*, and Associate Director *Dr. Tiffany Kyser* for their leadership and guidance in the development of all tools and resources to support the region." (italics in original)

The 20-Minute Talk: Episode 6—Hope, Healing, and Harmony for Antiracism
https://www.youtube.com/watch?v=-HWjdnvS9mo

Co-hosts:
- Tiffany Kyser, Ph. D., Associate Director of Engagement and Partnerships, Midwest & Plains Equity Assistance Center
- Nickie Coomer, M. Ed., Doctoral Assistant, Midwest & Plains Equity Assistance Center

Guests:
- Chrishirella Warthen-Sutton, Ph. D., Director of Family and Community Engagement for Racine Unified School District; Assistant Professor of Education, Concordia University, WI
- Courtney Reed Jenkins, J.D., C.P.M., Assistant Director of Special Education, Wisconsin Department of Public Instruction
- Rev Hillstrom, Ed. D., Director of Educational Equity, Osseo Area Schools, MN

Starting @ 0:00
"The Midwest and Plains Equity Assistance Center (MAP) is one of four regional Equity Assistance Centers, funded by the United States Department of Education under Title IV of the 1964 Civil Rights Act. The MAP Center provides technical assistance and training, upon request, in the areas of race, sex, national origin, and religion to public school districts and other responsible governmental agencies to promote equitable educational opportunities and work in the areas of civil rights, equity, and school reform. The Center serves 13 state education agencies, 7,025 public school districts, and 11,249,050 public school students. You can find our website at greatlakesequity.org.

"The following Anti-racist Vodcast Series aims to advance anti-racist efforts and action within school communities in our 13-state region and beyond with a succinct, 20-minute discussion with anti-racist school practitioners."

Starting @ 4:45 (Chrishirella Warthen-Sutton)
"As I begin to even read Kendi's work, "How to Be an Antiracist," on the inside cover, the quote "The only way to undo racism is to consistently identify, describe it, and dismantle it.""

Starting @ 10:35 (Courtney Reed Jenkins)
"And I think about the question around, in the pursuit of hope, healing, and harmony for antiracist school communities, is it different depending on one's race? And I would say the short answer is, yes. So I'll speak specifically to what I feel called to do as a white educational equity leader and frame it around three specific ideas. One, my role as a white leader in dismantling white supremacy. Number two, my role as a white leader in centering and empowering the voices of people of color to define hope, healing, and harmony. And then, thirdly, my responsibility as a white educational leader for my white colleagues and their growth. And when, I'll start with the ideas around dismantling white supremacy. And for that, the place I lean most heavily on when I think about that is Tema Okun's work and she relied, she articulated in an article entitled "White Supremacy Culture", some of the characteristics of white supremacy culture that show up in our organizations. And because they function as norms and behaviors, it creates two things, it creates a very strong sense of who belongs and who doesn't belong. And because these are often unspoken norms and values, it creates a culture that very actively pushes out folks of color and operates as a barrier. And so the characteristics that Tema shared in her article were things like perfectionism, sense of urgency, quantity over quality, defensiveness, worship of the written word, only one way, "either-or" thinking, fear of open conflict, individualism, objectivity, and who has the right to be comforted in conversation and in conflict. And in the article, Tema offers what she calls antidotes or ways to interrupt or ways to reframe those characteristics. So that the ways we operate or organize as an organization are better matched with our explicit values around equity and justice. And so I wanted to share very specifically some of the ways that I'm practicing how to disrupt white supremacy in my space, which is at the state education agency. And I want to offer three examples. The first is an invitation or offer to dissent in real time and not in meetings after the meeting. So, one of the ways that I see "Midwest nice" play out in our educational agencies is that very rarely will dissent happen within an actual meeting but happen in a meeting after the meeting where decisions then get made. And so, moving that space to the actual space of decision-making within the meeting by holding time on the agenda for active dissent and for actively establishing

how we'll solve the decision without a meeting after the meeting. The second example that I want to share is that I believe it's fully within my power, whenever I get an invitation to lead or to work on something that I would call juicy or exciting or a challenge, a challenging growth, stretch assignment that I have full responsibility and I have full power to invite other folks to lead with that around me, to lead in that effort with me without asking. So as a white person, if I'm asked to do a presentation at a conference, and I'm the only white person, and I notice that, then I will co-present with someone, I'll share my time, but not necessarily check back with someone. So, I'm disrupting the power hoarding structures that often exist within an organization. And then finally, I'm working, practicing on decentering the value or important of the written word by calling in spoken word, by calling in stories. So, for example, the way I started today, for example, even when I have to do a written memo, which is sort of our protocol within the state agency, I'll start with a quote from a parent in the community that talks about why we need to be moving forward with it and focusing on anti-racism or a picture. So, pushing the boundaries of what is expected in small ways are ways of dismantling white supremacy. And to conclude this, I'll say that when I use the word, "I'm currently practicing," this is a practice. So, it means that there is a regular personal reflection on how I'm reinforcing white supremacy at DPI. That I'm identifying places where I need to grow and then I commit to that growth through practicing and holding myself accountable."

Starting @ 22:17 (Rev Hillstrom)
"The community is so fractured if for no other reason that colonialism has been the foundation of this country and those behaviors have been perpetuated throughout."

Starting @ 24:45 (Tiffany Kyser)
"And the ways in which, because of intersectionality, some of us, our work is different than, as Courtney noted, the work if you have more dominant identity."

Starting @ 26:51
"The Midwest and Plains Equity Assistance Center, a project of the Great Lakes Equity Center, is funded by the United States (U.S.) Department of Education to provide technical assistance, resources, and professional learning opportunities related to equity, civil rights, and systemic school reform throughout the 13-state region. 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. This product and its contents are provided to educators, local, and state education agencies, and/or non-commercial entities for educational training purposes only. […] [T]he Midwest and Plains Equity Assistance Center would like to thank the Indiana University School of Education-Indianapolis (IUPUI), as well as Executive Director *Dr. Kathleen King Thorius*, Director of Operations *Dr. Seena Skelton*, and Associate Director *Dr. Tiffany Kyser* for their leadership and guidance in the development of all tools and resources to support the region." (italics in original)

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Anti-Racism Resources

Center Statement



Over the last nine years, we have partnered with hundreds of education agencies in work to address racism at the intersection of other oppressions. Many of you have read our publications, looked through our website, joined us in online learning communities and face-to-face for our Equity Leaders Institutes and Summits. You have applied our Equity Fellows policy and practice improvement tools, participated in Girls STEM Institute, shared our resources with your university students, and supported us as we worked to reignite the momentum of the journal *Multiple Voices: Race, Disability, and Language Intersections in Special Education*. At the same time, as your partners in the deep and constant struggle, we urge you to consider alongside your outrage over the systemic violence against our Black communities (and indeed, our BIPoC+ communities more broadly), that this very same systemic violence occurs in our schools. *These* are the traumas that must inform any claim of educators' “trauma informed care”: the traumas of suspension, expulsion, tracking, discouragement, silencing, restraining, secluding, segregating, and killing through systems of formal and informal surveillance and policing.

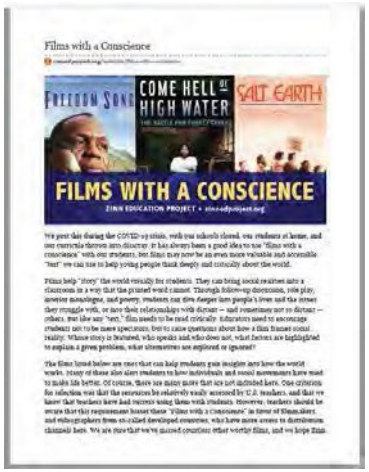
For those who are white (non-disabled, Christian, non-LGBTQIA+, English-only speaking, US born, and otherwise privileged) educators/scholars, we urge you to focus your work on dismantling the racism and ableism, and other oppressions *you* engage to maintain this systemic trauma for our Youth of Color and intersectionally-marginalized youth, alongside your community of white educators and scholars. Position yourselves as vulnerable and work toward the *redistribution of your own power and resources, not the deficit-based fixing of children* who are already brilliant and beautiful exactly as they show up in our schools, classrooms, and online spaces each and every day.

For our Black, Indigenous, People of Color+ partners, including families and students, we will continue work to center your experiences, your leadership, your wisdom, your voices, and all other forms of your expression. We will work to create more healing and loving spaces for you in particular as we move forward in the immediate and long-term future.

In solidarity,

Great Lakes Equity Center/Midwest and Plains Equity Assistance Center

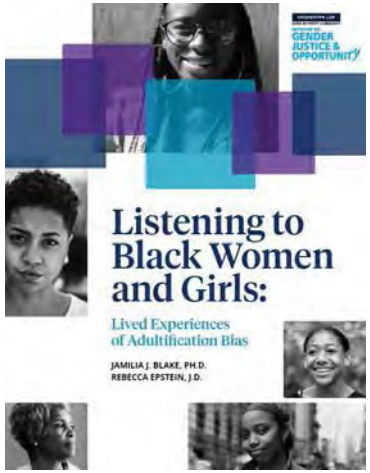
Downloadable Resources



(/sites/default/files/2020_6_18_films_with_a_conscience_-_zinn_education_project_rj_0.pdf)



(/sites/default/files/aecf-itstimetotalk-2015.pdf)



(/sites/default/files/georgetown-listeningtowmoenandgirls-2019.pdf)

Films with a Conscience (/sites/default/files/2020_6_18_films_with_a_conscience_-_zinn_education_project_rj.pdf)

Zinn Education Project

This guide for teachers utilizes meaningful films to teach children and youth about civil rights movements for historically marginalized groups, as well as other social justice issues.

It's Time to Talk (/sites/default/files/aecf-itstimetotalk-2015_1.pdf): How to Start Conversations about Racial Inequities (/sites/default/files/aecf-itstimetotalk-2015_1.pdf)

The Annie E. Casey Foundation

This report outlines four recommendations to help legislators, public systems, nonprofit organizations, businesses and community leaders address the many barriers facing children of Color using Nebraska and Wisconsin case studies as examples.

Listening to Black Women and Girls: Lived Experiences of Adultification Bias (/sites/default/files/georgetown-listeningtowmoenandgirls-2019_0.pdf)

Jamilia J. Blake & Rebecca Epstein

Georgetown Law Center on Poverty & Inequality

This report presents the findings from quantitative analysis of a form of gendered racial bias against Black girls--adultification, in which adults view Black girls as less innocent and more adult-like than their white peers—and a summary of findings from focus groups with Black women and girls across the U.S.


Reconstructing Race
A Teacher Introduces His Students to the Slippery Concept of Race

(/sites/default/files/2020_6_18_reconstructing_race_rj.pdf)


Whitewashing the Past
A proposal for a national campaign to rethink textbooks

(/sites/default/files/2020_6_18_whitewashing_the_past_rj.pdf)


'I'm Not White': anti-racist teacher education for white early childhood educators

(/sites/default/files/im_not_white_0.pdf)

Reconstructing Race (/sites/default/files/2020_6_18_reconstructing_race_rj_0.pdf)

Nathaniel W. Smith

Zinn Education Project

This article explores how a white teacher in a predominantly white school helped students to see their own whiteness, better understand racial issues, and the ways it shapes their lives.

Whitewashing the Past (/sites/default/files/2020_6_18_whitewashing_the_past_rj_0.pdf)

Bob Peterson

Zinn Education Project

This article examines textbook curriculum and the colonial "whitewashing," or White-centered erasure, of key history concepts, such as racism, classism, gender discrimination, and imperialism. The author urges a rethinking of traditional textbooks to be more representative, diverse, and inclusive of historically marginalized groups.

I'm Not White: Anti-racist Teacher Education for White Early Childhood Educators (/sites/default/files/im_not_white.pdf)

Tara Goldstein

This article discusses three ways that teacher educators might prepare white early childhood education students for anti-racist work in their classrooms.

Resources

Anti-racist Education

Books:

How to Be an Antiracist by Ibram X. Kendi

Me and White Supremacy by Layla F. Saad

Sister Outsider by Audre Lorde

The New Jim Crow: Mass Incarceration in the Age of Colorblindness by Michelle Alexander

White Fragility by Robin DiAngelo

Not Light But Fire

Articles:

16 Books About Race That Every White Person Should Read (https://www.huffpost.com/entry/16-books-about-race-that-every-white-person-shou
read_n_565f37e8e4b08e945fedaf49?guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20vc2VhcmNoP3E9cmVhZGluZytsaXN0cytmb3Ird2hpdGUr
guce_referrer_sig=AQAAANhsLQcegWlnE-nG6fG3qV6RH-QfoQQpY7jIAKx_9BC_uif9Y6PpMoA_TU1_CVKWB7Tbl_AUD6KAPetdCwgqRfdti5Uh

Who Gets to Be Afraid in America? (https://www.theatlantic.com/ideas/archive/2020/05/ahmaud-arbery/611539/)

White Privilege: Unpacking the Invisible Knapsack (http://convention.myacpa.org/houston2018/wp-content/uploads/2017/11/UnpackingTheKnaps

The 1619 Project (https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html)

97 Things White People Can Do for Racial Justice (https://medium.com/equality-includes-you/what-white-people-can-do-for-racial-justice-f2d18b0

Resources for White People to Learn and Talk About Race and Racism (https://blog.fracturedatlas.org/resources-for-white-people-to-learn-and-ta

Racism/Anti-Racism Websites (https://www.library.wisc.edu/socialwork/research-help/social-issues-websites/racismanti-racism-websites/)

Justice & Civic Identity (https://www.aspeninstitute.org/issues/justice-civic-identity/)

5 Tips for Being an Ally (https://www.youtube.com/watch?v=_dg86g-QlM0)

Talking About Race (https://nmaahc.si.edu/learn/talking-about-race?fbclid=IwAR2XDpKAvILO9Ezc7SOZr5Zjs9VRTcZexiDWq2MW7vE4tDHxW7n

The Anti-racist Starter Pack (https://parade.com/1046031/breabaker/anti-racist-tv-movies-documentaries-ted-talks-books/?fbclid=IwAR2se3JXD5

The Anti-Racist Reading List (https://www.theatlantic.com/ideas/archive/2019/02/antiracist-syllabus-governor-ralph-northam/582580/)

Mirrors of Privilege: Making Whiteness Visible (https://www.world-trust.org/mirrors-of-privilege-making-whitene)

White Anti-Racism: Living the Legacy (https://www.tolerance.org/professional-development/white-antiracism-living-the-legacy)

Implicit Bias and Structural Racialization (https://nationalequityproject.org/wp-content/uploads/National-Equity-Project-Implicit-Bias.pdf)

Multicultural Education vs Anti-Racist Education (http://www.socialstudies.org/sites/default/files/publications/se/5806/580605.html)

Racial Healing Handbook: Practical Activities to Help You Challenge Privilege, Confront Systemic Racism, and Engage in Collective Healing (http

Talking to Very Young Children about Race (http://r20.rs6.net/tn.jsp?f=001o0tSRL6qECx9aQzVvl5nzCoP6k_X4KHuN5qkJaFEEYX7hX29v7rpUJ9

The Characteristics of White Supremacy Culture (https://www.showingupforracialjustice.org/white-supremacy-culture-characteristics.html)

Explaining White Privilege To A Broke White Person (https://www.huffpost.com/entry/explaining-white-privilege-to-a-broke-white-person_b_52692

Directories:

Anti-Racism Resource Directory for Families: Resources for Multiple Grade Levels (http://r20.rs6.net/tn.jsp?f=001o0tSRL6qECx9aQzVvl5nzCoP6
pKwq0vsihlZ6QfdzY9KjGBMhGg==&ch=iIg-i5cCzCdbCzNp7OwrP_0X2ej7LPSEDmOLosT24CYz7ginXUPdSA==)

Videos:

Black Feminism & the Movement for Black Lives: Barbara Smith, Reina Gossett, Charlene Carruthers (https://youtu.be/eV3nnFheQRo)

Dr. Robin DiAngelo discusses 'White Fragility' (https://youtu.be/45ey4jgoxeU)

How Studying Privilege Systems Can Strengthen Compassion (https://youtu.be/e-BY9UEewHw)

Moving from Cultural Competence to Antiracism (https://www.youtube.com/watch?v=_wJ_pvbC3SI)

What is Systemic Racism? (https://www.raceforward.org/videos/systemic-racism?fbclid=IwAR0FTw0FVdUtr-1L_I-dBLLPq7993aoLTwHeRt5Y8znr

Podcasts:

1619 (https://www.nytimes.com/2020/01/23/podcasts/1619-podcast.html)

About Race (https://www.showaboutrace.com/)

Code Switch (https://www.npr.org/sections/codeswitch/)

Intersectionality Matters! hosted by Kimberlé Crenshaw (https://podcasts.apple.com/us/podcast/intersectionality-matters/id1441348908)

Momentum: A Race Forward Podcast (https://www.raceforward.org/media/podcast/momentum-race-forward-podcast)

Pod For The Cause (https://civilrights.org/podforthecause/)

Pod Save the People (https://crooked.com/podcast-series/pod-save-the-people/)

Seeing White (https://www.sceneonradio.org/seeing-white/)

Blacktivism in the Academy (https://open.spotify.com/show/6XfSZnJvux9BI0nMgoKZqq)

Have You Heard? (https://haveyouheardblog.com/have-you-heard/)

Revisionist History (http://revisionisthistory.com/)

Just Talk Ed (https://justtalkedequity.podbean.com/)

Seeing White (http://www.sceneonradio.org/seeing-white/)

Films and TV series:

13th

American Son

Black Power Mixtape: 1967-1975

Blindspotting

Clemency

Dear White People

Fruitvale Station

I Am Not Your Negro

If Beale Street Could Talk

Just Mercy

King in The Wilderness

See You Yesterday

Selma

The Black Panthers: Vanguard of the Revolution

The Hate U Give

When They See Us

Putting Racism on the Table: Robin DiAngelo on White Privilege (https://www.youtube.com/watch?v=Dv-pkNXcKsw)

Websites

Hate Symbols (https://www.adl.org/hate-symbols)

Explainer: White Nationalism (https://www.facinghistory.org/educator-resources/current-events/explainer/white-nationalism)

Junebaby Anti-Racist Encyclopedia (https://www.junebabyseattle.com/encyclo/)

Self-Defined: Social Justice Dictionary (https://www.selfdefined.app/)

Toolkits

Racial Equity Toolkit (https://spark.adobe.com/page/cDjtnU2XPsq7v/)

Blogs

A Guide to Activism in the Digital Age (https://online.maryville.edu/blog/a-guide-to-social-media-activism)

Anti-Asian Racism

Center Statement on the Violence in Atlanta on 3/16

This morning, we woke up to the sad and angering news of yet another act of racial violence with the mass shooting in Atlanta overnight. Our hea
COVID-19 over the past year. Educators committed to anti-racist education can engage in specific actions to combat racism and specifically anti-
and also be triggering for your Black, Latinx, and Jewish students, whose communities have also been targets of increased racial violence over th

Websites

Resources for Addressing Anti-Asian Racism in the Time of Coronavirus (https://asiasociety.org/sites/default/files/inline-files/Resources%20for%2

Report Anti-Asian Racism (https://stopaapihate.org/)

- Stop AAPI Hate Inforgraphics (https://stopaapihate.org/update-reports/stop-aapi-hate-infographics)

Documents

The Asian American Racial Justice Toolkit (https://www.asianamtoolkit.org/the-toolkit)

Organizations

AP3CON (http://www.asianpacificpolicyandplanningcouncil.org/)

Asian Pacific Policy and Planning Council (A3PCON) is a coalition of API-led community organizations and individuals s that advocates for the rig

- COVID-19 Resources (http://www.asianpacificpolicyandplanningcouncil.org/covid-19-resources/)

Chinese for Affirmative Action (CAA) (https://caasf.org/)

Chinese for Affirmative Action (CAA) is a progressive voice in and on behalf of the broader Asian American and Pacific Islander community. We a

- What to Do When You See or Experience COVID 19 Hate (https://caasf.org/2020/05/what-to-do-when-you-see-or-experience-covid-19-hate

Asian American Studies Department, San Francisco State University (https://aas.sfsu.edu/)

Asian American Studies Department, San Francisco State University furthers the understanding of the histories and cultures of Asian Americans

Books

At 40

The Coming Man

War Baby/Love Child

Contact Info

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Indianapolis, IN 46202

(https://apex.uits.iu.edu/ords/f?p=117:LOGIN) Staff (/user)

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However, the content does not necessarily represent the policy of the Department of Education, and endorsement by the Federal Government should not be assumed.

Exhibit K
(IES anti-racism and DEI resources)

Institute of Education Sciences (IES): Acting on Diversity

Mark Schneider, Director of IES | August 6, 2020

Since the murder of George Floyd, Breonna Taylor, and others, IES leadership has done soul searching as we continue to grapple with the educational (and societal) conditions that established present-day patterns of inequities.

We are trying to find *actions* not just words that help us more fully realize the language in ESRA charging the Director with the responsibility for ensuring that IES' work is conducted in a manner that is "objective, secular, neutral, and nonideological and free of partisan political influence and racial, cultural, gender, or regional bias." ESRA further charges the Director to undertake "initiatives and programs to increase participation of researchers and institutions that have been historically underutilized in Federal education research activities of the Institute, including historically Black colleges or universities or other institutions of higher education with large numbers of minority students."

Addressing racial, cultural, gender, or regional bias is not just a moral imperative—it's also a legal one.

Since actions matter more than words, IES leadership is trying to identify what we can *do*, and we are undertaking empirical research to find out where we have missed opportunities—so we can craft the most effective responses. The list below provides a high-level look at some of what we are doing. While these steps are directionally correct, ultimately, we all will be judged on how well we implement them.

- We need to look at our research investments more carefully to see if we are serving researchers and institutions that have not previously been brought into the IES ecosystem.
    - To further this effort, we need to expand our efforts to increase diversity among the peer reviewers who evaluate the significance and quality of the research we fund.
- We need to support more training to create a new and more diverse population of education researchers.
    - The Pathways program is a great source of inspiration and a guide to future IES investments.
    - We are establishing a program of supplemental grants to investigators, especially those early in their careers, from underrepresented backgrounds.
- We need to look at the portfolio of NCES data collections to see if they are up-to-date and reflect today's world of education.
- We need to find ways of supporting community colleges and career/technical education—because there are many effective pathways into the labor market besides the bachelor's degree that lead to family-sustaining wages.

- We need to find ways of growing the resources we invest in adult education—because low levels of adult literacy economically strand so many minority and low-income adults.
- We need to find ways to improve the delivery of effective special education, because it is minority and low-income students who often end up with the worst services.
- We need to improve the design of our assessments and other studies to develop better analytic methods leading to interventions that have a positive impact on the learning outcomes of students of color and low-income students.
- We need to build on the use of student internship and other programs that have presented opportunities for students in Historically Black Colleges and Universities, Hispanic Serving Institutions, and other minority serving institutions.
    - A powerful example of this is NAEP's summer internship program with ETS. Since 2013, 130 promising junior researchers have participated in the NAEP-ETS Summer Undergraduate Research Internship Program.

IES has been working on some of these issues for years—but not always with the appropriate sense of urgency. Many of you know about my commitment to adult and career/technical education. And I have been trying to build up NCSER from the day I arrived at IES. My hope is that the events of last few months will lead us to *actions* that will improve how we spend the millions upon millions of dollars that the American taxpayer entrusts to us and lead us to better redress the long-standing inequities in educational outcomes.

Many of you also know that I have been frustrated by the slow pace of government, which can be difficult to overcome even at an agency like IES, filled with passionate, hard-working staff. The urgency of the moment, hopefully, will lead us to consider how IES can better conduct our work in a manner that is consistent with ESRA and is free of racial, cultural, gender, or regional bias.

As always, please feel free to contact me: mark.schneider@ed.gov

Mark

YouTube Search P



Engaging in Anti-racist, Culturally Responsive Research Practices

101 views Mar 9, 2022 Attention to racial and ethnic gaps in education has not led to a significant improvement in minoritized children's educational access, experiences and outcomes. Specifically, there has been limited attention to racism and systemic inequities, beyond poverty, in the research enterprise focused on educational disparities. We are at a moment of time where educational research can be transformed by explicitly centering race and racism (in all of its forms and consequences). This interactive session will engage with participants on how educational research focused on children can be decolonized, focused on racial equity, and incorporate asset-framing for minoritized children, families, and educators.

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Engaging in Anti-racist, Culturally Responsive Research Practices
https://www.youtube.com/watch?v=vzlAbcgVzRI

Annual IES Principal Investigators Meeting
January 25-27, 2022
Advancing Equity and Inclusion in the Education Sciences

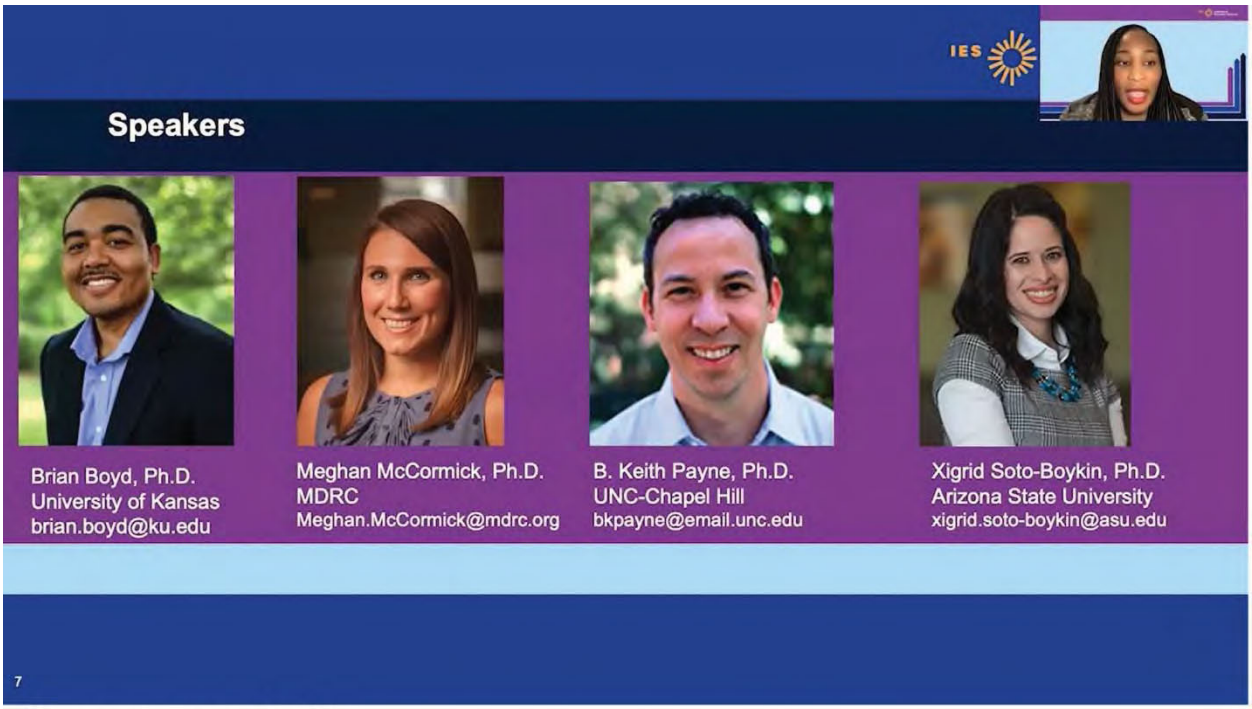
Posted on the Institute of Education Sciences YouTube channel
(IES logo appears on the video and PPT)



Timestamp: 1:15
https://www.youtube.com/watch?v=vzlAbcgVzRI

Moderator:
- Iheoma U. Iruka, UNC-Chapel Hill

Guest speakers:
- Brian Boyd, Ph. D., University of Kansas
- Meghan McCormick, Ph. D., MDRC
- B. Keith Payne, Ph. D., UNC-Chapel Hill
- Xigrid Soto-Boykin, Ph. D., Arizona State University



Timestamp: 4:46
https://www.youtube.com/watch?v=vzlAbcgVzRI

Starting @ 2:19: (Iheoma Iruka)
"Just a couple of definitions that we're all sort of working through. So, first, anti-racism. It really is a conscious and intentional action that includes policies, programs and strategies that really eliminate hierarchy, privilege, marginalization and dehumanization based on race or skin color. So really, it's about you're working against issues of racism, which is a system of hierarchy and privilege. And so anti-racism is the act of fighting against racism. So you can't be not racism. You're either racist or anti-racist. And that's something really important that I hope we can make sure we get today.

"And then finally, equity. Which is like I tell people, equity is like the word "the" that everybody has in front of their sort of lexicon. And so just the definition that we're using today really is about, equity is 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. So those are three big parts. You recognize and value all individuals; you rectify historical injustices; and you provide resources based on needs. That is equity. And then disparities will be eliminated when equity is fully achieved."



Timestamp: 2:27
https://www.youtube.com/watch?v=vzlAbcgVzRI

Starting @ 3:40: (Iheoma Iruka)
"So hopefully, as you, as I'm about to introduce the panelists, as you sort of, as you listen to them, I want you to kind of lean into the idea of, what is the role of science in equity? And the three things I just talked about, right."

Starting @ 4:03: (Iheoma Iruka)
"And so for me the idea is that we have to understand that it's urgent, that we center issues of anti-racism, equity, and justice in our research. This is necessary for the humanity of people."

Starting @ 5:32: (Iheoma Iruka)
"So, I want Brian to give us a little sense of who he is, to describe himself and how he centers racial equity and other, I mean, intersectionality in his work."

Starting @ 6:11: (Brian Boyd)
"My work is focused on young children and families who have autism. So I really look at, really increasingly, the intersection of race and disability within that world. […] So really centering issues of race and racism in particular in understanding disparities in outcomes."

Starting @ 9:07: (Meghan McCormick)
"So my research is focused on identifying policies and programs specific to early childhood setting that really promote equitable learning opportunities and outcomes for young children in pre-K and during thr transition to elementary school. And I'm really also focused on the intersection of race and socioeconomic status or family income and that work. […] And also, I'm really interested more recently,

and thinking about how to make pre-K assessment processes and kindergarten entry assessment more equitable and using an equitable, equity-centered, anti-racist, culturally-responsive lens to get a better understanding of what kids' strengths are[.]"

Starting @ 11:43: (B. Keith Payne)
"So I'm a social psychologist, and my two main areas of research are the psychology of racial inequality and the psychology of income inequality. So I'm also interested, of course, in that intersection between race and class and the biases that those categories evoke in people's minds. So I focus especially on the distinction between implicit and explicit bias."

Starting @ 38:26: (Meghan McCormick)
"So, I think a turning point for a lot of people in our research community was really the summer of 2020 when we were, just kind of, I mean, obviously, there had been, this was just kind of the comeuppance of hundreds of years of issues with racism across America. But I think a lot of people were really, white people were really personally affected and reflecting on how they could use, and think about using, research skills to really become an anti-racist researcher, and not just use their words to say that they were, but actually take some action. And a few researchers in the Early Learning Network came together; I think some folks are in the panel, Mary Bratsch-Hines, Virginia Vitiello, and others from teams to create, and really led by Iheoma and her work, to create a racial equity work group in the Network and to really recenter racial equity as a core part of the research that we were doing in that Network, which aims to identify malleable practices in children's learning experiences and learning contexts that support their development."

Starting @ 50:59: (Iheoma Iruka)
"We all drink the same Kool-Aid of, arguably, racism, and who is privileged and who is not. So I think it's how do we decolonize our work? And so I like to sort of ask Brian, and obviously others as well on the panel, to also speak to are there, what could funders do? Because I think part of it, as Keith mentioned earlier, is that the issue of bias is not so much about, because he says basically a bias changes with the wind, and blows either way, but right, but the point is about the context in the system. So we are, at IES. IES clearly has funded probably every one of us, either as a researcher, as a post-doc, as, you know, as a graduate student, whatever it may be. And it is a funder, it is an institution. And, not to put Brian on the spot, because he's one of the co-chairs of the conference, but is there any sort of guidance you would give? […] like ideas about how they begin to really address issues of anti-racism in the research enterprise."

Starting @ 52:12: (Brian Boyd)
"So, it's a great question, Iheoma. I've thought about this both because I was asked to co-chair this meeting on diversity, equity, and inclusion, and so what does it all mean? You know, I always come back to this, is this a moment or is this a movement? And I worry sometimes that this is just a moment. And if it's just a moment that then the real change that needs to happen in order to ensure equitable outcomes isn't going to be achieved. Right. So how do we really make this a movement? And it takes, as Xigrid said, hard work, self-reflecting, but it also means that we have to go about the long-haul work of making sure we're continuing to have these conversations. Right. We're continuing to have these spaces. This can't be the only year we talk about diversity, equity, inclusion at IES. So how do we also think about ways to reduce bias in the review process, ways to ensure we're training more scholars of color? How do we think about the leadership at IES, or at other funding agencies that fund educational research? Because the funders decide what matters and what gets prioritized. So there are lots of things we need to do, but I think the big thing we need to make sure of is that this is a movement and not just

a moment in time where we're having these conversations because of the recent event. So I hope we keep these conversations going."

Starting @ 54:16: (Iheoma Iruka)
"Meghan or Keith, do you have any sort of either a response to Brian and/or Xigrid, and/or what you would tell funders about what they can do in their, whether it's IES, NIH, foundations, about how they as funders who have power, how do they begin to make sure that we, all of us collectively, are engaged in anti-racist sort of research practices?"

Starting @ 54:42: (Meghan McCormick)
"So I have a thought that I've been thinking about a lot and that is, just ensuring that funders are investing in researchers of color and are putting in place, are helping to structure systems that put in place a really robust pipeline of scholars of color because I think that is a huge limitation of our field right now, with the majority of people doing this work are not representative of the populations that we're trying to, like, we're trying to elevate. And I think that to really create diverse teams, we need funders to really be investing in the next generation of folks who are going to be more representative of our population. […] And so I would make a call to funders to just invest in people and thinking more about the need to diversify just the population of people doing this work."

Starting @ 57:23: (B. Keith Payne)
"And so, I think, one direction I'd like to see us move is for considerations of equity and anti-racism to be woven through all of these kinds of research projects. And there are already lots of aspects of research that are like that. Right? You don't so any research proposal without considering ethics and IRB approval. You don't so any research proposal without considering statistics or your analysis plan. And so I'd like to see issues of inclusion and equity be as normal as an IRB approval and a statistical power analysis plan."

Inside IES Research (http://ies.ed.gov/blogs/research/)

Notes from NCER & NCSER

← Powering Our Future: How Service-Learning Aligned with Next Generation Science Standards Can Promote Science Learning, Social and Emotional Skills, and Civic Engagement (/blogs/research/post/powering-our-future-how-service-learning-aligned-with-next-generation-science-standards-can-promote-science-learning-social-and-emotional-skills-and-civic-engagement)

Promoting Equitable and Sustainable Behavioral Interventions in Early Childhood → (/blogs/research/post/promoting-equitable-and-sustainable-behavioral-interventions-in-early-childhood)

The 2022 IES PI Meeting: Advancing Equity & Inclusion in the Education Sciences (/blogs/research/post/the-2022-ies-pi-meeting-advancing-equity-and-inclusion-in-the-education-sciences)

April 6, 2022 Blog Editor (http://ies.ed.gov/blogs/research/author/blogeditor) NCER (/blogs/research/category/NCER), NCSER (/blogs/research/category/NCSER)

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On January 25-27, 2022, NCER and NCSER hosted our first Principal Investigators (PI) Meeting since the COVID-19 pandemic changed the world as we know it. Even though we were hopeful and eager to connect with our grantees in person, given the continuing uncertainties due to COVID-19, we opted for our very first fully virtual PI meeting (https://ies.ed.gov/pimeeting/default.aspx), and we are pleased to say it was a success on many fronts!

Our co-chairs, Brian Boyd (University of Kansas), and Doré LaForett (Child Trends and University of North Carolina at Chapel Hill) were instrumental in the success of this meeting. They helped identify the meeting theme: *Advancing Equity & Inclusion in the Education Sciences*, suggested sessions (including the plenaries) that addressed the theme, recommended strategies to encourage networking and engagement, and participated in two great sessions focused on Engaging in Anti-racist, Culturally Responsive Research Practices (https://youtu.be/vzlAbcgVzRI) and the Importance of Identifying English Learners in Education Research Studies (https://youtu.be/pa4JWqPWu3E).

Here are a few highlights:

The meeting kicked off (https://youtu.be/-y5gRnkTZBw) **with a welcome from the Secretary of Education Miguel Cardona, followed by IES Director Mark Schneider's opening remarks.** Secretary Cardona reaffirmed the importance and need for high-quality education research to identify, measure, and address disparities in education opportunities and outcomes. Director Schneider spoke about improving the infrastructure of the education sciences and ways that IES will continue to encourage investigators to incorporate the SEER principles going forward. He also revealed a ninth SEER (https://ies.ed.gov/seer/) principle focused on equity, calling on researchers to "address inequities in societal resources and outcomes." See a recap of his talk here (https://ies.ed.gov/director/remarks/02-02-2022.asp).

This year's theme was threaded throughout the meeting, emphasizing the importance and complexity of advancing equity and inclusion in the education sciences. The opening plenary (https://youtu.be/vzlAbcgVzRI) speakers began the meeting with advice on how to center equity and inclusion in education research; the Commissioners provided updates on how NCER (https://youtu.be/A3_D3AoMml4) and NCSER (https://youtu.be/b48mcHBhfmI) are working to address diversity, equity, inclusion, and accessibility (https://ies.ed.gov/blogs/research/post/updates-on-research-center-efforts-to-increase-diversity-equity-inclusion-and-accessibility); sessions focused on challenges and potential solutions for doing research

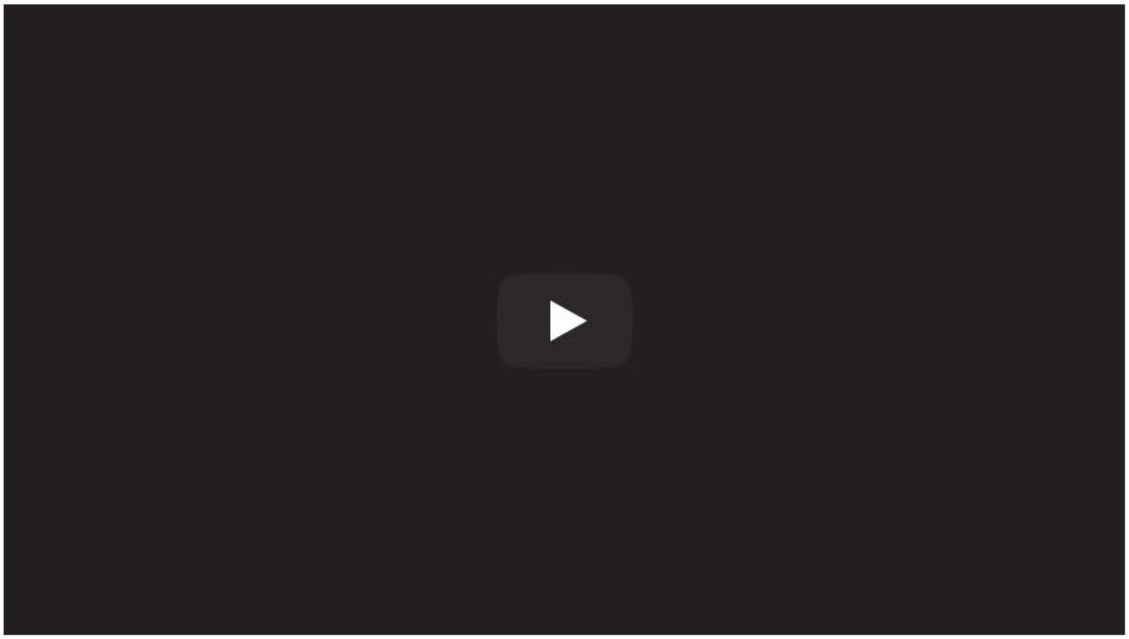
with an equity lens; and the closing plenary (https://youtu.be/q1huC_qsCuk) discussed how to plan for diversity in education research.

Deep conversations occurred around meaningful and relevant topic areas. Over three days, we had nearly 900 attendees going in and out of virtual rooms (with very few technology glitches—no small feat!) participating in discussions around four main topic areas:

- Diversity, Equity, Inclusion, and Accessibility (DEIA)—Sessions included discussions of centering equity in education research
- COVID-19 Pandemic—Sessions included lessons learned from COVID-19 research pivots and considerations for research during COVID-19 and recovery
- Methods & Measurement—Sessions included information on innovations in statistical methods, data collection tools, and scaling evidence-based practices
- Results from IES Research—Sessions included highlights of findings from several IES-funded grants and Research and Development centers

See the agenda (https://f.hubspotusercontent40.net/hubfs/1577998/2022%20-%20IES%20-%20Bizzell%20Group/2_IES_NCER_Agenda-At-A-Glance.FINAL.R2_1.7.22.pdf) for a complete list of this year's sessions.

Finally, although we weren't able to be in the same physical room, **one of the real benefits of this virtual meeting was the ability to record the sessions.** IES continues to encourage the dissemination of IES-supported research to a wider audience, and we want to do our part by making the recordings (https://www.youtube.com/playlist?list=PLVHqsnePfULoYq_5YmVudLBo3TUR2j4cr) from the sessions publicly available. We hope you enjoy watching the incredibly valuable and thought-provoking presentations and discussions and share widely with your networks.



Thanks to our attendees for their participation. Your engagement made this year's meeting a true success. We are already looking forward to next year's meeting!

If you have any comments, questions, or suggestions for how to continue the conversation around DEIA, please do not hesitate to contact NCER Commissioner Liz Albro (Elizabeth.Albro@ed.gov (mailto:Elizabeth.Albro@ed.gov)) or NCSER Commissioner Joan McLaughlin (Joan.McLauglin@ed.gov (mailto:Joan.McLauglin@ed.gov)). We look forward to hearing from you.

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Editor's Note: The following post was originally posted on the IES-funded CTE Research Netw

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6	7	8	9	10	11	12
13	14	15	16 (/Blogs /research /2022/06 /16/default)	17 (/Blogs /research /2022/06 /17/default)	18	19
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The Postdoctoral Research Training Program in Special Education and Early Intervention (https://ies.ed.gov/ncser/projects/program.asp?ProgID=57) *was designed to prepare scientists to conduct rigorous, practice-relevant research to advance the fields of special education and early intervention. Xigrid Soto-Boykin recently completed an IES postdoctoral fellowship at the University of Kansas and is currently an assistant research professor and senior scientist at Arizona State University. Her research focuses on early childhood education for bilingual learners, including those with communication impairments. We recently caught up with Dr. Soto-Boykin to learn more about her career, the experiences that have shaped it, and how her work addresses equity and inclusion in early intervention. This*

is what she shared with us.



As a Puerto Rican who learned English at age 11 and who was the first person in my family to attend college, my passion for conducting research focused on high-quality early childhood education for Latinx preschoolers stems from my personal experiences.

During my postdoctoral fellowship at Juniper Gardens Children's Project at the University of Kansas (https://ies.ed.gov/funding/grantsearch/details.asp?ID=2116) under Dr. Judith Carta, I had the opportunity to conduct community-based research in a local bilingual early childhood center in Kansas City. Initially, my goal was to expand my dissertation work, which focused on evaluating the effects of bilingual emergent literacy instruction for Latinx preschoolers. However, like all great stories go, my research agenda took some unexpected twists and turns. On the day my initial research study was approved, we were informed we needed to work remotely and that we could not go on-site to conduct our research due to the COVID-19 pandemic. What initially felt like a major setback became an opportunity to expand my research. While working remotely, I continued to collaborate with the administrators and teachers to determine their most pressing needs. We co-constructed a strategic plan for identifying the center's strengths and areas for improvement. To address areas identified as major needs, we began initiatives to provide educators with ongoing professional development and families with engagement opportunities. Through this research-community partnership, we were awarded a Kauffman Quality Improvement Grant. This grant is funding our creation of the infrastructure necessary to apply data-based decision making to guide teacher professional development and monitor children's school readiness and bilingual development.

In 2020, as the nation was reeling from the COVID-19 pandemic and a reckoning of the structural racism impacting the lives of Black and Brown individuals, the work I was doing at the bilingual early childhood center became contextualized. I saw how teachers who earn minimal wages risked their lives to provide essential care for children and families. I saw how families struggled to make ends meet after losing their jobs. I began understanding how linguistic discrimination impacts the way researchers, educators, and policymakers address bilingualism. As I read outside my typical fields of speech-language therapy, bilingualism, and early childhood special education, I began to see how the interconnected systems in our society impact the lives of Latinx bilingual children.

This renewed understanding led me to where I am today. In 2020, I launched a website, habladll.org (http://www.habladll.org/), containing free resources for parents, teachers, and therapists working with bilingual children. I am presently an assistant research professor and senior scientist of bilingual learning at The Children's Equity Project (CEP) at Arizona State University. The CEP is a non-partisan center that seeks to inform research, policy, and practice to promote equitable access to early childhood education. In this role, I am applying what I learned during my postdoctoral fellowship to ensure young dual language learners with and without disabilities and their families receive the bilingual support they deserve.

My research and personal experiences are one and the same. I see myself as a scholar-activist with the goal of creating just educational experiences for Latinx children and their

families. I am grateful for my training, mentors, colleagues, and community partners who continue to equip me with the tools to co-create a world where Latinx children receive high quality early childhood instruction centered on their unique linguistic and cultural assets.

This year, Inside IES Research (https://ies.ed.gov/blogs/research/)*is publishing a series of interviews (see here* (https://ies.ed.gov/blogs/research/post/disability-research-informed-by-researcher-s-experience-as-a-person-with-a-visual-impairment-an-interview-with-dr-rosenblum)*, here* (https://ies.ed.gov/blogs/research/post/challenging-implicit-bias-in-schools)*, and here* (https://ies.ed.gov/blogs/research/post/perspective-matters-how-diversity-of-background-expertise-and-cognition-can-lead-to-good-science)*) showcasing a diverse group of IES-funded education researchers and fellows that are making significant contributions to education research, policy, and practice.*

This blog was produced by Bennett Lunn (Bennett.Lunn@ed.gov (mailto:Bennett.Lunn@ed.gov)*), Truman-Albright Fellow, and Katie Taylor (Katherine.Taylor@ed.gov* (mailto:Katherine.Taylor@ed.gov)*), postdoctoral training program officer at the National Center for Special Education Research.*

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School environments are places in which students, particularly students of color, are exposed to implicit bias and discrimination that can negatively impact their academic outcomes. In this interview blog, we asked prevention scientist Dr. Chynna McCall to discuss how her career journey and her experiences working with children and families from diverse populations inspired her research on creating equitable school environments.

How did you begin your career journey as a prevention scientist?



Perhaps my most valued professional experience is serving as a licensed school psychologist in public schools in Colorado, working with children and families from racially, culturally, and linguistically diverse populations. This experience inspired me to join the Missouri Prevention Science Institute in 2018 as an Institute of Education Sciences postdoctoral fellow (https://ies.ed.gov/funding/grantsearch/details.asp?ID=1686), where I studied how to use research to solve real-world problems. More specifically, I learned how to use prevention science to develop and evaluate evidence-based practices and interventions that prevent negative social and emotional impacts before they happen. After my fellowship, I was hired and promoted to a senior research associate position at the Missouri Prevention Science Institute. In this role, I have operational responsibilities for various federally funded grants and conduct my own grant-funded research. Presently, I am working on the development and testing of an equity-focused social-emotional learning curriculum for 3rd through 5th grade students.

What challenges did you observe as a school psychologist?

As a school psychologist, I worked in two vastly different school districts. In one, most students came from low-income families, spoke English as a second language, and the school's performance on standardized tests was significantly below average. Most of the challenges I tackled during my time there could be categorized as social-emotional; most students had unbalanced home lives, and many suffered emotional or physical trauma. Because the school district pressured teachers to improve test scores, focus on behavior and classroom management unilaterally shifted towards scholastics. The unfortunate outcome was neglecting to acknowledge the role that student behavior and the root causes of those behaviors play in affecting academic outcomes. While the second district I worked for was a high-performing one with generally high socioeconomic status, I chose to work for the school designated for those children in the district who have serious emotional disabilities.

Even though there are stark differences between the two districts, I consistently encountered a need for students to develop better relationships with their teachers, peers, and parents, develop a better sense of self, and for teachers, other school personnel, students, and parents to have a better understanding of how their practices and interactions are impacting student social-emotional and academic outcomes.

How does your background as a school psychologist influence your research?

My experience as a school psychologist has reinforced my understanding of what is needed

to improve public education and what research questions are of utmost importance. Through my time as a school psychologist, it helped me define the goals of my research, which include 1) understanding the influence of prejudice and discrimination on student internal and external behaviors and outcomes, 2) understanding how school personnel expression of prejudice and discrimination influence student internal and external behaviors and outcomes, and 3) determining how to most effectively develop an equitable school environment that positively influences marginalized and minoritized youth outcomes.

My research examines how school environment—including the prejudicial and discriminatory thoughts and behaviors of school staff, students, and guardians—influences identity development, identity expression (for example, racial identity, gender identity, sexuality, and intersectionality) and internal and external behaviors. The objective is to use this knowledge to create a school environment that facilitates prosocial student identity development. My research hinges on my observations and experiences as a practicing school psychologist to focus on how to shift differential outcomes observed in public education due to experiences of discrimination both in and out of the school setting.

In your area of research, what do you see as the greatest research needs or recommendations to address diversity and equity and improve the relevance of education research for diverse communities of students and families?

I believe schools at every level of education are microcosms for the greater society. How students traverse through the school system dictates how they will navigate through the macrocosm of society. How students navigate the school system can be improved if school systems are equipped with the tools that allow staff to prepare the students better academically, socially, and emotionally. These tools are essential for students who are having a difficult time because of cultural, linguistic, psychological, or physical differences from their peers. It is crucial for the research community to continually advocate for positive change in our education system, work towards better understanding student needs, and develop effective and efficient tools that better promote student growth and outcomes.

I also believe that researchers who study school environments must explicitly study bias. We have to look at whether and how school professionals are becoming aware of and challenging their implicit biases, as well as how students are becoming aware of bias and how they deal with it—either by internalizing it or challenging it. We also must look into how challenging or accepting bias affects students emotionally, behaviorally, and academically.

What advice would you give to emerging scholars from underrepresented, minoritized groups that are pursuing a career in education research?

See your perspective and experience as assets. Your perspective is underrepresented and is needed in making necessary changes to education and education outcomes. When you view your perspective as something of value, you are better able to determine what unaddressed research questions need to be asked and to move education research in a direction that is more inclusive of every student.

This year, Inside IES Research (https://ies.ed.gov/blogs/research/) *is publishing a series of interviews (see here* (https://ies.ed.gov/blogs/research/post/representation-matters-

exploring-the-role-of-gender-and-race-on-educational-outcomes)*, here* (https://ies.ed.gov/blogs/research/post/expectations-matter-understanding-student-learning-outcomes-and-implicit-bias-in-the-early-childhood-classroom)*, and here* (https://ies.ed.gov/blogs/research/post/perspective-matters-how-diversity-of-background-expertise-and-cognition-can-lead-to-good-science)*) showcasing a diverse group of IES-funded education researchers and fellows that are making significant contributions to education research, policy, and practice. As part of our Black History Month blog series (https://ies.ed.gov/blogs/research/?tag=/BHM), we are focusing on African American/Black researchers and fellows as well as researchers who focus on the education of Black students.*

Dr. Chynna McCall is a Senior Research Associate with the Missouri Prevention Science Institute at the University of Missouri. Prior to this position, she was an IES postdoctoral fellow in the Missouri Interdisciplinary Postdoctoral Research and Training Program training program.

*Produced by Corinne Alfeld (*Corinne.Alfeld@ed.gov (mailto:Corinne.Alfeld@ed.gov)*), postdoctoral training program officer, and Katina Stapleton (*Katina.Stapleton@ed.gov (mailto:Katina.Stapleton@ed.gov)*), co-Chair of the IES Diversity and Inclusion Council and predoctoral training program officer.*

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For over a year, IES has been exploring how to expand participation in the education sciences and in

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6	7	8	9	10	11	12
13	14	15	16 (/Blogs/research/2022/06/16/default)	17 (/Blogs/research/2022/06/17/default)	18	19
20	21	22 (/Blogs/research/2022/06/22/default)	23	24	25	26

27	28	29	30	1	2	3
4	5	6	7	8	9	10

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(/blogs/research/category/feed/NCER) NCER (243) (/blogs/research/category/NCER)

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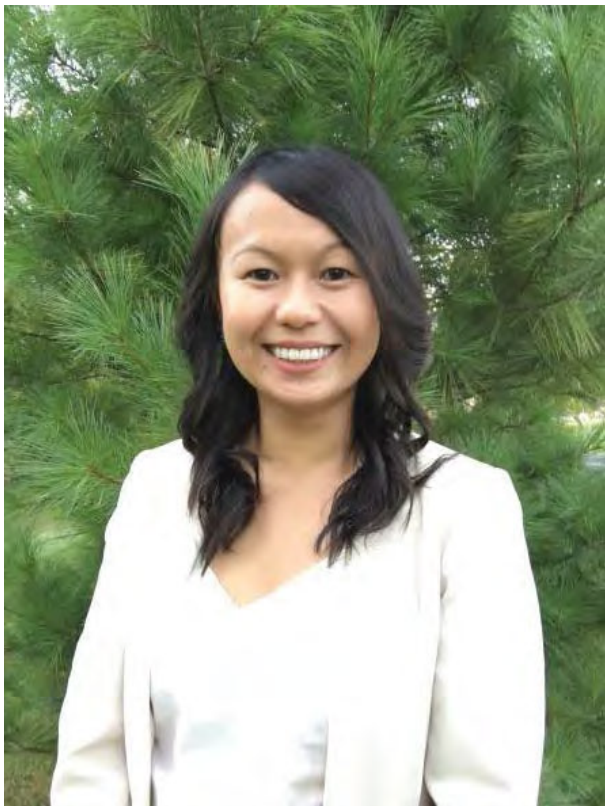
The IES Predoctoral Training Programs (https://ies.ed.gov/ncer/projects/program.asp?ProgID=16) *prepare doctoral students to conduct high-quality education*

research that advances knowledge within the field of education sciences and addresses issues important to education policymakers and practitioners. In recognition of Asian American and Pacific Islander Heritage Month (https://www.asianpacificheritage.gov/)*, we asked two predoctoral scholars who are embarking on their careers as education researchers to share their career journeys, perspectives on diversity and equity in education research, and advice for emerging scholars from underrepresented backgrounds who are interested in pursuing careers in education research. Here is what they shared with us.*



Na Lor (University of Wisconsin-Madison (https://itp.wceruw.org/)) is currently a PhD candidate in educational leadership and policy analysis where she is studying inequity in higher education from a cultural perspective.

How did you become interested in a career in education research? How have your background experiences shaped your scholarship and career?

I view education institutions as important sites of knowledge transmission with infinite potential for addressing inequity. In addition, my background as a Hmong refugee and a first-generation scholar from a low-income family informs my scholarship and career interests. My positive and negative experiences growing up in predominantly White spaces also shape the way in which I see the world. Meanwhile, my time spent living abroad and working in the non-profit sector further influence my ideals of improving the human condition. With my training through IES, I look forward to conducting education research with a focus on higher education in collaboration with local schools and colleges to better serve students and families from underserved communities.

In your area of research, what do you see as the most critical areas of need to address diversity and equity and improve the relevance of education research for diverse communities of students and families?

I see ethnic studies, culturally sustaining pedagogies, and experiential learning in postsecondary education as core areas in need of improvement to provide relevant education for an ever-diverse student body. Likewise, I see community college transfer pathways as crucial for addressing and advancing equity.

What advice would you give to emerging scholars from underrepresented, minoritized groups who are pursuing a career in education research?

Chase your burning questions relentlessly and continuously strengthen your methodological

toolkit. Embrace who you are and rely on your lived experience and ways of knowing as fundamental assets that contribute to knowledge formation and the research process.



Helen Lee (University of Chicago (https://voices.uchicago.edu/coed/about-ies-2/)) is currently a PhD candidate in the Department of Comparative Human Development where she is studying the impact of racial dialogue and ethnic community engagement on the identity and agency development of Asian American youth.

How did you become interested in a career in education research? How have your background and experiences shaped your scholarship and career?

I first considered a career in education research while completing my Master's in educational leadership and policy at the University of Michigan-Ann Arbor. I had entered my program in need of a break after working as a classroom teacher, organizer, and community educator in Detroit for five years. During my program, I had the opportunity to reflect on and contextualize my experiences in and around public education. It was also during my program that I first came across scholarship that aligned to my values and spoke to my experiences as a teacher in under-resourced communities and as a first-generation college graduate.

Taking classes with Dr. Carla O'Connor and Dr. Alford Young, working with Dr. Camille Wilson, and engaging with scholarship that counters deficit notions of people of color was a critical turning point for me. The work of these scholars motivated me to pursue a path in education research. Since then, I've been fortunate to meet other scholars who conduct community-based and action-oriented research in service of social justice movements. These interactions, along with the opportunities to collaborate with and learn from youth and educators over the years, has sustained my interest in education research and strengthened my commitment to conducting research that promotes more equitable educational policies and practice.

In your area of research, what do you see as the most critical areas of need to address diversity and equity and improve the relevance of education research for diverse communities of students and families?

My current research examines the racial socialization experiences of Asian American youth in relation to their sociopolitical development. This work is motivated by my own experiences as an Asian American, my work with Chinese and Asian American-serving community

organizations, and a recognition that Asian American communities are often overlooked in conversations about racism due to pervasive stereotypes.

Education research must be better attuned to the history and current manifestations of racism. That is, research should not only consider the consequences of systemic racism on the educational experiences and outcomes of marginalized communities but also challenge and change these conditions. I believe there is a critical need for scholarship that reimagines and transforms the education system into a more just and humanizing one.

What advice would you give to emerging scholars from underrepresented, minoritized groups who are pursuing a career in education research?

I would provide the following advice:

- **Clarify what your purpose is—the reason why you are engaged in this work**. This will help guide the opportunities you pursue or pass on and connect you to the people who can support your development toward these goals. Your purpose will also serve as a beacon to guide you in times of uncertainty.
- **Seek out mentorship from scholars whose work inspires your own.** Mentorship may come from other students as well as from those outside of academia. It may stem from collaborations in which you participate or simply through one-time interactions.
- **Be attuned to your strengths and your areas of growth and nurture both accordingly**. In retrospect, I could have done a better job of recognizing my own assets and engaging in diverse writing opportunities to strengthen my ability to communicate research across audiences.
- **Continuously put your ideas and research in conversation with the ideas and research of others**. This enables growth in important ways—it can open you up to new perspectives and questions as well as strengthen your inquiry and understanding of your findings.
- **Engage in exercises that nurture your creativity and imagination and participate in spaces that sustain your passion for education research**. A more just and humanizing education system requires us to think beyond our current realities and to engage in long-term efforts.

This year, Inside IES Research (https://ies.ed.gov/blogs/research/) *is publishing a series of blogs* (https://ies.ed.gov/blogs/research/?tag=/DEIA) *showcasing a diverse group of IES-funded education researchers and fellows that are making significant contributions to education research, policy, and practice. For Asian American and Pacific Islander (AAPI) Heritage month blog series, we are focusing on AAPI researchers and fellows, as well as researchers that focus on the education of AAPI students.*

Produced by Katina Stapleton (Katina.Stapleton@ed.gov (mailto:Katina.Stapleton@ed.gov)*, co-Chair of the IES Diversity and Inclusion Council and training program officer for the National Center for Education Research.*

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30	31 (/Blogs/research/2022/05/31/default)	1 (/Blogs/research/2022/06/01/default)	2	3	4	5
6	7	8	9	10	11	12

13	14	15	16 (/Blogs /research /2022/06 /16/default)	17 (/Blogs /research /2022/06 /17/default)	18	19
20	21	22 (/Blogs /research /2022/06 /22/default)	23	24	25	26
27	28	29	30	1	2	3
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Islander Heritage Month (https://www.asianpacificheritage.gov/) we interviewed Dr. June Ahn, associate professor of learning sciences and research-practice partnerships at the UC Irvine School Of Education and PI of the IES-funded Career Pathways for Research in Learning and Education, Analytics and Data Science (https://ies.ed.gov/ncer/projects/grant.asp?ProgID=95&grantid=4600&NameID=194) training program. Here's what he shared with us on how his background and experiences shaped his career and how his work addresses the importance of diversity, equity, and inclusion in education.



How have your background and experiences shaped your scholarship and career?

I am a child of immigrant parents who came to the United States from South Korea. Neither of my parents graduated from higher education but were able to find stable, working-class jobs as postal workers in Rhode Island. These details very much shape the experiences I've had and how I think about my work. For example, growing up in an extremely small Korean-American community, not many people outside of the community understood my background and family history. I had to learn to navigate many different social groups with diverse ethnic and cultural histories. As a child of immigrants, I very much understood how education was seen as an important mechanism for social and economic mobility. At the same time, I was keenly aware of how my experiences and realities were often absent or misrepresented in my schooling, the curriculum, and experiences with educators.

These facets of my history shape the kind of scholarship that I pursue, where I strive to—

- Design new learning environments for STEM education that turn an empathetic eye towards fostering rich experiences for minoritized youth, for example, by linking science learning with writing in science fiction clubs (https://repository.isls.org/bitstream/1/1177/1/657-664.pdf), carefully designing game experiences (https://dl.acm.org/doi/pdf/10.1145/2930674.2930712) to expose diverse learners to science, using social media tools (http://ahnjune.com/wp-content/uploads/2018/05/paper278.pdf) to show how science is fused into everyday lives and selves, and creating STEM learning environments (https://sites.uci.edu/ucistemlearninglab/2021/04/08/playful-learning-landscapes/) built into actual city and neighbor spaces so that young people and their families can see how science and play can be joined together
- Develop research-practice partnerships with educator and community partners to co-create solutions that are relevant to their needs, for example, to foreground an understanding of race, our histories, and racial justice as the focus of education improvement, as well as to help educators better support foster and homeless students who experience hardships as they traverse K-12 education systems
- Create experiences for minoritized students at UC Irvine through an IES Pathways

Training Grant (https://education.uci.edu/ahn_ies2021.html) to learn about educational data science and analytics and build their identities and skills while preparing for future graduate study

At the heart of this scholarship is my interest in building learning experiences that support students from diverse racial identities and partnering with communities while centering issues of race in how we develop solutions.

In your area of research, what do you see as the greatest research needs or recommendations to address diversity and equity and improve the relevance of education research for diverse communities of students and families?

I think researchers need to realize that we are products of our own racialized histories, meaning that we bring our unique perspectives and blind spots to how we frame scholarship. The research questions we devise, what we decide is worthy to study, and our research design choices all come from our histories and ways we have been conditioned to understand the world and other people. Knowing this, I firmly believe that we need to build capacity for education researchers to understand how to be more empathetic in our approaches, to learn how to better partner with communities—not just inform them of our findings—to make research more relevant to local stakeholders, and finally to learn ways to step back and let others in the community have their voices centered in the research process. These skills and dispositions do not mean that we abandon what we know about how to do research or science. Instead, they give researchers tools to better understand how to value our own diverse histories and bring them into our research projects.

Beyond these methodological needs, I think that future research to address diversity and equity must continually go back to the lived experiences of the youth and families we are trying to reach. Even if research might illuminate trends and inequity, these findings mean little—and tell us little about what to do—unless we also couple our findings with an understanding of how our partners experience these inequities or lack of inclusion.

How can the broader education research community better support the careers and scholarship of researchers from underrepresented groups?

There are a few inflection points that I think are important to continually support the careers of researchers from minoritized groups. First, representation matters. Universities and organizations need to strongly encourage their faculty or workforce to continue to seek out and hire folks from underrepresented groups. This task should never end, or organizations can quickly move backward. Funding decisions for which scholars and what research endeavors are supported also need to continually ensure that diverse scholars can build their careers, and that innovative ideas begin to permeate through academic communities.

However, representation is not enough. Deliberate attempts to change workplace culture is vital to supporting the career growth of scholars. In my own life experience, I've often felt unsupported because the cultural norms, the behaviors that colleagues and supervisors enact, and the ways that a "system" continues to position someone as not welcome, help push individuals out. It is easy to spot egregious, clearly racist, situations. However, the most damaging experiences are usually enacted by well-meaning individuals who don't understand how to be self-reflective about their blind spots and take responsibility for how

their ways of working may hurt scholars from minoritized groups. This type of change cannot be made with a DEI workshop or other typical strategies that organizations take. Change can only happen if individuals can be truly self-reflexive, take personal responsibility for their own actions, and actively work from the perspective of minoritized scholars. This is slow work requiring multiple hard conversations and many years of trust-building.

What advice would you give to emerging scholars from underrepresented, minoritized groups that are pursuing a career in education research?

I am so excited about the next generation of scholars in education research. My advice is threefold.

- **Trust that your past histories, experiences, and perspectives give you a unique insight into issues of education, teaching, and learning.** The fun challenge is to continually seek out what makes your perspective unique and to confidently communicate this uniqueness to your academic communities.
- **Seek out senior mentors who both support your vision and act in ways that position you for more impact and recognition.** Early in my career, I had senior mentors who were co-PIs on grant-funded projects with me. This allowed me to further my research vision and gain entryway into important avenues of resources for scholarship. These acts of strategic mentorship propelled my career and put me in position to pay it forward to the next generation of scholars.
- **Cultivate supporters outside of your home research institution and build long-term trust in relationships by continually doing good work with integrity and kindness.** This type of work is slow, taking years to cultivate, and requires a lot of patience and faith that doing the right thing will pay off in the long run. However, building a career on good research, trusting relationships, and kindness builds a strong foundation from which scholars from minoritized groups can jump off from while withstanding many challenges one might face.

Produced by Katina Stapleton (Katina.Stapleton@ed.gov (mailto:Katina.Stapleton@ed.gov)*, co-Chair of the IES Diversity and Inclusion Council and training program officer for the National Center for Education Research.*

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6	7	8	9	10	11	12
13	14	15	16 (/Blogs/research/2022/06/16/default)	17 (/Blogs/research/2022/06/17/default)	18	19
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IES Institute of Education Sciences

Increasing Diversity and Representation of IES-funded Education Researchers

Technical Working Group Summary | December 2, 2020

U.S. DEPARTMENT OF EDUCATION

A Product of the National Center for Education Research



Increasing Diversity and Representation of IES-unded Education Researchers

Technical Working Group (TWG) Meeting

December 2, 2020
National Center for Education Research
Institute of Education Sciences
U.S. Department of Education

This meeting summary was prepared by Christina Chhin and Katina Stapleton of the National Center for Education Research (NCER), Institute of Education Sciences (IES). The summary draws from the slide presentations, notes prepared and taken by Robin Pu Yigh (under JDC Events' contract ED-IES-D-0003), and notes taken by IES program officers – Corinne Alfeld (NCER), Sarah Brasiel (NCSER), and Katherine Taylor (NCSER). The views expressed in this document reflect individual and collective opinions and judgments of the presenters and participants at the meeting and are not necessarily those of IES or the U.S. Department of Education.

Table of Contents

Technical Working Group Members 1
Institute of Education Sciences Staff 2
Introduction 3
Diversity and Inclusion at IES 4
Education Science Reform Act of 2002 4
U.S. Department of Education Diversity and Inclusion Initiatives 4
IES Diversity Statement 5
IES Diversity and Inclusion Council 5
Broadening Participation in IES Training Programs 5
Reducing Barriers to Participation in IES Research 7
Perception that IES Funds Only "Certain Kinds" of Institutions and Individuals 7
Need for Additional Attention to Diversity, Equity, and Inclusion in the Application and Peer Review Process 9
Perceived Lack of Emphasis on Qualitative and Community-Based Research 9
Lack of Resources to Submit Competitive Grant Applications 9
Why Reducing Barriers Matters 10
Expanding Outreach 12
Using an Expansive Definition of Diversity 12
Expanding Outreach Through Professional Organizations 12
Increasing Outreach 13
Outreach Strategies for Underrepresented Researchers 13
Outreach Strategies for Underrepresented Institutions (e.g., MSIs) 14
Increasing Research Capacity 15
Concluding Recommendations 17
Identify the Key Gaps and Barriers 17
Develop an Action Plan 17
Revise Existing and Develop New Funding Opportunities 17
Attend to the Research Pipeline/Ecosystem 18
Engage in Targeted Outreach 18
Appendix A. Meeting Agenda 19
Appendix B. Summary of TWG Recommendations and Suggested Actions for IES 21

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Introduction

On December 2, 2020, the Institute of Education Sciences (IES) convened a technical working group (TWG) to discuss strategies for increasing diversity among IES-funded education researchers and grantee institutions. This TWG is part of IES leadership's ongoing commitment to broadening participation within IES grant programs and the education sciences. The TWG included researchers with expertise in outreach, diversity, equity, and inclusion. Representatives from IES and other federal agencies, including the National Institutes of Health, also participated in the discussion. The goal of this TWG meeting was to advise IES's National Center for Education Research (NCER) and National Center for Special Education Research (NCSER) on strategies to increase the diversity and representation of the researchers and institutions funded by IES. The meeting focused on four topics (see Appendix A for the full meeting agenda):

1. Reducing barriers to participation in IES research
2. Expanding outreach
3. Increasing outreach
4. Increasing research capacity

Prior to the meeting, IES provided TWG members with discussion questions and prompts and requested that members submit initial responses in writing. IES staff reviewed and compiled responses to identify themes and inform discussion facilitation. IES requested that TWG members focus on practical recommendations for actions IES can take. This TWG summary shares key discussion themes and remarks, along with specific action recommendations for IES (see Appendix B for a summary table of recommendations and actions). Where possible, IES has organized the comments made during the general discussion thematically.

Diversity and Inclusion at IES

IES Director Mark Schneider welcomed TWG members to the meeting and discussed IES's intent to identify opportunities for growth and change in education research and IES's ongoing commitment to diversity and inclusion. Katina Stapleton provided overviews of the diversity language within the Education Science Reform Act of 2002, the IES Diversity Statement, IES participation in U.S. Department of Education-wide diversity and inclusion initiatives, the new IES Diversity and Inclusion Council, and broadening participation in IES-funded training programs. This section summarizes the information shared with the TWG.

Education Science Reform Act of 2002

IES was established by the Education Sciences Reform Act of 2002 (ESRA – P.L. 107-279) in part to improve academic achievement and access to educational opportunities for all students. ESRA charges the IES Director with the responsibility for ensuring that IES's work is conducted in a manner that is "objective, secular, neutral, and nonideological and free of partisan political influence and racial, cultural, gender, or regional bias." ESRA further charges the Director to undertake "initiatives and programs to increase participation of researchers and institutions that have been historically underutilized in Federal education research activities of the Institute, including historically Black colleges or universities or other institutions of higher education with large numbers of minority students."

U.S. Department of Education Diversity and Inclusion Initiatives

As part of the U.S. Department of Education (Department), IES participates in department-wide diversity and inclusion initiatives. The Department's mission for diversity and inclusion is to "promote an inclusive work environment that ensures equal employment opportunities, values diversity, and empowers individuals so that they may participate and contribute to their fullest potential in support of the Department's mission."

The Department's Diversity and Inclusion Council (Council) was established in 2012 and includes senior leadership from all principal offices as well as representatives from employee affinity groups and at-large representatives. The Council is charged with developing and executing department-wide strategies that lead to a diverse and inclusive environment and works with human resources and principal office leadership to achieve this goal. At the time of the TWG, IES had four voting members on the Council, including the IES Director, the Council Secretary, chair of the Council's Data and Measurement subcommittee, and an additional at-large member.

The Department also has a Diversity Change Agent (DCA) program to help foster an inclusive culture within the Department that respects individual talents, values, and differences. The Department has trained over 300 DCAs who serve as role models and lead efforts across the Department to educate and train the workforce on diversity and inclusion. At the time of TWG, IES had five DCAs located in the Office of the Director, the National Center for Education Research (NCER), the National Center for Education Statistics (NCES), the National Center for Education Evaluation and Regional Assistance (NCEE), and the National Assessment Government Board (NAGB).

IES Diversity Statement
In August 2020, IES published its first Diversity Statement affirming IES's commitment to diversity and to ensuring that our work is carried out in a manner that is free of racial, cultural, gender, or regional bias. The statement provides an overview of this commitment and then specific examples of how this commitment translates into action in four domains: preparing a diverse research workforce; grant making for diversity; research, data collection, and analysis; and hiring and staffing.

IES Diversity and Inclusion Council
At the time of the TWG, IES was developing its first Diversity and Inclusion Council to nurture a diverse and inclusive research environment within IES that supports our mission to provide scientific evidence on which to ground education practice and policy and to share this information broadly. The Council was formally launched in March 2021. While the exact role of the Council may change over time, the initial Council function is to help IES operationalize the principles of the IES Diversity Statement (and the corresponding emphasis on diversity in ESRA). The Council includes members of all IES offices and centers and is co-led by Craig Stanton, the IES Deputy Director for Administration and Policy, and Katina Stapleton, IES DCA.

Broadening Participation in IES Training Programs
Since IES launched its first training programs in 2004, IES has encouraged training programs to recruit fellows and participants from diverse backgrounds. IES funds undergraduate, predoctoral, and postdoctoral fellowship-based training programs as well as methods training programs for current researchers. In 2014, IES began strengthening requirements and now requires all training programs to develop recruitment plans that provide specific strategies for promoting diversity in their programs.

In 2016, IES developed the Pathways to the Education Sciences Research Training Program (Pathways) to develop a pipeline of talented education researchers who bring fresh ideas, approaches, and perspectives to addressing the issues and challenges faced by the nation's diverse students and schools. Pathways Training Program grants are awarded to minority-serving institutions (MSIs) and their partners to create education research training programs that prepare fellows for doctoral study. As of December 2020, IES had established six Pathways training programs.

Katina Stapleton presented demographic data on fellows funded from 2004-2020 through Pathways, the Predoctoral Interdisciplinary Research Training Program in the Education Sciences (Predoctoral), and the two IES Postdoctoral programs (Postdoctoral Research Training Program in the Education Sciences and Postdoctoral Research Training Program in Special Education and Early Intervention). The majority of fellows are female (69 percent of Postdoctoral, 66 percent Predoctoral, 78 percent Pathways).

Race and Ethnicity of Fellows in IES Pathways, Predoctoral, and Postdoctoral Training Programs (2004-2020)[1]

Race/Ethnicity	Pathways (2016-2020) N=251	Predoctoral (2004-2020) n=1009	Postdoctoral (2005-2020) n=278[2]
American Indian/ Alaskan Native	4%	0%	0%
Asian	3%	9%	9%
Black/African American	45%	7%	5%
Native Hawaiian/ Pacific Islander	0%	0%	1%
Multiple/Multi-Racial	21%	4%	2%
White	14%	75%	74%
Not Reported	13%	6%	9%
Hispanic	37%	7%	5%

1 Race and ethnicity of fellows are separately reported to IES by the training programs. The category race includes American Indian/Alaska Native, Asian, Black/African American, and Native Hawaiian/Pacific Islander, Multiple/multi-racial, and Not Reported. The category ethnicity includes Hispanic and Non-Hispanic.

2 Postdoctoral includes data from both Postdoctoral programs in the Education Sciences and Special Education.

The other key demographic highlights were as follows:

- The majority of fellows in the Predoctoral (75 percent) and Postdoctoral (74 percent) programs are White.
- The Pathways program is more diverse than the Predoctoral and Postdoctoral training programs.
- The Predoctoral training program is becoming more diverse over time (e.g., 4 percent of fellows from 2004-2009 grants are African American compared to 12 percent of fellows from 2014-2020 grants).
- The programs fund very few American Indian, Alaska Native, Native Hawaiian, and Pacific Islander fellows (fewer than 20 fellows across all programs).

Reducing Barriers to Participation in IES Research

To set the stage for the discussion, Elizabeth Albro, NCER Commissioner, presented an overview of the IES research funding process, along with information about the number of IES grant applications reviewed and funded and applicant characteristics. Each year IES holds funding competitions for research and research training through the National Center for Education Research (NCER) and the National Center for Special Education Research (NCSER).[1] Annually, NCER manages a grant portfolio of approximately $156 million, and NCSER manages a grant portfolio of approximately $56.5 million. In an effort to assess diversity of its applicant pool, during the past two funding cycles, IES has begun collecting and analyzing data on the institutions that apply for IES funding.

As part of the grant application submission process, applicant institutions voluntarily provided demographic information of key personnel on grant applications (e.g., principal investigators, co-principal investigators). During the most recent round of grant applications (for funding in FY 2021), approximately 74% of applicants voluntarily answered a question about their race and 71% answered a question about their ethnicity (Hispanic/Non-Hispanic). As of December 2020, the data show that there are few key personnel that report being from racial and/or ethnic minority groups and that few applicant institutions are MSIs.

IES also has 2013 to 2020 data on the types of institutions that apply for funding. From 2013 to 2020, approximately 4 percent of applications to NCER and less than 1 percent of applications to NCSER were from MSIs. For NCER, approximately 10 percent (n=24) of institutions that have received funding between 2013-2020 are MSIs, including 16 Hispanic-serving Institutions (HSIs), 9 Asian American and Native American Pacific Islander-serving Institutions (AANAPISIs), 1 historically Black college or university (HBCU), and 1 predominately Black institution (PBI).[2] In addition, NCER has awarded grants to 19 institutions of higher education that serve low-income students.[3] For NCSER, no minority-serving institutions have received funding between 2013-2020.

Given the limited diversity seen in the applicant pool for IES's grant programs, TWG panelists were asked

- What are the institutional/structural barriers that impede a diverse pool of applicants and principal investigators (PIs)?
- What steps can IES take to help reduce those barriers?

Perception that IES Funds Only "Certain Kinds" of Institutions and Individuals
Several TWG members suggested that many researchers do not believe IES supports diverse applicants to its grant programs, and this perception impacts who applies for

[1] Descriptions of IES funding opportunities are available at https://ies.ed.gov/funding/.
[2] Total exceeds 24 because some institutions qualified as more than one type of MSI.
[3] Defined as institutions that have at least 50 percent of degree students receiving need-based assistance under Title IV of the Higher Education Act, or have a substantial number of enrolled students receiving Pell Grants, and have low educational and general expenditures (indicated by eligibility for the Strengthening Institutions Program). Four of the 19 institutions also qualify as MSIs.

funding. They specifically suggested that a major barrier to having a diverse applicant pool is that potential applicants think that IES does not fund researchers "like them." There is a perception that the focus of their research, their research methods, their institutional affiliation, and/or their demographic backgrounds are at odds with IES's priorities. TWG members suggested that IES address these perceptions by creating active, ongoing, targeted efforts to engage diverse researchers and institutions in the application process.

TWG members suggested that current IES communications and processes do not clearly convey that IES is committed to diversity and inclusion. Therefore, TWG members recommended that IES

- Implement communications strategies aimed at changing potential applicants' misperception of IES as an organization that does not support diversity or inclusion, noting that at a minimum, this would include reviewing and updating competition announcements, application instructions, scoring criteria, and other messaging to make clear that IES seeks applications from a wide range of researchers and institutions
- Conduct targeted recruitment of researchers and institutions that have not been historically funded by IES in the past
- Conduct needs assessments with different groups (such as MSIs, the LGBTQ+ community, qualitative researchers, and researchers with disabilities) to identify their specific concerns and application barriers
- Convey a clear commitment to diversity and inclusion by
    - Reviewing and revising the language in the requests for applications (RFAs) so that it does not unintentionally exclude certain applicants
    - Reaching out to researchers that have not been previously funded by IES and showing how their work aligns with IES research priorities and encouraging them to apply
    - Explicitly inviting applicants from MSIs[4] and PIs from underrepresented[5] groups through funding priorities or special competitions
    - Explicitly supporting research related to diversity, equity, and inclusion (DEI) within existing competitions
    - Developing special topics or competitions that are focused on equity and dismantling systematic inequality in education
    - Emphasizing the importance of researchers collaborating with and giving back to the communities that are involved in the research
    - Revisiting what knowledge is in educational research and what types of backgrounds and experience are important for researchers (e.g., emphasizing the role of qualitative research in educational research)

[4] Section 114 of the Education Science Reform Act of 2002 (ESRA, Title I of P.L. 107-279) charges IES with undertaking "initiatives and programs to increase the participation of researchers and institutions that have been historically underutilized in Federal education research activities of the Institute, including historically Black colleges or universities or other institutions of higher education with large numbers of minority students."

[5] Although TWG members did not specifically define the term "underrepresented", it may include racial/ethnic minorities, first in their families to graduate college, veterans, individuals from low-income backgrounds, individuals from rural settings, and individuals with disabilities.

- Sharing stories of successful applicants from underrepresented groups or institutions in order to encourage others from similar backgrounds to apply

Need for Additional Attention to Diversity, Equity, and Inclusion in the Application and Peer Review Process

TWG members recommended that IES examine its application materials, application process, and review process (including scoring criteria) to identify and mitigate potential sources of bias. As part of this process, TWG members suggested that IES

- Clearly state in announcements of funding opportunities and application guidance that IES considers diversity, equity, inclusion, and responsiveness to community needs to be core components of research quality
- Recruit reviewers from a wide variety of backgrounds and areas of expertise
- Recruit reviewers with specific expertise in education diversity, equity, and inclusion issues
- Train reviewers to assess the degree to which the proposed research supports IES's diversity, equity, and inclusion goals

Perceived Lack of Emphasis on Qualitative and Community-Based Research

Several TWG members mentioned that many researchers perceive that IES funds only large experimental or quasi-experimental studies that apply quantitative methods. TWG members stressed that answering many types of education research questions (including questions regarding diversity, equity, and inclusion) frequently require qualitative methods. The TWG emphasized that IES should

- Consider the value of qualitative research methods in conducting education research
- Recognize that conducting qualitative research often requires expertise other than academic credentials, such as understanding community values, norms, and needs
- Require all grant applicants to demonstrate how their research is relevant to and meets the needs of the communities involved in the research, including key stakeholders and the individuals or groups that the research is meant to address

TWG members emphasized that community engagement is necessary and must be authentic and meaningful, not mere statements of intent made in an application but not implemented during a project. They noted that often communities are only superficially engaged for the purpose of attaining research funding but then are not meaningfully included post-award in the research process, including implementation and dissemination decisions. TWG members theorized that by requiring accountability to communities and supporting researchers in building trusting relationships with the communities they aim to benefit, IES will attract more diverse applicants who propose projects that address education equity issues.

Lack of Resources to Submit Competitive Grant Applications

Another major barrier identified by TWG members is a lack of resources to submit competitive grant applications. TWG members emphasized that IES must focus not only on increasing the number of applications from individuals and institutions that are typically underrepresented in education science but also on applying strategies to support these

applicants in successfully competing for awards. Individuals and institutions typically underrepresented in education science frequently face structural and institutional barriers to developing successful research proposals. For example, MSIs and broad- and open-access institutions of higher education (IHEs) typically require faculty to carry a substantial teaching load, and this limits time available for faculty members to develop research proposals or conduct research projects. Faculty at these institutions may hesitate to invest the time necessary to compete for research grants if they believe their success rate to be low. Researchers at MSIs and broad- and open-access IHEs may be less likely to have administrative and staffing resources dedicated to grant development, and this makes preparing grant applications more challenging. In addition, many education researchers began their careers as educators or administrators and then turned to research as an approach for addressing issues they encountered in the field. As a result, they may require additional training specific to research methods and grant writing.

TWG members recommended that IES

- Develop and implement strategies to address these resource-related barriers, with the first step being to identify who needs help
- Analyze data on applicant demographics (and success rates) to identify which groups require outreach and/or technical assistance to submit competitive proposals
- Offer small grant award opportunities for early career applicants, thereby allowing early career researchers an opportunity to compete with peers rather than with established senior researchers who have extensive experience successfully competing for funding
- Support training of mentors for early career scholars

The TWG also suggested several strategies for increasing competitive applications from researchers and institutions that have not been historically funded by IES. They recommended that IES provide

- Focused outreach
- Grant writing workshops
- Training in education research methods
- Opportunities to observe IES PI meetings
- Opportunities to discuss research concepts with IES program officers
- Support for partnerships between institutions with less research infrastructure and institutions with the infrastructure necessary to develop competitive grant applications and IES-funded research projects
- Support for institutional infrastructure development

Why Reducing Barriers Matters

Throughout the discussion of barriers, TWG members stressed the importance of soliciting (and subsequently funding) proposals from a wide range of applicants. They argued that IES is losing out on valuable insights and contributions of many researchers who have not been typically funded by IES. In particular, TWG members argued that IES may be neglecting key questions, ignoring important education issues, and overlooking useful research methodologies. TWG members encouraged IES to solicit additional input from

researchers from underrepresented backgrounds and representatives of MSIs about the types of research IES should fund and about potential approaches for transforming education.

Expanding Outreach

As noted earlier by the TWG members, expanding and conducting focused outreach is needed in order for IES to diversify its pool of applicants and funded researchers. IES specifically requested TWG guidance on how to expand outreach by asked TWG members

- Are there specific groups or communities of researchers that are not represented in the IES research community? How might this impact the type and/or quality of IES-funded research?
- Which organizations/institutions/groups of researchers should IES reach out to with more or better targeted outreach?

Using an Expansive Definition of Diversity

In order to diversify the IES education research community, TWG members recommended that IES should first consider a broad definition of diversity. The TWG indicated that diversity should refer to several factors beyond binary gender, race, and ethnicity, to include (but not limited to) non-binary gender identity, sexual orientation, first-generation graduate students, urban and rural students, socioeconomic class, and people with disabilities. Some TWG members pointed out that efforts to increase diversity, equity, and inclusion often focus on the needs of a single underrepresented group, while people often belong to more than one group. TWG members urged IES to be mindful of individual researchers' potential membership in multiple underrepresented groups when conducting outreach. Translated to the context of outreach, TWG members indicated that IES should

- Conduct more targeted outreach with researchers who are members of these multiple communities
- Conduct targeted outreach to MSIs

Expanding Outreach Through Professional Organizations

TWG members suggested that professional organizations could be valuable resources for outreach to diverse communities of researchers, and they provided a list of these organizations to IES. Some of these organizations have early career networks and prioritize career development for women and minority members, and some have caucuses that could facilitate IES outreach and provide IES with input on how to conduct respectful outreach to a wide range of communities. Many also have formal and informal mentoring networks that could support outreach and capacity building efforts. TWG members agreed that IES should

- Focus outreach efforts toward key leaders in the field who can disseminate IES's outreach messages
- Present at professional organization conferences to increase awareness of the value of education research as a tool to support the organization's mission

Increasing Outreach

Building on the prior discussion of which groups of researchers or organizations IES should target in their outreach, IES asked the TWG to recommend specific outreach activities and strategies for reaching underrepresented researchers and institutions (especially MSIs) who have not applied to nor received IES funding in the past. The specific questions asked of the TWG members were

- What specific types of outreach activities and strategies do you recommend for increasing outreach to underrepresented researchers?
- What specific types of outreach activities and strategies do you recommend for increasing outreach to institutions (e.g., MSIs, non-R1s)?

Outreach Strategies for Underrepresented Researchers

To increase outreach to underrepresented researchers, TWG members recommended that IES

- Examine the demographics of their researchers to identify which groups of researchers are not applying, not getting funded, and not serving as reviewers and then focus outreach efforts on those underrepresented groups
- Conduct needs assessments with communities of researchers to help determine what barriers or challenges they encountered when applying to or reviewing for IES, what resources would help to overcome these challenges, and what would encourage them to (re)apply for IES funding
- Ensure that outreach efforts express commitment to mutually beneficial relationships with researchers underrepresented in the education sciences.
- Invest early on in supporting the pipeline of the next generation of education researchers, thereby building a more diverse education research pipeline to begin with and increasing the probability that the researchers who apply and are funded are more likely to reflect that inherent diversity

TWG members noted that the recommendations provided earlier for overcoming the perception that IES does not prioritize diversity, equity, and inclusion can also be applied as strategies for increasing outreach to underrepresented researchers. For example, revising and rewording funding announcements and application guidance to express IES's commitment to diversity, equity, and inclusion can be an important first step toward improving outreach. Similarly, prioritizing researchers that are currently underrepresented in the education research community (such as education researchers who study diversity, equity, and inclusion and researchers at MSIs) for grant funding may incentivize these researchers to apply for IES funding.

In addition, TWG members discussed how IES can build relationships between program officers and potential applicants. They recommended that IES

- Have IES program officers host events at IES, online, or at professional association conferences and convening professional networks of researchers
- Provide detailed, practical debriefings to unsuccessful applicants so that they can resubmit more competitive applications in the future

- Leverage scholars who have been successful in receiving IES grants to assist in outreach efforts, such as IES fellows and alumni, who can support IES work to increase diversity and inclusion by disseminating information about IES and serving as ambassadors to increase awareness

Outreach Strategies for Underrepresented Institutions (e.g., MSIs)

TWG members stressed the importance of IES developing long-term relationships with institutions that have not historically been funded by IES, especially MSIs. To improve outreach to underrepresented institutions, they recommended that IES

- Host webinars tailored for specific types of MSIs, such as HBCUs, Hispanic-serving institutions, and tribal colleges and universities to inform potential grant applicants about the IES grant application and review process and also provide an opportunity for potential applicants to give IES feedback on this process
- Hold office hours with IES program officers to allow potential research grant applicants to make inquiries without an appointment
- Provide funding opportunities for smaller seed grants for research conducted at MSIs, with an emphasis on research that addresses local education issues and community needs
- Tailor outreach messages for specific audiences and learn which communication channels are most likely to reach these audiences

After IES has confirmed which strategies are effective, TWG members recommended that IES support sustained implementation by establishing formal policies.

Increasing Research Capacity

IES presented information on its current capacity building efforts, including its Education Research training and Special Education Research training programs, funding opportunity webinars, and technical assistance activities. IES then requested TWG members' input on how IES can provide sufficient and equitable opportunities that increase education research capacity at the institutional and individual level, for individuals at different educational levels, for different types of institutions, and for different fields of discipline. The specific questions that the TWG members were asked to respond to include

- How can IES provide sufficient and equitable opportunities that increase the capacity of education researchers – whether novice or expert – to conduct rigorous and relevant research?
- What specific capacity building strategies are needed at the individual level at different points of the education research career pipeline?
- What specific capacity-building strategies are needed at the institutional level, especially for MSIs and non-R1 institutions?
- What specific capacity-building strategies are needed within the disciplines or for different communities of researchers?

Throughout the meeting, TWG members suggested that IES develop a diverse pipeline of education researchers from the K-12 to postdoctoral education levels. In particular, TWG members noted the importance of the pathway(s) from undergraduate to post-graduate training in education research. TWG members suggested that IES

- Provide mentoring support to prepare students for graduate school
- Provide fellowship support for undergraduate, graduate, and post-graduate scholars
- Align and connect IES programs that offer undergraduate, graduate, and post-graduate training
- Provide support for scholars transitioning from graduate school and postdoctoral programs to careers in the education sciences

TWG members noted that an important part of research capacity is building a research network and support system. Fostering relationships among researchers, and even with program officers, can help underrepresented researchers in the education community build their efficacy and a positive mindset about their effort and provide timely resources and information on the next steps in their research.

Several barriers discussed earlier in the meeting reemerged during the capacity-building discussion. Several TWG members again cited the time demands of grant applications and teaching responsibilities typical for faculty at MSIs and open-access IHEs. They suggested that IES provide grant support that protect these faculty's time to prepare research proposals through faculty development grants, planning grants, or early career awards.

Some TWG members noted the importance of institutional capacity to support research. They suggested that IES could issue grants to support MSIs in increasing research capacity and support efforts to build capacity across different types of institutions.

The TWG members noted that not all researchers are from academic institutions. Some conduct valuable education research in education and government agencies, professional associations, and private research organizations. TWG members indicated IES should also provide capacity building for researchers at non-academic institutions and make clear that it values researchers from these organizations.

Concluding Recommendations

To conclude the meeting, TWG members were asked how IES should define success in increasing diversity, equity, and inclusion among IES-funded education researchers and institutions and how IES should measure the organization's progress toward achieving its goals. In addition, TWG members were asked to recommend specific short-term and long-term goals for IES to undertake to improve diversity, equity, and inclusion among IES-funded education researchers and institutions.

The detailed recommendations and feedback from the TWG reaffirmed IES's commitment to improving diversity, equity, and inclusion in its education research grants program. IES leadership has already begun to address and implement some of the recommendations that were made by the TWG, but there is still much more that needs to be accomplished. Summarized below, these recommendations from the TWG outline the actions IES needs to implement to continue to be the nation's leader in providing high-quality, rigorous, and relevant research to inform education policy and practice.

Identify the Key Gaps and Barriers

As a first step, TWG members recommended that IES take a deeper look at the demographic and institutional data of applicants and identify which groups of researchers and institutions are underrepresented. From there, the TWG recommended that IES conduct a needs assessment with researchers and institutions that are underrepresented in the IES education research community to better understand what the barriers are to applying and receiving funding from IES. In addition, the TWG recommend that IES bring together a diverse group of education stakeholders to discuss how IES can better support the needs of underrepresented groups and communities (e.g., people with disabilities, LGBTQ+ community).

Develop an Action Plan

TWG members agreed that IES should develop a concrete action plan to implement TWG recommendations for improving diversity and inclusion, to monitor results, and to implement policies for sustaining effective strategies. Specifically, IES should develop a clear logic model of how inputs are expected to result in the targeted diversity and inclusion outcomes, as well as how the organization will collect and analyze evaluation data. Targeted outcomes should include relationship building, increased outreach, and an increase in funded applications from researchers from a wide range of demographic backgrounds, expertise, and different types of institutions. A person or team within IES should be designated to oversee and track IES's progress in meeting the identified short-term and long-term goals and outcomes. Importantly, the TWG also noted that IES should build on and institutionalize the programs and actions that are currently working well to improve diversity, equity, and inclusion (e.g., Pathways Training program).

Revise Existing and Develop New Funding Opportunities

The TWG recommended that IES review the current language in the request for applications (RFAs) through a diversity, equity, and inclusion lens to determine whether it may be excluding, intentionally or unintentionally, certain groups of researchers or

applicants. To increase the diversity of researchers and institutions that apply for funding, IES should consider providing special grant topics or competitions that are focused on equity and dismantling systematic inequality in education, along with prioritizing applicants from MSIs and PIs from underrepresented groups. The TWG also noted, however, that equity should be emphasized in every project, so a separate grant topic or competition would not be sufficient. They recommended that diversity, equity, and inclusion should be explicitly addressed in *every* grant application that is submitted and awarded by IES.

The TWG also emphasized the importance of collaborating with and giving back to the communities that are involved in the research, including disseminating and sharing the data with key stakeholders and the individuals or groups that the research is meant to address.

Attend to the Research Pipeline/Ecosystem

The TWG recommended that IES support early career researchers through smaller grant opportunities or mentoring supplements. IES should consider whether there are ways to reach out to students earlier on in their education (e.g., in PK-12) to get them exposed to and interested in education research. IES will need to pay attention to the education pipeline and ecosystem to support the next generation of education researchers at critical transitions (e.g., from high school to undergraduate, from undergraduate to graduate). Additionally, IES can help support the education research ecosystem by providing training and networking opportunities for researchers to make connections and build capacity.

Engage in Targeted Outreach

The TWG emphasized the importance for IES to build relationships and engage in targeted outreach with underrepresented researchers and institutions. It was noted that IES staff may need additional training on issues of equity and diversity in order to effectively build these relationships. TWG members also suggested that IES should learn which practices have worked for other organizations to increase diversity, equity, and inclusion, and what resources these practices require. IES can also collaborate with national and local associations to amplify efforts to increase diversity, equity, and inclusion in education research.

Appendix A. Meeting Agenda

Technical Working Group (TWG) Meeting:
Increasing Diversity and Representation of IES-funded Education Researchers

December 2, 2020
9:30 AM – 5:00 PM Eastern Time
Virtual Meeting

9:30 - 10:15 AM	**Welcome and Meeting Overview** • Introduction to TWG meeting and logistics (Christina Chhin, STEM Program Officer) • Welcome (Mark Schneider, IES Director) • Diversity & inclusion at IES (Katina Stapleton, Diversity Change Agent) • Panel member introductions
10:15am – 11:45am	**Reducing Barriers to Participation in IES Research** • Overview of IES research funding processes (Elizabeth Albro, NCER Commissioner) • Guiding questions and group discussion o What are the institutional/structural barriers that impede a diverse pool of applicants and principal investigators? o What steps can IES take to help reduce those barriers?
11:45am – 11:55am	**Break**
11:55am – 12:25pm	**Expanding Outreach** – "Who's not in the room", and why does it matter? • Guiding questions and group discussion o Are there specific groups or communities of researchers that are not represented in the IES research community? How might this impact the type and/or quality of IES-funded research? o Which organizations/institutions/groups of researchers should IES reach out to with more or better targeted outreach?
12:25pm – 1:00pm	**Lunch Break**
1:00pm – 2:00pm	**Increasing Outreach –** Identifying strategies for increasing outreach • Guiding questions and group discussion o What specific types of outreach activities and strategies do you recommend for increasing outreach to underrepresented researchers? o What specific types of outreach activities and strategies do you recommend for increasing outreach to institutions (e.g., MSIs, non-R1s)?
2:00pm – 3:15pm	**Increasing Research Capacity** • Overview of IES-funded training programs and technical assistance opportunities (Katina Stapleton) • Guiding questions and group discussion o How can IES provide sufficient and equitable opportunities that increase the capacity of education researchers – whether novice or expert – to conduct rigorous and relevant research? o What specific capacity building strategies are needed at the individual level at different points of the education-research career pipeline?

- What specific capacity building strategies are needed at the institutional level, especially for MSIs and non-R1 institutions?
- What specific capacity building strategies are needed within the disciplines or for different communities of researchers?

3:15pm – 3:30pm **Break**

3:30pm – 5:00pm **Moving Forward & Final Thoughts**

- What is success & how do we measure it? (Christina Chhin)
- Short-term and long-term suggestions for IES
- Opportunities for continued feedback (Katina Stapleton)
- Closing thoughts (Elizabeth Albro and Joan McLaughlin, Commissioner, National Center for Special Education Research)

Appendix B. Summary of TWG Recommendations and Suggested Actions for IES

Themes/Topics	Recommendations	Suggested Actions
Reducing barriers to participation in IES research	Address Perception that IES funds only "certain kinds" of institutions and individuals	Implement communications strategies aimed at changing potential applicants' misperception of IES; Convey a clear commitment to diversity and inclusion; Conduct targeted recruitment of researchers and institutions that have not been historically funded by IES.
	Give Attention to Diversity, Equity, and Inclusion (DEI) in the Application and Peer Review Process	Clearly state the importance of DEI and responsiveness to community needs to be core components of research quality in RFAs; Recruit reviewers from a wide variety of backgrounds and areas of expertise, including specific expertise in education DEI issues; Train reviewers to assess the degree to which the proposed research supports IES's DEI goals.
	Better Support Qualitative and Community-Based Research	Stress the value of qualitative research methods in conducting education research; Recognize that conducting qualitative research often requires expertise other than academic credentials; Require all grant applicants to demonstrate how their research is relevant to and meets the needs of the communities involved in the research.
	Provide Resources to Submit Competitive Grant Applications	Analyze data on applicant demographics (and success rates) to identify which groups require outreach and/or technical assistance to submit competitive proposals; Develop and implement strategies to address resource-related barriers; Provide grants to support career development and mentoring.
Expanding outreach	Use an Expansive Definition of Diversity	Conduct targeted outreach with researchers, going beyond binary gender, race, and ethnicity categories, to include (but not limited to) non-binary gender identity, sexual orientation, first generation graduate students, urban and rural students, socioeconomic class, and people with disabilities.

	Expand Outreach Through Professional Organizations	Focus outreach efforts toward key leaders in the field who can disseminate IES's outreach messages; Present at professional organization conferences.
Increasing Outreach	Outreach Strategies for Underrepresented Researchers	Conduct needs assessments with communities of researchers to help identify barriers or challenges; Express commitment to mutually beneficial relationships with researchers underrepresented in the education sciences; Invest early on in supporting the pipeline of the next generation of education researchers; Build relationships between program officers and potential applicants; Leverage scholars who have been successful in receiving IES grants to assist in outreach efforts.
	Outreach Strategies for Underrepresented Institutions	Host webinars and office hours with IES program officers tailored for specific types of MSIs; Provide funding opportunities for smaller seed grants for research conducted at MSIs; Tailor outreach messages for specific audiences and learn which communication channels are most likely to reach these audiences.
Increasing research capacity	Develop a diverse pipeline of education researchers from the PK-12 to postdoctoral education levels	Provide mentoring and fellowship support to prepare undergraduate, graduate, and post-graduate scholars; Align and connect IES programs that offer undergraduate, graduate, and post-graduate training; Provide support for scholars transitioning from graduate school and postdoctoral programs to education careers.
	Build a research support system	Foster relationships among researchers and even with program officers.
	Address issues around resources needed to submit competitive grant applications	Provide grant support that protect faculty's time to prepare research proposals through faculty development grants, planning grants or early career awards; Provide grants to support MSIs in increasing research capacity and support efforts to build capacity across different types of institutions.

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September 2021
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National Academies of Science and Medicine:
Diversity, Equity and Inclusion in Peer Review

1. Introduction

Diversity, equity and inclusion represent broad values and goals that businesses, institutions and communities seek to embody. This report addresses the state of knowledge about how diversity, equity and inclusion are considered in the competing, reviewing and awarding of research grants, and how the review process impacts the outcomes of scholarly research. While many academic institutions and funding bodies have expressed support for these values, little experimental and causal research exists regarding the effects of diversity, equity and inclusion programs on research. Thus, the report draws on larger bodies of scholarship about peer review practices, scientific production and diversity in group processes within corporate as well as academic programs. Considering these literatures together provides descriptive work about how different processes of review and deliberation shape outcomes. Studying peer review as a social process uncovers the mechanisms that contribute to inequality and that both advance and hinder the scientific process.

The report proceeds with five sections. First, it defines diversity, equity and inclusion with attention to how the concepts have been operationalized and used in the context of peer review and studies of science. Next, the report provides an overview of peer review, including its historical and ideational roots, which continue to shape how peer review is structured. The second section also provides four challenges to diversity, equity and inclusion present in standard peer review practices. The third section addresses benefits of diversity, equity and inclusion within the scientific enterprise, incorporating research on scientific excellence and group processes. The fourth section provides models of peer review and interventions to support diversity, equity and inclusion from two other major American based funding organizations, namely The National Science Foundation and the National Institute of Health, who have each reflected on their practices in support of these values. The final section offers best practices and recommendations for funding bodies based on a synthesis of the literature, as well as recognizes knowledge gaps to evaluate the effects of diversity, equity and inclusion in peer review on the scientific process.

2. Definitions and operationalization

Diversity

Diversity is broadly defined as the range of human difference. Most commonly, diversity refers to difference based on race, ethnicity, gender, sexual orientation, age, social class, physical ability, religious background, national origin and/or political beliefs. The attributes that are salient in defining diversity depend on social context and group dynamics, specifically how a group or society constructs categories of sameness and difference. For example, a young female worker may find her gender identity most salient within a predominantly male workgroup, but her age more salient in an inter-generational, familial setting (Brekhus 2020). Within the context of peer review and science studies, diversity is commonly operationalized and studied as gender and disciplinary background difference based on race and/or ethnicity, epistemic orientation, LGBTQ identification and institutional employment (Cech and Waidzunas 2021; Ginther et al. 2011; Guzzo and Salas 1995; Huutoniemi 2012; Lamont and Da Silva 2009; Laudel 2006; Luo et al. 2021; Smith-Doerr et al. 2016; Whittaker et al. 2015).

Equity

Equity refers to the quality of being fair and impartial while considering current and past realities. Equity differs from equality because it accounts for historical and situational factors that limit people's ability to achieve equivalent levels of success. Diversity is linked to equity by considering the role of difference enroot to equal outcomes. Within the context of peer review and science studies, equity has mainly been considered in terms of different career outcomes with an emphasis on gender as well as some work on race, class status and LGBT background. Career outcomes considered include academic hiring, promotion and citation rates and funding levels (Cardel et al. 2020; Ellemers et al. 2004; Hengel 2020; Isbell et al. 2012; Moss-Racusin et al. 2012; Sugimoto 2013; Teele and Thelen 2017; Van der Lee and Ellemers 2015).

Inclusion

Inclusion encompasses the involvement and empowerment of individuals within a collective by promoting a sense of belongingness, while also recognizing uniqueness (Shore et al. 2011). Inclusive groups recognize the value, worth and dignity of all members and their contributions to the collective. Within the context of peer review and science studies, inclusion has been studied as the incorporation of underrepresented groups within the scientific discipline (Cheryan et al. 2017; Griffith and Dasgupta 2018) and the relationship between inclusive work environments and work productivity, success rates and satisfaction (DeAro et al. 2019; Gurthrie et al. 2019; Hong and Page 2004).

3. Peer review

Peer review is a central practice within academia in which those working in similar disciplinary fields evaluate the research of colleagues. Peer review developed in the 17th century, emerging as a distinct practice with the proliferation of individual authorship in the publishing trade (Huutoniemi 2015). The creation of scientific journals redefined peers in terms of

specialized expertise and nonlocal colleagues, who then acted as gatekeepers in the scientific enterprise (Csiszar 2006). In the 19th century, with an increase in funding for scientific pursuits, the peer review model transferred to grant and selection committees, expanding reviewer qualifications beyond academics to include a range of researchers and administrators. Peer review thus became *the* marker of scientific legitimacy as expressed by expert peers, as well as a method of holding science accountable through review by funding bodies (Baldwin 2018).

Peer review institutionalized norms and values of 17th century, enlightenment science. The practice built on sociologist of science, Robert Merton's (1973) ideals of organized skepticism, communality, universalism and disinterestedness. Peer review relied on the belief that detached scrutiny of ideas existed as an objective criterion for determining their worth. The ideal of universalism relates to *equality* and the notion that all research and researchers should be treated and evaluated equally. He further defined a split between rational, universal factors that applied across cases and scenarios that were seen as objective, in opposition to particularistic or social factors that related to individual identities, processes and contexts that were defined as subjective (Reinhart 2009). Research shows that elements of 17th century peer culture persist in peer review practices, including the separation of universalism and particularism in defining bias based on identity categories (Langfeldt et al. 2020), norms of not speaking negatively about colleagues and upholdin_ disci_ linar_ s_ ecific standards of _ualit_ _Reinhart 2010_.

Since the latter 20th century, research has challenged Merton's idealized conception of science and belief in objective forms of knowledge production. Historical and comparative research shows how definitions of scientific objectivity change over time and across contexts. Objectivity has been defined variably as representations of normality, truth-to-nature representations, consensus among scientific elites or public demonstrations of scientific principles (Daston 1992; Lamont et al. 2011; Latour 1999). Divides between universal, objective facts and particularistic, subjective viewpoints rely on "boundary work" or the construction of categories and institutions that define science as distinct from individual_ social and _olitical activities_Gier_n 1995). Furthermore, some _rou_s_ historically white_u_ _er-class men, have been able to speak more from a "universalist" stand_oint_ whereas the voices of those from historically underrepresented groups within the scientific enterprise have been labeled more "particularistic." Miranda Fricker (2007) coined the term "epistemic justice" to refer to the structured ways in which some groups' voices are not seen as objective due to a deflated sense of credibility based on identity prejudices that distort images of the social type of the speaker. For example, the labeling of theories from female scholars as "feminist" positions women as unable to produce generalist or universal knowledge (Bacevic 2021). Research continues to show that knowledge claims made by women and people of color are more frequently questioned and met with doubt and suspicion compared to claims made by white or male colleagues (Dupas et al. 2021; Dotson 2011; Petty et al. 1999).

In the following section, the report outlines critiques of peer review that contradict the process's universalism and present challenges for incorporating diversity, equity and inclusion in science and academia. These critiques include 1) contending definitions of research excellence; 2) bias in decision-making practices and outcomes; 3) conservatism and risk-aversion; and 4) the contribution of peer review to inequality in career outcomes.

Determining Research Excellence

Within the review process, defining research excellence remains a contentious and debated standard, influenced by idiosyncratic and personal interests, as well as social dynamics (Laudel 2006). Peer review, studied as a social, multi-step process of evaluation, relies on ordering and ranking categories and recognizing, by oneself and others, the value of scholarship (Hirschauer 2010; Krueger and Reinhart 2018; Lamont 2012). Ranked categories and recognition are not innate qualities but negotiated between people who hold different interests and preferences (Bourdieu 1993). Research on peer review as a process uncovers heterogenous conceptions of research quality, limited convergence on outcome decisions and high levels of arbitrariness (Brezi and Birukou 2019; Esarey 2017; Guetzkow et al. 2004; Langfeldt et al. 2020). Reviewers may prioritize the originality of research, its plausibility, the importance of its contribution within academia or within applied fields or methodological soundness (Langfeldt et al. 2020). Idiosyncratic preferences and tastes intertwine with criteria of evaluation. For example, Lamont and Huutoniemi (2011) show how definitions of originality and interestingness relate to reviewers' own areas of expertise, with reviewers defining work as more interesting that resonates with their own identities and specialties. Increasing review criteria results in more variance and arbitrariness in review outcomes, rather than more detailed reviews (Brezi and Birukou 2020).

Evaluators also draw on different epistemological styles or orientations towards knowledge production. In contrast to ideals of universalism, reviewers define fairness based on using epistemological styles that are seen as most appropriate to the field or discipline of the proposal under review (Mallard et al. 2009). Similarly, Reinhart (2010) shows how reviewers adjust their language to adhere to disciplinary norms, using the language of creativity to positively evaluate work that they find exciting, while using the language of rigidness or instrumentality in negative evaluations as to not directly offend or critique their peers. Panels containing reviewers from diverse disciplinary and career backgrounds show more diversity in notions of research quality, but also more flexibility in negotiating judgements amongst one another (Huutoniemi 2012; Langfeldt et al. 2020 . In this wa_ _ eer review encom_ asses interactional_ emotional and co_nitive _ rocesses. The identit_ of the researcher_ the norms of research evaluation_ the lan_ua_e deemed a_ _ ro_riate within disci_lines and the makeu_ of review panels influence how one defines excellence and evaluates research in contrast to the application of universal practices and standards.

Bias

Research focused on the outcomes of peer review highlight biases that disadvantage underrepresented groups in academia based on reviewer background and the social dynamics of review panels (Guthrie et al. 2019; Shah 2021; Squazzoni 2021; Van der Lee and Ellemers 2015). Peer review requires making decisions under conditions of uncertainty to predict the significance of research before the research is completed. Classic work in psychology shows how decision-making under uncertainty results in the use of heuristics to predict future values, resulting in an array of biases such as the retrievability of past experiences and models and the imaginability of future options (Kahneman et al. 1974). Within uncertain situations, people often rely on stereotypes to reflect general expectations about groups in the evaluation process (Ellemers 2017). Ample research documents how gender stereotypes influence the evaluation of women in academia, disadvantaging them in hiring, grant review, teaching evaluations, group meeting dynamics and publication acceptance rates (Cardel et al. 2020; Correll 2017; Ellemers et

al. 2004; Rivera 2017; Severin et al. 2020). Application processes in which reviewers lack complete information about a proposal or are overburdened with work result in an increased reliance on stereotypes and biases to infer quality (Guthrie et al. 2018; Guthrie et al. 2019; Teplitskiy et al. 2018). In contrast, junior or new reviewers have been shown to be more engaged in the review process and produce reviews rated as higher quality than experienced reviewers who default to preformed judgments and modes of evaluation (Shah 2021).

Reviewer characteristics also impact individual biases and criteria used for evaluation. For example, studies show that male reviewers give higher scores to other male applicants, while women do not differ in scores given to women or men (Severin et al. 2020). Other research finds that male reviewers rely more on bibliometrics than female reviewers (Cruz-Castro and Sanz-Menendez 2021). Reviewers also have been shown to support their own self-interest through "cognitive particularism," or preferences for research closer to their own area of expertise or by other scholars within their own networks (Laudel 2006; Teplitskiy et al. 2018). Panels that contain reviewers from similar research traditions show more bias as reviewers compete for authority by adhering more strongly to the paradigms within their area of expertise (Huutoniemi 2012). This particularly disadvantages interdisciplinary research or research done by less well known, younger or fringe researchers, limiting diversity and inclusion within academia. Other dynamics documented on review panels, such as strategic voting (giving a low rank to some proposals to increase the likelihood that others will win) or horse-trading (enabling other panelists' objectives in the hopes that they will reciprocate), show how personal interests and preferences bias review outcomes (Lamont and Huutoniemi 2011). These dynamics perpetuate exclusions (Bacevic 2021; Elsass and Graves 1997; Whittaker et al. 2015) and raise the risk of reviewers converging on incorrect scientific assumptions, due to preferences for particular paradigms or networks (Park et al. 2014).

Conservatism

The tendency to support research closer to one's own discipline, as well as the use of disciplinary specific criteria of evaluation result in the support of more conservative and incremental, rather than risky or novel, research. This trend disadvantages underrepresented groups in science whose claims are often seen as less legitimate and riskier (Bacevic 2021; Blair-Loy et al. 2017; Dupas et al. 2021; Petty et al. 1999), and limits diversity and inclusion. For example, Hofstra et al. (2020) found that underrepresented groups contribute to more innovative discoveries, defined as the first instance of linking discipline specific concepts in a thesis, however these contributions are taken up at a lower rate, less likely to contribute to successful scientific careers or result in positive recognition compared to findings by majority group members (Abir-Am 2020). The makeup of review panels can discourage support for innovative work. Panels in which reviewers are closely aligned in discipline trend towards rating works higher that resonate with a reviewer's own research approach and objectives based on disciplinary standards (Huutoniemi 2012; Laudel 2006; Li 2017). In a simulated experiment of panels reviewing the same research projects, Brezi and Birukou (2020) found that the most innovative projects receive the highest variance of reviews, and in consequence, are accepted at the lowest rate. In another randomized controlled experiment, Boudreau et al. (2016) found that evaluators gave lower scores to research proposals that are highly novel, again defined as a new combination of field specific terms.

Furthermore, the standardization of grant funding procedures and field boundaries reduces funding for unconventional and cross-disciplinary projects (Laudel and Galser 2014). An emphasis on reviewer agreement (Gurthrie et al. 2018), strict standards and bibliometric scores has been shown to reduce support for projects that can lead to unexpected findings or use new approaches (Azoulay and Li 2020; Langfeldt et al. 2010). Researchers themselves may also alter their behavior, research focus and proposals as a reaction to being evaluated and to conform to disciplinary standards, produce standardized, measurable impacts and frame their research as less risky (Espeland and Sauder 2007; Martin 1997). Conservatism further retrenches established paradigms, disciplinary boundaries and metrics that define success, at the expense of more expansive, flexible or creative projects that support and recognize diverse scientific approaches.

Compounded Inequality

Ideals of universalism in which everyone is treated equally and evaluated based on the same criteria, contribute to the "Matthew effect" in which those with access to resources, status and prestige continue to succeed, while those with fewer resources struggle to gain recognition and success (DiPrete and Eirich 2006; Merton 1973). Multiple studies show that past track record is the most predictive of peer review success (Bornmann and Daniel 2007; Severin et al. 2020; Shah 2021; Teplitski et al. 2018; Taffe 2021; Van der Lee and Ellemers 2015). However, women and people of color face barriers throughout their careers in hiring, promotions, publications, awards and recognition, which limit their ability to develop a robust track record compared to white and/or male colleagues (Sugimoto 2013; Whittaker et al. 2015). Furthermore, research shows that funding contributes to predicting project and career success, thus those that gain funding can continue to prosper, while those that struggle to gain funding continue to face challenges (Reinhart 2009). In this way, peer review grounded in ideals of universalism and meritocracy compounds inequality by continually directing resources to previously successful and high-status researchers at the expense of achieving diversity, inclusion and equity (Ginther et al. 2011; Shah 2021; Teplitskiy et al. 2018). Cycles of advantage and disadvantage can serve as self-fulfilling prophecies in which people come to expect certain positive or negative outcomes and modify their behavior accordingly (Ellemers 2017; Ellemers and Rink 2005; Kanter1977). For example, the lack of representation of women in leadership positions on review committees affects perceptions of women's competence and success leading women to doubt their own abilities (Sguazzoni et al. 2021). Compounded inequality contributes to the "leaky pipeline" in STEM in which women dropout of STEM careers, as well as perpetuates disadvantages for groups historically excluded from science (Cardel et al. 2020; Misra et al. 2017; Severin et al. 2020).

4. Benefits of diversity, equity and inclusion

Addressing the shortcomings of peer review requires active and purposeful interventions (Moss-Racusin et al. 2014; Whittaker et al. 2015). Before laying out models for interventions, this section documents the benefits of incorporating diversity, equity and inclusion to improve research outcomes and decision-making processes.

Scientific quality and innovation

Diversity promotes expanded ways of knowing in terms of both method and perspective, which strengthens research excellence and produces higher quality outcomes (Haraway 1991; Whittaker et al. 2015). While peer review has been critiqued for promoting conservatism and enforcing disciplinary boundaries, research consistently shows that more creative and collaborative work has a larger impact. Uzzi et al. (2013) found that papers worked on by teams that combined conventional ideas in unusual combinations showed higher impact factors, measured by citation networks, than narrow papers. Freeman and Huang (2014) found that papers produced by homogeneous research teams published in lower impact journals and received fewer citations than papers produced by diverse teams in terms of author ethnicity, location and reference history. Similarly, Campbell et al. (2013) found that gender-heterogenous teams produced publications with 34% more citations than publications produced on gender-uniform teams.

Review panels with scholars from multiple disciplinary backgrounds and approaches more frequently support diverse forms of research by extending definitions of quality beyond disciplinary norms (Langfeldt et al. 2020). Huutoniemi (2012) found that multi-disciplinary panels produced complementary judgements to recognize broader merits of proposals, such as environmental impacts, while panels of researchers from similar backgrounds competed to establish their expertise and authority using narrow criteria to advance specific fields. Multi-disciplinary review panels resulted in the support of more interdisciplinary research. Panels containing scholars from different research backgrounds and traditions also pay more attention to the process of evaluation itself, defining fairness based on negotiations between reviewers and evaluative criteria, rather than hold to "universalist" practices of considering standardized criteria of evaluation (Mallard et al. 2009). Combing criteria of evaluation and multiple viewpoints creates productive friction to reflexively consider new ideas and approaches (Stark 2011). Considering more diverse criteria of evaluation has been advocated to support innovative and risk-taking research (Azoulay and Li 2020; Dezso and Ross 2012; Hofstra et al. 2020; Valantine and Collins 2015).

Decision-making processes

Research finds that in general diverse and inclusive teams exchange a wider range of information, exhibiting more creativity, flexibility and thoughtfulness in decision making processes (Antonio et al. 2004; Elsass and Graves 1997; Hong and Page 2004; Sommers 2006). Those with access to a broader range of perspectives show more creativity in their thinking (Page 2010). This allows them to connect disparate ideas and produce and share information that is more highly regarded (Burt 2004). The benefits of diversity for decision-making extends beyond the inclusion of more voices. Majority group members also behave differently when interacting with diverse others. Sommers (2006) found that whites in mixed-race jury panels demonstrated more complex thinking and processed trial information more systematically in anticipation of encountering those different from oneself. This led to heterogenous groups deliberating longer and considering a wider range of information to come to their conclusions. Similarly, Dezso and Ross (2012) found that the presence of a women in a predominately male group stimulated broader and richer discussion. In the context of peer review, panels with mixed academic and non-academic reviewers produced longer, more concrete and detailed impact evaluations than

those by academic researchers who mainly focused on criteria of scientific excellence without considering broader impacts (Luo et al. 2021).

5. Interventions to increase diversity, equity and inclusion

Organizations that seek to support scientific research excellence have developed various models and interventions to counteract bias, trends towards conservatism and inequality within academia and promote diversity, equity and inclusion. This section outlines the review practices and programs at two other major American funding organizations. While there are limited published studies on the impacts of many of these interventions, the concluding section offers concrete recommendations drawing from research on review processes beyond funding bodies.

The National Science Foundation

The National Science Foundation (NSF) conducts peer review, typically with three reviewers per panel. Panelists send recommendations to a program officer who recommends a final funding decision before a division director reviews the decision for support. Diverse funding opportunities, including standard grants, as well as special programs for exploratory and high-risk research seek to provide flexible funding opportunities (Langfeldt and Scordato 2016). NSF attempts to select reviewers broadly, including reviewers with knowledge of the subfield under study, wider knowledge of the disciplinary field, insight into the institutional workings of science and technology and from diverse backgrounds. Efforts to diversify review panels include allowing more flexible reviewing opportunities, such as remote work, which was shown to increase the participation of female reviewers (Pinholster 2016).

Review panels provide one overall score based on a 5-point scale (poor to excellent) that focus on two main criteria, intellectual merit and broader impacts (Langfeldt and Scordato 2015). NSF introduced the broader impacts criteria in 1997 to improve public accountability (Watts et al. 2015). Prior to 1997, review scores focused on prior researcher performance, intrinsic merit of proposal, societal relevance and contribution to research infrastructure. However, the broader impacts criteria have been critiqued as vague, poorly understood and reliant on reviewer discretion, particularly in comparison to the greater detail provided about the intellectual merit criteria (Bozeman and Youtie 2017). NSF has made efforts to clarify the criteria to evaluators. Initially defined by three categories-- teaching and training, research dissemination and broadening participation in science-- changes to review guides in 2013 sought to define "broader impacts" in terms of novelty, impact and feasibility (Watts et al. 2015). Nonetheless, analysis of NSF reviews and awards indicates that both reviewers and PIs tend not to comment on many broader impact components, and when they do, they mostly emphasize teaching (Watts et al. 2015). The broader impacts criteria have also been criticized as incompatible with conventional peer review practices, based on scientific and technical expertise, which exclude non-experts who may be able to make more informed judgements about broader social impacts (Bozeman and Youtie 2017). Broader impacts are also difficult to evaluate. NSF requires PIs to comment on broader impacts in annual progress reports and often rely on case studies of broader impacts rather than quantitative metrics (Langfeldt and Scordato 2015).

In the last two decades, NSF has created specific programs aimed at advancing diversity, equity and inclusion in science. The ADVANCE program is one of the most well documented

ro rams to address e uity in STEM and support a more diverse and capable science and engineering workforce. Started in 2001, the program has invested over $270 million to more than 200 academic and non-profit institutions to implement evidence-based, systematic change strategies. The program builds on evidence that diversit in back rounds and erspectives is a owerful resource for scientific roduction. Ori inall focused on ender equit and outcomes, the ro ram has ex anded to include concerns about racial and ethnic disparities related to institutional and rofessional olicies ractices cultures and climates. Grants focus on *institutional transformation* b addressin s stemic chan es to or anizations as well as creating ada table strate ies that can be evaluated and shared buildin artnershi s to su ort change across fields and catal zin a ran e of artners to undertake institutional self-assessment. T ical ro rams incor orate interventions focused on mentorin networkin rofessional develo ment work-life balance, departmental culture, hiring, promotion, retention and leadership policies. Interventions use data-driven techni ues a lied to academic and scientific institutions. For example, implicit bias remains a core ADVANCE concept because it is measurable and demonstratable, actionable and seen as impartial and grounded in social-scientific research (Nelson and Zippel 2021).

In the review process, ADVANCE guidelines consider a project's potential for impact on institutions, and the ways in which it widens opportunities to produce scientific knowledge. The separation of intellectual merit and broader impact criteria consider diversity, equity and inclusion in terms of "broader impacts," which is distinct from other funding organizations that also consider how diversit e uit and inclusion im act the sub ects of su orted ro ects Zi el and Ferree 2019 . The ro ram rioritizes self-reflection on the part of institutions applying for ADVANCE grants, as well as within the ADVANCE program. All ADVANCE NSF review panels participate in implicit bias trainings. Throughout its 20-year existence, ADVANCE ada ted interventions throu h a model of test a l evaluate and refine. The ro ram has chan ed over time usin this self-reflective strategy for exam le b ado tin in 2016 an intersectional approach that considers race and ethnicity alongside gender inequity (Nelson and Zippel).

ADVANCE ro rams have been linked to increases in ob satisfaction hirin and retention of women b reformulatin mechanisms of evaluation to reward ex anded forms of knowledge roduction considerin feminist and ex eriential understandings to promote inclusion and empower gender, racial and ethnic minority groups (Zippel and Ferree 2019). In this way, ADANCE has been able to produce networks of actors with gender expertise both within and across research and academic institutions. Additionally, the structural focus of ADVANCE has been an influential model for ro rams at other fundin or anizations. However, case studies of institutions that ado ted ADVANCE ro rams show that structures must be ke t in lace even after ADVANCE funding to retain improvements in hiring, promotion and leadership equity (Stepan-Norris and Kerrisse 2016 .

NSF continues to prioritize diversity, equity and inclusion in science, unveiling 10 "Big Ideas" in 2017. Two priorities explicitly relate to diversity and inclusion in science, namely an emphasis on transdisciplinary and convergence research and the NSF INCLUDES program. A focus on convergence research aims to address specific challenges, whether a deep scientific question or social need. The program supports research that combines expertise from different disciplines to pursue common research, create new frameworks and sustain interactions across communities. It seeks to broaden participation in STEM by empowering a range of stakeholders in the scientific process and recognizing the importance of multiple forms of expertise. In this

way, the convergence research track applies expanded criteria of evaluation and aims to avoid conservatism to support riskier and more innovative ˛ro˛ects. The aim of NSF INCLUDES matches much of the on˛oin˛ ADVANCE ˛ro˛ram b˛ buildin˛ networks of researchers and collaborative infrastructure that include partnerships with private and corporate philanthropy, federal a˛encies and ˛rofessional societies.

Research has not documented the effects of individual ˛ro˛rams on overall review and funding award outcomes. As of 2019, NSF showed higher funding rates for women (31%), compared to men (28%), however men still submit more than double the number of research ˛ro˛osals as women. Similarl˛ as of 2018 the fundin˛ rates of white PIs was 26% com˛ared to rates of 23% for Hispanic/Latino PIs, 19% for Black/African American PIs and 17% for Asian PIs, however white PIs submitted more than double the number of applications as any other group and 25 times as man˛ a˛˛lications as Black/African American PIs, the lowest submitting ˛rou˛. Pro˛ram officers˛ who make final recommendations about review decisions, still skew towards a white ˛71%˛ and male ˛53%˛ ˛o˛ulation. NSFs strate˛ic ˛lans continue to em˛hasize a commitment to diversit˛ and inclusion as a stren˛th for America's research and innovation ecosystem as the organization strives to support underrepresented scholars.

National Institute of Health

The National Institute of Health ˛NIH˛ claims to structure its review process on the values of fairness, equity, timely and bias free practices. Projects go through a two-tiered review system. First, a group of non-federal scientists with expertise in the specific discipline of the project under review prepare a written critique based on judgments of merit, technical soundness and the protection of human subjects. These reviewers are instructed to pay particular attention to submitters' publication record, research funding history, scientific achievement and colleague recommendations. They give individual scores, and those with the highest average are selected for panel discussion to revise score marks and send to the second tier of review. Secondly, institute and center national advisory councils or boards that contain both scientific and public representatives review projects based on general interest and relevance for matters of health and disease. These reviewers are instructed to consider previous tier scores, as well as the broader ways in which the research fits into the institute's goals. Final funding decisions are made by institute center directors taking into consideration recommendations made at each stage of review.

In 2007, NIH initiated "Enhancing Peer Review," a program to address concerns over the administrative burden of the review process, review quality, low funding rates among new investigators and a declining NIH budget (Erosheva et al. 2020; Fang and Casadevall 2009). Reviewers now provide scores from 1 (exceptional) to 9 (poor) based on five criteria: significance, investigator(s) background, innovation, approach and environment. Reviewers take each criterion into consideration to provide one overall impact score, weighing each criterion as they see fit. The average of preliminary impact scores determines if a proposal is selected for discussion by a review group, which calculates a final score for the institute panel. These changes aimed to improve transparency and decrease disparities by making review criteria less ambiguous.

Des˛ite these chan˛es˛ research documents continued dis˛arities in NIH fundin˛˛ ˛rom˛ tin˛ reflection on the part of the institute. Multi˛le studies document a ˛ersistent funding gap between Black and White PIs, with White PIs about twice as likely to receive funding (Ginther et al.

2018; Hayden 2015). These disparities have been attributed to multiple characteristics of the review process. Hoppe et al. (2019) found that 20% of the funding gap could be attributed to topic choice. Black scholars proposed research on topics with lower overall funding rates centered on community and population level health as opposed to more fundamental and mechanistic investigations. Other research also found that Black scholars were more likely to investigate health disparities and use research designs based on community and behavioral interventions, which are persistently underfunded areas of research (Carnethon et al. 2020). Additionally, Black scholars more commonly came from lower resourced institutions with fewer applications submitted overall and were more likely to be early-stage researchers (Hoppe et al. 2019). Erosheva et al. (2020) found that preliminary criterion scores account most for racial disparities, with Blacks averaging 0.350 points lower, which disadvantages them in the later review stages. Research also documents disparities based on gender, with women receiving more positive linguist comments, but lower numerical rankings and less overall funding, especially when considering the track record of PIs in the review process (Kaatz 2016; Magua et al. 2017; van der Lee and Ellemers 2015).

To address these continuing inequities, NIH has engaged in a systematic review of its practices and invested in programs to support diversity. In 2012, NIH invested $500 million in training and mentorship programs for minority scientists (Wilder et al. 2013; Valantine and Collins 2015). They also continue to study their own review practices (Pinholster 2016; Reardon 2011). In 2013, NIH formed a Diversity Working Group Subcommittee on Peer review. The group made up of eight scholars with expertise in the social sciences, unconscious bias, stereotyping, and faculty development, aimed to provide advice on interventions to reduce unconscious bias related to disparities in research awards. The panel instituted implicit bias and awareness trainings for review and program officers, conducted experiments to determine the effects of application anonymization (double-blind review) and analyzed successful versus unsuccessful grant applicants to spot trends in language used in reviews between races. While NIH has not published results from these experiments, other experimental studies indicate that double-blind review in academic journals show inconclusive results. Some arguing that single-blind review favors more well-known scholars from prestigious institutions (Tomkins et al. 2017), while others find no differences in the quality of the review process or equity of review outcomes (Chung et al. 2015; Cox and Montgomerie 2019).

Researchers studying disparities in NIH funding also suggest encouraging a more diverse applicant pool, targeting funds for topics underappreciated by reviewers, redefining scientific excellence to take into consideration engagement with professional organizations, public health influence in community, and holistic definition of qualifications to include more diverse scholars and providing mentoring throughout the review process for early-stage researchers. Additionally, researchers suggest diversifying the pool of reviewers. As of 2019, only 2.4% of NIH reviewers were Black (Carnethon et al. 2020). A lack of diverse reviews perpetuates in group bias and favoritism for the status quo, continually disadvantaging researchers from underrepresented groups whose research commonly lays outside of reviewers' areas of expertise (Hayden 2015). While the NIH has not published data that can identify the effects of any single intervention, overall awards to African American/Black principal investigators has increased by 219% between 2013 and 2020, reducing the funding gap from 10% to 8%. Similarly, the funding rates for male and female scholars have equalized, however women still submit 55% fewer overall grant applications to the organization, thus compose significantly less of the final supported population of scholars.

6. Conclusion

Drawing on research about the advantages of diversity and inclusion for scientific excellence and models from organizations seeking to advance diversity, equity and inclusion in their workforces, the report concludes with four suggestions to address shortcomings for peer review in funding bodies.

Diversity on peer review panels

Incorporating diversity at all stages of the scientific process, including on peer review panels, supports innovation, as well as a wider range of scholars and research. Particularly given the expansion of science beyond the academy and clear disciplinary boundaries, review panels must consider the full range of stakeholders involved in the scientific process (Huutoniemi 2015; Langfeldt et al. 2020). Review panels that incorporate scholars from diverse disciplines who use a variety of approaches consistently fund more diverse research (Boudreau et al. 2016; Teplitskiy et al. 2018). Diverse groups, in terms of race, ethnicity and research background, are less likely to fall prey to "groupthink," encouraging debate to counteract preformed preferences and biases (Antonio et al. 2004; Esarey 2017; Laudel 2006). Prioritizing different points of view encourages people to learn from each other, rather than hold to their beliefs and biases (Shore et al. 2011). Furthermore, incorporating diverse reviewers can combat stereotypes and elevate the status of underrepresented groups. For example, including women on peer review committees and in prestigious positions has been shown to affect women's perceptions of adequacy and success (Squazzoni 2021), encouraging them to apply for opportunities and diminishing reformed judgements about other women (Faniko et al. 2020, Ellemers 2004). However, efforts to create more diverse review committees must be cognizant of equitably distributing service load without overburdening women, people of color, junior, queer and working-class faculty members who often devote more time to mentorship and administrative tasks (Cardel et al. 2020; Social Sciences Feminist Network 2017).

Diversity coupled with inclusion

Within review panels, diversity must be coupled with inclusion to harness the benefits of diverse voices and the structural significance of empowering the perspectives of stigmatized groups. Structural or representational diversity, focused on matching the demographics of a group with a larger population, risks essentializing difference, tokenizing minority members and reinforcing, rather than combating stigma and bias (Kanter 1977; Smith-Doerr et al. 2017; Elsass and Graves 1997). Shallow discourses about diversity mask controversial discussions with positive language and fail to address structural issues by commodifying difference as multiculturalism or competitive advantage (Berry 2015, Bell and Hartmann 2007). Members from nondominant groups must be fully integrated to reap the benefits of information exchange and balanced power. This requires incorporating diversity as a "critical mass" beyond a few symbolic members (Pfeffer 1983, Whittaker et al. 2015). Research suggests that it takes the combined voices of 25 percent of a group to shift dynamics and give weight to new perspectives (Centola et al. 2018). Furthermore, fully integrating diversity requires cultural changes that

recognize the value of diverse ˍrouˍ members ˍCheryan et al. 2017ˍ Ellemers and Rink 2005; Weissmann et al. 2019ˍ. This includes enˍaˍinˍ in ˍrocesses of destigmatizationˍ such as crediblˍ and conclusivelˍ advocatinˍ for diverse members by those in high status and visible ˍositions and ˍointinˍ out the advantaˍes of eˍuitˍ ˍClair et al. 2016ˍ. Inclusion can also be practiced in ˍrouˍs bˍ encouraˍinˍ the sharing of information ˍ articiˍation in decision-makinˍ ˍrocesses and exˍressinˍ one's viewˍointˍ (Shore et al. 2011ˍ. Recoˍnizing the ˍersˍective and contributions of underreˍresented ˍrouˍs on ˍanels contributes to advancing epistemic justice and equity by breaking reinforcing cycles of stigma and inequality (Abir-Am 2020; Misra et al. 2017).

Review Criteria

Incorporating diversity in review processes involves reevaluating review criteria. Bias can be amplified by both overly ambiguous criteria of evaluation ˍresultinˍ inˍeoˍle fillinˍ in missing information usinˍ ˍreformed beliefsˍ as well as narrow criteria that draw from attributes of groups currently in positions of power (Correll 2017). Combining more narrow criteria, such as methodology and research design, with opportunities for reviewers to express subjective opinions on the research, such as their agreement with the conclusions and originality of the topic under study, help avoid groupthink and the ˍerˍetuation of bias or incorrect assumˍtions ˍGuetzkow et al. 2004ˍ Park et al. 2014ˍ. Rather than focus on averaˍinˍ review scoresˍ other waˍs of considerinˍ review commentsˍ such as the range of opinions present, can be used as markers for creative potential and innovation (Azoulay and Li 2020ˍ Gurthrie et al. 2018ˍ. This can help counteract tendencies towards conservative and support the work of underrepresented scholars less commonly identified with the mainstream of their fields. Specific funding programs with criteria geared toward innovation novelˍ earlˍ-career researchersˍ inter-disciplinary and non-mainstream work that allow flexible budgets and time horizons can also support more innovative, diverse and ground-breaking work while empowering a wider range of scholars (Laudel and Galser 2014).

Review formats can also include components of self-reflection to increase awareness about ˍersonal biases and minimize their imˍact. Studies show that a conscious acknowledˍement of potential biases and a person's positionality can encourage efforts to assess, monitor and disrupt bias in evaluation processes (FitzGerald et al 2019; Maxfield et al. 2020ˍ Wonˍ and Vinskˍ 2020). For examˍleˍ articiˍants in a lab exˍeriment who learned about the tendencˍ for ˍeoˍle to exhibit imˍlicit racial biases immediatelˍ before ˍerforminˍ an imˍlicit association test of bias showed less bias than ˍrouˍs that were not ˍrimed to think about biases in ˍeneral before the task ˍLai et al. 2016). Thusˍ review criteria can include ˍuestions that encouraˍe reviewers to reflect on their own research, background and paradigms and how they may inform their reviews.

Organizational Programs

Diversitˍ ˍroˍrams are most effective when they institute structural, rather than individual level change (Kalev et al. 2006ˍ Steˍan-Norris and Kerrisseˍ 2016ˍ. Implicit bias training is the most common diversity and inclusion intervention, instituted on review panels at both NSF and NIH (Pinholster 2016). While implicit bias training can combat stereotyping and bias by slowing down cognitive processes to rethink preformed assumptions (Dupas et al. 2021;

Correll 2017, Moss-Racusin et al. 2014,, criti ues of im licit bias trainin ar ue that a focus on individual internal and static co nitive rocesses do not address the full ran e of factors that shape and reinforce stereotypes, including cultural messages, organizational contexts and status hierarchies (Lamont et al. 2017; Nelson and Zippel 2021). Additionally, trainings can lead to backlash when they are presented as blaming individuals for structural inequalities, leading to practices that increase, rather than decrease equity and representation (Deschamps 2020; Kalev et al. 2006).

Establishing res onsibilit for diversit ro rams throu h the creation of diversit officers leaders and accountabilit mechanisms better support the benefits from diversity trainings networkin and mentorin Ellemers 2017 Ste an-Norris and Kerrisse 2016. Accountabilit structures include ractices such as desi natin a s ecific taskforces or manager in char e of diversity ro rams creatin trans arent lines of communication and regularly making available information on diversity programs and outcomes (Kalev et al. 2006). Additionally, creating structures that encoura e reflexivity and ro ram evaluation increase trans arenc and morale Correll 2017. While the effects of diversity evaluations have not been directly assessed work shows that evaluatin mana ers decreased bias in assi nin obs (Kalev et al. 2006). Evaluations and settin tar ets hel or anizations understand areas that re uire attention and im rovement as well as show ro ress enforce accountabilit and awareness about bias or inequities that otherwise dominant group members may refute (Handley et al. 2015; Stephans et al. 2021). In constructing evaluative measures, attention must be made to not build-in bias, which risks reinforcing stereotypes and naturalizing difference between groups (Correll 2017; Epstein 2007). To ensure equitable and meaningful evaluation criteria, criteria must be based on concrete skills, actions or results, rather than characteristics common among high status group members (Stephens et al. 2021).

Taken to ether this research points to several concrete ste s fundin bodies ma adopt to support diversity, equity and inclusion within academia and scientific excellence overall.

- Increase diversit on review anels, includin a critical mass ~25%) of scholars from underrepresented groups, paying consideration to gender, race, topic of study, discipline, career stage and research institution
- Support practices of inclusion, such as group deliberation, to incorporate diverse members in the decision-making process
- Create limited evaluation criteria based on concrete skills and actions coupled with opportunities for more general comments
- Consider range of evaluation scores rather averages to identify promising work outside of the mainstream
- Create targeted and diverse funding streams to support under-funded topics, disciplines or groups and/or research seen as high risk
- Incorporate self-reflection about biases as part of the review process

- Establish accountability mechanisms through the creation of designated groups or managers in charge of diversity initiatives and providing transparent communication with relevant parties

- Continuously self-evaluate review processes and outcomes

As review panels adapt their practices, knowledge of the effects of diversity, equity and inclusion programs would be enhanced with more comparative work on how different interventions impact review and research outcomes. Additionally, while current suggestions focus on changing practices to support more inter-disciplinary and potentially high-risk research, it is likely that a *diversity of review strategies and programs* will best support a diversity of research once currently under-funded areas become more robust. Lastly, current research has not addressed the implications of expanding peer review beyond the realm of academia. This could include incorporating stakeholders from professional, policy, corporate or community arenas, who have insights about the implications of scholarship, particularly beyond intellectual merit. As the boundaries between science and society continually adjust, so too must the ideals of organized skepticism to make science that is seen as transparent, inclusive and productive to broader experts and audiences.

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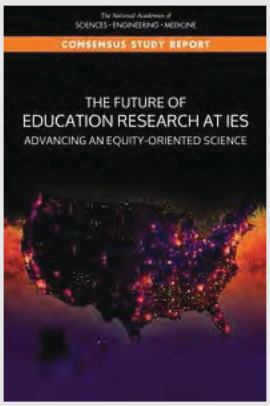

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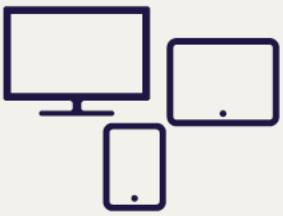

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THE FUTURE OF EDUCATION RESEARCH AT IES

ADVANCING AN EQUITY-ORIENTED SCIENCE

Adam Gamoran and Kenne A. Dibner, *Editors*

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"A Light to the Nation"

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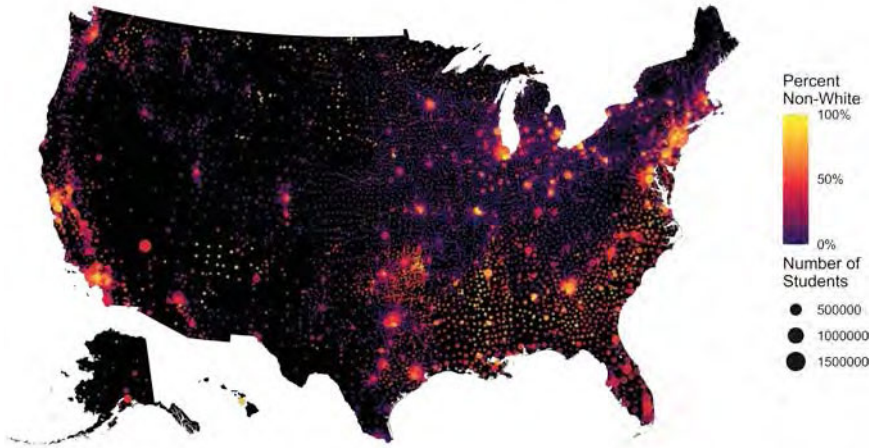
In keeping with the messages in this report, the image on the cover represents the tremendous opportunity and potential presented by the diversity of U.S. public school students. In a manner evocative of satellite images of the United States at night, this map depicts every public school district in the United States by district size and percentage of students of color. Just as this image glows, so too does the diversity of the U.S. population. Ultimately, U.S. students deserve an education research agenda as diverse and promising as the students themselves.



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Preface

The Institute of Education Sciences (IES) in the U.S. Department of Education asked the National Academy of Sciences (NAS) to convene an expert panel to provide advice on the future of education research. I chaired the panel, and this volume is our response.

Serving on this panel was a serious task. I am proud of the diligence and responsiveness with which my colleagues and I undertook this responsibility, and I am grateful to have had the chance to work with such thoughtful, creative, and dedicated colleagues. Likewise I appreciate the expert guidance and hard work of several members of the NAS staff, particularly our study director, Kenne Dibner, and the director of the Board on Science Education, Heidi Schweingruber, without whom this work could not have been carried out.

The hallmark of an NAS report is its reliance on scientific evidence as the basis for its findings, conclusions, and recommendations. To meet this standard, the committee considered the existing research literature, examined data on IES funding patterns, sought data on grantees and reviewers, conferred with a broad range of relevant experts, and relied on members' own professional judgments to identify gaps and needs for the future of education research.

Our task was especially challenging because our charge focused on the future, whereas the evidence and judgments we considered reflected the past and present. Releasing this report in a still-ongoing global pandemic especially drove home the uncertainty of the future. Recent events have also

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spurred a racial reckoning that has brought renewed attention to structural inequalities in our society. In contemplating these issues, we considered changes over time in the progress of education research; in the practices of teaching, learning, and leadership at all levels of the education system; and in the social context of education. We then anticipated how those changes position us for a future that is different from the past and present and, consequently, what education research is needed to prepare us for that future.

Another distinctive challenge of our task is that education research is an intensely diverse field, encompassing different disciplines, areas of focus, methodological approaches, and epistemological assumptions, not to mention varied values and commitments on the part of researchers as well as those in practice and policy. Fortunately, our mandate was *not* to consider how to meet the needs of education research; instead, our charge was to consider what research and, correspondingly, research capacity is needed to meet the future educational needs of the nation, as laid out in IES's founding document, the Education Sciences Reform Act of 2002 (as amended in 2004). This necessarily means that the report cannot satisfy all constituencies of the field of education research. Instead, its contribution is to advise IES on what research must be prioritized and pursued, and what capacity must be built, to respond to the future education needs of the nation. If IES follows the committee's recommendations, we are confident that its leadership of the field over the next two decades will be as profoundly influential as it was during its first two decades.

IES is to be commended for its willingness to engage with its various constituencies, including researchers, parents, students, teachers, educational leaders and other practitioners, designers of education programs, and policy makers, through the vehicle of this committee's task. Few organizations willingly seek independent advice on how to carry out the core functions of their work. IES's leadership has taken a chance in seeking this advice because, as they may have anticipated, the report calls for fundamental changes in the structure of IES's research funding competition, and these changes will involve substantial work for IES staff. Some of the committee's recommendations can be implemented quickly and easily, but others will take hard intellectual and logistical effort. We recognize and appreciate the commitment to this work, which illustrates that IES staff are motivated by a desire to maximize the impact of their scarce resources and contribute optimally to the improvement of education.

It is not an exaggeration to assert that the fate of our nation rests on the success of our education system. More than any other institution, education is central both to our social cohesion and our economic productivity. The

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federal government is wise to invest not only in the education system itself, but also in research that can point the way toward addressing the serious challenges at hand. The Institute of Education Sciences must carry the torch that illuminates the way forward.

Adam Gamoran, *Chair*
Committee on the Future of Education Research
at the Institute of Education Sciences

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Acknowledgments

The Committee on the Future of Education Research at the Institute of Education Sciences (IES) was charged with offering advice to IES that could be used to inform the 2023 grantmaking cycle. In order to achieve this task, the committee agreed to do the work of a full National Academies consensus study on a shortened timeline. A number of people devoted time and energy to supporting our work, and we owe a sincere debt of gratitude to all involved.

First, we wish to extend a thank you to IES staff and leadership for their willingness to engage in this project. Throughout this process, Mark Schneider, director of IES; Elizabeth Albro, commissioner of the National Center for Education Research; Joan McLaughlin, commissioner of the National Center for Special Education Research; and Anne Ricciuti, deputy director of the Office of Science at IES were on hand to provide resources, answer committee questions, and offer insight. We are profoundly grateful for their support.

We also wish to extend our thanks for the contributions of the many scholars who presented to the committee so that we might bring in outside expertise: your insights were invaluable, and each presentation informed our thinking in some way. Thank you also to Elizabeth Hora of Northwestern University for designing the image used on the cover of this report.

This Consensus Study Report was reviewed in draft form by individuals chosen for their diverse perspectives and technical expertise. The purpose of this independent review is to provide candid and critical comments that will assist the National Academies in making each published report as sound as possible and to ensure that it meets the institutional standards for quality,

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objectivity, evidence, and responsiveness to the study charge. The review comments and draft manuscript remain confidential to protect the integrity of the deliberative process.

We thank the following individuals for their review of this report: Prudence L. Carter, Department of Sociology, Brown University; David J. Francis, Department of Psychology, University of Houston; Lynn S. Fuchs, Department of Special Education, Vanderbilt University; Learning Supports, American Institutes for Research; Ray C. Hart, Office of the Executive Director, Council of the Great City Schools; Fiona Hollands, Department of Education Policy and Social Analysis, Teachers College, Columbia University; Venessa Keesler, AEM Corporation, Herndon, VA; Julie A. Marsh, Rossier School of Education and Sol Price School of Public Policy, University of Southern California; Roy D. Pea, David Jacks Professor of Education and Learning Sciences and H-STAR Institute, Stanford University; William R. Penuel, Institute of Cognitive Science and School of Education, University of Colorado Boulder; Beth D. Tuckwiller, Special Education and Disability Studies, The George Washington University; and George L. Wimberly, Professional Development and Diversity Officer, American Educational Research Association, Washington, DC.

Although the reviewers listed above provided many constructive comments and suggestions, they were not asked to endorse the conclusions or recommendations of this report nor did they see the final draft before its release. The review of this report was overseen by Michael J. Feuer, Dean and Professor, Graduate School of Education and Human Development, George Washington University, and James S. House, Angus Campbell Distinguished University Professor of Survey Research, Public Policy and Sociology, Institute for Social Research, University of Michigan. They were responsible for making certain that an independent examination of this report was carried out in accordance with the standards of the National Academies and that all review comments were carefully considered. Responsibility for the final content rests entirely with the authoring committee and the National Academies.

The committee wishes to extend its gratitude to the staff of the Division of Behavioral and Social Sciences and Education (DBASSE), in particular to Heidi Schweingruber, director of the Board on Science Education, whose strategic thinking and dedication helped ensure an incisive report, and to Leticia Garcilazo Green, who in her capacity as a research associate supported all elements of report production, from editing chapters to formatting report drafts. She has served as a full partner throughout the entirety of this process, and has made this work both enjoyable and efficient. Margaret Kelly's expert administrative leadership enabled smooth meetings and report production. Kirsten Sampson Snyder of the DBASSE staff deftly guided

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us through the National Academies review process, and Paula Whitacre provided invaluable editorial assistance.

Finally, the committee wishes to thank Adam Gamoran, study chair, for his seasoned leadership of a complex project. Adam's ability to listen to multiple perspectives and forge connections across ideas has enabled a forward-looking report that speaks to multiple audiences. His willingness to lead us toward robust consensus has infinitely strengthened this report, and the committee is deeply grateful for his wisdom.

Kenne A. Dibner, *Study Director*
Committee on the Future of Education
Research at the Institute of Education Sciences

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Contents

Summary **1**

Chapter 1 Introduction **11**
Study Scope and Approach, 12
Interpreting the Statement of Task, 14
Approach to Gathering and Assessing Evidence, 15
The Current Context of Education and Crosscutting Themes, 17
Current Context, 17
Crosscutting Themes, 19
Audiences, 27
Organization of This Report, 28
References, 28

Chapter 2 Background **31**
Education Research in 2002, 31
Funding a Vision of Scientific Research in Education, 34
Changes since 2002, 36
Use of Research Evidence in Education, 36
Attending to Culture and Deficit Ideologies in Understandings of Learning, 39
Methods and Approaches to Conducting Research, 42

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IES at 20: Now What?, 43
References, 44

Chapter 3 IES at 20 51
Operating Structure, 51
Programming, 52
Administration, 53
Direction, 53
Funding and Staff Levels, 54
Recent Efforts and Decisions, 55
SEER Principles, 56
X Prize, 56
Research-Practice Partnerships, 57
Data Collection, 58
Conclusion, 58
References, 59

Chapter 4 Project Types for NCER/NCSER Grants 61
Progression Across Project Types, 62
Examining Progression of Projects, 65
Understanding Project Progression, 67
Connecting Research and Practice, 69
A Revised Scientific Structure Is Needed, 72
1. Discovery and Needs Assessment, 76
2. Development and Adaptation, 78
3. Impact and Heterogeneity, 81
4. Knowledge Mobilization, 84
Conclusion, 89
References, 95

Chapter 5 Research Topics for NCER and NCSER Grants 101
Overview of Topics, 102
The Challenge of Topics, 104
The Case of Teacher Education, 105
A System for Updating Topics and Research Priorities, 106
New Topics, 109
Civil Rights Policy and Practices, 109
Teaching Quality and the Teacher Workforce, 112
Education Technology, 115

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Special Considerations for NCSER, 118
Expanding a Focus Beyond Identifying Effective Programs, 118
Understanding How School Contexts and Structures Support Inclusion and Access to Improved Outcomes for Students with Disabilities, 119
Recommendations, 120
References, 122

Chapter 6 Methods and Measures 129
The Future of Methods Research, 131
Summary of Methods Research to Date, 131
Methods Research Moving Forward, 132
The Future of Measurement Research, 140
Summary of Measurement Research to Date, 140
Emerging Needs in Measurement Research, 141
Recommendations, 146
References, 147

Chapter 7 Ensuring Broad and Equitable Participation in NCER and NCSER Research Training Programs 153
Description of Existing NCER and NCSER Training Programs, 154
Understanding the Impact of Research Training Programs at IES, 158
Need for Continued Training in Education Sciences, 159
Broadening Participation in Education Research through Research Training Programs, 163
Transparency in Data, 163
Expanding Methods Training, 164
Additional Strategies for Broadening Participation, 165
Recommendations, 167
References, 169

Chapter 8 Application and Review Process 171
Overview of the Application and Review Process, 171
Elements and Functions of the Application and Review Process, 174

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Issues with the Current Application and Review Process, 177
Data on Applicants, Reviewers, and Grantees, 178
Review Panels, 179
Timely and Responsive Application Cycles, 182
Coherence with the Needs of the Field, 183
Recommendations, 186
References, 189

Chapter 9 Concluding Observations 191
Twenty Years of IES: A Changed Landscape, 192
Enabling Recommendations, 194
Reference, 195

Appendixes
A Gathering and Assessing the Evidence 197
B Email Correspondence Sent to the Committee 201
C Committee-Commissioned Papers 223
D Analysis of IES Funded Topics Commissioned Paper 225
E Funding Information in NCER and NCSER Provided by the Institute of Education Sciences 235
F Committee and Staff Biographies 257

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Summary

In 2002, Congress passed the Education Sciences Reform Act of 2002 (ESRA), authorizing the creation of the Institute of Education Sciences (IES) as the research arm of the Department of Education, and crystallizing the federal government's commitment to providing "national leadership in expanding fundamental knowledge and understanding of education from early childhood through postsecondary study" (ESRA, 2002). In the 20 years since its founding, IES has had a field-defining impact on education research in the United States.

IES's activities are accomplished through four centers: the National Center for Education Research (NCER), the National Center for Education Statistics (NCES), the National Center for Education Evaluation and Regional Assistance, and the National Center for Special Education Research (NCSER).[1] This report focuses on NCER and NCSER. The two centers support a wide range of research activities with the broad goal of improving the quality of education in the United States. These research activities span from infancy through adulthood and across multiple education settings, depending on the center. NCER and NCSER also support the development of the next generation of education researchers through various training programs including predoctoral, postdoctoral, early career, and research methods training programs. The centers fund these activities through a

[1] In December 2004, Congress reauthorized the Individuals with Disabilities Education Act and, in doing so, authorized NCSER as part of IES. NCSER began operation on July 1, 2005.

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competitive grant process, and the funding to support research programs is dependent on annual funding appropriated by Congress.

As the 20th anniversary of ESRA approaches, it is time to consider ways that IES can improve its current research activities and plan for future research and training in the education sciences. Such an examination can ensure that IES-funded research moves the field forward on issues that are of critical importance to education and special education policy and practice and that improve learner outcomes.

THE COMMITTEE'S CHARGE AND APPROACH

In response to a request from the Institute of Education Sciences, the National Academies of Sciences, Engineering, and Medicine through its Board on Science Education convened the Committee on the Future of Education Research at the Institute of Education Sciences to provide guidance on the future of education research at the National Center for Education Research and the National Center for Special Education Research. The committee was tasked with providing guidance on critical problems and issues where new research is needed, how to organize the request for applications, new methods and approaches, and new and different kinds of research training investments.

Research and training activities funded by the two centers have transformed education research and generated substantial insights for education policy and practice. However, the landscape of education and education research have changed substantially since the founding of IES due in large part to the portfolio of work funded by NCER and NCSER. These changes have consequences for how NCER and NCSER need to operate in order to effectively maintain their leadership role in education research.

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 and developed guidance. The committee's recommendations are intended to help NCER and NCSER continue to produce transformative education research that will allow IES to maintain its status as the premier funder of education research.

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KEY FINDINGS AND RECOMMENDATIONS

New Problems and Issues: Project Types and Topics

NCER and NCSER use both project types (Exploration, Development and Innovation, Initial Efficacy and Follow-up, Systematic Replication, and Measurement) and topics to organize grant competitions. Project types are important for NCER and NCSER's internal processes, as different types of projects result in different request for application (RFA) requirements and different budgets. These project types have also played a *normative* role in shaping education research, defining a process through which interventions *ought* to be developed and evaluated—moving from exploration to development to efficacy and finally to replication.

This structure was developed around the fundamental assumption that the challenges facing schools could be addressed by developing and testing interventions that could be packaged and that would increase student achievement across different school and community contexts. Twenty years into this science, however, it is now clear that this model does not account for the complexities of implementation, nor does it reflect what is now known about how evidence influences or drives changes in practice and policy.

Thus, the committee concluded that the current project type structure needs to be revised. The committee proposes an updated framework for the types of research one might undertake that would better reflect (a) the realities of the heterogeneous contexts in which research in education takes place, and (b) the actual ways in which research is used and engaged in education settings.

RECOMMENDATION 4.1:
IES should adopt new categories for types of research that will be more responsive to the needs, structures, resources, and constraints found in educational organizations. The revised types of research should include

- **Discovery and Needs Assessment**
- **Development and Adaptation**
- **Impact and Heterogeneity**
- **Knowledge Mobilization**
- **Measurement**

The committee also concluded that while the current set of topics does a good job of representing the field, the way that topics intersect with the present project types poses a challenge. Under the existing project type structure and given IES's emphasis on designs that allow for causal inferences, topic areas that can be more readily studied with causal designs (i.e.,

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large samples, randomized interventions) are viewed as more competitive by reviewers. Further, NCER and NCSER's focus on student outcomes means that studies that would focus solely on other outcomes in the system are not eligible for funding. And, if investigators focused on outcomes other than those at the level of students are to make their proposal competitive, it means they likely have to change their research questions to focus on students and/or divert project resources to ensure they are meeting IES requirements. As a result, some of the most pressing topics given the current context of education have not received the attention warranted and need focused attention.

RECOMMENDATION 5.1:
Existing constraints or priorities in the RFA structure and review process have narrowed the kinds of studies within topics that are proposed and successfully funded. In order to expand the kinds of studies that are proposed and successfully funded in NCER and NCSER, IES should consider the following:

- **Allowing use of outcomes beyond the student level (classroom, school, institution, district) as the primary outcome**
- **Expanding the choice of research designs for addressing research questions that focus on why, how, and for whom interventions work**

In advance of these structural changes, however, the committee recognizes that the current moment of racial reckoning and responding to COVID-19 requires immediate scholarly attention. Given the issues in education that are emerging at breakneck pace and the subsequent demand for assistance from the field, the committee thinks that designating separate competitions for certain topics is warranted in order to signal their importance even though these topics might technically be "fundable" in existing competitions.

RECOMMENDATION 5.2:
Within each of its existing and future topic area competitions, IES should emphasize the need for research focused on equity.

RECOMMENDATION 5.3:
In order to encourage research in areas that are responsive to current needs and are relatively neglected in the current funding portfolio, NCER and NCSER should add the following topics:

- **Civil rights policy and practice**
- **Teacher education and education workforce development**
- **Education technology and learning analytics**

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RECOMMENDATION 5.4:
IES should offer new research competitions under NCSER around these topics:

- **Teaching practices associated with improved outcomes for students with disabilities**
- **Classroom and school contexts and structures that support access and inclusion to improved outcomes for students with disabilities**
- **Issues specific to low-incidence populations**

The topics listed above represent priorities identified by the committee based on our understanding of the current state of education research. This list is not intended to be exhaustive or restrictive; rather, these topics are examples of the types of topics that emerge through consistent, focused engagement with the field. Indeed, the committee recognizes that education research is perennially evolving in response to both the production of knowledge as well as the circumstances in the world. For this reason, the committee advises that the list of topics funded by the centers should also evolve in order to remain responsive to the needs of the field. This responsiveness is a necessary component of fulfilling the obligations laid out in ESRA: in order to "sponsor sustained research that will lead to the accumulation of knowledge and understanding of education," it is important to fully understand not only what knowledge has accumulated, but also where the existing gaps are.

RECOMMENDATION 5.5:
IES should implement a systematic, periodic, and transparent process for analyzing the state of the field and adding or removing topics as appropriate. These procedures should incorporate:

- **Mechanisms for engaging with a broad range of stakeholders to identify needs**
- **Systematic approaches to identifying areas where research is lacking by conducting syntheses of research, creating evidence gap maps, and obtaining input from both practitioners and researchers**
- **Public-facing and transparent communication about how priority topics are being identified**

Methods and Approaches

IES will also need to re-orient its investment in methods and measures. In developing guidance on research to advance new methods and approaches the committee kept in mind that IES's charge requires that the Institute maintain a focus on "what works." Since causal questions are inherently comparative, descriptive work is also needed to conceptualize and

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describe current practices and the context of schools as a means for full understanding of the comparisons being made. Also, in order to fully understand why and how a particular intervention or program is working, the questions of what works and how it works need to be pursued in concert.

In reviewing the balance of funded work on methods and measures to date, the committee identified key gaps that need to be addressed moving forward. The committee recommends:

RECOMMENDATION 6.1:
IES should develop competitive priorities for research on methods and designs in the following areas:

- **Small causal studies**
- **Understanding implementation and adaptation**
- **Understanding knowledge mobilization**
- **Predicting causal effects in local contexts**
- **Utilizing big data**

RECOMMENDATION 6.2:
IES should convene a new competition and review panel for supporting qualitative and mixed-methods approaches to research design and methods.

To respond to the new study types and priority topics and to support the continued growth of methods, new measures and new approaches to measurement will be required. For this reason, we offer a recommendation for IES to consider related to measurement research that will support continued growth in other parts of NCER and NCSER's portfolio.

RECOMMENDATION 6.3:
IES should develop a competitive priority for the following areas of measurement research:

- **Expanding the range of student outcome measures**
- **Developing and validating measures beyond the student level (e.g., structural and contextual factors that shape student outcomes; teacher outcomes; knowledge mobilization)**
- **Developing and validating measures related to educational equity**
- **Using technology to develop new approaches and tools for measurement**

Training Programs

The training portfolio offered by NCER and NCSER is an important and vital function that has helped strengthen the education research field, and it is imperative that these programs continue to be offered to education

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research scientists. While IES continues these programs, there is also a need for more equitable opportunities and transparency in the offered trainings within both NCER and NCSER. Data that look at who is participating in the training programs are not readily available, and we do not know about the success of training as there are no obvious indicators of success created by IES. There is also a clear opportunity to build on current programs and expand trainings in methods to attend to the high demand among researchers. Finally, IES can implement a variety of strategies that can help broaden participation within its training programs and in turn, continue to strengthen a highly reputable portfolio. The committee recommends:

RECOMMENDATION 7.1:
IES should develop indicators of success for training, collect them from programs, and then make the information publicly available. IES should report the data it already collects on the success of programs and pathways of trainees post-training.

RECOMMENDATION 7.2:
IES should build on its current strengths in methods training and expand in the following areas:

- **Methods to address questions of how and why policies and practices work**
- **Methods that use machine learning, predictive analytics, natural language processing, administrative data, and other like methods**

To fully meet the needs of the field as outlined in ESRA, IES has a responsibility to ensure that its training programming is reaching populations of scholars and researchers who need it most. As the committee notes in this report, this is an important issue of equity in the education research community. In addition, there is tangible value in ensuring that the field of education research is diverse insofar as it improves the overall quality of eventual research, increases the likelihood that issues of equity will be taken up in research, and supports the ultimate identity-building of future researchers.

RECOMMENDATION 7.3:
IES should collect and publish information on the racial, ethnic, gender, disability status, disciplinary, and institutional backgrounds (types of institutions including Historically Black Colleges and Universities and Minority-Serving Institutions) of applicants and participants in training at both the individual and institutional levels.

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RECOMMENDATION 7.4:
IES should implement a range of strategies to broaden participation in its training programs to achieve greater diversity in the racial, ethnic, and institutional backgrounds of participants. These strategies could include

- **Implementing targeted outreach to underrepresented institution types**
- **Supporting early career mentoring**
- **Requiring that training program applications clearly articulate a plan for inclusive programming and equitable participation**
- **Offering supplements to existing research grants to support participation of individuals from underrepresented groups**
- **Funding short-term research opportunities for undergraduate and graduate students**

RFA and Review

The committee concluded that the explicitness of the RFAs used by NCER and NCSER was one of the strengths of the IES grant review system, even as the detailed requirements result in lengthy proposals. Similarly, the committee viewed the review process of IES as a strength. Unlike other 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. Thus, the determination for funding arises only in relation to the final proposal score and the cut-score for that particular year.

Despite these strengths, the committee identified three central challenges that undermine the effectiveness: (1) IES does not publicly share information on its applicants, reviewers, and grantees, making it impossible to track whether the application and review process is resulting an equitable distribution of awards, and if not where in the process disparities are introduced; (2) the current procedures do not provide IES with sufficient information throughout the process to assess the potential impact of projects, including the significance of individual proposals, and the extent to which proposals collectively cohere as a program of research; and (3) the current procedures undermine IES's ability to be timely and responsive to the needs of the education research community. To address these challenges, the committee recommends:

RECOMMENDATION 8.1:
IES should regularly collect and publish information on the racial, ethnic, gender, disciplinary, and institutional backgrounds of applicants and funded principal investigators (PIs) and co-PIs, composition of review panels, and study samples.

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RECOMMENDATION 8.2:
IES should review and fund grants more quickly and re-introduce two application cycles per year.

The committee thinks that attending to the larger structural issues facing NCER and NCSER (see Recommendations 4.1 and 5.1–5.5) will serve to help ensure that funded research is better positioned to be useful for practitioners and policy makers. However, the effects of implementing these recommendations may take several years to emerge, and the committee notes that the field needs useful research as soon as possible. For this reason, we offer two recommendations that may help ameliorate some of the challenges related to usefulness that the committee laid out. First, we suggest that the RFA adjust expectations around collaboration so that stakeholders in communities engaged in funded research are fully included in project planning.

RECOMMENDATION 8.3:
For proposals that include collaborating with LEAs and SEAs, the RFA should require that applicants explain the rationale and preliminary plan for the collaboration in lieu of the current requirement for a letter of support. Upon notification of a successful award, grantees must then provide a comprehensive partnership engagement plan and letter(s) of support in order to receive funding.

The committee also noted the current lack of a consistent plan for engaging practitioner and policy maker perspectives in the application and review process. There are multiple ways that IES might want to leverage these communities, ranging from consistent participation on panels to separate working groups, but the committee notes that practitioner and policy maker communities should be involved in determining the mechanism that works best for IES. The ultimate goal of this work is for IES to define a role for these communities that is both distinct and meaningful, such that these already burdened professionals can maximize their valuable time and effort.

RECOMMENDATION 8.4:
IES should engage a working group representing the practitioner and policy maker communities along with members of the research community to develop realistic mechanisms for incorporating practitioner and policy maker perspectives in the review process systematically across multiple panels.

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Enabling Recommendations

Throughout this report, the committee returns to two major issues that constrain IES's ability to support research that attends to the needs of *all* students. The first issue is the lack of consistent reporting and analysis related to who applies and is funded in NCER and NCSER competitions, which limits the extent to which IES can ensure that funded research and researchers truly represent the needs of the communities they are intended to serve. Second, IES is afforded a relatively modest budget compared to other federal science agencies. The committee agreed that in order for IES to truly achieve the vision of these recommendations, it is critical to also address both of these issues. As such, the committee recommends:

RECOMMENDATION 9.1:
In addition to implementing the recommendations highlighted above, NCER and NCSER should conduct a comprehensive investigation of the funding processes to identify possible inequities. This analysis should attend to all aspects of the funding process, including application, reviewing, scoring, and monitoring progress. The resulting report should provide insight into barriers to funding across demographic groups and across research types and topics, as well as a plan for ameliorating these inequities.

RECOMMENDATION 9.2:
Congress should re-examine the IES budget, which does not appear to be on par with that of other scientific funding agencies, nor to have the resources to fully implement this suite of recommendations.

REFERENCE

Education Sciences Reform Act (ESRA). (2002). Title I of P.L. 107-279.

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1

Introduction

A seismic shift in the landscape of public education in the United States occurred at the beginning of the 21st century. Building on decades of momentum, the years 2000–2004 saw federal and state governments passing a suite of policies that would affect virtually every stakeholder in the public education system, and usher in a new era in how the government interacts with schools. Ideas like "accountability" and "school choice," though not new to individuals already steeped in the work of education policy and teaching, became common parlance in public discourse around education. Education policy at all levels, most notably articulated in the federal No Child Left Behind Act of 2001, placed accountability for student achievement at the heart of the education enterprise and called upon stakeholders to employ evidence-based programming and practices in the service of that aim. Equally important was the new federal insistence on exposing disparities in achievement among students from a variety of demographic subgroups.

In support of those policy efforts, Congress passed the Education Sciences Reform Act of 2002 (ESRA), authorizing the creation of the Institute of Education Sciences (IES) as the research, evaluation, statistics, and assessment arm of the Department of Education, and crystallizing the federal government's commitment to providing "national leadership in expanding fundamental knowledge and understanding of education from early childhood through postsecondary study" (ESRA, 2002). The overarching goal of this legislation was to build and share reliable information on education with a broad base of constituents and intended audiences, including parents, educators, students, researchers, policy makers, and the general

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public. Specifically, ESRA mandates that IES share information on (a) the condition and progress of education in the United States, including early childhood education and special education; (b) educational practices that support learning and improve academic achievement and access to educational opportunities for all students; and (c) the effectiveness of federal and other education programs. With regard to research, the agency's charge is to build and disseminate a robust evidence of knowledge gained from "scientifically valid research activities" (ESRA, 2002). In the 20 years since its founding, IES has had a field-defining impact on education research in the United States.

Indeed, it is hard to overstate the role that IES has played in shaping the landscape of education research in the United States. In the intervening two decades since its founding, IES has provided funding for education research and statistics through contracts with both public and private research institutions, competitive awards to institutions around the country, and investments in research training programs, grants, and contracts. The work of IES is driven by an emphasis on using scientific research to guide education policy and practice. The agency's focus on rigor in its funded research has shaped the enterprise of education research, from who has access to research training, to what counts as high-quality research, to what questions researchers are encouraged to ask.

At the same time, the landscape of public education in the United States has changed since IES was founded in 2002, resulting in a different constellation of priorities and political realities than existed at the time IES was founded. As the 20th anniversary of ESRA approaches, it is time to consider ways that IES can improve its current research activities and plan for future research and training in the education sciences. Such an examination can ensure that IES-funded research moves the field forward on issues that are of critical importance to education and special education policy and practice and that improve learner outcomes.

STUDY SCOPE AND APPROACH

In response to a request from the Institute of Education Sciences, the National Academies of Sciences, Engineering, and Medicine through its Board on Science Education convened the Committee on the Future of Education Research at the Institute of Education Sciences to provide guidance on the future of education research at the National Center for Education Research (NCER) and the National Center for Special Education Research (NCSER).[1] IES directs two additional centers not included in this study: the

[1]Whereas NCER was created when IES was established by ESRA in 2002, NCSER came along 2 years later through a 2004 amendment to ESRA.

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National Center for Education Statistics (NCES)[2] and the National Center for Education Evaluation and Regional Assistance (NCEE). In focusing on the future of educational research at NCER and NCSER, IES tasked the committee with identifying critical problems and issues, new methods and approaches, and new and different kinds of research training investments (see Box 1-1).

This statement of task is directly focused on helping NCER and NCSER strategically fund education research in the coming decade. Given this focus, a committee was assembled with expertise in the four primary elements of the charge. The committee members have a broad range of expertise including education policy, methods in education research, education leadership, education technology, cognition and student learning, training in education research, social-emotional learning, and early learning. In addition,

BOX 1-1
Statement of Task

The National Academies of Sciences, Engineering, and Medicine will convene an ad hoc committee to inform the Institute of Education Sciences (IES) 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.

The committee will consider the policy and practice needs for education and special education research, as well as the balance across basic and applied research. The committee's work will be informed by documents that encompass the research mission and vision of IES, including the Education Sciences Reform Act (ESRA), Standards for Excellence in Education Research (SEER) principles, and detailed descriptions of the IES research and research training programs, as well input from IES staff, IES-funded researchers, and education leaders and practitioners.

[2]IES concurrently commissioned two other studies from the National Academies. One addresses key strategic issues related to the National Assessment of Educational Progress program, including opportunities to contain costs and increase the use of technology. The second study addresses NCE"s portfolio of activities and products, operations, staffing, and use of contractors, focusing on the center's statistical programs.

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the committee was composed of scholars working in general education as well as in special education contexts, with several individuals who conduct research across settings. Several committee members are current or former practitioners and/or administrators in both K–12 and higher education settings. For more information on committee members, see Appendix F.

Interpreting the Statement of Task

One of the primary tasks facing a National Academies committee is to determine the bounds of its statement of task. Accordingly, the committee made judgments about the scope of its work. The statement of task clearly directs the committee to focus on NCER and NCSER and excludes other parts of IES such as NCEE and the Regional Education Laboratories within it. However, there were two issues the committee considered that are primarily in the purview of other units in IES, but that have implications for NCER and NCSER.

The first issue is "dissemination" of research and use of evidence generated by research conducted within NCER and NCSER. Based on materials provided to the committee by IES, the committee understood that IES categorizes dissemination of research findings as the purview of the What Works Clearinghouse (WWC) in NCEE. The theory of change, in this sense, is that research funded by NCER and NCSER that meets WWC standards can be included in the WWC repository, where it can be accessed by practitioners and policy makers in search of scientific evidence to support decision making. However, as the committee describes throughout this report, a contemporary understanding of how evidence is used by education stakeholders demands that knowledge mobilization become integrated into the work of researchers from the outset, and so these considerations are within the bounds of this committee's work.

The second issue is the review processes that govern who receives grants from NCER and NCSER. Reviews are managed by the Office of Science, which is outside of NCER and NCSER, but the committee's statement of task clearly asks the committee to address "how best to organize the request for applications issued by the research centers to reflect those problems/issues." So, while the organization of the Office of Science is out of scope, issues pertaining to how to organize reviews for NCER and NCSER are in scope, as confirmed by the IES deputy director for science in her testimony to the committee. Further, to the extent that WWC standards inform how researchers are designing and implementing their projects such that their research could be included in the repository (see more on the WWC in Chapters 2 and 4, and throughout this report), the committee considered

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WWC standards as an implicit factor in the request for application (RFA) process, although stops short of commenting on the WWC itself.

Along those same lines, the committee interpreted the statement of task's four bullets as the primary tasks relevant to our work, and for this reason, focused on the research centers' activities that have direct bearing on future investments in critical problems or issues, new approaches or methods, training, and organization of RFAs. As described in Chapter 3, NCER and NCSER support research activities across multiple grant competitions, ranging from annual Education Research and Methods grant competitions to funding for Research and Development centers and Research Networks. One of the mechanisms is the Small Business Innovation Research (SBIR) competitions, which provide "seed funding to for-profit small businesses to develop and evaluate new education technology products to improve education and special education" (IES website, 2022).[3] Although the committee recognizes the value of this work, we note that the purpose of SBIR grants does not align with the specific tasks outlined in our scope, and therefore have not addressed this program.

The committee recognized that IES is both guided and constrained by the legislative language in ESRA. For this reason, the committee regularly returned to the legislative language included in ESRA to guide deliberations. As the committee made judgments about the future of NCER and NCSER, we continually reviewed ESRA text to ensure that our recommendations were within bounds.

Approach to Gathering and Assessing Evidence

The committee met five times over an 8-month period—four times completely virtually and once in a hybrid virtual/in-person setting. In addition, subgroups of the committee met throughout this period on an as-needed basis. After reviewing the expertise within the committee itself, the committee invited testimony from a number of outside experts in order to augment its expertise. The committee also considered documentation of organizational structure and programming as provided by IES staff, and invited commentary from the public via an open call for input. For details about who provided testimony to the committee and the topics covered, see Appendix A. For a description of public commentary, see Appendix B.

In addition to hearing from outside experts and soliciting public input, the committee sought additional input on scholarly areas in which we deemed further expertise was necessary. The committee commissioned five short papers to help synthesize existing evidence in the field and frame

[3]This sentence was modified after release of the report to IES to remove the suggestion that the use of SBIR competitions was a new mechanism for NCER. See https://ies.ed.gov/sbir/solicitations.asp.

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our recommendations. These papers focused on (1) the scope of loss, both personal and educational, facing the nation in the wake of the COVID-19 pandemic; (2) the ways that scholarly understandings of learning have evolved and grown since the founding of IES in 2002; (3) what is known about how evidence is used in education policy and practice; (4) the impact of interventions aimed at supporting diversity, equity, and inclusion in academic peer-review processes; and (5) an analysis of what research topics have been funded through NCER and NCSER since their founding. These papers and their findings have all been considered as scholarly input into the committee's work. See Appendix C for a list of commissioned papers, and Appendix D for a full description of the methods used in the analysis of funding at NCER and NCSER.

Published, peer-reviewed literature remains the gold standard by which the committee made its judgments. Committee members relied on a combination of peer-reviewed published literature, the input of experts, and their own professional experience in reaching conclusions and developing recommendations. The committee's statement of task does not call for a synthesis of specific bodies of scholarship. Instead, we were asked to apply our professional judgment to a discrete set of recommendations about the future of IES, an assignment that requires deep expertise across education contexts and content areas, as well as a breadth of professional experience as IES grantees, reviewers, and research consumers. This particular statement of task demanded that the committee consider the prevailing evidence in their respective fields as the foundation for their expert judgment: that is, in the absence of a specific body of evaluative literature about IES, committee members were called upon to apply their own expertise in making recommendations. The committee was not asked to conduct original research or evaluations on how well IES is meeting its stated mandates: Indeed, the committee was directed to focus its energies on the future rather than perseverate over past events. When determining conclusions and formulating recommendations, the committee relied on our professional expertise to interpret multiple kinds of evidence: documents and information provided by IES staff, the five commissioned background papers, and oral testimony regarding the state of education research in the United States, as well as committee members' own experiences as producers and consumers of education research. Throughout our deliberations, committee members collaborated to ensure collective agreement on how the evidence was interpreted: that is, one individual's understanding of the literature in their field was not sufficient evidence to support a claim. The committee took particular care to not offer judgment in the absence of sufficient supporting evidence. In such cases, the committee attempted to elucidate ongoing issues or concerns for IES to consider as it moves forward. The conclusions and recommendations outlined in this report, and the process used to author it, reflect the full

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consensus judgment of the Committee on the Future of Education Research at the Institute of Education Sciences.

THE CURRENT CONTEXT OF EDUCATION AND CROSSCUTTING THEMES

As the committee began to address its charge, it became clear that to make recommendations about the future of education research at IES, it needed first to understand how the work of NCER and NCSER fits into the current landscape of education and education research in the United States. In doing so, the committee considered how that education landscape has changed since the founding of IES and whether these changes might have consequences for how NCER and NCSER should operate. The committee also considered how the advances in education research generated by IES's investments to date should inform a renewed set of priorities for the agency.

Current Context

The social and political context of education in the United States is quite different now than when IES was established. The past 20 years have seen major social and political shifts that both directly and indirectly impact education. Support for public education, politically and economically, has vacillated over this time, creating challenges for K–12 and higher education in providing high-quality learning experiences, retaining staff, and maintaining facilities. Political polarization and ideological differences have become heightened, embroiling educators and education decision makers in conflicts that often do not have much to do with student learning and student well-being. These kinds of tensions have become more visible during the COVID-19 pandemic, as exemplified by protests and often open conflict in school board meetings (Kamenetz, 2021).

The student population across preK–12 and higher education has also shifted over the past 20 years, with greater ethnic and racial diversity and growing numbers of students in K–12 who do not speak English as a first language (Irwin et al., 2021). Over this same period, income inequality in the United States has grown considerably, with consequences for the home and community contexts of students (Gamoran, 2015). PreK–12 schools have also become increasingly segregated by class and race (Reardon et al., 2021; Reardon & Owens, 2014; An & Gamoran, 2009). These trends pose increasing challenges for school systems that serve large numbers of students living in poverty, which all too often are the same school systems that have fewer economic resources in the first place.

There have also been rising concerns over the past two decades about the overall well-being of students—their mental health, their sense of be-

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longing in school, and their social and emotional growth (National Academies of Sciences, Engineering, and Medicine, 2019a). While the alarm about students' overall well-being likely reflects issues in the broader society, schools are both called upon to support and nurture learners and themselves can be toxic and unsafe environments. The rise of school shootings, for example, and disciplinary practices that are differentially applied such that Black, Latinx, and Indigenous students and those with disabilities are more likely to suffer negative consequences are in-school phenomena that threaten learners' health and well-being (GAO, 2018; Gregory, Skiba, & Mediratta, 2017; Beland & Kim, 2016).

The COVID-19 pandemic, in concert with renewed public attention to issues of racial justice, has spotlighted the pernicious inequities that trouble the nation in a wide range of areas, including its education system (NASEM, 2021a). The impacts on schools and communities are innumerable: In addition to unprecedented disruption to schooling and staffing crises, the nation is dealing with profound personal and familial loss as the COVID-19 death toll continues to rise (NASEM, 2021b).

It is not yet possible to articulate a comprehensive analysis of the full scale of loss facing schools and communities, in part because the crisis is still ongoing. Though much media attention has been paid to the notion of "learning loss" as a result of interference with in-person schooling, the committee acknowledges a series of challenges in interpreting existing evidence around this concern. Beyond student achievement, however, there remains an abundance of open questions about how the pandemic will impact education going forward. Among them, what kind of support will communities need to be able to support student learning in the wake of the death of over 940,000 individuals in the United States? How will the nature of schooling change as a result of shifts made during the pandemic? What lessons can be learned from decisions to shift to remote schooling, and what role will technology play in schools going forward? What is the role of schools in attending to the social-emotional needs of students, families, and communities, and what is the role of families in supporting schools in the wake of the pandemic?

These issues and other pandemic-related concerns will necessarily be of paramount importance as the nation continues to battle the pandemic. In recognizing that education research can and should play a pivotal role in helping schools and communities address these critical questions, the committee has considered its work and framed its recommendations with the understanding that the aftershocks of the COVID-19 pandemic will bear on the research community for generations to come.

In addition to these broader social and political trends, insights from advances in research across the many fields that study education—education science, the learning sciences, psychology, sociology, anthropology, eco-

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nomics and political science—are providing more nuanced understanding of the processes of learning itself, as well as how education systems function and can be improved (see Chapter 2 for a more in-depth discussion of these advances). These insights are the result, in part, of IES research investments over the past 20 years and they offer guideposts for how IES will need to renew its approach and its portfolio to be relevant for the next 20 years.

For example, there is now wide recognition that learning is a complex cognitive and emotional phenomenon that is situated in specific social and cultural contexts (NASEM, 2018). The experiences that learners have outside of school shape and influence their learning experiences in school. Similarly, there is now a deeper appreciation of the dynamics and challenges of educational improvement and change. Classrooms, schools, and districts are situated within communities and regions across the country that vary on a variety of dimensions. Changes at the school, classroom, or district level need to be understood in context with recognition that a successful program in one setting may not lead to the same outcomes in another setting. There is also increasing recognition of the need to understand and attend to the interlocking elements of the education system. That is, changing what happens in a given classroom for a given student or group of students may be limited in the absence of attention to a broad array of interacting policies and practices that are under the purview of many different actors and decision makers operating at many different levels of the education system.

Crosscutting Themes

In order to make sense of and provide focus to this broad set of contextual issues and take account of advances in the understanding of learning and of education broadly, the committee developed five crosscutting themes: (1) equity in education, (2) changing use of technology, (3) use and usefulness of education research, (4) heterogeneity in education, and (5) implementation and system change. These themes helped the committee to maintain a coherent analysis as we worked through the specific tasks in our charge. Within each task, we have attempted to use these themes as lenses through which to identify salient questions, analyze key issues, and orient our recommendations.

In the chapters that follow, we refer to these five themes to help explain our thinking and contextualize our recommendations, and endeavor to be transparent where it is our judgment of the available evidence undergirding our claims. In the following sections, we describe why we relied on these five crosscutting themes and why they are essential to the ongoing work of IES.

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Equity in Education

As the committee's work commenced, issues around equity in education emerged as one of the most urgent, primary factors that must be centered in decisions about the future work of IES. As noted above, exposing inequities in student achievement across lines of race, class, gender, language minority status, and disability status was a central feature of the No Child Left Behind Act, which set the stage for the founding of IES. In this section, we describe why equity is designated as a crosscutting theme in this report, as well as our approach to operationalizing the theme in this document.

As noted above, the student population in the nation's schools has become more racially and ethnically diverse over the past 20 years. Students are more likely to speak a language other than English at home, and there is a higher percentage of students who are immigrants (NASEM, 2020). In addition, rising income inequality has increased residential segregation, as families move to places where they can afford the cost of housing, which frequently leads to areas with high concentrations of poverty (Fry & Taylor, 2012). Black and Latinx children are more likely than White children to live in high-poverty areas (NASEM, 2019b). Specifically,

- The rate of Black children living in high-poverty areas in 2016 was about six times higher than that for White children (30% and 5%, respectively). The rate for Latinx children (22%) was about four times that for non-Latinx White children (Annie E. Casey Foundation, 2018).
- The rate of children living in poverty in 2016 was about three times higher for Black children (34%) than for White children (12%). The rate for Latinx children (28%) was more than double that for White children.

Moreover, Black children (12%) were twice as likely as White children (6%) to live in families in which the head of the household did not have a high school diploma. The rate for Latinx children (32%) was more than five times that for non-Latinx White children (Annie E. Casey Foundation, 2018).

Most school districts reflect the demographic and socioeconomic compositions of their neighborhoods. School assignment policies that send all (or many) children from a high-poverty neighborhood to the same school create schools with high concentrations of children living in poverty. Schools serving children from low-income families tend to have fewer material resources (books, libraries, classrooms, etc.), fewer course offerings, and fewer experienced teachers. The educational opportunities available

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to students attending these schools are not of the same quality as those in schools in more affluent neighborhoods (Monarrez & Chien, 2021).

These kinds of disparities in access to educational opportunity are deep and enduring characteristics of the American education system. While education is sometimes characterized as the "great equalizer," the country has not found ways to successfully address the adverse effects of socioeconomic circumstances, prejudice, and discrimination (NASEM, 2019b). Recognizing this, the last two reauthorizations of the Elementary and Secondary Education Act have specified that states need to address achievement gaps between different student groups.

The committee noted that the language in ESRA's charge to NCER and NCSER puts equity issues front and center, for example calling on NCER[4]

> …to sponsor sustained research that will lead to the accumulation of knowledge and understanding of education, to—
>
> (A) ensure that *all children* have access to a high-quality education;
>
> (B) improve student academic achievement, including through the use of educational technology;
>
> (C) *close the achievement gap between high-performing and low-performing students* through the improvement of teaching and learning of reading, writing, mathematics, science, and other academic subjects; and
>
> (D) improve access to, and opportunity for, postsecondary education;… (ESRA, 2002 emphasis added).

In addition to these federal mandates, the importance of equity also emerges out of decades of research pointing to educational inequity in all facets of the education system. In the committee's view, educational inequity is one of the paramount challenges facing education researchers, and often the problems that IES and education research broadly are trying address are fundamentally problems of equity. When ESRA mandates that NCER ensure that its funded work is in service of "ensur[ing] that all children have access to a high-quality education," NCER is being asked to take on questions of equity. This same logic also applies to work designed to address the achievement gap and the multitude of other problems enumerated under the law.

To frame its thinking on this issue, the committee relied on President Biden's 2021 Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, which outlines in full all federal agencies' responsibilities related to equity. President Biden has declared that this order applies across his administration, and

[4]This sentence was modified after release of the report to IES in order to clarify the role of NCER vs. NCSER in addressing equity issues.

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because IES (and therefore NCER and NCSER) fall under the purview of the executive order (EO), it seems clear that organizational and programmatic decisions within IES will need to be consistent with the order. The committee has taken this into account in forming its recommendations.

The EO directs several federal actors to take actions to rectify past inequities and also advance a formal equity agenda in all future work. Of note, the EO directs the heads of all agencies to "assess whether underserved communities and their members face systemic barriers in accessing benefits and opportunities" in their respective programs, and to produce a plan for addressing these barriers. As part of that plan, agencies should identify "whether new policies, regulations, or guidance documents may be necessary to advance equity in agency actions and programs." Finally, the EO calls on agencies to "consult with members of communities that have been historically underrepresented in the Federal Government and underserved by, or subject to discrimination in, Federal policies and programs [in order to to] evaluate opportunities, consistent with applicable law, to increase coordination, communication, and engagement with community-based organizations and civil rights organizations" (Executive Order 13985, 2021). These directives, and others, are intended to "better equip agencies to develop policies and programs that deliver resources and benefits equitably to all" (Executive Order 13985, 2021).

Ultimately, the EO's definition of equity and of underserved communities helped focus the committee's understanding of IES's obligations:

> The term "equity" means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality (Executive Order 13985, 2021).

Throughout this report, the committee has operationalized these definitions of equity and of underserved communities when discussing how equity considerations can and should enter into IES's decisions. When the committee calls for attention to equity in its findings and recommendations, it is calling for treatment of underserved communities that is actively "fair, just, and impartial." In the committee's view, equitable treatment extends beyond diversity goals, though that may be one aim. Indeed, "just" treatment of underserved communities requires active attention to the historic and systemic issues that have perpetuated inequity broadly. As a result, the

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committee has endeavored to put these shared understandings of the terms equity and underserved communities to work throughout this report.

The committee's interpretation of the text of both ESRA and the executive order point to two primary equity aims for NCER and NCSER. First, NCER and NCSER are obliged to fund research that offers insight into and solutions aimed at addressing the equity challenges outlined in ESRA. To fulfill that obligation, it is incumbent upon IES to encourage research that explores issues related to equity and to support the development of an equitable education research enterprise. This report is intended to assist IES responding to both of those aims.

The urgency of addressing equity in education and understanding how inequities in society interact with inequities in schooling has been made even more salient by the events of the COVID-19 pandemic. The impact of the pandemic has varied widely for different communities with particularly devastating impacts for communities of color and communities experiencing poverty. Understanding how to help students, educators, and communities recover from the devastating effects of the pandemic will require a nuanced and deep understanding of equity.

In sum, the attention to equity issues laid out in both ESRA and Executive Order 13985 is rooted in a wealth of education research that posits that attending to equity is a necessary condition for ensuring that education in the United States lives up to its promise. For these reasons, the committee has used equity in education as a crosscutting theme throughout this report. We have attempted to articulate a set of recommendations that, if operationalized, will allow NCER and NCSER to be responsive to President Biden's commitment to providing the underserved communities defined in his Executive Order with "an ambitious whole-of-government equity agenda" (Executive Order 13985, 2021).

Technology in Education

Though the role that technology plays in education has certainly changed since 2002, it is critical to note that the importance of technology was explicitly included in the ESRA legislation. In fact, ESRA takes care to specify that attending to the role of technology in education (and in particular, the role of technology in supporting student achievement) should be one of the primary foci of IES's work (ESRA, 2002). Given the centrality placed on technology in the legislative language, the committee recognizes that the unprecedented technological leaps that have occurred in the last 20 years are a critical consideration for any future education investments.

The scope of the change in how schools engage with technology is dramatic. Although most public schools in 2002 had access to the Internet (via Ethernet cables with a student-to-computer ratio of approximately 5:1), the

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vast majority of educational technology offerings were limited and most did not take advantage of the Internet (Wells & Lewis, 2006). Low-cost personal computers did not yet exist, despite discounts offered to schools and educators by many companies. The intervening years have seen robust change not only in the nature of technology used, but also in the modalities in which technology is integrated. Teachers, students, and caregivers now make liberal use of smartphones, tablets, and low-cost laptops, and they leverage an increasing number of related applications and web-based platforms for both communication and educational content (U.S. Department of Education, 2021). New genres of technologies are being used for learning and collaboration, such as games (Plass, Mayer, & Homer, 2020), augmented reality, virtual reality (Weiss et al., 2006), among others, and many schools and districts are endeavoring to productively engage social media platforms (Yamaguchi & Hall, 2017). In addition to the proliferation of student-facing learning management systems such as Google Classroom, teachers, administrators, and other staff are now obliged to engage with a battery of education data systems as part of their jobs. This same phenomenon is true in special education contexts: In the past 20 years, access to adaptive technologies has exploded, enabling exciting new possibilities for learning for special education populations (Zimmerman, 2019). And, as noted later in this chapter, the circumstances surrounding schooling in the COVID-19 pandemic have demanded an exponential increase in teacher, student, and caregiver use of technology-based strategies for supporting remote learning (NASEM, 2021a).

Advances in technology, both in systems to support learning and administrative data systems, have led to an explosion of data on students and schools. How best to leverage these systems to support improved student outcomes, while also respecting privacy and ethical use, are critical issues for education at all levels.

Given this substantial shift, the committee found it prudent to consider not only the speed of change prior to 2022 in adoption of technology, but also the likelihood that future decades will experience continued growth and development. Moreover, ESRA is clear in its direction to IES that technology and its use for and in education needs to play a central role in the work of NCER and NCSER. For this reason, the committee identified the use of technology as a crosscutting theme that must be attended to when addressing the foci in its statement of task.

Use and Usefulness of Education Research

A major goal of IES, as outlined in ESRA, is to facilitate the use of evidence to inform education. The very structure of IES is designed to identify and promote effective approaches that have robust, scientific evidence

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behind them. Since the founding of IES, however, there have been major advances in understanding how education decision makers and practitioners use evidence in their work and what can make education research more useful.

When IES was established, a common belief in the field was that when interventions were shown to be effective with rigorous scientific testing, they would be discovered and adopted by users in the field (Farley-Ripple et al., 2018; Coburn, Honig, & Stein, 2009). That is, decision makers would immediately turn to the evidence base when they had a problem to solve. Research conducted during the past two decades, however, shows that research use in education rarely works in this linear fashion (Finnigan & Daly, 2014; Best & Holmes, 2010; Davies & Nutley, 2008). Instead, decisions in school systems rely on a variety of factors, only one of which is evidence produced by research (Coburn, Honig, & Stein, 2009). In fact, policy makers and practitioners are unlikely to identify a problem and turn to peer-reviewed literature for a solution (Penuel et al., 2017). Rather, stakeholders are more likely to engage in conceptual use of research: that is, sustained and iterative interaction with a body of work over time, such that it informs how stakeholders ask questions and understand problems (see Chapter 2 for more discussion).

These insights complicate IES's task of conducting and promoting evidence-based approaches in education. Ensuring that the problems being addressed in education research are meaningful and important to educators and education decision makers is a key challenge. This has been particularly evident during the pandemic when schools sought guidance on how to best support students' learning during the crisis, and the education research community had difficulty both identifying existing studies that could provide guidance and mounting new research that could be completed and acted upon in a timely way.

As outlined in ESRA, the functions of IES include obligations to "promote the use, development, and application of knowledge gained from scientifically valid research activities," and "promote the use and application of research and development to improve practice in the classroom." Thus, the committee understands that IES's function is not merely to "disseminate," or inform the public about, research findings, but to take steps to enable their use in practice. As a result, the committee identified use and usefulness of research as a theme that must be consistently addressed. If the research that NCER and NCSER fund is not useful to or used by its intended audience, then it is not meeting the charge mandated under ESRA to effect change in student outcomes. Throughout this report, the committee repeatedly returns to the question of how NCER and NCSER can continue to ensure that the research it funds is both useful and used.

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Heterogeneity

In order to fully address the goals laid out for IES in ESRA, education research funded by NCER and NCSER needs to grapple with the wide variation present at every level of the education system. That is, research on how to improve student outcomes will fall short if it does not explicitly address issues of heterogeneity (Bryan et al., 2021; Bryk et al., 2015). This means that "what works, under what conditions, and for whom" (Gutiérrez & Penuel, 2014, p. 22) and why (Cowen, 2019) must be central questions for research. Often, current approaches to determining what is effective for improving student outcomes assume that there is very little to no variation in effect sizes across students, teachers, and schools. However, over the past 20 years, there is mounting evidence that treatment effects vary, sometimes substantially (Weiss et al., 2017).

This concern suggests to instead *begin* with the assumption that treatment effects can and will vary across students, teachers, and schools. Studies need to treat this heterogeneity as a *primary* concern, not secondary. Understanding heterogeneity involves more than merely a statistical exercise in computing and finding variation. Explaining what led to that heterogeneity, and then applying the inferences based on past findings to future settings, requires analyzing how conditions differ and how important those differences are in influencing an observed variation (Provost, 2011; Deming, 1953).

Analyzing variation may also help distinguish between the need for systemic change or for targeted action. Calculating the variability of a process may reveal whether it is stable and predictable, or whether the results emerge from an out-of-control process or from separate systems (Provost & Murray, 2011; Deming, 1953). A stable process producing undesirable results needs to shift the entire system to yield improvement; an unstable process requires systemic improvements to detect and correct issues to bring the process under control. However, high variability emerging from separate systems "raises questions about hidden factors and potential systemic inequities to identify and resolve" (Ming & Kennedy, 2020).

The committee notes that IES has, in fact, made multiple efforts to attend to issues of heterogeneity in its tenure. As we discuss in Chapter 4, IES has called for research that better addresses the "whom, where, and under what conditions" questions embedded in research. As with a number of challenges the committee will describe throughout this report, however, a series of structural issues present in IES guidance creates a funding context in which questions of heterogeneity may be less likely to receive support. For this reason, the committee chose to highlight the importance of these issues in establishing recommendations that build in heterogeneity as an assumption, as well as methods to study and explain heterogeneity more fully.

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Implementation and System Change

The portfolio of research funded by both NCER and NCSER makes clear that the success of interventions is driven in large part by their implementation. It is also clear that understanding implementation needs to go beyond simply determining if a given intervention is implemented with fidelity. Rather, there is increasing recognition that the process of implementation itself is worthy of study if education research is to provide educators with sufficient guidance on how to improve student outcomes.

Implementation research "is the scientific study of methods to promote the systematic uptake of research findings and other evidence-based practices into routine practice, and, hence, to improve the quality and effectiveness" of interventions, policies, and practices (Eccles & Mittman 2006, p. 1). This definition distinguishes between *what* is being implemented and *how* to support its implementation, where "what" refers to the intervention, evidence-based practice, innovation, or "the thing," while "how" refers to the implementation strategies or "how to support the thing" (Curran, 2020; Fixsen et al., 2005). Identifying relevant factors influencing implementation, and situating them within a theoretical explanation for their influence, allows stakeholders to identify and develop strategies targeting those factors more effectively, ultimately improving desired outcomes. This shift in framing will also clarify where systemic changes might be needed in order to support a more effective implementation of an intervention.

It is the committee's judgment that if NCER and NCSER are indeed going to support the kind of research outcomes articulated in ESRA, it is critical that funded research engages with issues of implementation. For this reason, the committee considers implementation as a crosscutting theme throughout this report, and endeavors to address how NCER and NCSER might take on implementation and systemic change in support of its stated goals.

AUDIENCES

This report is intended to address the statement of task provided to the committee by its IES sponsors. For this reason, the committee considers IES, specifically NCER and NCSER stakeholders, as the primary audience for this report. However, the committee sees the audience for this report as extending beyond IES: Insofar as NCER and NCSER support a large percentage of the education research community in the United States, this report is intended to reflect that community's needs and concerns. The committee therefore sees the education research community as an additional but important audience for this report. Finally, the committee recognizes that IES's scope is limited both by its governing language in ESRA and by its

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congressional appropriations. For these reasons, the committee envisions Congress and other relevant policy makers as another audience.

ORGANIZATION OF THIS REPORT

This report is organized to reflect the committee's recommendations on the items listed in our statement of task. Following Chapters 2 and 3, which describe the background and current organizational structure of IES, the committee turns to the substance of its argument. In Chapter 4, we discuss our recommendations for a structure of project types for organizing funding in NCER and NCSER, and in Chapter 5, we make recommendations for new topics of study. Together, Chapters 4 and 5 cover the research goals and topics that IES uses to organize its work, and these chapters constitute our response to the first element of our charge—to identify problems and issues that should be considered for IES funding. We address the second, third, and fourth elements of our charge in Chapter 6, which focuses on methods and measures; Chapter 7, which examines the future of training; and Chapter 8, which offers commentary on how the request for applications process can be organized to support NCER and NCSER's future work. We conclude with a chapter offering our vision for the future of education research in NCER and NCSER.

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2

Background

As introduced in Chapter 1, this committee was tasked with providing guidance to the Institute of Education Sciences (IES) on how it might expand and improve its work consistent with the mandates laid out in its authorizing legislation, the Education Sciences Reform Act (ESRA). To accomplish this objective, the committee's first step was to consider background information about the context in which the National Center for Education Research (NCER) and National Center for Special Education Research (NCSER) operate. In this chapter, the committee expands on the background information provided in Chapter 1 to describe the initial problems that ESRA was trying to solve, identify how NCER and NCSER have sought to address those problems, consider what NCER and NCSER have achieved in their current structure, and examine how the field has changed in the intervening decades since ESRA was enacted.[1] Taken in concert, this background allowed the committee to lay the groundwork for recommendations for how NCER and NCSER might adapt to meet the contemporary and future needs of education research.

EDUCATION RESEARCH IN 2002

When ESRA was authorized at the turn of the 21st century, education research was in the spotlight. In 2001, Congress reauthorized the Elementary and Secondary Education Act as the No Child Left Behind Act (NCLB)

[1]We discuss how NCER and NCSER are organized, including approaches to funding and other structural considerations, in Chapter 3.

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of 2001, establishing a series of policy priorities and mandating that decisions about schooling flow from "research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs." The following year, the National Research Council (now the National Academies of Sciences, Engineering, and Medicine) released *Scientific Research in Education,* which noted that the passage of NCLB had "brought a new sense of urgency to understanding the ways in which the basic tenets of science manifest in the study of teaching, learning, and schooling" so that decisions could be informed by that science (NRC, 2002). When Congress authorized the founding of a new federal science agency devoted solely to education research in November 2002, the timing was fortuitous.

Grover "Russ" Whitehurst was selected as the first director of IES. Whitehurst expressed concerns about the state of education research in the United States prior to 2002. Speaking to the American Educational Research Association (AERA) in 2003, he noted that he was unconvinced that education research prior to 2002 would be able to change practice toward improving student outcomes. Whitehurst remarked, "Education hasn't even incorporated into instruction what we know from basic research [in cognitive neuroscience into] practice—and I learned about that in a psychology course I took in 1962" (Whitehurst, 2003). Whitehurst posited that a new IES would focus on applied research: that is, research "that has high consideration of use, that is practical, that is applied, that is relevant to practitioners and policy makers."

In his 2003 comments to AERA, Whitehurst laid out a set of principles to guide IES in pursuing scientific research in education. He asserted that "questions of efficacy and effectiveness, or what works, are causal, and are addressed most rigorously with randomized field trials." These principles, gleaned from scientific research in other fields, served as the conceptual underpinnings of how IES was initially organized and operated. They included the following:

1. Randomized trials are the only sure method for determining the effectiveness of education programs and practices.
2. Randomized trials are not appropriate for all questions.
3. Interpretations of the results of randomized trials can be enhanced with results from other methods.
4. A complete portfolio of federal funding in education will include programs of research that employ a variety of research methods.
5. Questions of what works are paramount for practitioners; hence randomized trials are of high priority at the Institute (Whitehurst, 2003).

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So, while methods outside of the randomized controlled trial would be part of IES's portfolio, studies that employed randomized designs would be privileged in IES's funding competitions. In organizing the institute this way, Whitehurst hoped that IES would create a body of knowledge upon which practitioners could draw to make immediate decisions informed by high-quality research. He concluded his presentation to AERA by presenting a vision for the future:

> The people on the front lines of education want research to help them make better decisions in those areas in which they have choices to make, such as curriculum, teacher professional development, assessment, technology, and management.... I have a vision of a day when any educator or policy maker will want to know what the research says before making an important decision. The research will be there. It will be rigorous. It will be relevant. It will be disseminated and accessed through tools that make it useable. The production and dissemination of this research will be in the hands of an education research community that is large, well-trained, and of high prestige (Whitehurst, 2003).

Responses from the education research community to Whitehurst's vision reflected sharply divided perspectives. Many of the most prominent U.S. education researchers were eager to see leadership oriented toward this articulation of scientific rigor. Previewing Whitehurst's plan for IES, Robert Slavin outlined the opportunities for evidence-based policy in education, describing in detail the critical importance as well as the difficulties of employing randomized designs in making claims about what works in education. Despite its challenges, he argued, it is important that education research seize the moment to demonstrate what kind of study is possible in education. Slavin (2002) noted,

> This is a time when it makes sense to concentrate resources and energies on a set of randomized experiments of impeccable quality and clear policy importance to demonstrate that such studies can be done. Over the longer run, I believe that a mix of randomized and rigorous matched experiments evaluating educational interventions would be healthier than a steady diet of randomized experiments, but right now we need to establish the highest possible standard of evidence, on a par with standards in other fields, to demonstrate what educational research can accomplish.

In praising the move toward randomization, Slavin called for using this opening to build capacity and proof of concept. Eventually, he suggested, the field would be able to strategically engage multiple methods toward a robust, comprehensive knowledge base.

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Others in the field were less enthusiastic about this approach. Critiques ranged from frustration around codifying "what counts" as knowledge in education to more tactical concerns about the practical capacity of schools and districts to serve as sites for experiments. In a rebuttal to Slavin's claims, Olson (2004) described the limitations of experimental design for building a robust knowledge base. Olson argued,

> Good research is not just a matter of trying out things or even comparing them, but rather a matter of advancing theoretically inspired notions of sufficient merit that they would benefit from being put to strenuous empirical test. We require richer theories than those assuming simple cause-effect relations among treatments (as defined by designers), their construals and implementations by teachers, and their interpretations by learners. The reputation of educational research is tarnished less by the lack of replicable results than by the lack of any deeper theory that would explain why the thousands of experiments that make up the literature of the field appear to have yielded so little.

Other criticisms emerged at that time, as well. Eisenhart and Towne (2003) argued that the definitions of scientifically based research were not coherent across different forms of policy guidance and would benefit from more public input. Others argued that ESRA, NCLB, and *Scientific Research in Education* fundamentally misunderstood the epistemology and practice of qualitative research (Howe, 2003a; Erickson & Gutiérrez, 2002). These critics argued that qualitative research can do more than just investigate "what is happening," but also can generate theory and develop useful interpretations of classroom activity for both research and practice.

Nevertheless, ESRA gave Whitehurst the opportunity to forge ahead with an IES that reflected his interpretation of rigor in scientific research in education. The organizing structures and priorities of NCER and NCSER reflect his vision. In the section that follows, we discuss the substance of NCER and NCSER's work, and describe how this work has altered the shape of education research in the United States.

FUNDING A VISION OF SCIENTIFIC RESEARCH IN EDUCATION

From their outset, both NCER and NCSER (authorized in an amended ESRA in 2004) were organized to support a science of education research that would contribute to "expanding fundamental knowledge and understanding of education from early childhood through postsecondary study" (ESRA, 2002). As established in ESRA, the founding research mission of NCER was to

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> (1) Sponsor sustained research that will lead to the accumulation of knowledge and understanding of education, to—(A) ensure that all children have access to a high-quality education; (B) improve student academic achievement, including through the use of educational technology; (C) close the achievement gap between high-performing and low-performing students through the improvement of teaching and learning of reading, writing, mathematics, science, and other academic subjects; and (D) improve access to, and opportunity for, postsecondary education.

Correspondingly, NCSER's founding mission included the following: "Sponsor research to expand knowledge and understanding of the needs of infants, toddlers, and children with disabilities in order to improve the developmental, educational, and transitional results of such individuals."

With these missions in mind, NCER and NCSER have operationalized *scientific research in education* as research that both (a) focuses on student outcomes, and (b) prioritizes rigor by emphasizing research designs and methods appropriate to the research question posed. The aim of documenting programs and practices that work to improve student outcomes ultimately calls for impact studies, which bring a particular emphasis on randomized designs with sufficient statistical power to detect anticipated effects. A corresponding goal has been to improve the capacity of education researchers to carry out this new charge.

In the committee's view, the establishment of NCER and NCSER was foundational for elevating scientific research in education. Over the past 20 years, NCER and NCSER have produced valuable knowledge across a broad range of topics, which collectively provide evidence of how to improve academic outcomes for students from infancy to adulthood. The centers' work has rapidly expanded the research tools (including the methodologies, measures, and technologies) necessary to carry out scientific research. Finally, as discussed in depth in Chapter 7, NCER and NCSER's investments in training education researchers have changed the shape of the field. Since their inception, NCER and NCSER's training programs have provided opportunities for specific methodological training experiences and career development opportunities. These programs have been highly popular, and they have allowed for the development of a cadre of researchers who share similar understandings of how to conduct research on particular issues.

These strengths, taken together, have been pivotal to the work of building a coherent field in education research. In the absence of NCER and NCSER's strategic funding and resources, education research in the United States would be a different enterprise than it is today.

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CHANGES SINCE 2002

As noted above, IES—and NCER and NCSER—have substantially reshaped education research since 2002. In the intervening decades, though, the world has changed around IES—in part because of the knowledge base to which NCER and NCSER have contributed. In this section, we consider several changes that have occurred since the founding of IES, and consider what these changes might mean for NCER and NCSER's current portfolio. The committee acknowledges that IES has already taken many steps to respond to changes in the field; for example, in Chapter 5 we discuss IES's changing approach toward the topics it seeks to fund, including the increasingly prominent role of special topics and of large-scale research networks. The question facing IES, however, is whether NCER and NCSER's current structure and priorities can sufficiently address these broader changes in the field or whether more substantial changes are necessary.

Use of Research Evidence in Education

As noted in Chapter 1, the committee found that the structure of IES (as dictated in ESRA) reflects a particular understanding of how research is used in education. Indeed, as stated earlier, IES categorizes dissemination of research findings as the purview of the What Works Clearinghouse in the National Center for Education Evaluation and Regional Assistance, while NCER and NCSER are tasked with funding the *doing* of research.[2] However, contemporary research on evidence use indicates that this view of how stakeholders engage with research and evidence is inconsistent with the realities of evidence use in the education system. Indeed, in the past 20 years, the field has evolved toward much more nuanced understandings, not only of how stakeholders do (and do not) engage with evidence from research, but also of which conditions facilitate and sustain productive use. The inconsistency between assumptions prevalent in 2002 about how educators would come to use research evidence, and what subsequent studies show about how evidence is used in practice, has constrained IES's ability to achieve its legislated function to "promote the use, development, and application of knowledge gained from scientifically valid research activities (Education Sciences Reform Act of 2002, Section 112(3)).

Research on the instrumental use of research evidence—that is, when evidence from research serves as a tool for making policy or pedagogical decisions—indicates that this form of evidence use is less common than researchers would like; specifically, research evidence plays a limited role in

[2]The committee notes that NCER and NCSER do both require that applicants propose a dissemination strategy as part of their request for funding, which we discuss in Chapters 4 and 8 of this report.

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the decision making of central office staff, local school boards, principals, and teachers (Finnigan & Daly, 2017; Asen et al., 2013, 2011; Farley-Ripple, 2012).[3] Instead, prior research suggests that educators turn to people first and prefer evidence curated by colleagues to inform their decisions (Finnigan & Daly, 2017; Penuel et al., 2017); central office staff prefer publications from professional organizations, conferences, the Internet, and leadership books over peer-reviewed journal articles (Farley-Ripple, 2012); and school board members rely on a variety of evidence (e.g., experience or testimony) in deliberations, rarely using research as evidence in these processes (Asen et al., 2013, 2011). Educators hold a variety of definitions of what counts as evidence as they consider education issues or problems, ranging from empirical studies, to local evaluation reports, to expert opinion, to the popular press (Finnigan, Daly, & Che, 2012). So, while actors throughout the education system acknowledge that evidence from research is important, the extent to which they actually use research (versus other types of evidence) in instrumental ways varies widely.

However, research on this subject over the last decade has shown that conceptual use of research, while not always commonplace, may be occurring in ways that make meaningful differences throughout the system of U.S. education. Stakeholders engage in conceptual use of research when they interact with research in ways that inform how they ask questions and understand problems. Conceptual use may occur slowly, intermittently, and over long periods of time, which makes it a substantially harder phenomenon to study, though no less important to understand.

As Tseng and Nutley (2014) described:

> [Conceptual] use is contingent, interactive, and iterative. It involves people individually and collectively engaging with research over time, bringing their own and their organization's goals, motivations, routines, and political contexts with them. Research also enters the policy process at various times—as problems are defined (and redefined); ideas are generated; solutions are identified; and policies are adopted, implemented, and sometimes stalled.

Importantly, recent research suggests that the use of research evidence in education by policy makers and practitioners can be facilitated by individuals who serve as "research brokers" as well as by intermediary organizations and networks. This finding is important because it helps clarify the ways that researchers connect with policy makers and practitioners indirectly rather than directly. For example, Finnegan and Daly (2014) found that key individuals in school districts served as brokers. Unfor-

[3]This section draws on findings synthesized for the committee by Finnigan (2021).

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tunately, high levels of churn in these leadership roles meant that the ties relating to research and evidence were constantly being disrupted. Other work has found that staff at county-level school districts played important brokering roles (Neal et al., 2015) and that district staff have filled gaps between producers and users of evidence (Finnigan & Daly, 2014). In these cases, the brokers serve in intermediary positions, but they are internal to the organization, rather than external entities. In all cases, brokers can play a critical role in the flow of ideas and practices because they filter what is known in a given organization about research and evidence.

In the past decade, new groups have emerged to position themselves as the "interpreters" of evidence (Debray et al., 2014; Scott & Jabbar, 2014; Scott et al., 2014). In essence, brokers operate within a type of market, as policy makers and practitioners require information to make decisions and intermediaries respond to this demand (Debray et al., 2014). Intermediaries have taken on important roles in the packaging of research and the management of perceptions to "sell" policy makers or practitioners on sets of findings, as well as to validate whether evidence is credible. Of course, while filling a larger "need" of the system to bridge researcher to user, another "need" was being filled as many of these organizations spent considerable resources moving their own agendas forward, many unchecked (Reckhow, Tompkins-Strange, & Galey-Horn, 2021; Scott & Jabbar, 2014). Intermediary organizations are active in promoting, participating in, or opposing educational policies like charter schools, vouchers, "parent trigger" laws, and merit-pay systems for teachers (Scott et al., 2015).

Use of research evidence occurs in a robust network of interconnected relationships, whether one focuses on the school, district, state, or federal government. Several studies that involved case studies and network analysis found that trust plays a role in use of research and evidence (Penuel et al., 2020; Asen, 2015; Finnigan & Daly, 2014) in that stakeholders make determinations about the evidence based upon the person providing the evidence. In other words, the same type of evidence brought by a trustworthy or untrustworthy source will have a different result in a person's response to that evidence, for example, whether it resonates or whether they are skeptical of it. As such, it is important for the research community to be mindful not only that individuals have social relationships, but also that the quality of relationships between individuals is consequential for use of research and evidence.

Understanding how research evidence is used by stakeholders making decisions in education is a central component of ensuring that IES's investments in research ultimately matter for improving education in the United States. For this reason, and in light of how much the field has grown in the past two decades, the committee brings these perspectives to bear in its recommendations for IES throughout this report.

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Attending to Culture and Deficit Ideologies in Understandings of Learning

Over the past 20 years, the study of human learning has expanded, shifted, and progressed in critically important ways, leading to foundational changes in conceptions of human learning.[4] Among the most important of these advances is the wide recognition of what Arnett (2008) and later Henrich and colleagues (2010) named the "WEIRD (western, educated, industrialized, rich, democratic) people problem" or the deep systemic bias in the social and behavioral sciences, of which educational sciences is an important part. A watershed special publication in *Brain and Behavioral Sciences*, and another in *Nature*, reviewed the accumulation of evidence demonstrating that overly broad claims to understanding human learning and development were dubious at best. The authors in these collections, and many others, called attention to broad-scale sample bias as well as experimental design bias (e.g., Thalmayer, Toscanelli, & Arnett, 2021; Hruschka et al., 2018; Baumard & Sperber, 2010) that reflect field-level flattening of human diversity and cultural variation. To concretize this problem, 96 percent of studies in psychology are conducted with WEIRD samples, which reflects just 12 percent of the world's population, and even in societies that are multiracial like the United States, more than 83 percent of those studies are conducted with predominantly White samples (Henrich et al., 2010). This critique has allowed social scientists to unpack traditions of literature as they apply to complex, plural societies.

The growing body of scholarship demonstrating important cultural variation ranges from foundational processes such as visual and olfactory perception (e.g., Kay, 2005; Gordon, 2004; Levinson, 2003; Roberson, Davies, & Davidoff, 2000; D'Andrade, 1995) and basic cognitive and moral reasoning processes (e.g., Haidt & Graham, 2007; Norenzayan, Choi, & Peng, 2007; Nisbett, 2003; Thirumurthy, 2003; Al-Shehab, 2002; Baek, 2002; Peng & Nisbett, 1999); to core models of self (e.g., Heine, 2008; Fryberg & Markus, 2003; Oyserman, Coon, & Kemmelmeier, 2002; Markus & Kitayama, 1991) and related motivational and decisional processes (e.g., Tanner, Arnett, & Leis, 2009); to dimensions of sociality such as personal choice (e.g., ojalehto, Medin, & García, 2017; Schwartz, 2004; Kahneman & Tversky, 2000; Bandura, 1982), individualism (e.g., Morling & Lamoreaux, 2008; Vohs et al., 2008; Fryberg & Markus, 2003; Nisbett, 2003; Oyserman et al., 2002; Lipset, 1996; Hofstede, 1980); views of punishment and cooperation (e.g., Gächter, Renner, & Sefton, 2008; Herrmann, Thöni, and Gächter, 2008; Fehr & Gächter, 2002); and motivations to conform

[4]This section relies on findings articulated in the committee's commissioned paper on evolving conceptions of learning by Vossoughi, Bang, and Marin (2021).

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(e.g., Kim & Markus, 1999). In addition, scholars have increasingly demonstrated that there are significant cultural differences in core understandings and reasoning patterns of school-related phenomena such as biology (e.g., Taverna et al., 2020; ojalehto et al., 2017; Washinawatok et al., 2017; Ross et al., 2007; Atran, Medin, & Ross, 2005; Medin & Atran, 2004) and mathematics (e.g., Hu et al., 2018; Saxe, 2015). This groundswell of evidence from multiple disciplinary and methodological traditions has significant consequences for research on learning and education processes, calling to task theoretical and methodological constructs that do not engage cultural variation as fundamental to science (e.g., Brady, Fryberg, & Shoda, 2018). Work that does not carefully engage cultural variation easily participates in the perpetuation of a science based in White middle-class norms projected as universalist claims.

The field's response to the sobering recognition that there is significant work to do to understand human diversity has been varied. Much of the field has looked to tighten methodological rigor (e.g., as a response to the "replication crisis"; see Shrout & Rodgers, 2018; Maxwell, Lau, & Howard, 2015; Open Science Collaboration, 2015), such as through preregistration efforts (e.g., Simmons et al., 2021; see also Pham & Oh, 2021), and to increase sample diversity (e.g., Amir & McAuliffe, 2020). Others, however, are proposing new methodological approaches and applications (e.g., Zirkel, Garcia, & Murphy, 2015) as well as careful reconsideration of what should be observed (e.g. Barrett, 2020).

While the overrepresentation of "WEIRD" individuals in psychological research resulted in universalist theories of cognition based on narrow samples, its overreliance on skewed population samples reproduced conceptions of cultural variation as a deviation from presumed singular pathways of learning (Lee, 2009; Nasir et al., 2006). As a result of lack of diversity in samples and researchers (Medin et al., 2017), scientific instruments and measures of intelligence have often projected deficit conceptions across cultural communities, with Western researchers presuming their own frames of reference as the universal norm (Medin & Bang, 2014). Research within this deficit paradigm has been used "as the underlying warrant for the ideology of white supremacy" (Lee et al., 2020), justifying the subjugation of Indigenous and non-Western peoples whose thought processes were framed as inferior or "primitive" (Bang, 2016; Medin & Bang, 2014), with particular consequence for the education sciences.

This deficit stance typically fails to inquire into external and structural factors: "How schools are organized to prevent learning, inequalities in the political economy of education, and oppressive macro-policies and practices in education are all held exculpatory in understanding school failure" (Valencia, 1997, p. 2). Gutiérrez, Morales, and Martinez (2009) showed how "students themselves come to be known as the problem rather than a population of people who are experiencing problems in the educational

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system" (Gutiérrez, Morales, & Martinez, 2009, p. 218). Similarly, Nasir and colleagues (2006) described the everyday implications of the cultural deficit stance for youth, who must learn to manage multiple developmental tasks, both the ordinary tasks of life-course development and the tasks that involve managing sources of stress rooted in particular forms of institutional stigmatization due to assumptions regarding race, poverty, language variation, gender, and disability (Spencer, 1999, 1987; Burton, Allison & Obeidallah, 1995). Such stigmatization limits access to opportunities (e.g., schooling, work, etc.) across the life course for certain groups of youth (Nasir et al., 2006, pp. 489–490).

Despite the well-established role of interactional and structural factors in education outcomes, deficit stances typically treat the individual as their unit of analysis and have thus been shown to perpetuate a view of human learning in which outcomes "ultimately depend on [students'] own individual worth and effort (Varenne & McDermott, 1998)" (Artiles, 2009). Marin (2020) conceptualized units of analysis as theoretically informed "containers" or "bundles" of segmented information that "reflect researchers' ideas about what counts in knowledge building and meaning making processes" (p. 285). Conceptions of learning as an individual accomplishment frequently shape low expectations and levels of instruction, leading to unequal outcomes that are then used to confirm artificial deficiencies in students (Diaz & Flores, 2001). As Sengupta-Irving (2021) argued, "The legacy of these discourses is that they compel stratification—they create 'smart' or 'dumb,' 'success' or 'failure,' 'desirable' or 'undesirable'" (p. 188). There is increasing consensus and evidence that challenging deficit stances requires units of analysis that move beyond the individual to include careful attention to the cultural tools, sources of pedagogical and social support, forms of psychological safety and belonging, valued ways of knowing and being, and access to resources and opportunities that mediate students' experiences both within schools and across contexts (Sengupta-Irving, 2021; Marin, 2020; Bang & Vossoughi, 2016; Artiles, 2009; Gutiérrez, Morales, & Martinez, 2009; Nasir et al., 2006; Lee, 2003; Rogoff, 2003; Diaz & Flores, 2001; Cole, 1998; Moll, 1992). Lee, Spencer, and Harpalani (2003) illustrated how the presence or absence of such resources shapes the risks as well as protective factors that all human beings must learn to manage in ways that facilitate positive outcomes across the life course.

This stance brings three important ideas into view:

- "At risk" is not a trait or category of person but a fundamental human experience that is distributed unequally within a racially and economically stratified society.
- Understanding cultural repertoires of resilience and resurgence, particularly within communities sustaining cultural lifeways in the face of oppression and erasure, leads to a more agentive and ad-

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equately complex understanding of how youth and families navigate and productively respond to structures of inequity (Bang et al., 2016; Paris & Alim, 2014; Lee, 2009; Tuck, 2009; Gutiérrez & Rogoff, 2003).

- Protective factors leading to positive outcomes include opportunities for academic learning that meaningfully connect disciplinary domains with students' everyday lives, cultural practices, and ways of knowing (Warren et al., 2020; Lee, 2001).

Thus, expanding the unit of analysis beyond the individual also widens the focus of intervention from individuals to environments and systems, notions that IES has attempted to address in its topic structure over time (see Chapter 5). Arguments for widening units of analysis also have important practice advantages given that education is ultimately an interactional activity. Importantly, equity efforts that eschew overt deficit stances can nevertheless perpetuate similar ideologies through narrow, culturally normative conceptions of learning goals and processes.

Upon reviewing this body of evidence, the committee identified an important departure from the conceptions of learning that held sway at the outset of IES. Consistent with the committee's identification of equity as a crosscutting theme undergirding our analytic work, we determined that efforts aimed at supporting "fair, just, and impartial" research in education need also to account for latent deficit framing at all levels (Executive Order 13985, 2021). Consequently, the committee used these updated frameworks as a guidepost through which to understand how IES can meet its equity mandates, both in ESRA and in President Biden's Executive Order, while reflecting the leading edge of scholarship on learning. Throughout this report, the committee brings these scholarly perspectives to bear on existing challenges and potential responses for IES.

Methods and Approaches to Conducting Research

As noted earlier in this chapter, the key organizing principle for IES at its formation was the central importance of answering questions of efficacy and effectiveness to elevate student achievement. Consistent with this organizing principle, the randomized controlled trial has consistently been the preferred method for studies funded by IES, though other quasi-experimental methods have also been supported by IES since its inception. Over time, however, the need for quasi-experimental approaches has only been made clearer. Further, the rise of mixed methods research has been a development over the past two decades that can inform the next two decades of IES initiatives. Mixed methods designs offer powerful tools for examining complex social phenomena and systems in education. As

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Tashakkori and Creswell (2007) argued, mixed methods involve research in which the investigator "collects and analyzes data, integrates the findings, and draws inferences using both qualitative and quantitative approaches or methods in a single study or program of inquiry" (p. 4). DeCuir-Gunby and Schutz (2017) characterized mixed methods research pragmatically as combining approaches and research methods to solve problems.

The power behind mixed methods research lies with integration. For example, qualitative methods can inform the development or refinement of quantitative instruments or interventions, and quantitative data can inform sampling procedures for naturalistic observations, interviews, or case studies (e.g., O'Cathain, Murphy, & Nicholl, 2010). The specific approaches researchers can use to integrate qualitative and quantitative research procedures operate at three levels: at the study design level, methods level, and interpretation and reporting levels (Creswell & Plano Clark, 2018; DeCuir-Gunby & Schutz, 2017; O'Cathain, Murphy, & Nicholl, 2010). At the study design level, integration occurs through three basic mixed methods designs—exploratory sequential, explanatory sequential, and convergent, as well as various combinations of these (Nastasi et al., 2007). Integration at the methods level occurs through linking approaches to the collection and analysis of data. According to Creswell (2013), linking occurs in several ways: (1) connecting—when one type of data links with the other through the sampling frame; (2) building—when results from one data collection procedure inform the data collection approach of the other; (3) merging—when data from qualitative and quantitative collection procedures are brought together into a single database; and (4) embedding—when qualitative data collection and quantitative data collection are recurrently linked at multiple points in time (Creswell et al., 2011). At the interpretation and reporting level, integration occurs through narrative construction, data transformation, and joint display (Creswell & Plano Clark, 2017; Fetters, Curry, & Creswell, 2013).

IES AT 20: NOW WHAT?

When the issues above are considered in relationship to one another, it is clear that the world of education research has changed dramatically in the years since 2002. Educators are facing different, but no less urgent, challenges; researchers are building upon a constantly expanding knowledge base (much of it funded by NCER and NCSER); and the modes by which education stakeholders engage and interact with one another are continuously developing. NCER and NCSER undeniably laid the foundation for much of this growth. One way to think about the role that IES has played, and the challenge now facing it, is through the concept of *knowledge infrastructures* (Hirschman, 2021; Edwards, 2019, 2010). Sociologists have used the idea of knowledge infrastructures to explain how fields produce

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codified ways of generating and sharing specific kinds of knowledge about the world, often through the collection and analysis of similar kinds of data over time. Knowledge infrastructures have their affordances—allowing concerted effort toward producing new knowledge in a domain and fostering consensus—but they also have their disadvantages. As Hirschman (2021) described, "Past priorities shape existing knowledge infrastructures that in turn channel researcher attention toward some problems and away from others" (p. 742). These initial priorities may become "locked in" and limit the kinds of knowledge that are generated. It is easy to see the parallel to the situation facing IES. Its initial design choices (i.e., focusing on experimental designs, prioritizing academic student outcomes) have fostered tremendous knowledge generation in domains that lend themselves to such parameters. At the same time, the infrastructures that have facilitated rapid knowledge accumulation in some areas have also limited the kinds of questions that have been readily answered over the past 20 years. IES has an opportunity to set a course that continues the tradition it initially established while also broadening the kinds of research that it supports, with the goal of helming a next generation of equitable, useful education research. With several strategic shifts, this committee believes that NCER and NCSER can continue their inimitable leadership role in supporting an education research enterprise that truly meets the needs of students in all their complexity.

In the next chapters, we describe the current structure of NCER and NCSER at IES, detailing how funding competitions are organized and implemented, and how different topics and issues have been funded since 2002. In Chapters 4 and 5, we propose an updated matrix of project types (sometimes referred to as "goals") by research topics, in response to our charge to identify critical problems and issues that IES should address in its research funding. We address the remaining elements of our charge in Chapters 6 through 8, focusing on methods and measures, training, and the request for applications process. We draw together recommendations intended to enable our suggestions to IES in Chapter 9.

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3

IES at 20

To offer a coherent set of recommendations that respond to our charge, the committee first needed to understand how the Institute of Education Sciences (IES) and particularly its National Center for Education Research (NCER) and National Center for Special Education Research (NCSER) currently operate. In this chapter, the committee describes IES's operating structure, funding and staffing resources, the centers' project types and topics, and recent policy and programming efforts. We will return to the discussion of how the research centers operate throughout this report, referring to this chapter's content to respond to the questions posed by our statement of task.

OPERATING STRUCTURE

IES's operating structure is articulated in its founding legislation, the Education Sciences Reform Act (ESRA), which specifies the institute's organizing framework as well as the roles and responsibilities of each of its research centers and offices. The committee conceptualized the institute's functions as mandated in the legislation as divided into three separate areas of responsibility: direction, administration, and programming, each of which has multiple offices or centers (see Figure 3-1 for a diagram of IES's operational structure). In the following sections, we discuss the chief functions of each part of IES.

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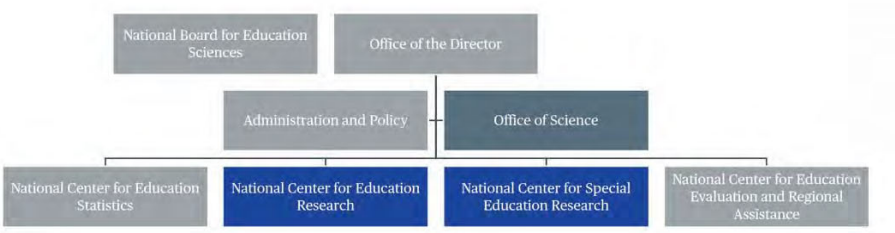

FIGURE 3-1 IES organizational structure.
SOURCE: Adapted from https://ies.ed.gov/help/ieschart.asp.

Programming

The programming work of IES is accomplished through the work of four independent research centers: NCER, the National Center for Education Statistics, the National Center for Education Evaluation and Regional Assistance, and NCSER. As noted in Chapter 1, in accordance with the committee's statement of task, this report is focused on the work of NCER and NCSER, also referred to as "the research centers" of IES. NCER and NCSER support a wide range of research activities with the broad goal of improving the quality of education in the United States. These research activities span from infancy through adulthood and across multiple education settings, depending on the center, and encompass three primary mechanisms: research grants, research and development (R&D Centers), and research networks. Grants for Education Research (including Education Research Grants [305A], Systematic Replication [305R], Special Education Research Grants [324A], and Systematic Replication in Special Education [324R]) comprise the central, continued work of NCER and NCSER. According to the IES website, these investments are intended to "advance our understanding of and practices for teaching, learning, and organizing education systems, and it helps to identify what works, what doesn't, and why. The goal is to improve education programs and, hence, outcomes for all learners, particularly those at a heightened risk of failure" (IES, 2022a). Both NCER and NCSER also fund R&D Centers. At NCER, R&D Centers are intended to "contribute to the production and dissemination of rigorous evidence and products that provide practical solutions to important education problems in the United States. The R&D Centers develop, test, and disseminate new approaches to improve education outcomes" (IES, 2022b). The R&D Centers at NCSER have a similar purview, although their work is more squarely focused on improving child outcomes through enhancements in the special education and early intervention systems (IES, 2022c). Finally,

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the Research Network program is an effort to marshal the talents and skills of multiple teams of researchers toward addressing complex problems in education. These networks provide a structure for researchers "to share ideas, build knowledge, and strengthen their research and dissemination capacity" (IES, 2022d).

NCER and NCSER also support the development of the next generation of education researchers through various research training programs including, but not limited to, predoctoral, postdoctoral, early career, and research methods training programs. NCER and NCSER fund these activities through a competitive grant process, and the funding to support research and research training programs is provided through annual congressional appropriations.[1]

Administration

IES has two primary functions that are part of the Office of the Director: (1) the Office of Administration and Policy provides ongoing administrative support for the activities of the centers and the Office of the Director and (2) the Office of Science is responsible for scientific issues across IES, including independent scientific peer-review processes of competitively funded research and research training grants, as well as reports conducted or supported by the institute. The deputy director for science serves as the Department of Education's chief science officer. As noted in Chapter 1 of this report, this latter function is necessarily independent from both NCER and NCSER: In order to maintain the integrity of the peer-review process, governance of the scientific peer review of research and research training competitions is managed by an entirely separate IES office. For more discussion on how the Office of Science supports review, see Chapter 8 of this report.

Direction

IES has two primary directive entities: the National Board for Education Sciences (NBES) and the Office of the Director. As per ESRA, the primary responsibilities of NBES include (1) advising and consulting with the IES director on the policies of the institute; (2) considering and approving priorities proposed by the director to guide the work of the institute; (3) reviewing and approving procedures for technical and scientific peer review

[1]This sentence was modified after the release of the report to IES to clarify how IES receives its annual appropriations.

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of the activities of the institute; and (4) advising and providing recommendations to the IES director in a number of areas related to enhancing the scope and impact of IES-funded activities and enhancing the overall effectiveness of the institute. NBES consists of 15 voting members appointed by the President of the United States. The director of IES, each of the four commissioners of the National Education Centers, the director of the National Institute of Child Health and Human Development, the director of the Census, the commissioner of Labor Statistics, and the director of the National Science Foundation all serve on the board as nonvoting ex officio members. NBES has not met since 2016 due to a lack of quorum of appointed members, signaling that this directorial function has been inactive.[2] President Trump announced his nomination of several additional members to the board shortly before the end of his term, but the board did not meet, and those members were never seated.[3]

The director of IES is appointed by the President and confirmed by the Senate and serves a term of 6 years. ESRA outlines a series of responsibilities for the director specific to the ways that she or he should effectively carry out the mission of IES. The director and NBES share responsibility for setting the institute's agenda and research priorities. Although the board is tasked with approving the director's priorities, the director is offered substantial latitude in setting a course for the institute's investments that is in line with the mission as articulated in ESRA. The committee also notes that, in practice, the director typically works closely with the each of the four IES center commissioners and the deputy directors to establish an agenda and substantive priorities for IES.

FUNDING AND STAFF LEVELS

Given the breadth of what IES is expected to accomplish as mandated in ESRA, its funding for both programmatic activities and staffing has historically been limited in comparison to other federal science, research, and statistical agencies with similar objectives. In 2021, IES received a congressional appropriation of $197 million for Research, Development, and Dissemination, about $172 million of which was available to cover the

[2]The most recent NBES meeting was held on November 8, 2016. See https://ies.ed.gov/director/board/minutes/index.asp.

[3]A reviewer of this report who was appointed by President Trump stated that "[President] Biden summarily dismissed the whole Board in 2021 with a one-line email."

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entirety of NCER's grantmaking.[4] NCSER,[5] on the other hand, receives far less funding from Congress to perform its core responsibilities. In FY2021, NCSER's appropriation was $58.5 million. For detailed information about funding at NCER and NCSER, see Appendix E for a series of tables provided to the committee by IES.

Although both NCER and NCSER face funding constraints, NCSER's limited budget remains a particular and perpetual challenge. In FY2010, NCSER received more than $71 million, but this amount was cut by Congress by more than $20 million annually in subsequent years. NCSER's current funding is still $27.1 million short of the buying power of its FY2010 funding level after factoring in inflation, an issue that has yielded serious consternation and instability within the special education research community.

In comparison, the Education and Human Resources division of the National Science Foundation operated in FY2020 and FY2021 with a $940 and $968 million budget, respectively. Similarly, funding for the National Institute for Child Health and Human Development—a subagency of the National Institutes of Health with a mandate similar to that of NCSER—has a $1.6 billion budget. The committee notes that these discrepancies in funding are a critical consideration in the recommendations in this report: Limitations in the centers' capacities mean that both NCER and NCSER need to be extremely judicious in how they allocate resources.

Since IES was established in 2002, NCSER, NCER, and the Office of Science have also operated with limited staffing resources. NCER has ranged in its staffing from 13 to 17 full-time employees, while NCSER has ranged in its staffing from 5 to 7 full-time employees, and the Office of Science has ranged in its full-time employees from 6 to 9.

RECENT EFFORTS AND DECISIONS

In recent years, under the leadership of IES Director Mark Schneider, NCER and NCSER have implemented a series of policy and programming initiatives aimed at continuing IES's legacy of funding and communicating robust research in education. In this section, we discuss a few of these efforts. Though the efforts described below are only a subset of the ongoing work at NCER and NCSER, the committee has selected these particular

[4] This sentence was modified after the release of the report to IES to reflect the actual 2021 appropriation and to clarify the amount of the appropriation available to NCER for grantmaking.

[5] NCSER was not able to run any of its competitions for FY2022 as the funds appropriated to NCSER were needed to meet outstanding commitments for current awards. The pandemic recovery competitions that NCSER was able to run in FY2022 are supported in their entirety via American Rescue Plan funds appropriated to IES.

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examples for discussion here due to their relevance to this study's statement of task.

SEER Principles

In September of 2018, Director Schneider introduced a set of principles designed to define rigor in IES-funded research. Known as the Standards for Excellence in Education Research (or the SEER principles), the principles are comprised of a set of "key domains and core questions" aimed at identifying quality in research proposals and supporting the production of high-quality research (see Box 3-1). As noted on the IES website,

> SEER codifies practices that IES expects—and increasingly requires—to be implemented as part of IES-funded causal impact studies. But note that many standards and associated recommendations are applicable to other types of research and IES increasingly requires applicable standards be followed in those studies as well. IES-funded researchers should consult grant and contract documents for more information about how SEER applies to your project.

X Prize

In March of 2021, Director Schneider introduced a competition designed to stimulate innovation in digital learning. According to his blog (Schneider, 2021), the challenge is

> designed to incentivize developers of digital learning platforms to build, modify, and then test an infrastructure to run rigorous experiments that

BOX 3-1
The SEER Principles

SEER encourages researchers to

- Pre-register studies
- Make findings, methods, and data open
- Identify interventions' components
- Document treatment implementation and contrast
- Analyze interventions' costs
- Use high-quality outcome measures
- Facilitate generalization of study findings
- Support scaling of promising interventions

SOURCE: https://ies.ed.gov/seer/index.asp.

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> can be implemented and replicated faster than traditional on-ground randomized control trials. The long-term goal of the competition is to modernize, accelerate, and improve the ways in which we identify effective learning tools and processes that improve learning outcomes.

The winning team will have demonstrated that their platform can successfully support researchers in conducting rapid, reproducible experiments in formal learning contexts. The winning team will be announced in March 2023 and will receive a $1 million prize.

Research-Practice Partnerships[6]

In 2018, Director Schneider announced that IES would be reviewing its existing commitments to research-practice partnership (RPPs) models for conducting research and building knowledge. Though IES had historically funded RPPs through a number of funding mechanisms outside of NCER and NCSER, NCER began a specific competition solely for RPP models in 2013. This competition became a topic in a new competition focused on NCER's investment in partnership work, Partnership and Collaborations Focused on Problems of Practice of Policies, in 2014. This RFA invited applications under three topics: Researcher-Practitioner Partnerships in Education, Continuous Improvement Research in Education, and Evaluation of State and Local Programs and Policies. The Evaluation topic was competed as a separate topic from 2009 to 2014. The Partnership and Collaborations competition was discontinued in 2019. Director Schneider expressed concern with the extent to which RPP models were focused primarily on "process rather than outcomes," noting that IES would continue to "encourage, support, and prioritize collaboration between researchers and practitioners, but without specifying how that cooperation should be structured" (Schneider, 2020).

Given the identification of usefulness in education research as a cross-cutting theme described in Chapter 1, the committee notes the existence of multiple bodies of research that provide evidence related to the utility and function of research-practice partnerships. While not all RPPs are successful at achieving all intended outcomes, research shows that co-designed interventions from RPPs can positively impact student learning outcomes (e.g., Krajcik et al., 2021; Saavedra et al., 2021; Coburn & Penuel, 2016; Booth et al., 2015; Barab, Greslfi, & Ingram-Goble, 2010; Geier et al., 2008; Snow, Lawrence, & White, 2009), as well as teaching and assessment

[6]Although IES uses the convention "researcher-practitioner partnerships" in its work, the committee elected to use the more commonly used to term "research-practice partnerships" throughout this report.

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outcomes (DeBarger et al., 2017; Yarnall, Shechtman, & Penuel, 2006). RPPs have supported efforts that resulted in dramatic reductions in high school dropout rates (Allensworth, 2015), and they have enabled partners to make effective use of research to inform their thinking and guide local decision making (Penuel et al., 2020; Henrick, Jackson, & Smith, 2018). Indeed, an evaluation of IES's RPP initiative conducted by the IES-funded National Center for Research in Policy and Practice found that, from the perspective of nearly all grantees, the program was achieving its stated purposes (Farrell et al., 2018).

Though RPPs are no longer a separate topic, NCER continues to fund research that involves partnerships between researchers and practitioners, including awards made under the FY2020 and FY2021 Using Longitudinal Data to Support State Education Policymaking competitions.

DATA COLLECTION

In responding to its charge, one of the committee's chief concerns was understanding the current state of funding in NCER and NCSER: that is, who has been funded through NCER and NCSER competitions over time, and what institutions and research areas have *not* received funding. Given our focus on the importance of attending to equity at every step in the NCER and NCSER funding process, the committee was interested to know how successful IES has been in engaging researchers from multiple disciplines, across institutions, and from a variety of backgrounds.

In its open sessions with IES staff, the committee asked for demographic and institutional information related to funded and unfunded applicants, as well as reviewer panels, and was informed that such information was not available for privacy and statistical reasons. In a post shared to the *Inside IES Blog* on September 16, 2021, IES shared limited demographic data about applicants (see Box 3-2).

The committee notes that the communication of this information is a critical step to helping IES address equity issues both inside and outside the organization. Throughout this report, the committee will discuss how continued sharing of data along these lines can buttress IES's good work in each of the areas of our statement of task.

CONCLUSION

This chapter describes the current state of IES: its current structure and funding levels, as well as recent policy and programming efforts. In the following chapters, the committee will make use of this information in order to address the committee's statement of task.

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BOX 3-2
Demographic Data on NCER and NCSER's Applicants and Awardees

Data indicate that the percentage of applications received from MSIs [Minority Serving Institutions] between 2013 and 2020 was very small—4 percent of applications to NCER and 1 percent to NCSER. Of those applications that were funded, 10 percent of NCER's awards were made to MSIs and none of NCSER's awards was made to an MSI. IES reviewed the demographic information that FY 2021 NCER and NCSER grant applicants and awardees voluntarily submitted, and among those who reported their demographic information, found the following:

- *Gender* (response rate of approximately 82%): The majority of the principal investigators who applied for (62%) and received funding (59%) from IES identified as female.
- *Race* (response rate of approximately 75%): The majority of principal investigators who applied for (78%) and received funding (88%) from IES identified as White, while 22% of applicants and 13% of awardees identified as non-White or multi-racial.
- *Ethnicity* (response rate of approximately 72%): The majority of principal investigators who applied for (95%) and received funding (97%) identified as non-Hispanic.
- *Disability* (response rate of approximately 70%): The majority of principal investigators who applied for (97%) and received funding (96%) identified as not having a disability.

SOURCE: IES (2021).

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4

Project Types for NCER/NCSER Grants

Grants funded by the National Center for Education Research (NCER) and National Center for Special Education Research (NCSER) use a structure of goals or project types to divide the studies "into stages for both theoretical and practical purposes" (IES RFA, 2018). Since 2002, five such project types have been funded: (1) Exploration, (2) Development and Innovation, (3) Initial Efficacy and Follow-up, (4) Scale-up/Effectiveness/Systematic Replication,[1] and (5) Measurement.[2] In this chapter, we focus on the first four of the project types; we address Measurement (along with Statistical and Research Methodology projects) in Chapter 6.

We begin our response to the question of new problems and issues that warrant Institute of Education Sciences (IES) research grant funding with a focus on project types for two reasons. First, these project types play an administrative role in IES, as different types of projects result in different request for applications (RFA) requirements and different budgets. Project types thus set the stage for the types of studies that IES would like to see conducted, including the purpose of each study. Second, these project types have from the outset played a *normative* role in education research, reflecting assumptions about the process through which interventions—programs, policies, and practices—*ought* to be developed and evaluated. For

[1]Note that in FY2020, 1–3 and 5 have been funded under the Education Research grants competition, whereas 4 is funded under a separate RFA.

[2]Whereas grants submitted to the main research funding competitions of NCER and NCSER enter with a specific project type, applications for Research Networks and Research & Development Centers typically encompass multiple project types.

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example, these project types emphasize that randomized controlled trials offer the highest form of evidence regarding the effect of an intervention. Importantly, this normative role is what is often perceived by education researchers as being the core identity of IES.

Based on testimony from numerous speakers and our own analysis of grant patterns, the committee identified a fundamental mismatch between the presumed structure of scientific practice as expressed in the IES project structure and what is required to meet the needs of children, schools, and society. This is not to say that a scientific structure is not needed, but that such a structure should be based upon the realities and contexts found in education from early childhood to adulthood. Based upon this analysis, we articulate a new system of science that is distinctly aligned and attuned to education science. Corresponding to this system, we propose a new project type structure, and recommend its adoption by IES.

PROGRESSION ACROSS PROJECT TYPES

Prior to 2020, what are now referred to as "project types" were called "goals."[3] The numbering of these goals gave the appearance of a linear process, with a possible intervention moving from an idea (Goal 1) to a scalable intervention (Goal 4) that could then reach and impact student outcomes in schools across the nation. While no longer called "goals," this same logic can be found in the descriptions of the project types. In the current system, *Exploration* projects focus on the identification of relationships between learner, educator, school, and policy-level characteristics and student outcomes; in particular, the focus is on identifying characteristics that can be changed via new interventions. Projects that might be funded in this type include small experiments testing if it is possible to change an observed factor, and the identification of associations between possible malleable factors and outcomes using both primary and secondary data. In *Development and Innovation* projects, an intervention is "developed," resulting in a logic model, intervention components, and a pilot study in a handful of schools (or sites). This intervention is then evaluated in an *Initial Efficacy* project. This is an explanatory, proof-of-concept study, focused on establishing that the intervention can produce an effect under "ideal" conditions (i.e., when

[3]While Exploration studies and Development and Innovation studies have remained roughly the same over time, project types (3) and (4) have been continually changed. Until 2018, studies of type (3) were called "Efficacy and Replication"; from 2019 onward these were renamed "Initial Efficacy and Follow-up." Until 2012, studies of type (4) were called "Scale-up Evaluations," then 2013 to 2018, they were called "Effectiveness," in 2019, "Replication: Efficacy and Effectiveness," and since 2020, this competition has been removed. In its place, "Systematic Replication" studies are now funded through a separate competition. See Brock and McLaughlin (2018) for more information.

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implemented well). Finally, if an efficacy study suggests that an intervention has a positive impact, a *Replication* study may be conducted. In a replication study, the focus is on systematically changing one or more features of the intervention or context, to see if the previous efficacy findings are robust to this change. This replication study can itself be an efficacy study or an effectiveness study. In the latter case, the intervention is evaluated under routine conditions by an independent evaluator, with less researcher control and, likely, more variable implementation.

Notably, this last project type is where most changes have occurred in the past two decades. In the beginning, these fourth project types were referred to as "Scale-up" studies, with a focus on studying the intervention in a larger, broader, and more representative sample of schools. Later, these studies were renamed "Effectiveness" studies, with a focus on "typical" implementation and independent evaluation. This shift from "scale-up" to "effectiveness" on the one hand offered cost savings to IES (since "scale-up" studies were more expensive[4]), while on the other hand they deemphasized the need for interventions to be studied in more heterogeneous settings. At the same time, these changes to the fourth project type led to changes to the third. Initially these were referred to as "Efficacy" studies—which could include replications of previous efficacy studies. When the fourth project type shifted to "Replication," this third type was thus repositioned as "Initial Efficacy" studies instead.

To better understand these project types, Klager and Tipton (2021) analyzed data made available on the IES website about funded grants. These data include grants funded since 2002 and categorize them by project types, as well as program, center, topic area, year, principal investigator (PI), and institution. Since the purpose of this analysis was to understand project types, these analyses included all grants, regardless of funding mechanism. For further details on data coding this analysis, please see Appendix D of this report.

Tables 4-1 and 4-2 provide the total number of all grants and the total dollars spent on grants by NCER (Table 4-1) and NCSER (Table 4-2). The top rows of these tables show the total number of grants awarded in each 5-year time period (with the exception of the last time period, 2017–2020, which only covers 4 years) and overall. The second row shows the total funding awarded in millions of dollars. The next three rows indicate the number of grants, funding, and proportion of the total funding that fall into the Exploration, Development & Innovation, Efficacy, and Replication/Effectiveness categories. The columns depict the proportion of funds distributed in

[4]Many researchers now turn to Investing in Innovation (i3, first established with American Recovery and Reinvestment Act funds in 2009, and now called Education Innovation and Research, or EIR) for scaling studies instead.

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TABLE 4-1 Proportion of Funding by Project Type and Year—NCER

	2002-2006	2007-2011	2012-2016	2017-2020	Overall
Grants	228	443	421	362	1454
Funding (Millions of $)	466.6	952.2	770.9	649.1	2838.9
Project Grants	174	305	256	240	975
Project Funding	269.3	561.1	508.8	458.2	1797.5
% of Total Funding	58%	59%	66%	71%	63%
Exploration	5%	8%	17%	23%	14%
Development & Innovation	35%	37%	24%	18%	28%
Efficacy	34%	28%	35%	43%	35%
Replication/Effectiveness	25%	27%	24%	15%	23%

SOURCE: Klager & Tipton, 2021 [Commissioned Paper]. Data from https://ies.ed.gov/funding/grantsearch/.
NOTE: Total grants includes all grant types, including Research Networks and R&D Centers. Project grants include those awarded in specific goals or project types.

TABLE 4-2 Proportion of Funding by Project Type and Year—NCSER

	2002-2006	2007-2011	2012-2016	2017-2020	Overall
Grants	39	175	144	149	507
Funding (Millions of $)	86.3	337.6	286.8	245.4	956.1
Project Grants	23	135	108	105	371
Project Funding	41.2	248.5	224.1	205.7	719.5
% of Total Funding	48%	74%	78%	84%	75%
Exploration	1%	5%	7%	12%	7%
Development & Innovation	37%	49%	32%	31%	38%
Efficacy	7%	18%	36%	43%	30%
Replication/Effectiveness	56%	28%	25%	14%	25%

SOURCE: Klager & Tipton, 2021 [Commissioned Paper]. Data from https://ies.ed.gov/funding/grantsearch/.
NOTE: This analysis includes all grant types, including Research Networks and R&D Centers.

each time period to each grant category. Going across a row for each grant category shows how the proportion of funding awarded in each category has changed over time.

These tables indicate that over time, IES has focused an increasing proportion of its funding on these four project types—increasing from 57 percent to 71 percent of the total spending in NCER and from 48 percent to 85 percent in NCSER. Much of this increase can be attributed to the implementation of a more standardized goal structure over time. In the first time period (2002–2006), a large portion of the NCER/NCSER spending

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went to studies that were "other goals," "no goals," or some combination of goals (e.g., "development and measurement"); for NCSER this included grants already encumbered by the Office of Special Education Programs. Over time the portion of these funds provided to each of the four project types has shifted. For example, both *Exploration* (5%–23% NCER; 1%–12% NCSER) and *Efficacy* (44%–54% NCER; 49%–56% NCSER) projects have increased in share over time, while *Development* (35%–18% NCER; 37%–31% NCSER) and *Replication/Effectiveness* (from 16%–6% NCER; 14%–2% NCSER) have decreased.

Examining Progression of Projects

The committee began by examining whether and how projects progress through and among the project types. To study this, Klager and Tipton (2021) examined the reporting of "related grants" in IES grant abstracts. For each grant, they examined whether there were later grants (of any type) identified as related that were funded. These results are shown in Table 4-3. Importantly, because these data do not indicate whether the "related" studies are of the exact same intervention or are only loosely related, these analyses may overestimate the amount of progression across projects.[5,6]

The analyses presented in Table 4-3 indicate that within IES-funded studies, interventions are not moving across the project types in a connected way from Exploration to Replication/Effectiveness very often. This lack of connection is most prominent for Exploration grants, of which only 16 percent are connected to at least one later IES-funded study. Given the nature of exploratory work, it might be expected that a smaller percentage of these types of studies would progress. In comparison, 30 percent of Development and Innovation grants are later connected to other grants, including 20 percent associated with Efficacy grants and 4 percent with

[5]There are no public data available that clearly identify progressions across project types by intervention. To approximate this, this table uses public data on "related grants" as a proxy. Parsing "initial efficacy" versus "replication" studies is also not definitive in these data, and instead the latter are identified by use of the word "replication" in the title or abstract. This results in 47 "Initial Efficacy" studies that are "related to" later "Initial Efficacy" studies, but that do not use the word "replication" in the title or abstract. A cursory read of these studies suggests that many are "related" in that they have the same PI or team members.

[6]While it not possible to tell from these data how studies funded by other agencies (e.g., National Institutes of Health [NIH], National Science Foundation [NSF]) might precede or follow IES-funded studies, it is possible to make some inferences regarding how they might connect. For example, we know that NSF EHR also funds development studies, but that they less often fund efficacy or effectiveness studies. Similarly, we know that NIH (and the National Institute of Child Health and Human Development specifically) funds both the development of interventions and efficacy and effectiveness studies; however, these are focused on a small subset of the education space. Thus, it is more likely that development studies funded by these other agencies funnel *into* IES Efficacy studies than the reverse.

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TABLE 4-3 Grants Related to Future Grants by Goal (2002–2017)

Table 7. Grants funded from 2002-2017 that are related to future grants by category

		Related to a future grant in...					
		Exploration	Development & Innovation	Efficacy	Replication / Effectiveness	None in Future	Total Grants
Grants from...	Exploration	**17**	15	5	3	177	211
	Development & Innovation	9	**68**	97	19	339	487
	Efficacy	13	19	**17**	22	184	236
	Replication/Effectiveness	6	16	25	**30**	119	169

Note. Grants included in the "Grants from..." rows were funded bewteen 2002 and 2017. Grants included in the "Related to a future grant in..." were funded between 2002 and 2020.

SOURCE: Klager & Tipton, 2021 [Commissioned Paper]. Data from https://ies.ed.gov/funding/grantsearch/.

NOTE: Relationship determined from language in abstracts of grants. If the originating study resulted in multiple later studies of the same project type, it is only counted once in this table. However, if the originating study resulted in later studies of different project types, it is counted in both; thus the rows do not sum to the "total." The bolded diagonal numbers indicate multiple grants of the same type related to one another. Those above the bolded diagonal numbers indicate goals that progressed forward (e.g., D&I to Efficacy), while those below the diagonal progressed backward (e.g., Efficacy to D&I).

Replication/Effectiveness grants. (Since a grant many be associated with more than one subsequent grant, some of these may be duplicates.) Perhaps surprisingly, only 9 percent of Initial Efficacy studies are associated with later Replication/Effectiveness grants, while 6 percent are associated with additional Efficacy grants, and another 6 percent with new Development and Innovation grants. Notably, most grants are not associated with any future grants at all.

As early as 2013, in collaboration with NSF, IES noted few interventions were moving across these goals in a direct path. As the IES-NSF Common Evidence Guidelines (p. 10) state, "Knowledge development is not linear. The current of understanding does not flow only in one direction (that is, from basic research to studies of effectiveness). Rather, research generates important feedback loops, with each type of research potentially contributing to an evidence base that can inform and provide justification for other types of research."

Later analyses by Albro and Buckley (2015) supported the highly nonlinear and iterative process through which research moved across and within the pipeline. This observation contributed to the decision to change the names from "goals" to "project types" and remove the numbering. The data in Table 4-3 speak to the iterative, nonlinear nature of the development process; for example, many Development and Innovation grants are followed up with new Development and Innovation grants, and Efficacy

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studies are sometimes also followed up with Development and Innovation grants.

Understanding Project Progression

The committee considered several potential reasons for the lack of consistent progression across project types (Farley-Ripple et al., 2018; Farrell & Coburn, 2017; Greenhalgh et al., 2004). The first is the lack of connections between different researchers or research teams. Nearly 84 percent of Exploration grants and 70 percent of Development and Innovation grants are not associated with *any* later grants. Furthermore, only 24 percent of the Development and Innovation grants were associated with later Efficacy, Effectiveness, or Replication grants. While one interpretation of this could be that the interventions explored and developed simply did not achieve desired ends, another possible explanation is a hand-off problem between project types that leaves promising interventions slipping through the cracks.

This hand-off problem is not hard to imagine, given that a given researcher may be more likely to possess skills and interests that fit into one (or maybe two) project types. For example, relative to those at research firms, university researchers are far more likely to be involved in Development and Innovation studies than Efficacy studies (Klager & Tipton, 2021). This makes sense in many regards, given the complexities of running randomized trials in large, sometimes geographically dispersed sets of schools. But unlike other fields, such as the pharmaceutical industry, researchers who undertake Development and those who undertake Efficacy studies are found in disparate organizations, with limited opportunities for natural connection across skills and interests. Thus, it is possible that one reason some interventions do or do not move from Development and Innovation to Efficacy has less to do with promise and more to do with connections researchers do or do not have across skill sets and organizations.

A second potential reason for lack of progression is related to implementation concerns. How an intervention works in a local context is directly related to how well it can be implemented given the culture, constraints, and resources found in its classrooms, teachers, schools, and districts (Century & Cassata, 2016; Bauer et al., 2015). As a result, most interventions are ultimately adapted to local environments, and some of these adaptations are likely better than others. Highly scripted, packaged programs provide a means to control implementation—which is ideal for teasing apart causality—but these can lead to an entire intervention being discarded when it does not fit well into the school environment. This creates an inherent tension between implementation and usefulness. The interventions most implementable with fidelity are heavily scripted and require

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specific supports, yet these requirements may not be feasible or desirable in many school environments (Coburn, 2003).

As a result, implementation plays out differently in Development and Innovation grants versus Efficacy and beyond studies. In Development and Innovation studies, implementation can be more tightly controlled: through the selection of schools and teachers into the study, through the small sample size, and through close monitoring by researchers. This degree of selection and monitoring simply cannot continue, however, as sample sizes grow larger in Efficacy studies. Thus, even though Efficacy studies often seek to focus on "high implementation" conditions, these goals are not always achieved.

A third possible reason for lack of progression relates to heterogeneity. The fact that students are inherently nested in classrooms, schools, and school systems is important since classrooms, teachers, and schools vary considerably in a myriad of ways. These factors include student backgrounds and baseline knowledge, classroom composition, teacher characteristics and behaviors, and school policies, practices, and resources (Weiss, Bloom, & Brock, 2014). Indeed, numerous studies in education research show that teachers' experiences of teaching and students' experiences of learning vary considerably across contexts (Nasir et al., 2016).

Furthermore, studies show that treatment effects can vary across these school and contextual factors (e.g., see Weiss et al., 2017). One of the most obvious sources of variation in effects, both across and within studies, has to do with what practice would have been absent the intervention. That is, the comparison condition ("business as usual") in causal studies is rarely doing nothing; rather, these studies are often teaching the same subjects and skills but using different curricula or approaches. It is easy to see, then, that these business-as-usual practices might vary, and as a result, so do impacts of an intervention.

The committee recognizes that NCER and NCSER have been aware of and actively sought to address many of these concerns. Efforts to respond to these challenges are reflected in additional recommendations included in the RFAs. For example, the RFAs include a list of possibilities that could be included for a "strong proposal" in addition to the primary focus on estimation of the average treatment effect. The 2022 RFA for Education Research Grants, for example, recommends that researchers proposing Efficacy and Replication studies "describe the setting and implementation conditions," assess "fidelity of implementation and comparison group practice," collect implementation outcomes, and describe a plan for examining fidelity of implementation.

Similarly, the RFA *requires* proposals to describe their sample and *recommends* that they define a target population. Proposals are encouraged to develop a plan to represent this target population during recruitment and

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to address concerns with the generalizability of their sample. "[A]lthough not required," the RFA suggests "the analysis of factors that influence the relationship between the intervention and learner outcomes (mediators and moderators)" and notes that when these are included, power analyses for related hypothesis tests should be included.

Regarding the concerns about connecting points between different project types, however, there has been considerably less work. The committee understood that in the original conception of the goal structure, the same researcher or team might develop an intervention over a sequence of studies from Exploration to Effectiveness.[7] In this conception, no connecting points were needed since the same team carried the idea through to completion. Over time, however, it became clear that this model was rarely followed in practice, and that the research process was iterative. But removing the numbering and changing the names did nothing to address this connecting point problem—if different researchers conduct different types of studies, how should interventions be moved along in the system?

Perhaps the closest IES has come to addressing this concern is again through the "dissemination plan" found in the RFA. For example, for Development and Innovation grants, proposals must include dissemination plans that focus on "letting others know about the availability of the new intervention for more rigorous evaluation and further adaptation." This includes activities like journal publications, presentations, and engagement with research networks. Importantly, these activities are focused on individual researchers and their own networks and interests since no repository or database of preliminary findings exists within IES.

CONNECTING RESEARCH AND PRACTICE

The model of education improvement that IES research is built upon assumes that interventions are developed, tested, refined, and tested some more and then ultimately the successful interventions are adopted by school districts, schools, and teachers—thus ultimately improving student learning and reducing disparities at a national scale. Information about successful interventions is made accessible to decision makers through a variety of dissemination activities and especially through the What Works Clearinghouse (WWC), which is housed in the National Center for Educational Evaluation and Regional Assistance. To this end, the WWC developed and maintains a database of intervention effects that can be accessed online, as well as practice guides. The WWC also develops and maintains a Standards Handbook that provides rules regarding different designations that studies

[7]This sentence was modified after release of the report to IES to indicate that this statement is part of the committee's judgment.

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can receive. As a result, most Efficacy, Effectiveness, and Replication grants at NCER and NCSER strive to meet these standards so that their results can ultimately contribute to this knowledge base and make it to schools and decision makers.

A continued question at IES is whether the research produced by IES grants is used in schools and educational contexts for decision making. To date, however, it has been difficult to answer this question since there are little data available to understand the outputs of the IES research system. For example, simple online searches of interventions studied via IES grants often result in project or intervention websites, but without any clear indicator of how often the program is adopted. Research on knowledge mobilization suggests that only 17 percent of school and district leaders report accessing research from the WWC "often" (13%) or "all the time" (4%) (Penuel et al., 2017). Yet at the same time, some individual researchers have made considerable headway in getting their curricula and/or interventions into classrooms.

As noted in Chapter 1, however, there is now a deeper understanding of how educators and education decision makers access and use research evidence to inform practice and policy. These insights suggest that traditional models of dissemination are insufficient for connecting the education policy and practice communities with the evidence produced by research. The complexity of decision making in education raises several possible explanations for why a given intervention may not be identified or adopted by education decision makers even when it is accessible through the WWC.

First, decision makers may be facing problems other than those being addressed by IES-funded educational interventions. Adoption decisions are one of many decisions that educational leaders make, and some research suggests that these decisions are relatively rare (Penuel et al., 2018; Coburn, Toure, & Yamashita, 2009). Put another way, researcher foci and school and district needs may be out of sync. This disconnect could occur because the current project structure does not prioritize understanding and connecting with decision makers regarding their needs and current practice, or because IES's preferred study types and methods are not well suited to investigating the issues that schools and districts are facing. There may be whole classes of interventions or approaches that are not being studied by IES-funded research but that are of interest to education organizations. These might include issues that are difficult to study using randomized controlled trials (e.g., student assignment algorithms, school funding approaches, teacher hiring practices, course de-tracking policies, or meal subsidy policies) or that are not directly focused on student achievement (e.g., approaches to school discipline, social-emotional learning, or school-community collaborations related to health, safety, and wellness).

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A second possible explanation is that even if an intervention or approach addresses a "real" problem faced by teachers, schools, and school districts and is potentially implementable, it may not be available for schools and school districts to use. That is, the intervention may not be marketed and distributed in the same way as commercial curricula, leaving most schools and districts unaware that the intervention even exists. Or it may be that even if marketed and available, it is not packaged and supported in the same way that other curricula and programs are. This suggests that there may be a need for approaches that bring together and incentivize partnerships between researchers, communities, education technology companies, publishers, and nonprofits that focus on selling curricula and professional development to schools. Through these partnerships, researchers can take advantage of the scale and reach of these organizations, thus getting "best practices" out to schools more efficiently.

Third, interventions developed by researchers may not be readily adaptable, implementable, and sustainable in schools and districts: that is, the results are not useful because they are difficult to use. For example, a brief, 9-week science program may be effective and yet, if compared to a full-year science program, may be difficult to implement (since curricula for the remaining weeks of the year then need to be selected, too). Other barriers may arise around training personnel, freeing up staff time from competing demands, or aligning programs to related initiatives.

Furthermore, in many instances, schools and districts may not be interested in packaged programs as much as developing their own, locale-specific programs based upon best practices found in research. This suggests a need also for research evaluating approaches developed by practitioners, strategies for developing locale-specific interventions (e.g., for districts), and identification of core components of interventions.

Again, the concerns the committee raised above are not unfamiliar to IES. Indeed, over time IES has responded to concerns of this type via various revisions to both the WWC and to RFAs and requirements for grants. Perhaps one of the most concerted efforts can be found in the requirements for dissemination plans for Efficacy and Replication grant proposals. The RFA notes that "IES considers all types of findings from these projects be potentially useful to researchers, policymakers, and practitioners…" and that researchers who create interventions "are expected to make these products available for research purposes or … for general use." In practice, these efforts often include workshops or trainings for the districts and schools involved in the study, for other districts or schools, or the development of a website for the intervention. The success of these plans, however, is difficult to monitor since they occur in the last year of the grant funding for a study.

More broadly, though, research shows that dissemination by itself is

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not sufficient for enacting research in practice (Rabin & Brownson, 2012; Greenhalgh et al., 2005). Decision making occurs through relational dynamics within larger systems (Best & Holmes, 2010; Boswell & Smith, 2007), where policy makers engage with multiple actors around multiple forms of knowledge (Farrell & Coburn, 2017; Greenhalgh et al., 2004). Furthermore, packaging, scaling, and marketing interventions are far beyond the skill set of most academic researchers. To have substantive impact, dissemination and engagement activities require time and resources that go beyond what can be conducted in the last year of a grant, as educators also need continued support beyond the adoption decision to train, implement, and adapt new practices within their local contexts (Dearing & Kee, 2012). While the challenges are clear, much remains to be learned about robust strategies for ensuring that findings from education research reverberate in the decisions of educational leaders and practitioners (Conaway, 2021).

This speaks to a need to better understand *knowledge mobilization*, including how schools and decision makers identify problems and develop solutions; which interventions, curricula, and programs are currently used in schools; how to get promising evidence into their hands; how education leaders harness that evidence to guide action; and what conditions support education leaders to use research more centrally and substantively in their decision making (Farley-Ripple et al., 2018). Improving understanding of the processes of knowledge mobilization would help develop better mechanisms for determining what research would be useful for education policy makers and practitioners, as well as identifying strategies for supporting them in using that research when it is available (Jackson, 2021).

A REVISED SCIENTIFIC STRUCTURE IS NEEDED

As the committee showed in the previous section, the existing IES project structure has encountered and addressed a variety of problems over the previous 20 years. These include problems moving interventions from Exploration to Efficacy and from Efficacy to scale and practice. In the face of each of these concerns, IES has reflected on and acknowledged these shortcomings, each time attempting to address concerns with new additions, including new names, new requirements, and new trainings. But at the core, this project structure has remained the same.

This project structure was developed around assumptions that seemed reasonable 20 years ago: that the challenges facing schools could be addressed by developing and testing interventions that could be easily packaged (and thus randomized) and that would uniformly increase student achievement. Twenty years into this science, however, it is clear that this model does not map onto the reality of education science and U.S. schools,

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that changing practice is harder than simply providing evidence, and that changing school environments and reducing inequity is difficult work.

For these reasons, the committee argues that now is the time for IES to rejuvenate and revise its project type structure. Unlike the previous project structure, which followed a pattern that is familiar from other scientific fields such as biomedical research, the new structure is grounded in the specific challenges of education today, and thus is uniquely designed to support a robust and cumulative science of education. To develop this new project structure, we begin with the charge, often repeated in RFAs and reports that the goal of research supported by IES is to determine "what works, *for whom*, and *under what conditions*." This framing puts the users of evidence at the center: the school districts, schools, teachers, and students. This charge is echoed in the mission statement for IES:

> Our 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 [emphasis added].

As we articulated in previous chapters, an overarching goal of this science of education should be to reduce inequities in schooling and society. From the No Child Left Behind Act, to the Every Student Succeeds Act, to President Biden's Executive Order on Racial Equity, a bipartisan sequence of Presidents and other policy makers has placed equity at the heart of the national goals for education. It is time for the research enterprise to do the same (Jackson, 2021; Farrell et al., 2021).

Drawing on both the five themes introduced in Chapter 1, and on the previous analysis of how and why interventions may or may not be progressing through the existing project types, the committee identified a set of framing principles for education research that inform the revised project structure.

1. One of the major purposes of education research is to identify and intervene on inequities in schools and society. This purpose pushes beyond understanding what works simply for the sake of science toward identifying the most promising ways to improve schools. It targets the nation's greatest educational challenge: to eliminate pervasive and persisting disparities among groups such as those defined by race, ethnicity, gender, income, disability, and language minority status, as called for in repeated enactments of the Elementary and Secondary Education Act, the Higher Education Act, the Education Sciences Reform Act, and President Biden's Executive Order.

2. The effects of interventions will vary given the complexities of school contexts, cultures, resources, learners, and existing practices (Bryan, Tipton,

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& Yeager, 2021; Joyce & Cartwright, 2010). Contextual conditions, such as the social, economic, political, and resource structures in which education operates, shape the needs of actors in the education system, the feasibility of implementation, and the effects of interventions. Greater attention to contextual differences is also essential to make progress toward advancing equity through education research. Decision makers are rarely interested in the average impact of an intervention; instead, they want to understand the projected effect in *their* local context, often for a specific student population. This suggests that the primary focus on "the effect" of an intervention—at any stage of research—is likely inappropriate.

3. Interventions will be adapted differently in different environments, thus contributing to the heterogeneity of effects. This implies that it is important to both develop *and* evaluate interventions in the realistic conditions found in schools and school systems. Given concerns with implementation, adaptation is an inherent part of the adoption of new interventions in schools. For this reason, decision makers need information regarding which adaptations are responsive versus unresponsive to local contexts, which barriers and facilitators may affect implementation, and which supports are needed (McLeod et al., 2017; Abry, Hulleman, & Rimm-Kaufman, 2015; Nilsen, 2015; Powell et al., 2015; Waltz et al., 2014; Michie, van Stralen, & West, 2011; Damschroder et al., 2009).

4. Decision makers obtain information on educational interventions from a variety of sources. Decision makers are inundated with potential interventions and professional development services, in addition to frequently adapting and creating their own, and would benefit from guidance on how to efficiently surface and weigh evidence to compare different options. Altogether, this speaks to a need to better understand *knowledge mobilization*, including how schools and decision makers identify problems and develop solutions; which interventions, curricula, and programs are currently used in schools; how to get promising evidence into their hands; how educational leaders harness that evidence to guide action; and what conditions support educational leaders to use research more centrally and substantively in their decision making. Improving understanding of the processes of knowledge mobilization would help develop better mechanisms for determining what research would be useful for education policy makers and practitioners, as well as identifying strategies for supporting them in using that research when it is available.

5. The most promising interventions will not necessarily find their way through the research structure and into educational settings. Infrastructure is needed to both support research (e.g., to disseminate knowledge across project types, to surface promising interventions, to encourage evaluations of these interventions) and to connect researchers with users (e.g., to develop networks, identify knowledge brokers). There are many potential

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forms for this infrastructure, but at the core, they need to be about building systems to integrate research with practice.

Beginning with these principles makes clear that issues of equity, implementation, heterogeneity, and usefulness need to be addressed from the very beginning of the research and development process, not at the end. The research process needs to begin in the field—in schools and other educational settings—and should involve exploring what current constraints, resources, and needs teachers, schools, and school systems face; the range of practices and policies they have already been developing and exploring; and the variety of contexts found in schools nationwide. The development of new interventions, including policies, practices, supports, and organizational approaches, needs to, from the beginning, account for issues of adaptation, implementation, and heterogeneity that arise in this diversity of contexts, when researchers are not nearby. Studies evaluating these interventions need to focus not only on estimating the average effect, but also on understanding variation in effects, and helping to guide decision makers where, under what conditions, and for whom such an intervention may be promising.

Finally, infrastructure is needed that continually synthesizes and updates what is known—for each project type—and uses this infrastructure to connect with and direct research in other project types. Importantly, this means systematic reviews of not only efficacy studies and those that meet WWC standards intended for decision makers, but also of exploration and development studies intended for researchers. This interstitial work might surface, for example, promising interventions that have been developed and that need to be evaluated. This could be the work of IES directly or commissioned to be carried out by others. These syntheses—and the ability to understand gaps—are essential to creating the feedback loops necessary to move the field forward.

In more practical terms, this means revising the underlying project structure. Like the current structure, we envision four project types, each of which can be crossed with a topic area. However, these project types would differ in focus and content from their current versions. Importantly, these changes should not be seen as in opposition to the current structure so much as an outgrowth and evolution of this structure—and of the knowledge we, as a field, have accumulated over the past two decades. The committee notes that these proposed project types would encompass research that currently exists in the IES grant system but would expand beyond and address some of the limitations, thus making space for new research. (A fifth project type, for measurement studies, is discussed in Chapter 6.) These project types pertain to both NCER and NCSER.

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1. Discovery and Needs Assessment

Current: In the original goal structure, the intervention pipeline was assumed to begin in the research "lab." This meant early studies would focus on identifying "malleable factors" associated with educational outcomes (IES RFA, 2019). Many current Exploration studies continue to focus on establishing the relationships between pre-determined "malleable" factors and pre-determined "outcomes." In this way, Exploration studies are often less "exploratory" and more "confirmatory" in nature, focused on determining if theories developed in the laboratory can be confirmed to hold in schools.

Over time, Exploration studies have expanded to include a broader range of study types. As Table 4-4 indicates, more than one-third (35% NCER; 13% NCSER) of these studies have been focused on questions of causality, with some addressed via strong quasi-experimental methods (11%; e.g., regression discontinuity designs) and others using small experiments (22%). Here is it notable that studies focused on causal questions—answered with quasi-experimental methods and secondary data—are considered "exploratory." Calling these exploratory indicates that even findings from high-quality quasi-experiments are not to be taken as serious evidence.

Finally, to date 6 percent (4% NCER; 7% NCSER) of these Exploration studies have been systematic reviews and meta-analyses. In examining the abstracts of these reviews, nearly all of them focus on synthesizing the results of randomized trials and high-quality quasi-experiments. Yet in the current structure, while they summarize a broad base of causal research, the research itself is considered "exploratory."

New: If, as a field, we are to develop and refine interventions that can successfully improve educational outcomes for students, then it is imperative that these interventions consider the diversity of the educational

TABLE 4-4 Current Exploration Study Types

	NCER		NCSER		
	Primary Data	Secondary Data	Primary Data	Secondary Data	Total
(Any) Meta-Analysis	0	12	0	4	16
(Only) Correlational	97	36	21	22	176
(Only) Quasi-experiment	10	19	0	3	32
(Any) Experiment	56	6	4	0	66
Total	163	73	25	29	290

Note. When grants included multiple data sources and/or studies, primary data collection supercedes secondary data collection. Likewise, meta-analysis supercedes experiments which supercede quasi-experiments.

SOURCE: Klager & Tipton, 2021 [Commissioned Paper]. Data from https://ies.ed.gov/funding/grantsearch/.

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contexts found in this nation. For this reason, the committee proposes that schools, districts, and out-of-school learning spaces should actively be the breeding ground of scientific theories themselves. To highlight this anchoring in educational context, we call this new project type *Discovery and Needs Assessment*. These studies would begin in authentic learning environments, with a focus on observing, measuring, and understanding the varieties of practices and processes *on the ground* and determining gaps between "what is" and "what could be."

By emphasizing the need for situating work in authentic school environments, we are also highlighting the need for a broad range of descriptive work that involves primary data collection. Qualitative data might include deep descriptions of processes and problems, identifying the ways in which these processes and problems might contribute to persistent inequality and surfacing potential barriers, facilitators, and implementation strategies. Quantitative data might include descriptive or correlational analysis of surveys of current practices—including curricula used and time allocations—as well as the problems faced by teachers, schools, and school systems. Of course, this is also a place in which new sources of data, such as big data and administrative data, could be examined to better describe educational contexts and trajectories.

The language of *Needs Assessment* makes clear that the factors under study would shift from a primary focus on students to also consider classrooms, teachers, schools, and systems. This means shifting toward landscape analyses and diagnostic work, with the goal of understanding the social, economic, political, and resource structures in which schools operate; current business-as-usual practices; considerations for implementation of new practices; and possibilities and levers available for intervening. Importantly, this also means soliciting and understanding the problems education organizations care about and are searching to solve. This is not to say that this research needs to *only* respond to the immediate, stated concerns of decision makers; certainly science can have a longer and broader vision of what is possible than what is immediate. But without this information—without understanding the needs of the actors involved in the system—moving toward this broader vision is not possible.

This project type would allow IES to continue its current stance to "encourage, support, and prioritize collaboration between researchers and practitioners, but without specifying how that cooperation should be structured" (Schneider, 2020). However, the research literature suggests that research-practice partnerships, which are increasingly found in large school districts across the country as well as many states and regional

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collaborations,[8] would provide an especially hospitable context for discovery and needs assessment research. As Turley and Stevens (2015) explained, by jointly developing a research agenda, researchers are more likely to ask questions whose answers matter to educational decision makers. The partnership also enables researchers to understand the context more deeply, and to interpret their findings in light of local conditions. Meanwhile, educators benefit from the chance to have their questions addressed in the most pertinent context of all, their own district, state, or region. Both needs assessment and discovery of responses to those needs may be enhanced when undertaken in the context of a sustained partnership that embodies trust, a diverse range of expertise, and opportunities for many actors to have a voice in the questions pursued and the interpretation of findings (Farrell et al., 2021).

This new framing of *Discovery and Needs Assessment* studies is responsive to the general mission of IES as laid out in the Education Sciences Reform Act (ESRA), Section 111(b)(1): "to provide national leadership in expanding fundamental knowledge and understanding of education from early childhood through postsecondary study, in order to provide parents, educators, students, researchers, policymakers, and the general public with reliable information" about the condition of education; practices that support access, learning, and achievement; and program effectiveness. By beginning in the field instead of in the laboratory, IES-sponsored research will be better positioned to uncover new knowledge and understanding that responds to the need to improve outcomes and advance equity in U.S. education.

2. Development and Adaptation

Current: In the current project structure, Development and Innovation grants focus on iteratively developing or refining new interventions for use in schools. These studies are encouraged to identify how their innovation differs from current practice, how much such an intervention would cost, and how the sample of schools in which it is piloted represent a (narrow) target population that might use the intervention (IES RFA, 2022). Here we focus on two issues.

Pilot studies often include only a small sample of schools (e.g., less than 10) and involve a high degree of researcher control. This means that the intervention is developed in an optimal condition: that is, one where implementation is highly monitored so that high fidelity is achieved. In the short run, this focus on optimal implementation is ideal, as it allows for

[8]The National Network of Education Research–Practice Partnerships now includes 57 members across the United States; see https://nnerpp.rice.edu/.

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the causal effect to be isolated in the best-case scenario. In the long run, this can be far from optimal, as it means that problems of implementation and adaptation are not discovered until later studies with larger samples (Farley-Ripple et al., 2018; Finnigan & Daly, 2014).

The current project structure also has not sufficiently addressed heterogeneity. Development studies are encouraged to identify a target population that is "narrow," and in practice—given the smaller resources found in these grants relative to Efficacy studies—this can mean a population that is local to the researcher and somewhat homogenous. Again, in the short run, this may be optimal, as reduced variation can improve statistical precision. But this pushes questions of heterogeneity to later studies. To see why, note that "narrow" target populations may not represent well schools elsewhere in terms of resources, practices, organizational conditions, students, or business-as-usual curricula and teaching practices. As a result, the intervention has only been developed and refined in one, particular population, delaying questions of contextual variation and the feasibility and fit elsewhere until later studies.

New: In contrast, we propose that researchers need to—from the outset—consider the types of heterogeneous environments that an intervention may be implemented within and focus on determining barriers and facilitators (Tabak et al., 2012) and effective implementation strategies. We include the word *Adaptation* in the title to clarify that adaptations to local contexts *will* occur and that it is incumbent on researchers to develop their interventions with this in mind. The language of *adaptation* recognizes that by adapting to local conditions, an intervention may be more likely to be adopted, supported, and sustained, thus improving educational outcomes. As Joyce and Cartwright (2020, pp. 1048–1049) explained, research on local conditions that support or impede program success requires information that goes well beyond impact assessment.

The kinds of research that can produce the requisite information, locally or more generally, often in coproduction, require a mix of methods well beyond those listed in current evidence hierarchies. The standard reasons for mixing methods in evidence-based education are to aid implementation (Gorard, See, & Siddiqui, 2017) and to make general effectiveness claims more reliable (Connolly et al., 2017; Bryk, 2015). We, by contrast, encourage mixed methods because reliable and useful effectiveness predictions require a variety of different kinds of information relevant to determining how an intervention will perform in a specific setting that different kinds of research help uncover. These different modes of research allow the development of interventions that not only work in one, narrow population, but that are robust and potentially effective in a broad range of school contexts.

Importantly, while planning for adaptation does require greater heterogeneity in the samples included in pilot studies, it does not necessarily mean

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that larger samples are required. For example, it is possible to include a small sample that is even more heterogeneous than a population simply by carefully and purposively including schools that differ in a myriad of ways during the design process (see Tipton, 2021). Collecting both quantitative and qualitative data would allow information on supports and derailers to be studied, and for the intervention itself to be robustly developed quickly.

By positioning adaptation and heterogeneity as central to the development of interventions, we also highlight the potential for new approaches to intervention development entirely. Often, development is a researcher-led activity, one in which a person from the outside brings in new ideas and approaches. But if the goal is for an intervention to be implementable and adaptable, it may mean that starting with existing practices and programs and refining these to be more evidence based may ultimately be more scalable. This framing, too, allows for consideration of who designs, for what purposes, and how design will take place (Philip et al., 2018; Bang & Vossoughi, 2016).

Finally, taken together, this call for focusing on adaptation and heterogeneity in design has important consequences for the goals and purpose of the pilot study in Development and Adaptation studies. Certainly, this increased variation will make it more difficult to estimate a statistically significant average treatment effect in a pilot study. But many scholars in both medicine and education research have already argued that the focus of pilot studies should *not* be on estimation of the average treatment effect or on testing null hypotheses (e.g., see Westlund & Stuart, 2017). Instead, these studies should be focused on the preparations needed to ensure success in later efficacy studies—and being able to anticipate adaptations across a wide range of contexts is essential to this work. This means that requirements for later efficacy, effectiveness, and replication studies would not be focused primarily on an estimated effect size or hypothesis test, but should consider them in tandem with the logic model for the intervention, proximal measures, and the ability to implement and adapt to a range of contexts.

This new conception of *Development and Adaptation* studies is no less responsive than current practice to ESRA's call for "scientifically valid research activities, including basic and applied research, statistics activities, scientifically valid education evaluation, development, and widespread dissemination" (Section 112(1)). Indeed, if it leads to greater identification of programs and practices that, because they are responsive to real needs and attend to implementation challenges, can actually be implemented and are in fact implemented, the new conception will meet the law's requirements with even greater force than the present system.

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3. Impact and Heterogeneity

Current: In the current goal structure, interventions are tested first in "some" population (often considered "ideal," often "narrow") via an "initial" efficacy study, later in another context (or version of the intervention) via an efficacy "replication" study, and, rarely, in a broad population, via an "effectiveness" replication study. In the best-case scenario, this results in *over a decade* of evaluation before the intervention is considered ready for marketing to schools. By this time, both current practices in schools and the intervention itself may have shifted, making the direct evidence from these studies out of date. And in the interim, the average effect from each of these studies may still be considered evidence for school decision making (e.g., via the WWC), albeit based on evidence from a small fraction of school environments that may not at all represent the schools that might benefit from the intervention.

In the current framework, the focus is on ensuring high internal validity—the ability to detect cause-and-effect relationships—at the expense of external validity. This can be seen in the fact that considerations of heterogeneity and implementation are pushed later and later in the process. Initial efficacy trials are *not required* to focus on either, leaving these for replication grants (efficacy or effectiveness), which are rarely conducted. Studies of existing research practices indicate that the samples included in efficacy studies have not historically represented either national or state populations of schools well and are vastly less heterogeneous than these populations (Tipton, 2021; Tipton, et al., 2021; Stuart et al., 2017). Thus, understanding heterogeneity is saved for replication studies, which are to systematically vary "at least one aspect" of a prior study, in order to determine "the conditions under which [interventions] work and for whom" (IES RFA, 2021). Importantly, these aspects could include the version of the intervention itself (a "conceptual" replication), thus not necessarily addressing the heterogeneity found in business-as-usual conditions across education contexts.

This prioritization of internal validity can also be seen in the predominance of randomized trials in both efficacy and effectiveness studies.[9] The fact that randomization to treatment provides clear identification of a cause-and-effect relationship is not to be disputed. But not all interventions can *feasibly* be randomized, particularly those involving school and system interventions, both because of the large commitment required by schools and budget limitations. Even when randomization is possible, attrition before outcomes are measured, particularly in long-term interventions, can

[9]This section has been modified after release of the report to IES to clarify research design types permitted for Efficacy, Effectiveness, and Replication projects, as well as for Exploration projects.

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undermine the benefits of randomization. Thus, it is not surprising that the interventions studied via Initial Efficacy and Replication studies largely focus on student-level interventions, while teacher, school, and system interventions are largely found in quasi-experiments.

Finally, while IES focuses strongly on internal validity, new research suggests that policy makers appear mainly concerned with external validity when accessing and using research. This point is driven home by a recent experimental study that found that while policy makers do not exhibit a preference for experimental over observational findings, they are more likely to be drawn to evidence from larger studies and from contexts like their own than to smaller studies and contexts that differ from their own settings (Nakajima, 2021). Likewise, a recent national survey of education leaders found that when asked to identify specific examples of research that informed their practice, respondents most commonly pointed to books covering broad topics, and they rarely identified research studies that would meet the top tier of evidence in the Every Student Succeeds Act (Farrell, Penuel, & Davidson, 2022). These studies point to a disconnect between the priorities of researchers and decision makers when considering what makes evidence useful for practice.

New: In contrast, we call for combining all studies focused on determining causal effects of interventions into a single project type referred to as *Impact and Heterogeneity* studies. This includes quasi-experimental studies (currently most commonly funded via *Exploration* studies), as well as all types of efficacy and effectiveness studies. Combining these type of studies under a single project highlights that the question and purpose is the same in each—to estimate causal effects—while allowing variation in the approaches used depending upon the population, context, and intervention. Furthermore, a single project type for causal questions, which includes both efficacy and effectiveness studies and addresses heterogeneity as well as the average impact, will elevate matters of external validity to be considered on par with the matters of internal validity.

The inclusion of quasi-experiments in this category is of particular importance, as some interventions may simply not be able to be studied using randomized trials. For example, we know that it is difficult to recruit schools into trials, in general, and particularly in trials with intensive interventions. Interventions focused on changing school policies, leadership, and structures may be particularly difficult to randomize. This means that focusing only on the inclusion of randomized trials as "evidence" of a causal impact severely narrows the types of interventions that can be studied and evaluated. Here, we are calling to elevate the ability to use high-quality quasi-experimental designs when conducting a randomized trial would be infeasible. High-quality quasi-experimental designs might include regression discontinuity, instrumental variables, (comparative) difference-in-difference,

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and propensity score methods. (Importantly, studies of this type would not be possible without the methodological developments for quasi-experiments funded by IES Statistical and Research Methods grants over the past two decades.) By elevating these methodologies, the focus becomes clearly on determining the best evidence for the interventions that schools need, instead of on finding interventions that fit the best methods of evidence.

Within randomized trials, combining efficacy and effectiveness studies into a single project type also removes what can be arbitrary distinctions between the two. In medicine, it has long been noted, for example, that very few studies are fully either efficacy or effectiveness trials, with most operating on a continuum between these (e.g., the PRECIS-2 tool; see Loudon et al., 2017). Our assessment as a committee is that in education, it is hard if not impossible to fully "control" the school environment in ways that are typical in efficacy trials in medicine. For example, in education, the comparison condition is very often a business-as-usual condition (effectiveness language) instead of a researcher-determined comparison (efficacy language). Similarly, even when the intervention is highly scripted, it is often very difficult to highly control how it is both delivered and how well its implementation matches what is intended (efficacy language); instead, very often the intervention is adapted to local conditions (effectiveness language). Similarly, the line between a "conceptual replication" study—in which an intervention that exists is changed systematically in some way—and a new "efficacy" study—based on a "new" intervention—can also be an arbitrary distinction. The point here is that this is not an either-or, that most studies fall on the spectrum of efficacy-effectiveness, and that the current language reifies a distinction that is often false.

Furthermore, combining Initial Efficacy and Replication studies (of both types) into a single project type makes clear that heterogeneity and implementation should be front and center in *any* impact analysis (Bryan, Tipton, & Yeager, 2021). For some interventions, this may mean condensing what would have been several studies—Initial efficacy, Efficacy replication, another Efficacy replication, and perhaps others—into a single large study focused on testing theories about the mechanism of the intervention (via moderator and mediation analyses), questions of impact variation, and questions about the local conditions under which the intervention may be effective. Certainly, a study of this type would be more expensive (and require more schools) than a single efficacy trial. Yet, it may be *less* expensive (and require fewer schools) when compared to the multiple trials necessary to produce this evidence in the current approach.

For other interventions, this may mean that a series of smaller studies, closer to the prototypical "efficacy" study, may be necessary. For example, this may be the case for a high-dosage, focused intervention funded by NCSER. The distinction is that while the studies may be conducted sequentially,

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the planning of the studies would need to consider the broader set of studies and what the contribution of a particular study is to answer theoretical questions about mechanism and heterogeneity. Instead of a wait-and-see approach, researchers would design a series of studies (what may currently be considered replication studies) in advance, to develop what might be called a "prospective meta-analysis" and to argue clearly for how these studies in combination will answer the questions posed.

Taken together, this combination of experimental and quasi-experimental, efficacy and effectiveness studies into a single project type means that decisions regarding the methods, scale, and purpose of the study would need to be aligned clearly with the intervention proposed, the population in need, and the state of knowledge in the field. With these considerations in mind, a study would need to articulate *why this research design* is the best possible design for the intervention studied. It may be, for example, that for a structural intervention affecting school district organization—in a literature in which there are no previous causal studies—a well-done quasi-experimental design would provide the best evidence possible at this time. At the same time, arguing for this design in a study focused on a student-level intervention in which there are several previous studies using randomized designs may be much harder. Again, this framing allows researchers to center the needs of schools and gaps in the research base, instead of the choice of study design.

Finally, we note that this new conception of *Impact and Heterogeneity* is grounded in IES's longstanding commitment to assessing causal impact using designs that warrant such inferences. As stated in ESRA Section 102(19)(D), a "scientifically valid education evaluation" is one that "employs experimental designs using random assignment, *when feasible*, and other research methodologies that allow for the *strongest possible* causal inferences when random assignment is not feasible [emphasis added]." The revision we are recommending fulfills ESRA's promise to ensure that education research meets the standards of science, but with sufficient nuance to be implemented in real schools in a timely way.

4. Knowledge Mobilization

Current: The current project structure is built upon the assumption that decision makers will act upon evidence once it is available. In fact, very few school and district leaders regularly consult the WWC as a way to learn about research (Penuel et al., 2016). More generally, education leaders do not regularly incorporate examination of research findings in an instrumental way when making decisions about programs or policies (Finnigan & Daly, 2014; Coburn, Honig, & Stein, 2009). In recent years, IES has increased requirements for dissemination from grants. These dissemina-

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tion plans focus on increasing and diversifying the number of *outputs* that researchers produce; for example, this might include publishing in both scholarly journals and practitioner journals. These dissemination plans also encourage researchers to make their intervention available (e.g., via websites) and to provide findings to the schools involved in the research. Based on available research, however, these specific dissemination plans, however well intended, are unlikely to greatly influence education decision makers at the early childhood, K–12, and postsecondary levels, because reporting research evidence, even when it is timely, relevant, and accessible, does not necessarily lead to the use of evidence (Finnigan & Daly, 2014).

While IES's operating assumption is that educational leaders need high-quality evidence about interventions, research shows that educational leaders and practitioners in fact face a glut of information of varying quality (e.g., Tseng, 2012; Honig & Coburn, 2008). It is not clear how decision makers weigh the evidence produced by IES-funded research versus other sources, including research that is less rigorous. This suggests that the problem is not simply one of providing evidence to those in need. Instead, it is about understanding how school and district leaders are making decisions about improving student outcomes, how research makes its way into these deliberations, and the conditions and supports that enable them to use this research evidence in productive ways. Conceiving of the problem of evidence use in this way makes it clear that the same sorts of questions that IES fosters about evidence *production* also warrant asking about evidence *use*.

Further, even if education decision makers consult research to adopt interventions, implementation requires practitioners to integrate and adapt the interventions in a new setting (Joyce & Cartwright, 2020; Nilsen, 2015; Dearing & Kee, 2012; Rabin et al., 2012; Greenhalgh et al., 2005). That adaptation process may then result in practices that no longer align to the original evidence (e.g., Cohen, 1990). Conversely, studying interventions developed in practice may enable more systematic spread of success (LeMahieu et al., 2017; Spreitzer & Sonenshein, 2004). For these reasons, we propose that strategies to mobilize knowledge be studied directly, not merely as another stage of the project to implement the findings in practice, but rather as a research enterprise in itself.

New: We propose a new project type focused on *Knowledge Mobilization*. We propose the term "knowledge mobilization" rather than "knowledge utilization" or "research evidence use" because we incorporate into this project type the organization and synthesis of bodies of evidence as well as improvement of the use of research evidence in real-world settings. This project type would encompass a range of activities and would, in many ways, serve as the central engine of the research infrastructure.

These projects would focus on studies of the conditions that foster research use in a range of contexts from early childhood to postsecond-

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ary, synthesizing bodies of evidence to arrive at generalizable conclusions (about *"what works, for whom, and under what conditions"*), developing and testing robust strategies to foster the use of research in varied contexts, and studies to support the development of robust measures of research use. As Conaway (2021) argued,

> In its role as a funder of basic research, IES should prioritize research on research use itself. We need to know how to measure research use, because if we can't measure it, then we can't tell if it's happening, let alone increasing. We need to know more about the conditions, mechanisms, and strategies for increasing research use, so that we can understand when, how, and why it works best. And we need to better understand the role of boundary-spanners—people who sit between researchers and practitioners and enable them to work effectively together.[10]

Consistent with the view that evidence use demands the same type of attention as that given to evidence production, we propose that projects of this type might include descriptive, synthesis, intervention, or measurement focus, which we describe below. Given this range of possible study foci, the committee deliberated on whether it would be more appropriate for Knowledge Mobilization to be a topic or a project type. We ultimately decided that by positioning Knowledge Mobilization as a project type, we emphasize that *the entire field of education research* needs to develop and study the success of these strategies to integrate research with practice. Establishing Knowledge Mobilization as a project type that cuts across multiple topics, rather than as a standalone topic, also recognizes that due to heterogeneity in populations, interventions, implementation, adaptation, and contexts, *successful mobilization strategies likely differ by topic*. They vary not just by domain (e.g., language and literacy, math, socioemotional learning, or technology use), but also by sector (e.g., early childhood, postsecondary education, or special education), given different structures, accountability requirements, staffing pipelines, family partnership roles, and cultural norms. Thus, by designating it as a project type, the responsibility for understanding how to mobilize knowledge lies *within* existing topic areas (e.g., literacy), not as a separate body of research that can be ignored.

4a. Descriptive studies on Knowledge Mobilization would include research on the ways that system leaders draw on (or do not use) research evidence in their ongoing decision making, including but not limited to the factors influencing development, adoption, and adaptation of policies and practices. Other studies might examine the organizational, social, and political conditions that enhance or inhibit research engagement in school

[10]For a discussion of these and other terms for evidence use, see Nelson and Campbell (2019).

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systems, including how existing power structures maintain and reproduce inequities in knowledge use. Yet others might explore how publishers update materials when new research emerges, how education technology companies incorporate current research, how the media portray and report on research, and the networks via which educational decision makers share knowledge. Some studies of this type might focus on the broader research enterprise, including whose knowledge is valued, who gets to decide on the implications of knowledge, and who is benefited or harmed by the production or use of that knowledge.

Another critical set of questions could explore circumstances leading to inequitable or harmful consequences of knowledge mobilization, particularly research which devalues lived experience or perpetuates deficit narratives (Chicago Beyond, 2019; Doucet, 2019; Kirkland, 2019; Tuck & Yang, 2014). Importantly, these studies would need to identify ways in which the system could be changed or intervened upon to increase productive and equitable research use. Finally, because studies of the social, political, and organizational conditions that foster decision making have largely been done in the context of K–12 education and, more specifically in K–12 general education, descriptive studies are needed that focus on early childhood settings, postsecondary, and special education at every level for the birth–grade 16 system.

4b. Synthesis studies would take stock of both current practices in schools as well as interventions studied to date, indicating *across* interventions the types of program features that are effective and which are not. At the same time, and just as importantly, these syntheses would identify gaps in the evidence base—places where decision makers need evidence and where such evidence does not yet exist. In this way, these syntheses would both provide evidence (ultimately to be "mobilized") for schools and decision makers *and* for the research community regarding priorities for the future.

This information for the research community could also include interstitial work between project areas, helping summarize and disseminate important research regarding current practices and contexts in schools (to those that develop interventions), and locating and elevating promising new interventions (to those that conduct impact studies). Notably, this would mean moving meta-analyses from Exploration studies (current) to Knowledge Mobilization (new).

4c. Intervention studies in Knowledge Mobilization would focus on the development and evaluation of strategies for mobilizing knowledge; developing and investigating tools to support incorporating evidence in decision making; partnerships between intervention developers and vendors; and partnerships between researchers and practitioners. Indeed, more research on the effectiveness of research-practice partnerships is needed to

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contribute to improved understanding about whether and how these structures for connecting research and practice not only provide a context for the emergence of trusting relationships, but also affect decisions made by educational leaders and outcomes for students (Penuel et al., 2020; Schneider, 2020). However, interventions should not only target the instrumental use that IES has long prized: that is, situations where research is applied to inform a specific decision, usually after weighing the relative costs and benefits of various options (Weiss & Bucuvalas, 1980). In light of research that suggests the power and importance of conceptual use in educational decision making at the K–12 and postsecondary level (Penuel et al., 2017; Finnigan & Daly, 2014; Farley-Ripple, 2012)—that is, situations where individuals change how they view a problem or possible solutions via engagement with research, often outside of a specific decision—interventions designed to foster such use should also be a priority. Finally, intervention research should be especially attentive to fostering knowledge mobilization strategies that are most likely to address structural and systemic inequality, as there is a long and unfortunate history of research reinforcing rather than interrupting inequality (Kirkland, 2019; Saini, 2019).

Intervention studies related to knowledge mobilization should be rooted in existing research on the nature of decision making in specific contexts, such as those discussed above. Specific knowledge mobilization strategies may differ in the way they affect the production as well as the use of evidence. For example, community-engaged scholarship may strengthen the relevance and rigor of the research produced, through refining the questions and methods to better fit the local context (Balazs & Morello-Frosch, 2013). In contrast, intermediaries and networks may be especially valuable for facilitating conceptual research use, through increasing connections to research knowledge and enabling dialogue with trusted colleagues about implications (Penuel et al., 2020; Neal et al., 2015; Finnigan & Daly, 2014). Understanding these distinct mechanisms and outcomes could help elucidate how best to mobilize knowledge across research and practice.

4d. Measurement studies would also be necessary to develop valid and reliable measures of knowledge mobilization. Gitomer and Crouse (2019) provide a reference guide to such measurement work, and Penuel and colleagues (2016) provide an example from IES-funded research. In developing these measures, it will be important to attend to the variety of ways in which research evidence may be used. Measuring conceptual use of research is notoriously difficult and thus should be a priority for measurement studies. Likewise, developing reliable measures of research use and the varied contributions of multiple stakeholders to the generation, use, and impact of high-quality research will help the field build a common understanding of success.

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Finally, we note that ESRA specifically charges IES with disseminating its work "in forms that are understandable, easily accessible, and usable, or adaptable for use in the improvement of educational practice by teachers, administrators, librarians, other practitioners, researchers, parents, policymakers, and the public…" (Section 102(10)). ESRA also asks, as part of the mission of the Research Center, for IES to "support the synthesis, and as appropriate, the integration of education research" (Section 131(b)(1)(D)) and to "synthesize and disseminate, through the National Center for Education Evaluation and Regional Assistance, the findings and results of education research conducted or supported by the Research Center" (Section 133(a)(7)). A project type for Knowledge Mobilization would be newly responsive to these elements of the IES mandate.

CONCLUSION

Throughout this chapter, we have argued that it is time for a structure of science that embraces and builds upon the past 20 years of knowledge generated by IES. We have focused here on project types both since they structure the types of studies that can be funded by the agency and since they serve a normative role, identifying clearly to the field what "IES research" is about. We have argued that this new system needs to be focused around the end goal—to improve student outcomes and reduce disparities—and around the decision makers who ultimately mediate this process. This new system needs to be built upon five principles: equity, heterogeneity, implementation, usefulness, and infrastructure. These principles result in four new project types that are uniquely suited to the science of education: Discovery and Needs Assessment, Development and Adaptation, Impact and Heterogeneity, and Knowledge Mobilization. In sum, the committee recommends:

RECOMMENDATION 4.1:
IES should adopt new categories for types of research that will be more responsive to the needs, structures, resources, and constraints found in education. The revised types of research should include

- **Discovery and Needs Assessment**
- **Development and Adaptation**
- **Impact and Heterogeneity**
- **Knowledge Mobilization**
- **Measurement**

The committee envisions a model of research that would have multiple parts working simultaneously for educational change. Since this new structure assumes that different researchers will play different roles, focusing

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on different types of studies, this system cannot depend upon individual researchers to move interventions along the research-to-practice process. For this reason, Knowledge Mobilization sits at the center, serving as the engine of this structure. These studies fit at the interstitial spaces, connecting research of one type with researchers focused on another, researchers with practitioners, and synthesizing and integrating knowledge (see Figure 4-1). Each of the other three project types interface both with one another and with this central engine.

The committee expects that this revised project structure will facilitate research that will be more useful and better used in practice. First, shining an equity lens across the entire research portfolio demands a broader examination of systems and practices, as well as a deeper analysis of the mechanisms by which inequities emerge and persist. Elevating the use of descriptive and quasi-experimental methods enables unraveling the many contextual factors and systemic processes that perpetuate or disrupt inequitable opportunities. Second, the need to anticipate and examine heterogeneity requires prioritizing these important questions immediately, facilitating faster discovery of and response to the many differences which exist across populations and contexts. Third, planning for implementation from the beginning requires researchers to ensure that their proposed strategies and interventions are usable, emphasizing the need to study phenomena in real-life settings, not just in the laboratory, and to study adaptations throughout the process. Finally, more fluid movement and more rapid iteration across project types accelerates the production of useful and actionable research, not just theoretically interesting findings that await further study before yielding relevant implications. With these changes, research will be better



FIGURE 4-1 New project types in collaboration.

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positioned to address urgent questions for policy and practice through providing more useful knowledge. We provide an overview of this new structure in Table 4-5, describing the possible questions that might emerge when examining crosscutting themes (heterogeneity, implementation, and equity) within each of our proposed project types.

Connecting all of these parts is the new project type of Knowledge Mobilization, which highlights the need to systematically study and improve both research usefulness and research use. Such inquiry may unearth processes of knowledge exchange that would enable researchers to develop a richer understanding of the kinds of research that would be useful for educational practice. Further, knowledge mobilization explicitly studies the conditions and processes that promote more systematic, sustained, and reliable use of research. Positioning knowledge mobilization in the center of the engine creates greater opportunities for sharing and applying knowledge across all stages of the research enterprise. Embedding these revised expectations within IES's RFAs would direct the education research community to prioritize these needs in how they conceptualize and conduct research.

Reorganizing project types in the way we have described will allow IES to fund research that more closely addresses the needs of the field. In the following chapter, we turn to a discussion of topic areas, and offer insight into how IES might continue this reorganization toward better meeting its stated goals.

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TABLE 4-5 Proposed Project Type Structure and Crosscutting Themes

Project Type	Equity	Heterogeneity	Implementation
1. Discovery and Needs Assessment	Not sufficient merely to characterize inequitable outcomes. Explore systems, inputs, and practices that create, reproduce, or interrupt inequity. Examine assets, not just deficits. Identify possible levers of change. May need smaller samples or oversampling to represent minoritized populations. Need methods to explore and explain mechanisms.	Examine diverse school contexts, seeking to understand variation in business-as-usual practices and the ability to intervene across school structures and cultures. Build theoretical explanations of how heterogeneity affects practices and outcomes.	Apply appropriate models, theories, or frameworks to examine how characteristics of the individuals, the intervention, and the context affect implementation. Examine influences across multiple levels of system. Identify barriers and facilitators to implementation, as well as potentially promising strategies.
2. Development and Adaptation	Build on assets within populations and communities of interest to develop strategies aligned to local context. Develop solutions to improve structures and processes enacted by adults in the system, not to "fix" the students. Address systemic barriers and upstream causes of inequities. Create high-leverage, multicomponent strategies to address inequities within and across schools.	Develop interventions in a wide range of purposively selected contexts, so as to develop a robust intervention (or clearly delineate under what conditions it should or should not be selected).	Design, develop, and iterate on potential interventions and implementation strategies together. Identify core components of intervention; explore likely adaptations. Develop implementation strategies that preserve core components and allow for productive adaptations. Develop strategies that build on supports and address derailers.

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3. Impact and Heterogeneity	Define success not just as overall improvements, but as a decrease in equity gaps. Be driven by the potential for impact, not the ability to conduct a randomized controlled trial. In some situations, the best design may be a quasi-experimental design (QED). Report continuous measures of effects in order to capture variation and reveal potentially promising interventions. Report effects for focal populations of interest. Attend closely to inclusion, exclusion, and attrition.	Test interventions in heterogeneous and generalizable samples across a diverse range of contexts representing the groups and places of interest. Examine differential effects by setting and population. Estimate not only an average treatment effect, but also provide information necessary for local predictions.	Encourage hybrid evaluation designs which examine effectiveness of the intervention along with the implementation strategy. Account for effects due to differences in implementation. Analyze effects relative to implementation costs. Characterize benefits and harms of alternatives.
4. Knowledge Mobilization	Focus on supporting knowledge production and use in systems and schools facing large inequities. Attend to inequities in whose knowledge is valued, who gets to decide on the implications of the knowledge, who takes action on that knowledge, and who is benefited or harmed by the production or use of that knowledge. Examine how existing power structures maintain and reproduce inequities in knowledge production and use.	Explore and integrate knowledge across interventions (systematic reviews), accounting for different designs, populations, interventions, and measures. Develop and test approaches to improve knowledge production and use in diverse settings. Tailor strategies to individuals with different roles and backgrounds; adapt strategies to different topics and contexts. Investigate existing pathways of knowledge mobilization.	Articulate how knowledge flows across different roles, levels, offices, and sites in the system. Examine and compare different processes for cultivating and sharing knowledge about implementation. Develop and test strategies for addressing barriers and facilitators and for supporting productive adaptation. Investigate best practices for implementation and adaptation. Examine how structures and systems contribute to sustainment, spread, and scale of successful implementation.

continued

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TABLE 4-5 Continued

Project Type	Equity	Heterogeneity	Implementation
5. Measurement	Explore and develop measures of equity beyond achievement tests. Develop valid measures of inequities (gaps and variation). Develop measures of educational opportunity. Refine system-level measures of diversity and heterogeneity (e.g., student and staff composition, resource allocation).	Be validated in generalizable and heterogeneous samples.	Ensure measures can be implemented in a broad range of contexts. Develop common measures for core components of interventions. Develop measures to assess intervention fidelity, adaptation, and enhancement. Develop measures of implementation strategies, implementation outcomes, and service delivery outcomes. Develop measures of partnership, engagement, and collaboration.
Methods (Stand Alone Panel)	Develop standards and methods for QEDs that can be useful when studying structural interventions. Develop methods for evaluating interventions on rare subgroups. Refine methods for examining structural inequities and intersectionality by race, gender, language background, socioeconomic class, and ability status.	Develop methods for understanding treatment effect heterogeneity, moderators of effects, and local predictions. Develop approaches that focus on a "total error" framework beyond internal validity.	Explore designs that allow for identifying and testing implementation strategies, including SMART, single case, factorial, hybrid, stepped-wedge, and other designs. Refine methods for specifying implementation strategies, studying causal mechanisms of change, and evaluating implementation in education.

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5

Research Topics for NCER and NCSER Grants

The first charge of this committee was to identify critical problems or issues on which new research is needed. We began our response to this charge in Chapter 4 with a discussion of project types (or goals) of studies supported by the Institute of Education Sciences (IES). In this chapter we continue our response to the first charge by considering the other axis of the IES "matrix," asking what new topics should be addressed by IES-funded research. To inform this question, we heard testimony from a variety of education researchers, practitioners, and other stakeholders across the landscape. We examined data on investments by the National Center for Education Research (NCER) and National Center for Special Education Research (NCSER) in research across topics over time. We also drew on the committee's diverse and extensive expertise. However, when sitting down to identify new topics for NCER and NCSER to invest in, the committee struggled to identify a clear set of issues that were not already technically "fundable" in IES's current structure and organization. At almost every suggestion, the committee found a place in the topic structure where a hypothetical study *could technically* fit. And yet, it is undeniable that IES has accumulated research evidence in some areas far more than in others.

In this chapter, we describe the nature of this challenge. We begin with an overview of how NCER and NCSER use topics to organize their funding opportunities. We then outline barriers within the existing topic structure that prioritize some forms of research at the expense of others. Next, we provide considerations for how NCER and NCSER might develop a mechanism for revisiting these issues in the future to ensure that the development

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The Future of Education Research at IES: Advancing an Equity-Oriented Science

of research is dynamic, cumulative, and responsive to changing times. We conclude the chapter by identifying a small set of topics that are of critical, immediate importance.

OVERVIEW OF TOPICS

NCER and NCSER use topic areas to communicate research needs and to help manage applications that come in through their grant competitions (see, for example, p. 2 of the FY2021 NCER Education Research Grants request for applications [RFA] and p. 9 of the FY2021 NCSER Special Education Research Grants RFA for a discussion of how they use research topics). Additionally, topic areas allow the research centers to distribute applications across program officers to provide targeted feedback throughout the application process and to efficiently assign applications to peer reviewers with the appropriate expertise.

In FY2021, there were 11 topics supported by NCER and 9 supported by NCSER (see Table 5-1 for the list of topics).

Across all topics in the Education Research and Special Education Research Grants competitions, applicants are invited to submit proposals to any of IES's five project types: Exploration, Development and Innovation, Initial Efficacy and Follow-up, Replication/Effectiveness,[1] and Measurement. (See Chapter 4 for our proposed revision to these project types.) Jointly, the intersection of types and topics forms a kind of matrix which serves as an organizational framework for the Education Research Grants and the Special Education Research Grants competitions (Schneider, 2021).[2]

In theory, grouping research into these topics allows NCER and NCSER to be responsive to changes in the field: they can take stock of what has been learned and diagnose where further research is necessary. The committee saw evidence of this in practice. NCER and NCSER routinely add or remove topics based on emerging or changing needs. In FY2021, NCER added a new standing topic focused on *Civics Education and Social Studies*, which had previously been competed as a special topic in FY2019 and FY2020. NCER and NCSER also removed *Education Technology* and *Technology for Special Education* as standalone topics, with the rationale that education technology plays a central role across *all* topic areas. NCER and NCSER have also at times changed the names of topics to reflect

[1] For consistency, we include (4) "replication" here, as this is how it has been discussed in Chapter 4. However, more accurately, this project type does not exist in the most recent RFA. Instead, replication studies have a separate RFA altogether.

[2] Other research grant competitions supported by NCER and NCSER do not rely on this matrix structure.

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TABLE 5-1 FY2021 NCER and NCSER Topics

NCER	NCSER
Cognition and Student Learning	Cognition and Student Learning
Literacy	Reading, Writing, and Language
Science, Technology, Engineering, and Mathematics (STEM) Education	Science, Technology, Engineering, and Mathematics (STEM)
Civics Education and Social Studies	
Social and Behavioral Context for Academic Learning	Social, Emotional, and Behavioral Competence
English Learners	
Early Learning Programs and Policies	Early Intervention and Early Learning
Career and Technical Education	Transition to Postsecondary Education, Career, and/or Independent Living
Postsecondary and Adult Education	
	Families of Children with Disabilities
Effective Instruction	Educators and School-Based Service Providers
Improving Education Systems	Systems, Policy, and Finance

SOURCE: Committee generated; adapted from Request for Applications (IES, 2021).

changes in conventions in the field or to signal to a broader set of scholars that their research is welcome within a given topic area.

NCER and NCSER also use their annual RFAs as a way to provide broad descriptions of its topics and to indicate areas of "Needed Research." For example, in the FY2021 NCER RFA, the *Cognition and Student Learning* topic highlighted the need for "Exploratory research to guide the development and testing of education technology products that can personalize instruction." One tension the research centers face in providing such descriptions is that investigators who do not see their research interests explicitly named in the topic description may choose to modify the goals of their work. Or worse, they may choose to forego applying to IES entirely. As a result, NCSER has in recent years aimed to broaden the kinds of research it supports by removing language that specifies needed research.[3]

Finally, in addition to their lists of standing topics, NCER and NCSER also include special topics within the Education Research Grants and Special Education Research Grants competitions to respond to pressing issues in the field, or to jumpstart research in areas that have not received

[3]This sentence was modified after release of the report to IES to correct information about the actions that NCSER has taken to broaden the kinds of research it supports.

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adequate attention. For example, in FY2019, NCSER opened a special topic focused on *Career and Technical Education for Students with Disabilities* that continued into FY2020. In FY2020, it included a special topic on *English Learners with Disabilities*. These special topics, in theory, allow the research centers to adapt to the changing landscape.

THE CHALLENGE OF TOPICS

Overall, the committee agreed that IES's matrix of possible research areas, organized by topics and project types, corresponded well to the broad network of educational research (again, see our proposal for a revised set of project types in Chapter 4). The challenge for the field is how research has accumulated across this matrix. Some of this is to be expected: Knowledge will naturally accumulate at varying rates across IES's project types and topics. For a field as diverse as education, it is understandable that researchers would gravitate toward certain programs of research. But in its review of which topics actually receive funding, the committee noted that, in reality, a series of barriers exist both internal and external to IES that hamper the potential for funding for a set of critically important topics.

Our committee's key takeaway is that the challenge of topics is situated not within the topics themselves. The current set of topics do a good job representing the field. Instead, the committee determined, the challenge lies in how these topics intersect with the present project type structure. Under the existing structure, studies designed toward certain project types lend themselves to demonstrating rigor as described and prioritized by IES (see Chapter 2). In practice, this means that topic areas that can be more readily studied with these methods (i.e., large samples, randomized interventions) are more competitive with reviewers. Further, NCER and NCSER's focus on student outcomes means that studies that would focus on other outcomes in the system are less likely to receive funding. If investigators focused on outcomes other than those at the level of students are to make their proposals competitive, it means they likely have to change their research questions to focus on students and/or divert project resources to ensure they are meeting IES requirements. The committee's concern is not that measuring other outcomes is discouraged, but that the requirement to measure students' academic outcomes takes the focus away from outcomes at other levels, especially for system-level studies.[4]

[4]In their analysis of public data on NCER- and NCSER-funded projects, Klager and Tipton (2021) reported that in Development and Innovation, Efficacy, Effectiveness, and Replication studies, 71% of NCER-funded and 72% of NCSER-funded studies focused on student factors as malleable conditions, whereas only 18% of NCER-funded and 20% of NCSER-funded studies focused on teachers and even fewer on classroom, school, or system factors (12% NCER, 8% NCSER).

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The Case of Teacher Education

To illustrate this challenge, we use the example of research on teacher education—although we acknowledge that the challenges described can easily be applied to many other areas, a point we return to later in this chapter. There are many reasons IES might want to invest in research on teacher education. There is widespread evidence that teachers play a critical role in improving student outcomes (e.g., Hanushek & Rivkin, 2006), so initial preparation could serve as a key learning opportunity for future educators (e.g., Theobald et al., 2021; Brownell et al., 2019; Ronfeldt et al., 2018). Further, for an organization such as IES, teacher education could play a complementary role to its existing program of research, ensuring, for example, that future educators are equipped with knowledge on effective academic and behavioral interventions for students. Finally, the field of teacher education would benefit a great deal from the investment. Teacher education remains highly localized, with little consistency in how teachers are prepared across programs (CRMSE, 2010; Wilson, Floden, & Ferrini-Mundy, 2001). And causal evidence in teacher education is exceedingly rare (Hill, Mancenido, & Loeb, 2020).

Yet, across 20 years, NCER and NCSER have funded only a handful of studies explicitly focused on teacher education. This is an area of research where there is a clear need, where the challenges have been longstanding, and where the research centers have simply not made much headway. The topic structure does not seem to be the source of the problem. NCER has always maintained a topic focused on *Effective Teaching* (previously known as *Effective Instruction*), and the studies on teacher education that have been funded have most commonly fallen under this topic (e.g., Grant #R305M060065 (2006), #R305A180023 (2018)). Grantees have also found a home for teacher education research under *Systems, Finance and Policy* (#R324A170016), and *Researcher-Practitioner Partnerships* (#R305H170025), among others. In recent RFAs, NCSER has even expressly called for a concerted focus on teacher education research.

So, while the current topic structure looks as though it *could* fund this work, in practice, teacher education research has largely gone unfunded. The challenge, it seems, relates to the project type structure employed by NCER and NCSER as well as their study requirements. Notably, we could find no teacher education projects that have been funded under the Initial Efficacy and Follow-Up project type (nor the Measurement project type for that matter). All of this work has been either Exploratory or Development studies. The lack of efficacy trials in teacher education may reflect the challenge in applying research designs developed for other contexts (such as K–12 settings) in preservice teaching programs. Efficacy or Effectiveness studies would require a sufficient number of students within a teacher edu-

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cation program as well as a sufficient number of programs. Such cross-site coordination rarely occurs. Nor has teacher education research exhibited substantial progress in methodological development (Hill et al., 2020).

A second challenge is the NCER and NCSER requirement that funded studies focus on and include measures of student outcomes. Researchers who study teacher education face problematic constraints in tailoring their research for IES funding. Eventual student outcomes (once preservice teachers transition into their first teaching jobs) are both distal and often secondary to the target of an intervention. More proximal student outcome options are limited, restricted to the progress made by the students of teacher-candidates during the clinical teaching placement, which is only partially attributable to the candidates themselves. Teacher education is certainly not the only area of research subject to these limitations. Studies that would address subject areas that are not tested for accountability purposes, such as science or social studies, have historically run up against similar challenges.

In sum, we argue that the lack of research on teacher education is not one that could be fixed through the mechanism of topics alone. NCER and NCSER could explicitly call out the need for teacher education research—which may be a good idea in its own right—but without making broader changes to their project type structure and to the outcomes they prioritize, it is unlikely that things would change much beyond the current situation.

Teacher education is just one of the many topics that is likely to face challenges like these. Similar claims could be made about research on changing systems or policy effects, where NCER and NCSER have funded considerably fewer projects than other areas, or on improving teacher or administrator quality through professional development. When problems of research do not naturally lend themselves to randomized controlled trials, or when the direct focus of change is on stakeholders other than students, the pathways to funding at IES's research centers can be prohibitive.

A SYSTEM FOR UPDATING TOPICS AND RESEARCH PRIORITIES

NCER and NCSER have used a number of mechanisms over the years to modify topics included in their grant competitions, whether by adding, combining, or removing standing topics; changing the names of topics; changing descriptions of topics; or holding occasional special topics or topically focused competitions. While our committee acknowledges that these steps have allowed the research centers to adapt over time, we note that in order to truly respond to the field, IES will need to go a step further. A more systematic, transparent process would strengthen IES's responsiveness to the needs of the education research community. Such a mechanism

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could be used to both (1) assess demand for and awareness of research by key stakeholders, and (2) identify where the supply of research is lacking, inconclusive, or contradictory. Such information can then guide efforts in production, curation, or dissemination of research. Where demand exceeds awareness, IES might then promote greater engagement with existing research products. Where supply exists but not in a usable format to satisfy demand, IES might create more usable practice guides or commission syntheses with plain-language recommendations. Where supply and demand are not aligned, IES can then adapt its research portfolio by adjusting its topic by project type matrix, as well as the questions embedded within those topics and project types.

Although research priority setting is a complex process lacking consensus on best practices, some common themes emerge, such as inclusive stakeholder engagement, relevant criteria and methods for deciding on priorities, and transparency (Viergever et al., 2010; Sibbald, et al., 2009). Numerous methods have been tested in health research, with a summary and critique of their strengths and weaknesses described by the World Health Organization (2020). This publication identifies three categories of criteria: public benefit, scientific feasibility, and cost. It also identifies two types of methods for deciding between priorities: consensus-based approaches and metric-based approaches. Consensus approaches (e.g., Ghaffar et al., 2009) allow for values to drive priorities, but should be balanced by methods that account for diverging perspectives, such as deliberative dialogues (McDonald et al., 2009). Metric-based approaches (e.g., Rudan et al., 2008; Dalkey & Helmer, 1963) aggregate perspectives across a broader audience to generate a list of top priorities, which may then be published or undergo further deliberation (e.g., through the James Lind Alliance).

To expand and strengthen IES's current processes for identifying new research priorities, we highlight key themes rather than suggest the adoption of a specific method to inform research priorities. In particular, we emphasize the important roles for diverse and equitable stakeholder engagement, evidence synthesis, and greater visibility and transparency.

First, engaging with a broader range of stakeholders (policy makers, practitioners, and other community members, as well as researchers) would build a richer picture of where they perceive needs for better research knowledge. While policy makers, practitioners, and the general public would provide key insights about relevance and benefit, researchers would be better positioned to comment on scientific feasibility, as well as where there are unresolved conflicts or gaps in the research base. Both may offer important perspectives on cost, with the former addressing the cost of implementing potential strategies and the latter addressing the cost of conducting the research. Enlisting existing networks, such as the Regional Comprehensive Centers, Regional Education Laboratories, and professional

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associations, can help expand IES's reach. When analyzing stakeholders' different roles in the research enterprise (e.g., Brugha & Varvasovszky, 2000; Haddaway et al., 2017), applying an equity lens will be critical for rectifying imbalances in values, opportunities, and impacts (Nasser et al., 2013).

Second, tighter coordination between the priority-setting and evidence synthesis processes would further build understanding of how the evidence base compares to the questions being asked. This could help to identify which topics and questions (1) have existing syntheses which need better dissemination, (2) have existing research which needs to be synthesized, or (3) need more research to be produced. Both NCER and NCSER could work with the National Center for Education Evaluation and Regional Assistance (NCEE) to commission practice guides, syntheses, or evidence gap maps in response to emerging demand. In Chapter 4, we also discussed the import of funding research syntheses within a new Knowledge Mobilization project type. Conducting these syntheses across the different goals could illuminate gaps or surpluses in the progression of research. Specifically, they could reveal where there are needs or potential practices (identified during Discovery and Needs Assessment) that lack adequate intervention development, and where promising interventions (from Development and Adaptation) have not yet been adequately evaluated for effectiveness across the range of populations and contexts needed. Alternately, they could reveal where interventions and programs are proliferating, instead of converging on core components. They could reveal where mismatches between research and practice may motivate further study of knowledge mobilization strategies. They could also reveal where new measures are needed or where common measures are needed.

Third, increasing the visibility and transparency of these processes can engage a wider audience in the research enterprise, helping to build awareness, interest, and trust in both existing and emerging research. With clear routines and timelines for engagement, multiple groups of stakeholders would be able to anticipate when and how to provide input and learn about the perspectives of others in the field.

Some potential instantiations of these themes may be to engage in the following activities at routine intervals, such as every 3 years:

- Form an equity committee that releases data and issues equity reports, documenting areas where research is needed, and reporting who has gotten funded;
- In collaboration with NCEE, provide mechanisms for broad community input through an online suggestion form, surveys, and focus groups embedded within existing networks (e.g., professional associations);

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- Hold NCER and NCSER researcher panels and community panels for deeper engagement, chaired by a researcher and an IES program officer, who collaborate to identify issues that both the research and practice community see as important unanswered questions in the field;
- On an ongoing and rotating basis, conduct research syntheses based on existing topics, identifying gaps in the research knowledge. Researchers can apply for the (small) contract to complete the synthesis;
- Delineate and document these processes and outcomes transparently, so that stakeholders understand opportunities for input and how their input is being used.

NEW TOPICS

Implementing the above procedures would provide IES with ongoing information about urgent and emerging needs within the field. But given the current circumstances—including both an unprecedented global pandemic and necessary racial reckoning for continued acts of prejudice and violence against historically marginalized groups in this country—the committee would be remiss if it did not provide specific guidance surrounding topics that likely demand immediate action. The field cannot wait for IES to update its processes for integrating new information from more systematic processes if education is to meet the challenge these historical circumstances demand. Thus, drawing on testimony, commissioned papers, our committee's collective expertise, and the crosscutting themes identified in this report, we nominate a small number of topics that merit a concerted investment in the coming years. These nominations should not be taken as an exhaustive or restrictive list; rather, they are examples of areas of potential study that emerge when the field is engaged in a process of assessing its needs.

Civil Rights Policy and Practices

Education researchers have produced valuable empirical and conceptual studies on the context of equity in education over the past 20 years. From this literature, it is clear that U.S. schools are more diverse racially and ethnically, but also more segregated and unequal. This paradox is due, in part, to historical legacies of policies related to housing, zoning, and employment, all of which are affected by racial injustice. More recently, in the past two decades, the courts have moved away from desegregation as a remedy for state-sponsored segregation, even as schools continue to be marked by deepening stratification (Gamoran, Collares, & Barfels, 2016).

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Economic inequality is also at historic highs (Gamoran, 2015), and the relationship between racial and economic inequality is deeply intertwined and expressed in housing, labor, health, and educational opportunities (Reardon et al., 2021). The COVID-19 pandemic, the opioid crisis, and the struggles to find and maintain reliable housing, food, and health care have deep implications for educational institutions, educational interventions, and the study and measurement of both. For too long, researchers have been trained to elide these contexts in their examinations of educational innovations, and as a result, missed opportunities to build the field's understanding of the importance of the intimate linkages between the context of schooling and learning and achievement.

IES, through NCER and NCSER, has an opportunity to help build our understanding of how interventions and approaches to teaching, learning, and school processes are informed by these contextual factors for the range of students being educated. In addition, there are important understandings of the within-school practices related to racial and socioeconomic inequality that could be enriched by further robust research (Horsford, 2011). For example, Black, Latinx, and Native American students are far more likely to experience discipline in schools that leads to suspension or expulsion (Losen et al., 2016; Okonofua & Eberhardt, 2015). Also important, students whose identities exist at intersections, such as Black, LGBTQIA, disabled, and/or multilingual children and adolescents, are especially vulnerable to being targeted for harsh discipline that harms their opportunities to learn and predicts greater likelihood for disassociating from school, dropping out, and becoming part of the carceral system as they are referred to police and the courts for behavioral infractions, or simply failing to reach their potential as learners (Scott et al., 2017; Shedd, 2016; Skiba et al., 2011).

Given the challenges within K–12 schooling and for students with disabilities from preschool through age 21, along with the deepening and persistent inequalities that shape school systems, the teaching force, and the learning conditions within and across schools, it is imperative to support and strengthen different epistemological and methodological approaches for investigating issues at the intersection of education and civil rights. As Johnson (2021) argued, IES is not yet equipped with the expertise and systemic data collection and databases to answer questions about racialized mechanisms that shape learning opportunities, experiences with racism and violence in and out of school, and the effects of carceral policies within and out of school. IES could help to support the development of robust metrics to understand race, racialization, and racism in schools and systems; support interventions to remedy inequality; and identify cases that have made progress towards equitable outcomes (Scott et al., 2020).

Consistent with the committee's focus on equity as a crosscutting theme, and in line with President Biden's Executive Order on Racial Equity (EO

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13985), the committee sees a need for the future of IES-funded research to be purposively oriented toward addressing the needs of underserved communities. To these ends, IES could better support research on equity and civil rights policies by funding research that responds to the education field's knowledge of how racial injustice in the structures, processes, and practices of schools and systems have an impact on learning and lifetime outcomes by supporting new research on what schools and other education settings can do to mitigate these effects. This might include, for example, research on

- School discipline: Disparities in discipline are well documented, and schools are engaged in a variety of strategies intended to reduce or eliminate these disparities. IES-funded researchers would find willing partners in states and school systems committed to better understanding the conditions that give rise to disparities and the diverse impacts of efforts (such as restorative approaches) to mitigate them.
- Services and supports for students with disabilities: Students with disabilities are likely to have experienced considerable challenges to receiving appropriate supports and services, and considerations for effective mechanisms for engaging students in productive ways educationally are needed.
- COVID-19 and orphans: Over 160,000 children in the United States and 1.5 million worldwide have lost a parent or caregiver. With these numbers likely to grow given unequal access to health care, and with Black, Latinx, and Native American children more likely to have experienced such loss, it is necessary to know how the practice of education can be made responsive to the trauma inflicted by the pandemic on educational opportunities and student well-being, learning, and educational attainment (Cluver, 2021; Imperial College of London, 2021; Treglia et al., 2021).
- Bullying and violence prevention: School violence and bullying pose serious problems, especially for students with intersectional identities based on race, ethnicity, disability, sexual orientation, and gender identity (Esplenage, 2015). Research is needed to identify programs that may work, in specific contexts, to eliminate violence and bullying, with a focus on structural conditions as the source of the problem and the student experience, rather than achievement as the outcome.
- School racial composition: Ongoing research indicates that racial segregation exacerbates inequality because it concentrates Black and Latinx students in high-poverty schools, which tend to be less effective than low-poverty schools (Reardon et al., 2021). Research is needed to examine voluntary and mandatory policies to break

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the link between segregation and concentrated poverty and to ensure high-quality learning opportunities for all children.

Teaching Quality and the Teacher Workforce

Teachers (in both general and special education) serve as the primary interface between students and education in the United States, and yet improving the quality of the teacher workforce represents a notably understudied part of NCER and NCSER's portfolio. To be clear, many IES-funded studies have relied on teachers, often as the ones who carry out academic or behavioral interventions. Less common are studies that focus specifically on changing the knowledge, skills, practices, and dispositions of the teacher workforce. As described previously in this chapter, many of the reasons for this go beyond the question of topics. With IES's strong focus on student outcomes, researchers have had fewer avenues for exploring interventions where teacher outcomes are the focus. As we note later in Chapter 6, there has been minimal investment in measurement studies focused on teacher outcomes. The field lacks both IES-funded studies that have focused explicitly on teachers as well as suitable tools for measuring the effects of interventions targeting teachers.[5]

The committee identified research on improving the teaching workforce as a pressing need within both NCER and NCSER. Improving the workforce is a longstanding need but one that has intensified in response to changes in the educational landscape. As articulated in the recent National Academies' report on the teacher workforce: "Teachers are called on to educate an increasingly diverse student body, to enact culturally responsive pedagogies, and to have a deeper understanding of their students' socioemotional growth. Integrating these various, layered expectations places substantially new demands on teachers" (NASEM, 2020, p. 187) as educators are tasked with supporting students in the wake of COVID-19.

The committee recognized the need for research addressing teacher education (TEd) and professional development (PD). Although there is substantial empirical evidence about the critical importance of teachers for promoting students' academic and long-term success (e.g., Chetty, Friedman, & Rockoff, 2014; Aaronson, Barrow, & Sander, 2007; Clotfelter, Ladd, & Vigdor, 2007; Rivkin, Hanushek, & Kain, 2005; Darling-Hammond, 2000), there are sizable knowledge gaps about the initial preparation and

[5]The committee wishes to note that school leaders and other professional leaders clearly deserve the same scholarly attention as teachers, and are similarly overlooked in IES's portfolio for the reasons highlighted in this chapter. Though teachers play a particular role in supporting student achievement because of their direct proximity to students, it is also critically important to understand the impact and potential of other professionals in the school building and throughout the education system.

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PD of teachers (Hill, Manciendo, & Loeb, 2021; Phelps & Sykes, 2020; Fryer, 2017; Waitoller & Artiles, 2013; Sindelar, Brownell, & Billingsley, 2010). Research on TEd in this field has been described as "scattered and thin" (Sindelar et al., 2010, p. 13). Reviews of the literature have consistently described the research foundation in these domains as "weak" and identified limitations in the quality and focus of this scholarship (Ronfeldt, 2021; Brownell et al., 2019; National Research Council, 2010; Sindelar et al., 2010; Cochran-Smith & Zeichner, 2009; Wilson et al., 2001). Research on pedagogical practices has been emphasized in the past two decades, but "knowledge accumulation on teacher education … has been uneven and in many areas, sparse" (Brownell et al., 2019, p. 35). Greater support for research on the initial and continuing education of teachers will improve the design and impact of these programs and interventions, improve teacher quality, and ultimately influence the quality of services provided to students. Specific considerations for additional research are as follows:

- Systematically investing in a range of kinds of research studies to bolster knowledge of effective systems of teacher professional learning that better prepares teachers to effectively meet the needs of a range of learners including those with disabilities. For example, in the case of teacher education, this might look like (a) effectiveness studies to establish teacher education practices resulting in improved candidate outcomes, (b) qualitative studies to explore promising practices and underlying mechanisms, and (c) descriptive studies linking program features to long-term candidate and student outcomes. This will contribute to the advancement of a knowledge base that is rich in explanatory and contextualized models.
- Identifying effective approaches for preparing educators for the complexities of the student population, changing professional roles, and the improvement of outcomes for all students.
- Substantiating research programs on teacher learning with a close attention to theory. Scholars have noted the lack of a sustained and coherent approach in the study of TEd and PD (Billingsley & Bettini, 2019; Brownell et al., 2019; Kennedy, 2019).
- Exploring research designs that support causal inferences in the contexts of TEd and PD research.
- Developing measures that are proximal to the goals of teacher education and professional development. As an example, recent advances have been made in measuring teacher content knowledge and establishing parameters for using teacher content knowledge as an outcome measure in cluster randomized trials (e.g., Kelcey et al., 2017; Phelps et al., 2016). Similar lines of research are necessary to

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develop validated, useable measures of teachers' practice that might complement existing observation tools.

- Studying the broader workforce issues that impact the success of TEd and PD opportunities, including ongoing issues related to teacher supply. Issues of teacher supply are particularly relevant in special education where teacher shortages have existed for decades. In the past 20 years, the landscape of teacher licensure has changed dramatically, with the proliferation of a variety of programs and pathways into the classroom (NASEM, 2020). Researchers have begun to look generally at how licensure pathways shape the teaching workforce (Ronfeldt, 2021), but further work is necessary. In particular, we need further research on how best to support schools in staffing the hardest areas to fill (special education, science, technology, engineering, and math).
- Understanding the intersection between education technology and teacher learning in both TEd and PD. This may include, for example, examining the effectiveness of new online TEd or PD programs. Or, it may involve technology to supplement existing learning opportunities, such as the use of simulations in teacher education or providing automated feedback to educators based on videos of classroom instruction.
- Increasing synergies and complementarities in TEd and PD research in general and special education. Increasing awareness of the complexities of student needs complicates the initial preparation and PD of teachers. Teachers are expected to provide quality instruction and social-emotional learning supports to the range of learners in their classrooms. These expectations include how to differentiate instruction and build trusting relationships to provide genuine support that the range of learners (e.g., gifted, students with disabilities, learners from low-resourced families, culturally and linguistically diverse students) require in today's schools. These requirements and expectations are inadequately addressed in TEd and PD scholarship. General education teachers get minimal preparation on how to educate students with disabilities. A complicating factor is that TEd and PD in general and special education operate with disparate conceptions of teaching and learning with little cross-pollinations. These systemic barriers disadvantage general and special education teachers while the expectations for coordinated collaborative work continue to increase (e.g., Response to Intervention and Multi-tiered system of supports models). Research in TEd and PD is urgently needed to address these gaps.

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Education Technology

Education technology is the use of digital technologies and related software with the goal to enhance learning. A report commissioned by IES, *A Compendium of Education Technology Research Funded by NCER and NCSER: 2002–2014* (Yamaguchi & Hall, 2017), defines the uses of technology as support for student learning, support of teachers and instructional practice, and support of research and school improvement. The compendium recognizes that education technology can support the development of metacognitive and social strategies, support learners with special needs, support collaborative learning, extend learning beyond traditional boundaries of the classroom, connect learners who are geographically dispersed, and expand learning beyond formal environments into informal settings such as museums, cultural institutions, and learners' homes. Similarly, technology has the potential to transform teacher instruction, teacher professional development, and teacher practice. Additionally, schools and their leaders use technology for a range of administrative tasks, to support data-driven decision making, and help devise strategies to increase equity.

IES competed Education Technology as a separate topic from 2008 to 2020 but not in 2021 or 2022. The RFA for the 2022 competition calls for related research in three of the topics: It lists the "development and testing of interventions designed to support all learners in becoming digitally literate citizens in the 21st century, including those which integrate new forms of technology within social studies programs, such as social media, multiuser virtual environments, virtual and augmented reality, and wearables" (p. 13) under the Civics Education and Social Studies topic; "Exploratory research to guide the development and testing of education technology products that can personalize instruction" (p. 14) in the Cognition and Student Learning topic; and calls for researchers to investigate how "technology be leveraged for more effective reading and writing instruction" (p. 19) under the Literacy topic.

The committee expressed concerns about the decision not to separately compete Education Technology at this historic moment in time because the COVID-19 pandemic has shown the critical importance of education technology to support continuity in formal schooling and informal learning (Schwartz et al., 2020). The pandemic has also revealed deep inequities in access to educational technologies across the country. Where education technology was available, the experience of remote learning forced by the pandemic in 2020 and 2021 has shown the deep limitations of current education technology infrastructure, products, practices, and research (Consortium for School Networking, 2021; Sahni et al., 2021; Education Endowment Foundation, 2020; Gallagher & Cottingham, 2020). As a nation, we now also recognize that inequity, lack of diversity, and lack of

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inclusion is not only unjust, but also it prevents us from unlocking the full potential of the next generations. Even though the committee recognized that ultimately, education technology needs to serve the specific topics taught in schools, it has become clearer than ever that more research is needed to guide the design of the next generation of education technology tools, and that this research involves many issues that are broader than the specific topics for which IES provides research support. Recent analyses have estimated, for example, that the education technology market will grow by $112.39 billion from 2020 to 2025 (Technavio, 2021). Among the drivers of this growth are artificial intelligence applications, including machine learning, and game-based learning (PRNewswire, 2021). The use of these technologies in the classroom requires a significant, dedicated investment into rigorous research that informs their design to ensure they serve the needs of the learners.

The committee therefore believes that Education Technology proposals should be invited that investigate these broader topics, and that these proposals should be reviewed by a dedicated Education Technology panel. The committee expressed a sense of urgency for this kind of education technology research, as the recognition of the importance of education technology as a result of remote schooling during the pandemic has already begun to result in the development of many new digital tools for learning, support of teachers, and support of schools, which would benefit from this kind of research.

Further, additional research is warranted to more fully explore the relationships between technology and the broader learning environments in which the technology is used. This plays out in two corresponding ways. First, education technology research must examine the ways in which biases become embedded in the design of technology (Scardamalia & Bereiter, 2008). For example, this requires opening up the "black box" of the algorithms for greater transparency in how user profiles and predictive analytics are used to constrain or expand learning opportunities for students based on prior experiences and characteristics (Rospigliosi, 2021). Second, education technology research should examine how technology is embedded within learning environments, or how technology is designed for real-life contexts, social interactions, and cultural influences. This includes how students, teachers, and families use and augment the technology; the role of the "digital divide" in access to resources, including broadband Internet as well as various technological devices; and the moderating influence of peers on students' use and engagement with technology (van Dijk, 2020; Zheng et al., 2017; Jeong & Hmelo-Silver, 2016).

The above concerns highlight the importance for education technology research to have a strong grounding in the theoretical mechanisms of learning under investigation, to guard against research and technology that

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perpetuate bias and inequity. Theoretical transparency will be essential when building and testing new technologies. The kinds of predictive modeling used to personalize instruction for students often depends on a massive amount of student data, demanding close attention to questions about whether the available data are appropriate for the questions being explored, the conditions under which the data were collected, who and what may be missing from the data, how to balance the information gained from the data with the need to protect privacy, and what additional measures may be worth developing (Schwabish & Feng, 2021; Regan & Jesse, 2019). Given inequitable access to education technology, including variation in how schools deploy technology for students across different achievement levels (Lee et al., 2021), ensuring that such research is not extractive and has relevance across a broad range of populations and contexts takes on even greater importance.

Questions that should be addressed in research on Education Technology supported by NCER and NCSER include, but are not limited to

- Development of new pedagogies and theoretical approaches addressing diversity, equity, and inclusion in education technology;
- Ethically aligned design processes for education technology that benefit from knowledge mobilization and focus on diversity, equity, and inclusion;
- Meaningful integration of responsible, accountable, and transparent analytics in learning environments;
- Approaches to personalization, adaptivity, and adaptability that incorporate diversity, equity, and inclusion; focus on transparency; and go beyond learning progressions and adapting for learners' current level of knowledge;
- Use of artificial intelligence-based approaches for novel education technology solutions, including personalization, adaptivity, and adaptability;
- Measurement approaches for learning outcomes, as well as learner state and learner trait variables, using longitudinal log data from education technology environments;
- Approaches to reliably measuring accountability/attendance versus engagement versus competency in remote learning, and the relative value of each of these outcomes;
- Designing methods of efficacy and effectiveness research harnessing user logs from widely available education technology environments;
- Development of standards for user logging and policies for data collection, storage, and ownership in education technology environments; and

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- Effective strategies for the commercialization of successful research prototypes of education technology solutions.

Additional questions that should be addressed in research on Education Technology supported by NCSER could include strategies for use of assistive technology for simulations, games, virtual reality, mixed reality, augmented reality, and similar advanced technologies.

SPECIAL CONSIDERATIONS FOR NCSER

While the current moment motivates the need for further research on specific topics across IES, the committee encourages IES to give specific consideration to pressing challenges facing the field of special education. What makes the re-examination of NCSER's topics so urgent? Among all groups of students affected by COVID-19, it is becoming increasingly clear that the consequences have been particularly pronounced among students with disabilities. The lack of access to specialized instruction during remote instruction (GAO, 2020), coupled with the fact that students too often lost out on legally mandated services throughout the pandemic (Morris, 2021), presents the very real threat of a further widening of academic and career outcomes between students with and without disabilities. Additionally, as the United States grapples with the consequences of structural racism throughout its institutions, it cannot be overlooked that disability identification is racially stratified, and a better understanding is needed on how special education interventions and other programs function for different subpopulations of students. Finally, key policy shifts in recent years have established an even stronger warrant for the quality of special education practice. The 2017 Supreme Court case *Endrew F. v. Douglas County School District* established the responsibility that a school district's special education services produce "appropriate progress" for a given student's needs (Kauffman et al., 2021; Lemons et al., 2018). In other words, schools are to be held accountable for ensuring that the instruction they provide results in academic and behavioral gains in line with what is established in a child's Individualized Education Program. This precedent warrants a close investigation into the totality of services students receive. In the next section, we offer several opportunities for enhancing the knowledge base in special education. These are provided as examples only of possible directions.

Expanding a Focus Beyond Identifying Effective Programs

Identifying the programs that are effective for individuals with disabilities and their families has been an important and necessary focus of IES

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through NCSER. In addition to program efficacy/effectiveness, it is critical to better understand the teaching practices and instructional contexts in which students with disabilities are provided opportunities for accessing beneficial educational outcomes, both academically and behaviorally. Most of the teaching that teachers do throughout the day is not derived directly from a "program." They design, implement, and evaluate teaching by taking in resources (curricula, professional development, texts, materials), filtering these resources through their own knowledge and perceived needs of their students while navigating institutional affordances and constraints (e.g., district curricular policies, instructional reform mandates, school assessment initiatives), and then co-constructing teaching-learning processes and outcomes. With this in mind, it is critically important to support programs of research that document the multifaceted processes and contingencies that surround the complex work of teachers.

For example, much has been learned in the past two decades about how people learn (as described in Chapter 2 of this report), although much of that work has been conducted outside of special education contexts. IES, through NCSER, is ideally suited to support work that further extends the learning science work to individuals with disabilities and special education teachers. For example, outside of special education, scholarship in content-area instruction (e.g., mathematics, science, history and civics) has shifted increasingly toward inquiry-oriented approaches to instruction; how do these practices affect the learning outcomes of individuals with disabilities? To what extent are students with disabilities engaged in activities and provided opportunities to access learning with their general education classmates? Pedagogies that vary between general and special education may have real consequences for students with disabilities, because neither field has provided suitable guidance on how to support this population as they navigate activity-based classroom work. How can teachers scaffold these learning activities to ensure that students are developing foundational skills as well as higher-order skills and concepts?

Understanding How School Contexts and Structures Support Inclusion and Access to Improved Outcomes for Students with Disabilities

Perhaps one of the most persistent themes in education for students with disabilities is the provision of access to the general education classroom—for whom, under what conditions, and the instructional arrangements associated with positive outcomes within these arrangements. In light of the standards for special education established through *Endrew F.*, the field must tackle the question of how educators, collectively, can work to ensure that students make appropriate academic progress. Most educators would agree that inclusion in the general education classroom is a goal for students with

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disabilities, but researchers have largely ignored the question of whether specific inclusion policies are associated with improved student outcomes. For example, despite the widespread use of co-teaching (where a general educator and special educator provide instruction in the same classroom) as a service delivery model, there is virtually no causal evidence supporting whether the practice actually leads to improved student outcomes (Jones & Winters, 2020; Solis et al., 2012). NCSER is ideally suited to support research that will better inform educators about inclusive practices and models that yield beneficial outcomes for students and their families.

A related area where expanded research is necessary is in better understanding how other contextual factors outside of classroom teachers can positively impact students with disabilities. These factors include professionals (e.g., school psychologists, physical therapists, speech and language therapists); for example, Mulhern (2020) provided causal evidence that school counselors can affect student attainment at levels approaching typical teacher effects. It will also be important to continue expanding research on the role of families in supporting outcomes among students with disabilities. In addition, research on the mediating effects of organizational factors, the layering of multiple (often contradictory) policies, and sociohistorical legacies (e.g., community and school racial segregation) in the implementation and outcomes of inclusive models is urgently needed.

RECOMMENDATIONS

In this chapter, the committee describes its finding that a series of barriers exists both internal and external to IES that hampers the potential for funding for a set of critically important topics. While the current set of topics does a good job representing the field, these constraints limit the extent to which IES can fund research in areas that are pivotal in efforts toward improving student achievement. Ultimately, reimagining the project types alone (as we have recommended in Chapter 4 of this report) will not address the numerous ways that topics, although technically fundable, are unlikely to get funded in the current topic structure. The committee recognizes that without attention to how the Education Sciences Reform Act (ESRA) is enacted in RFA requirements, as well as the review process, it will be difficult to fund research that looks at interventions targeting teachers or systems in particular. Further, as we describe in Chapter 4, fealty to the methodological rigor associated with experimental design has also limited the use of alternative methods for deep understanding of the context in which interventions work (or do not). Finally, the committee recognizes that there are a set of factors (e.g., teacher knowledge and practice, school and district organizational contexts) that matter for supporting student outcomes; it is essential that these factors are attended to in the design and development of studies.

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RECOMMENDATION 5.1:
Existing constraints or priorities in the RFA structure and review process have narrowed the kinds of studies within topics that are proposed and successfully funded. In order to expand the kinds of studies that are proposed and successfully funded in NCER and NCSER, IES should consider the following:

- **Allowing use of outcomes beyond the student level (classroom, school, institution, district) as the primary outcome**
- **Expanding the choice of research designs for addressing research questions that focus on why, how, and for whom interventions work**

In advance of these structural changes, however, the committee recognizes that the current moment of racial reckoning and responding to COVID-19 require immediate scholarly attention. Given the issues in education that are emerging at breakneck pace and the subsequent demand for assistance from the field, the committee thinks that designating separate competitions for certain topics is warranted in order to signal their importance even though these topics might technically be "fundable" in existing competitions.

RECOMMENDATION 5.2:
Within each of its existing and future topic area competitions, IES should emphasize the need for research focused on equity.

RECOMMENDATION 5.3:
In order to encourage research in areas that are responsive to current needs and are relatively neglected in the current funding portfolio, NCER and NCSER should add the following topics:

- **Civil rights policy and practice**
- **Teacher education and education workforce development**
- **Education technology and learning analytics**

RECOMMENDATION 5.4:
IES should offer new research competitions under NCSER around these topics:

- **Teaching practices associated with improved outcomes for students with disabilities**
- **Classroom and school contexts and structures that support access and inclusion for improved outcomes for students with disabilities**
- **Issues specific to low-incidence populations**

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The topics listed above represent priorities identified by the committee based on our understanding of the current state of education research. This list is not intended to be exhaustive or restrictive; rather, these topics are examples of the types of topics that emerge through consistent, focused engagement with the field. Indeed, the committee recognizes that education research is perennially evolving in response to both the production of knowledge as well as the circumstances in the world. For this reason, the committee advises that the list of topics funded by the centers should also evolve in order to remain responsive to the needs of the field. This responsiveness is a necessary component of fulfilling the obligations laid out in ESRA: In order to "sponsor sustained research that will lead to the accumulation of knowledge and understanding of education," it is important to fully understand not only what knowledge has accumulated, but also where the existing gaps are.

RECOMMENDATION 5.5:
IES should implement a systematic, periodic, and transparent process for analyzing the state of the field and adding or removing topics as appropriate. These procedures should incorporate

- **Mechanisms for engaging with a broad range of stakeholders to identify needs**
- **Systematic approaches to identifying areas where research is lacking by conducting syntheses of research, creating evidence gap maps, and obtaining input from both practitioners and researchers**
- **Public-facing and transparent communication about how priority topics are being identified**

The committee expects that these recommendations, implemented in concert with one another, will allow NCER and NCSER to support research that meets the immediate needs of the field while simultaneously ensuring that it can nimbly adapt to shifting priorities as they inevitably emerge. In the following chapter, we turn to a discussion of how NCER and NCSER might update its work in the area of methods and measures.

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6

Methods and Measures

In this chapter, the committee responds to the third element in our charge: to identify new methods or approaches for conducting research supported by the National Center for Education Research (NCER) and the National Center for Special Education Research (NCSER) of the Institute of Education Sciences (IES). We include both measures (a project type, or goal, in the IES matrix) and methods (a separate competition) because of the close links between the two. We placed this chapter here for the sake of narrative flow and will return to the second element in our charge—how best to organize NCER and NCSER's request for application (RFA) process—in Chapter 8.

One of IES's hallmarks since its inception has been its continuous investment in advancing education methods and measures. IES has adopted three primary strategies aimed at improving the quality of research methods in education: (1) funding basic research on methodological innovation and measurement, (2) prioritizing specific applied research methods in its RFAs, and (3) fostering a community of scholars with the necessary skills to make use of new and innovative methods and measures.

IES's investments in methodological innovation has produced a wealth of knowledge in this arena. This investment is both through field-generated research via grants from NCER and NCSER, and through IES-driven research focused on the What Works Clearinghouse (WWC) via contracts from the National Center for Education Evaluation and Regional Assistance. While the committee focused on the first of these types of research, given the statement of task, there are clearly connections between the two.

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These investments have produced core knowledge around estimating average treatment effects—in both randomized controlled trials (RCTs) and quasi-experimental designs (QEDs)—as well as models and data useful for planning studies with adequate power for hypothesis tests. This funding has also advanced research methods specifically appropriate for research on students with disabilities, including advances in statistical approaches to estimating effects in single-case designs.

IES has also invested in development of measures, largely through field-generated research funded through NCER and NCSER. They include new approaches for measuring student academic and behavioral outcomes in the context of research, as well as the expansion of available assessments for use in practice, including a number of universal screening and progress monitoring tools. There have also been advancements in the technologies of student assessments, including the use of adaptive testing.

IES has also established high standards that have been widely adopted across the field for how causal research is conducted. Through its RFAs and guidance to proposal reviewers—and in alignment with recommendations for internal validity through the WWC—IES encourages submitted studies to meet high technical standards. Examples include the requirement that Efficacy and Replication studies be adequately powered, that studies prioritize research designs aligned with causal inferences (e.g., experimental designs, quasi-experimental designs, single subject designs), and more recently, that Efficacy and Replication studies provide information on their generalizability and on the cost effectiveness of the intervention being studied (IES, 2021).

In addition to these formal avenues for research on methods and measurement, NCER and NCSER have worked to establish a community of education research scholars focusing specifically on methodology. It has done so in large part through its investment in methodological training opportunities, described in Chapter 7 of this report. IES also invested in the initial development and growth of the Society for Research on Educational Effectiveness, a research organization focused on increasing the field's capacity to design and conduct causal investigations, which, in 2008, launched the *Journal of Research on Educational Effectiveness* committed to publishing causal studies in education. Without such an investment, it is hard to imagine that causal studies in education would be anywhere close to where they are today.

Collectively, these three strategies converge to provide a roadmap for how IES can support the development of tools to conduct high-quality scientific research in education. But, as outlined across this report, as the educational landscape shifts, so too must IES's investments in methods and measures research. A focus on treatment heterogeneity, implementation and

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adaptation, knowledge mobilization, and equity means that IES will need to re-orient its investment in methods and measures.

We begin with underlying principles to guide our recommendations:

- **IES's charge as written into the Education Sciences Reform Act (ESRA) requires that the institute maintain its focus on causal research.** IES is uniquely situated—among other federal agencies and private foundations—to develop and test interventions in education settings. This focus should certainly continue.
- **Since causal questions are inherently comparative, descriptive work is also needed to conceptualize and describe current practices and the context of schools and districts.** This means IES will need to invest in other approaches beyond causal designs (e.g., descriptive, qualitative, mixed methods).
- **Questions of what works and how it works need to be pursued in concert.** Only by pairing different methodologies can researchers answer not only what works for improving student outcomes, but also how to make something work, for whom, and under what conditions. The committee's view is that each of these questions needs answering and each is necessary to inform the others.
- **Theoretical frameworks play an essential role in connecting research questions across studies.** The connections across causal and descriptive studies are strengthened when researchers are clear about the theoretical framework they are developing and testing.

THE FUTURE OF METHODS RESEARCH

Summary of Methods Research to Date

NCER and NCSER have invested in methodological innovation from their beginnings. This investment was first via unsolicited grants and later through a separate grant program, Statistical and Research Methodology in Education, that funded research relevant to both centers. From its beginning in 2002 through 2020, NCER awarded 93 grants to support methodological innovation in the education sciences. In an analysis of abstracts from these studies, Klager and Tipton (2021) revealed that funded studies have been roughly evenly divided across four categories:

- Psychometrics (n = 28), including value-added models (n = 8).
- Statistical Models for Analysis (n = 23), including multilevel models and missing data (n = 13).

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- Randomized Controlled Trial Designs (n = 28), including power analyses (n = 7), effect size computations and interpretations (n = 5), and single-case designs, n = 6).
- QED Designs (n = 14), including regression-discontinuity (n = 6) and comparative interrupted time series (n = 5).

Overall, these studies have addressed a variety of difficult problems that occur in applied research. Abstracts indicate that most of these studies (n = 48) mention the development and availability of free software tools for use by applied researchers, providing a mechanism to increase the likelihood that methodological innovations get taken up in future IES-funded work. Further seeding the potential for methodological uptake, many of the funded studies have resulted in methodological workshops delivered at national research conferences in education. The committee thinks that this approach used to generate knowledge and use of statistical methods has been one of NCER and NCSER's considerable strengths.

Methods Research Moving Forward

In this report, we have argued that education research needs to focus on five crosscutting themes: the *heterogeneity* of contexts, experiences, and treatment effects; the *adaptation* of programs and policies to local contexts, leading to different degrees and types of implementation; the need to better understand and test new ways to support the development of knowledge that is *useful* for decision making; the continued need to take advantage of *education technologies;* and the need to focus directly on the goal of improving *equity* in educational experiences.

In this section, based upon what has been previously studied and these themes and goals, we propose areas that need new methodological development. Overall, each of these areas begins from the question: What methods are required for researchers developing and testing interventions to provide decision makers with the information they need regarding interventions?

Methods for Understanding Treatment Effect Heterogeneity

Current literature makes clear that there is no single effect of an intervention, and instead that effects likely vary across structures, contexts, cultures, and conditions (Joyce & Cartwright, 2020). As such, education research stands to benefit from studies that improve the ability to understand how treatment effects vary. Meeting this goal requires both quantitative methods and qualitative methods, as both are essential for developing theory and understanding mechanism.

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IES is already a leader in building quantitative approaches to heterogeneity. Over the past decade, an increasing number of methods grants have focused on questions of treatment effect heterogeneity, understanding moderators of effects, and external validity (n = 14). These studies have provided methods for estimating and testing hypotheses about the degree of heterogeneity, as well as methods for improving generalizations from samples in studies to populations in need of evidence. This generalization literature, for example, has shown that if treatment effects vary, the average treatment effect estimated from a randomized trial in a sample of convenience can be as different from the true population average treatment effect as one estimated using a nonexperimental design. That is, external and internal validity biases can be of the same magnitude.

To date, much of this research has focused on how to improve estimates of average treatment effects (what is called generalization). Repeatedly, however, decision makers call upon research to provide them not simply an estimate of the average treatment effect, but also a prediction regarding if the intervention will work in their school, district, or community. To date, only three of the methods grants have focused directly on the development and testing of methods for the prediction of local treatment effects. Predicting local effects with precision will require both new statistical methods for analysis, such as machine learning and Bayesian Additive Regression Trees, and more complex research designs, such as factorial, crossover (Bose & Dey, 2009), and stepped-wedge designs (Hussey & Hughes, 2007). As these methods are better understood, and fit to the realities of education contexts, they may provide important insights into how studies should be conducted in the field. For example, it is likely that studies focused on heterogeneity and prediction will require larger samples than are typical in studies of the average treatment effect. In order to know exactly how much larger and what other trade-offs might be included, however, methods for study design, including determining power and precision, will be needed.

Finally, not all of the methods required are quantitative. In order to understand treatment effect heterogeneity—essential for the prediction of local causal effects—data are not sufficient on their own. Instead, the development and refinement of theory will be essential. Theory can help, for example, guide researchers in determining *why* treatment effects might vary, under what conditions interventions might be most useful, and the mechanism through which an intervention works. It is here that qualitative and mixed methods research especially offers promise.

Methods for Understanding Implementation and Adaptation

Tied to the concept of heterogeneity is the need to understand the implementation and adaptation of interventions. Decision makers need

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to know what adaptations implementers make and why, which adaptations are productive and which adaptations go "too far," and what kinds of supports are required to implement well. IES has shown interest in and encouraged methods development related to implementation, fidelity, and mediation. To date, six Statistical Models and Research Methods grants have focused on these topics. However, more methods are needed to study implementation and adaptations made as programs move across places and people (reconceived in Chapter 4 as Development and Adaptation grants).

There are several exciting possibilities for continued methods development in this burgeoning field. Methods for evaluating implementation build on many familiar designs for studying efficacy and effectiveness, while also expanding beyond them through a variety of randomized and nonrandomized designs (Brown et al., 2017). They include, but are not limited to, hybrid effectiveness-implementation designs (Curran et al., 2012), multiphase optimization strategy implementation trials (e.g., Collins, Murphy, & Stretcher, 2007), helix counterbalanced designs (Sarkies et al., 2019), and stepped-wedge trials (Brown & Lilford, 2006). Additional methods include survival analysis to evaluate sustainability (e.g., Brookman-Frazee et al., 2018) as well as system dynamics, network analysis, and agent-based modeling to assess diffusion and spread (Northridge & Metcalf, 2016; Burke et al., 2015; Mabry et al., 2008). Closely related to implementation research, a family of improvement approaches with roots in statistics, industry, and health care have migrated to education (Cohen-Vogel et al., 2018). Described by some as representing a fourth wave of implementation science, the approaches involve iterative tests of change in an increasingly larger number of classrooms, grades, and schools (e.g., Bryk, 2020; Bryk et al., 2015; Lewis, 2015). The approaches, which include but are not limited to improvement science, design-based implementation research, and design experimentation, share an emphasis on learning from adaptations that occur as programs are tested in an ever-growing number of settings as well as authentic collaborations between researchers and practicing educators that span innovation design, prototype testing, and implementation (e.g., Cohen-Vogel et al., 2015; Cobb et al., 2013; Donovan, 2013; Means & Harris, 2013; Anderson & Shattuck, 2012; Bryk, Gomez, & Grunow, 2011; Design-Based Research Collective, 2003). Methods for evaluating improvement projects include variants of trial designs, quasi-experimental designs, qualitative field techniques, and systematic reviews, as well as program, process, and economic evaluations (Portela et al., 2015).

Of particular interest for their rigor and sensitivity in detecting variation in a system are statistical process control methods, which distinguish between common-cause variation and special-cause variation to determine when changes are significant and when a process is out of control (see Provost & Murray, 2011; Deming, 1982; Juran, 1951; Shewhart, 1931,

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and later in this chapter for a discussion of methods for learning from and about education technologies). Closely related to interrupted time series designs, statistical process control can detect variation across subgroups and sites, not just over time, and displays information more intuitively for real-time monitoring and decision making in practice (Fretheim & Tomic, 2015). These methods also are especially valuable for highlighting the distinction in framing between enumerative studies that describe the current state and analytical studies that make predictions about a future state (Provost, 2011).

Finally, questions related to implementation and adaption are fundamentally questions of process, an area where qualitative and mixed methods excel. The power behind mixed methods research lies in integrating data from multiple sources. Qualitative methods can inform the development or refinement of quantitative instruments, for example, and quantitative data can inform sampling procedures for naturalistic observations, interviews, or case study (e.g., O'Cathain, Murphy, & Nicholl, 2010). Consequently, the committee believes that standards for the conduct and reporting of data from qualitative and mixed methods could be helpful for a future IES. The further development, testing, and refinement of these methods will enhance the ability of researchers to study implementation of evidence-based practices in education.

Methods for Knowledge Mobilization

As the committee noted in Chapter 1 of this report, if the research that NCER and NCSER fund is not useful to or used by its intended audience, it is not meeting the charge mandated under ESRA to effect change in student outcomes. In Chapter 4, we proposed the creation of a new project type focused on Knowledge Mobilization. The purpose of this project type is to continue to develop a science of decision making in education, in order to understand current practice and to develop and test new strategies for mobilizing knowledge produced from research so that it may be used to support improved practice in schools.

Studying knowledge mobilization can be difficult because it is a subtle and complex process, one that does not always lend itself to the kind of randomized controlled design common with other interventions (e.g., researchers do not have two sets of research-practice partnerships to test out one form of knowledge utilization in one group and a different form or control message in another group). Thus, it is necessary to continue to develop innovative methods to help make these kinds of comparisons and study strategies to mobilize knowledge. There are several opportunities for the development of methods (for a broader overview, see Gitomer & Crouse, 2019).

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By far, the most common method for studying knowledge mobilization in education to date is survey and interview methods (e.g., May et al., forthcoming; Penuel et al., 2017; Weiss & Bucuvalas, 1980). While these approaches have been useful for descriptive studies of research use in nationally representative samples of educators and education leaders, they fall prey to social desirability bias and retrospective smoothing. In response, there are new efforts aimed at studying decision making in real time using observational methods (e.g., Huguet et al., 2021). These methods are labor intensive and, to date, limited to small N descriptive studies. However, there is great potential for adapting such methods for use in experimental design of interventions to foster knowledge mobilization that include observation or, for example, video analyses of nationally representative samples of school board meetings (see Box 6-1 for an additional need in the knowledge mobilization space).

Another key development in research on knowledge mobilization has been the use of social network methods to map the relationships between producers and consumers of research and the intermediaries who knit them together (Frank et al., 2020; Gitomer & Crouse, 2019; Finnigan, Daly, & Che, 2013). This approach allows researchers to identify who the powerful

BOX 6-1
Knowledge Mobilization and Data Visualization

In the Knowledge Mobilization space, there is a need for studies of the best practices regarding communication around the use of new and improved statistical and research methods in practice. Questions include: Are workshops effective? Is a software package an effective approach, or is a webtool better? Is it better to convey findings using statistics or using data visualizations?

To these ends, there is a pressing need for studies regarding data visualization. As a result of almost two decades of funding and research, IES is now at a place in which there are many studies and interventions a decision maker might need to choose between when selecting an intervention. These findings are typically provided for decision makers using online dashboards (e.g., WWC), data visualizations, and webtools. The committee observes that often these tools are conceived of and developed by statistical research methodologists, who are experts in understanding and working with data and statistics. However, research on data visualization—found in journalism and cognitive psychology—shows that the best approaches for displaying findings for experts are often far from optimal for nonexperts (Eberhard, 2021; NRC, 2000). The existing literature highlights that appropriate visualizations and data exploration tools for one field are not necessarily appropriate for another (Li, 2020; Padilla et al., 2018). Altogether, this suggests that research comparing different types of visualizations, both static and dynamic, is itself worthy of scientific study.

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actors are and how information flows across systems. Outside of education, there are researchers who have used natural language processing and other strategies to track the uptake of research studies or ideas in legislation or policies (Weber & Yanovitsky, 2021; Yanovitsky & Weber, 2020; Weber, 2018), an approach that could profitably be adapted for scholarly studies of knowledge mobilization in education. Network methods and natural language processing methodologies applied to knowledge mobilization face a number of challenges, some that are general to network methods, such as sampling concerns, and some that are distinctive to knowledge mobilization, such as adequately capturing information flows (Gitomer & Crouse, 2019). IES investments in network methods and natural language processing for knowledge mobilization studies could fuel important advances in this area.

Additionally, one of the arguments the committee makes in Chapter 4 of this report is that "connectors" between project types are needed to help surface promising findings and interventions. This suggests that one area of growth will be the need for methods for systematic review and meta-analytic studies. Given the scope of the WWC, it is perhaps surprising that outside of single-case designs, there has only been one *single* Statistical and Research Methods grant focused on the development of meta-analytic methods. Many possible types of syntheses—and thus methods—are necessary. Perhaps the most obvious is the need for methods for synthesizing findings from impact studies; this includes methods for very small meta-analyses (as found in the WWC) and for very large meta-analyses focused on understanding variation (including 50 or more studies). Given the growing trends toward open data and data science, integrated data analysis and other data harmonization methods (Kumar et al., 2021, 2020; Musci et al., 2020) may be particularly valuable for synthesizing findings across disparate studies. Less obvious, but equally important, is the need for methods for synthesizing descriptive studies (Discovery and Needs Assessment) and for surfacing promising interventions (Development and Adaptation).

Supporting all of these is the need for methods research that informs various aspects of the meta-analysis process, including, for example, methods for efficiently and systematically searching the literature (e.g., using machine learning algorithms), efficient and standardized coding and reporting, presenting and conveying the results to nonexperts, and measuring knowledge mobilization and research use. It is likely, for example, that the best syntheses do not focus solely on quantitative summaries of the field, but also provide rich examples and information on the intervention mechanisms and components—again, a combination of both quantitative and qualitative methods.

Finally, the importance of studying knowledge mobilization motivates strengthening participatory research methods, which highlight the value

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of including the voices, perspectives, and questions originating from those who are intended to benefit from the research. Examples include participatory design, action research, youth participatory action research, and community-based participatory research (Stringer & Aragón, 2020; Balazs & Morello-Frosch, 2013; Robertson & Simonsen, 2012; Cammarota & Fine, 2010; Shalowitz et al., 2009). How best to engage with the range of stakeholders when discovering, innovating, and adapting, or evaluating a new educational experience may vary by research goal, emphasizing the importance of considering these perspectives throughout the research, not merely at its "end." Yet such methods may carry significant time and resource costs, not just for researchers but also for practitioners and community members. Refining these methods allows elucidating when and how to engage in coproduction in a manner that is not only beneficial, but ethical and equitable.

Methods for Learning from and about Education Technologies

Since the founding of IES, determining how, when, and under what conditions education technology can improve student outcomes has been at the fore. It is perhaps surprising, then, that to date *zero* IES methods grants have explicitly focused on methods for working with data from education technologies. This is not to say that IES has not invested here, however. For example, NCER recently awarded five grants under the Digital Learning Platforms to Enable Efficient Education Research Network that will redesign existing digital learning platforms to support research.

Education technology data differ from typical data in randomized trials in that they include a vast amount of process data. For example, in addition to a pre-test and a post-test, an education technology product may also collect "click" data regarding every single item, the pathway taken through the intervention, and even data on attention. These new data bring new opportunities for understanding student learning. The committee anticipates a continued need for learning analytic methods.

But education technology research is broader than simply studying how to use technology to deliver learning experiences to students. Here we also include the promise of new and emerging data sources, including big data. These sources include administrative data, as well as data scraped from the web and from learning platforms. They also include data not only about students, but also about teachers, schools, and communities. We anticipate that these data will become increasingly useful in all types of projects, from answering descriptive questions about how systems work (Discovery and Needs Assessment), to how students' progress and learn (Development and Adaptation), to how to understand treatment effect heterogeneity and predict local treatment effects (Impact and Heterogeneity Analyses), to the networks through which teachers and leaders interact and share knowledge

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(Knowledge Mobilization). We anticipate an ongoing need for methods development in all of these areas.

Methods for Centering Equity in Research

Throughout this report we have argued that equity should be front and center as the primary goal for research funded by IES. To date, this has not been an explicit focus of methods development grants at IES (though certainly questions of equity have motivated the development of many methods). Below we provide examples of several possible areas for methods development to support this work.

Interventions focused on small subgroups or communities, such as students with low-incidence disabilities (e.g., traumatic brain injury), are often hampered by the fact that recruiting large samples is simply not feasible. In these cases, the resulting studies will need to be smaller than usual and may have additional considerations for recruitment. The development and testing of new research designs and statistical analysis methods for conducting *small* causal studies, both randomized and quasi-experimental, are needed.

In Chapters 4 and 5, we argued that focusing on interventions that can be studied by randomized trials severely limits the type of interventions that IES-funded studies can focus upon and learn about. Some of the largest effects on student outcomes may, in fact, arise from structural changes that are difficult to randomize. To date, IES has invested heavily in the development of quasi-experimental methods (n = 20 grants to date), but several important questions remain. For example, this work might address the conditions under which common quasi-experimental methods, such as difference-in-difference, instrumental variables, and synthetic control groups, perform well and where they do not. This might also include methods for not only conducting quasi-experimental studies on existing data, but also planning future quasi-experimental studies that involve collecting new data. Importantly, as with randomized trials, this next wave of methods development needs to focus both on estimating the average treatment effect using these designs and on methods for understanding heterogeneity and generalizability.

Generally, a methodological focus on equity can proceed in two ways: either via an examination of changes over time (or across treatment and control groups) in disparities between groups, such as the subgroups articulated in the No Child Left Behind Act and the Every Student Succeeds Act, or through a focus on creating conditions to enhance the performance of a traditionally underserved community, without explicitly measuring disparities but relying on the research literature to identify an underserved community, as expressed in President Biden's Executive Order on Advancing Racial Equity. For example, Atteberry, Bischoff, and Owens (2021) have

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developed statistical approaches for gauging progress toward racial and ethnic achievement equity in U.S. school districts, focusing both on performance relative to other groups within the same district and in comparison to statewide averages.

Finally, schools have increasingly begun to rely upon education technology products to diagnose, assess, and place students (at all age levels). Here there is the opportunity for algorithmic biases to enter the systems. This creates an increased need for the development of methods and approaches to study and improve these algorithms, including the data these systems are developed upon and how to ensure that methods that perform well in the sample in which they were developed also perform well and without bias in new samples that might be quite different.

THE FUTURE OF MEASUREMENT RESEARCH

Summary of Measurement Research to Date

Studies that develop, evaluate, and scale measures are currently funded at NCER and NCSER within each topic area. Through 2020, the centers have funded 176 measurement studies.[1] An analysis of the abstracts of these studies indicates that they can be categorized by their unit of analysis: students, teachers, or "other" (Table 6-1).[2]

Collectively, these studies have provided the field with a number of measures related to student outcomes and student characteristics. These measures have expanded the field's understanding of the ways interventions impact students. At the same time, there is a need for further research

TABLE 6-1 Proportion of Measurement Grants Funded by NCER and NCSER, by Target

Table 21. Proportion of Measurement grants by target - NCER and NCSER

	NCER	NCSER
Student	77%	95%
Teachers	18%	4%
Other	5%	2%
Total Grants	121	55

SOURCE: Klager & Tipton, 2021 [Commissioned Paper]. Data from https://ies.ed.gov/funding/grantsearch/.

[1]This analysis is based on studies with GoalType = Measurement. This excludes investments via center grants, networks, or studies with multiple goals.

[2]This sentence was modified after release of the report to IES to indicate that this tally of funded studies runs through 2020.

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on measures related to education systems, education leaders, and teachers. Detailed information on students only limits understanding of the mechanisms by which interventions lead to changes in student outcomes, as well as whether specific school or teacher characteristics moderate the impact of interventions. As we lay out a measurement agenda moving forward, we give careful attention to measurement tools across the education system and identify where IES might want to consider additional work.

Methods and measures are closely linked. Often new methods require new measures, and sometimes new measures spur the creation of new methods or the improvement of existing methods. Therefore, many of the issues we point to throughout this report will also require the development of additional measures. While we do not offer specific recommendations on which measures to invest in, we acknowledge in Chapter 9 that IES will need to consider strategic investments in support of our other recommendations.

Emerging Needs in Measurement Research

As noted above, the committee sees a number of areas where the development of new measures would facilitate IES's work as it continues to grow. In this section, we identify a few areas where we believe investment from IES could support emerging fields.

Expanding the Range of Student Outcome Measures

When it comes to measuring "what works," IES has in the past 20 years emphasized a broad range of student outcomes beyond standardized test scores and grades alone. This is evidenced in the broad range of measurement studies focused on student outcomes. At the same time, IES-funded researchers still frequently use standardized test scores and grades as the primary outcomes of their studies. This focus is easy to understand as these metrics are regularly collected by education institutions and agencies, relatively easy to access by researchers, and currently prioritized as outcomes in some education policies. Indeed, even research focused on social-emotional learning (SEL) often includes test scores or grades as the ultimate result or outcome in models and research designs. However, an overreliance on these narrow measures of learning make it difficult to understand the mechanisms and processes by which interventions have impact. Moreover, grades and achievement are the tip of the iceberg when it comes to assessing student learning.

However, there is now a deep knowledge base about the links between "upstream" affective, psychological, and behavioral processes that play a role in the "downstream" distal achievement of students (NASEM, 2018).

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Moreover, there are many more ways to measure learning, both inside and outside the classroom, than test scores and grades. SEL, motivation, and behavior (e.g., persistence, engagement, disciplinary behavior)—and the processes and moderators that shape these outcomes—are important to study in and of themselves.

Developing and Validating Measures beyond the Student Level

Measures of the structural and contextual factors that shape student outcomes. It is important to measure the opportunities that education systems provide and the context in which learning occurs, in addition to how students perform. Rather than narrowly focusing on direct-to-student interventions (that often locate the problem within students), studies of the learning environment, systems, and contexts can also be valuable. Examples of such foci include federal, state, district, school, and classroom policies and practices that influence effective teaching and learning; school leaders and the educational opportunities they foster; and how the instructional environment and interactions between students, teachers, administrators, and staff shape students' learning and experience.

Measures of the context in which children develop and in which students learn, from birth through college, would be valuable. Of the 176 grants awarded by IES over the last 20 years, only four grants (2%) have focused on measuring qualities of schools as the primary question of interest. Studies that develop and validate structural and contextual measures that assess how these factors influence students' SEL, engagement, motivation, behavior, and performance—and how these systemic and contextual factors may differentially impact students from structurally disadvantaged backgrounds—would be valuable.

Measures of teacher development, practice, and effectiveness. Research on the measurement and assessment of teacher development, teacher practice, and teacher effectiveness in creating more equitable learning environments where all students are valued, engaged, and perform to their potential—regardless of their background and social identities—is important. The classroom climates that teachers create can predict students' experiences and learning; moreover, teacher practice can be observed, measured, improved, and intervened upon in an interactive fashion over the course of terms and years.

Of the 176 measurement grants awarded by IES over the past 20 years, only 16 grants (9%) included measures of teachers or teacher practice. The vast majority of IES grants (89%) focus almost exclusively on measurement of students and student-level characteristics.

To understand how students learn and develop in the American education system, it is essential to understand what goes on with schools and

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teachers inside and outside the classroom. Research on how teachers create the learning environment of their classes has centered on three core aspects that many professional development efforts variously target: (1) *teachers' intentions* to enact changes to their practice; (2) *teachers' implementation* of those intended changes/practices in their classrooms; and (3) *students' perceptions and experiences* of those enacted practices (e.g., Murphy et al., 2021). Implementation measurement is labor intensive and more work is needed to build on recent IES-supported advances in automated measurement of instructional practice (e.g., Kelly et al., 2018).

Measurement research focused on teachers' practices is an important step in identifying which practices positively influence *students'* SEL, engagement, motivation, behavior, and performance. In addition, it will be helpful to develop measures of teacher professional development (PD) in order to identify what kinds of PD are effective in creating changes and improvements to teachers' intentions and implementation of policies, practices, interactions with students, interactions with parents, and other aspects that mitigate group-based experience and achievement gaps in their classrooms and support all students' learning and development.

Measures of knowledge mobilization. As discussed in Chapter 4, the committee identified knowledge mobilization as a project type. In the past, IES has funded efforts to measure knowledge use through the creation and support of two knowledge utilization centers. Work from these centers resulted in validated survey measures of instrumental, conceptual, and symbolic use (Penuel et al., 2016) and measures of depth of research use (May et al., forthcoming, 2021). The work also highlights the psychometric challenges of measuring practitioner knowledge of research quality (Hill & Briggs, 2020). These measures, developed for survey research, could be built upon and extended by developing measures that could be used in observational data (including longitudinal observational data, video data, and observation in the context of experiments) as well as tracing the impact of research in policy and practice (e.g., Farrell et al., 2018; Huguet et al., 2017). In order to advance this work, IES will need to consider how to leverage existing work and what kinds of additional measures to support new knowledge mobilization project time.

Developing and Validating Measures of Equity and Inequity

Given the urgency of improving educational equity, the field needs more informative measures of the range of inequities in inputs, processes, and outcomes to help monitor and spur progress across all of these areas. How can it be known when systems, learning environments, and opportunities inside and outside the classroom (e.g., curricula, textbooks, instructional practices, teacher-student interactions) are equitable or inequitable? While

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school systems are generally required to report student outcomes disaggregated by various demographic characteristics, measuring and comparing between-group gaps in experiences, achievement, and proficiency rates (and growth over time) face multiple challenges, due to small subgroup sizes, distortion in binary measures, lack of a clear criterion for comparison, and ambiguity in interpreting changes in absolute gaps (Ho, 2008). For example, structurally disadvantaged student populations often experience the classroom setting differently than their structurally advantaged peers; thus, should measures of equity in such student experiences always include an advantaged comparison group? Many quantitative critical race scholars argue that requiring White and other advantaged "quasi-control groups" or "comparison groups" is a racist practice that assumes that the experiences of advantaged groups serve as a normative standard by which to compare other groups (e.g., Flanagin et al., 2021; Sablan, 2018; Garcia et al., 2017). Other measures of gaps, disparate impact, and disproportionality exist (e.g., Reardon & Ho, 2014) but are not consistently used across the field, whether due to technical complexity or limitations in applicability. Developing clearer measures of differences would support more effective and transparent monitoring of equity in outcomes.

A growing body of frameworks and tools have emerged for measuring equity in education, highlighting a range of dimensions and indicators for school systems to monitor (e.g., Hyler et al., 2021; Alliance for Resource Equity, 2020; NASEM, 2019). These include student, teacher, and staff inputs; funding and infrastructure; curricula; school climate; leadership; and teaching practices. Measurement along any single dimension could constitute an accounting of strengths and needs, documenting evidence on a checklist, comparing group differences, or calculating more complex metrics. For example, student composition may be measured in terms of its diversity (e.g., Keylock, 2005), its similarity to the broader population (e.g., Reardon & Firebaugh, 2002; Atkinson, 1970), or each group's exposure to other groups (e.g., Massey & Denton, 1988). Examining the relationship between dimensions, such as between demographics and inputs, then allows for measuring the extent to which all groups have equal access to those resources and opportunities. This could be calculated as correlations or as probability distributions (e.g., Shannon, 1948). Assessing the distribution of individuals and resources across organizational structures, or the distribution of individuals' participation in and experience of various interactional processes, could serve as measures of inclusion. Other challenges emerge when measuring growth and gaps.

Building on these measures of diversity, equality, and inclusion to assess equity requires tracking change over time. A key conceptual distinction between equality and equity is that while equality focuses only on the present, equity recognizes the influence of past experiences. Although the

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above measurement approaches account for situational differences, they do not capture historical differences. Tracking past and future change is critical, both to account for compounding historical inequalities and to assess whether investments are successful in subsequently reducing gaps. Future projections are essential for anticipating what is needed to achieve more equitable outcomes. The field needs reliable and transparent measures of equity from birth to college, not only to make sense of the multiple dimensions and indicators that influence outcomes, but more importantly, to guide policy and practice in providing the resources, opportunities, and supports necessary for educational equity.

Using Technology to Develop New Approaches and Tools for Measurement

The field of education has largely benefited from new and emerging technology that allows researchers and practitioners to understand the mechanisms that improve students' learning and development. Education technology has the potential to be a powerful tool for measurement and assessment allowing new insights into learning and teaching. For instance, data can shed light on the learning process (e.g., observational data such as classroom audio or video recordings, learning management system behavior, analyses of electronic documents, etc.). Web-scraping tools, education data mining, and learning analytics and the data that result from these approaches also offer new opportunities for measurement research.

Developing Common Measures

A major problem that the field of education encounters is a plethora of measures created by education researchers and practitioners. Understanding and effecting system-wide implementation and improvement demands a coherent set of measures that link processes and outcomes across levels. For example, measures that are calibrated across tests to a single scale of measurement support the same inferences about student performance from one locality to another and from one year to the next (National Research Council, 1999). Collectively, such measures could facilitate moving beyond simplistic deficit frames that attribute gaps to students, by revealing the opportunity gaps in what education systems provide. Systems of measures further enable researchers and practitioners to examine the relationships between processes across levels (Bryk et al., 2015; Provost & Murray, 2011).

At the same time, an overemphasis on common measures may force researchers to use measures that are not well suited to the outcomes they focus on and may limit creativity and development of innovative measures. For this reason, the committee concluded that encouraging, but not requir-

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ing, common measures is ideal and allows investigators to pursue innovative measures as called for by theory and the needs of particular studies.

RECOMMENDATIONS

IES's investments over the past two decades have led to substantial methodological advancements in education research, particularly with respect to how to conduct randomized controlled trials. To continue to set the standard for research and respond to the current needs of education writ large, IES will need to expand the range of research on methods it funds. The committee recognizes that ESRA calls for IES to maintain a focus on causal research. At the same time, descriptive research is needed to be able to fully understand the context of interventions and the nuances of implementation. This means IES will need to invest in research on methods and approaches beyond causal designs that can help to answer questions about how and why interventions work or do not work across varying contexts (e.g., descriptive, qualitative, and mixed methods).

RECOMMENDATION 6.1:
IES should develop competitive priorities for research on methods and designs in the following areas:

- **Small causal studies**
- **Understanding implementation and adaptation**
- **Understanding knowledge mobilization**
- **Predicting causal effects in local contexts**
- **Utilizing big data**

RECOMMENDATION 6.2:
IES should convene a new competition and review panel for supporting qualitative and mixed-methods approaches to research design and methods.

In order to respond to the new study types and priority topics and to support the continued growth of methods, new measures and new approaches to measurement will be required. IES has funded numerous studies focused on development of measures, and these studies have provided the field with a number of measures related to student outcomes and student characteristics and have expanded the field's understanding of the ways interventions impact students' learning and achievement. At the same time, there is a need for research on measures of other student outcomes such as motivation, behavior and social-emotional development as well as measures related to educational systems, education leaders, and teachers. For this reason, we offer a recommendation for IES to consider related to measurement

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research that will support continued growth in other parts of NCER and NCSER's portfolio.

RECOMMENDATION 6.3:
IES should develop a competitive priority for the following areas of measurement research:

- **Expanding the range of student outcome measures**
- **Developing and validating measures beyond the student level (e.g., structural and contextual factors that shape student outcomes; teacher outcomes; knowledge mobilization)**
- **Developing and validating measures related to educational equity**
- **Using technology to develop new approaches and tools for measurement**

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7

Ensuring Broad and Equitable Participation in NCER and NCSER Research Training Programs

According to Section 112 of the Education Sciences Reform Act (ESRA), the Institute of Education Sciences (IES) is directed to "strengthen the national capacity to conduct, develop, and widely disseminate scientifically valid research in education." To fulfill this charge, over the past two decades, IES has funded programs that train researchers in the skills needed to carry out such research. Put another way, IES's training programs have "seeded" the field of education sciences with researchers who have the skills necessary to carry out its vision of scientific research. In the early 2000s, as a new agency encouraging the adoption of research methods not widely used in the field, IES decided it was crucial to invest in several types of highly competitive training programs, including those administered by the National Center for Education Research (NCER) and National Center for Special Education Research (NCSER). Although data on the outcomes of the NCER and NCSER training programs are not available, based on the high volume of participation, increases in the funding, and publication of research of the sort desired by IES, as well as the high quality of training experiences reported in testimony to the committee and witnessed by committee members themselves at first hand, these training programs seem to have paid off in advancing IES's goal to build a cadre of researchers capable of pursuing the sort of research it aimed to fund.

In this chapter, we re-examine the goals of NCER and NCSER's training programs, asking the question of what it would mean to "strengthen the national capacity" to carry out this report's vision of education research for the future. At minimum, the recommendations of this report are likely to require a broadening of the number and kinds of training opportunities made

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available to emerging researchers. We begin the chapter by examining the existing NCER and NCSER training programs at the undergraduate, predoctoral, postdoctoral, and early career levels, as well as the methods training program. This chapter also explores the impact of the research training programs and the continued need for these programs within the field. Finally, we discuss numerous ways NCER and NCSER can work to broaden participation in education research through these training programs.

DESCRIPTION OF EXISTING NCER AND NCSER TRAINING PROGRAMS

A review of training program requests for applications (RFAs) over IES's 20-year history indicates that the NCER and NCSER research training portfolios have had three primary objectives: (1) to increase the number of scientists capable of conducting rigorous and relevant education research independently, (2) to increase the number of education researchers capable of conducting education research that can be funded by IES, and (3) to advance the field of education research statistically, methodologically, theoretically, and practically. Over the past 5–10 years, a fourth objective has emerged: to increase the diversity of researchers and institutions that participate in training opportunities provided by NCER and NCSER so as to increase the diversity of the education research workforce. To achieve these goals, NCER and NCSER offer several different types of training programs for education researchers at different points in their careers, including programs aimed at undergraduate students, predoctoral students, postdoctoral scholars, and early career faculty. There are also methods training programs that vary in their focus, providing opportunities for education researchers at any stage of their careers, including graduate students (NCER only), researchers and faculty at institutions of higher education, and researchers outside of institutions of higher education, like local education agencies (LEAs), state education agencies (SEAs), research institutes and centers, and other non-university entities. More recently, some training programs have been designed specifically to increase participation of individuals from groups who are traditionally underrepresented in education research, including faculty and undergraduate students at Minority-Serving Institutions (MSIs). Other training programs require fellows to work in or with SEAs and LEAs to gain practical experience. We summarize these programs in Table 7-1.

The training opportunities offered by NCER and NCSER are overlapping but distinct. For example, both centers provide training opportunities for postdoctoral researchers and specialized methods training. NCER and NCSER diverge in their offerings for junior scholars, with NCSER providing training programs for early career faculty and NCER providing training

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TABLE 7-1 Research Training Programs at the Institute of Education Sciences, FY2002–Present

Program	Agency	Years	Goal	Program Reach
Pathways to the Education Sciences Research Training	NCER	2016–Present	To broaden participation of groups underrepresented in education research, focusing on undergraduate, master's, and postbaccalaureate students at MSIs.	12 grants at 7 institutions; $14.9 million
Predoctoral Interdisciplinary Research Training Programs in the Education Sciences	NCER	2004–Present	To increase the number of education researchers capable of producing research evidence that is both rigorous and relevant to the decisions that policy makers and practitioners make to support student learning and achievement in school.	47 grants at 21 institutions; $209 million
Postdoctoral Research Training Program	NCER NCSER	2005–Present (NCER) 2008–Present (NCSER)	To prepare doctoral graduates to conduct high-quality education, special education, and early intervention research independently and to be able to use and conduct research that is funded by IES.	NCER: 47 grants at 27 institutions; $30.3 million. NCSER: 20 grants at 13 institutions; $13.6 million
Early Career Development and Mentoring in Special Education	NCSER	2013–Present	To support early career early intervention and special education researchers capable of producing rigorous research relevant to the needs of infants, toddlers, children, and youth with or at risk for disabilities.	33 grants; $16.3 million

continued

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TABLE 7-1 Continued

Program	Agency	Years	Goal	Program Reach
Training in Education Research Use and Practice	NCER	2014	To bring together policy makers, practitioners, and researchers around a specific issue in order to share the latest evidence on the issue with policy makers and practitioners and to provide policy makers and practitioners an opportunity to talk with researchers regarding their own informational needs.	1 grant; $1 million
Early Career Mentoring Program for Faculty at Minority-Serving Institutions	NCER	2021–Present[3]	To diversify the types of institutions that provide research training opportunities funded by IES and the faculty who are prepared to conduct high-quality education research independently and can conduct research that is funded by IES.	No awards announced to date
Methods Training for Educational Researchers	NCER NCSER	2002–Present[4]	To support current researchers in building and expanding their skills to design, analyze, and interpret rigorous education research.	NCER: 15 grants; $11.7 million[1] NCSER: 4 grants; $2.2 million[2]

SOURCE: Committee-generated based on data from IES.

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NOTES:

[1]This includes five grants funded through the Unsolicited grant opportunity. Three of these were funded prior to the existence of the official Methods Training for Education Researchers topic area (R305U080001, R305U100001, R305U110001), and the other two include one grant to provide training for SEA and LEA research staff to conduct cost analysis (R305U180001) and one Methods training planning grant (R305U190001).

[2]This includes one grant funded through the Unsolicited grant opportunity (R324U140001), two grants funded under a competition called "Methods Training Using Single-Case Designs" (R324B160034 and R324B200022), as well as one grant funded under a competition called "Research Methods Training Using Sequential, Multiple Assignment, Randomized Trial (SMART) Designs' (R324B180003).

[3]The Early Career Mentoring Program for Faculty at Minority-Serving Institutions was announced, but no awards had been made in FY2021.

[4]Prior to establishing the Methods Training for Education Researchers program, NCER and NCSER supported methods training grants that were submitted under the unsolicited grants opportunity. We have included these grants in our total grants funded under this program, and therefore have noted the starting date for these grants as 2002.

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programs for undergraduate, masters, and predoctoral students and, as of FY2022, for early career faculty as well. These differences are due, in part, to differences in the funding levels for both centers. With substantially less funding, NCSER directs its limited resources to the postdoctoral and early career levels.

UNDERSTANDING THE IMPACT OF RESEARCH TRAINING PROGRAMS AT IES

IES has invested millions of dollars into its training programs to date. How impactful have these programs been? We know that hundreds of students, junior, early career, and senior scholars have participated in training programs, and many have carried these skills and competencies into education research careers (IES, 2021). Likewise, available data on the career-development aspects of the training programs suggest that the programs have brought scholars to education science who may not otherwise be in the field (IES, 2021).

Although some new information was provided in a recent report (IES, 2021), more data are needed for the committee and the field to fully understand who participates in these programs, how their participation has contributed to their success as education researchers, and how their participation has shaped the field. For example, it is not clear from the available data how many participants in the various training programs have matriculated through education research careers, how many have applied for and secured funding from NCER and NCSER, or how many have made use of the specific methodological and statistical techniques they were trained on in their research. Moreover, although recent RFAs specifically encourage training programs to recruit fellows from specific groups that are underrepresented in education research, information about the participation of individuals from these groups in the training programs is not available. It would be important to know if individuals from these groups are or are not applying for the NCER and NCSER programs, being accepted into the programs, or using their experiences in the programs to further their research careers (e.g., to secure IES funding as independent researchers). Data about each of these points are needed to better understand the success of the programs and to evaluate whether changes are needed.

Beyond the quantity of participants, data are also not readily available on different aspects of the training experiences provided by the programs. For example, all of the pre- and postdoctoral training programs are required to implement strategies to recruit and retain fellows from groups that are underrepresented in education research. In addition, many of the current IES training programs have an explicit interdisciplinary focus, including the predoctoral training programs. Further, over time, required

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activities for trainees have changed (such as the move toward apprenticeships for predoctoral fellows). However, data on the success of these efforts are not readily available. We do not know which components of the training programs are most beneficial for trainees. We do not know the extent to which programs have succeeded at enrolling and retaining individuals from historically underrepresented groups. And, we do not have data to understand whether specific disciplines within the broad field of education are underrepresented in the training opportunities.

All in all, it seems likely that the training opportunities have led to many desired changes. However, in the absence of specific data related to each of the training programs' primary objectives, it is difficult to ascertain the impact of the training opportunities offered by NCER and NCSER on education research. It is worth noting that the training programs' reporting requirements imply that indicators of program success have been collected; however, the data are not publicly available currently and were not made available to the committee. These data represent a rich and robust resource that can be used to examine who is and who is not participating in education research training programs at different points in the pipeline; what practices are effective for recruiting and retaining scientists in successful education research careers; and what barriers and opportunities are important to consider in the development of a diverse cadre of interdisciplinary education researchers. These data need to be made available to realize this promise.

NEED FOR CONTINUED TRAINING IN EDUCATION SCIENCES

The training portfolio that NCER and NCSER established to meet the charge issued within ESRA (Section 112) is impressive. Through these programs, IES has established a pipeline for developing education scientists, from undergraduate and graduate study and continuing throughout their research careers. It has also established a reputation for offering high-quality training opportunities that have advanced statistical and methodological expertise in the broad interdisciplinary field of education research, equipping the field with the expertise, tools, and competencies required to produce rigorous research. The sheer volume of education researchers who have participated in these training programs would seem to indicate that IES has, indeed, strengthened the nation's capacity to develop, conduct, and disseminate scientifically valid education research widely. At historical moments such as the present one, strengths like the training programs can and should be leveraged to address both challenges and opportunities to improve student achievement and school success.

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As noted in previous chapters, recent events associated with the global COVID-19 pandemic and civil rights violations have laid bare historical and structural inequities that are prevalent in many aspects of U.S. society. Emerging data make clear that education is no exception. Disparities in academic, behavioral, and social-emotional opportunities and outcomes are not new (Schneider, 2021) but have been exacerbated as student experiences in schools have continued to vary in unexpected, unpredictable, and unprecedented ways. These issues are complex, and evidence is only just now emerging on their impact on a variety of educational outcomes. When available, data indicate that, on average, students who were already more likely to experience poorer outcomes on most indicators of school achievement and success fared much worse, including students with disabilities, students growing up in poverty and low-income households, and students from minoritized groups.[1] If these trends hold, then the immediate and long-term impacts of this once-in-a-lifetime moment are likely to be felt for generations, making already stubborn disparities even more difficult to address.

Advances in education science are required to respond sufficiently to such complex challenges proactively and effectively. Now more than ever, the public demands that the field act quickly and strategically to produce research that is rigorous, relevant, and responsive to this moment. Doing so will require a balance of improvement and innovation—both hallmarks of training programs offered by NCER and NCSER.

Regarding improvement, NCER and NCSER's training programs were founded, in part, on the assumption that many education researchers did not have specific skills or competencies required to design, conduct, or disseminate causally informative research studies. As discussed in Chapter 2, although the field continues to debate what constitutes scientifically valid research, the number of IES-funded research studies that have employed experimental and quasi-experimental research designs has increased substantially over the past 20 years, allowing for an increasing number of effectiveness and efficacy studies, and allowing for meta-analyses and research syntheses on several interventions and instructional practices across elementary, secondary, and postsecondary education. It stands to reason that these advances were due, in part, to training opportunities provided by NCER and NCSER to develop and upskill scientists who could produce this research. IES has been successful in building the field's capacity for conducting education research, and this success should be celebrated and continued.

Relatedly, diversity has emerged as an important area of improvement for the training programs. In recent years, both NCER and NCSER have

[1]These summary statements about the effects of the COVID-19 pandemic on education rely on a background paper the committee commissioned from Hough et al. (2021).

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made efforts to increase diversity in the field of education research by providing training opportunities for individuals and institutions historically underrepresented in education research. RFAs for all training programs now explicitly encourage providers to recruit participants from underrepresented groups, including individuals from racial and ethnic subgroups, individuals with disabilities, individuals working in smaller or less well-known institutions, individuals in MSIs, individuals who are first-generation college students, and individuals with nontraditional professional pathways into education research. Specific data on the characteristics of participants in the training programs have become available only recently and make clear that participation of individuals from underrepresented groups in the full array of NCER and NCSER training opportunities is limited (IES, 2021). Thus, intentional efforts to broaden participation are warranted and would constitute a substantive improvement for both centers.

Regarding innovation, a hallmark of NCER and NCSER's training programs is their capacity to evolve to respond to needs in education research and education practice. For example, although ESRA charges IES with disseminating scientifically valid research, growing evidence indicates that dissemination of research evidence does not always translate into the uptake and use of research evidence; practitioners and policy makers often require significant engagement with researchers, knowledge brokers, and other agents to use research in a manner that changes policy, practice, and student performance (e.g., Finnigan & Daly, 2014; Coburn, Honig, & Stein, 2009). Accordingly, the most recent training programs respond to this need to improve efforts to mobilize research evidence for policy and practice. The 2019 predoctoral training grants required trainees to apprentice with an education agency or organization (e.g., school district, nonprofit education organization, or postsecondary institution) for a minimum of 1 year. The postdoctoral training grants required mentors to develop trainees' ability to "communicate their research findings effectively to researchers, education policymakers, practitioners, and the public." In 2021, a Methods Training on implementation research was awarded to prepare researchers to gain skills for studying the use of research evidence by teachers, principals, and other school administrators, and a Methods Training on research to support program and policy decisions was awarded to prepare researchers in state and local education agencies. These training programs are intended to increase the likelihood that IES-trained researchers are prepared to work in collaboration with communities and schools in ways that lead to timely, relevant, and high-quality research. Future trainings could build on these recent advances by explicitly developing the knowledge and skills needed to, for example, understand practitioner or policy maker contexts, build trusting relationships with partners, clearly establish roles and responsibilities

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of researchers and collaborative stakeholders, and more broadly engage in rigorous research in partnership with schools and communities.

Relatedly, innovation will be required to develop training programs that will prepare researchers to grapple with the complex themes of equity, implementation, heterogeneity, usefulness, and technology that resonate throughout this report. Both NCER and NCSER have prioritized training that supports scholars to pursue lines of inquiry to develop generalizable knowledge about "what works." Yet, data on student achievement and school success before and during the global pandemic have made it increasingly clear that access to and availability of evidence-based programs and practices are not sufficient to support student achievement for all learners. There are many barriers as well as opportunities for advancing education science in a manner responsive to practitioners, policy makers, students, and families, including issues associated with heterogeneity of intervention effects, barriers and facilitators to implementation of evidence-based practices, measurement of inequitable outcomes, development of effective intensive interventions for students with disabilities, analysis and integration of "found" data, and production of products and tools that can be used at scale to support learning. In its definition of scientifically based research standards, ESRA, Section 102(18)(vii) charges IES with "using research designs and methods appropriate to the research question posed." Accordingly, both NCER and NCSER have begun to focus on training that supports scholars to develop scientific evidence about the processes and mechanisms that underlie not just "what works," but how it works, why it works, for whom it works, and under what conditions it works. For example, in 2020, a Methods Training on selecting, implementing, and evaluating evidence-based interventions was awarded to build the capacity of researchers working in or with high-need school districts to use evidence-based interventions effectively to improve student and school outcomes.

Such pursuits of improvement and innovation should continue in earnest, as the nation will continue to face many challenges to ensuring equitable educational outcomes for all learners. ESRA charges IES with applying science to improve education and to address achievement disparities among different populations of students in specific content areas (ESRA, 2002). Scientific investigations that inform these complex problems of policy and practice will require theoretical, statistical, and methodological approaches above and beyond those already in use. Training that employs innovative approaches to quantitative, qualitative, and mixed methodologies will be needed to advance the field. Therefore, NCER and NCSER's training programs should be prepared for continued improvement and innovation.

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BROADENING PARTICIPATION IN EDUCATION RESEARCH THROUGH RESEARCH TRAINING PROGRAMS

With a mission of building the nation's capacity for designing, conducting, and disseminating scientifically valid education research, IES has always been responsible for broadening participation in the field. NCER and NCSER have been critical in the institute's strategic approach to taking on this challenge. It is reasonable to suggest that the training provided by NCER and NCSER has not only changed the way that basic and applied education research are conducted, but also has changed the way that scientists are trained in the broad and interdisciplinary field of education research. This reciprocal relationship is critical for the advancement of science and for the overall health and well-being of the field of education. In the following section, we discuss practices that can both demonstrate and expand NCER and NCSER's commitment to broadening participation in education research through training programs.

Transparency in Data

As noted earlier in the chapter, IES requires that training programs make targeted efforts to recruit participants from diverse backgrounds. For the most part, however, data about the backgrounds of applicants and participants in the training programs have not been made public. Very recently, information on participants in Pathways predoctoral and postdoctoral training programs was released in a Technical Working Group summary (dated December 2, 2020) that was linked on an IES blog post (IES, 2021). This summary report noted the limited racial and ethnic diversity among predoctoral and postdoctoral trainees (75% and 74% White, respectively). The report also noted that the predoctoral training programs are becoming more diverse over time (the percentage of predoctoral fellows who are African American increased from 4 percent in 2004–2009 to 12 percent in 2014–2020). In addition, IES has organized listening sessions since the report's release to better understand how it might enhance diversity, equity, inclusion, and accessibility. The report—and the actions that have followed—makes clear that IES is increasingly attending to the need to track its training practices and the participants in its training programs. We encourage IES to prioritize the routine collection and public reporting of these data.

To better understand how current practices affect recruitment, participation, and retention in the training programs and to develop appropriate solutions to broaden participation, more detailed data on the racial, ethnic, gender, disability status, disciplinary, and institutional backgrounds of applicants and participants in the training programs must be collected

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and published. At present, we cannot discern whether individuals from underrepresented groups are not applying for training programs, not being accepted into training programs, or not remaining in the field over career transition points (graduation, becoming faculty members or research scientists). To identify which issues are at hand will require appropriate data and data access.

In the future, it will be necessary to develop and publicly share the criteria used to evaluate the success of each training program, and to gather and share data on these measures. These actions are needed to inform continued development of training that responds to the needs of the field and of society.

Expanding Methods Training

Addressing inequities in education requires understanding not only what educational practices, intervention, and policies "work," but also how and why they work, for whom they work, and under what conditions. Given the importance of these questions, there is a clear need for training opportunities that focus on methods to address questions of how and why educational practices, interventions, and policies work. This will require training focusing on methodological approaches appropriate to these research questions, including qualitative methods, survey research, and mixed methods. To address these "how" and "why" questions with cutting-edge tools and approaches, researchers will also need training in methods for working with new data sources and "found data," including machine learning, predictive analytics, and natural language processing. In addition, researchers will need training in the implications of these new methods for equity concerns (e.g., issues of bias detection and correction). Finally, we emphasize the need for all methods training to address connections to theory, with consideration of how methodological choices and approaches relate to the theoretical conceptions of the constructs being studied.

These strands of methodological training are important both in dedicated methods training and as part of career development programs. Emerging scholars need to gain expertise in the new and advanced methodologies that they will encounter during and after graduate study. More advanced scholars may be better equipped to take on the risk of a "career change" and lead others in the field in new directions. Thus, training in these methodological approaches needs to be offered, both in methods training opportunities for early and mid-career scholars, and in undergraduate, predoctoral, postdoctoral, and career-development training programs.

Finally, the number of methods training opportunities needs to be increased. There is intense demand for such training opportunities, and the committee anticipates that demand will continue to grow. If demand for

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spaces in methods training workshops continues to outstrip supply, it is also important to consider how to allocate spaces to interested individuals, with attention to the implications of such decisions for equity concerns.

Additional Strategies for Broadening Participation

Some current training programs are effectively broadening participation, most notably the Pathways to Education Sciences programs and the Early Career Mentoring Program for Faculty at MSIs. These programs must be continued with increased funding. Building on these strengths, IES can implement additional strategies to further broaden participation in its training programs and in the field as a whole.

First, IES can develop new training mechanisms to provide opportunities for individuals who do not have access to training programs within the current structure. One such mechanism would be *supplements for existing research grants* that could create training opportunities for individuals at institutions that do not have organized training programs but that do have IES-funded principal investigators (PIs). For example, supplements could support undergraduates' participation in research grants (similar to the National Science Foundation Research Experience for Undergraduates supplement program) or could support graduate students' and postdocs' participation in research grants (similar to National Institutes of Health ([NIH] Minority Supplements). Another mechanism would be *short-term research opportunity programs for undergraduate students*, such as summer internships or formal training programs like the national McNair Scholars Program or the Big Ten's Summer Research Opportunities Programs. Such programs would provide career and talent/skill development opportunities to a different set of undergraduates than the current Pathways programs, which are longer term and more geographically limited. Summer internship programs frequently draw students from undergraduate institutions or regional universities that are not research intensive and that might not be able to support Pathways programs. Summer internship programs could also provide research opportunities for practicing teachers who wish to consider working in education research.

Several other changes can lead to shifts in who is served by existing career-development training programs. Toward this end, IES could consider implementing competitive priorities to incentivize broadened participation for existing training programs. IES could institute competitive priorities for institutions underrepresented within the training grant portfolio (e.g., MSIs, Hispanic-Serving Institutions, Historically Black Colleges and Universities [HBCUs]); for programs that graduate a high percentage of individuals from underrepresented groups; for predoctoral programs that recruit schol-

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ars from the IES Pathways Programs; or for programs that include doctoral training in understudied or priority areas of education research.

It is also important to set increased expectations for continued funding for training programs at institutions that have previously received training grants. Training grants serve to enhance infrastructure and improve capacity; therefore, institutions that have received funding multiple times should be in a better position to take on greater responsibility for broadening participation. IES could encourage this greater responsibility, for example, by requiring institutions to implement practices to yield a greater percentage of participants from underrepresented groups admitted, retained, and successfully launched in education research careers postgraduation. Institutions that hold training programs could also be required, in subsequent applications, to partner with MSIs and HBCUs, to include faculty at MSIs and HBCUs as co-PIs or multiple PIs, to offer training programs at both campuses, or to establish extended in-person and/or remote research apprenticeship opportunities in MSIs and HBCUs.

The committee also recommends supporting engagement and interaction of scholars across different career stages—in a sense, creating "intergenerational" learning ecologies in which scholars can work together to learn new skills and to build broader and deeper networks. IES currently encourages interactions between predoctoral training programs and Pathways undergraduate training programs, for example, by asking applicants for training sites to formally describe their plans for such interactions. This practice could be continued and expanded. More broadly, career-development training programs can build in opportunities for trainees to engage with scholars at different career stages, as these opportunities may open new possibilities for trainees to receive mentoring or to gain skills via research site visits, "shadowing" opportunities, or research apprenticeships. These strategies focus not only on getting people into the field, but also on retaining them as they transition from undergraduate and graduate study into research careers in academic and nonacademic organizations.[2] By leveraging their training programs for researchers at different career stages, NCER and NCSER would be well positioned to promote sustained career development and thereby support retention of education researchers (Byrd & Mason, 2021).

[2]Education faces a shortage of well-trained research-active doctoral graduates. Though education produces more doctorates than all other fields combined, less than 10 percent of education doctoral recipients pursue research careers (Hedges & Jones, 2012). This faculty shortage is especially pronounced in the field of special education (Smith & Montrosse, 2012; Smith et al., 2011), which experiences substantial yearly losses of faculty to retirement and especially high attrition from doctoral training programs (Robb, Moody, & Abdel-Ghany, 2012). The shortage of special education faculty has cascading effects on the persistent shortages of special education teachers (Smith et al., 2011).

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IES might also consider other avenues to broaden access to its training programs, particularly its methods training for education researchers. The methods training programs have proven to be highly desirable (as evidenced by the large number of participants annually). IES could elect to provide online access to these training materials, or coaching and/or technical assistance could be delivered remotely. IES might also consider approaches that would give faculty guidance on how to better navigate the grant proposal process, particularly for early career scholars who may not have mentors who had previously submitted IES proposals. For example, potential grantees might be able to observe panel discussions to better understand how proposals are reviewed. Or, successful grant applications could be made available (after sufficient time has passed) to give potential grantees models from which to learn.

Finally, another critical means to broaden participation in education research is to provide targeted funding for topics that scholars from underrepresented groups are interested in addressing. Some recent research (e.g., Hoppe et al., 2019) focusing on research portfolios at NIH has suggested that some of the challenges NIH faces in creating a diverse pipeline of scholars is that the agency has not tended to prioritize issues or research topics that are of interest to diverse scholars or the populations they serve. The same may be true for IES, although evidence is not yet available to discern if there is a mismatch between education researchers and IES's funding priorities. Therefore, IES may consider broadening the focus of its research portfolio to prioritize such topics, including those topics highlighted in Chapter 5 of this report. This broadening of focus will also require diversifying the reviewer pool and training reviewers to evaluate proposals to study these priorities appropriately.

RECOMMENDATIONS

IES's training programs are a vital and important component of its efforts to strengthen the education research field, and it is imperative that these programs continue to be offered. Indeed, the committee heard overwhelming testimony regarding both the popularity and utility of the existing programming. The committee encourages IES to systematically document the success of these programs and to expand them.

RECOMMENDATION 7.1:
IES should develop indicators of success for training, collect them from programs, and then make the information publicly available. IES should report the data it already collects on the success of programs and the pathways of trainees post-training.

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RECOMMENDATION 7.2:
IES should build on its current strengths in methods training and expand in the following areas:

- **Methods to address questions of how and why policies and practices work**
- **Methods that use machine learning, predictive analytics, natural language processing, administrative data, and other like methods**

To fully meet the needs of the field as outlined in ESRA, IES has a responsibility to ensure that its training programming is reaching populations of scholars and researchers who need it most. As the committee notes in this report, this is an important issue of equity in the education research community. In addition, there is tangible value in ensuring that the field of education research is diverse insofar as it improves the overall quality of eventual research, increases the likelihood that issues of equity will be taken up in research, and supports the ultimate identity building of future researchers.

RECOMMENDATION 7.3:
IES should collect and publish information on the racial, ethnic, gender, disability status, disciplinary, and institutional backgrounds (types of institutions including Historically Black Colleges and Universities and Minority-Serving Institutions) of applicants and participants in training at both the individual and institutional levels.

RECOMMENDATION 7.4:
IES should implement a range of strategies to broaden participation in its training programs to achieve greater diversity in the racial, ethnic, and institutional backgrounds of participants. These strategies could include

- **Implementing targeted outreach to underrepresented institution types**
- **Supporting early career mentoring**
- **Requiring that training program applications clearly articulate a plan for inclusive programming and equitable participation**
- **Offering supplements to existing research grants to support participation of individuals from underrepresented groups**
- **Funding short-term research opportunities for undergraduate and graduate students**

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8

Application and Review Process

While previous chapters focus on the content of grants funded by the National Center for Education Research (NCER) and the National Center for Special Education Research (NCSER), in this chapter we focus on the application and review process through which these grants are awarded. Understanding and making recommendations related to this process responds to the second element of the committee's charge.

OVERVIEW OF THE APPLICATION AND REVIEW PROCESS

Each year, NCER and NCSER oversee multiple grant competitions. In 2021, NCER and NCSER awarded more than 147 research grants to universities, research firms, developers, and other organizations. This total included grants focused on each of the five project types (Chapter 4) and a myriad of topics (Chapter 5), as well as those focused on research methodology (Chapter 6) and training (Chapter 7). The overall funding for FY2021 was roughly on par with that of 2020, although less than 2010. The total planned funding commitment for grants initially awarded in FY2021 was $226,469,425 in NCER and $79,314,071 in NCSER. Figure 8-1 indicates the total funding for NCER and NCSER for grants that were categorized as Exploration, Development & Innovation, Efficacy, Replication/Effectiveness, or Measurement from 2002 to 2020.

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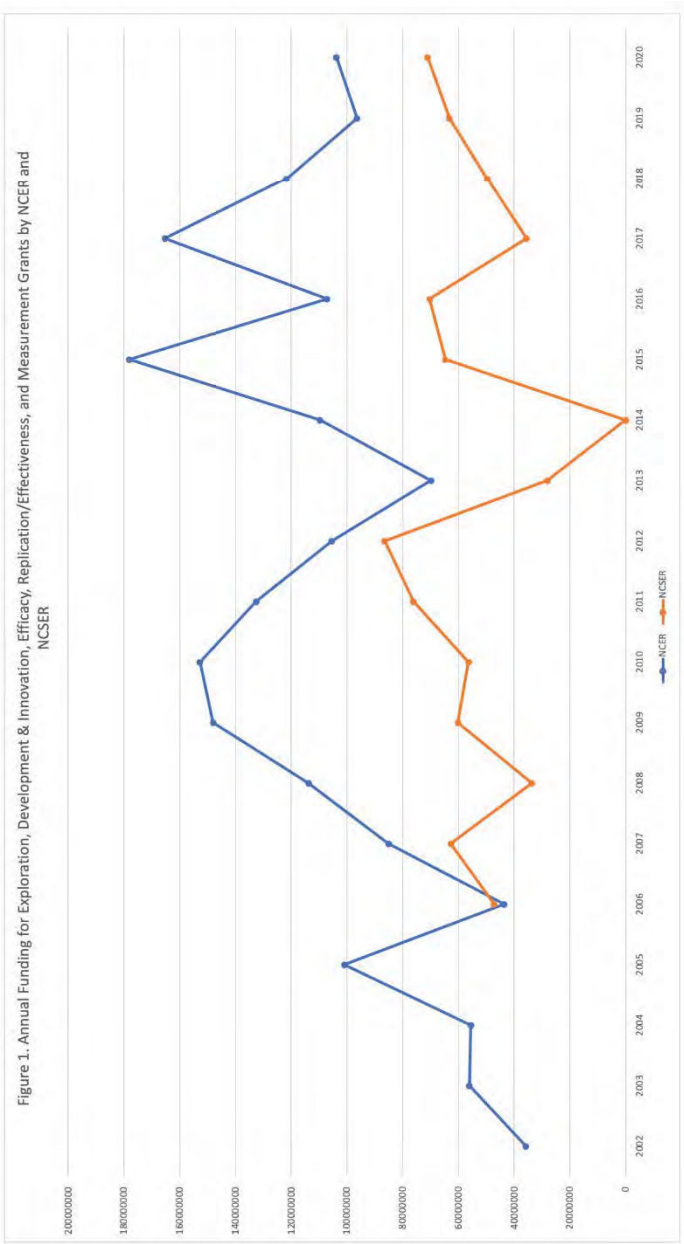

FIGURE 8-1 Annual awards for NCER and NCSER, 2002–2020, for grants categorized as Exploration, Development & Innovation, Efficacy, Replication/Effectiveness, or Measurement.
SOURCE: Klager & Tipton, 2021 [Commissioned Paper]. Data from https://ies.ed.gov/funding/grantsearch/.

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The annual grant process[1] for the main NCER and NCSER Education and Special Education Research competitions begins with a Notice Inviting Application (NIA) published each year in the Federal Register, along with an accompanying request for applications (RFA) published on the Institute of Education Sciences (IES) website. The NIAs and RFAs for many—but not all—of the research and research training competitions are typically released, advertised, and promoted in spring (~ April–June) of each year, leading to grant submissions in late summer/early fall (~ August–September). Additional reviewers for relevant panels are recruited beginning in the summer, applications are released to reviewers for initial conflict of interest identification in November, and applications are assigned to primary reviewers for initial reviews in December. IES maintains some standing review panels with some principal members who continue on each year. The Office of Science also recruits new principal and rotating members for those panels. The Office of Science also recruits reviewers for single-session panels that are newly constituted panels for one-off or irregularly run competitions.

Panels meet in mid-winter (~ February) and final decisions regarding funding are made in mid-spring of the following year (~ April–May). Applicants to the main competitions receive scores from the review panels about a week after the panel meetings end, and summary statements (narrative reviews and discussion summaries) about a month after the panel meetings. If selected for funding, a first disbursement usually occurs in late summer at the earliest, over a full year after the grant application was submitted. There are also smaller competitions that are run at different times and with different time frames that have much shorter turn-around times.

This research grant cycle thus includes three major activities for IES staff: the generation of the NIA and RFA (primarily the responsibility of NCER and NCSER, with input from the IES Director and the Office of Science); the application receipt, processing, and peer-review process (primarily the responsibility of the Office of Science with input from NCER and NCSER); and the funding decisions and obligation of new awards (primarily the responsibility of NCER and NCSER with IES Grants Administration staff).

In this chapter, we discuss the role and function of each purpose of the review process. We then turn to a discussion of three areas where the committee believes the current structure and organization of the review process

[1]The committee notes that this grant competition schedule represents a typical schedule for the main Education Research and Special Education Research grants. NCER and NCSER regularly run several other competitions that are competed on different time schedules. In FY2021, the Research Centers ran a total of eight grant competitions.

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presents challenges to meeting NCER and NCSER's overarching goals, offering insight into how IES might consider each of these issues.

Elements and Functions of the Application and Review Process

The research community interprets IES's mission and values primarily through the application and review process. Indeed, the application and review process is the primary way that IES is able to convey its understanding of what research the field needs to improve outcomes for students and educators. By identifying a set of topic areas and requirements for what high-quality research looks like, the application and review process is a codex for a field looking to understand IES's priorities for research. Within those priorities, it is up to the applicants to determine the specific focus of their research. In this section, we discuss the purpose and functions of the three elements of the application and review process at IES: the request for applications (the RFA), panels and reviewers, and the review and scoring process.

RFAs

In FY2022, RFAs allowed grant proposals for NCER's Education Research Grants competition to include up to 22 pages of a narrative that included four required sections: Significance, Research Plan, Personnel, and Resources. The committee heard testimony that this length exceeds those allowed by other agencies, including the National Science Foundation (NSF) (maximum of 15 pages) and National Institutes of Health (NIH) (maximum of 12 pages). While some speakers urged the committee to recommend that IES adopt shorter proposal lengths, committee members were concerned that this might limit the level of detail in IES proposals that reviewers need to judge the proposals, especially in light of the committee's call for basing the significance of the research in the needs of the field as well as in disciplinary knowledge. In addition to this narrative, applications can include several required and/or optional appendixes on topics such as dissemination history (required), responses to reviewers (required for resubmissions), charts and figures, letters of agreement, and budget. In total, a grant proposal can thus include nearly 100 pages of material.

According to the committee's review, requirements found in the RFAs are more explicit than those provided by other funders, with clear directions for each section, as well as suggestions for the kinds of content that have been included in past successful applications. The committee carefully reviewed a range of RFAs from both NCER and NCSER over time: in addition to hearing testimony from IES staff and other speakers, the committee reviewed multiple iterations of the document itself, searching for

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places where the document was either unclear or redundant. Ultimately, the committee found that the explicit nature of the RFA's directions is one of the strengths of the IES grant review system, even if it precludes a shorter proposal. The requirements articulated throughout the document scaffold a complex process even for first-time applicants who might be working in institutions without strong, centralized support for grant submission. The committee was particularly impressed by the document's attention to detailed recommendations for strong proposals. For example, suggestions for Initial Efficacy studies include clear and explicit guidance regarding what should be reported regarding statistical power analyses (e.g., effect size selected).

Panels and Reviewers

Following the completion and submission of an application, each grant application that is responsive to and compliant with the requirements of the RFA to which the application was submitted is assigned to a specific review panel. The Standards and Review staff within the Office of Science at IES manages the entirety of the scientific peer-review process for NCER and NCSER's grant competitions. In order to ensure the integrity of the review process, and allow the program officers to provide intensive technical assistance to applicants, the Standards and Review team is completely independent from NCER and NCSER. A contractor provides support to IES and coordinates many aspects of the logistics of the review process, as well as maintains and enhances the online peer-review system. Standards and Review staff are responsible for all of the substantive activities related to peer review. Among other things, they "determine the number and type of review panels needed, select and recruit peer reviewers, assign grant applications to the appropriate review panels, [and] assign primary reviewers to each application" (IES, 2021a). Thus, at the same time that NCER and NCSER staff are working to develop RFAs, encourage applications, and provide technical assistance to applicants, the Standards and Review staff is working to complete recruitment of reviewers. The majority of these are standing panels that currently include a commitment of 5 years from the principal members of the panels (although the panels also include rotating members who serve for a particular session, and ad hoc reviewers who provide specialized expertise and review a small number of applications). Additional single-session panels also occur when necessary. Depending upon the number of applications received, each standing panel might need one or more sections, each with approximately 15 members, including both experts in the topic area(s) itself as well as experts in measurement and methods (research design, data analysis, cost analysis) in education research. For reviewers, this commitment includes serving as the primary

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reviewer on up to eight proposals, as well as reading and discussing *all* of the proposals that are forwarded after the triage process to the full panel for discussion and final scoring for the panel (between 10 and 20 typically).

Review Process and Scoring

The Office of Science oversees the review process. Prior to beginning the process, reviewers are provided with a variety of instructional materials to guide them through the premeeting, meeting, and postmeeting review process. Currently, the reviewer materials include an IES Guide for Grant Peer Review Panel Members, and a set of Review Notes with information specific to each panel or group of panels. In addition, the Office of Science now provides a set of three videos that explain what happens to an application after it is submitted, what the responsibilities are of an IES peer reviewer, and what panel meetings are like (including a mock panel meeting). Panel chairs are provided with the materials described above, as well as with a Panel Chair Supplement to the IES Guide for Grant Peer Review Panel Members. Before the panels meet, reviewers provide detailed feedback and scores (1–7, with 7 = Excellent) related to each of the review criteria specified in the relevant RFA, as well as an overall rating (1.0–5.0, with 1.0–1.5 = Outstanding). Based upon these initial primary reviews, the Standards and Review team "conduct[s] discrepancy analyses of initial rating scores, [and] conduct[s] the triage of applications to be considered by the full panel" (IES, 2021a). Applications above a given cut-score are then discussed by the full panel. For each application considered by the full panel, this includes a brief presentation by the primary reviewers (usually two to four reviewers per proposal), followed by a discussion by the full panel, panel discussion summary, reconsideration of initial scores by the primary reviewers, and final scoring by each panel member on both individual criterion (1–7, with 7 = Excellent) and overall (1.0–5.0, with 1.0–1.5 = Outstanding) scores. Importantly, each application is required to be reviewed on its own merits, relative to the expectations in the RFA, not in relation to other applications discussed. Given available funds, applications in the Outstanding and Excellent range, which generally corresponds to an average overall score of 2.0 or better, are considered for funding.

As noted above, this RFA and review process ensures that research funded through NCER and NCSER serves to advance the mission of promoting the development and evaluation of interventions to improve educational outcomes for students. Evidence of IES's success in using the RFA and review process toward these ends can be seen in a few ways. First, IES has iteratively improved the quality of causal studies funded by shifting its RFA requirements such that successful proposals reflect contemporary understandings around rigorous design. For example, requirements regard-

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ing assumptions and sensitivity testing for quasi-experiments, as well as sample size and statistical power requirements for randomized experiments, were not originally included in IES's first round of RFAs, but were added in later in order to incentivize higher-quality studies. Similarly, the requirements addressing concerns regarding the ultimate usefulness of research to practice were added over time, including requirements for addressing issues of generalizability and sample recruitment, data sharing, and most recently, inclusion of a dissemination plan. The committee thought that this use of the RFA for promoting best practices was a strength of NCER and NCSER.

Finally, throughout this process, IES has established procedures to ensure that the system is fair and objective. This can be seen in the explicit criteria in the RFAs, the separation of proposals and review by the SRO, the inclusion of a thorough conflict-of-interest process, and the focus on review conducted entirely by a panel of experts. Akin to NIH but unlike NSF, IES program officers have no role in the review process, other than to encourage applicants and provide guidance on the RFAs. Thus, the determination for funding arises only in relation to the final proposal score and the cut-score for that particular year. The committee found that these steps to ensure the independence of the enterprise are a considerable strength of the current system.

ISSUES WITH THE CURRENT APPLICATION AND REVIEW PROCESS

As noted above, the annual process has served IES well in that it is predictable, investigators have ample information to write their proposals, and the procedures to score proposals and award funding provide all stakeholders with a common framework for assessing a study's potential for funding. Despite these strengths, the committee's assessment of the current application and review process revealed three issues that if addressed, may allow IES to build on its current strengths toward funding even stronger and more useful research: (1) IES does not consistently share demographic information on its applicants, reviewers, and grantees with the public, making it impossible to track whether the application and review process is resulting in an equitable distribution of awards and, if not, where in the process disparities are introduced; (2) the current procedures undermine IES's ability to be timely and responsive to the needs of the education research community; and (3) the current procedures do not allow for sufficient understanding of how well-proposed research addresses the needs of the field. We review these challenges in the section below, describing how current regulations or procedures may inadvertently create barriers to funding the best possible research proposals.

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Data on Applicants, Reviewers, and Grantees

As with all aspects of its charge, the committee formulated its considerations around how well the current application and review process functions in the context of the crosscutting themes identified at the beginning of this report (see Chapter 1). In light of these themes, one of the first questions the committee asked was how equitable the review process is in terms of those who applied for and were ultimately funded. This issue is particularly important to the committee given President Biden's Executive Order, which asks agencies to assess "potential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services in Federal programs" (Executive Order 13985, 2021). In order to better understand the implications of this order for funders, the committee heard testimony from IES staff, as well as from representatives from NSF and NIH.

The committee was surprised to find that in comparison to both NSF and NIH, IES reports very little data on equity. The most common source of data available is on *institutions* that receive IES grants. Tables 8-1 (NCER) and 8-2 (NCSER) provide overall funding (across years 2002–2020) by project type, and, within project type, by institution type.[2] These tables are inclusive of all NCER and NCSER grantmaking, including research centers, training, and research grants, but exclude funding for Small Business Innovation Research grants. These data indicate that overall, approximately 7 percent of NCER and 8 percent of NCSER grants have been held by Minority-Serving Institutions (MSIs); relative to other project types, MSIs were more likely to hold Exploration grants than any other type. By and large, most grants have been held by Carnegie-classified Research 1[3] universities (68% NCER, 72% NCSER).

IES collects and reports considerably less information on *applicants*. A recent IES blog post reported voluntarily submitted demographic information for the principal investigators (PIs) on applications submitted to the FY2021 competitions (IES, 2021b). Across NCER and NCSER, 59 percent of PIs who received funding were female (compared to 62% of applicants; 82% response rate). Only 13 percent of awardees were non-White or multi-racial (compared to 22% of applicants; response rate 75%). Similarly, 3 percent of awardees were Hispanic (compared to 5% of applicants;

[2] Although NCSER was not founded until 2006, Table 8-2 includes nine grants that were initially awarded at the Office of Special Education Programs but ultimately inherited by NCSER at its inception. The trends in these data do not qualitatively change when these nine grants are excluded from analyses. Given that NCSER includes these data in their list of funded research, the committee elects to include these grants as part of NCSER's portfolio.

[3] Research 1 universities may also be Minority-Serving Institutions, and so may be counted in both groups cited here.

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response rate 72%). Finally, 4 percent of awardees identified as having a disability (compared to 3% of applicants; response rate 70%). As written in the blog post, "These data underscore the need for IES to continue to broaden and diversify the education research pipeline, including institutions and researchers, and better support the needs of underrepresented researchers in the education community" (IES, 2021b). Moreover, these data only represent a single year in the life of IES, leaving the committee unable to assess whether the state of information above is typical, or if the situation is improving or declining.

Finally it is important to highlight that while there are very limited data on applicants and awardees, to date there is *zero* publicly available information regarding the demographic background of members of review panels.

While there is very little information available regarding equity in the Application and Review process, the available data surface significant challenges. Clearly, both non-White and Hispanic researchers are less likely to submit applications (22% and 5%, respectively). Even when they do submit applications, they are less likely to receive funding (13% and 4%, respectively).

Review Panels

Available research suggests that that there are reasons to attend to the composition of review panels that extend above and beyond the rationales for attending to equity noted in the section above. There is much to learn about the role that multiple perspectives in the review process can play in supporting high-quality research, as the current literature on diversity in review panels[4] has come to suggest.[5] For example, Langfeldt and colleagues (2020) found that review panels with scholars from multiple disciplinary backgrounds and approaches more frequently supported diverse forms of research by extending definitions of quality beyond disciplinary norms. In contrast, Huutoniemi (2012) found that panels of researchers from similar backgrounds competed to establish their expertise and authority using narrow criteria to advance specific fields. Diverse groups, in terms of race, ethnicity, and research background, are less likely to fall prey to "groupthink," encouraging debate to counteract preformed preferences and biases (Esarey, 2017; Laudel, 2006; Antonio et al., 2004). Considering more diverse criteria of evaluation has been advocated to support innovative and risk-taking research (Azoulay and Li, 2020; Hofstra et al., 2020; Valantine

[4]This section draws on findings synthesized for the committee by Zilberstein (2021).

[5]The committee recognizes that attending to racial and disciplinary diversity in review panels in and of itself does not guarantee an equitable review process. Given the evidence about the importance of racial and disciplinary diversity in supporting high-quality research, we argue that this particular dimension of equity is of critical import.

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TABLE 8-1 Average Proportion of NCER Funding by Project Type and Institution Type, 2002–2020[1]

Table 4. Proportion of funding by grant category and institution type - NCER

	Exploration	Development & Innovation	Efficacy	Replication / Effectiveness	Measurement	Methods	RPP	Training	Other	All Grants
Grants	236	369	236	134	121	93	61	114	90	1454
Funding (Millions of $)	251.1	508.9	628.1	409.3	184.0	60.8	24.3	256.5	515.8	2838.9
University	86%	82%	66%	70%	84%	70%	69%	100%	74%	77%
MSI (vs Non-MSI)	13%	7%	3%	5%	9%	5%	2%	3%	11%	7%
R1 (vs Non-R1)	80%	68%	54%	60%	73%	59%	61%	97%	73%	68%
Private (vs Public)	24%	24%	23%	18%	19%	36%	20%	51%	25%	26%
Research Firm	12%	9%	26%	28%	13%	30%	21%	0%	21%	18%
Developer	1%	6%	5%	0%	3%	0%	3%	0%	4%	3%
Other	0%	3%	3%	2%	1%	0%	7%	0%	1%	2%

SOURCE: Klager & Tipton, 2021 [Commissioned Paper]. Data from https://ies.ed.gov/funding/grantsearch/.

[1] As discussed in Chapter 4 and in the Klager and Tipton (2021) paper, the categories identified here are delineated by project type and not grant-making program. For this reason, the RPP column only includes grants with the RPP project type specifically identified, and therefore does not include the entire suite of partnership investments.

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TABLE 8-2 Average Proportion of NCSER Funding by Project Type and Institution, 2002–2020

Table 5. Proportion of funding by grant category and institution type - NCSER								
	Exploration	Development & Innovation	Efficacy	Replication / Effectiveness	Measurement	Training	Other	All Grants
Grants	54	191	70	56	55	48	33	507
Funding (Millions of $)	53.4	271.8	216.0	178.3	85.8	26.2	124.5	956.1
University	90%	94%	92%	80%	81%	100%	93%	90%
MSI (vs Non-MSI)	13%	12%	6%	3%	5%	13%	10%	8%
R1 (vs Non-R1)	76%	71%	76%	65%	65%	81%	76%	72%
Private (vs Public)	17%	12%	14%	20%	13%	12%	22%	16%
Research Firm	9%	2%	3%	19%	17%	0%	7%	8%
Developer	0%	3%	2%	0%	0%	0%	0%	1%
Other	1%	1%	3%	1%	1%	0%	0%	1%

SOURCE: Klager & Tipton, 2021 [Commissioned Paper]. Data from https://ies.ed.gov/funding/grantsearch/.

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and Collins, 2015; Dezsö and Ross, 2012). Also notably, a lack of racially diverse reviewers perpetuates in-group bias and favoritism for the status quo, continually disadvantaging researchers from underrepresented groups whose research commonly lies outside of reviewers' areas of expertise (Hayden, 2015).

From their personal experiences, committee members noted IES review panels often include a range of disciplines, with panels typically including those in both the NCER and NCSER communities, researchers in multiple disciplines that pertain to the panel, and experts in methods and measurement. At the same time—in the committee members' experiences—most of the review panels were composed of researchers who had at some point been funded by IES. When considering this observation in concert with IES's reported data that the majority of awardees are White, it stands to reason that current review panels may not be able to access the benefits associated with racially diverse groups.

Given the role that both racial and disciplinary diversity on review panels can play in supporting high-quality research, the committee notes the importance of ensuring that review panels are, in fact, representative of multiple perspectives. In this case, a lack of consistently reported information has undermined the committee's ability to assess the degree to which IES has attended to these issues in its application and review process.

Timely and Responsive Application Cycles

The NCER and NCSER application and review processes takes, on average, 8–10 months from the time that a grant application is submitted until it is ultimately funded. Committee member experience (as reviewers and applicants) suggests that most grant proposals are not funded in their first submission but may take two or three submissions before ultimately being funded, resulting in a total process of as much as 3 years. While this timeline offers benefits in terms of both feasibility (for IES) and refinement of the proposal and research plan, it can impede the ability of researchers to be responsive to on-the-ground concerns of practitioners and decision makers in schools. Programs and interventions tend to move quickly within school districts, and it is likely that many programs that were ripe for research have been understudied due to the lack of federal funding at the crucial moment in time.

This timeline impacts proposals in that it makes it difficult to develop and maintain true partnerships with schools and districts. Currently, applications require letters of support from school district personnel indicating a commitment to take part in the study. However, school district superintendents and school leaders often move schools and school districts, as do teachers. From the researcher standpoint, the lengthy timeline means that

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the schools recruited for the first application may ultimately not be available for the second application, resulting in them investing less heavily in the partnership than they may otherwise. From the school district position, this means that most researchers who contact them are unlikely to lead to productive partnerships in a timeframe that matters to them or, even worse, valuable time invested into partnership building may be wasted. Finally, in the committee's experience, letters of support do not necessarily articulate a warrant for conducting research on a given topic in a given location, as support for conducting research is not always equivalent to identifying a rationale for why something is important. It is the committee's judgment that the current letters of support mechanism is not ideally suited toward guaranteeing participation or identifying the significance of proposed research.

Coherence with the Needs of the Field

The committee reviewed the current application and review process with an eye toward whether or not the process resulted in research that is ultimately useful to the field. In considering these questions, the committee noted a set of critical junctures wherein the current procedures do not allow for sufficient information to assess the significance of individual proposals and the extent to which proposals, if funded, are likely to serve the needs of the education community. In this section, we delineate several places in the application and review process where we see this problem emerge.

Reviewer Preparation and Scoring

Reviewers are encouraged to engage with a series of preparatory materials in advance of their review process. Reviewers are instructed to carefully read the RFA and evaluate applications based on the stipulations of the most current RFA text. Additional materials are provided to panel chairs who meet with the Office of Science prior to the panel meeting; however, it is the experience of members of this committee that chairs of review panels are left to their own discretion to lead and facilitate the conversation around individual applications. In addition, Office of Science staff attend and monitor the panel meetings to address questions or issues that arise, and to ensure that review criteria are appropriately applied. Reviewers are asked to draw upon their own expertise when evaluating how well applications respond to each aspect of the RFA.

Although the committee does not dispute the substantial expertise that each reviewer brings to the process, we note the absence of any kind of directive or orienting material that allows reviewers to gauge the significance of a proposal against expressed research priorities or notable needs in the field. Further, reviewers are also explicitly advised against attempting to

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build a complementary group of studies among those that they review and are asked instead to consider each study on its own individual merits. As a result, it is challenging for review panels to track whether a set of funded proposals coherently maps onto the needs of the field. This question, important as it is, is simply not structured into the review process.

Specific to scoring, the committee notes that after a proposal is discussed by the panel, the proposal's original reviewers are able to change their holistic scores for the proposal and then every panel member submits a score. As noted earlier in this chapter, these scores are between 1 and 7 to the tenth of a point. The committee notes that, in our experience, there is no real anchor for this scoring and that different reviewers may conceive of the meaning of scores differently; for example, the difference between a 1.9 and 2.1 is likely measurement error, not a precise difference. In the absence of clear and meaningful anchors for judgment, reviewers in different panels may be harsher or more lenient than others and, over the review panel meeting period, there may be drift in these scores.

Furthermore, the committee notes that while the scoring scale is continuous, it is understood by committee members who have participated in this process that a review score below 2.0 is typically considered "fundable" and a score above 2.0 is not, as noted earlier in this chapter. As a result, a repeated concern is that it is likely that reviewers are not simply providing a scale score of "merit" when providing an overall summary, but also a "vote" regarding whether they think the grant should be funded. It is thus possible to bias the merit review process by providing slightly lower scores (just below 2.0) for grants that reviewers prefer, or slightly higher scores (just above 2.0) for grants they do not, thus making it possible for reviewers to "game" the system in ways that may result in bias and inequities. The committee discussed these concerns at length, but observed that a comprehensive understanding of potential problems in this arena would require deeper analyses of data on applicants.

RFA: Significance

Applications submitted to NCER and NCSER typically include four parts: Significance, Research Plan, Personnel, and Resources. In the FY2022 Education Research Grants RFA (IES RFA, 2022), guidance for strong applications indicates that the Significance section should include a description of "how the factors you propose to study are under the control of education agencies" [Exploration], why the intervention would "be an improvement over what already exists" [Development], a description of the "population of learners and educators intended to benefit from this intervention" [Development], and "the learners who should benefit … from this

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intervention" [Initial Efficacy]. The full RFA document contains additional relevant guidance intended to support strong applications.

While each of these suggestions encourages researchers to consider how their particular intervention or study might connect to improving practice, it does not ask them to provide rationale that the problem the intervention is attempting to address is one in need of additional research. That is, it is possible that there are problems and opportunities that education decision makers face that need research (that would clearly be "significant") and yet there are no studies conducted in this area (see Chapter 5 for our discussion about how current constraints impede the study of certain topics). At the same time, there may be many studies (each significant in a more narrow sense) on a single topic or intervention. Although the suggestions included in the RFA are intended to assist applicants in considering the current research landscape around a particular problem, they ultimately serve to direct applicants away from locating the value of their work inside the existing needs of educators and education stakeholders. Across many proposals and studies, the result of this framing is that it puts the interests of researchers above the needs of the field.

RFA: Dissemination

The Education Research Grant RFA includes a requirement that researchers identify a plan for how they will share the results of their study upon completion. The committee recognizes that this requirement represents an attempt to ensure that funded research ultimately makes its way into the hands of "end users." However, we have identified a set of ways in which the current dissemination requirement does not actually function to ensure that funded research will be useful to education stakeholders.

As with the Significance section described above, the RFAs include relatively open-ended instructions with minimal guidance for the required dissemination plan, and no clear direction for how reviewers should evaluate the dissemination requirement. In the absence of such guidance, research teams and review panels may be applying idiosyncratic judgments of the kind of dissemination that is appropriate and effective. Committee members note from their own experience on reviews that panels vary greatly in how they approach this portion of the application.

Additionally, the committee notes that current framing of the Dissemination section suggests a largely unidirectional kind of engagement around research results: that is, researchers tell stakeholders about their findings, and then stakeholders use those findings. However, as described in Chapter 4, contemporary scholarship around knowledge mobilization problematizes this unidirectional assumption. Stakeholders need to engage with the research at multiple stages of the process to interpret, adapt, and apply it

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in practice. Some projects with active partnerships may be well positioned for stakeholder engagement before, during, and after conducting the research. However, relying on a post-project dissemination plan alone may perpetuate inequities in access to relevant research. Further, the committee believes it is important to consider how dissemination and engagement extend beyond those who are immediately involved in the development and production of the research.

Role of Practitioners

Finally, the committee notes that the current application and review process does not have a consistent plan or procedure for engaging the education practice community. While some educators or policy makers may participate in the review process, the voices of practice stakeholders are not regularly integrated into review. Given the proximity of these professionals to the work of education, it is possible that the review process is missing a unique opportunity to ensure the application and review process yields useful research.

The issues highlighted above, taken together, point to a process wherein reviewers lack a clear north star by which to make calibrated judgments about what proposed research will be useful to stakeholders in the field, which can result in funded research that does not sufficiently meet the needs of education stakeholders and decision makers. We conclude this chapter with a set of recommendations for how IES might address this challenge.

RECOMMENDATIONS

In this chapter, we describe the elements and functions of each component of the application and review process. Given the role of the RFA as the primary mechanism through which NCER and NCSER signal their priorities to the field, the committee was particularly concerned with how to organize the review process. As noted in this chapter, the committee concluded that the RFA is well organized and purposeful, it is intentionally oriented toward providing applicants with an equitable experience, and its directions are clear and understandable.

Despite these successes, the committee did observe a few areas in which the current organization of the application and review process sets up a series of challenges: (1) IES does not publicly share information on its applicants, reviewers, and grantees, making it impossible to track whether the application and review process is resulting an equitable distribution of awards, and if not where in the process disparities are introduced; (2) the current procedures undermine IES's ability to be timely and responsive to the needs of the educational research community; and (3) the current

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procedures do not allow for sufficient understanding of how well-proposed research addresses the needs of the field. In this chapter, we described how these issues may inadvertently create barriers for NCER and NCSER in funding research that meets their stated goals. It is our sincere belief that with some modification to the process, IES will be even more successful in funding research that meets the needs of the field.

In regard to the first challenge noted above (i.e., lack of consistently reported data), the committee determined that given the centrality of equity issues to the mission and purpose of IES, it is critical that IES provide the field with transparent data on not only who is funded, but also who applies for funding and who is selected to review applications. Where this demographic data reveal inequitable inputs and outcomes into the review process, IES will want to craft immediate responses, but it is impossible to know what these problems are in the absence of a regular data report. For this reason, the committee recommends that IES takes immediate action related to the reporting of data.

RECOMMENDATION 8.1:
IES should regularly collect and publish information on the racial, ethnic, gender, disciplinary, and institutional backgrounds of applicants and funded principal investigators (PIs) and co-PIs, composition of review panels, and study samples.

Specific to the second issue noted in Chapter 8—timely and responsive application cycles—the committee found evidence that the current structure of a single annual review panel is not functional for the research community in education, and a September deadline for proposals is particularly problematic given the timing of the school year.

RECOMMENDATION 8.2:
IES should review and fund grants more quickly and re-introduce two application cycles per year.

The committee agrees that attending to the third challenge described in Chapter 8—ensuring that funded research is useful to the field—will require longer and more concerted effort. For a variety of reasons described in the chapter, reviewers in the current system do not have a way to calibrate their review of application materials toward any kind of shared understanding of what the field needs. It is therefore difficult to ensure that the work is relevant to policy and practice decision makers, which leads to funded research that meets the requirements of the RFA, but is not always aligned with the needs of education more broadly.

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In general, the committee thinks that attending to the larger structural issues facing NCER and NCSER (see Recommendations 4.1 and 5.1–5.5) will serve to help ensure that funded research is ultimately positioned to be useful for the practitioners and policy makers. However, the effects of implementing these recommendations may take several years to emerge, and the committee notes that the field needs useful research as soon as possible. For this reason, we offer two recommendations that may help ameliorate some of the challenges related to usefulness that the committee laid out. First, in response to the current letter of support mechanism at work in the RFA, we considered how adjusting expectations around collaboration might better serve both researchers and involved communities. Below, we recommend an alternative approach to the letter of support that we believe will better map onto the current grantmaking timeframe, and also help better ensure that funded research is warranted in the community in which it is proposed.

RECOMMENDATION 8.3:
For proposals that include collaborating with local and state education agencies, the request for applications should require that applicants explain the rationale and preliminary plan for the collaboration in lieu of the current requirement for a letter of support. Upon notification of a successful award, grantees must then provide a comprehensive partnership engagement plan and letter(s) of support in order to receive funding.

The committee also noted the current lack of a consistent plan for engaging practitioner and policy-maker perspectives in the application and review process. The committee discussed multiple ways that IES might want to leverage these communities, ranging from consistent participation on panels to separate working groups, but notes that practitioner and policy-maker communities should be involved in determining the mechanism that works best for IES. Ultimately, the committee agreed that each approach has trade-offs to consider regarding the burden placed on policy makers and practitioners, as well as the logistics of working with school schedules. Importantly, the goal of this work is for IES to define a role for these communities that is both distinct and meaningful, such that these already burdened professionals can maximize their valuable time and effort.

RECOMMENDATION 8.4:
IES should engage a working group representing the practitioner and policy-maker communities along with members of the research community to develop realistic mechanisms for incorporating practitioner and policy-maker perspectives in the review process systematically across multiple panels.

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The committee also discussed possible approaches to changing the review process to take on issues with rating described in this chapter. One idea was for IES to identify a person or entity to oversee and audit panel decision making. This person could, for example, review triaged proposals—ultimately pulling proposals out of triage when there appeared to be discrepancies or errors. They might also examine the final panel scores around the cut-point (2.0) and make substantive recommendations regarding priorities for funding. The committee, however, had difficulty determining who the right person for this position might be. Some thought that the program officer could take on this role; a problem, however, is that this changes the role of program officers, opening them up to have undue influence on funding decisions. Another idea was for the panel chair to take on this role; here the concern was that this would increase reviewer burden.

The committee also spoke about the problem of the cut-point at length. Some highlighted that another solution altogether was to shift from a known cut-point to a funding percentage instead, with such funding percentage cut-offs varying across panels. A benefit of this approach, some felt, was that it took into account differences in scoring across panels and did not allow for such clear gaming. Others worried, however, that there may be real differences across panels and that some panels may have stronger proposals than others, and that such a relative score would not be fair. Overall, while the committee declined to make a recommendation on the best approach to addressing these concerns, we agree that these problems require careful consideration in the future.

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9

Concluding Observations

This committee was charged with providing guidance to the Institute of Education Sciences (IES) aimed at supporting the work of its National Center for Education Research (NCER) and National Center for Special Education Research (NCSER) in the years to come. The committee focused on four primary tasks outlined in its charge: (1) to identify critical problems or issues on which new research is needed; (2) to consider how best to organize the request for applications issued by the research centers to reflect those problems/issues; (3) to explain new methods or approaches for conducting research that should be encouraged and why; and (4) to identify new and different types of research training investments that would benefit IES. To carry out its charge, the committee gathered and reviewed evidence from multiple sources, including official documents from IES and federal legislation, testimony from IES leadership, perspectives of education stakeholders, and scholarly literature. Committee members also drew on their own expertise and their knowledge of and experience with NCER and NCSER in formulating the recommendations it offers throughout this report.

The reach and impact of NCER and NCSER over the past two decades is impressive. As of 2022, there is virtually no part of the education research enterprise in the United States that is not in some way influenced by IES-funded work. Moreover, the committee recognizes that it is due in large part to the efforts of IES that education research has achieved recognition as a robust science-based field. In formulating its recommendations, the committee kept these successes in mind while also working to identify areas

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where NCER and NCSER can improve their processes and be responsive to changes in the education landscape that have occurred over the past 20 years. In this chapter, we summarize several high-level observations about the landscape of education research in the United States, and point to two additional recommendations to support IES's ongoing work in building an education research enterprise equipped to serve the next generation of students.

TWENTY YEARS OF IES: A CHANGED LANDSCAPE

As the committee notes in the first several chapters of this report, the field of education research has changed substantially since the founding of IES. Any survey of education research over the past 20 years could point to a myriad of areas in which knowledge in education has grown, much of which is directly tied to IES-funded research. Beginning with the No Child Left Behind Act of 2001 and furthered by policies at all levels that require use of data in decision making, the field of education now has nearly two decades of data of all kinds. This abundance of data—on students, teachers, schools, and other education settings—has expanded the kinds of questions that education researchers can ask and answer.

As a result of two decades of research, the field now better understands the ways that students are nested within cultural contexts and the way those contexts matter for students' experiences. Similarly, the field is better positioned to understand the ways that nonacademic outcomes help support students' academic outcomes. Further, the field now has a more complete understanding of the way that education in the United States is a system, signifying that change needs to occur at multiple points in the system in order to bring about desired outcomes. Perhaps most importantly, the field now has decades of concrete evidence describing the undeniable role of structural inequality and systemic racism and discrimination in shaping educational experiences and outcomes of all kinds.

Of course, U.S. education and education research has seen tremendous upheaval in the past 2 years in particular. As the nation continues to reckon with the twin pandemics of COVID-19 and systemic racism, the committee encourages NCER and NCSER to shift to ensure that funded research is responsive to the challenges of the present moment. Recognizing that racial, ethnic, and economic inequality in education have always been present, and armed with new evidence that these divides have sharpened during the pandemic, it is more important than ever that IES prioritize research that advances equity. Likewise, we recognize the importance of addressing questions regarding access and inclusion of students with disabilities to ensure their meaningful academic progress and life chances.

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In addition, knowledge of how research evidence is used in education settings has grown by leaps and bounds in the 20 years since the founding of IES. As discussed throughout this report, the field now recognizes that with rare exceptions, local decision makers do not tend to identify problems of practice and then turn to peer-reviewed research to find a "vetted" intervention to solve whatever the problem may be. In reality, mobilization of knowledge from research is a dynamic, multidirectional process that relies heavily on trusted relationships among researchers, practice partners, and individuals or organizations in knowledge broker roles.

As a result, the committee is concerned that the current reliance on a model for knowledge use that expects post-facto decision making by practitioners otherwise divorced from the production of knowledge simply does not map onto the realities of knowledge use in public education. This tension has the potential to substantially limit the ultimate utility of research funded by NCER and NCSER. In its recommendations, the committee offers insight into how IES might make changes to its current programming in order to better address the reality of how knowledge is and can be used in education. Throughout this report, the committee has identified recommendations that are intended to help IES continue to produce transformative education research and maintain its status as the premier funder of education research.

When the committee stepped back to look at NCER and NCSER's work within IES, it became clear that an organizational structure that once worked to build a national infrastructure of education research now constrains the issues and methods that are likely to be studied. Over time, NCER and NCSER have attempted to address these constraints as well as the shifting needs of the field by adding new and often unique or specific funding opportunities (such as Education Research grants in Special Topics) and altering institutional policies (Schneider, 2021). As the field continues to grow as a result of NCER and NCSER's investments, the ability to address ongoing challenges by adjusting the existing structure is unlikely to meet expanding needs. The recommendations identified by this committee are aimed at helping NCER and NCSER transform its infrastructure in a coherent and cohesive way to meet the present and future needs of this field.

IES has an obligation to adapt its work so that the centers' funded research continues to meet the objectives laid out in the Education Sciences Reform Act (ESRA) of 2002. In identifying these recommendations, we are describing a vision of NCER and NCSER that is distinctly appropriate for scientific research in education, based on two decades of cumulative knowledge building. If enacted in concert with one another, these recommendations will help IES continue to fulfill the obligations laid out in its founding legislation.

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ENABLING RECOMMENDATIONS

The committee's recommendations are informed by our understanding of how the five crosscutting themes identified in Chapter 1 (equity in education, technology in education, usefulness in education research, attending to implementation in education research, and heterogeneity) bear on what IES needs to change or adapt in order to meet the current and future needs of education research. Some of our recommendations can be implemented rapidly, particularly those pertaining to topics, methods, and measures for future study, whereas other recommendations may require longer consideration by IES stakeholders.

By following our recommendations, IES will set a course for a productive and impactful body of education research in the future. To fully realize the vision, however, two additional conditions, if met, will enable IES to implement the recommendations we have offered. At face value, these additional recommendations may seem to go beyond our charge, but the committee determined that for IES to respond to the recommendations that respond directly to our charge, these additional recommendations are necessary. In that sense, these recommendations, too, fall within our charge. The first is directed to IES and the second is directed to the U.S. Congress.

First, as noted throughout this report, the committee has determined that given that ESRA clearly mandates that the work of NCER and NCSER attend to pernicious and stubborn gaps in achievement between groups of students, it is essential that the centers consider how to address equity issues in all aspects of their work. Such consideration would also be consistent with President Biden's Executive Order on Advancing Racial Equity. To build a diverse and inclusive field that is well positioned to meet the most difficult challenges facing education in the United States, IES should be continuously vigilant about how its activities relate to diversity, equity, and inclusion.

RECOMMENDATION 9.1:
In addition to implementing the recommendations highlighted above, NCER and NCSER should conduct a comprehensive investigation of the funding processes to identify possible inequities. This analysis should attend to all aspects of the funding process, including application, reviewing, scoring, and monitoring progress. The resulting report should provide insight into barriers to funding across demographic groups and across research types and topics, as well as a plan for ameliorating these inequities.

Second, the committee recognizes that meaningful and lasting change within an organization cannot occur without financial support. We are keenly aware of the realities of IES's budgetary constraints and have at-

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tempted to prioritize recommendations that would re-allocate existing resources, rather than require additional funding. That said, the committee knows that in order to achieve the overarching vision presented through these recommendations, IES will require additional investments. We were dismayed to learn about the modest size of IES's budget in comparison to the budgets of other like agencies throughout the federal government. The modest size seems particularly unwarranted in light of the high degree of success IES has demonstrated in pursuit of its mission, as outlined throughout this report. The committee's assessment was amplified in three of the six public comments received throughout the process of writing this report. These public comments, representing dozens of organizations, urged us to recommend higher funding levels for IES, particularly for special education research. In light of the committee's recommendations on project types, topics, methods, training, and the application process, the need for greater funding is even more acute. The committee recognizes that in the absence of additional funding, IES will need to make a series of challenging decisions related to how it will address the recommendations identified in this report. For this reason, the committee makes the following recommendation.

RECOMMENDATION 9.2:
Congress should re-examine the IES budget, which does not appear to be on par with other scientific funding agencies nor does it have the resources to fully implement this suite of recommendations.

The committee regards NCER and NCSER, under the auspices of IES, as well positioned to realize the vision laid out in ESRA: a federal agency squarely aimed at improving the experiences of students around the country. Building on the past accomplishments of IES, the committee offers this report as a series of recommendations to IES as a mechanism for continued improvement of its already good work.

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Appendix A

Gathering and Assessing the Evidence

The committee drew on multiple sources of evidence in response to its charge. The Education Sciences Reform Act was a key reference, as was documentation of organizational structure and programming as provided by Institute of Education Sciences (IES) staff. The committee also held four public sessions with IES staff and experts from relevant areas of research. At the first session, on May 6, 2021, the committee heard testimony from Elizabeth Albro, commissioner of the National Center for Special Education Research [NCSER], and Joan McLaughlin, commissioner of NCSER, who provided an overview of the goals and organization of IES as well as insight into their goals for this study. At the second public session, on May 13, 2021, the committee heard from the director of IES, Mark Schneider, who shared his vision for this study and how he intends to use and engage with this report. The committee also heard from Anne Ricciuti, deputy director of science, who explained the review process for NCER and NCSER competitions, and NCER and NCSER program officers Katherine Taylor, Jacquelyn Buckley, Allen Ruby, Erin Higgins, and Emily Doolittle, who discussed their roles and responsibilities.

The third open session was comprised of a 2-day public meeting with multiple panels (June 29 and July 7, 2021). The first panel offered an opportunity for Elizabeth Albro, Joan McLaughlin, and Anne Ricciuti to update the committee and answer additional questions. The second panel provided the committee an opportunity to better understand where NCER and NCSER fit into the landscape of federal research agencies: the committee heard from James Griffin, chief of the Child Development and Behavior Branch at the National Institute of Child Health and Human Development;

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Evan Heit, division director in the Division of Research on Learning at the National Science Foundation; and Gila Neta, program director for implementation science in the Division of Cancer Control and Population Sciences at the National Cancer Institute. Analogously, the committee heard from a series of private foundations that support education research in the third panel of the day, with speakers Bob Hughes, director of K–12 education at the Bill & Melinda Gates Foundation; Na'ilah Suad Nasir, president of the Spencer Foundation; and Jim Short, program director of leadership and teaching to advance learning at the Carnegie Corporation of New York.

The committee then turned to two panels focused on the education research needs of practitioners. In the first practitioner panel, the committee heard from "research brokers"—individuals whose job is to help "translate" researchers for practice communities. This panel included Carrie Conaway, senior lecturer at Harvard Graduate School of Education; Raymond Hart, director of research for the Council of Great City Schools; Emily House, executive director for the Tennessee Higher Education Commission; and Kylie Klein, director of research, accountability, and data in Evanston/Skokie School District 65. The second practitioner panel focused on supporting beneficial research partnerships, and included Elaine Allensworth, Lewis-Sebring Director for the University of Chicago Consortium on School Research; Kingsley Botchway, chief of human resources and equity from the Waterloo Community School District; and Colin Chellman, university dean for institutional and policy research at the City University of New York.

The second day of the third meeting's public session focused on how and why education research is done. In the first panel, the committee heard about methods and measures in education research from Ryan Baker, associate professor at the University of Pennsylvania; David Francis, Hugh Roy and Lillie Cranz Cullen Distinguished University Chair at the University of Houston; Odis Johnson, Bloomberg Distinguished Professor at the Johns Hopkins University; and Elizabeth Stuart, associate dean for education and professor at the Johns Hopkins University. The next panel focused on assessing impact in education research, with panelists Ana Baumann, research assistant professor at Washington University in St. Louis; Becky Francis, chief executive officer of the Education Endowment Foundation; and Adam Gamoran, president of the William T. Grant Foundation and this committee's chair. Finally, the committee heard from a series of experts on research training in education: Curtis Byrd, special advisor to the provost at Georgia State University; Julie Posselt, associate professor at the University of Southern California; Sean Reardon, professor at Stanford University; and Katharine Strunk, professor and Erickson Distinguished Chair at Michigan State University.

Finally, the committee held a public session focused on topics in special education (August 10, 2021). As part of that panel, the committee heard

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from Beth Harry, professor emerita at the University of Miami; Karrie Shogren, professor and senior scientist at the University of Kansas; Patricia Snyder, distinguished professor at the University of Florida; and Vivian Wong, associate professor at the University of Virginia.

In addition to outside experts, the committee commissioned five short papers to help synthesize existing evidence in the field and frame our recommendations. First, we asked Heather Hough and colleagues at Policy Analysis for California Education to offer insight into the scope of loss, both personal and educational, facing the nation in the wake of the COVID-19 pandemic. Next, we asked Shirin Vossoughi, Megan Bang, and Ananda Marin to consider the ways that scholarly understandings of learning have evolved and grown since the founding of IES in 2001. Third, Kara Finnigan offered insight into what is known about how evidence is used in education policy and practice. Shira Zilberstein, under the supervision of Michelle Lamont, provided a paper on the impact of interventions aimed at supporting diversity, equity, and inclusion in academic peer-review processes. Finally, Christopher Klager, under the supervision of committee member Elizabeth Tipton, conducted an analysis of what research topics have been funded through NCER and NCSER since its founding in 2001. In addition to the full review provided by the committee for all five of these papers, the committee sent the Klager and Tipton paper to several external, independent coders under the supervision of committee member Nathan Jones. These external coders were asked to follow directions outlined in the Klager and Tipton paper to "spot check" 10 percent of the paper's original coding in order to ensure the coding process was both clear and accurate. This process resulted in 95 percent agreement between the original and external coders. For more information on how the Klager and Tipton paper is used in this report, as well as further details on coding processed, see Appendix D.

These papers and their findings have all been considered as scholarly input into the committee's work. As noted above, published, peer-reviewed literature remains the gold standard by which the committee made its judgments. The committee also received formal public comment from multiple scholarly organizations and individuals, including the deans of the schools of education associated with the LEARN Coalition, the American Educational Research Association, the National Center for Learning Disabilities, and dozens of others. Committee members have evaluated all documentation from IES as well as outside testimony through the lens of their scholarly expertise: these judgments ultimately form the basis of the committee's recommendations.

Following the completion of a draft report, the committee sent its work into the National Academies of Sciences, Engineering, and Medicine's review process. The report was reviewed by 15 independent reviewers, whose

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areas of expertise map onto and complement the study committee. The purpose of this independent review is to provide candid and critical comments that will assist the National Academies in making each published report as sound as possible and to ensure that it meets the institutional standards for quality, objectivity, evidence, and responsiveness to the study charge. The committee considered the full range of commentary from each reviewer, and made changes to the report draft in response to that commentary. The review of this report was overseen by Michael Feuer, George Washington University, and James House, University of Michigan. They were responsible for making certain that an independent examination of this report was carried out in accordance with the standards of the National Academies and that all review comments were carefully considered.

Concurrent to this review process, the committee shared a redacted version of the original draft with IES staff for fact-checking purposes. The redacted draft report contained the committee's understanding on matters of fact only: that is, IES staff were not privy to the committee's analytic work until after the report review process. Following a fact-checking process internal to IES, IES staff returned a set of comments and suggested edits. The committee considered those suggestions based on the following principles: (1) is the suggested edit an issue of fact or of characterization (facts were corrected as advised); (2) if the suggestion is a characterization, does it fit within the committee's shared understanding and judgment (suggestions for revised characterization that were aligned with the committee's judgment were adopted subject to the third principle); and (3) in either case, is the suggestion within the bounds of the committee's statement of task (if so and if the suggestion met either of the first two principles, the suggestion was adopted). Several committee members facilitated a first round of adjudications of these suggestions, and then each chapter was subjected to a second read for consideration by a different committee member. The entire report was then reviewed by the full committee, and submitted for final consideration to the National Academies' report review process.

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Appendix B

Email Correspondence Sent to the Committee

Due to the high interest in this consensus study, National Academies of Sciences, Engineering, and Medicine staff created a project email account to gather all public commentary. This account received a total of 20 email messages, most of which asked for information about how to attend planned open sessions. The following six messages contained substantive comments sent to the committee for consideration while answering its charge. They are reproduced below, in the order received.

- Kenji Hakuta, Stanford University (7/26/2021)
- Early career Special Education Researcher (8/6/2021)
- Soraya Zrikem, Learning and Education Academic Research Network (LEARN) Coalition (8/11/2021)
- Christy Talbot, American Educational Research Association (9/21/2021)
- Elizabeth Talbott, College of William and Mary (9/28/2021)
- Steve Pierson, American Statistical Association (10/5/2021)

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From: Kenji Hakuta
To: IES Research Agenda
Cc: Gordon, Edmund; Sonya Douglass Horsford; "Kent McGuire"; Na"ilah Suad Nasir
Subject: Letter from Edmund W. Gordon re: IES ARP
Date: Monday, July 26, 2021 11:55:19 AM
Attachments: Letter to Director Schneider .pdf

Dear Colleagues:

We recently sent the attached letter to IES Director Mark Schneider, which speaks directly to the ARP funding, but more broadly makes a statement about educational research priorities and knowledge production capacity at HBCU's. Chair of the Committee Adam Gamoran suggested that we enter it into your public comment records.

Thank you.

Kenji

From: Kenji Hakuta <hakuta@stanford.edu>
Date: Monday, July 26, 2021 at 8:47 AM
To: Mark.Schneider@ed.gov <Mark.Schneider@ed.gov>
Cc: Gordon, Edmund <egordon@exchange.tc.columbia.edu>, Sonya Douglass Horsford <sdh2150@tc.columbia.edu>, 'Kent McGuire' <KMcGuire@hewlett.org>, Na'ilah Suad Nasir <nsnasir@spencer.org>
Subject: Letter from Edmund W. Gordon re: IES ARP

Dear Director Schneider:

Please find attached a letter from Prof. Gordon and his colleagues who are commemorating his centennial birthday, immediately regarding the ARP funds, and more broadly about priorities in education research. We would also like to request a follow-up meeting with you.

Thank you.

Edmund Gordon
Kenji Hakuta
Sonya Douglass Horsford
Kent McGuire
Na'ilah Suad Nasir

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TEACHERS COLLEGE
COLUMBIA UNIVERSITY

July 24, 2021

Director Mark Schneider
Office of the Director, IES
National Center for Education Statistics
Potomac Center Plaza
550 12th Street, SW
Room 4109
Washington, D.C. 20202

Dear Director Schneider:

We are writing as a collective of individual scholars, all concerned with equity and justice in the educational system that reflect the complex history of race and class in our nation. In addition to the historical moment captured in the recovery efforts from the magnification of these issues through the lens of COVID-19, we are also propelled by a celebratory note – the centennial birthday of one of the authors of this letter, Edmund Gordon – who has been addressing this issue for his entire career, recognized by scholars, practitioners, and policymakers.[1] His history of scholarship and advocacy on behalf of all disadvantaged students, particularly Black students, presents a vantage point from which to assess our current situation. As a celebration of Dr. Gordon's centennial, a large number of his students have been holding conferences and events over the course of the year. Research funders, notably the Spencer Foundation, the William T. Grant Foundation and the William and Flora Hewlett Foundation, have contributed to mark the moment as well.

As part of these events, we have been in conversations with the Congressional Black Caucus as well as staff from the House Education and Labor Committee, offering advice and seeking assistance with specific requests that promote our agenda. In our recent conversations with Congress in which we expressed our interests, they suggested that we contact you regarding ways of prioritizing the additional appropriations to IES that were made as part of the American Rescue Plan.

As might be expected from a long (and still continuing) career of a centenarian with a broad vision, a plethora of issues have been explored and advanced. But among them we would like to bring to your attention three simple priorities:

1. A synthesis of research that extend the report of the National Academies report *How People Learn II* to specifically address implications of educational science to support the design of appropriate and sufficient pedagogical intervention. This would lead to a focus on educational opportunities that are equitable, and not just equal -- appropriate and sufficient to the needs and characteristics of the learning

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persons. The need to address this is particularly amplified by the evidence of COVID-19 gaps that are becoming increasingly apparent.[2]

2. An effort to expand the field of educational assessment to privilege the development of ability as much as it has promoted the measurement of ability. This has been a continuous theme of Dr. Gordon's life, ever since he began his career as a clinician conducting psychological testing of children in Brooklyn during the 1950's, extending into his leadership of The Gordon Commission on the Future of Assessment for Education (in contrast to "Assessment of Education."). This group advanced the notion that educational assessment can and should inform and improve learning and its teaching, as well as measure developed ability.

3. Developing a strong capacity in Historically Black Colleges and Universities (HBCU's) to engage in research and knowledge production in the education sciences (and the social sciences more generally) to enable strong alignment of the educational mission and purpose of these critical institutions with the K-12 needs of the Black community. Getting something akin to this in the social sciences was a long-term goal of one of Dr. Gordon's mentors, W.E.B. DuBois in the 1940's, and is something that could serve as an inspiration to this continuing need.[3]

We recognize your personal commitment as reflected in your memo of August, 2020, *Acting on Diversity*, highlighting ESRA legislation for "initiatives and programs to increase participation of researchers and institutions that have been historically underutilized in Federal education research activities of the Institute, including historically Black colleges or universities or other institutions of higher education with large numbers of minority students." We further applaud your emphasis on the Pathways program in working with minority-serving institutions, as well as comprehensively searching for opportunities across all of the IES programs. We truly applaud these actions, and encourage follow-through. As you do so, we hope that the three priorities indicated above help shape the ways in which the additional appropriations from the ARP are utilized.

We would like to request a meeting with you to further discuss our request, and to offer any assistance as appropriate. Thank you for your attention.

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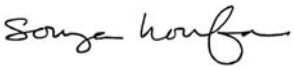
Sincerely,



Edmund W. Gordon
John M. Musser Professor of Psychology, Emeritus - Yale University
Richard March Hoe Professor of Psychology and Education, Emeritus - Teachers College, Columbia University



Kenji Hakuta
Lee L. Jacks Professor of Education, Emeritus – Stanford University



Sonya Douglass Horsford
Associate Professor of Education Leadership
Teachers College, Columbia University



Kent McGuire
Program Director of Education
William and Flora Hewlett Foundation

[Electronic Signature TBA]

Na'ilah Suad Nasir
President, The Spencer Foundation

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[1] Entered into the Congressional Record by Congressman Steven Horsford, Vice Chair of the Congressional Black Caucus CELEBRATING PROFESSOR EDMUND W. GORDON S 100TH BIRTHDAY

Mr. Speaker, I rise today to honor the life and legacy of Professor Edmund W. Gordon, an extraordinary professor of psychology whose career work has heavily influenced contemporary thinking in psychology, education, and social policy. Professor Gordon s research and initiatives have focused on the positive development of under-served children of color, including advancing the concept of the "achievement gap."

Professor Gordon grew up in a highly segregated area of North Carolina to parents who encouraged the importance of schooling. He received both his Bachelor s and Master s degrees from Howard University, and went on to pursue a PhD in psychology at the Teacher s College at Columbia University.

In 1956, after working with mentor and friend W.E.B. DuBois, Professor Gordon was commissioned by President Lyndon B. Johnson to help design the Head Start Program, aimed at providing early childhood education and family services to under-resourced families. After six months working on Head Start, Professor Gordon and his team had built a program to serve nearly half a million children. Professor Gordon also conducted research that would later be used to prove to the Supreme Court that school segregation had harmful effects on children. Professor Gordon strongly advocated the importance of understanding the learner s frame of reference in the development of education action plans.

Professor Gordon is the John M. Musser Professor of Psychology, Emeritus at Yale University, Richard March Hoe Professor, Emeritus of Psychology and Education and Founding Director of The Edmund W. Gordon Institute of Urban and Minority Education (IUME) at Teachers College, Columbia University.

From July 2000 until August 2001, Professor Gordon was Vice President of Academic Affairs and Interim Dean at Teachers College, Columbia University. Professor Gordon has held appointments at several of the nation s leading universities including Howard, Yeshiva, Columbia, City University of New York, Yale, and the Educational Testing Service. He has served as visiting professor at City College of New York and Harvard.

Currently, Professor Gordon is the Senior Scholar and Advisor to the President of the College Board where he developed and co-chaired the Taskforce on Minority High Achievement.

As a clinician and researcher, Professor Gordon explored divergent learning styles and advocated for supplemental education long before most scholars had recognized the existence and importance of those ideas. From 2011 to 2013, Professor Gordon organized and mentored the Gordon Commission, bringing together scholars to research and report on the Future of Assessment for Education.

Professor Gordon has authored 18 books and more than 200 articles on the achievement gap, affirmative development of academic ability, and supplementary education. He has been elected a Fellow of many prestigious organizations, including the American Academy of Arts & Science, and has been named one of America s most prolific and thoughtful scholars.

Approaching his centennial birthday, Professor Gordon still pays close attention to the state of education, and has stated that he would love to be able to change national education policy "to get a more equal focus on out-of-school and in-school learning."

On April 12, 2021, Professor Gordon was appointed as the first ever Honorary President of the American Educational Research Association.

I wish Professor Edmund W. Gordon the very best as he and his family celebrate his 100th birthday on June 13, 2021.

[2] See S. Douglass Horsford, L. Cabral, C. Touloukian, S. Parks, P. A. Smith, C. McGhee, F. Qadir, D. Lester & J. Jacobs (July 2021), Black Education in the Wake of COVID-19 & Systemic Racism Toward a Theory of Change & Action. *Black Education Research Collective*, Teachers College Columbia University, July 2021. See also D. Bailey, G. J. Duncan, R. J. Murnane & N. A. Yeung (2021), Achievement Gaps in the Wake of COVID-19, *Educational Researcher 50* 266-275.

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[3] David Levering Lewis (2019) in *W.E.B. Du Bois A Biography 1868-1963* characterizes this push in 1943 as "a rebirth of the seminal Atlanta University Studies at the beginning of the century" (Du Bois was briefly at Atlanta then but the early studies he directed ran from 1896-1914 even as he was at NAACP). As Lewis wrote "At the convention of the Presidents of the Negro Land Grant Colleges in Chicago that October [1943], Du Bois had rallied the association s seventeen presidents to formal endorsement and financial backing of an annual Atlanta University Conference. These were seventeen state-supported, racially restricted institutions founded as a result of the Morrill Act of 1862, to which the presidents of Hampton, Howard, and Tuskegee were affiliated." In his autobiography published posthumously in 1968 (*The Autobiography of W.E.B. Du Bois A Soliloquy on Viewing My Life from the Last Decade of Its First Century*), Du Bois re-creates extensively his plan for knowledge generation and the capacity needed at HBCU s to do this work. What might have been had he successfully created the Black sociological empire focused on the problem of race is a matter of consideration, as it would have greatly affected where the state of educational research would be today.

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From:	ngb@ku.edu
To:	Schweingruber, Heidi
Cc:	Dibner, Kenne; Kelly, Margaret; Lammers, Matthew; Schweingruber, Heidi
Subject:	IES Feedback [DBASSE-BOSE-20-07] - The Future of Education Research at the Institute of Education Sciences in the U.S. Department of Education
Date:	Friday, August 6, 2021 3:14:28 PM

Thank you for taking the time to evaluate research activities and priorities for the future of IES. As an early career Special Education researcher, I believe these are two areas that deserve increased focus moving forward. Helping early career researchers become established in the field is critical for the future, and the current requirement that applicants in this award are within their first 3 years post-Ph.D. is extremely limiting given the competition is only held every 2 years. Additionally, Special Education research overall deserves increased support in the future. Effective instructional practices frequently used across this discipline (e.g., direct instruction) will become critical for all students as we work to decrease learning losses from the ongoing pandemic. I appreciate your consideration of these issues.

Open project information: DBASSE-BOSE-20-07

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From:	Soraya Zrikem
To:	IES Research Agenda
Cc:	Alex Nock
Subject:	LEARN NAS Comments
Date:	Wednesday, August 11, 2021 12:43:59 PM
Attachments:	LEARN NAS Letter_8 11 21.pdf

Good Afternoon,

Attached please find the comments submitted by the Learning and Education Academic Research Network (LEARN) Coalition to the call for comment from the NAS panel on "The Future of Education Research at the Institute of Education Sciences in the U.S. Department of Education." Thank you for your consideration of LEARN's views.

Best,
Soraya Zrikem

--
Soraya Zrikem
Associate, Penn Hill Group
777 6th St NW, Suite 610 | Washington, DC 20001
szrikem@pennhillgroup.com
(734) 417-1796

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Wheelock College of Education and Human Development

Boston College
Lynch School of Education

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Indiana University
School of Education

Iowa State University
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Penn State University
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Syracuse University
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University of Central Florida
College of Community Innovation and Education

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Peabody College of Education and Human Development

Virginia Commonwealth University
School of Education

LEARN Learning and Education Academic Research Network
Advancing the Sciences of Teaching and Learning

August 11, 2021

Adam Gamoran

Committee on The Future of Education Research at the Institute of Education Sciences
National Academy of Sciences, Engineering and Medicine
500 Fifth St., N.W.
Washington, D.C. 20001

Dear Dr.Gamoran:

We are writing on behalf of the Learning and Education Academic Research Network (LEARN) Coalition to provide recommendations to the National Academies of Sciences, Engineering and Medicine (NAS) panel on "The Future of Education Research at the Institute of Education Sciences (IES)." LEARN, a coalition of 40 leading research colleges across the country, advocates for the importance of research on learning and development. As experts in the field, LEARN members provide evidence-based information to guide legislators and policy makers while advocating for an increased Federal investment in education research. With this letter, we hope to provide valuable insight on how this panel's recommendations should aim to improve ES and its critical work.

As the education world works towards recovery from the COV D-19 pandemic, IES can play an important role in supporting education research on learning recovery. Consequently, the timing of this panel's recommendations should account for and address the challenges of the COVID-19 pandemic on the education world. While this response to the pandemic is critical, we also strongly urge the panel to consider a long term and broad view of its charge, so as not to lose momentum and focus on the many other domains of research that are so crucial for the nation's schools, students and communities. In short, IES's role in spurring high quality education research and discovery of knowledge across the full spectrum of education is more critical now than ever.

After listening to both NAS public meetings, LEARN would like to respond to the four guiding questions asked in the afternoon of June 29 on "Knowledge Gaps in Education Research" and "Supporting Beneficial Research Partnerships." As Deans of Schools of Education from around the nation, LEARN provides a valuable perspective on the challenges and successes facing the education research world.

From your position in the field, what are the current knowledge gaps that could benefit from more robust research attention?

While we know a great deal around certain areas of research (for example how children learn to read), other areas we have little to no knowledge. Additionally, as research is conducted, we are exposed to new factors that influence the education of children and adults, raising new areas in which we need to develop knowledge. Below are several areas we believe there are gaps in research that need additional attention.

Overall, education research should investigate the student holistically; students need to learn about persistence, endurance and perseverance in addition to developing their content knowledge, cognitive skills, and problem-solving ability. This calls for a better understanding of effective interventions on student social and emotional learning (SEL), including school-based counseling interventions for significant mental health stressors. Schools need to develop confident and flexible learners and

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Advancing the Sciences of Teaching and Learning

problem-solvers, ones who can embrace ambiguity and nuance, who can move away from binary thinking and who can manage the complexity in challenging problems.

LEARN members also believe research is required on virtual learning at all ages. In addi ion to studying the effectiveness of current virtual programs, researchers should capitalize on the range of data and digital learning applications in their research and develop new ways for children to be learning with he use and assistance of technology. Virtual learning is still in its infancy. We must continue to tap into its potential to better help children learn. However, as we know, learning does not take place in isolation, and we note hat it is also essential to conduct research that studies the systems of public education that support and/or inhibit improvement, and promising approaches and practices.

We need more research on successful interventions that can address the achievement gap. This is especially relevant after his past year when this gap grew and became much larger. How do we catch students up if they have fallen behind while still challenging students who are making good educational progress?

Las ly, we submit that there needs to be much more research around successful implementation and scale up of he contexts, structures, and approaches that support research take-up, including he conditions and types of research that are best aligned to research-practice partnerships.

Where are the human capital gaps that could benefit from better or more readily available training, and what kind of training is necessary?
LEARN believes it is critical to support the education research pipeline by training and providing grant opportunities to new researchers, including graduate students seeking to embark on a career in education research, as well as fellowships and training grants. The last two years have been highly detrimental to rising researchers, as projects and funding streams were paused in response to the COVID-19 pandemic. With the staggering learning loss being experienced by students due to the pandemic, it is important that IES provides researchers from a wide range of backgrounds with the grant opportunities to identify and develop innovative, evidence-backed and effective educational interventions. Using what we already know will only get us so far and not investing in our early career researchers will reduce our future potential at solving the problems facing education.

While a focus on research on the most effective interventions is important, we also need the nation's future generation of researchers to study educa ional systems, and policies that address complex educational challenges, including preparing teachers and leaders. Specifically, we note he need for more pre-doctoral training grants and a focus on mixed -methodologies as well as methodologies and approaches for research-practice partnerships, including improvement science. This strand of research can also include the development of researchers to focus on developing culturally relevant methodologies and approaches.

How does the field support and sustain mutually beneficial partnerships in education research?
The field, as well as IES as a federal grantmaking organization, must foster a greater number and more powerful set of partnerships. IES's research-practitioner partnerships are one example of IES seeking to foster partnerships in the education research space. However, the benefit of these partnerships is largely limited to only the organizations ac ively involved in the specific grant or research work envisioned by the partnership. To further drive the expansion of the partnership model, LEARN proposes that IES create a matching directory of locales, school districts, entities and organizations hat are seeking research partnerships so hat connections can be more efficiently and equitably made. This directory would not promise or require IES grant funding, but rather serve as a clearinghouse for those seeking to connect. Since he partnerships are reciprocal relationships, expanding access to this opportunity equally will benefit both the education and research field.

What are the conditions necessary for ongoing partnerships?
To identify the ingredients of a successful partnership, we need to identify he types of research that are best suited for partnerships. Additionally, there are multiple types and approaches to partnerships with

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little research on the variation and the impacts. A broader research agenda into partnerships is warranted. Ques ions that must be asked as part of this agenda include:

- How can research funding balance response to local needs and priorities, and support research that is generalizable and builds a knowledge base all while providing clear standards of evidence and scientific merit?
- How is partnership and improvement science blended with, and used in concert with other types of research and knowledge funded by IES, rather than separate from research funded through other priorities?

Additional Comments on IES independence, RFP timing and IES Funding Levels

Outside of our immediate comments on he questions posed during the June 29th panel, we would also like to emphasize several other points. First, we view IES' independence from the U.S. Department of Education (ED) as critical as it allows for flexibility in quickly identifying and addressing research problems and issues. LEARN finds that this independent structure is most effective when IES is led by both a director and board. This structure is key to he integrity of IES and it is critical that IES populate the National Board for Education Sciences (NBES) which has been largely nonfunc ional for he past several years due to few or no active members. We also want to emphasize the paramount importance of scientific merit and peer review in the funding process.

Second, we are concerned about the amount of time hat IES generally permits between the release of a grant competition and he due date for proposals with respect to Request for Proposals (RFPs) hat utilize partnerships. The ime allotted generally does not sufficien ly allow for developing the conditions for deep and ongoing partnerships. We recommend that IES consider establishing separate timeframes for issuance to proposal date when considering approaches for RFPs for new partnerships versus RFPs for established partnerships.

Finally, LEARN would be remiss to overlook he budget limitations IES currently faces. Conversa ions with IES staff have uncovered that hey are working at capacity and straining to adequately operate competitions and identify priorities. As we have discussed above, there is a vast amount of research we need to conduct and knowledge we need to develop in order to address the education challenges of today's students. IES must be properly supported and staffed to allow for this work to occur inten ionally and effectively.

This is especially cri ical in research on special education, which is presently spearheaded by IES's National Center for Special Education Research (NCSER). NCSER received over $71 million in FY 2010 but was misguidedly cut to less than $51 million in he subsequent fiscal year. NCSER's funding reached at high of $58.5 million in FY 2021, but hat is $27.1 million short of the buying power of the FY 2010 NCSER funding level after factoring in inflation.

Likewise, Research, Development and Dissemination (R, D and D) funding, IES's largest research account, was $200.2 million in FY 2010. The FY 2021 R, D and D funding level is $195.9 million, which is $45 million short of what the FY 2010 amount would buy in today's dollars. Without an increase in funds for R, D and D and NCSER, IES will not be able to properly address this panel's recommendations nor drive the education research currently required. We hope the NAS panel will underscore the need for Congress to increase IES' funding in their recommendations.

Thank you for your commitment to sustaining and strengthening the nation's education research infrastructure. If you have questions, please do not hesitate to contact Alex Nock at 202 495-9497 or anock@pennhillgroup.com.

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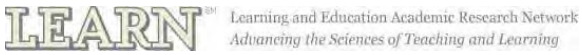

Respectfully Submitted,

Camilla P. Benbow, Ed.D.
Co-Chair, Learning and Education Academic Research Network (LEARN)
Patricia and Rodes Hart Dean of Education and Human Development of the Peabody College of Education and Human Development, Vanderbilt University

Glenn E. Good, Ph.D.
Co-Chair, Learning and Education Academic Research Network (LEARN)
Dean of the College of Education, University of Florida

Rick Ginsberg, Ph.D.
Co-Chair, Learning and Education Academic Research Network (LEARN)
Dean of the School of Education, University of Kansas

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From:	Christy Talbot
To:	IES Research Agenda
Cc:	Felice Levine
Subject:	Comments from Education Research Stakeholders - Future of Education Research at IES
Date:	Tuesday, September 21, 2021 1:08:25 PM
Attachments:	Comments from Education Research Stakeholders on the Future of Education Research at the Institute of Education Sciences (FINAL).pdf

Dear Dr. Gamoran and Committee Members,

Thank you for the opportunity to submit comments to inform the work of the National Academies of Science, Engineering, and Medicine Committee on the Future of Education Research at the Institute of Education Sciences (IES).

On behalf of 19 organizations with particular interest in IES research and training programs, please find attached comments that encourage the committee to address the underinvestment in IES over the past decade in its report and recommendations. Sufficient resources are critical for IES to meet both its mandated responsibilities and emerging priorities, including those discussed by this committee.

We specifically urge the committee to include two recommendations to Congress in its consensus report: (1) Advance strong, sustained funding levels for the Research, Development, and Dissemination (RD&D) and the Research in Special Education line items in appropriations legislation; (2) Include robust authorization levels for IES in a future reauthorization of the Education Sciences Reform Act.

Thank you for your consideration of these comments and recommendations. Please do not hesitate to contact Felice Levine (copied here) or me with any questions.

Warm regards,
-Christy

Christy Talbot
Senior Program Associate, Government Relations
American Educational Research Association
1430 K St. NW, Suite 1200
Washington, DC 20005
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Comments from Education Research Stakeholders to the
National Academies of Science, Engineering, and Medicine
Committee on The Future of Education Research at the Institute of Education Sciences

September 21, 2021

On behalf of the 19 undersigned organizations, we appreciate the opportunity to provide comments on The Future of Education Research at the Institute of Education Sciences (IES) study by the National Academies of Science, Engineering, and Medicine. The organizations joining these comments represent scientific associations, K-12 and higher education organizations, universities, and organizations serving persons with disabilities.

We greatly appreciate the thoughtful work and deliberation that the committee has taken on over the past few months to examine the roles of the National Center for Education Research (NCER) and the National Center for Special Education Research (NCSER) in supporting rigorous and relevant education research. **As part of that effort, we encourage the committee to include recommendations that address the underinvestment in IES research and training programs over the past decade in its final consensus report.**

To enable NCER and NCSER to increase their respective capacities to support high-quality, innovative research and to build a diverse and inclusive education researcher workforce, we particularly encourage the committee to include two recommendations to Congress in its consensus report:

- Advance strong, sustained funding levels for the Research, Development, and Dissemination (RD&D) and the Research in Special Education line items in appropriations legislation.
- Include robust authorization levels for IES in a future reauthorization of the Education Sciences Reform Act (ESRA).

We are thankful for the $100 million provided through the American Rescue Plan to support education research and data collection as part of the response in education to the COVID-19 pandemic. We are also pleased to see strong proposals with significant and long-needed boosts for the investment in IES in President Biden's FY 2022 budget request and the House FY 2022 Labor, Health and Human Services, Education, and Related Agencies bill. These proposals show the commitment of the administration and Congress to the important role education research has in informing evidence-based policy and practice.

We urge you to address funding levels in your recommendations as sufficient resources are necessary for IES to meet its mandated responsibilities under ESRA and to support emerging priorities. The FY 2022 budget request and House bill serve as important steps to restore lost purchasing power that has constrained the ability of IES to award research grants and support training programs to advance essential knowledge on important educational issues and build the education research pipeline. Unfortunately, IES is still significantly behind the deep cuts borne by sequestration in FY 2011-2013, with the FY 2021 appropriation providing nearly $160 million less in purchasing power compared to the FY 2010 appropriation after adjusting for inflation.

The RD&D line item supports the research and training grants provided by NCER, yet funding for RD&D has remained relatively flat over the past five years. Funding in FY 2021 for RD&D was only $3 million above the FY 2016 level of $195 million. In that time, NCER launched new grant solicitations encouraging the use of innovative methods and open science best practices. As important as these programs are, appropriations levels have not kept up with the increased costs to incorporate the Standards for

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Excellence in Education Research, resulting in larger, but fewer, grants for the field. NCER is also balancing awards for its core field-initiated education research grants with off-cycle competitions that promote replication of IES-funded research and use of state longitudinal data systems, among other programs. Postdoctoral and predoctoral training grants also provide professional development incorporating innovative methodological skills; additional funding could go toward increasing the reach of training programs to underrepresented institutions among IES grantees, including HBCUs, HSIs, and MSIs.

Funding has also remained relatively frozen for NCSER. The FY 2021 appropriated amount of $58.5 million is only $4.5 million above the FY 2014 funding level. Although NCSER will award research grants focused on accelerating learning recovery in special education with funding provided through the American Rescue Plan in FY 2022, it will not run its core special education research grant competition. This will be the second time since FY 2014 that NCSER has not been able to award new grants through its core research grant program due to limited funding.

Several of the organizations joining this statement will also be commenting separately on specific areas where there are gaps in research that could be supported by IES, new methods and approaches in education research, and new and different types of research and training. We have joined on these comments to collectively underscore that IES will require significant and sustained investment in order to meet those recognized needs. We thus urge the committee to include recommendations for Congress to increase appropriations and authorization levels to enable NCER and NCSER to support rigorous, timely, and innovative education research and training programs to develop a diverse education research workforce. In addition, we encourage the committee to provide language in the consensus report on the role of the executive branch to advance robust budget proposals for NCER and NCSER.

Thank you again for the opportunity to comment and for considering these recommendations. If committee members have any questions or need additional information, please contact Felice Levine (flevine@aera.net) or Christy Talbot (ctalbot@aera.net) at the American Educational Research Association.

Undersigned Organizations

Alliance for Learning Innovation (ALI)
American Educational Research Association
American Psychological Association
Association of Population Centers
Consortium of Social Science Associations
EDGE Consulting Partners
ETS
Institute for Educational Leadership
Institute for Higher Education Policy (IHEP)
Knowledge Alliance
LEARN Coalition
Lehigh University
National Center for Learning Disabilities
National Down Syndrome Society
National Education Association
Population Association of America
University of Florida
University of Washington College of Education
Vanderbilt University

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From: Talbott, Elizabeth
To: IES Research Agenda
Subject: Comments on the Future of IES-NCSER research
Date: Tuesday, September 28, 2021 10:10:22 AM

To the National Academies Committee:

Thank you for providing a public recording of the panel presentation in August addressing future directions and priorities for IES-NCSER research. I watched the entire presentation and found it absolutely fascinating.

I know that 4 panelists commenting on needs for the field and future directions for IES-NCSER cannot possibly address all pressing issues. But the panelists did a terrific job of highlighting key ones, such as the need for systems change, funding for implementation science/team science and participatory research, and improving services provided to children and youth with disabilities from diverse backgrounds.

Yet I was struck by the fact that none of the panelists was an IES-funded expert in academic interventions, even as one of the most pressing and persistent needs for students with disabilities is the advancement of their academic skills leading to college and career readiness. OSEP has done a fantastic job of funding researcher and educator preparation in the area of intensive intervention, with the AIR providing technical assistance to leaders of school districts. However (and especially because of COVID), research addressing the academic and mental health needs of all students with disabilities becomes even more urgent, and we need IES NCSER to be a leader in funding intensive intervention research, in my opinion.

How do researchers and practitioners deliver intensive intervention in the context of instruction provided in inclusive settings? This question is absolutely critical for NCSER funding to address. Jade Wexler's IES-funded Project Cali provides direction to this end, with specific training for more effective co-teaching in literacy. Sharon Vaughn's work in individual and small group instruction with students who have LD also provides a helpful structure, as does Lynn and Doug Fuchs' work in peer tutoring. Special education researchers are well prepared to tackle this challenging question, as they are among the best in the nation. For example, both Chris Lemons, whose research focuses on intensive intervention in reading with students who have Down Syndrome and Sarah Powell, whose research addresses interventions for students with math disabilities, have received the Presidential Early Career Award for Scientists and Engineers.

These are a few examples of the significant accomplishments of researchers in our young field—yet the work clearly needs to accelerate and intensify and special education researchers, many of whom are funded by IES and OSEP, are well positioned to take on this challenge.

NCSER's struggle over the past decade has been its chronic under-funding by Congress. NCSER funding is 20% lower today than in 2010. Every few years or so (including 2021), NCSER has not been able to offer its regular competitions, creating lost momentum in critical areas such as career and technical education. There was no early career competition this year. I hope that the National Academy can reflect this urgent need for more funding in its report.

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Thank you for providing this opportunity to comment. I wish the committee all the best in concluding its work.

Sincerely,
--
Elizabeth Talbott, PhD
Professor, Special Education
Associate Dean for Research & Faculty Development
School of Education
William & Mary

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From: Pierson, Steve
To: IES Research Agenda
Subject: Comments from American Statistical Association
Date: Tuesday, October 5, 2021 12:08:49 PM
Attachments: NAS_IES_Research.pdf

Hello,

Please see the attached for your panel from the American Statistical Association.

Thank you,
Steve

Steve Pierson, Ph.D.
Director of Science Policy

American Statistical Association
Promoting the Practice and Profession of Statistics®
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Alexandria, VA 22314-1943
(703) 302-1841
www.amstat.org/policy
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October 5, 2021

Adam Gamoran
Chair, Committee on The Future of Education Research at the Institute of Education Sciences in the US Department of Education
National Academies of Sciences, Engineering, and Medicine
[Transmitted electronically]

Dear Dr Gamoran,

We are pleased to have the opportunity to provide input to your panel considering the future of education research at the Institute of Education Sciences (IES) in the US Department of Education As the science of learning from data, statistics is fundamental to IES's mission to "provide scientific evidence on which to ground education practice and policy " The role of statistics in education research starts with framing the problem and designing the study and continues through analyzing and interpreting the data and communicating the findings We believe emphatically that engagement of statisticians and the statistical perspective results in better science

The tremendous strides in education research over the past 25 years underscore the important role of statistics both through the Statistical and Research Methodology in Education (SRME) program and more broadly One manifestation of this success is the What Works Clearinghouse (WWC), which provides decision-makers with information about effective interventions in reading, math, science, dropout prevention, and more Many of these advances, and the confidence in the studies reported in the WWC, would not be possible without strong statistical methods underpinning the study designs and analyses and a solid research base for understanding which designs and analyses yield accurate results

Through the SRME program, we appreciate that IES has recognized—and indeed, fostered—the importance of statistical methodology grounded in and disciplined by the context of education research Recognizing the need for statistical advances that respond to the specific challenges faced by the field, SRMA-funded projects have ensured the following:

- Principled analyses of primary data collected in empirical studies
- More informative use of large-scale survey data routinely collected by IES
- Advances in methods for characterizing findings and synthesizing bodies of evidence from multiple studies

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- Advanced power-analysis methodologies, with assumptions informed by empirical data, to ensure the money spent on research is put to good use
- Robust methods to determine what interventions work best for whom—again, a particularly important topic in times of limited resources

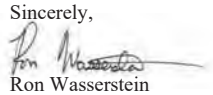
For IES to continue furthering education research, we recommend thoughtful implementation of the following statistical perspectives:

- More strategic use of existing administrative data, and new modalities for collecting and processing data, to provide practitioners and decision-makers with up-to-date information on student progress
- Study designs representing in more detail the heterogeneity of student and school characteristics to better inform local decisions
- Improved systems for archiving, accessing, and reanalyzing data collected from completed primary studies to better address emerging policy questions and improve the relevance of available evidence
- Continued development and improvement of methods for evaluating systemic and structural-level reforms that may not be easily randomized or evaluated using traditional quasi-experimental approaches currently examined by the WWC
- Further use of statistical methods and strategies for helping identify study design and analysis approaches most likely to yield accurate results, as has been done for the WWC to this point
- Development of methods that monitor or measure systems of discrimination
- Increased support of programs, workshops, and training initiatives in statistical and methodological research in education settings both generally and to increase the diversity of researchers engaged in statistical and methodological research in education settings

The following experts provided input and time to craft these recommendations: Vivian Wong, University of Virginia; Tracy Sweet, University of Maryland; Elizabeth Stuart, The Johns Hopkins University; James Pustejovsky, University of Wisconsin, Madison; and Luke Miratrix, Harvard University. My comments here echo the comments of some of those who presented to this committee over the summer.

Thank you for your consideration.

Sincerely,



Ron Wasserstein
Executive Director, American Statistical Association

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Appendix C

Committee-Commissioned Papers

Finnigan, K.S. (2021). *The current knowledge base on the use of research evidence in education policy and practice: A synthesis and recommendations for future directions.*

> This paper synthesizes what is known about use of research evidence (URE) in the United States educational system over the past decade as this knowledge base expanded and identified where gaps remain in the field's understanding of URE.

Hough, H.J., Myung, J., Domingue, B.W., Edley, C., Kurlaender, M., Marsh, J., and Rios-Aguilar, C. (2021). *The impact of the COVID-19 pandemic on students and educational systems, critical actions for recovery, and the role of research in the years ahead.*

> This paper reported early findings on the impact of the pandemic and also offered an approach on how to potentially leverage research to address the differential impacts that were experienced during the pandemic.

Klager, C., and Tipton, E. (2021). *Summary of IES funded topics.*

> This paper summarized the research studies funded by NCER and NCSER throughout the 20-year history of IES.

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Vossoughi, S., Marin, A., and Bang, M. (2021). *Foundational developments in the science of human learning and their implications for educational research*.

> This paper explored what was learned about human learning and development over the past 20 years from a sociocultural perspective, and what the implications of these new understandings mean for human communities.

Zilberstein, S. (2021). *National Academies of Science and Medicine: Diversity, equity, and inclusion in peer review.*

> This paper addressed the state of knowledge about how diversity, equity, and inclusion are considered in the competing, reviewing and awarding of research grants, and how the review process influenced the outcomes of scholarly research.

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Appendix D

Analysis of IES Funded Topics Commissioned Paper

As the committee began to discuss how to approach this consensus report, it identified the need for an analysis of Institute of Education Sciences (IES) past spending by topic area, with summary data on the topics studied by the National Center for Education Research (NCER) and National Center for Special Education Research (NCSER) grantees over the past 20 years. Chris Klager is a research associate at the Statistics for Evidence-Based Policy and Practice (STEPP) Center at Northwestern University. He was selected to write this paper because he researches the translation and communication of evidence about educational programs for policy makers and practitioners, and also has experience performing analyses related to projects funded by IES. This work was supervised in its entirety by committee member Elizabeth Tipton. This appendix details how the authors gathered the necessary data under six parameters to create summary tables that were utilized by the committee in the body of the report. A full copy of the final paper, which includes the Codebook that the authors created to develop the summary tables, is available at https://nap.nationalacademies.org/resource/26428/READY-KlagerTipton_IES_Topic_Analysis_Jan2022v4.pdf.

The paper addressed a range of research questions listed below regarding the types of studies that have been funded across different time periods and categories:

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- What *topics* have been studied in research funded by NCER and NCSER, and how has the distribution of funded topics shifted over time?
- How have studies of different *project types* funded by NCER and NCSER changed over time? How are studies connected to one another?
- What types of *interventions* are studied? Where are these interventions targeted?
- What is the relative *funding* distribution across topic areas, and what topic areas have received the highest levels of funding?
- What *institutions* receive grants from NCER and NCSER? How has this changed over time?
- What *Methods* and *Measurement* types have been studied under funded grants?

To answer these questions, Klager and Tipton reviewed publicly available data on IES-funded grants, which included information on each of these areas via the inclusion of study abstracts (IES, 2021). They also included data to classify institution types (R1, MSI, and Private) that came from the Carnegie Classification database which is based on information from the Indiana University Center for Postsecondary Research (n.d.).

The authors found that the complete dataset on the IES website has over 2,500 grants and contracts funded by NCER, NCSER, the National Center for Education Evaluation and Regional Assistance (NCEE), and the National Center for Education Statistics (NCES) from 2002 to 2021. The analysis completed was limited to grants funded by NCER and NCSER between 2002 and 2020. They noted that while 2021 awards were announced, it was unclear if all 2021 awards were present in the data that were downloaded at the time this paper was completed, so those awards were excluded. The analytic dataset also excluded awards funded by NCEE and NCES as this was not within the parameters that the committee was charged to examine in our statement of task. Contracts were also excluded, leaving only grants. All analyses in this paper exclude Small Business Innovation Research (SBIR) grants. Although NCER and NCSER issue SBIR awards, they differ from other awards in several ways. SBIR awards fall into either Phase I Development or Phase II Development. They are of a short duration and target small businesses with an emphasis on commercialization of the products that are developed. Many of them are also classified as contracts rather than grants. SBIR is a federal program that operates across federal agencies and is not unique to the Department of Education.

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PROJECT TYPES

When trying to define project types, Klager and Tipton explained that over the past 20 years, NCER and NCSER have funded grants in a variety of categories based on two dimensions—the topic of the grant and project type. Over time, the project types have changed, and for much of the past 20 years, these were divided into numbered goals (1 through 5). More recently, this numbering was removed and some categories shifted. Because of these changes in the wording of the request for applications (RFA) and types of studies that fall under each project type, Klager and Tipton saw some simplification in terminology was required to communicate about each.

Historically, the core project structure included five goals:

- Goal 1 – Exploration
- Goal 2 – Development and Innovation
- Goal 3 – Efficacy
- Goal 4 – Effectiveness
- Goal 5 – Measurement

The categorizations that IES provides on its website include variations on these five goals. Additionally, IES funds grants in other programs such as researcher-practice partnerships (RPPs), Training, Methods, and various special programs including large "center" grants that engage in activities that cover multiple goals. The publicly available data on IES's website about funded grants includes a field called "GoalText," but not the actual Goal (i.e., 1, 2, 3, 4, 5, etc.) each grant was funded under. Instead, the GoalText field contains a description that characterizes the purpose of the grant. For the purposes of these analyses, Klager and Tipton categorized grants by their GoalText. This means that all grants that were marked by IES (in the GoalText) as Exploration were categorized as Exploration, regardless of the program the grant was funded under.

While Exploration and Development and Innovation projects have remained approximately the same over the history of IES, Efficacy and Effectiveness studies have changed over time. To explore trends over time, Klager and Tipton had to create new categories which involved combining categories in some cases. One important case is with regards to replication grants, which over time moved from Goal 3 to Goal 4 studies, and then to their own project type.

For purposes of comparison, the authors divided out "Initial Efficacy" studies into their own project type and then combined "Replication" and "Effectiveness" trials into a single category. This required them to determine which Efficacy studies were "initial" trials versus "replications." To do so,

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they turned to Chhin, Taylor, and Wei (2018), who categorized all Goal 3 and Goal 4 grants funded by NCER and NCSER between 2004 and 2016 as either a direct or conceptual replication, new evaluation, re-analysis, or longitudinal follow-up. They used the codes applied by Chhin and colleagues (2018) for the grants that they coded to identify replications.

All other grants with GoalText of Efficacy or Efficacy and Replication that were not coded by Chhin and colleagues were coded using the publicly available abstracts. Following the method described in Chhin et al. (2018), Klager and Tipton checked IES abstracts for evidence of the stated purpose of the evaluation and prior efficacy evaluations of the program. If a study cited pilot evaluations only, including previous Development and Innovation grants from IES, or provided no information about the purpose of the study regarding replication, it was coded as a non-replication and was classified as Efficacy for these analyses. If there was evidence of previous efficacy studies or if the stated goal of the grant was for replication, it was coded as a replication and classified as Replication/Effectiveness. The publicly available abstracts provide limited information about each grant. Chhin and colleagues had access to full grant proposals and were able to identify many replications (~50% of 307 grants). Using abstracts, Klager and Tipton identified 32 out of 189 (17%) additional grants that had GoalText indicating an efficacy trial. It is plausible that coding replications from abstracts undercounts the number of replications based on the disparity between Chhin and colleagues' rate and the rate Klager coded from abstracts. It is unclear, though, if the rate of replications is consistent across time and programs funded by IES.

Table D-1 shows how those GoalText descriptions were categorized for these analyses. Grants were categorized based on the GoalText rather than the programs under which grants were funded. For example, five grants funded as part of the Digital Learning Platforms to Enable Efficient Education Research Network program had GoalText of "Methodological Innovation" and were classified with other grants that also had the "Methodological Innovation" regardless of the programs they were funded under. The "Other" category includes special grant competitions, unsolicited grants, centers established for the study of particular topics, and other projects that cover multiple goals. All grants with GoalText that cover more than one goal (e.g., Efficacy and Development) were classified as meeting multiple goals and were categorized as Other.

TOPICS

Eight topics were formed using the program names that IES provides as the source of funding for each grant. (See Tables D-2 and D-3 for a list of program names where all grants were assigned to a particular topic and

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TABLE D-1 Categorization of GoalText into Grant Categories

Table 1. Categorization of GoalText into grant categories	
Exploration	Exploration
Development & Innovation	Development and Innovation
Efficacy	Efficacy*
	Efficacy and Replication*
	Follow-Up
	Initial Efficacy
Replication/Effectiveness	Effectiveness
	Efficacy*
	Efficacy and Replication*
	Replication Effectiveness
	Replication Efficacy
	Scale-Up Evaluations
Measurement	Measurement
Methods	Methodological Innovation
RPP	Researcher-Practitioner Partnership
Training	Training
Other	Multiple Goals
	No Goal
	Other Goal
	Development and Evaluation
	Efficacy and Development
	Exploration and Efficacy
	Exploration and Measurement

a list of program names for which topics were coded by coders.) In some cases, the program names are descriptive and map well onto a topic, as is the case with the Science, Technology, Engineering, and Mathematics (STEM) program that maps onto the STEM topic used in this analysis. In other cases, the program name is not very descriptive, as in the case of Research Grants Focused on Systematic Replication. In the cases where the program name was not indicative of the type of intervention or idea being studied, the IES abstracts were coded to fit within the topic categories. Because the topics are not mutually exclusive (e.g., a STEM intervention that happens in an Early Childhood classroom could fall into both the STEM and Early Childhood categories), the authors gave preference to School Systems, Age (Early Childhood and Post-Secondary/Adult), then Cognition & Learning, Social & Behavioral, followed by content area (Reading, Writing, Language, Literacy, & ELL; STEM). School Systems was used for interventions that changed the structure of school operations, regardless of content area (e.g., State-wide remedial Algebra program). The Other category captures a small proportion of grants that do not fit well within the seven other topic categories.

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TABLE D-2 Programs that Correspond to a Coded Topic

Topic	ProgramName
Early Childhood	• EARLY LEARNING PROGRAMS AND POLICIES • PRESCHOOL CURRICULUM EVALUATION RESEARCH • SUPPORTING EARLY LEARNING FROM PRESCHOOL THROUGH EARLY ELEMENTARY SCHOOL GRADES NETWORK • EARLY INTERVENTION AND EARLY LEARNING
Post-Secondary/Adult	• POSTSECONDARY AND ADULT EDUCATION • TRANSITION TO POSTSECONDARY EDUCATION, CAREER, AND/OR INDEPENDENT LIVING
Reading, Writing, Language, Literacy, & ELL	• ENGLISH LEARNERS • LITERACY • FOREIGN LANGUAGE EDUCATION • READING, WRITING, AND LANGUAGE
STEM	• SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS (STEM) EDUCATION • SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS
Cognition & Learning	• COGNITION AND STUDENT LEARNING • COGNITION AND STUDENT LEARNING IN SPECIAL EDUCATION
Social & Behavioral	• SOCIAL AND BEHAVIORAL CONTEXT FOR ACADEMIC LEARNING • SOCIAL AND CHARACTER DEVELOPMENT • SOCIAL, EMOTIONAL, AND BEHAVIORAL COMPETENCE
School Systems	• EDUCATION LEADERSHIP • EVALUATION OF STATE AND LOCAL EDUCATION PROGRAMS AND POLICIES • IMPROVING EDUCATION SYSTEMS • EDUCATORS AND SCHOOL-BASED SERVICE PROVIDERS • SYSTEMS, POLICY, AND FINANCE
Other	• ARTS IN EDUCATION • CAREER AND TECHNICAL EDUCATION • CIVICS EDUCATION AND SOCIAL STUDIES • SYSTEMIC APPROACHES TO EDUCATING HIGHLY MOBILE STUDENTS • UNSOLICITED AND OTHER AWARDS • AUTISM SPECTRUM DISORDERS • FAMILIES OF CHILDREN WITH DISABILITIES • SPECIAL TOPIC: CAREER AND TECHNICAL EDUCATION FOR STUDENTS WITH DISABILITIES

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TABLE D-3 Programs for Which a Topic Was Coded

	ProgramName
Topic was coded	• EDUCATION TECHNOLOGY • EFFECTIVE INSTRUCTION • FIELD INITIATED EVALUATIONS OF EDUCATION INNOVATIONS • LOW-COST, SHORT-DURATION EVALUATION OF SPECIAL EDUCATION INTERVENTIONS • RESEARCH GRANTS FOCUSED ON SYSTEMATIC REPLICATION • RESEARCH GRANTS FOCUSED ON SYSTEMATIC REPLICATION IN SPECIAL EDUCATION • RESEARCH NETWORKS FOCUSED ON CRITICAL PROBLEMS OF POLICY AND PRACTICE IN SPECIAL EDUCATION: MULTI-TIERED SYSTEMS OF SUPPORT • SPECIAL TOPIC: SYSTEMS-INVOLVED STUDENTS WITH DISIBILITIES • TECHNOLOGY FOR SPECIAL EDUCATION

INSTITUTION TYPE

In categorizing institutions that have received IES funds (both NCER and NCSER), Klager and Tipton decided to have universities include hospitals and research centers that are affiliated with a university. Research firms were defined as nonuniversity institutions whose primary work is in the evaluation of products and programs that they did not develop themselves (i.e., external evaluations). This does not mean that they never engage in development of interventions, products, and techniques but that it is not their primary purpose. Developers, on the other hand, engage in basic research and evaluations, primarily on their own products and interventions. Within the Other category, there are several types of institutions although individually, they make up only a very small proportion of grants and funding awarded by IES. These types of institutions include education service providers, scientific organizations, state departments of education, and school districts. All institutions were coded into an institution type based on the description of the institution on its own website, if available, or other internet sources.

R1 classification was based on the classification given to the university at the time the grant was awarded. Classifications are recalculated every few years by the Indiana University Center for Postsecondary Research, with new releases in 2000, 2005, 2010, 2015, and 2018. Minority-Serving Institutions (MSIs) status is based on the 2018 data; thus, it does not reflect any changes in MSI status over time.

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EXPLORATION CATEGORIES

Exploration studies include a range of possible study types. To learn more about these, Klager and Tipton divided these studies into different categories. First, they determined if the study involved collecting primary data or if it only included secondary data. If the former, the grant was classified as "primary," whereas grants that use only secondary data are classified as "secondary." Additionally, the authors divided the grants into categories based on study design. These designs were coded based upon information in the abstracts, resulting in the following categories: meta-analysis, correlational analyses, randomized experiments (including pilots), and quasi-experiments (causal questions). There were many Exploration grants that had multiple studies with varying analysis plans. In these cases, if there was any experimental study, the grant was classified as experimental. If there was any meta-analysis, the grant was classified as meta-analysis. If the grant did not use an experiment or conduct a meta-analysis, then if there was a quasi-experiment the grant was classified as such. All other grants were showing associations, correlations, or doing mediation analyses.

METHODS GRANTS

Publicly available IES abstracts for Methods grants were coded for type of statistical method employed/developed, products produced, and topic of study. Klager and Tipton classified studies as psychometric (28), statistical models for analysis (23), randomized control trial design (22), and quasi-experimental design (20). Within those classifications, the authors also noted some subclassifications that commonly were funded or which are of interest to the educational methods research community. Relevant subtypes that were coded include value-added models, multilevel models, missing data, power analysis, effect size computation/interpretation, regression discontinuity, interrupted time series, single-case design, heterogeneity, external validity, and local treatment effects. If the abstract indicated the grant dealt with any of the subtypes, the subtype code was applied. Klager and Tipton also coded if the grant mentioned development of software.

LEVEL OF INTERVENTION

Klager and Tipton also sought to understand the level at which an intervention was targeted. Coding the target of the grants from publicly available abstracts was difficult because ultimately, the authors acknowledge that virtually all IES grants seek to affect student outcomes. In many cases, even if the primary agent through which an intervention worked was someone other than the student, the outcome data used to measure impact

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was collected from students. Also, it is quite common for studies funded in these categories to have multiple components that target different people. For example, a common occurrence is to have teacher professional development that is accompanied by a curriculum intervention for students.

In cases where an intervention was clearly targeted only or primarily at students, the grant was coded as targeting students. If an intervention had components that affected someone other than students (e.g., professional development for teachers) but those actors were merely delivering an intervention (e.g., a math curriculum) to students, the grant was coded as students as the primary target.

Grants were coded as targeting teachers if they were meant to change teacher practice but did not otherwise affect students except through the changes seen in the teacher. These are primarily tools for teachers or professional development programs that are not intended to train teachers on the use or delivery of a product/intervention to students. The "other" category includes interventions focused on parents, administrator and principals, schools, and school systems. As with teachers, interventions were coded as other if they were designed to affect one of the aforementioned actors and did not otherwise affect students, except through the changes induced in the targeted individual or institution. Coding for parents and administrators as the primary target of the intervention worked in much the same way as teachers; the intervention needed to focus on changing beliefs, skills, or behavior or providing tools for the parents or administrators rather than simply having the parents or administrators deliver the intervention.

For schools and school systems, it is not enough for the program to be delivered to all students or staff in a school or for the unit of randomization to have been the school. Grants targeted at schools and school systems change the structure of schools (e.g., implementing a Montessori model) or are policies that affect schools (e.g., a new accountability system for schools in a state). Using this coding scheme results in most interventions funded by both NCER and NCSER across Development and Innovation, Efficacy, and Replication/Effectiveness targeting students.

This same coding scheme was also used to organize Measurement grants. Abstracts were coded for mentions of various actors for which the measures might be targeted. These include students, teachers, or other actors including schools or school systems.

LIMITATIONS

While Klager and Tipton were able to download the data that form the basis of the paper from the IES website, they noted that these data are limited in that there are categorizations and details about grants that may or may not be present in the public abstracts. The public abstracts tend

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to follow a format provided by IES, but it is still sometimes difficult to discern what a grant is about and what sorts of activities the researchers are engaged in. The fields that IES does provide are useful for categorizing by program, but there are many more fields that would clarify the types of grants IES has funded. More concrete categorizations would be useful instead of relying on principal investigators to include information in project abstracts.

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Appendix E

Funding Information in NCER and NCSER Provided by the Institute of Education Sciences

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Table 1 Number of Awards and Funding Investment by Grant Topic within Education Research Grants (84.305A)[1]

Topic within 305A	#Awards	$ Investment	Award Year	Notes
Career and Technical Education	11	$19,661,305	2017–present	Began as special topic, changed to "regular" topic in FY2019
Civics and Social Studies Education	6	$14,175,708	2019–present	Began as special topic, changed to "regular" topic in FY2021
Cognition and Student Learning	182	$258,797,210	2002–present	
Early Learning Programs and Policies	106	$211,946,505	2008–present	Data include 1 unsolicited award made in 2003; Before FY2011, topic was Early Childhood Programs and Policies.
Education Leadership	19	$36,002,238	2004–2012; 2015–2019	Applications related to education leadership can be submitted under other topics
Education Technology	48	$87,284,640	2008–2019	Applications focused on education technology prior to 2008 and after 2019 are accepted under other topics
Effective Instruction	107	$191,090,933	2003–present	Starting in FY2012, this topic incorporated Teacher Quality-Math/Science and Teacher-Quality-Read/Write
English Learners	49	$85,954,075	2010–present	Before FY2011, topic was English Language Learners
Improving Education Systems	83	$108,732,130	2004–present	In FY2006, FY2005 the topic was Education Finance, Leadership, & Management
Literacy	133	$241,226,872	2002–present	The name for this topic has changed over time from the Program of Research on Reading Comprehension to Reading and Writing to

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				Literacy and includes a subset of projects funded under Adolescent and Adult Literacy. Projects specifically addressing Adult Literacy are now classified under the "Postsecondary and Adult Education" topic.
Postsecondary and Adult Education	88	$153,663,554	2007–present	This was originally two topic areas: Postsecondary education, which was first funded in FY2007, and Adult Education, which was first competed for FY2011 funding. The combined topic area was first funded in FY2012. Prior to their combination, Postsecondary did not allow for teaching/learning outcomes and Adult Education did not allow for policy/systems work.
Science, Technology, Engineering & Mathematics Education (STEM)	102	$201,908,928	2003–present	The name for this topic changed from Mathematics and Science Education to STEM in FY2018.
Social and Behavioral Context for Academic Learning	165	$338,205,052	2008–present	
Special Topics				

[1]Note that, prior to combining topics under a single request for applications (RFA) inviting applications in FY2007, many of these "topics" were competed as stand-alone competitions. An observant reader will also notice that many of these topics mirror the requirement for NCER to support research in 11 topic areas specified in Sec 133(c)(2). A full discussion of the decision and rationale to create a smaller number of RFAs with a larger number of topics is available in the FY2007 Education Research Grants RFA available here: https://www2.ed.gov/about/offices/list/ies/2007-305.pdf. Because of this, applications to the "A" competition were submitted under multiple RFAs between 2001 and 2005 for funding in FY2002–FY2006.

continued

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Table 1 Continued

Topic within 305A	#Awards	$ Investment	Award Year	Notes
Arts in Education	2	$2,000,000	2017–2018	
Foreign Language Education	1	$1,400,000	2019	
Systematic Approaches to Educating Highly Mobile Youth	1	$1,399,914	2018	
TOTALs in 305A	1103	$1,953,469,063		

Note: In FY2016, NCER did not accept Development and Innovation (Goal 2) applications.

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Table 2 Number of Awards and Funding Investment by Project Type within Education Research Grants (84.305A)[2]

Project Types within 305A	#Awards	% of total 305A awards	$ Investment	% of total 305A $ investment	Notes
Exploration	254	23%	$273,501,778	14%	
Development and Innovation[3]	390	35%	$549,553,768	28%	
Efficacy and Replication[4]	310	28%	$835,162,328	43%	Includes Efficacy, Initial Efficacy, Follow-up, and Efficacy and Replication. Beginning in FY2020, there was a separate competition (84.305R) for replication studies
Effectiveness/Scale-Up	19	2%	$94,371,925	5%	Includes "Replication Effectiveness"
Measurement	130	12%	$200,879,265	10%	
TOTALS	1103		$1,953,469,063		

Note: For each project type, we provide number of awards, percent of total awards, dollar investment, and percent of total dollar investment to illustrate the differing costs per project type. For example, NCER spends a greater proportion of the budget on Efficacy and Replication projects, even though we make fewer Efficacy and Replication awards than Development and Innovation projects. In addition, while the formal labeling of research project types did not occur until the FY2007 competition, IES reviewed the grant descriptions, identified the primary project type, and tagged them for type in the grant search engine.

[2]Prior to FY2007, "goals" were not specified in separate RFAs. However, NCER recoded projects on the public-facing abstracts for projects funded between 2002 and 2006 so as to (more clearly) identify the primary research questions of the project.

[3]In FY2016, NCER did not accept Development and Innovation (Goal 2) applications.

[4]For additional information see: Chhin, C.S., Taylor, K.A., & Wei, W.S. (2018). Supporting a culture of replication: An examination of education and special education research grants funded by the Institute of Education Sciences. *Educational Researcher*, *47*(9), 594–605.

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Table 3 Number of Awards and Funding Investment by Project Type within the Research Grants Focused on Systematic Replication (84.305R) Program

Research Grants Focused on Systematic Replication (305R)	#Awards	$ Investment	Award Years	Notes
Replication Efficacy	0		2020–present	This topic was competed, but no awards have yet been made.
Replication Effectiveness	2	$8,499,905	2020–present	
TOTAL	2	$8,499,905		

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Table 4 Number of Awards and Funding Investment by NCER Grant Competitions

The table below shows the number of awards and amount of investment by funding cluster, corresponding to the clusters linked to on the NCER website (https://ies.ed.gov/ncer/research/). Beneath the clusters are individual competitions or funding opportunities for all but the Education Research Training cluster and the Education Research & Development Centers cluster, both of which have separate dedicated tables. The cluster-level name and details are in bold. The competition-level name and details are in italics. The competition RFA number (e.g., 305A, 305B) refers to the most recently used Assistance Listing Number (ALN) associated with the competition.

Competition Cluster and Program Name	#Awards	% of total awards	$ Investment	% of investment	Award Year	Notes
Education Research and Methods	1223	78%	$2,059,469	67%	2002–present	
Education Research Grants (305A)	*1103*	*70%*	*$1,953,469,063*	*64%*	*2002–present*	*Includes programs initially competed separately for funding between FY2002 and FY2006 under multiple separate competitions that were combined into a single RFA for the FY2007 competition cycle. Includes all Project Types (see Table 1)*
Statistical and Research Methodology (305D)	*102*	*7%*	*$67,765,711*	*2%*	*2004–present*	*Note that between 2004-2008, research to support methodological innovation was funded via unsolicited grant opportunities. The stand-alone Stats and Methods competition was launched in FY 2009 and has been held annually except in FY2018.*

continued

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Table 4 Continued

Competition Cluster and Program Name	#Awards	% of total awards	$ Investment	% of investment	Award Year	Notes
Field Initiated Evaluations in Education (305F)	*12*	*0.77%*	*$17,740,220*	*0.58%*	*2005*	
Systematic Replication (305R)	*2*	*0.13%*	*$8,499,905*	*0.28%*	*2020–present*	
Transformative Research in Education (305T)	*4*	*0.26%*	*$11,994,568*	*0.39%*	*2021*	
Education Research Training Programs (305B)	122	8%	$266,882,547	9%	**2004–present**	Please see Table 7 (included in a separate file), which provides information about the NCER and NCSER investment in research training. This count includes some grants that were awarded under the Unsolicited Grant opportunity.
Education Research & Development Centers (305C)	**34**	**2%**	**$318,634,797**	**10%**	**2004–present**	As specified in ESRA, NCER is required to have 8 active R&D Centers in one of 11 pre-specified topic areas. Required by ESRA; includes topical foci. Note–the total also includes the Gifted Centers. Please see Table 5 for additional information.

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Research Networks	**49**	**3%**	**$227,748,229.70**	**7%**		
Reading for Understanding Research Initiative (305F)	*6*	*0.38%*	*$113,433,194*	4%	2010	
Expanding the Evidence Base for Career and Technical Education	*1*	*0.06%*	*$4,999,998*	*0.16%*	*2018*	*Network research team grantees were funded under "A" and are not counted here. This grant is for the network lead. The funds for this project came from the Office of Career, Technical, and Adult Education (OCATE) U.S. Department of Education.*
Scalable Strategies to Support College Completion Network	*4*	*0.26%*	*$13,915,461*	*0.46%*	*2016*	
Supporting Early Learning From Preschool Through Early Elementary School Grades Network	*7*	*0.45%*	$26,491,692	*0.87%*	2016	
Building Adult Skills and Attainment Through Technology Research Network	*6*	*0.38%*	*$20,700,363*	*0.68%*	*2021*	*Note: This network meets the requirement under ESRA for an R&D Center on Adult Literacy*
Digital Learning Platforms to Enable Efficient Education Research Network	*6*	*0.38%*	*$12,998,292*	*0.43%*	*2021*	
Preschool Curriculum Evaluation Research (305J)	*12*	*0.77%*	*$20,213,628*	*0.66%*	*2002–2003*	*This evaluation also included a contract for a multi-site coordinator, not included in this table or in the search tool.*

continued

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Table 4 Continued

Competition Cluster and Program Name	#Awards	% of total awards	$ Investment	% of investment	Award Year	Notes
Social and Character Development (305L)	7	*0.46%*	*$13,595,688*	*0.44%*	*2004*	*This evaluation also included a contract for a multi-site coordinator, not included in this table or in the search tool.*
Collaborations Between Researchers & Practitioners	**111**	**7%**	**$158,810,754**	**5%**		
Evaluation of State and Local Education Programs and Policies (305E/305H)	27	2%	$110,490,105	4%	2009–2015; 2017– 2019	
Low-Cost, Short-Duration Evaluation of Education Interventions (305L)	*9*	*0.58%*	*$2,207,185*	*0.07%*	*2016–2018*	
Continuous Improvement (305H)	*6*	*0.38%*	*$14,992,800*	*0.49%*	*2014–2015*	
Using Longitudinal Data to Support State Education Policymaking (305S)	7	0.45%	$6,434,368	0.21%	2021–present	
Unsolicited (not included in other counts)	26	2%	$27,116,852	0.89%		
TOTAL NCER awards	1565		$3,057,262,733			

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Table 5 Grants Awarded in Education Research & Development Centers (84.305C)[5]

Name of Center	Award FY	$ Investment	Project Type(s)[6]	ESRA Topic
Center for Data-Driven Reform in Education	2004	$9,997,674	Multiple Goals	Improving low-achieving schools
National Research and Development Center on School Choice	2004	$9,972,909	Multiple Goals: Exploration, Efficacy	Innovation in education reform
National Research Center on Rural Education Support	2004	$10,000,000	Multiple Goals: Exploration, Development, Efficacy	Rural education
Center for Research on Evaluation, Standards, and Student Testing (CRESST)	2005	$9,968,718	Multiple Goals: Measurement, Efficacy	Assessment, standards, and accountability research

[5] As specified in ESRA, Sec 133(c)(1)—In carrying out activities under subsection (a)(3), the Research Commissioner shall support not less than 8 national research and development centers. The Research Commissioner shall assign each of the 8 national research and development centers not less than 1 of the topics described in paragraph (2). In addition, the Research Commissioner may assign each of the 8 national research and development centers additional topics of research consistent with the mission and priorities of the Institute and the mission of the Research Center. (2) TOPICS OF RESEARCH.—The Research Commissioner shall support the following topics of research, through national research and development centers or through other means: (A) Adult literacy. (B) Assessment, standards, and accountability research. (C) Early childhood development and education. (D) English language learners research. (E) Improving low achieving schools. (F) Innovation in education reform. (G) State and local policy. (H) Postsecondary education and training. (I) Rural education. (J) Teacher quality. (K) Reading and literacy. (3) DUTIES OF CENTERS.—The national research and development centers shall address areas of national need, including in educational technology areas.

[6] Each R&D Center carries out multiple projects and has multiple goals including providing national leadership in their assigned topic area. Many, but not all, of the projects carried out by the R&D Centers align with the project types included in Table 3 and are listed here.

continued

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Table 5 Continued

Name of Center	Award FY	$ Investment	Project Type(s)[6]	ESRA Topic
Center for Research on the Educational Achievement and Teaching of English Language Learners (CREATE)	2005	$9,897,290	Multiple Goals: Development, Efficacy	English language learners research
Center for Analysis of Longitudinal Data in Education Research (CALDER)	2006	$11,996,301	Multiple Goals: Exploration	State and local policy
National Center for Performance Incentives (Policy-NCPI)	2006	$10,835,509	Multiple Goals: Exploration, Efficacy	State and local policy; Teacher quality
National Center for Postsecondary Research	2006	$9,813,619	Multiple Goals: Exploration, Efficacy	Postsecondary education and training
National Center for Research on Early Childhood Education	2006	$11,016,009	Multiple Goals: Efficacy	Early childhood development and education
National Research Center on the Gifted and Talented[7]	2006	$8,706,200	Multiple Goals: Exploration, Measurement	
National Research & Development Center on Cognition and Science Instruction	2008	$9,995,038	Multiple Goals: Development, Efficacy	Innovation in education reform
National Research & Development Center on Instructional Technology: Center for Advanced Technology in Schools	2008	$9,833,451	Multiple Goals: Development, Efficacy	Innovation in education reform
National Research & Development Center on Instructional Technology: Possible Worlds	2008	$9,197,582	Multiple Goals: Development, Efficacy	Innovation in education reform

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National Center for Teacher Effectiveness: Validating Measures of Effective Math Teaching	2009	$9,997,888	Multiple Goals: Measurement	Teacher quality
The National Center for Research on Rural Education	2009	$9,997,852	Multiple Goals: Exploration, Efficacy	Rural education
National Research & Development Center on Cognition and Mathematics Instruction	2010	$9,998,406	Multiple Goals: Development, Efficacy	Innovation in education reform
National Research and Development Center on Scaling Up Effective Schools	2010	$13,573,066	Multiple Goals: Exploration, Development	Improving low-achieving schools
The Center for Analysis of Postsecondary Education and Employment	2011	$9,951,362	Multiple Goals: Exploration, Efficacy	Postsecondary education and training
Center for the Study of Adult Literacy (CSAL): Developing Instructional Approaches Suited to the Cognitive and Motivational Needs for Struggling Adults	2012	$9,999,985	Multiple Goals: Exploration, Development	Adult literacy
National Center for Analysis of Longitudinal Data in Education Research (CALDER)	2012	$10,000,000	Multiple Goals: Exploration	State and local policy

continued

[7]Note: IES has managed the Department's requirement to host a National Research Center for the Education of Gifted and Talented Children and Youth since 2006. As stated in the FY2020 Education Research and Development Center's RFA: "In fulfillment of the requirement in the "Jacob K. Javits Gifted and Talented Students Education Program" in the Every Student Succeeds Act (ESSA) (SEC. 4644. ø20 U.S.C. 7294 [d]) for a National Research Center for the Education of Gifted and Talented Children and Youth."

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Table 5 Continued

Name of Center	Award FY	$ Investment	Project Type(s)[6]	ESRA Topic
Center for the Analysis of Postsecondary Readiness	2014	$9,989,803	Multiple Goals: Exploration, Efficacy	Postsecondary education and training
National Center for Research in Policy and Practice	2014	$4,995,352	Multiple Goals: Measurement, Exploration	Innovation in education reform
National Center for Research on Gifted Education	2014	$5,000,000	Multiple Goals: Exploration, Efficacy	
Center on Standards, Alignment, Instruction and Learning (C-SAIL)	2015	$9,999,999	Multiple Goals: Exploration, Measurement, Efficacy	Assessment, standards, and accountability research
The Center for Research Use in Education (CRUE)	2015	$4,999,958	Multiple Goals: Measurement, Exploration	Innovation in education reform
Precision Education: The Virtual Learning Lab	2016	$8,908,288	Multiple Goals: Measurement, Efficacy	Innovation in education reform
The National Center for Research on Education Access and Choice	2018	$9,998,565	Multiple Goals: Exploration	Improving low achieving schools
The National Center for Rural Education Research Networks (NCRERN)	2019	$9,994,246	Multiple Goals: Exploration, Development, Efficacy	Rural education

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The National Center for Rural School Mental Health (NCRSMH): Enhancing the Capacity of Rural Schools to Identify, Prevent, and Intervene in Youth Mental Health Concerns	2019	$9,999,729	Multiple Goals: Development, Efficacy	Rural education
WRITE Center for Secondary Students: Writing Research to Improve Teaching and Evaluation	2019	$5,000,000	Multiple Goals: Exploration, Development	Reading and literacy
National Center for Research on Gifted Education	2020	$5,000,000	Multiple Goals: Exploration, Efficacy	
National Research and Development Center to Improve Education for Secondary English Learners	2020	$10,000,000	Multiple Goals: Exploration, Development, Efficacy	English language learners research
Transdisciplinary Approaches to Improving Opportunities and Outcomes for English Learners: Using Engagement, Team-Based Learning, and Formative Assessment to Develop Content and Language Proficiency	2020	$9,999,999	Multiple Goals: Exploration, Development, Efficacy	English language learners research
Postsecondary Teaching with Technology Collaborative	2021	$9,999,999	Multiple Goals: Exploration, Development	Postsecondary education and training
TOTAL (R&D Centers)		$318,634,797		

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Table 6 Number of Awards and Funding Investment by Grant Topic within Special Education Research Grants Program (84.324A)

Topic within 324A	#Awards	$ Investment	Years competed	Notes
Autism Spectrum Disorders	28	$55,460,024	FY2007–FY2013, FY2015–2020	In FY2021 ASD topic was removed from the RFA and applicants interested in research with children with ASD could apply to any topic area.
Cognition and Student Learning in Special Education	17	$29,062,362	FY2009–2013, FY2015–2021	
Early Intervention and Early Learning	106	$210,745,720	FY2006–2013, FY2015–2021	
Educators and School-Based Service Providers	37	$60,299,829	FY2006–2007, FY2009–2013, FY2015–2021	Before FY2011, topic was Teacher Quality. From FY2011–FY2020, topic became Professional Development for Teachers and Related Service Providers. In FY2021 this topic was changed to Educators and School-Based Service Providers.
Families of Children with Disabilities	2	$3,805,693	FY2012–2013, FY2015–2021	
Reading, Writing, and Language Development	59	$117,367,866	FY2006–2013, FY2015–2021	
Science, Technology, Engineering, and Math	31	$57,476,538	FY2006–2013, FY2015–2021	Before FY2019, topic was Math and Science.
Social, Emotional, and Behavioral Competence	80	$178,457,206	FY2009–2013, FY2015–2021	Before FY2021, topic was Social and Behavioral Outcomes to Support Learning.

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Systems, Policy, and Finance	28	$43,393,489	FY2009–2013, FY2015–2021	Before FY2011, topic was Systemic Interventions & Policies. From FY2011–FY2020, topic was Special Education Policy, Finance, and Systems.
Technology for Special Education	11	$16,356,486	FY2012–2013, FY2015–2021	In 2021 the Technology topic was removed from the RFA and applicants interested in technology research could apply to any topic area.
Transition to Postsecondary Education, Career, and/or Independent Living	38	$59,224,562	FY2006–2013, FY2015–2021	Before FY2011, topic was Secondary & Postsecondary Transitions. From FY2011–FY2021, topic was Transition Outcomes for Special Education Secondary Students. In FY2021, topic changed to Transition to Postsecondary Education, Career, and/or Independent Living.
Special Topics				
Career and Technical Education for SWD	3	$2,955,747	FY2019–FY2020	
Systems-Involved SWD	1	$3,299,326	FY2019–FY2020	
TOTALS	441	$837,904,848		

Note: SWD is Students with Disabilities. Due to funding constraints, there were no NCSER funding competitions in FY2014. In FY2017, again due to funding limitations, NCSER restricted the focus of the 324A RFA to research on teachers and other instructional personnel. In FY2019 and FY2020 there was a third Special Topic: English Learners with Disabilities that received applications, but none were rated highly enough in the peer review process to be considered for funding.

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Table 7 Number of Awards and Funding Investment by Project Type within Special Education Research Grants (84.324A)

Project Types within 324A	#Awards	% of total 324A awards	$ Investment	% of total 324A $ investment	Notes
Exploration	58	13%	$58,725,260	7%	
Development and Innovation	198	45%	$285,688,284	34%	
Efficacy and Replication	125	28%	$389,257,633	46%	Beginning in FY2020, a separate competition (84.324R) was held for replication studies
Effectiveness/Scale-Up	3	1%	$16,399,131	2%	Beginning in FY2020, Effectiveness Replications were included in the Systematic Replication RFA (84.324R)
Measurement	57	13%	$87,834,540	11%	
TOTALS	441		837,904,848		

Note: For each project type we provide number of awards, percent of total awards, dollar investment, and percent of total dollar investment to illustrate the differing costs per project type. For example, NCSER spends a greater proportion of the budget on Efficacy and Replication projects, even though we award fewer Efficacy awards than Development and Innovation projects.

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Table 8 Number of Awards and Funding Investment by Project Type within the Research Grants Focused on Systematic Replication in Special Education (84.324R) Program

Project Types within Systematic Replication 324R	#Awards	% of total 324R awards	$ Investment	% of 324R $ investment	Notes
Replication Effectiveness	4	50%	$16,992,435	54%	FY2020–present
Replication Efficacy	4	50%	$14,755,488	46%	FY2020–present
TOTALS	8		$31,747,923		

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Table 9 Number of Awards and Funding Investment by NCSER Grant Competitions

NCSER Research Grant Competitions	#Awards	% of total awards	$ Investment	% of total $ investment	Notes
Special Education Research Grants (324A)	441	83%	$837,904,848	84%	All Project Types (See Table 1)
Research Training Programs in Special Education (324B)	56	10%	$31,790,528	3%	Training (Early Career, Postdoctoral, and Methods Training for Special Education Research)
Special Education Research & Development Centers (324C)	6	1%	$62,015,787	6%	Multiple project types within and across R&D Centers, including efficacy as well as development and/or exploration and/or measurement
Accelerating the Academic Achievement of Students with Learning Disabilities Research Initiative (324D)	1	<1%	$10,000,000	1%	Development and Efficacy
Low-Cost, Short Duration Evaluations (324L)	6	1%	$1,452,956	<1%	Efficacy Studies in partnership with state and local education agencies
MTSS Research Networks (324N)	5	1%	$17,496,507	2%	1 Development and Evaluation, 1 Efficacy, 1 Efficacy and Development, 1 Measurement, 1 Network Lead
NAEP Process Data (324P)	2	<1%	$ 1,399,340	<1%	Exploration
Systematic Replication in Special Education (324R)	8	2%	$31,747,923	3%	Replication Effectiveness, Replication Efficacy (See prior table)

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Pandemic Recovery (324X)	—	—	—	—	—	As of January 2022, two awards have been made in the first round (324X-1); peer review of applications for the second round of (324X-2) is currently under way.
Unsolicited (324U)	9	2%		$3,857,426	<1%	
TOTALS	534			$997,665,315		

Note: Early Career grants within the Special Education Training Program (84.324B) include research projects with varying project types.

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Table 10 Grants Awarded in Special Education Research & Development Centers (84.324C)

Name of Center	Fiscal Year of Award	$ Investment	Project Type(s)
Center for Response to Intervention in Early Childhood	2008	$10,000,000.00	Multiple
National Research and Development Center on Serious Behavior Disorders at the Secondary Level	2008	$10,447,669.00	Multiple
National Research and Development Center on Improving Mathematics Instruction for Students with Mathematics Difficulties	2010	$ 9,896,532.00	Multiple
National Research and Development Center on Assessment and Accountability for Special Education	2011	$11,677,134.00	Multiple
Center on Secondary Education for Students with Autism Spectrum Disorders	2012	$ 9,994,452.00	Multiple
Special Education Research and Development Center on Reading Instruction for Deaf and Hard of Hearing Students	2012	$10,000,000.00	Multiple
TOTALS	**6**	**$62,015,787.00**	

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Appendix F

Committee and Staff Biographies

COMMITTEE

ADAM GAMORAN (*Chair*) is president of the William T. Grant Foundation. Previously, he held the John D. MacArthur Chair in Sociology and Educational Policy Studies at the University of Wisconsin–Madison where, among other roles, he chaired the department of sociology, directed the Wisconsin Center for Education Research, and spent three decades engaged in research on educational inequality and school reform. He is a past grantee of the Institute of Education Sciences, the National Science Foundation, the National Institute of Child Health and Human Development, and several private funders. His research contributions have been honored by the Association for Public Policy Analysis and Management, the American Educational Research Association (AERA), and the Sociology of Education Section of the American Sociological Association. He is an elected member of the American Academy of Arts and Sciences and the National Academy of Education, which he currently serves as vice president. He was also twice appointed by President Barack Obama to the National Board for Education Sciences and is past chair of the Independent Advisory Panel of the National Assessment of Career and Technical Education. Gamoran received his Ph.D. in education from the University of Chicago.

MARTHA W. ALIBALI is a Vilas Distinguished Achievement Professor of Psychology and Educational Psychology at the University of Wisconsin-Madison, and she is a principal investigator (PI) at the Wisconsin Center for Education Research. Her research is situated at the interface of

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developmental psychology, cognitive psychology, and mathematics education. Her primary line of work investigates mathematical learning and development, with a special focus on the roles of gesture and action in mathematical cognition, learning, and instruction. She has published more than 130 journal articles and book chapters, co-edited two books, and co-authored a textbook on cognitive development. Her research has been funded by the Institute of Education Sciences, the National Science Foundation, and the National Institutes of Health. She is a fellow of the Cognitive Science Society and a past recipient of the Friedrich Wilhelm Bessel Research Prize from the Alexander von Humboldt Foundation. Alibali received her Ph.D. in developmental psychology from the University of Chicago.

ALFREDO J. ARTILES is Lee L. Jacks Professor of Education at Stanford University. He is the director of the Stanford Center for Opportunity Policy in Education and the director of research at the Center for Comparative Studies in Race & Ethnicity. His scholarship has been supported by many federal and philanthropic organizations to examine cultural-historical dimensions of disability and inclusive education and their implications for policy and practice. Artiles is the editor of the book series *Disability, Culture, & Equity*, and an elected member of the National Academy of Education, AERA fellow, previous resident fellow of the Center for Advanced Study in the Behavioral Sciences, and previous member of the White House Commission on Educational Excellence for Hispanics. He has received numerous honors for his scholarly work and mentoring activities including being named an honorary professor at the University of Birmingham (United Kingdom) and receiving an honorary doctorate from the University of Göteborgs (Sweden). He holds a Ph.D. in special education from the University of Virginia.

CYNTHIA E. COBURN is a professor in the School of Education and Social Policy at Northwestern University. She studies the relationship between instructional policy and teachers' classroom practices in urban schools, the dynamics of school district policy making, and the relationship between research and practice for school improvement. She is a fellow of AERA and received an honorary doctorate (Doctor Honoris Causa) from CU Louvain in Belgium. She is also a member of the National Academy of Education, among other recognition for her scholarship. Coburn holds a B.A. in philosophy from Oberlin College, and an M.A. in sociology and Ph.D. in education from Stanford University.

LORA A. COHEN-VOGEL is the Frank A. Daniels Distinguished Professor in the School of Education at the University of North Carolina at Chapel Hill, where she is also director of interprofessional education. Her teach-

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ing and research focus on education policy and politics, teacher quality, continuous improvement research, and bringing to scale programs and processes for system-level improvement and equity. As associate director of the National Center for Research and Development on Scaling Up Effective Schools, Cohen-Vogel helped lead research-practice partnerships that used the science of improvement to raise schooling outcomes for traditionally underserved students in two of the nation's largest school districts. She is currently co-PI of a project looking to extend the early learning gains of students in the rural South as part of the Early Learning Network. Cohen-Vogel is immediate past vice president of the AERA and former president of the Politics of Education Association. Cohen-Vogel began her career in education as the executive director of a grassroots community organization dedicated to advancing music education in California schools. She has a Ph.D. in education from Vanderbilt University.

NATHAN D. JONES is an associate professor of special education and education policy in the Wheelock College of Education & Human Development at Boston University. His research focuses on teacher quality, teacher development, and school improvement, with a specific emphasis on conceptualizing and measuring teaching effectiveness in preservice and inservice contexts. Recent work is on special education teacher evaluation; the measurement of teachers' time use and affect; the impact of special education policies and programs on student outcomes; and the development of curricular materials to support preservice general education teachers in teaching students with disabilities. In 2018, he served as co-chair of the Institute of Education Sciences (IES) Principal Investigators Meeting. Jones is associate editor of the *Journal of Teacher Education* and co-editor of *The Elementary School Journal*. Prior to pursuing his doctoral training, Jones taught for three years as a middle school special education teacher in the Mississippi Delta. He received his Ph.D. in special education and education policy from Michigan State University.

BRIDGET T. LONG is dean and Saris Professor of Education and Economics at the Harvard Graduate School of Education. Long is an economist who studies educational opportunity with a focus on college access and success, including the role of affordability, academic preparation, and information. She is a research associate of the National Bureau of Economic Research, a member of the National Academy of Education, and an affiliate of the Abdul Latif Jameel Poverty Action Lab. Long has served as chair of National Board for Education Sciences, the advisory panel of the Institute of Education Sciences at the U.S. Department of Education, and testified multiple times before federal congressional committees and state government bodies. She earned her A.B. from Princeton University in economics

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with a certificate in Afro-American studies and M.A. and Ph.D. from the Harvard University Department of Economics.

NORMA C. MING is the supervisor of research and evaluation in the San Francisco Unified School District's Research, Planning, and Assessment Division, where she manages the research portfolio and leads internal evaluations. Her work focuses on establishing and studying the conditions and supports that enable integrating research and practice for continuous improvement in education. This includes developing learning agendas, drawing from existing evidence syntheses, coordinating research partnerships to generate relevant evidence, supporting improvement teams to innovate and iterate through disciplined inquiry, and facilitating the implementation of evidence-based policy and practice. Her current research addresses inequities in school attendance and engagement through youth-led inquiry, and her publications apply text mining to disciplinary records and online discussion forums, use statistical process control to visualize trends and outliers in educational data, and propose a framework for assessing research for educational policy making and practice. She is a former K–12 and university educator and researcher. Ming holds a B.A. in chemistry from Harvard and Ph.D. in cognitive psychology from Carnegie Mellon University.

MARY C. MURPHY is the Herman B. Wells Professor of Psychological and Brain Sciences at Indiana University. Her education research illuminates the situational cues that influence students' academic motivation and achievement with an emphasis on understanding when those processes are similar and different for structurally advantaged and disadvantaged students. She develops, implements, and evaluates social psychological interventions that reduce identity threat and spur students' motivation, persistence, and performance. Murphy also co-founded the College Transition Collaborative, a research-practice partnership housed at Stanford University. In the realm of organizations and technology, her research examines barriers and solutions for increasing gender and racial diversity in STEM fields, in particular the role of organizational mindset in companies' organizational culture, employee engagement and performance, and diversity, equity, and inclusion. In 2019, she was awarded the Presidential Early Career Award for Scientists and Engineers (PECASE). She earned a Ph.D. from Stanford University and completed a National Science Foundation postdoctoral fellowship at Northwestern University.

NICOLE S. PATTON-TERRY is the Olive & Manuel Bordas Professor of Education in the School of Teacher Education, director of the Florida Center for Reading Research, and deputy director of the Regional Education Lab—Southeast at Florida State University (FSU). Prior to joining

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FSU, she was an associate professor of special education and the founding director of the Urban Child Study Center at Georgia State University. Her research, innovation, and engagement activities concern young learners who are vulnerable to experiencing poor language and literacy achievement in school, in particular African American children, children growing up in poverty, and children with disabilities. Patton-Terry currently serves as an associate editor for the *Journal of Learning Disabilities*, board member for the Society for the Scientific Study of Reading, and fellow of the American Speech-Language-Hearing Association. She was a special education teacher in the Evanston (Illinois) Public Schools. She earned a Ph.D. from Northwestern University's School of Communication Sciences and Disorders, with a specialization in learning disabilities.

JAN L. PLASS is a professor in the Steinhardt School of Culture, Education, and Human Development at New York University (NYU). He is the founding director of the Consortium for Research and Evaluation of Advanced Technology in Education and co-directs the Games for Learning Institute. He was also the inaugural holder of the Paulette Goddard Chair in Digital Media and Learning Sciences at NYU. Plass' work envisions, designs, and studies the future of learning with digital technologies, most recently involving simulations and games for desktops, mobile, and AR/VR/MR. He is the author of more than 120 journal articles, chapters, and conference proceedings, and has given more than 200 presentations at academic conferences. He has served as lead editor for several publications, as PI or co-PI on numerous projects, and editorial review member on a number of journal boards. He has been a reviewer for funding agencies around the world and chairs the IES panels on basic processes and math and science learning. Plass received his M.A. in mathematics and physics education and Ph.D. in educational technologies from Erfurt University (Germany).

NATHANIEL SCHWARTZ is a professor of practice at Brown University's Annenberg Institute for School Reform, where he leads a set of research partnerships focused on improving educator pipelines and student well-being in Rhode Island. He also co-founded the EdResearch for Recovery project, which collects requests for pandemic-related research guidance from education leaders and identifies teams of researchers across the country to build out quick-response evidence synthesis. Schwartz previously served as the chief research and strategy officer for the Tennessee Department of Education. In that position, he led the department's research and strategic planning teams, contributing to the launch of Tennessee Succeeds, a strategic plan and vision aimed at increasing postsecondary and career readiness, and to the creation of the Tennessee Education Research Alliance, a state-level research partnership with Vanderbilt University. Prior

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to his graduate education, Schwartz was a high school science teacher in Arkansas and Illinois. He received his Ph.D. in educational studies from the University of Michigan.

JANELLE SCOTT is a professor and the Robert C. and Mary Catherine Birgeneau Distinguished Chair in Educational Disparities at the University of California at Berkeley in the Graduate School of Education, African American Studies Department, and Goldman School of Public Policy. Her research investigates how market-based educational reforms affect democratic accountability and equity in public education across several policy strands: (1) the racial politics of public education; (2) the politics of school choice, marketization, and privatization: (3) the politics of research evidence on market-oriented reforms; and (4) the role of elite and community-based advocacy in shaping public education and research evidence utilization. Her work has appeared in many edited books and journals, and she is the editor or author of numerous other publications. Scott is an AERA fellow and member of the National Academy of Education. Before earning her doctorate, she was a teacher in Oakland, California. She earned a B.A. in political science from the University of California at Berkeley and Ph.D. in education policy from the University of California at Los Angeles.

L. ELIZABETH TIPTON is an associate professor of statistics, co-director of the Statistics for Evidence-Based Policy and Practice Center, and faculty fellow in the Institute for Policy Research at Northwestern University. Her research focuses on the design and analysis of field experiments, with a particular focus on issues of external validity and generalizability in experiments; meta-analysis, particularly of dependent effect sizes; and the use of (cluster) robust variance estimation. She was previously a member of the faculty at Teachers College, Columbia University, for 7 years. Tipton is a board member of the Society for Research on Educational Effectiveness and serves as an associate editor of the *Journal of Educational and Behavioral Statistics*. She earned a B.A. in mathematics from Transylvania University, M.A. in sociology from the University of Chicago, and Ph.D. in statistics from Northwestern University.

SHARON VAUGHN is the Manuel J. Justiz Endowed Chair in Education and the executive director of The Meadows Center for Preventing Educational Risk, a research unit that she founded with a "make a wish" gift from the Meadows Foundation. She is the recipient of numerous awards, including the first woman in the history of The University of Texas to receive the Distinguished Faculty and Research Award. She is the author of more than 40 books and 350 research articles. She is currently PI on several Institute of Education Sciences, National Institute for Child Health and

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Human Development, and U.S. Department of Education research grants. She works as a senior adviser to the National Center on Intensive Interventions and has more than six articles that have met the criteria of the What Works Clearinghouse. Vaughn was a classroom teacher for five years, and has worked with state departments of education across the United States including Florida, Texas, Colorado, and New York as well as more than 30 school districts to develop, identify, and implement research-based practices and policies. She earned a B.S. in education from the University of Missouri, and master's and Ph.D. in education and child development from the University of Arizona.

STAFF

KENNE A. DIBNER (*Study Director*) is a senior program officer with the Board on Science Education at the National Academies of Science, Engineering, and Medicine (the National Academies). She has served as study director for *Reopening K–12 Schools During the COVID-19 Pandemic: Prioritizing Health, Equity, and Communities* and *Science Literacy: Concepts, Contexts, and Consequences,* as well as a recently completed assessment of the NASA Science Mission Directorate's education portfolio. Prior to this position, she worked as a research associate at Policy Studies Associates, Inc., where she conducted evaluations of education policies and programs for government agencies, foundations, and school districts, and as a research consultant with the Center on Education Policy. She has a B.A. in English literature from Skidmore College and a Ph.D. in education policy from Michigan State University.

LETICIA GARCILAZO GREEN is a research associate for the National Academies Board on Science Education. As a member of the board staff, she has supported studies focusing on criminal justice, science education, science communication, and climate change. She has a B.S. in psychology and a B.A. in sociology with a concentration in criminology from Louisiana State University and an M.A. in forensic psychology from The George Washington University.

MARGARET KELLY is a program coordinator for the National Academies Board on Science Education. She has more than 20 years of experience working in the administrative field for the private sector, federal government, and nonprofit organizations, including American University, Catholic University, the Census Bureau, International Franchise Association, the Department of Defense, and the University of the District of Columbia. She has received numerous professional honors and awards throughout her career, including the 2020 DBASSE staff award for Citizenship/Spirit, a

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Superior Performance of Customer Service Award, Sustained Superior Performance Cash Awards, and Air Force Organizational Excellence Awards and Certificates of Appreciations.

HEIDI SCHWEINGRUBER is the director of the National Academies Board on Science Education. She has served as study director or co-study director for a wide range of studies, including those on revising national standards for K–12 science education, learning and teaching science in grades K–8, and mathematics learning in early childhood. She also co-authored two award-winning books for practitioners that translate findings of Academies' reports for a broader audience, on using research in K–8 science classrooms and on information science education. Prior to joining the Academies, she worked as a senior research associate at the Institute of Education Sciences. She also previously served on the faculty of Rice University and as the director of research for the Rice University School Mathematics Project, an outreach program in K–12 mathematics education. She has a Ph.D. in psychology (developmental) and anthropology and a certificate in culture and cognition, both from the University of Michigan.

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Exhibit M
(excerpted correspondence between the whistleblower, OSC, and the ED investigators)

CARDINAL MAIL [redacted]

Draft Fact Section Referral Letter

[redacted] Mon, Jun 14, 2021 at 10:17 AM
To: [redacted]

Great, thank you, [redacted]. I'll speak with the investigators, whenever they contact me.

-[redacted]

On Mon, Jun 14, 2021, 10:13 AM [redacted] wrote:

> Good morning,
>
> Thank you for your feedback. We will make the requested changes relating to enhancing your anonymity. We will incorporate your remaining suggested edits where we find them to be warranted.
>
> Regarding your other allegations, we either believed the issues were being sufficiently addressed already by the agency (and in such cases we do not refer the issue to the agency for investigation) or we did not believe there was sufficient evidence to warrant a referral. Regardless, if you wish to have your name shared privately with the investigators (which is common when we refer an anonymous disclosure), you may share with them any other allegations and evidence you have.
>
> Thanks,
>
> [redacted]
> Attorney
> Retaliation and Disclosure Unit
> U.S. Office of Special Counsel
> 1730 M Street, N.W.
> Suite 218
> Washington, D.C. 20036
> [redacted]
> [redacted]
>
> **NOTICE**: This message and any attachments may contain information that is sensitive, confidential, or legally privileged. If you are not the intended recipient, please immediately notify the sender and delete this email from your system; you should not copy, use, or disclose its contents. Thank you for your cooperation.

From: [redacted]
Sent: Sunday, June 13, 2021 4:59 PM
To: [redacted]
Subject: Re: Draft Fact Section Referral Letter

CAUTION: EXTERNAL EMAIL Do not click on links, open attachments, or provide information unless you are sure the message is legitimate and the content is safe.

Hi [redacted],

Please find an edited version below, and also as an attachment.

Edits were minor:

1) replacing "whistleblower" and "he" with "WB" to eliminate my gender (I chose to use "WB" as my initials; I doesn't matter which acronym you use, you can change it if you want, as long as it is not my real initials);

2) replacing "Pathways intern on the Human Subjects Team" with "federal employee involved in the grant-making process at ED" -> (it's too easy to identify me otherwise);

3) switching the place of the Harvard and Fort Wayne grants (because I discovered and reported the Harvard grant first);

4) adding one particularly important quote from the Harvard grant application (“the training is also designed to address ethnic-racial systemic inequities. […] Educators will be able to explain and provide at least one example of how institutional racism plays out in the U.S. education system in a manner that reproduces ethnic-racial inequalities in academic outcomes (e.g. by reifying the notion that Whites do not have ethnic-racial identity and therefore are the “norm,” thereby othering youths from ERM backgrounds).”)

5) renumbering the end-notes, for your convenience.

I hope this helps. I'm wondering about the remaining illegalities too, particularly the 34 CFR 97 stuff? Will those be included later?

Thanks,

[redacted]

The whistleblower (WB), who wishes to remain anonymous, was a federal employee involved in the grant-making process at the Department of Education (ED). While reviewing grant applications, WB identified two grants that WB alleges violate federal statutes and U.S. Supreme Court precedent.

The first grant WB 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 $1,399,993.00, distributed incrementally, to Harvard University for a grant application entitled "Developing and Testing Training Modes for Improving Teachers' Race-Related Competencies to Promote Student Learners' Academic Adjustment."[1] The grant involves refining the Harvard Identity Project curriculum and identifying the most effective and efficient delivery modality. WB alleges that federal funding of this grant is 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.[2]

The second grant WB 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.[3] WB 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.[4]

The allegations to be investigated include:

- 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;

- The issuance of Grant Award No. U165A180062 to Fort Wayne Community Schools violates Title VI of the Civil Rights Act of 1964 and current U.S. Supreme Court precedent on affirmative action in educational settings; and

- Any additional, related allegations of wrongdoing discovered during the investigation of the foregoing allegations.

Given the complex legal nature of these allegations, I have provided a more thorough explanation of each allegation below. It is also my expectation that the party chosen to investigate these allegations will consult with WB to obtain further details regarding the allegations.

Allegation 1: The Identity Project's racially biased and ideological curriculum

WB 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,[5] 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."[6]

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."[7] 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[8] describes its operative theoretical framework as "increas[ing] teachers' ERI development, reduc[ing] their colorblind racial ideology, and increas[ing] their ERI content knowledge [i.e., race-related competencies]." The grant further 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." Additionally, "the training is also designed to address ethnic-racial systemic inequities. […] Educators will be able to explain and provide at least one example of how institutional racism plays out in the U.S. education system in a manner that reproduces ethnic-racial inequalities in academic outcomes (e.g. by reifying the notion that Whites do not have ethnic-racial identity and therefore are the "norm," thereby othering youths from ERM backgrounds)."

Information resources on the Identity Project's webpage further WB's arguments.[9] 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?"[10] 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."[11] 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?"[12] 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."[13] In general, these and other Identity Project resources are geared toward assisting "educators in navigating discussions about race, ethnicity, and identity with their students."[14]

Allegation 2: 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.[15] 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.

[1] Grant Award No. R305A200278. Copy of grant description available at https://ies.ed.gov/funding/grantsearch/details.asp?ID=4474.
[2] 20 U.S.C. §§ 9501(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.")
[3] Grant Award No. U165A180062. Copy of grant available at https://oese.ed.gov/files/2018/11/0062-Ft.-Wayne-Community-Schools.pdf.
[4] *See* 42 U.S.C. § 2000d.
[5] § 2000d.
[6] 20 U.S.C. §§ 9511, 9514, 9516.
[7] *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.
[8] Grant excerpts were provided by the whistleblower, who no longer has access to the full grant application.
[9] 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/.
[10] Adriana Umaña-Taylor, *ERI Resources*, Harvard Graduate School of Education, **Microsoft Word - 10_YMBW_White Stereotypes_Final_04-12-21.docx (harvard.edu).**
[11] *Id*.
[12] 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).**
[13] *Id*.
[14] 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/.
[15] Copy of grant available at https://oese.ed.gov/files/2018/11/0062-Ft.-Wayne-Community-Schools.pdf. Please refer to pages e39 to e41 for a description of the lottery system used to select students for programs for which applicants exceed program capacity.

On Fri, Jun 11, 2021 at 3:36 PM [redacted] > wrote:

> Hi [redacted],
>
> I noticed minor inaccuracies; I'll send you a red-line version later today.
>
> Also, I'm wondering... what happened to the rest of it? I did allege a huge number of illegalities in the two response/summary emails I sent you. I would have thought that, at the very least, you'd choose to investigate all the Common Rule for the Protection of Human Subjects in Research (34 CFR 97) stuff. At ED, I was one of only four people involved in the HSR process. The only person at ED who could speak more knowledgeably on this topic is [redacted].
>
> Please let me know when you're available for a call. I tried just now, and I sent you text (not sure if your phone

receives texts).

Thanks,

[redacted]

On Fri, Jun 11, 2021 at 2:57 PM [redacted] wrote:

[redacted],

Below are the factual portions of a draft of the possible referral letter. As we discussed on the phone, this is not a final version. Please review the language carefully for factual inaccuracies. If I make any substantive changes to the fact section, I will keep you informed.

Please let provide me your feedback before Monday.

The whistleblower, who wishes to remain anonymous, is a former Pathways law intern in the Grants Policy and Training Division of ED. While reviewing grants as part of his responsibilities on the Human Subjects in Research Team, he identified two grants which he 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 $1,399,993.00, 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 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. U165A180062 to Fort Wayne Community Schools 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, I have provided a more thorough explanation of each allegation below. It is also my expectation that the party chosen to investigate these allegations will consult with the whistleblower to obtain further details of his allegations.

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.

. . .

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,[6] 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."[7]

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."[8] 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[9] 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 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.[10] 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?"[11] 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."[12] 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?"[13] 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."[14] In general, these and other Identity Project resources are geared toward assisting "educators in navigating discussions about race, ethnicity, and identity with their students."[15]

Best,

[redacted]

Attorney

Retaliation and Disclosure Unit

U.S. Office of Special Counsel

1730 M Street, N.W.

Suite 218

Washington, D.C. 20036

[redacted]

[redacted]

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[1] Grant Award No. U165A180062. 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.

[4] 20 U.S.C. §§ 9501(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] Copy of grant available at https://oese.ed.gov/files/2018/11/0062-Ft.-Wayne-Community-Schools.pdf. Please refer to pages e39 to e41 for a description of the lottery system used to select students for programs for which applicants exceed program capacity.

[6] § 2000d.

[7] 20 U.S.C. §§ 9511, 9514, 9516.

[8] *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.

[9] Grant excerpts were provided by the whistleblower, who no longer has access to the full grant application.

[10] 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/.

[11] Adriana Umaña-Taylor, *ERI Resources*, Harvard Graduate School of Education, **Microsoft Word - 10_YMBW_White Stereotypes_Final_04-12-21.docx (harvard.edu).**

[12] *Id*.

[13] 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).**

[14] *Id*.

[15] 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/.

--

[redacted]

J.D. Candidate, Class of 2022

The Catholic University of America

Columbus School of Law

--

[redacted]

J.D. Candidate, Class of 2022

The Catholic University of America

Columbus School of Law

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-804-7122

July 14, 2021

VIA ELECTRONIC MAIL

[redacted]

Re: OSC File No. DI-21-000533

Dear [redacted]:

The Office of Special Counsel (OSC) has completed its review of the information you submitted to the Retaliation and Disclosure Unit. You alleged that the U.S. Department of Education (ED) may be violating laws, rules, or regulations. You did not consent to the inclusion of your name in the referral letter to the agency but requested that we disclose your name to investigators.

OSC is authorized to determine whether disclosures should be referred to the involved agency for investigation, or review, and a report. OSC may refer allegations of violations of law, rule or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Disclosures referred for investigation and a report by the agency must include information sufficient for OSC to determine whether there is a substantial likelihood of agency wrongdoing. If a substantial likelihood determination cannot be made, OSC will determine whether there is sufficient information to exercise its discretion to refer the allegations to the agency head for a review and written report. OSC itself does not have the authority to investigate disclosures. Consequently, we base our review of a disclosure mainly on the information the whistleblower provides us.

You disclosed the following:

- DOE's issuance of Grant Award No. U165A170062 to Fort Wayne Community Schools violates Title VI of the Civil Rights Act of 1964 and current U.S. Supreme Court precedent on affirmative action in educational settings.

- DOE's issuance of Grant Award No. R305A200278 to Harvard University for the Identity Project violates Title VI and the Institute of Education Sciences' statutory authority because the project is racially biased in nature.

After reviewing the information you submitted, we have requested that the Secretary of Education conduct an investigation into these allegations and report back to OSC pursuant to 5 U.S.C. § 1213(c). We have provided the Secretary of Education 60 days to conduct the investigation and submit the report to OSC. However, you should be aware that these investigations usually take longer, and agencies frequently request and receive extensions of the due date. Should the DOE request an extension in this case, we will advise you of the new due date for the report.

At your request, we will inform agency investigators of your identity and ask that they interview you at the beginning of the investigation. Although the referral for investigation generally describes your allegations, we rely on you, as the originator of the disclosure, to provide the agency additional information and an explanation of your allegations, thereby streamlining the investigation.

Unless the report is classified or otherwise not releasable by law, we will send you a copy after our review so that you may comment on the report, if you wish. When the matter is closed, the Special Counsel will transmit the report and your comments to the President and the appropriate congressional oversight committees. Copies of these documents will be maintained by OSC in a public file, which is posted on OSC's website at www.osc.gov.

We emphasize that, while OSC has found a substantial likelihood of wrongdoing based on the information you submitted in support of your allegations, our referral to the Secretary of Education for investigation is not a final determination that the allegations are substantiated. This remains an open matter under investigation until the agency's final report is forwarded to the President and Congress.

If you have questions or would like to discuss this matter, please contact me at (202) 804-7030.

Sincerely

[redacted]

Attorney
Retaliation & Disclosure Unit
[redacted]

CARDINAL MAIL [redacted]

Question (OSC File Nos. MA-21-001364, DI-21-000533)

[redacted] Tue, Nov 2, 2021 at 9:34 AM
To: [redacted]

Thank you!

[redacted]

Attorney

Retaliation and Disclosure Unit

U.S. Office of Special Counsel

1730 M Street, N.W.

Suite 218

Washington, D.C. 20036

[redacted]

[redacted]

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From: [redacted]
Sent: Monday, November 1, 2021 7:43 PM
To: [redacted]
Subject: Re: Question (OSC File Nos. MA-21-001364, DI-21-000533)

CAUTION: EXTERNAL EMAIL Do not click on links, open attachments, or provide information unless you are sure the message is legitimate and the content is safe.

Hi [redacted],

Quick answer, replying from my phone now.

Regarding my termination, she said during that conversation in February 2021 that I could appeal my termination to [redacted]. I then emailed [redacted] immediately after that conversation with [redacted]. There is a lengthy description of that particular conversation and my appeal to [redacted] in my EEO rebuttal testimony PDF, which I previously sent you.

Regarding the Harvard and Fort Wayne grants - no, [redacted] did not say that I could contact [redacted] about either.

I know that [redacted] already knew about the Harvard grant, since I emailed [redacted], then he forwarded it to IES, then it went up the chain at IES, then IES sent it to [redacted], then [redacted] told [redacted] about it, then [redacted] had a conversation with me about it. I know the email went around this way because [redacted] told me during that conversation; I was not copied on the chain, just the first part when I emailed [redacted] directly.

I know that [redacted] knew about Fort Wayne too, because [redacted] said that [redacted] didn't want to hear any more about the Fort Wayne grant.

Regarding contacting an ethics attorney at OGC - no, [redacted] did not say I could contact an ethics attorney directly. And (theoretically, because she did not say I could) even if she had, who exactly would I have contacted? I'd never met anyone, since everyone was telecommuting. I remember there was an ethics attorney who did a short presentation during the new employee orientation in July 2020, but I'd never spoken to her directly or individually, not even virtually/via phone. I don't even remember her name now.

Hope this helped. Let me know if you need anything else. So glad you're working on this!

Thanks,

[redacted]

On Mon, Nov 1, 2021, 7:25 PM [redacted] wrote:

> Hi [redacted],
>
> Another quick clarification—did [redacted] inform you that you could bring your concerns directly to the ethics attorney yourself and/or [redacted], if you felt your concerns were not being addressed?
>
> Thanks,
>
> [redacted]
>
> Attorney
>
> Retaliation and Disclosure Unit
>
> U.S. Office of Special Counsel

1730 M Street, N.W.

Suite 218

Washington, D.C. 20036

[redacted]

[redacted]

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From: [redacted]
Sent: Monday, November 1, 2021 3:34 PM
To: [redacted]
Subject: Re: Question (OSC File Nos. MA-21-001364, DI-21-000533)

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Hi [redacted],

Two good questions! Thanks for asking them. I'm glad you're working on my case.

To answer both questions, I'll lay-out a partial timeline of relevant events (it's somewhat lacking in dates, because I don't have all my ED emails, or my ED Outlook calendar. I hope to get these, inter alia, during discovery - whenever the EEO administrative process gives me an opportunity for discovery).

July 6, 2020 - Orientation for new employees (100% virtual), and also my first working day (also 100% virtual). It's important to realize that I and everyone I interacted with was working virtually during my entire time at ED (approx. 7 months), so I never actually met my colleagues in-person - not the HSR team ([redacted]), nor [redacted], nor [redacted], and certainly nobody from OIG or OGC. Everything was emails, phone calls, and video chat. Because I was never able to go into an office (and even if I had been able to, nobody else would have been there), I didn't know anyone personally, and everyone telecommuting meant I couldn't simply stop by someone's desk and ask a question.

July 10, 2020 - Two inter-agency calls, both of which [redacted] invited me to sit-in on. Before the calls, we had a conversation where he told me not to say anything on inter-agency calls, to just listen.

[Date unknown] - Around the same time, I had a talk with [redacted], where she told me something very similar. Specifically, she said I could ask questions during weekly GPTD meetings (meaning, when [redacted], as the GPTD Director, was in charge of the meetings), but I was supposed to only listen for meetings when ED staff outside of GPTD were present on a conference call/video meeting.

September 4, 2020 - Quoting my Formal Complaint: "Weekly one-on-one meeting with [redacted]. I mentioned my concerns about the legality of the Harvard grant (R305A200278). [redacted] gave me some advice: it's best not to pursue these issues. According to her, during her career as a civil servant, she'd seen other federal employees face severe consequences for bringing up similar issues, and she didn't want that to happen to me. It was clear to me that her advice was honest & well-intentioned, that she cared, & she feared I'd be punished if I spoke up."

She did not say anything about contacting OIG or OGC; in fact, what she recommended was to drop the issue entirely, to not tell anyone.

September 8, 2020 - I emailed [redacted] about the Harvard grant. I previously provided you ([redacted]) with that email.

September 18, 2020: Quoting/paraphrasing my Formal Complaint: "One-on-one meeting with [redacted]. We discussed the Harvard grant. I attempted to quote directly from the grant application. [Specifically: "the Identity Project training program increases teachers' ERI development, reduces their colorblind racial ideology, ..."; etc. etc.] [redacted] interrupted me, and did not allow me to finish quoting the relevant sections of the grant application that supported my belief that IES deciding to fund this grant application violated multiple legal authorities."

She did not say anything about OIG or OGC.

Furthermore, expanding on the quotation above, about that conversation with [redacted]: What she was most aggrieved about was the fact that my Harvard email, which I had sent only to [redacted] originally and later to [redacted], had been forwarded to IES by [redacted] - meaning, outside of GPTD. There were two issues, according to [redacted]: one, that I had put my concerns about the Harvard grant in writing (an email) at all; and two, that my email have gotten outside of GPTD. And that latter issue was, by far, the bigger problem, in [redacted] view.

Up until this date (September 18, 2020), based on the above, I had made sure to stay within the chain of command (meaning only the HSR team led by [redacted], or [redacted]) (and again, please note that [redacted] forwarded my email to IES - I did not) - and after speaking with [redacted] about that Harvard email, there was no way I would ever go over her head or around her.

Quoting my Formal Complaint: "In December 2020 and January 2021, there was an email chain among us four Human Subjects Team staffers ([redacted] and I) discussing the Fort Wayne grant. There was also an email chain about a draft email to OGC that mentioned the Fort Wayne grant between myself, [redacted], and [redacted]. There was a Human Subjects team meeting with us four Human Subjects staffers and [redacted], during which [redacted] mentioned that [redacted] didn't want to hear anything more about the Fort Wayne grant."

Elaborating on the above: There are a few emails in the "Harvard, Fort Wayne, Biden EO" PDF packet that I previously provided you ([redacted]) with, regarding my request to [redacted] for an OGC ethics opinion. Quoting the email dated January 8, 2021: "Hi [redacted], [redacted], [redacted] asked me for an email she could forward to OGC. I'd appreciate comments on the following draft email."

It's important to note that [redacted] requested a draft email she could review then forward to OGC; she requested this instead of telling me to contact OIG or OGC myself. She did not tell me to contact OIG or OGC myself.

Her request for a draft email to OGC came in response to me emailing her saying, basically (paraphrasing), "I really need an ethics opinion on this. How do I get that, who do I contact?" I don't know whether you have that email already; I cannot seem to find it now. Not sure whether I printed it out previously, or included it in a PDF packet.

Further elaborating on the above: I mentioned an HSR Team meeting with us four on the HSR team ([redacted], and myself) plus [redacted], during which [redacted] informed us that she had spoken with someone at OGC about the Fort Wayne grant, who had said that if any of us believe there is "waste, fraud, or abuse," that person should contact OIG.

I then specifically asked whether that was exactly what OGC said, "only waste, fraud, or abuse? Nothing else?" I'm concerned about a violation of law, but I'm not sure it falls into the narrow categories of waste, fraud, or abuse. [redacted] repeated her original statement. I said, OK, is it's just those 3 things, then I won't contact OIG.

I'm paraphrasing the above, but I'm 100% sure [redacted] used the term "waste, fraud, or abuse," and my question was about the breadth of those terms, and her response was that is was only "waste, fraud, or abuse." [redacted], and [redacted] were also on that call - you ([redacted]) can ask them, and perhaps they remember the exact words used in that conversation.

Regarding your two questions:

1) Did [redacted] (or anyone else) tell you that you should bring your legal concerns to the OIG or to OGC yourself?

As you read from the timeline above, [redacted] had numerous opportunities to tell me to go to OIG or OGC myself, but she did not. The single instance where she might have (the "waste, fraud, or abuse" conversation described above) is arguable, and in any event she only mentioned possibly contacting OIG, not OGC.

Additionally, at the time I knew next to nothing about exactly how to contact OIG or OGC myself. I was a new employee, a pathways student intern, and I had not met anyone in-person. All I had was an online video-training about internal controls that I remembered taking, which said to contact my manager with any concerns (meaning [redacted]).

Even if [redacted] had told me to contact OIG or OGC myself (which she did not) - how was I supposed to do that, who exactly was I supposed to email? She would have also needed to tell me how to contact OIG or OGC myself (which, again, she did not).

2) If not, was it your understanding that you could not do so?

Exactly. That was my understanding, per the timeline above. I was not to go outside of GPTD (meaning [redacted]) (or

[redacted], since the HSR team is within GPTD), and even if I had tried to do so, who exactly would I have contacted, and how exactly would I have contacted that person?

I hope this helps. Please let me know if you have any more questions.

Thanks,

[redacted]

On Mon, Nov 1, 2021 at 10:38 AM [redacted] wrote:

> Hi [redacted],
>
> I hope you are doing well. I have a couple questions for you. Did [redacted] (or anyone else) tell you that you should bring your legal concerns to the OIG or to OGC yourself? If not, was it your understanding that you could not do so?
>
> Thank you,
>
> [redacted]
> Attorney
> Retaliation and Disclosure Unit
> U.S. Office of Special Counsel
> 1730 M Street, N.W.
> Suite 218
> Washington, D.C. 20036
> [redacted]
> [redacted]
>
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--

[redacted]

J.D. Candidate, Class of 2022

The Catholic University of America

Columbus School of Law

CARDINAL MAIL [redacted]

Procedural question (EEOC No. 570-2022-00198X)

[redacted] Wed, Jan 19, 2022 at 7:45 PM
To: [redacted]

Hi [redacted],

I'm so glad to hear that the forthcoming cover-up will now be less obvious.

Best regards,

[redacted]

On Wed, Jan 19, 2022, 6:15 PM [redacted] wrote:

> Good evening [redacted],
>
> I wanted to provide you with a quick update on the disclosure investigation. The agency informed us that it is continuing to explore options for who will be doing the investigation with the goal of achieving the most objective process possible. They will be providing us with some additional options, most likely by the end of the week. When we have more information, I will let you know.
>
> Best,
>
> [redacted]
>
> Attorney
>
> Retaliation and Disclosure Unit
>
> U.S. Office of Special Counsel
>
> 1730 M Street, N.W.
>
> Suite 218
>
> Washington, D.C. 20036
>
> [redacted]
>
> [redacted]
>
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>
> ---
>
> **From:** [redacted]
> **Sent:** Sunday, January 16, 2022 7:05 PM
> **To:** [redacted]

Subject: Fwd: Procedural question (EEOC No. 570-2022-00198X)

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Hi [redacted],

FYI (see email below). Since an AJ has not yet been assigned to my case, I emailed the EEOC Washington Field Office my questions about uploading a motion to disqualify for conflicts of interest to the EEOC portal, and I copied both opposing counsel. I redacted your information, and I forwarded only the original email.

Best regards,

[redacted]

---------- Forwarded message ---------
From: [redacted]
Date: Sun, Jan 16, 2022 at 6:54 PM
Subject: Procedural question ([redacted])
To: <WASHFO_HEARINGS@eeoc.gov>
Cc: [redacted], [redacted]

Dear EEOC Washington Field Office,

Hi, this is [redacted], the Complainant in EEOC No. [redacted]. I am unrepresented. I have some procedural questions that I'm hoping someone can help answer.

Both the Agency and I have uploaded Preliminary Case Information (PCI) to the EEOC portal/FedSep, but an Administrative Judge has not yet been assigned, and the Acknowledgement Order said the parties cannot yet initiate discovery. The Order did not say anything about whether the parties can upload motions to the portal now, before an AJ is assigned.

The underlying facts of my case gave rise to 3 administrative processes:

1) This EEOC hearing;

2) An Office of Special Counsel (OSC) investigation of Prohibited Personnel Practices (PPP); and

3) OSC finding a "substantial likelihood of wrongdoing" for my disclosures (specifically, two grants that likely violate Title VI of the Civil Rights Act, among other legal authorities), which OSC then referred to the Agency head (Secretary Cardona) for further investigation. I had believed, up until just recently, that the Agency Inspector

General (ED IG) would be/had been investigating my disclosures.

It recently came to my attention that, instead of the ED IG, Secretary Cardona has decided that the Agency's Office of General (ED OGC) will investigate my disclosures (see OSC email below; I redacted the OSC attorney's name). This means that ED OGC attorneys are now performing 3 roles simultaneously:

1) Two ED OGC attorneys are opposing counsel for this EEO hearing (both are copied on this email).

2) ED OGC attorneys are potential RMOs or witnesses that I will be seeking to depose during discovery due to their involvement in the underlying facts of my case, in at least three ways:

a) ED OGC attorneys were likely consulted on my opposition to the discriminatory grants and diversity, equity, inclusion (D&I) trainings,

b) at least one ED OGC attorney was consulted on the decision to terminate my employment, and

c) ED OGC attorneys were likely involved in the review of and/or decision to fund certain grants and D&I trainings that I alleged were illegally discriminatory (including the two grants that OSC referred to the Agency heard for further investigation).

3) ED OGC attorneys are investigating my disclosures (meaning, ED OGC attorneys are investigating other ED OGC attorneys, who are likely their colleagues/supervisory lawyers/subordinate lawyers).

Additionally, Secretary Cardona (as the Agency head) appears to be able to exert influence over all 3 categories of ED OGC attorneys, and I believe this includes improper influence. Unlike the ED IG, the ED OGC investigators do not appear to be insulated/independent.

Given these facts, I believe it likely that opposing counsel has numerous conflicts of interest, which likely implicate numerous Rules of Professional Conduct of their respective state bars. Per MD-110, section 7-32 (page 190): "In contrast to disqualification for misconduct, a disqualification for conflict of interest under 29 C.F.R. § 1614.605(c) applies only to the particular case. Parties shall disclose and reasonably attempt to avoid all conflicts of interest."

I am wondering whether opposing counsel has disclosed their possible conflicts of interest, and what reasonable attempts they have made to avoid such conflicts of interest?

Regarding my procedural questions:

1) For procedural questions that are not motions (like these questions), should I upload them to the portal instead of sending them by email like this?

2) For questions about opposing counsels' likely conflicts of interest, should I email opposing counsel directly? Am I allowed to contact them directly before an AJ has been assigned? I believe I am required to do so, prior to filing a motion to disqualify?

3) Am I now allowed to upload a motion to disqualify for conflict of interest, or must I wait until an AJ has been assigned?

4) Am I now allowed to upload other motions, or must I wait for an AJ to be assigned?

Thanks so much for your help!

Best regards,

[redacted]

--

[redacted]

[redacted] Class of 2022

The Catholic University of America

Columbus School of Law

---------- Forwarded message ---------
From: **[REDACTED - Name of OSC attorney]** <**[REDACTED]**@osc.gov>
Date: Thu, Jan 13, 2022 at 6:22 PM
Subject: disclosure interview (OSC File No. DI-**XX-XXXXXX [REDACTED]**)
To [redacted]

Hi [redacted],

I spoke with our liaison on the disclosure today. A team of attorneys in OGC who have no connection to the allegations will be conducting the investigation. I am reaching out to ensure that you are still interested in sharing your identity and contact information with that team so they can interview you. Please let me know.

Best,

[REDACTED - Name of OSC attorney]

Attorney

Retaliation and Disclosure Unit

U.S. Office of Special Counsel

1730 M Street, N.W.

Suite 218

Washington, D.C. 20036

[REDACTED - telephone number]

[REDACTED]@osc.gov

--

[redacted]

J.D. Candidate, Class of 2022

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CARDINAL MAIL [redacted]

For ED IG Sandra Bruce - triggering your statutory obligations

[redacted] > Wed, Feb 16, 2022 at 5:52 PM
To: [redacted]

Dear [redacted]

I understand your strong preference for an investigation completed by an Office of Inspector General (IG). As we have explained, OSC does not have statutory authority to dictate which entity will conduct the investigation of a referral pursuant to 5 U.S.C. § 1213(c). Moreover, the IG Act gives IGs the discretion to decide which allegations warrant an investigation. 5 U.S.C. app. §§ 7(a) ("The Inspector General *may* receive and investigate complaints or information from an employee") (emphasis added), 6(a)(2) (IG is authorized "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, *in the judgment of the Inspector General*, necessary or desirable") (emphasis added); *Heide v. Scovel*, 2008 U.S. Dist. LEXIS 125338, *11-14 (D. Minn. 2008) (IG decision to investigate and prosecute committed to its absolute discretion). As the DOE IG has exercised its discretion not to investigate these allegations, OSC does not have a basis for further contact with the IG on these issues.

With regard to your request that we provide information to Congress, please note that, as a general practice, to preserve the integrity of our process, we will do not release information about open matters.

Sincerely,

[redacted]

Attorney

Retaliation and Disclosure Unit

U.S. Office of Special Counsel

1730 M Street, N.W.

Suite 218

Washington, D.C. 20036

[redacted]

[redacted]

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From: [redacted]
Sent: Tuesday, February 15, 2022 10:33 AM
To: [redacted]
Subject: Re: For ED IG Sandra Bruce - triggering your statutory obligations

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Dear [redacted],

Thanks for your response. I'm really happy you cited the relevant statutes, and I think you made a good legal argument in favor of the proposition that the Office of Special Counsel has been complying with its statutory requirements. I'll accept your arguments; my position has always been that, if someone makes a legal argument, I'll evaluate it on the merits, and if it's a good argument, I'll accept it – even if it's not the conclusion that I would have come to myself. As I wrote to you previously, my previous email may have seemed a bit harsh, but I did not mean it as a critique of you personally; it has been a pleasure working with you on my disclosures and PPPs, and I'm sure you've done your best. You previously told me that you'd finished your investigation of my PPPs and had passed it up-the-chain for review and approval – and I know it's not your fault the approvals have been taking this long. Sign-offs at ED also took a while, I remember. My previous consent to an indefinite extension to OSC for my PPP investigation remains in effect.

As you know, I'd been under the impression that the ED IG had been, or would be, investigating my disclosures – the ones you referred to the Agency head, Secretary Cardona. I had believed this because I thought that the ED IG was the most appropriate entity to conduct these sorts of investigations; it's what an IG does, right? I remember that, when I originally checked the ED IG website many months ago, it stated that I could file with either the ED IG or OSC; I had thought that meant it was only a single administrative remedy, with two possible avenues. I had thought that, regardless of who I filed with, the ED IG would be the entity conducting the investigation.

Additionally, there are numerous reasons why I would prefer to have an IG (any IG) conduct the investigation of my disclosures. I have read the Inspector General Act of 1978, codified at 5a U.S.C., and it seems to me that the IG Act imposes certain requirements upon any investigation conducted by an IG (including by the ED IG), at the following sections:

- 5a U.S.C § 3. Appointment of Inspector General; supervision; removal; political activities; appointment of Assistant Inspector General for Auditing and Assistant Inspector General for Investigations
- 5a U.S.C. § 4. Duties and responsibilities; report of criminal violations to Attorney General
- 5a U.S.C. § 5. Semiannual reports; transmittal to Congress; availability to public; immediate report on serious or flagrant problems; disclosure of information; definitions
- 5a U.S.C. § 6. Authority of Inspector General; information and assistance from Federal agencies; unreasonable refusal; office space and equipment
- 5a U.S.C. § 7. Complaints by employees; disclosure of identity; reprisals

I would really like whoever conducts the investigation of my disclosures to comply with these statutory requirements – and that means the investigator must be an IG, to ensure the investigators fall within the purview of the aforementioned sections of the IG Act.

Additionally, I believe that any investigation conducted by an IG, and thus complying with the aforementioned sections of the IG Act, is more likely to be a full and fair investigation. If the investigation of my disclosures were conducted by an IG, I would be far less concerned about possible conflicts of interest.

I'm sorry my recent emails to you, and to the ED IG and her Key Personnel that I forwarded to you, sounded a little

pushy. My employment at ED was terminated on February 5, 2021 – and today it's February 15, 2022. It's been over a year, and despite pursuing three administrative processes simultaneously (disclosures, PPP investigation, and the EEO process), I've yet to receive an opportunity to tell my side of the story, to make my legal arguments, and to have them evaluated on their merits. I believe I was wronged by the Department, and I seek redress. It's rather frustrating that I've yet to receive that. I think there comes a point where, if it takes too long to get a fair hearing, or a full and impartial investigation, then my right to Due Process is violated.

If you would do me a favor: please forward this email to the ED IG, and ask her or her office to email me, so we can schedule a time for me to be interviewed, so her office can start investigating the disclosures that you guys at OSC referred to Secretary Cardona. I believe that, since she became aware of the facts of my case the moment her and her staff read my previous email (which I forwarded to you guys at OSC), she now has a statutory obligation to investigate – an obligation independent of investigating the disclosures that OSC referred to the Agency head. If the ED IG were to investigate my disclosures, I believe that would be more efficient and save government resources; it would be "two birds with one stone." I would appreciate it if you could let me know after you forward this email to the ED IG and her Key Personnel, just so I know that her office received this email.

As I stated to you previously, I requested anonymity in the OSC disclosure process – but I also told you that I consented to informing the investigators of my identity. I give you permission to forward this email only, along with the emails in this particular email chain (starting with my email to the ED IG and her Key Personnel) to the ED IG and her office. I also give both you guys at OSC and the ED IG permission to forward this email to the Integrity Committee of CIGIE. As the ED IG saw in the PDF attached to my email to her, and as you guys at OSC saw when I forwarded you that email with that attachment, that email to the Integrity Committee was based on two premises:
1) That the ED IG had declined to investigate my disclosures, and
2) That the investigation of my disclosures would be conducted by ED OGC.

If the investigation of my disclosures is conducted by either the ED IG or a different IG, the basis for those complaints no longer holds true, and there is no justification for those complaints to the Integrity Committee, or for any further complaints or triggering of statutory obligations. There would also be no reason for me to file a Motion to Disqualify for conflicts of interest against opposing counsel from ED OGC in my EEO hearing.

I have not "gone public" about these matters yet, and I do not plan to, as long as the administrative remedies I've been pursuing thus far are working as intended. All I've ever wanted is Due Process, and for everyone to follow the law, and I'd be very grateful if you and the ED IG could make that happen.

However, I have gotten in contact with a member of Congress and signed a Privacy Act consent form that I emailed to that Congressperson's office, allowing staffers to request information from OSC, ED OEEOS, and the EEOC about the administrative processes that I've been pursuing. If you are contacted by Congressional staffers inquiring about my administrative remedies, I would appreciate it if you could release to them any information you have about my cases, after they show you my signed consent form.

Best regards,

[redacted]

On Tue, Feb 8, 2022 at 3:56 PM [redacted] wrote:

> Dear [redacted],
>
> I would like to address your concerns with regard to the handling of your disclosure matter. First, we acknowledge that it has been more than 60 days since our referral to the Secretary of the U.S. Department of Education (DOE). The law permits OSC to agree to a longer period of time for the agency to submit its report of investigation. Here, DOE had not yet identified an appropriate entity to conduct the investigation and, as such, the time for filing a report was informally extended while the agency explored options for identifying an entity capable of investigating the allegations.
>
> Second, we understand that you object to agency attorneys conducting the investigation, even if the attorneys are screened for conflicts and are subject to a firewall to prevent persons with possible conflicts of interest from influencing the investigation. As we have discussed, by law, it is the agency head, not OSC, who determines which entity will investigate allegations referred pursuant to 5 U.S.C. §1213(c). We noted your objections and discussed alternatives with the agency. When we spoke on January 13, 2022, I anticipated that the agency would "most likely" provide us with additional alternatives by the end of the week, but it has taken longer than expected.

Regardless of which entity conducts the investigation, ultimately, the Special Counsel will review the report submitted by the head of the agency and determine whether the findings are reasonable. You, as the whistleblower, will have the opportunity to submit comments on the agency report (except in the event there is evidence of a criminal violation referred to the Attorney General).

With regard to your prohibited personnel practice case, we are following our regular case processing procedures. If you would prefer to pursue your retaliation claim before the Merit Systems Protection Board (MSPB), please let us know, as the law permits a complainant to do so where 120 days has elapsed since filing with OSC if he or she has not been notified that OSC will seek corrective action on his or her behalf. 5 U.S.C. § 1214(a)(3)(B).

Sincerely,

[redacted]

Attorney

Retaliation and Disclosure Unit

U.S. Office of Special Counsel

1730 M Street, N.W.

Suite 218

Washington, D.C. 20036

[redacted]

[redacted]

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From: [redacted]
Sent: Sunday, February 6, 2022 7:46 PM
To: [redacted]
Subject: Fwd: For ED IG Sandra Bruce - triggering your statutory obligations

CAUTION: EXTERNAL EMAIL Do not click on links, open attachments, or provide information unless you are sure the message is legitimate and the content is safe.

Hi [redacted],

I believe the most recent contact I received from you was on January 19, 2022, when you emailed me that "The agency informed us that it is continuing to explore options for who will be doing the investigation with the goal of achieving the most objective process possible. They will be providing us with some additional options, most likely by the end of the week."

As of today (February 6, 2022), no “additional options” have been provided to me. It’s been 18 days; whatever happened to “by the end of the week”?

I had some free time today, so I thought about my cases. For my EEOC hearing, I've already prepared motions and discovery requests, but I have to wait until an AJ is assigned. As soon as that occurs, I'll be bringing up the following topics at the Initial Conference, before proceeding to discovery:

- Voluminous evidence indicating that the Agency has been acting in bad faith,

- A motion to disqualify opposing counsel for conflicts of interest, and

- Possible sanctions against the Agency.

When the Agency acts in bad faith in the EEO process, I can appeal to the AJ - whenever I eventually get one assigned. What wonderful accountability!

Holding both the Agency and the Office of Special Counsel accountable

But what happens when the Agency acts in bad faith with my disclosures? Who is supposed to hold the Agency accountable? Oh, right - it's you guys at the Office of Special Counsel!

But what happens when you ([redacted]), on behalf of OSC:

1) In a July 14, 2021 emailed memo, inform me that "After reviewing the information you submitted, we have requested that the Secretary of Education conduct an investigation into these allegations and report back to OSC pursuant to 5 U.S.C. § 1213(c). We have provided the Secretary of Education 60 days to conduct the investigation and submit the report to OSC. However, you should be aware that these investigations usually take longer, and agencies frequently request and receive extensions of the due date. Should the DOE request an extension in this case, we will advise you of the new due date for the report" - then fail to advise me of any extensions granted by OSC to the Agency, or of any new due dates,

2) In a January 13, 2022 email, inform me that "A team of attorneys in [the ED Office of General Counsel] who have no connection to the allegations will be conducting the investigation” of my disclosures, per Secretary Cardona's decision - and you ([redacted]), on behalf of OSC, somehow thought it was acceptable to convey to me such a transparent cover-up attempt by the Agency,

3) In a January 13, 2022 phone call, tell me that you've completed your OSC investigation of my PPP allegations, but you're still waiting for your superiors at OSC to sign-off on it,

4) In a January 19, 2022 email, inform me that the Agency "will be providing us with some additional options, most likely by the end of the week," and

5) By today (February 6, 2022), have not yet contacted me with those "additional options" for who will be investigating my disclosures, or with a final decision by OSC regarding my PPP allegations. Presumably, whatever your superiors at OSC are supposed to review and sign-off on for my PPP allegations is still sitting on their desks.

What I've been pondering today is this: How do I hold both the Agency and OSC accountable in the disclosure and PPP processes? Who watches the watchmen?

I've decided on the following three methods:

1) Filing complaints,

2) Triggering statutory obligations, and

3) Going public with the information I currently have in the next few days, then releasing additional information later when I get discovery in the EEOC process.

As you can see from the email below, I have just triggered statutory obligations for the ED Inspector General (Sandra Bruce), and for Secretary Cardona. I view this as further exhausting my administrative remedies.

I have compiled a list of statutory obligations applicable to anyone involved in these matters - including Special Counsel Kerner. I will continue to file complaints and trigger statutory obligations until I see some progress on my disclosure and PPP cases. We must all follow the law, and that applies to you guys at OSC as well.

I hope to hear from you soon!

Best regards,

[redacted]

---------- Forwarded message ---------
From: [redacted]
Date: Sun, Feb 6, 2022 at 6:24 PM
Subject: For ED IG Sandra Bruce - triggering your statutory obligations
To [redacted]
Cc: [redacted]

Dear Inspector General Sandra Bruce,

Hi, my name is [redacted]. I'm sure you already know who I am. I'm sending this email to make you aware of the following facts, thus triggering your statutory obligation under 5a U.S.C § 5(d):

Facts

1) ED has funded two grants (R305A200278 to Harvard, and U165A180062 to Fort Wayne) with a "substantial likelihood" of violating Title VI of the Civil Rights Act, among other anti-discrimination legal authorities (per the Office of Special Counsel (OSC)'s referral of my disclosures to Secretary Cardona for further investigation);
2) At the Dept. of Education (ED), there is likely a pattern or practice of funding illegally discriminatory grants, including the two aforementioned grants (I reviewed many grant applications during the normal performance of my duties at ED, and I remember reading additional funded grants that discriminate on the basis of a protected characteristic);
3) At ED, there is likely a pattern or practice of funding illegally discriminatory diversity, equity, inclusion (D&I)-related trainings;
4) My employment at ED was terminated, likely as retaliation for my whistleblowing about, and opposition to, certain illegally discriminatory ED-funded grants and D&I-related trainings;
5) After my disclosures (of the two grants) were referred to Secretary Cardona by OSC, the ED IG (meaning you and your office, Inspector General Bruce) was asked to conduct the investigation. Per a January 13, 2022 phone

call that I had with the OSC attorney assigned to my case, the ED IG had refused to investigate my disclosures. Apparently, the reason given by the ED IG was that my case was a legal matter, not a fact-finding matter, and that's not what the IG does;
6) On January 13, 2022, the OSC attorney assigned to my case informed me that "A team of attorneys in [the ED Office of General Counsel] who have no connection to the allegations will be conducting the investigation" of my disclosures (As I'm sure you're aware, Inspector General Bruce, this sort of "internal investigation" arrangement is commonly known as "a cover-up.");
7) On January 13, 2022, I emailed the OSC attorney assigned to my case that I believed this arrangement was unreasonable *per se* and likely violated numerous Rules of Professional Conduct of the investigators' respective state bars.
8) On January 16, 2022, I emailed the EEOC Washington Field Office some procedural questions about filing a motion to disqualify opposing counsel (who are ED OGC attorneys) in my EEOC hearing for conflicts of interest (because an EEOC Administrative Judge had not yet been assigned to my case);
9) On January 18, 2022, I emailed the Integrity Committee (IC) of CIGIE.
10) On January 19, 2022, the OSC attorney assigned to my case emailed me that "The agency informed us that it is continuing to explore options for who will be doing the investigation with the goal of achieving the most objective process possible. They will be providing us with some additional options, most likely by the end of the week."
11) As of today (February 6, 2022), no "additional options" have been provided to me. It's been 18 days; whatever happened to "by the end of the week"?

Please find attached numerous documents that provide evidence in support of the facts listed above. I have redacted the name and contact info of the OSC attorney assigned to my case, along with certain other personal information.

5a U.S.C § 5(d)

5a U.S.C § 5(d) states that:
"Each Inspector General **shall** report immediately to the head of the establishment involved whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment. The head of the establishment **shall** transmit any such report to the appropriate committees or subcommittees of Congress **within seven calendar days**, together with a report by the head of the establishment containing any comments such head deems appropriate." [Emphasis added.]

Based on the aforementioned facts and attached evidence, it is clear to me that these matters constitute "particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of [the Dept. of Education (ED)]."

Option 1: Inspector General Bruce concurs with my conclusion.

If you (Inspector General Bruce) concur with my conclusion, then this triggers both:
1) Your statutory obligation to "report immediately to the head of the establishment" (meaning Secretary Cardona), and
2) Secretary Cardona's statutory obligation to "transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days[.]"

Option 2: Inspector General Bruce does not concur with my conclusion.

If you do not concur with my conclusion, then please consider this email to also include an allegation of wrongdoing against you, Inspector General Sandra Bruce.

In light of the aforementioned facts and attached evidence, I believe that Inspector General Bruce determining that 5a U.S.C § 5(d) does not apply in this case (for whatever reason) would constitute all of the following:

- Abuse of authority in the exercise of official duties or while acting under color of office;

- Substantial misconduct, such as: gross mismanagement, gross waste of funds, or a substantial violation of law, rule, or regulation; and

- Conduct that undermines the independence or integrity reasonably expected of a Covered Person.

5a U.S.C § 11(d)(4) states that:

> "An Inspector General **shall** refer to the Integrity Committee any allegation of wrongdoing against a staff member of the office of that Inspector General, if—
>
> (i) review of the substance of the allegation cannot be assigned to an agency of the executive branch with appropriate jurisdiction over the matter; and
> (ii) the Inspector General determines that—
>
> (I) an objective internal investigation of the allegation is not feasible; or
>
> (II) an internal investigation of the allegation may appear not to be objective."
>
> Because this allegation of wrongdoing would be against you, Inspector General Bruce, it is clear that "an internal investigation of the allegation may appear not to be objective." Additionally, because the ED Inspector General is a "covered person," the Integrity Committee (IC) of CIGIE would have appropriate jurisdiction over this matter.
>
> Therefore, if you do not concur with my conclusion, then this triggers your statutory obligation to refer my allegation of wrongdoing against you to the Integrity Committee, pursuant to 5a U.S.C § 11(d)(4).
>
> Best regards,
>
> [redacted]
>
> --
>
> [redacted]
>
> J.D. Candidate, Class of 2022
>
> The Catholic University of America
>
> Columbus School of Law
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> --
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> [redacted]
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> J.D. Candidate, Class of 2022
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> The Catholic University of America
>
> Columbus School of Law

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[redacted]

J.D. Candidate, Class of 2022

The Catholic University of America

Columbus School of Law

CARDINAL MAIL [redacted]

Contacting Investigator (DI-21-000533)

[redacted] Thu, Mar 24, 2022 at 10:02 AM
To: [redacted]

Good morning [redacted],

The team would like to visit with you to discuss the allegations set forth by OSC to ED in the June 14, 2021 letter. To be clear, the allegations are outlined on pg. 2 of the letter, and I've included the text below:

- The issuance of Grant Award No. U165A170062 to Fort Wayne Community Schools 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 Educational Sciences' 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.

The team respectfully requests that you set aside one hour for the visit, which will take place via Microsoft TEAMS. You will not need be required to download any software to your computer to connect to TEAMS. If you are unable or unwilling to videoconference via TEAMS, you may also use the call-in option. The link and call-in information will be emailed to you once we confirm a date and time for our visit. Please provide three dates and times that you are available to speak the weeks of March 28th and April 4th. We would like to express a preference to visit the week of March 28th but understand that we may encounter challenges finding a date so soon. Please provide me with dates/times when you have a moment, and I will try to confirm one that works as quickly as possible.

Have a good day.

[redacted]

From: [redacted]
Sent: Wednesday, March 23, 2022 9:16 PM
To: [redacted]
Subject: Re: Contacting Investigator (DI-21-000533)

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Thanks for your reply, [redacted]. I appreciate the additional information, and your assurances.

Regarding the ED IG: I understand your argument about the scope of the investigation being limited by what OSC referred to you - and it's exactly what I thought you would say. And it's what I was afraid you would say. It's exactly what I was attempting to avoid, and one of the primary reasons that I was fighting so tenaciously to get the ED IG to investigate my OSC disclosures instead of ED OGC.

The ED IG has an exceedingly broad authority to investigate [e.g. 5a USC 7(a)] - which means that, if the ED IG had conducted the investigation of my disclosures, and they discovered additional violations of law in the course of their investigation, they would have the authority to follow-up on those additional illegalities. They would not be limited by what's in the OSC referral (or, perhaps I should say, they could not use the OSC referral as an excuse to narrow the scope of their investigation).

And it's not only about scope. The statute gives the ED IG subpoena power, and they can administer oaths to witnesses. Do you have those authorities, [redacted]? The ED IG final reports must fulfill additional requirements in the Inspector General Act. Does your report need to fulfill those IG Act requirements, in addition to the requirements in 5 USC 1213(d)? I'm sure you understand where I'm going with this, [redacted].

Simply put, the ED IG would have been able to "get to the bottom of things," to *find the truth* - which is what I want. It's what I've always wanted. And I'm afraid I won't be getting that now.

I received a letter from the ED IG this morning. They said they had reviewed the documents I'd emailed them (including the same 3 packets of my ED emails that I originally sent to you - and the relevant documents like my Formal Complaint, "Clarifying Questions" email to OSC, etc.) - and you know what their conclusion was? They refused to investigate. No investigation of anything at all - not even the Department's historic, ongoing, and perpetual non-compliance with 34 CFR 97 (The Common Rule for the Protection of Human Subjects in Research). That's absurd, [redacted]. You read the same emails yourself, so I'm sure you can understand my view.

Regarding my other arguments to you about the ED IG's abuse of authority, and conduct that undermines integrity: the position they articulated to me in that letter was almost exactly the same as what I'd described to you in my previous email. I still have the exact same question now as I did prior to receiving the ED IG's letter: why didn't the ED IG simply solve the problem in the way I previously outlined?

I'm glad you're committed to an impartial investigation, [redacted], but you just told me that your investigation would be limited to the two grants on the OSC referral - meaning you're declining to investigate the 34 CFR 97 violations, or the violations of other anti-discrimination legal authorities not specified in the OSC referral (e.g. President Biden's Executive Order 13985). Meaning your investigation will not give me what I want: a full *and* impartial investigation. This is why I'm left with only three options:

1) Litigation,

2) Going public, and

3) Participating in Congressional hearings.

Hopefully Congress will give me my full and impartial investigation - and hopefully I can do it myself too, since I'll be getting discovery in my EEO hearing very soon.

On that note, I've attached an updated list of my claims/stipulations, which I just emailed to opposing counsel. I suggest you read page 6.

--[redacted]

On Wed, Mar 23, 2022 at 6:12 PM [redacted] wrote:

> [redacted],
>
> Thank you for your patience. To respond to your March 18th and today's email:
>
> 1. As it relates to your concern that the Department of Education's Office of the Inspector General is not investigating this matter, I can provide no further clarification than the information you received from OSC. The purview of the investigative team has been set out in the June 14, 2021, letter from OSC to the Department of Education, which outlines the allegations to be investigated. It is the investigative team's intent to conduct a thorough, fair and impartial investigation of these allegations, which leads to me to your second concern.
> 2. As it relates to your concern that the investigative team appears to have several conflicts of interest, I write to assure you that none of the investigative team was involved in working on the grant awards which you allege constitute violations of law, rule or regulation. In fact, two of the team members were not employed by the Department's General Counsel's Office at the time these grants were awarded. Moreover, I reiterate – and affirm – the statements made to you by the Department's attorneys during your EEO hearing that you referenced in your March 15th email. We believe that we have conducted our due diligence to set up appropriate guardrails to address the conflict of interest concerns and to ensure a thorough, fair and impartial investigation.
>
> Have a good evening.
>
> [redacted]
>
> ---
>
> **From:** [redacted]
> **Sent:** Friday, March 18, 2022 3:14 PM
> **To:** [redacted]
> **Subject:** Re: Contacting Investigator (DI-21-000533)
>
> **CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.**
>
> Dear [redacted],

I'd like to inform you of a recent development:

Facts:

1) A few hours ago, I had another call with those two Congressional staffers I mentioned in my previous email. According to them, they had again inquired with the ED Office of Inspector General (ED IG) about my cases, and the ED IG had reiterated the same facts that I related to you previously; specifically, that:

a. After OSC had referred my disclosures to "the Agency head" (Secretary Cardona), my disclosures were referred to the ED IG.

b. The ED IG had then referred my disclosures to the ED Office of General Counsel (ED OGC), for the following "reason":

c. The ED IG said they felt they did not have the expertise to investigate my disclosures, because they said they do not have a subject-matter expert on anti-discrimination law on staff.

d. The Department then offered to lend the ED IG a subject-matter expert from ED OGC to assist with the ED IG investigation of my disclosures.

e. The ED IG declined this offer, saying that it would create a conflict of interest.

f. The Congressional staffer was puzzled about this: if a single ED OGC attorney participating in an ED IG investigation of my disclosures creates too much of a conflict of interest, wouldn't an entire team of ED OGC attorneys investigating my disclosures create an even bigger conflict of interest?

2) One of the objectives of the Congressional staffers' recent inquiry with the ED IG was to obtain an answer to the question in item 1(f) above [which is item 2(f) in my previous email to you]. According to the Congressional staffers, the ED IG's answer was simply that, pursuant to 5a U.S.C. § 7(a):

> "The Inspector General **may** receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."

3) According to the Congressional staffers, the ED IG's position on this matter is that the ED Inspector General (Sandra Bruce) has statutory discretion whether to investigate, and she has chosen to exercise her discretion by refusing to investigate my disclosures to OSC – and that's the end of the matter, in the ED IG's view.

4) This matches what [redacted] (OSC) communicated to me via email on February 16, 2022 – that the ED Inspector General has discretion, and has chosen to exercise it by declining to investigate my disclosures to OSC. [It's important to note that this explanation differs from what [redacted] told me on January 13, 2022: that the reason given by the ED IG for refusing to investigate was that my case was a legal matter, not a fact-finding matter, and that's not what the IG

does.]

Now, I'd like to articulate my own position on this matter. This is solely my own view, and I intend to include it in my whistleblower comments. I am giving you advance notice via this email, to allow you and your team to address my arguments in your report:

1) I am not disputing the fact that ED Inspector General Sandra Bruce has discretion. The plain language says "**may**," not "**shall**," which means she does have discretion. I can read the statute above just as well as she can – and just as well as I'm sure you can, [redacted].

2) However, as I'm sure you're aware, both "abuse of discretion" and "abuse of authority" are well-developed concepts in the law. The ED Inspector General **having** discretion means she **can** exercise it in the way she has – but that does **not** mean she **should** have exercised it in this particular way.

3) This distinction between "can" and "should" is vital in the law – and it's actually been incorporated into the Inspector General Act itself by the establishment of both CIGIE and the Integrity Committee (IC) pursuant to 5a U.S.C. § 11.

4) Quoting the Integrity Committee (IC)'s webpage (https://www.ignet.gov/content/guidance-and-faqs):

> "The IC takes action on allegations of wrongdoing that involve:
>
> a. Abuse of authority in the exercise of official duties or while acting under color of office;
>
> b. Substantial misconduct, such as: gross mismanagement, gross waste of funds, or a substantial violation of law, rule, or regulation; **or**
>
> c. Conduct that undermines the independence or integrity reasonably expected of a Covered Person."

5) I believe that the ED Inspector General (Sandra Bruce) exercising her discretion to decline to investigate my disclosures to OSC (which have "a substantial likelihood of wrongdoing," per the OSC referral) constituted both:

a. "Abuse of authority in the exercise of official duties or while acting under color of office," **and**

b. "Conduct that undermines the independence or integrity reasonably expected of a Covered Person."

c. (And it's important to remember that **only one** of these is required, not both – although I am indeed alleging both.)

6) Elaborating on the above, the ED Inspector General's exercise of discretion to decline to investigate my OSC disclosures **created** the problems that I mentioned in my previous email: specifically,

a. The Inspector General Act not applying to your investigation and final report, likely resulting in an investigation and final report that is less full and impartial than it otherwise would have been

i. (including the loss of my anonymity that would have otherwise been protected under 5a U.S.C. § 7(b)), and

b. The numerous conflicts of interest within ED OGC.

7) Additionally, I would like to address the ED IG's argument (that having a single subject-matter expert on anti-discrimination law on loan from the Department participating in an ED IG investigation of my disclosures would create an unacceptable conflict of interest):

a. According to the Congressional staffers, the ED IG's position is that having a single subject-matter expert participate in an ED IG investigation of my disclosures would have unacceptably undermined the ED IG's independence.

b. To reiterate point 1(c) above [which is point 2(c) in my previous email],

i. "The ED IG said they felt they did not have the expertise to investigate my disclosures, because **they said they do not have a subject-matter expert on anti-discrimination law on staff**."

c. This purported problem of the ED IG needing to borrow a subject-matter expert on anti-discrimination law from the Department stems from the purported problem of the ED IG not already having a subject-matter expert on staff.

d. Why exactly does the ED IG not already have a subject-matter expert on anti-discrimination law on staff? Pursuant to 5a U.S.C. § 6(a):

(a) In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized—

[…]

(6) to have direct and prompt access to the head of the establishment involved when necessary for any purpose pertaining to the performance of functions and responsibilities under this Act;

(7) to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office subject to the provisions of title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates;

(8) to obtain services as authorized by section 3109 of title 5, United States Code, at daily rates not to exceed the equivalent rate prescribed for grade GS–18 of the General Schedule by section 5332 of title 5, United States Code; and

(9) to the extent and in such amounts as may be provided in advance by appropriations Acts, to enter into contracts and other arrangements for audits, studies, analyses, and other services with public agencies and with private persons, and to make such payments as may be necessary to carry out the provisions of this Act.

e. If the ED IG needed a subject-matter expert to conduct an investigation of my OSC disclosures, which Secretary Cardona had referred to the ED IG (according to the Congressional staffers), then the ED IG could have **simply cited the aforementioned sections of the Inspector General Act** and done the following:

i. "Hello. Pursuant to 5a U.S.C. § 6(a)(6), the Inspector General is authorized to have **direct and prompt** access to Secretary Cardona when necessary. Please arrange a phone call or meeting.

ii. "Good morning, Mr. Secretary. Thank you for referring the OSC disclosures to the Office of Inspector General. Unfortunately, we do not have a subject-matter expert on anti-discrimination law on staff. The Inspector General Act gives us several options:

a. Pursuant to 5a U.S.C. § 6(a)(7), the Inspector General is authorized "to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office." Because a subject-matter expert on anti-discrimination law is necessary to investigate these OSC disclosures, we would like to hire one. We may need one for future investigations as well.

b. Alternatively, pursuant to 5a U.S.C. § 6(a)(8), the Inspector General is authorized "to obtain services as authorized by section 3109 of title 5," which reads "**Employment of experts and consultants; temporary or intermittent**." If we cannot hire a subject-matter expert (e.g. because it would take too long, or because there isn't a budget for it), we can obtain the required services of an expert for this investigation only.

c. Alternatively, pursuant to 5a U.S.C. § 6(a)(9), the Inspector General is authorized "to enter into contracts and other arrangements for audits, studies, analyses, and **other services** with **public agencies** and with private persons, and to make such payments as may be necessary to carry out the provisions of this Act." We could contract with a different agency's Office of Inspector General, and they could conduct the investigation of the OSC disclosures.

iii. "Do you have a preference, Mr. Secretary? Or should we just make the decision ourselves, pursuant to the aforementioned statutory authority?"

iv. Problem solved.

[redacted], I am wondering why exactly the problem was not solved in this way. It seems to me that the ED IG **already has the statutory authority** to solve this purported problem, but **chose** not to.

If I am missing something, please let me know. As I mentioned to you previously, the ED IG's two purported "reasons" for declining to investigate are absurd on their face, and I would really appreciate you and your team looking into what the **real** reasons are for the ED IG declining to investigate. This matter specifically relates to 5 U.S.C. § 1213(d)(2) – "a description of the conduct of the investigation," so you are able to look into this matter.

Additionally, since the ED IG's discretion derives from the word "may" rather than "shall" in 5a U.S.C. § 7(a), it appears to me that the ED IG is exploiting what might be called a statutory loophole. Fixing this loophole is a legitimate legislative purpose, upon which Congress can hold hearings and issue subpoenas. I am currently looking into this option.

Best regards,

[redacted]

On Fri, Mar 18, 2022 at 9:58 AM [redacted] wrote:

[redacted],

Thank you for your email. The information will be reviewed and considered.

Have a nice day and weekend.

[redacted]

From: [redacted]
Sent: Tuesday, March 15, 2022 6:39 PM
To: [redacted]
Subject: Re: Contacting Investigator (DI-21-000533)

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear [redacted],

I checked my computer and emails for additional documents that might help your investigation, and I found a few. Please find 9 additional documents attached to this email.

4 of those 9 files relate to a previous investigation of a different ED employee's disclosures to OSC (DI-17-5434) (public versions, which were redacted by OSC). The whistleblower comments are particularly relevant to the processing of my EEO complaint, since the same people are involved ([redacted] who misinterpreted my Formal Complaint and misconstrued/narrowed my claims in a manner explicitly warned against by MD-110 on pages 98 to 100 ("fragmentation"); and [redacted], who I named as a Responsible Management Official in my Formal complaint, and who was involved in the underlying facts of my case). This explains the name of a previous file I emailed you, "EEO claims after my dissatisfaction email to ED OEEOS_Redacted.pdf".; [redacted] initial error was so egregious that a reasonable finder of fact could infer intent.

Additionally, I checked the statute applicable to your investigation, 5 U.S.C. § 1213(d), copied below:

(d) Any report required under subsection (c) shall be reviewed and signed by the head of the agency and shall include—

(1) a summary of the information with respect to which the investigation was initiated;

(2) a description of the conduct of the investigation;

(3) a summary of any evidence obtained from the investigation;

(4) a listing of any violation or apparent violation of any law, rule, or regulation; and

(5) a description of any action taken or planned as a result of the investigation, such as—

(A) changes in agency rules, regulations, or practices;

(B) the restoration of any aggrieved employee;

(C) disciplinary action against any employee; and

(D) referral to the Attorney General of any evidence of a criminal violation.

A description of the conduct of the investigation

In my original email to you, I did not mention any of my complaints about how Secretary Cardona has chosen to conduct this investigation of my disclosures. This was because I'd like you and your team to focus on the underlying illegalities at ED, and the retaliation against me (the whistleblower). However, because 5 U.S.C. § 1213(d)(2) requires that your report include "a description of the conduct of the investigation," I think your report should address the following concerns I have about your investigation:

1) Because this investigation of my disclosures is not being conducted under the auspices of the ED Office of Inspector General (ED IG), the requirements of the Inspector General Act of 1978 do not apply to your investigation or your final report. I am particularly concerned about 5a U.S.C. §§ 3, 4, 5, 6, and 7 not applying. OSC required that I waive anonymity to contact you, and my anonymity would have been protected by statute if the ED IG had conducted this investigation of my disclosures. I also believe the IG Act requirements would have enabled a more full and impartial investigation of my disclosures and the other illegalities I alleged.

2) Because this investigation is being conducted by ED OGC attorneys, there appears to be numerous conflicts of interest within ED OGC, including the following:

a. Two ED OGC attorneys are opposing counsel for my EEO hearing,

b. ED OGC attorneys are potential Responsible Management Officials or witnesses that I will be seeking to depose during discovery in the EEO process due to their involvement in the underlying facts of my case, in at least three ways:

i. ED OGC attorneys were likely consulted on my opposition to the discriminatory grants and diversity, equity, inclusion (D&I) trainings,

ii. at least one ED OGC attorney was consulted on the decision to terminate my employment, and

iii. ED OGC attorneys were likely involved in the review of and/or decision to fund certain grants and D&I trainings that I alleged were illegally discriminatory (including the two grants that OSC referred to "the Agency head" for further investigation), and

c. ED OGC attorneys are investigating my disclosures (meaning, ED OGC attorneys are investigating other ED OGC attorneys, who are likely their colleagues/supervisory lawyers/subordinate lawyers).

I mentioned these concerns to opposing counsel in my EEO hearing (who are two ED OGC attorneys), and they emailed me the following (excerpted below):

- "There is a team of attorneys investigating your OSC complaint, possibly from several different divisions, none of which were involved in any of the matters mentioned in your complaints."

- "We have done our due diligence in regard to ensuring that no conflict of interest exists and the head of our Division has additionally confirmed with us that our Division has not been involved in the OSC-directed ED investigation."

- "Responsibilities and areas of law are segregated within OGC, and most often there is little to no overlap between divisions."

While I was grateful to opposing counsel for providing this information (since it's more information than I've received from OSC or from the investigators themselves), I have yet to see any evidence that anyone at ED OGC has actually done any due diligence. If possible, I would like to see some evidence included in your final report.

Additionally, even if everyone at ED OGC has done their due diligence (and this is a big "if"), I still think that having ED OGC attorneys investigate my disclosures is unreasonable *per se* and, at the very least, presumptively unreasonable. There are reasons for why the Rules of Professional Conduct regularly impute a lawyer's conflict to the firm, and they're good reasons. It's not for nothing that "internal investigations" are commonly known as "cover-ups." There is simply too big of a risk that an internal investigation will be biased to protect the reputation of the office/firm/agency – even assuming that proper screenings have occurred (which is a big assumption).

What makes this ED OGC investigation particularly egregious is that, as far as I can tell, Secretary Cardona has chosen to create these avoidable conflicts of interest. These conflicts could have been avoided (or at least minimized) if the ED Office of Inspector General (ED IG) had conducted the investigation of my disclosures.

Between January 13, 2022 (when I first learned from OSC that ED OGC, rather than the ED IG, would be investigating my disclosures) and March 2, 2022 (when OSC made it clear to me that Secretary Cardona refused to reconsider having ED OGC investigate), I strenuously opposed this arrangement, during which I learned the following:

1) On January 13, 2022, I had a phone call with [redacted] (OSC) in which we discussed my disclosures and PPP investigation. One of the things she mentioned was that the ED Office of Inspector General (ED IG) had refused to investigate my disclosures. According to [redacted], the reason given by the ED IG was that my case was a legal matter, not a fact-finding matter, and that's not what the IG does.

2) On February 25, 2022, I had a phone call with two Congressional staffers who had contacted the ED Office of Inspector General (ED IG) about my disclosure case. According to these Congressional staffers:

a. After OSC had referred my disclosures to "the Agency head" (Secretary Cardona), my disclosures were referred to the ED IG.

b. The ED IG had then referred my disclosures to the ED Office of General Counsel (ED OGC), for the following "reason":

c. The ED IG said they felt they did not have the expertise to investigate my disclosures, because they said they do not have a subject-matter expert on anti-discrimination law on staff.

d. The Department then offered to lend the ED IG a subject-matter expert from ED OGC to assist with the ED IG investigation of my disclosures.

e. The ED IG declined this offer, saying that it would create a conflict of interest.

f. The Congressional staffer was puzzled about this: if a single ED OGC attorney participating in an ED IG investigation of my disclosures creates too much of a conflict of interest, wouldn't an entire team of ED OGC attorneys investigating my disclosures create an even bigger conflict of interest?

As I'm sure you can see, the two reasons given by the ED IG (both to [redacted], and later to the Congressional staffers) appear to be absurd on their face. I'd appreciate you and your team attempting to find the real reason(s). To give you a starting point, I can think of two plausible reasons:

1) Per the "List of witnesses – for OSC.docx" file attached to this email, [redacted] told me during that February 4, 2021 conversation that she had consulted with someone at the ED Office of Inspector General – but she did not tell me the name. Perhaps this same person was involved in the ED IG's declining to investigate my disclosures to OSC, and

2) It appears that the ED Inspector General, Sandra Bruce, is the Chairperson of the Diversity, Equity, Inclusion Work Group of CIGIE. As you know from reading my EEO Formal Complaint and my "Clarifying Questions" email to OSC, these are the buzzwords of "equality of outcome" (equity). Perhaps this is one of the reasons why the ED IG declined to investigate my disclosures.

The restoration of any aggrieved employee

In addition to your investigation of my disclosures, I am also pursuing the OSC PPP and EEO processes. For the PPP investigation, OSC has not yet made a final decision whether to recommend corrective action. For my EEO hearing, the Department has not yet made any settlement offers. This means that ED has not yet attempted to "restore" the aggrieved employee (me).

Even if ED did make a settlement offer in my EEO case, I don't think I would be able to accept it, due to the 10th Circuit's holding in Lindstrom v. United States of America, No. 06-8059, 2007 WL 4358287 (10th Cir. Dec. 14, 2007) (affirming a lower court's ruling that EEOC regulations do not permit an employee to file suit in federal court to challenge an agency's compliance with a settlement agreement). The Department has exhibited such bad faith in the underlying facts of my case, the processing of my EEO complaint, and the investigation of my disclosures that it's reasonable to believe the Department would not abide by any settlement agreement voluntarily, so I'd be foolish to accept a settlement offer that's subject to a lengthy EEOC enforcement process and unappealable to federal court. It would be better to litigate my claims now.

If you can find an alternative solution (besides "just trust the Department"), please let me know.

Thanks,

[redacted]

On Tue, Mar 8, 2022 at 3:53 PM [redacted] wrote:

> Thank you [redacted]. I hope to review the docs this week and will reach out in the next couple of weeks to request an interview if it's determined that it may be helpful for our investigation.
>
> Have a good day.
>
> [redacted]

From: [redacted]
Sent: Monday, March 7, 2022 7:59 PM
To: [redacted]
Subject: Fwd: Contacting Investigator (DI-21-000533)

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear [redacted],

Hi, [redacted]. I'm the whistleblower for DI-21-000533, which it appears you are investigating (see OSC email below).

I am traveling outside of DC now, and I'll return to DC on March 14. I have already submitted a significant amount of written testimony regarding this same case that you are investigating, via the OSC PPP and EEO processes. Please find that testimony attached to this email. Some information has been redacted, but nothing substantive to your investigation (e.g. the OSC file number for my PPP allegation, my home address, etc.). A total of 13 files have been attached to this email; I suggest you read "Formal EEO Complaint - EXCERPT.pdf" and "OSC - Clarifying Questions_Redacted.pdf" first, since they provide a good timeline and legal analyses.

Please email me back **after** you and your team have thoroughly reviewed all 13 attachments, to let me know whether you'd still like to interview me. I think that most of the questions you may have can be answered just by reviewing the attachments.

Also, just to give you advance notice, I intend to include some of these attachments in my whistleblower comments. In addition to the two grants that OSC referred to "the Agency head" (Secretary Cardona), which you are now investigating, you will notice the attachments provide evidence of additional violations of law at ED. If you decline to investigate those other illegalities as well, Congress will likely ask you for an explanation.

Thanks,

[redacted]

---------- Forwarded message ---------
From: [redacted]
Date: Mon, Mar 7, 2022 at 2:03 PM
Subject: Contacting Investigator (DI-21-000533)
To: [redacted]

Dear [redacted],

Below is contact information for one of the investigators, [redacted], so that you may reach out if you would like to be interviewed. [redacted] has stated that he would appreciate if you reach out within a week to let him know if you wish to be interviewed. I have not provided [redacted] with your name.

[redacted]

Attorney

U.S. Department of Education

Office of the General Counsel

Division of Educational Equity

[redacted]

[redacted]

Best,

[redacted]

Attorney

Retaliation and Disclosure Unit

U.S. Office of Special Counsel

1730 M Street, N.W.

Suite 218

Washington, D.C. 20036

[redacted]

[redacted]

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--

[redacted]

J.D. Candidate, Class of 2022

The Catholic University of America

Columbus School of Law

--

[redacted]

J.D. Candidate, Class of 2022

The Catholic University of America

Columbus School of Law

--

[redacted]

J.D. Candidate, Class of 2022

The Catholic University of America

Columbus School of Law

--

[redacted]

J.D. Candidate, Class of 2022

The Catholic University of America

Columbus School of Law

CARDINAL MAIL [redacted]

[DI-21-000533] and [MA-21-001364] - POA attached

[redacted] Mon, Apr 11, 2022 at 9:56 AM
To: [redacted]
Cc [redacted]

Good morning,

Thank you for letting me know.

Best,

[redacted]

Attorney

Retaliation and Disclosure Unit

U.S. Office of Special Counsel

1730 M Street, N.W.

Suite 218

Washington, D.C. 20036

[redacted]

[redacted]

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From: [redacted]
Sent: Friday, April 8, 2022 4:40 PM
To: [redacted]
Subject: [DI-21-000533] and [MA-21-001364] - POA attached

CAUTION: EXTERNAL EMAIL Do not click on links, open attachments, or provide information unless you are sure the message is legitimate and the content is safe.

Dear [redacted],

I have retained counsel for these matters. Please communicate with him as you need to. Please find the OSC Power of Attorney form attached.

Please also inform [redacted].

Thanks,

[redacted]

--

[redacted]

J.D. Candidate, Class of 2022

The Catholic University of America

Columbus School of Law

CARDINAL MAIL [redacted]

RE: DI-21-000533

[redacted] Fri, Jun 24, 2022 at 3:39 PM
Reply-To: [redacted]
To: [redacted]
Cc: [redacted]

Good afternoon [redacted]:

Thank you for considering the objection first raised by Complainant [redacted] about the inherent conflict of interest in the Department of Education personnel investigating [redacted] complaint and which I have lately confirmed with you. I understand your view of the limitations under 5 USC 1213. While I respect your fidelity to the legislative language, I would also suggest that the legislation is not the sole arbiter of acceptable action by attorneys or the Secretary in executing their duty. Read literally, your position infers that the Secretary is free to engage whatever process he may desire, irrespective of legal, ethical or professional regulatory constraints outside the context of 5 USC 1213. It seems that this is exactly the view taken by the Department of Education in rolling out the investigation in this case.

The Hobson's choice for [redacted] here is to acquiesce to the method of investigation or refuse to give it approbation through non-cooperation in the method by which the investigation is being executed. [redacted] does not condone the conflict and does not acquiesce. However, without participating in an interview and stating his position on the record, there can be no assurance that his position will be properly conveyed or reflected in the report. This latter concern -- ensuring that Complainant's position is reflected in the record -- would seem to trump the damage from the conflict if accompanied by sufficient notation of the inherent flaw.

Therefore, [redacted] will participate in an interview, but will maintain his position that the interview process is flawed. This email is being conveyed to [redacted] and his team, and out expectation is that -- given the extension which you have afforded -- [redacted] will have the opportunity to make the salient facts known. We will expect [redacted] to reach out to arrange a mutually acceptable time for the interview.

Regards,

[redacted]

Sent with Proton Mail secure email.

------- Original Message -------
On Sunday, June 19th, 2022 at 6:18 PM, [redacted] wrote:

[redacted],

We understand your client's objections to the investigation being conducted by attorneys within the agency's Office of General Counsel. We have previously communicated with him regarding these concerns and OSC's limited role at this stage in the process. We specifically explained that OSC cannot dictate to an agency how it conducts the investigation, or who conducts it; such decisions are squarely within the purview of the agency head to whom we refer the allegations. *See* 5 USC 1213. Moreover, 5 USC 1213 does not require a whistleblower's participation during the agency's investigation nor does it require that the agency cater to the whistleblower's requests in conducting an investigation. The statutorily provided process for registering a whistleblower's disagreement with the conduct or findings of the investigation is via whistleblower comments following the issuance of the agency's report of investigation. With the whistleblower's agreement, these comments will be placed in our public file and transmitted with the final report of investigation to the President and Congressional Oversight Committees.

Thank you,

[redacted]

Attorney

Retaliation and Disclosure Unit

U.S. Office of Special Counsel

1730 M Street, N.W.

Suite 218

Washington, D.C. 20036

[redacted]

[redacted]

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From: [redacted]
Sent: Friday, June 17, 2022 3:46 PM
To: [redacted]
Cc: [redacted]
Subject: RE: DI-21-000533

CAUTION: EXTERNAL EMAIL Do not click on links, open attachments, or provide information unless you are sure the message is legitimate and the content is safe.

Hello [redacted]:

I represent [redacted] in the above captioned investigation.

[redacted] had registered, as have I, an objection to the conflict/apparent conflict of interest inherent in the "investigation team" at DOE.

I have asked the "team" to address and justify the situation, and stand down if not justified. Instead of a substantive answer, I have received nothing but unsubstantiated assurances of a lack of conflict/apparent conflict. None of the issues I raised has been addressed. In short, the latest objections are noted in the copy of a May 27th email below. The response from [redacted] follows.

It is now apparent that the "investigation" team has decided to forge ahead, without addressing the issue and in spite of the issue. I am bringing this to your attention because this failure has put [redacted] in an untenable situation – "cooperate or else." He want to cooperate, and it is in his interests to cooperate, but not with an inherently conflicted team.

[redacted] would like to resolve this short of litigation. Frankly I am astounded at the abject failure to at least substantively respond, let alone the failure to recognize the conflict.

Please let me know what your office's position is on this issue. I am offering this opportunity to resolve the issue at

this level before moving to another forum. [redacted] does stand ready to cooperate but in a manner that respects is rights.

Thank you for your prompt reply.

Best Regards,

[redacted]

May 27, 2022

Hello [redacted]:

Thanks for your email. I wanted to share my thoughts to your prior email regarding the conflict of interest situation hovering over [redacted]'s investigation team. I have carefully considered the gravity of the conflict situation and this issue needs to be fully clarified and resolved before your team does any more investigating. So, in that regard, please cease activity immediately.

I understand your statement that General Counsel Lisa Brown set up "an independent fact-finding process to investigate the claims referred to the Secretary of Education by the Office of Special Counsel." While it was a good step to attempt to ensure that no member of the investigatory team had any prior knowledge of, or engagement in, any matter involving [redacted] or his claims, that step alone is far from adequately covering the concerns.

As you know, a conflict of interest is a very serious matter and key to due process. All attorneys, including government attorneys, are subject to their individual bar rules, and OSC has its own guidance for the applicable federal legal requirements. Indeed, proceeding with the investigation in a conflict situation can lead to some serious consequences. For that reason, I think we all need to ensure that the law and professional requirements are being strictly respected.

In this specific situation, I note the direct involvement of the Department of Education's Offices of the Deputy Secretary, the Assistant Secretary (Office of Finance and Operations), and the Office of General Counsel, including the Ethics Division and the Business and Administrative Law Division. The investigation concerns actions which are alleged to be illegal, which actions were either directly approved or indirectly approved by, and certainly the responsibility of, the heads of these Offices and Divisions. In particular, the same individual held and was responsible for, at all relevant times, the position under which [redacted] worked and under which the alleged illegal activities occurred.

The scope of the questions on which your investigation has chosen to focus goes deeper than simply whether "the Department" violated the law, but whether the individuals in the Office of General Counsel and the Office of Finance and Operations broke the law, approved the breaking of the law or oversaw activity which broke the law. To my knowledge, the individuals conducting the investigation work with, and under and in, these very offices.

In this context, I believe we need a further detailed explanation of ***why*** General Counsel Brown feels she can substantiate the claim that those investigating the facts of the complaint can be characterized as "independent." That detailed explanation would have to include, but not be limited to, a full explanation of why the situation described above does not involve a conflict of interest, an irreconcilable conflict of interest or the appearance of a conflict of interest, including the following information:

0. The names of those making up the fact-finding team, their position (and whether they are on detail to another office), and their association with any of the potential targets of the investigation.
a. The rationale of how the Office of General Counsel can be acting on behalf of OSC when the Office of General Counsel is involved in the inquiry.

I would also note that [redacted] complaint to OSC included the specter of a ***systemic*** problem, but your investigation is targeting only two grants that are alleged to be illegal. [redacted] has reason to believe there are ***many*** grants that were illegally granted and that systemic illegality should be investigated as well. I will add a third example -- for your information -- where a grant of $1.6mm to Indiana University (PR Number S004D160011) for a Midwest and Plains Equity Assistance Center contained what seems like actionable materials. There was actually a second grant to that same institution/project, with PR number S004D110021,

again with what seems like actionable materials. I am not sure why the investigation was limited to two grants, rather than a systemic issue investigation. The spectre of a systemic wide problem only enhances the already high level of concern to ensure an absence of any conflict situation.

Last, and this is in the spirit of hoping that the investigation can proceed with its integrity intact, please provide me with the Harvard and Ft. Wayne grant documents so [redacted] can familiarize himself with the contents to make a future interview more productive. The integrity of the confidentiality of those documents, of course, will be assured.

My schedule has loosened up, so I would like to focus on this matter so we can avoid the need for another 30-day delay.

Hi [redacted]:

The Team has considered your May 27th and June 1st emails. As we previously explained to you and your client, the process that was set up to investigate this referral from OSC was carefully established to ensure that the investigation is fair and impartial. The three team members tasked with investigating the referral have had no prior involvement with the grants at issue. In fact, two of the team members were not even employed by the Department's General Counsel's Office at the time these grants were awarded. Furthermore, the Department's Secretary and General Counsel were not employed by the Department at the time these grants were awarded.

We have assured your client that the Department set up clear guardrails to address your client's conflict of interest concerns, and reaffirmed our commitment to conduct a fair and impartial investigation. We have reiterated our desire to interview your client as part of our investigation and have been flexible to accommodate your client's needs, but your client has declined to participate.

The Department is committed to fulfilling its statutory obligation under with 5 U.S.C. 1213 to conduct a prompt investigation of a whistleblower's complaint and submit its report in a timely manner. We would very much like to hear from your client, so please advise by 5p E.S.T. on Monday, June 13th whether your client will speak with us. If so, please provide at least two dates and times between June 15th and June 17th when your client is available to speak. If you do not respond or if your client declines to speak with us, we will proceed with our investigation, noting your objection.

Thank you,

[redacted]

Sent with Proton Mail secure email.

CARDINAL MAIL [redacted]

Re: DI-21-000533

[redacted] Fri, Jul 15, 2022 at 4:16 PM
To: [redacted]
Cc: [redacted]

[redacted],

As [redacted] and I promised you last Friday (July 8) during our second call with you and your team, I have re-read the *entire* 453-page Fort Wayne grant application, and highlighted *all* of the sections that relate to violations of the following legal authorities:

- Title VI of the Civil Rights Act
- MSAP statutory authorities (e.g. 20 USC 7231d(c))
- MSAP ED regulations (34 CFR Part 280), which includes both non-discrimination and compliance with 34 CFR Part 75
- ED regulations applicable to Direct Grants (34 CFR Part 75), particularly as related to compliance with both Title VI *specifically* (34 CFR 75.500(a)) *and* basically all legal authorities generally (34 CFR 75.700).
- Assurances given by the grantee (Ft. Wayne) regarding non-discrimination, as required by the MSAP statutory authorities and/or ED regulations (some of these assurances are included in the grant application, and I have highlighted those; other assurances are located elsewhere, such as in the Grant Award Notice (GAN))
- SCOTUS precedent on affirmative action (I previously mentioned ***Grutter*** (2003), ***Fisher I*** (2013) and ***Fisher II*** (2016), but the case most closely analogous to the Fort Wayne grant's admissions policy is ***Parents Involved*** (2007). It's so closely analogous, in fact, that I think the "FWCS Attorney [who is] well briefed on FWCS Voluntary Desegregation Plan and will continue to monitor documents to ensure ongoing district compliance" mentioned on page 117 of the grant application ought to be disciplined by his/her state bar - along with whichever Office for Civil Rights attorney(s) gave this Ft. Wayne grant application the certification required by 20 USC 7231d(c)).
- Equal Protection Clause (since it appears Fort Wayne is also receiving funds from the state government, in addition to the MSAP federal funds from ED).
- Equal Protection component of the Due Process Clause (applicable to the federal government via reverse-incorporation, per ***Bolling v. Sharpe*** (1954))
- The Common Rule for the Protection of Human Subjects in Research (34 CFR 97)
- Assurances given by the grantee regarding the Common Rule

Please find that *fully-highlighted*, 453-page Ft. Wayne grant application attached.

Also, I want to lodge a few additional complaints against you and your "team" of "investigators", [redacted].
- I am supposed to be studying for the bar exam right now. I am *not* supposed to be spending *hours and hours* reading through such a *long* grant application to locate all of the discriminatory and/or otherwise illegal sentences. This is supposed to be *your job*, [redacted] - not mine. The only reason I needed to do this is because *you* requested it, and because you have continued to act *willfully blind* such that, unless I point-out *each and every* discriminatory and/or otherwise illegal sentence, you will sucessfully reach your favored and pre-ordained conclusion of "Nothing illegal, nothing to see here, folks!"
- I would do the same line-by-line highlighting with the Harvard grant application as well (which, thank God, is shorter than the Ft. Wayne grant) - except that you have *still* failed to provide it to me. I understand that you helped [redacted] submit a FOIA request for it; however, that is something you should have done *yourself* months ago, instead of 1 week ago. How *exactly* were you expecting me to point-out all of the discriminatory sections of the Harvard grant application *without ever giving me the grant application?*
- As I stated during our first 1-hour call on Weds, July 6 and also during our second 1-hour call on Fri, July 8, there is a *systemic* problem here - it's *not just* about *only* these two grants. Your repeated refusal to investigate the underlying *systemic* problem (per my email in the chain below) leads me to believe that OSC should report directly to Congress instead of giving you and the Department any additional extensions.

–[redacted]

On Thu, Jun 30, 2022 at 11:59 AM [redacted] wrote:

Additional PDF attached, evidencing illegally discriminatory content related to the Harvard grant, in violation of both Title VI and 20 USC 9514(f)(7).

--[redacted]

On Thu, Jun 30, 2022 at 11:58 AM [redacted] wrote:

As mentioned, two additional PDFs attached, which evidence violations of Title VI by two grants (S004D160011 and S004D110021).

--[redacted]

On Thu, Jun 30, 2022 at 11:56 AM [redacted] wrote:

[redacted],

[redacted] let me know that we'd scheduled a video call for July 6 at 10 AM EST. That is fine.

However, it appears that you have continued to:
- Dodge [redacted] request for an outline of the topics you are interested in asking me about, and
- Refuse to confirm that you will investigate anything more than just the Harvard and Fort Wayne grants. Your recent statement that you "will be limiting [y]our questions to the issues contained in the OSC referral" appears to indicate that, despite the evidence of a ***systemic*** management practice of ED funding ***hundreds*** of grants that likely violate Title VI, you are continuing to act willfully blind to this ***systemic*** problem.

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).

As you previously mentioned, "the issues contained in the OSC referral" included the following: "Any additional, related allegations of wrongdoing discovered during the investigation of the foregoing allegations." Your investigation is still ongoing, and anything I provide to you is clearly both "additional ... allegations of wrongdoing" and "discovered during the course of the investigation of the foregoing allegations." The only question is whether it's "related." Additional violations of the same two statutory authorities contained in your referral, specifically Title VI and 20 USC 9514(f)(7), would clearly be "related."

For this reason, I am providing you with the following additional, related allegations of wrongdoing:

1) I found a video on the Institute of Education Sciences (IES) YouTube channel entitled "Engaging in Anti-Racist, Culturally Responsive Research Practices", which was one of the presentations/discussion panels in the January 25-27, 2022 Annual IES Principal Investigators Meeting (the Meeting had a sub-heading of "Advancing Equity and Inclusion in the Education Sciences"). Please find a PDF attached to this email; the transcript starts on page 9.

Also, I think you should pay close attention to page 8, on which a definition of "equity" appears. IES specifically defines "equity" as what I've termed "equality of outcome"; compare this to President Biden's definition of "equity" in EO 13985, which defines "equity" as what I've termed "equal treatment of all individuals under law." IES is making my case for me, [redacted]. They're not even trying to hide the illegalities.

The PDF also contains several articles from the IES blog, found at IES.ED.gov, about both this IES PI Meeting and related topics - which I'm alleging are illegally discriminatory.

The IES logo appears on the video, which IES posted on their YouTube channel. The articles are posted on the IES section of ED's official government website. Both this video and the articles clearly used federal funding from IES. I am alleging that both this video and the articles violate Title VI of the Civil Rights Act.

Additionally, I am alleging that both the video and the articles violate 20 USC 9514(f)(7), which states: "The duties of the Director shall include the following: (7) 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."

In addition to being funded by IES, even if (hypothetically speaking) they somehow were not funded, the video and articles are still clearly "conducted or supported by the Institute" (meaning IES), so there is still a violation of 20 USC 9514(f)(7).

2) In a previous email to you, [redacted] mentioned two new, additional grants that likely violate Title VI: S004D160011 and S004D110021, both of which are/were awarded by OESE (the same Program/Principal Office (PO) that funded the Fort Wayne grant), and both of which were to a single institution - the Midwest & Plains Equity Assistance Center. I will send a follow-up email with 2 additional PDFs, one of which contains a transcript of several YouTube videos on "Anti-Racism". These videos explicitly state that ED funded these videos via the aforementioned OESE grant.

3) You really need to address the ***systemic*** problems within IES and OESE, [redacted] If you decline to do so, then Congress will likely ask you why. And, more to the point, these 2 new, additional grants will only be the start. That GPTD spreadsheet indicated ***hundreds*** of grants containing "divisive concepts". Unless you investigate this matter as a ***systemic*** problem, you (and ED) are looking at the inevitability of many, ***many*** more disclosure referrals from OSC over the next few months, [redacted] - spawning many, ***many*** new investigations. Seems like a waste of ED resources to me, when it would be ***far*** more efficient for you to simply investigate the systemic problems right now.

4) As [redacted] previously requested, I would like to know what exactly you're interested in asking me on July 6 - since it appears you're willfully blind to the aforementioned ***systemic*** problems. Please email [redacted] and/or me an outline of what you're actually interested in asking me.

--[redacted]

On Wed, Jun 29, 2022 at 2:04 PM [redacted] wrote:

> Hello [redacted]:
>
> July 6 at 10am would work. If you have a preferred conference line, please let me know.
>
> I understand that the questions would be limited to the OSC referral. Since this should be a fact finding investigation rather than an adversarial proceeding, it would be helpful and result in a better investigation result if you would specify areas of most interest to your team. This will allow [redacted] to be more responsive through better preparation.
> Thanks,
> [redacted]
>
> Sent with Proton Mail secure email.
>
> ------- Original Message -------
> On Wednesday, June 29th, 2022 at 12:59 PM, [redacted] wrote:
>
> > Hi [redacted],
> >
> > We will be limiting our questions to the issues contained in the OSC referral. We look forward to hearing from you tomorrow.
> >
> > Thank you,
> >
> > [redacted]

From: [redacted]
Sent: Monday, June 27, 2022 9:21 PM
To: [redacted]
Subject: Re: DI-21-000533

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Thank you [redacted]. I would also like to have an outline of the topics of conversation so [redacted] can be fully prepared.

[redacted]

Sent with Proton Mail secure email.

------- Original Message -------
On Monday, June 27th, 2022 at 9:29 PM, [redacted] wrote:

> Good evening [redacted]:
>
> By June 30th, please provide three dates and times next week (July 5th - 8th) when you and [redacted] are available to speak regarding this matter. Please set aside one hour for the conversation. I will send a Microsoft TEAMS invitation once we identify a mutually-agreeable date and time for the conversation.
>
> Thank you,
>
> [redacted]

--
[redacted]
J.D. Candidate, Class of 2022
The Catholic University of America
Columbus School of Law

--
[redacted]
J.D. Candidate, Class of 2022
The Catholic University of America
Columbus School of Law

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[redacted]
J.D. Candidate, Class of 2022
The Catholic University of America
Columbus School of Law

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[redacted]
J.D. Candidate, Class of 2022
The Catholic University of America
Columbus School of Law

Ft.-Wayne-Community-Schools_grant app_highlighted.pdf
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CARDINAL MAIL [redacted]

Your Office of Special Counsel Complaint Has Been Received

Filing NoReply <filing-noreply@osc.gov> Wed, Jun 22, 2022 at 8:24 AM
To: [redacted]

Your submission was received by the Office of Special Counsel. In the near future, we will email you to provide more specific information about your filing, including a case number and contact person at OSC.

Please bear in mind that OSC receives a large number of filings each year. While we attempt to handle them as expeditiously as is possible, we generally process them in the order received.

CARDINAL MAIL [redacted]

Referrals Department of Education

[redacted] Mon, Jul 18, 2022 at 2:26 PM
Reply-To: [redacted]
To: [redacted]
Cc: [redacted]

Good afternoon [redacted]:

As it turns out, [redacted] and I were able to briefly confer about your email.

[redacted] does consent to a referral of the following allegations to ED for an investigation:

(1) ED's Office of Elementary and Secondary Education, in funding ED Grant Award Nos. 12D004D110021 and S004D160011 to Indiana University, Indianapolis, Indiana, for the Midwest and Plains Equity Assistance Center, is violating Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; 34 C.F.R. § 100.6 - .7; and/or abusing its authority.

(2) The Institute of Education Sciences (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." *See* 20 U.S.C. §§ 9511(b)(2)(B), 9514(f)(7), § 9516(b)(8).

(3) ED 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.

With regard to how that investigation is handled, and your follow-on question:

1. [redacted] would like to handle anonymity the same way as last time (meaning,he was anonymous, but willing to speak with the investigators); and
2. That, as mentioned in his recent email to [redacted] regarding the Ft. Wayne grant sent on Friday, July 15 (of which you have a copy), he and I already have had two 1-hour calls with the DOE investigative team, during which [redacted] mentioned the 2 EAC grants, the IES YouTube video, and the systemic problem. They are aware but have refused to confirm that they would investigate anything more than just the Harvard and Ft. Wayne grants. Therefore, it is necessary to make these new disclosures, to ensure that the Department will in fact investigate the additional illegalities and systemic problems

Personally I got the impression that they were less interested in developing the facts to determine whether the issues have substantial support than having [redacted] talk about why he thought there was a problem. Hopefully that is not reflective of the investigative methodology the DOE team is using and they will do more to develop the facts.

Thanks for following this up.

[redacted]
Cousel for [redacted] Complainant

Sent with Proton Mail secure email.

CARDINAL MAIL [redacted]

Re: Update [redacted] Dept of Education Case

[redacted] Thu, Aug 11, 2022 at 4:47 PM
To: [redacted]

-------- Original Message --------
On Aug 2, 2022, 5:00 PM, [redacted] wrote:

Good afternoon,

The agency will include the additional allegations in the ongoing investigation of OSC referral DI-21-000533. OSC is currently considering the length of the deadline for the final investigative report. I will circle back with you when a deadline is finalized.

Thanks,

[redacted]
Attorney
Retaliation and Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W.

Suite 218

Washington, D.C. 20036

[redacted]

[redacted]

NOTICE: This message and any attachments may contain information that is sensitive, confidential, or legally privileged. If you are not the intended recipient, please immediately notify the sender and delete this email from your system; you should not copy, use, or disclose its contents. Thank you for your cooperation.

From: [redacted]
Sent: Friday, July 29, 2022 2:09 PM
To: [redacted]
Subject: Update [redacted] Dept of Education Case

CAUTION: EXTERNAL EMAIL Do not click on links, open attachments, or provide information unless you are sure the message is legitimate and the content is safe.

Good afternoon [redacted]:

I would appreciate any update you can provide me on the progress or schedule for [redacted] case. Thank you in advance and have a great weekend.

[redacted]

Counsel for Complainant [redacted]

Sent with Proton Mail secure email.

--

[redacted]

J.D. Candidate, Class of 2022
The Catholic University of America
Columbus School of Law

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-804-7000

October 19, 2022

VIA E-MAIL: [redacted]

[redacted]
c/o
[redacted]

Re: OSC File No. MA-21-001364 - Preliminary Determination

Dear [redacted]:

This letter is in response to the information you submitted to the U.S. Office of Special Counsel (OSC) involving the U.S. Department of Education (ED). We have thoroughly investigated your allegations. However, based on our evaluation of the facts and applicable law, we have made the ***preliminary*** decision to close your complaint. More specifically, ED made you a settlement offer that is as good or better than what we believe we could obtain for you at the Merit Systems Protection Board (the Board). While you are free to reject the offer, it is OSC's longstanding practice to close a case under these circumstances.

I. Factual Background and Allegations

From July 6, 2020, until the effective date of your termination, February 5, 2021, you were employed as a Pathways Intern, Management and Program Analyst, GS-0399-5, for ED's Office of Acquisition & Grants Administration (OAGA), Office of Finance & Operations (OFO), Grants Policy and Training Division (GPTD), Human Subjects Team (HSR Team) in Washington, D.C. You alleged that management improperly terminated your employment in retaliation for whistleblowing activity.[1]

[1] In addition to alleging that the termination of your employment constituted retaliation under the Whistleblower Protection Act (WPA), you also alleged that the termination fell within the ambit of other prohibited personnel practices. You asked that OSC address each of your legal theories for relief so that you may demonstrate before the Board that you exhausted your administrative remedies with regard to each. However, except in a case where an individual has the right to otherwise appeal directly to the Board, an individual only has the right to appeal to the Board select claims of retaliation (as opposed to other alleged prohibited personnel practices). 5 U.S.C. §§ 1214(a)(3), 1221(a). As such, no exhaustion requirement applies to these allegations. Moreover, we believe it is unnecessary to address the merits of your other theories of recovery, given that the available status quo ante relief would be unaffected.

Also, as we discussed previously, with regard to your allegations that you were discriminated against based on your race, color, and sex, although 5 U.S.C. § 2302(b)(1) prohibits discrimination on these bases, it is the general policy

Specifically, you alleged that management terminated your employment in violation of 5 U.S.C. § 2302(b)(8) in retaliation for persistently raising concerns about the legality of agency actions. You alleged that, almost from the beginning of your employment with the agency, you raised concerns with your first-line supervisor, Director of GPTD [redacted], and HSR Team Lead [redacted], that ED was improperly funding grants. In particular, you alleged that beginning in late summer 2020 and continuing through early winter 2021, you repeatedly raised concerns with the funding of two grants.. The first was a grant award to Harvard University[2] (Harvard Grant) by the Institute of Education Sciences (IES), the statistics, research, and evaluation arm of ED. You alleged that you informed [redacted] that the grant was problematic for various reasons, including that the grant pushed a political and ideological agenda under the guise of science and that it was contrary to the Office of Management and Budget Memorandum M-20-34, Training in the Federal Government (September 4, 2020).[3] You also alleged that you repeatedly raised concerns regarding a grant award through the Magnet Schools Assistance Program (MSAP) to Fort Wayne Community Schools (Fort Wayne Grant).[4] In raising concerns with the Fort Wayne Grant, you alleged that you described in detail a racial quota system for admissions utilized by Fort Wayne as failing to comply with federal regulations for MSAP and relevant, binding U.S. Supreme Court precedent.

You alleged that in response to your allegations of wrongdoing, [redacted] informed you that your concerns were outside the scope of your duties and were merely your opinion. You also alleged that she warned you that continuing to raise such concerns was a conduct problem that would not be tolerated.

In addition to raising concerns regarding the funding of these two grants, you also alleged that in a January 26, 2021, email, you voiced concerns that your third-line supervisor, Assistant Secretary of OFO [redacted], was not acting in accordance with President Biden's new Executive Order in re-starting diversity and equity training.

Following your alleged disclosures, your employment was terminated, effective February 5, 2021. You alleged that in a phone call with [redacted] on February 4, 2021, she explained to you that your employment was being terminated because of your emails regarding IES and your allegations related to [redacted]. The stated justifications for termination, as enumerated in your termination letter, were as follows:

> You are being terminated because your conduct fails to meet the expectations of a Pathways Intern and of a Federal employee at this Agency. You demonstrated the inability to work cooperatively as part of a team and maintain a respectful working

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of the Special Counsel to defer such allegations to the Equal Employment Opportunity processes established under anti-discrimination law in order to avoid duplicative processes. 5 C.F.R. § 1810.1. You have informed us that you have filed such a claim.

[2] Grant Award No. R305A200278.

[3] Rescinded by M-21-17, Revocation of Executive Order 13950, M-20-37, and M-20-34, issued March 2, 2021. Office of Management and Budget Memoranda, https://www.whitehouse.gov/omb/information-for-agencies/memoranda/#memoranda-2020 (last visited January 3, 2022).

[4] Grant Award No. U165A180062.

relationship with management officials. Additionally, you failed to follow instructions related to your work and/or your requirements as a program participant.

II. Full Corrective Action Offered

Settlement Offer

Assuming we could establish that the termination of your employment constituted a prohibited personnel practice, current case law indicates that the agency has offered corrective action that is as good or better than we could obtain on your behalf before the Board. Below is the agency's offer of settlement, which we conveyed to you on August 6, 2022:

> (1) Approximately five (5) months of back pay, which represents the pay he would have received if he finished his one-year appointment. We believe it is approximately $16,789, however that number may be slightly higher or lower once the exact computation is made.
>
> (2) Reasonable attorney's fees – based on documentation provided by [redacted] or his attorney (i.e., invoices, billing statements, etc.); and
>
> (3) Expungement of the termination from [redacted] Official Personnel Folder.

When we conveyed the offer to you, we noted that the amount of back pay offered by the agency was calculated by ED based on an estimate of your salary had you been working full time, even though in fact you were working only part time during the school year.

Rejection of settlement offer and consideration of available corrective action

You rejected the agency's offer of settlement on September 7, 2022. In accordance with our general practice, OSC considered whether the agency's offer is as good or better corrective action than we would likely be able to obtain for you before the Board and have determined that the offer meets these criteria. If the Board awards corrective action, such corrective action may include:

> (1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and
>
> (2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).[5]

[5] 5 U.S.C. § 1214(g). *See also* 5 C.F.R. § 1201.202.

Reinstatement not available

In this instance, you were employed as an Intern through the Pathways Program. "The Pathways Programs are developmental programs tailored to promote employment opportunities for students and recent graduates to fill entry-level positions at ED."[6] ED's Pathways Program Manual explains that the Pathways Internship Program is designed to provide students with the opportunity to explore federal jobs while in school.[7] Federal regulations provide that "[Pathways] Interns must meet the definition of student in [5 C.F.R.] § 362.202 throughout the duration of their appointment"[8] Per your Pathways Internship Participant Agreement, you were required to maintain at least a half-time course load and remain in good academic standing. Your Pathways Internship Participant Agreement projected your graduation date as May 20, 2022 and noted that the appointment was subject to completion of a one-year trial period.

While your Pathways Internship Participant Agreement noted the possibility of noncompetitive conversion to a permanent appointment upon satisfactory completion of the Pathways Internship Program, ED's Pathways Program Manual explains, "[t]he conversion is not mandatory or guaranteed."[9] Our investigation indicated that ED Pathways Program participants are rarely converted to permanent ED employees. Moreover, OPM has clarified that "[t]he Pathways Programs Executive Order [13562] and implementing regulations do not provide for conversion to an excepted service position for Intern or Recent Graduate positions" and, as such, attorney positions, which are in the excepted service, may not be filled using the Pathways Programs.[10]

During the period of your employment with the agency via the Pathways Internship Program, you were a full-time second-year law student at Catholic University, Columbus School of Law. You graduated from law school in May 2022. As such, you are no longer eligible for participation in the Pathways Internship Program. Further, while an intern at ED, you were evaluating grant applications for compliance with Human Subjects in Research requirements, which was non-attorney work. You have indicated that you are currently pursuing work as an attorney. As discussed, Pathways Interns are not eligible for conversion to attorney positions in the federal government. Considering the circumstances, reinstatement does not appear to be available or appropriate corrective action.

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[6] U.S. Department of Education, Human Capital Policy (HCP) 362-1, Pathways Programs (July 15, 2016).
[7] *Id.*; *see also* 5 C.F.R. §§ 362.201-.202 (students given "the opportunity to explore Federal careers as paid employees while completing their education"); Executive Order 13562 ("Participants in the program shall be referred to as "Interns" and shall be students enrolled, or accepted for enrollment, in qualifying educational institutions and programs, as determined by OPM.").
[8] 5 C.F.R. § 362.203; s*ee also* 5 C.F.R. § 362.201 (Pathways Internships are for students "while completing their education").
[9] *See also* 5 C.F.R. § 315.713 (conversion to the competitive service); Executive Order 13562 ("Appointment to a Pathways Program shall confer no right to further Federal employment in either the competitive or excepted service upon the expiration of the appointment").
[10] OPM, https://www.opm.gov/policy-data-oversight/hiring-information/students-recent-graduates/?page=1#url=Pathways-FAQs (last visited September 19, 2022).

Back pay

Back pay is an available remedy under the WPA.[11] At the time of your termination, you were working part time.[12] The agency has offered to compensate you at the full-time rate until what would have been the end of your probationary period. Under the Back Pay Act, an award of back pay accounts for the pay "the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period."[13] Here, it appears that you obtained work as a research assistant between April 2021 and April 2022. Thus, it appears you were unemployed following your termination for a period of only two to three months. Thus, it is likely that the agency's offer of five months' backpay at the full-time rate is as good or better compensation than we could obtain for you at the Board.

Attorney's fees and expungement of termination

The agency has also offered reasonable attorney's fees, as allowed by statute, with the amount to be calculated based on documentation provided by you or your attorney. In addition, the agency has offered to expunge the termination from your Official Personnel Folder. These measures would effectively place you in the position you would have been had you not been terminated from your employment.

Consequential and compensatory damages

The WPA also permits recovery of reasonable and foreseeable consequential damages.[14] Consequential damages are limited to "reimbursement of out-of-pocket costs," for which the complainant must provide evidence, such as receipts.[15] The law further permits an award of non-pecuniary compensatory damages, but only for harms directly or proximately caused by the agency's retaliatory actions and will reflect the nature, severity, and duration or expected duration of the harm.[16] You have not alleged or submitted proof of such damages in this case.

[11] 5 U.S.C. § 1214(g).
[12] The evidence indicates that you had been working a little more than 20 hours per week on average during the school year.
[13] 5 U.S.C. § 5596(b)(1)(A)(i).
[14] 5 U.S.C. § 1214(g).
[15] *Hickey v. Dep't of Homeland Sec.*, 766 Fed. Appx. 970, 979 (Fed. Cir. 2019).
[16] *Id.* at 977-78 (citing *Sloan v. U.S. Postal Serv.*, 77 M.S.P.R. 58 (1997)).

Unfortunately, because the agency has offered corrective action that is as good or better than what we believe we could obtain on your behalf before the Board, we anticipate closing your prohibited personnel practice file and notifying you of any additional rights you may have to file before the Board. We realize this is not the outcome you might have hoped for, so we will delay our final decision for 13 calendar days to provide you the opportunity to respond.

[redacted]
Attorney
Retaliation and Disclosure Unit
[redacted]

CARDINAL MAIL [redacted]

Settlement Offer/Department of Education (OSC File No. MA-21-001364)

[redacted] Wed, Dec 14, 2022 at 11:23 AM

To: [redacted]
Cc: [redacted]

Good morning [redacted]:

Thanks for your forbearance. I had some emergency matters come up Monday that required an immediate response.

I think you will find the attached letter analysis of DOE's settlement offer to be fair and more important, in line with OSC's obligations regarding this matter.

I remain concerned that the investigation you have been able to perform has not had the benefit of the facts available to me and [redacted]. While he is actively pursuing a Title VII claim which is unconnected to this claim, the reality is that the facts developed are relevant to both independent and separate claims. Obviously we are dealing here with your matter exclusively, not the Title VII. However, in addition to the common facts the Department is seeking a "global" waiver. Thus it is the Department's acts that really connects the two claim areas for a settlement analysis.

The analysis of this situation entails much less than may be implied at first blush, but of central importance is the fact that given the charges/excuses for [redacted] employment termination that the Department chose to pursue, [redacted] must now live with those charges when honestly answering employment inquiries or security application inquiries or, in fact, any inquiry. The best that he can do is actually clear his name. A settlement, even if the DOE record is expunged, cannot solve the issue given [redacted] obligations to answer inquires honestly and completely. At best he can "explain" if one is willing to listen.

The required settlement or case outcome terms can be accomplished either by a successful verdict, DOE admissions or OSC investigatory conclusions. Settlement of the money issues must come after, not before one of these developments and certainly not in the absence of something in the record to exonerate his good name.
settlement
As always I am available to meet and see if a successful resolution can be accomplished and/or discuss why, in my view, OSC should continue with the case and not stop at an incomplete settlement which does not achieve what should objectively viewed as legitimate, indeed necessary, core terms

Best regards,

[redacted]

Sent with Proton Mail secure email.

[redacted] LETTER 12 14 22.pdf
212K

[redacted]

[redacted]
*Admitted District of Columbia Only

December 14, 2022

FOR SETTLEMENT PURPOSES ONLY
CONFIDENTIAL

[redacted]
Retaliation and Disclosure Unit
U.S. Office of Special Counsel
Suite 218
1730 M Street, N.W.
Washington, D.C. 20036

RE: Settlement Offer/Department of Education (OSC File No. MA-21-001364)

Dear [redacted]:

Thank you for transmitting the Department's latest settlement offer letter. This latest offer takes into account several additional pecuniary factors and I appreciate the care you took to include an assessment of [redacted] latest fact submission to support further legitimate damage claims.

After a thoughtful review and discussion with [redacted], I want to share the following comments and formula for reaching a fair settlement; and clarify [redacted] core concerns as these concerns are central to a successful settlement.

The Department's latest settlement offer for [redacted] case calculated back pay (approx. $30,000) and reassessed, based on what are in my view inapplicable cases, an emotional distress/nonpecuniary damages amount ($15,000). The precedents either referred to by your office or cited by the Department in support of its offer appear to be MSPB wrongful termination cases. It is critical to keep in mind that [redacted] case is different from the run of the mill MSPB case. He is asserting under (b)(8) ***both*** a harassment/hostile environment and a wrongful termination claim, as mentioned in a previous email. While the Department may try to reframe this as a novel claim, the fact is [redacted] was the subject of harassment as well as wrongful termination. He was painfully aware of the Agency's discriminatory practices throughout his tenure, brought them to the attention of his supervisors and was continuously ignored, ultimately fired, because of his continual expression of concern in the face of Department inaction. It is not

possible to separate this claim from his action, recognizing that "The Board has held that harassment can be an actionable personnel action. See Covarrubias v. Soc. Sec. Admin., 113 M.S.P.R. 583, 589 n. 4 (2010)." See, "The U.S. Office of Special Counsel's Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing," a paper by Special Counsel Carolyn Lerner.

An additional critical factor is that the Department's settlement offer requires a *global* settlement yet completely ignores the numerous EEOC precedents in support of the $85,000 number in favor of case recoveries from different circumstances. Reference to MSPB cases to attempt to fix settlement amounts of different claims ignores the value of the other claims. The suggestion that [redacted] would not receive a recovery in the $85,000 range from one of these other claims is therefore shaky, at best. The precedents presented to the Department are clearly relevant to the Department's attempts to settle all claims, including his EEOC claims. If reference to case recovery precedent is going to be a tool to justify a recovery, the referenced cases must be the relevant cases. I am therefore surprised that the Department would put forward its rationale in these circumstances.

However, I want to get to the *core* issue which has driven [redacted] assessment of the Department's settlement offers and whether this is appropriate for OSC's consideration in determining whether to fully pursue this case. Notably, in addition to the insufficient economic damages, the Department offers only to expunge [redacted] termination letter and pay reasonable attorney fees. *Simply expunging a personnel record is not, under these circumstances, sufficient to address the harm inflicted on* [redacted] *nor does it represent the best he can do in court.* Let me explain.

I have settled hundreds of cases and been privileged to have a thorough working knowledge of the various factors that drive settlements. Although reliance on past claims' dollar settlement amounts is a common practice (if connected to the relevant claim recoveries), I have explained why this approach does not work here. With regard to the core claim, the offer does not adequately address the core settlement requirement through a simple expungement of [redacted] personnel record. To adequately even begin to address the harm, the following pertinent factors must be taken into account:

First, the fact that [redacted] was a law student who had not yet passed the bar is irrelevant to discounting his damages, but it is very relevant to the economic impact he suffered when poised to go out into the world and obtain professional employment. In fact, the nature of his chosen profession actually elevates this factor into a critical one. What do I mean? Under the terms of

the current settlement offer, [redacted] may have the benefit of his termination record "expunged" if the offer were accepted, but the sad fact is that unless the termination is actually adjudged illegal or admitted to be wrongful, he must still answer truthfully the following questions with the fact that he was terminated, and the Department's stated reasons why, for the next 40 years:

1) every employment application that asks if he was fired from a job,

2) every form that asks a reason for past job termination; and

3) every form that requires that all information provided be truthful and complete, such as a form seeking a security clearance, entry to any bar association, or any questionnaire that may result in an investigation regarding truthful and complete background information.

Do not forget, [redacted] was basically accused of being insubordinate, ignoring his job to pursue his own whims and unwilling to follow directives from a superior. These are not only very serious charges, but ones which would make any prospective employer think twice, at least.

Because the Department is offering a mere "settlement" of these charges, the offer to expunge a record about why [redacted] was fired relieves the Department from answering anything but it does not, and cannot, relieve [redacted] from answering. Expungement is only similar to a "*nolo contendere*" plea to a criminal charge. It is illusory. From the Department's records there is only a black, unanswered hole. [redacted] will still be viewed as guilty to the Department's accusations in the eyes of the beholder. He will still be an unattractive candidate for employment. *"Expunging" the record does not remedy this concern nor is it the best that* [redacted] *could obtain if he pursued the case to the end.*

Without a final judicial finding or a written acknowledgment of wrongdoing, it is not subject to any doubt that [redacted] will always be under this cloud. Frankly, even $85,000 will not remove the sting of that stain and I would have to consider this very carefully before making any recommendation.

I hope you see this distinction and understand why merely expunging a record is insufficient as a solution. [redacted] situation is similar to a victim of defamation or libel lawsuit which is publicized in a community. A settlement of the lawsuit without admission of fault does nothing to definitively retract or clear the victim's name, and [redacted] is in the same boat. He will always have to answer truthfully, and the truth is that the Department fired him based on stated reasons of insubordination and contumacious behavior. That those reasons were pretext requires a judicial finding or written admission to be believed.

I have also found that understanding where a party is coming from facilitates a settlement. I believe that some of [redacted] rhetoric in past correspondence may present a picture that is inaccurate for OSC, the agency to which [redacted] is turning for some "justice." His past

communications may have given the impression that he is seeking some form of retribution when using the term "justice." This is inaccurate. My conclusion is that [redacted] has not been articulate in making the point that "justice" for him has been nothing but shorthand for insisting that the endpoint is really to clear his name and recuperate fair compensation for his economic loss – and not just to settle a mentally troublesome litigation effort. As I have just explained, clearing his name can – by definition – only be done by a judgment or by admission – something the Department has not offered. So, this requirement has to somehow be met in any settlement offer, especially if the Department is seeking a full and complete waiver of all claims.

Now, I would ask you to consider, what is the Department's goal? Is the Department just trying to provide money to make this go away the most superficial way without [redacted] name being cleared? Is it concerned with the consequences to itself of admitting the facts, i.e. having the Department admit its culpability? Or is it attempting to get the Department off the hook with little money while protecting its employees and protecting its stated practice of keeping Congressional/White House oversight out of its business so it can pursue the "science" it desires whether contrary to the law or not? I believe that insisting on the basic terms of fairness for any settlement – economic compensation *and clearing* [redacted] *name* – will smoke out the Department's true motive and make its intentions clear. If damning deposition testimony and evidence can be available to OSC, the Department's motives may be made clear, since the facts to date show that hundreds of grants are discriminatory and illegal, not scientific. If OSC supports a settlement offer that is less than what [redacted] may obtain, it could also be viewed as facilitating the Department's bad motives for failing to offer a settlement that by definition must unmask its seriously illegal patterns.

I would also ask that OSC reflect on its own role and responsibility. I do not believe OSC is simply covering for the Department. But the question remains, is OSC simply trying to mediate what seems a facially reasonable settlement just to get rid of the case? Or is OSC mandated to seek a settlement that would be the best that [redacted] could get if he were to go to trial? I suspect that the answer is, "it depends." It may first depend on your view of the validity of [redacted] claim and your recognition of the facts. I do not know what your investigation has covered, but I will be happy to provide deposition testimony and fact evidence that reflects the disingenuousness and wrongfulness of the Department's patterns and their illegality coupled with the attitude "keep this quiet and stay out of our business." This is very clearly supported by the facts to date.

Second, OSC's position depends on its view of what is the most advantageous outcome possible if this were to go to trial. If so, I would hope you can agree that [redacted] name can never really be cleared – and the cloud created by the Department never really disbursed – unless there is a final judgment finding liability or an admission of wrongdoing. Short of that, no amount of

money can cover the wound. But with a judgment or an admission, [redacted] could get full satisfaction and obtain the best result possible. That is the nature of [redacted] core concern.

Third, OSC's position would depend on OSC's view of its role generally. Is OSC committed to not only fully investigate and lay out the facts but also to making corrective action recommendations? If so, this activity would also provide the equivalent of a judgment, an "admission" of guilt or an exposition of facts tending to clear [redacted] name and reputation. But to be meaningful to [redacted] that should take place as a prerequisite ***before*** he settles all his claims.

I think you get the picture of what kind of dynamic is involved here and what it would take to align the interests to settle the case. [redacted] would certainly seriously entertain a settlement providing "just" and fair economic remuneration and *something* that would clear his name. Options are that the parties could settle or agree on the economics and go to trial on the underlying culpability, or both economics and culpability could be settled without any trial. Realistically neither can be entertained *before* OSC issues its disclosure report and recommendations unless the Department admits to wrongdoing, and OSC should recognize that short of clearing [redacted] name and providing economic compensation, any settlement would not provide a sound basis for OSC to stand down.

I would hope you can fully understand why – if [redacted] were to be in a position to seriously consider settlement without agreement on an admission of wrongdoing – it is important to have the disclosure report issued prior to any decisions. If so, this would help him to easily decide whether to accept the economic settlement and, without more, waive all the claims.

I am always ready to assist OSC as ethically able, and am fully available to discuss with you a just resolution. Thank you for pursuing this.

Best regards,

[redacted]

[redacted]

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-804-7000

December 20, 2022

[redacted]

Re: OSC File No. MA-21-001364 - Final Determination

Dear [redacted]:

On October 19, 2022, the U.S. Office of Special Counsel (OSC) sent you a preliminary determination letter setting forth our factual and legal determination that the U.S. Department of Education (agency) had offered corrective action that was as good or better than we believed we could obtain for you at the Merit Systems Protection Board (Board). We explained that while you were free to reject the agency's offer, as you had done, we anticipated closing your case in accordance with our longstanding practice in such cases. In response to our preliminary determination letter, you alleged that you were entitled to additional back pay and compensatory damages, and you provided supporting evidence for your allegations. Based on the additional supporting documentation you provided, OSC approached the agency with your demands, and the agency increased its settlement offer to account for evidence of additional damages. On November 29, 2022, I conveyed to you the agency's second offer of settlement together with its accompanying rationale. Specifically, the agency made the following offer of settlement:

(1) A lump sum payment of $45,000, which the agency explained amounted to $30,000 in back pay through your graduation date and $15,000 in nonpecuniary compensatory damages;

(2) Reasonable attorney's fees, as supported by documentation; and

(3) Expungement of the termination from your Official Personnel Folder.

Our assessment of the agency's updated offer leads us to conclude that the agency has offered corrective action that is as good or better than what we believe we could obtain on your behalf before the Board. Its offer of $30,000 in back pay reflects the estimated amount you would have

earned had you remained employed through your projected graduation date, May 20, 2022—i.e., the end date of your internship as set out in your Pathways Internship Agreement.[1]

As support for its offer of $15,000 in nonpecuniary compensatory damages, the agency cited recent Board and Federal Circuit precedents involving harms similar to those alleged here, involving anxiety, depression, physical and mental manifestations of distress, damage to familial relationships, treatment of symptoms with medication, and financial injury.[2] Its offer to you is within the general range awarded in these cases.[3] You contend that your case is distinguishable because you claim to have been subjected to a retaliatory hostile work environment prior to your termination of your employment and, thus, only cases involving a hostile work environment could provide a fair comparison for purposes of calculating a damages award. Even if you had originally raised a hostile work environment claim as part of your OSC case, which you did not, we would still conclude that the agency's offer is as good or better than what you would receive if your case went to the Board.

Specifically, the Board recently clarified that "only agency actions that, individually or collectively, have practical and significant effects on the overall nature and quality of an employee's working conditions, duties, or responsibilities will be found to constitute a personnel action covered by section 2302(a)(2)(A)(xii)." *Skarada v. Dep't of Veterans Affairs*, 2022 M.S.P.B. 17, ¶ 16 (2022). There, the Board found that exclusions from a leadership retreat, subjection to workplace investigations, unresponsiveness to requests, untimeliness in providing guidance, three incidents of yelling by a superior, including being told to "shut up" during a meeting, "collectively and individually, while perhaps indicative of an unpleasant and unsupportive work environment," did not establish a significant change in working conditions under the Whistleblower Protection Act (WPA). *Id.* At ¶ 29. By comparison, here, your supervisor counseled you for going outside your job description and cautioned you that further such actions could warrant disciplinary action. We do not believe that this record is sufficient to meet the high legal bar for establishing a hostile work environment.

You further contend that the amount offered in compensatory damages is unfairly low because, although seeking a global settlement of both your prohibited personnel practice allegations and your Title VII claims (which you are currently litigating before the Equal Employment Opportunity Commission (EEOC)), the agency relied solely on Board precedent in

[1] The agency's Pathways Program Manual notes that the agency must specify an internship end date in the Pathways Internship Participant Agreement, which will generally be based on the intern's projected graduation date. U.S. Department of Education, Human Capital Policy (HCP) 362-1, Pathways Programs (July 15, 2016). The agency also explained why compensation for an additional 120 days in the absence of conversion to a permanent position would be unsupportable.

[2] In addition to physical and emotional harm, you claim that you had difficulty finding alternative employment. You did, however, obtain two consecutive legal research assistant positions shortly after your termination which you held until your graduation from law school in May 2022 and you subsequently obtained a legal position in September 2022.

[3] You have suggested at times that you are owed compensatory damages due to stress and harms caused by pursuing litigation. It should be noted, however, that litigation-induced stress is not generally recoverable as compensatory damages. *Tighe v. Purchase*, 2015 U.S. Dist. LEXIS 57488, *13-15 (2015) (citing case law from various circuits).

justifying the amount of its offer. But OSC can only evaluate the agency's offer of corrective action for purposes of determining whether it is as good or better than what we believe we could obtain on your behalf before the Board.

You have essentially requested that OSC proceed toward litigation based on your position that the agency's settlement offer does not amount to full corrective action absent an agency admission of guilt which you want in order to "clear [your] name."[4] As a threshold matter, we note that in settlement enforcement cases, the Board has held that a clean record settlement agreement requires the agency to act in matters relating to the individual as if he or she had a clean record, including in communications with third parties, such as in response to requests for information regarding suitability for employment and security clearance determinations. *See Principe v. United States Postal Serv.*, 100 M.S.P.R. 66, 68-72 (2005); *Torres v. Dep't of Homeland Sec.*, 2009 M.S.P.B. 19, ¶s 10-12 (2009). While you may believe a formal admission of wrongdoing, a favorable judgment, or formal findings vindicating your position provide benefits beyond a rescission of the termination and expungement of all relevant documentation from agency files, OSC's longstanding policy in evaluating an agency's offer of corrective action is to compare the offer with the specific relief we could obtain before the Board rather than the collateral benefits of a factual finding in the individual's favor.

For these reasons and those stated in our October 19, 2022, preliminary determination letter, we are now closing your prohibited personnel practice complaint. Please note we are also sending you a separate letter discussing the rights you may have to seek corrective action from the Board. Because you alleged potential violations of section 2302(b)(8) or (b)(9)(A)(i), (B), (C), or (D), you may have a right to seek corrective action from the Board under the provisions of 5 U.S.C. §§ 1214(a)(3) and 1221. You may file a request for corrective action with the Board within sixty-five (65) days after the date of this letter. The Board regulations concerning rights to file a corrective action case can be found at 5 C.F.R. Part 1209. It is important that you keep the accompanying letter because the Board may require that you submit a copy should you choose to seek corrective action there.

[redacted]
Attorney
[redacted]

[4] You indicate that you might be willing to settle your prohibited personnel practice claim absent an admission of guilt but not before the issuance of the agency's report in your disclosure matter (OSC File No. DI-21-000533). As we have explained, the disclosure process mandated by 5 U.S.C. § 1213 will be followed regardless of the outcome in your prohibited personnel practice case. You will have an opportunity to comment on the agency's disclosure report and may opt to have your comments made public. Thus, we see no reason to delay addressing your prohibited personnel practice case for the completion of the disclosure process in OSC File No. DI-21-000533.

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-804-7000

December 20, 2022

[redacted]

Re: OSC File No. MA-21-001364 – Individual Right of Action

Dear [redacted]:

The U.S. Office of Special Counsel (OSC) terminated its inquiry into your allegations of prohibited personnel practices under 5 U.S.C. § 2302(b)(8) on December 20, 2022. The purpose of this letter is to notify you that you may file an "individual right of action" (IRA) appeal seeking corrective action from the Merit Systems Protection Board (Board).

In your complaint against the U.S. Department of Education (ED), you alleged that management subjected you to a hostile work environment and terminated your employment in the Pathways Internship Program, effective February 5, 2021, in retaliation for persistently raising concerns about the legality of agency actions. Specifically, you alleged that, during almost the entire duration of your employment with the agency, from late summer 2020 and continuing through early winter 2021, you raised concerns with your first-line supervisor, the Director of the Grants Policy and Training Division, [redacted], and the Lead on the Human Subjects Team, [redacted], that ED was improperly funding grants. In addition to raising concerns regarding the funding of grants, you also alleged that in a phone conversation and in a number of emails, particularly a January 26, 2021, email to [redacted], you expressed your belief that your third-line supervisor, the Assistant Secretary of the Office of Finance & Operations, [redacted], was not acting in accordance with President Biden's new Executive Order in re-starting diversity and equity training.

In your IRA appeal, you may seek corrective action from the Board under 5 U.S.C. §§ 1214(a)(3) and 1221 for any personnel action taken or proposed to be taken against you because of a protected disclosure or activity that was the subject of your OSC complaint. You may file the IRA appeal with the Board within 65 days after the date of this letter. The regulations concerning rights to file an IRA appeal with the Board can be found at 5 C.F.R. Part 1209.

If you choose to file an IRA appeal with the Board, you should include this letter as part of your submission to help show that you have exhausted OSC's administrative procedures. Please note that OSC's decision to end the inquiry into your case may not be considered or otherwise held against you in the IRA appeal. *See* 5 U.S.C. § 1221(f)(2); *Bloom v. Dep't of the*

Army, 101 M.S.P.R. 79, 84 (2006). Although the Board may order you to submit a copy of OSC's letter closing your case, the order must contain an explanation of why the closure letter is necessary and give you the opportunity to consent. *See* 5 U.S.C. § 1214(a)(2)(B); *Bloom*, 101 M.S.P.R. at 84.

[redacted]
Attorney
Retaliation and Disclosure Unit
[redacted]

Exhibit N
(“The Power-Mad Utopians” by Michael Lind, published in *Tablet* on January 30, 2023)

NEWS

The Power-Mad Utopians

America needs a broad popular front to stop the revolution from above that is transforming the country

BY MICHAEL LIND

JANUARY 30, 2023

What happens in politics when one major party, or a major faction in both parties, commits itself to doomed utopian projects of social and economic engineering and seeks to capture and use government to impose its vision from above? In such cases ordinary political consensus and compromise become irrelevant. What is needed, in such cases, is the broadest possible coalition to defeat the mad and impossible schemes of these utopians.

Twice in the last half century utopian politics has emerged in the U.S.—once with the Republican Party as its vehicle, and now with the Democratic Party as its base. Old-fashioned conservative "fusionism"—a synthesis of anti-communism, moderate free market economics, and the genteel traditionalism represented by Russell Kirk—was replaced in the wake of the Cold War by what might be called Fusionism 2.0 and its allies on the hawkish left. This post-Cold War coalition, which culminated in the disastrous presidency of George W. Bush, was a radical movement, not "conservative" in any sense. It was based on the simultaneous promotion of three utopian projects: spreading "the global democratic revolution" through "wars of choice" and "humanitarian interventions" in the Middle East and elsewhere; radical libertarianism in trade

and immigration policy, combined with the repeal of the New Deal through the privatization of Social Security and Medicare; and the imposition of "family values" as defined by the evangelical Protestant minority that formed the base for the Christian Coalition and the Moral Majority.

To say that these were utopian projects does not imply that they did not address genuine problems. For example, following 9/11, Washington had to respond to the transnational terrorist threat. But the U.S. did not have to topple Saddam Hussein and Moammar Gadhafi, nor remain in Afghanistan for two decades after al-Qaida's local base was disrupted. Preventing terrorist attacks on the U.S. did not require President George W. Bush to declare in his second inaugural address that all nondemocratic regimes everywhere must be subverted and overthrown and that "it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world." This was utopianism at its most deranged and dangerous.

All three of these revolutions from above by the Bush Republicans—the global democratic revolution, the libertarian economic revolution, and the attempt to universalize evangelical Protestant morality—were, and remain, deeply unpopular with the American public. Already by 2008 the public had grown weary of the forever wars. Obama and Trump both ran on promises of a more restrained foreign policy (Trump delivered, but Obama added two Middle Eastern disasters, in Libya and Syria, to those in Iraq and Afghanistan). George W. Bush's proposal for partial privatization of Social Security was so unpopular among voters that Republicans refused even to debate it when they controlled the House and Senate. As for the religious right, the American public has always been divided on abortion, a fact reflected in state-level differences now that the Supreme Court has overruled *Roe v. Wade*. The anti-gay rights crusade of the religious right, meanwhile, backfired. By 2021, 55% of Republicans supported gay marriage. The maladroit Moral Majority is now the Moral Minority.

It is in the nature of radical utopian projects in politics that they lead to rule or ruin. In the case of Bush-era Fusionist Conservatism 2.0, all roads led to ruin. Hubris produced a nemesis in the form of Donald Trump, the anti-Bush who won the Republican nomination by denouncing the Iraq War, promising not to cut Social Security or Medicare, and embracing gay rights (though not transgender ideology) and appointing openly gay Republicans to high-ranking positions. Far from being the beginning of a white nationalist takeover, as Democratic partisans absurdly claim, the Trump presidency was the Thermidorian Reaction to the radical Bush revolution.

"What happens in politics when one major party, or a major faction in both parties, commits itself to doomed utopian projects of social and economic engineering and seeks to capture and use government to impose its vision from above?"

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Today, the threat of utopian politics comes from the radicalized center-left, not from the radicalized center-right. The term "progressivism" was revived in the 1980s and 1990s by Clintonite "Third Way" Democrats to distinguish their business-and-bank-friendly version of the center-left from the older New Deal farmer-labor version. But by the 2020s, "progressivism" came to mean

something quite different—a commitment to utopian social engineering projects even more radical than those envisioned by the crackpot Bush-era neocons, libertarians, and religious right.

Three social engineering projects define progressivism in the 2020s: the Green Project, the Quota Project, and the Androgyny Project.

The Green Project is not limited to mitigating global warming by reducing greenhouse gas emissions by industry and energy production. By itself, decarbonization is a technical project that can be carried out by methods like building nuclear power plants and replacing coal with natural gas in electrical generation.

The Green Project or Green New Deal is not satisfied with decarbonizing energy sources. It invokes climate change as an excuse to radically restructure the society of the U.S. and other advanced industrial democracies, from the way that food is grown to where people live to how people behave. Under the banner of the Green New Deal or the Green Transition, various lesser ideological projects on the left—veganism, replacing cars and trucks with mass transit, urban densification, anti-natalism—have rallied, even though none of these is necessary for decarbonizing the energy supply.

The Quota Project, embodied in the rote bureaucratic phrase “diversity, equity, and inclusion” (DEI), is another utopian project. Its goal is the radical restructuring of the U.S. and other Western societies on the basis of racial quotas, so that all racial and ethnic groups are represented in equal proportions in all occupations, classes, academic curriculums, and even literary and artistic canons. DEI is affirmative action on LSD.

For the Quota Project, anti-racism is the public justification. But quota-based tokenism is not a solution for specific cases of discrimination against individuals—which can and should be dealt with by race-neutral, anti-discrimination laws. Nor does the Quota Project have any real solutions to offer in the case of class or

cultural differences which—even in the absence of racism, conscious or "structural"—would result in some groups doing better than others in various occupations. Like the Green Transition, the Quota Project is a radical utopian program of social reconstruction in search of an excuse that might justify it.

The third of the three utopian projects that define contemporary trans-Atlantic progressivism is the Androgyny Project. This goes far beyond civil rights and humane treatment for victims of gender dysphoria and has nothing to do with the hard-won rights of gay men and lesbians. The Androgyny Project holds that gender identity is independent of biological sex and purely subjective. If a middle-aged man claims that he is a woman, then progressives favor requiring local government to retroactively falsify his birth certificate to show that he was "really" born female and "misassigned at birth."

Far more comprehensive than "trans rights," which affect fewer than 1% of the population, the Androgyny Project seeks to redefine all male and female human beings as generic, androgynous humanoids whose sex is a matter of subjective self-definition rather than objective reality.

The bizarre theory that sex is entirely a social construction has led much of the trans-Atlantic establishment to attempt to impose speech codes on society. Instead of "mothers," the androgynists insist that we say "birthing people." A "woman" becomes a "person with a cervix." It is easy to get confused by the weird jargon. During the 2020 presidential primaries, Democratic presidential candidate Julian Castro declared that every "trans female"—that is, a biological male incapable of pregnancy and childbirth—should have access to abortion, when he meant to say every "trans male" (that is, female).

Like all utopian social engineering projects, the Green Project, the Quota Project, and the Androgyny Project are at odds with reality and are doomed to fail. The Green Project is doomed by physics and engineering. Today 80% of the world's energy comes from fossil fuels.

Without reliance on nuclear fission or, perhaps, in the future, nuclear fusion, the transition from fossil fuels may never take place at the global level, though it might happen in a few small countries. Politicians can make all the commitments they like, but most energy is likely to come from fossil fuels in 2050, 2100, and perhaps beyond. Instead of resembling the energy transitions of the past—from wood to coal and from coal to oil, gas, and nuclear—the present-day green movement is best viewed as a puritanical moral crusade like Prohibition, with Demon Oil and Demon Gas substituted for Demon Rum and Demon Whiskey.

The Quota Project is doomed by its own internal contradictions. Rigid systems of racial quotas cannot work in societies like those of the U.S. and Western Europe in which immigration is constantly changing the relative proportions of different races and ethnic groups in a national population, while rising rates of interracial marriage are blurring the boundaries among racial categories.

In the name of DEI, public, private, and nonprofit institutions now regularly engage in illegal but tolerated racial discrimination to artificially increase the representation of Black Americans and Hispanics at the expense of so-called "non-Hispanic whites" and so-called "Asian and Pacific Islanders" (the Census terms for "race" themselves are incoherent and absurd).

If the goal is that every occupation, every club, every reading list, and every sports team in the U.S. have exact proportions of each "race" defined by the census, then every 10 years following the latest census the racial composition of corporate boards, university faculties, sports teams, and artists displayed by museums must be readjusted, with some groups losing their shares and others increasing their shares. Suppose that a wave of immigration from Asia shrinks the relative share of Hispanics and Black Americans in the U.S. population. Does that mean that jobs, grants, and congressional districts should be taken away from Black Americans and Hispanic Americans and given to Asian Americans, to prevent Black American and Hispanic "overrepresentation"? Far

better are the alternatives of race-neutral, anti-discrimination laws, protecting individuals of all races, and race-neutral reforms that help economically disadvantaged individuals of all races.

The Androgyny Project, for its part, is bound to crash against reality in the form of human biology. I predict that in a generation the "progressive" policy of so-called "gender-affirming health care" will be viewed in hindsight the way the prescription of lobotomies and chemical castration as cures for homosexuality in the 1950s is viewed today.

It might be objected that reactionary conservatives have long denounced many quite reasonable reforms as "utopian." That is true. And they have often been wrong to do so. But that does not alter my point.

New Deal energy policy, which sought to protect consumers from price-gouging private electric utility monopolies, was not crazy in the way that the project of replacing all fossil fuels with solar, wind, hydropower, and ethanol is crazy. The movements for equal civil rights for women and for gay men and lesbians did not require the redefinition of "women" and "men." The conservatives who warned that desegregation was a mad utopian project that was doomed to fail were wrong. The conservatives today—and sane centrists, and liberals, and leftists—who warn that pressuring or forcing everyone into agreeing that some men can give birth is a mad utopian project that is doomed to fail are correct.

MORE BY MICHAEL LIND

NEWS

Cold War II

The U.S. is losing its economic advantage in a new era of global conflict

BY MICHAEL LIND

NEWS

Labor's Lost

In America today, we have informal labor cartels for the college-educated elite, while private sector unions for the working class are all but annihilated

BY MICHAEL LIND

NEWS

The New Gatekeepers

How the major institutions of American society all came to sing in the woke chorus, and what can be done about it

BY MICHAEL LIND

An obvious question arises: If these utopian projects are so inherently at odds with reality, then how can widespread elite support for them in any given era be explained?

The answer, in the case of today's progressivism as well as various ideological manias of the past, is a combination of cowardice, careerism, and cash.

Cowardice: Nobody on today's center-left wants to be ostracized for pointing out that solar and renewable energy cannot power an industrial civilization with 7 or 8 billion people. In the same way, no Soviet scientist in Stalin's USSR wanted to be the first—or even the second or third—to point out that Comrade Lysenko's theories about the inheritance of acquired characteristics were wrong.

Careerism: DEI provides lots of lucrative jobs, fellowships, HR positions, deanships, professorships, foundation grants, and corporate gifts. Similarly, the open-ended global war on terror/global democratic revolution paid for a lot of mansions, cars, vacations, 401K contributions, and expensive private school tuitions for various government and nonprofit apparatchiks in the Washington,

D.C., suburbs and elsewhere.

Cash: Prophets are followed by profiteers. When the prophets of "antiracism" demand reparations for African Americans, what they really mean, explain the profiteers, are government subsidies for historically African American universities, businesses, and nonprofits—that is, indirect subsidies for African American professional and managerial elites, not the African American working-class majority. When Green zealots declare that climate change is an emergency that requires warlike mobilization, what they really mean, the profiteers tell us, is that the tax code should subsidize private investors in solar and wind plants that are set up to take advantage of those subsidies as well as guaranteed purchases by electric utilities. When radical androgynists insist that gender is fluid, they create new business opportunities for great numbers of self-appointed gender experts, online influencers, diversity consultants, and the pharma companies and surgeons in the medical-industrial complex who profit from private and public insurance payments for "gender-affirming health care." Apocalypse in the streets, lobbying in the sheets.

All three of these progressive utopian projects—the Green Project, the Quota Project, and the Androgyny Project—will ultimately fail. Of that we can be certain. But we don't have to wait for them to collapse of their own contradictions and from collisions with recalcitrant reality. Before they can do further damage, we need to stop them in their tracks.

We are constantly lectured about the dangers of "vetocracy" and "paralysis" —often by people who regret the fact that elections and checks and balances slow down or block the particular proposals they favor. But when proposals are destructive or at odds with empirical reality, like the war on fossil fuels, radical race and gender tokenism, and radical androgynism, then they ought to be slowed down or blocked altogether. Although Barack Obama did not act on his own maxim, "Don't do stupid shit," is an achievement in itself. A bad status quo is better than a reform that makes things worse.

"The Trump presidency was the Thermidorian Reaction to the radical Bush revolution."

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In international relations theory, it is a truism that "revisionist" coalitions (like the Axis alliance in World War II) which seek to overturn the existing world order need to be limited in membership in order to be effective, while status quo coalitions that seek to thwart the revisionists should be as large as possible, like the United Nations alliance against the Axis which, by 1945, included most of the former fence-sitting republics of Latin America. The same applies to domestic politics as well. It took a broad-based coalition of liberals, social democrats, and populist conservatives to thwart the utopians of the Bush era center-right, and it will take an equally broad and varied coalition to block the insane social engineering projects of the Biden era center-left.

As the progressive juggernaut crashes through the institutional landscape of American society, it is creating ever-growing numbers of angry or frightened refugees—not merely conservative and libertarians and populists, but also former progressives who simply will not pretend that men can get pregnant, along with pro-industry socialists who reject the pastoralism of the wind-and-solar Green fanatics.

The immediate necessity in American politics is to reject partisan and ideological purity tests in order to form the largest possible anti-progressive front—one that will include militant Enlightenment atheists and Orthodox Jews

and Ayn Rand libertarians and Trad Caths, pre-2010 neoliberals and old-fashioned labor liberals and reactionary paleoconservatives, small businesses and big businesses threatened by harmful Green New Deal energy policies, left-liberal professors who do not want to sign diversity statements and nuns in Catholic hospitals who refuse to pretend that men are women and women are men.

By its nature, a broad anti-progressive front must include Democrats as well as Republicans and independents. Although the Democratic Party has been hijacked and turned into the primary vehicle for progressive zealots, many Democratic politicians and most Democratic voters do not share these views. To date, sensible Democrats have been shamefully silent. Although few have spoken up to reject the crackpot crusade to "defund the police," no prominent Democrat has dared to criticize unnecessary surgical castrations or hormone therapy and mastectomies for patients who suffer from gender dysphoria.

That will have to change. The struggle to break the power of the new utopian progressivism must be a struggle within the Democratic Party to reclaim the power now held by a small cadres of well-organized and well-financed progressive radicals. Freed from a forced association with Green lunatics, anti-racist lunatics, and androgynist lunatics, tomorrow's center-left might focus again on sensible real-world projects like raising wages and increasing economic security for all.

Once the progressive juggernaut has been first slowed and then stopped and stripped for parts, former members of the anti-progressive front may well fall out among themselves, as members of victorious defensive coalitions often do. Yes, there is a danger that following the defeat of radical progressivism, the default option might be Clinton-Bush economic neoliberalism. But a restoration of pre-woke, fin de siècle free market neoliberalism would be temporary, because it no longer inspires anyone.

Violent resistance to today's progressive revolutions from above must be ruled out, needless to say. But the diverse members of the anti-progressive front can and should use every peaceful method, from voting in elections to lawfare (litigation) to peaceful protest and satire, in order to frustrate, delay, damage, cripple, divert, stall, and ultimately topple and dismantle the three lumbering juggernauts of green lunacy, equity lunacy, and gender lunacy.

Move over, antifa. Antiprog is on the way.

Michael Lind is a columnist at Tablet and a fellow at New America. His most recent book is *The New Class War: Saving Democracy from the Managerial Elite*.

#PROGRESSIVES #WOKENESS #U.S. POLITCS

Exhibit O
(ED OGC functional statements)

U.S. Department of Education

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US Department of Education Principal Office Functional Statements

Office of the General Counsel

Functional Statements (../index.html) > Office of the General Counsel (home.html)

Program Service

The Program Service is under the direction of a Deputy General Counsel who reports The Program Service is under the direction of a Deputy General Counsel who reports directly to the General Counsel. The Deputy General Counsel supervises and coordinates the work of three Divisions, each of which is headed by an Assistant General Counsel:

- Educational Equity and Research Division, and
- Education Programs Division.

Educational Equity and Research Division

The Educational Equity and Research Division assists the General Counsel in providing legal assistance to the Secretary and Deputy Secretary in connection with the civil rights enforcement activities of the Department pertaining to race, national origin, sex, handicap, and age discrimination. The Division also provides legal assistance to Department officials in connection with the administration of equal educational opportunity programs, including those related to the provision of educational services to handicapped individuals under the Education of the Handicapped Act and the Rehabilitation Act of 1973, as amended.
The Division also provides legal services for research and information programs administered by the Director, Institute for Education Sciences.

In performing its responsibilities, the Division:

- Provides services required by the Department in connection with civil rights court litigation, in close consultation with the Office for Civil Rights, including the development of litigation positions, preparation of documents for submission in court, and explanation of cases to the Department of Justice, and reviews of requests to the Department of Justice for United States participation as amicus curiae in civil rights litigation (This does not preclude the Inspector General from performing that officer's functions under Section 4(d) of the Inspector General Act of 1978.).
- Provides formal and informal legal advice to the Office of the Secretary, the Office of Special Education and Rehabilitative Services, the Office of English Language Acquisition, Institute for Education Sciences, and--with respect to Title IV of the Civil Rights Act and the Women's Educational Equity Act Program and Magnet Schools Assistance Program--the Office of Elementary and Secondary Education.

- Drafts or reviews drafts of legislation, regulations, preambles, responses to public comment, and other supporting documents, and participates in public hearings necessary for the development of regulations for the Department.
- With respect to equal educational opportunity programs, provides legal services required by the Department relating to the conduct of administrative proceedings (such as audit appeals and limitation, termination, and suspension proceedings), including presentation of cases before Administrative Law Judges, or other responsible presiding officers.

TOP

Education Programs Division

The Education Programs Division provides legal services for elementary and secondary education programs (except educational equity programs) administered by the Assistant Secretary for Elementary and Secondary Education, the Chapter I program for State institutions for handicapped children, and vocational and adult education programs administered by the Assistant Secretary for Vocational and Adult Education.

In performing its responsibilities for these programs, the Division:

- Provides formal and informal legal advice to various units in the Office of the Secretary, the Office of Elementary and Secondary Education, the Office of Vocational and Adult Education, and other units within the Department.
- Provides all legal services required by the Department relating to the preparation and defense of decisions in enforcement actions (such as audit, withholding, and cease and desist proceedings), including presentation of cases before administrative tribunals of the Department of Education, and, in particular, the Office of Administrative Law Judges.
- In connection with court litigation, provides all services required by the Department, including working with the Department of Justice, preparation of documents for submission to the court, and development of litigation positions; with respect to certain types of cases such as those involving audit determinations, takes full responsibility for presentation of the case to the court (This does not preclude the Inspector General from performing that officer's functions under Section 4(d) of the Inspector General Act of 1978.).
- Drafts or reviews drafts of legislation, regulations, preambles, responses to public comment, and other supporting documents, and participates in public hearings necessary for the development of regulations for the Department.
- Provides technical assistance to State and local grantees on legal matters arising from these programs.
- Provides advice and serves as a special resource in the Department on matters dealing with assistance to private school children under Federal aid to education programs and the collection of claims arising from audits.

TOP

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Last Modified: 02/10/2021

WHISTLEBLOWER COMMENTS

PROVIDED PURSUANT TO 5 U.S.C. § 1213(e)

on the December 22, 2022
U.S. Department of Education (ED)
Report of Investigation
and the June 23, 2023
Supplemental Report
submitted to the
U.S. Office of Special Counsel
OSC File No. DI-21-000533

SUBMITTED TO:

U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

Supplemental Whistleblower Comments to DI-21-000533

Table of Contents

Summary 3

OSC appears to have initially required that additional deficiencies be addressed in the supplemental report, but caved to ED and backed-down from this requirement. 8

The Integrity Committee should investigate OSC's apparent "Abuse of authority in the exercise of official duties or while acting under color of office" and/or (2) "Conduct that undermines the independence or integrity reasonably expected of" the Special Counsel and PDSC. 9

Both ED and OSC failed to comply with the statutory requirements of 5 USC § 1213(d). 9

The ED reports failed to address retaliation against the whistleblower and his "restoration," meaning both ED and OSC failed to comply with the statutory requirements of 5 USC § 1213(d)(5)(B). 10

The whistleblower requests that OSC intervene in his MSPB proceeding. 15

The ED reports failed to address "disciplinary action against any employee" meaning both ED and OSC failed to comply with the statutory requirements of 5 USC § 1213(d)(5)(C). 16

Even if ED and/or OSC did not violate the *letter* of 5 USC § 1213(d) by intentionally failing to address (d)(5)(B) and (d)(5)(C), they disregarded Congress' intent and the *spirit* of the law. 17

OSC's failure to require that ED address 5 USC §§ 1213(d)(5)(B) and (C) in the supplemental report qualified as: (1) Abuse of authority in the exercise of official duties or while acting under color of office, and/or (2) Conduct that undermines the independence or integrity reasonably expected of the Special Counsel and PDSC. 18

Neither report mentions the systemic or individualized violations of the Common Rule (34 CFR 97), presumably because OSC failed to require that these violations be addressed by ED in either report. 19

In the supplemental report, ED maintained its erroneous position that Title VI does not apply to ED. 24

ED caused, and is responsible for, violations of 34 CFR 100 *et seq*. 32

Neither report mentions reverse-incorporation (a.k.a. substantive due process), despite OSC's obligation to require that it be addressed by ED. 33

Neither report addressed the essential issue of differing definitions for "equity" – specifically, "the consistent and systematic fair, just, and impartial *treatment* of all *individuals*" (per President Biden's Executive Orders 13985 and 14035) or the illegally discriminatory definition of "equal outcomes between racial groups" *de facto* practiced by ED. 35

The *Students for Fair Admissions v. Harvard*, 600 U.S. ___ (2023) decision validated the whistleblower's pointing out "that our Constitution is colorblind." 42

Neither ED report addressed the discriminatory elements of the Harvard grant application. 50

The ED reports erroneously defended *without the required analysis* the assertion that the Harvard grant was not racially discriminatory in violation of Title VI and was "objective, secular, neutral, and nonideological and [was] free of partisan political influence and racial, cultural, gender, or regional bias." ED's mere "say so" is insufficient. 53

Neither report addressed the most salient expressions of discrimination contained in the six video podcasts funded by the Indiana University grant. 59

Supplemental Whistleblower Comments to DI-21-000533

In addition to racial discrimination (Critical Race Theory), the Indiana University grant funds Critical Gender Theory/trans agenda and encourages teachers to evade and/or violate the law. 61

Recommendations: 63

Exhibit AA: *Students for Fair Admissions v. Harvard*, 600 U.S. ___ (2023).....65
Exhibit BB: "Midwest teachers trade tips on 'subversively and quietly' transitioning kids without telling their parents, and skirting Republican gender laws, in workshop funded by federal government" by James Reinl, published in the Daily Mail on June 19, 2023…….....303
Exhibit CC: "DOJ And Ed Department Silent After Teachers Use Taxpayer Money To Criminally Push Gender Ideology On Students" by Evita Duffy-Alfonso, published in The Federalist on June 22, 2023.....312

Summary

On December 22, 2022, the U.S. Department of Education ("ED") conveyed the original investigative Report for case DI-21-000533 ("the Report") required by 5 USC § 1213(d) to the U.S. Office of Special Counsel ("OSC"). The Report was then forwarded to the whistleblower for comment.

On February 3, 2023, the whistleblower submitted his comments on the Report to OSC. His comments included the following Introduction (p. 3-4):

> The initial and supplemental whistleblower disclosures that the U.S. Office of Special Counsel ("OSC") evaluated primarily relate to how ED funded grants and trainings that purveyed illegal discrimination on the basis of race (i.e. disparate racial treatment), including concepts of "Whiteness," "white privilege," "systemic racism," etc. These individual illegal funding decisions align with an illegal racial "equity" concept at ED, requiring reverse-racism to achieve "equal outcome" rather than assuring "equal opportunity."
>
> Specifically, an illegal "equity" agenda in this context is an agenda that requires "equality of outcome between racial groups."[1] The evidence brought forward by the whistleblower shows that ED not only uses federal tax dollars to fund the proliferation of this agenda but in doing so disregards specific legal directives against such action. ED's adoption of this particular brand of "equity" is blatantly contrary to what is legal "equity" which, *even as defined by the current Administration's E.O. 13985*, means "the consistent and systematic fair, just, and *impartial* treatment of all *individuals*…" (Emphasis added.) Equity based on reverse racism is not impartial treatment of all individuals.
>
> The whistleblower's disclosures about ED's illegal activities are grounded in the belief in these same concepts, i.e. fair, just, and impartial treatment of all *individuals* in the use of federal tax dollars for funding both grants and trainings. The whistleblower pointed out issues of illegality with specific ED grants and trainings. He made his disclosures about ED's illegal activity because the fair, just, and impartial treatment of all *individuals* concept is not discriminatory in achieving what all Americans, and the law, agree should be equal treatment under law. Treating racial groups differently to achieve an "equitable" or uniform *outcome* is, however, discriminatory. The whistleblower has at all times been aware of this principle, as recently affirmed by the U.S. District Court in *Greer's Ranch Café v. Isabella Casillas Guzman and United States Small Business Administration*, 540 F. Supp. 3d 638 (N.D. Texas, filed May 18, 2021).
>
> Footnote 1: This definition of "equity" is also the product of a politicized agenda. While this whistleblower matter is not a question of politics, the whistleblower notes that the Educational

Supplemental Whistleblower Comments to DI-21-000533

> Sciences Reform Act of 2002 ("ESRA"), 20 USC § 9514(f)(7) prohibits ED grants that are NOT "objective, secular, neutral, and nonideological" and it specifically requires such grants to be "free of partisan political influence and racial, cultural, gender, or regional bias." This is the law. This matter involves respect for the law as it existed at the time of these events, nothing more. ED's practices may thus also be described as "political," "discriminatory," or "biased," but the fact is the ED practices subject to the whistleblower's complaint are prohibited under ESRA, the Code of Federal Regulations applicable to ED, ED's own code of ethical conduct, basic anti-discrimination statutory laws, and basic American constitutional principles. Notions of "equity"– aside from being discriminatory, illegal, and political – are explained further in a *Tablet* article by Michael Lind entitled "The Power-Mad Utopians" (January 30, 2023) (Exhibit N, starting p. 880). The article explains how the rote use of the bureaucratic phrase "diversity, equity, and inclusion" (DEI) is an effort to radically restructure the U.S. on the basis of racial quotas, so that all racial and ethnic groups are represented in equal proportions in all occupations, classes, academic curriculums, and even literary and artistic canons.

The whistleblower's previous comments highlighted specific issues and criticized the Report for:

1) The conduct of the investigation (i.e. the Report being produced by a team of ED OGC attorneys with ***obvious*** conflicts of interest in violation of: The Standards of Ethical Conduct at 5 CFR § 2635.101, and the ABA and DC Rules of Professional Conduct);
2) Failing to address retaliation against the whistleblower (i.e. disregarding the requirement of 5 USC § 1213(d)(5)(B) to address "the restoration of any aggrieved employee");
3) Failing to address salient facts (i.e. failing to address *or even mention* the most ***clearly*** discriminatory sections of: (1) the Harvard grant,[1] (2) the Indiana University grant,[2] and

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[1] **Harvard grant, p. 64-65:** "However, although teachers of all backgrounds vary in their own ERI formation and attitudes toward discussing racial issues, *White teachers in particular* (currently 80% of Kl2 educators; NCES, 2019) *struggle with acknowledging their own privilege and recognizing racism*, which can hinder productive conversations about race with students (Tatum, 1992; Utt & Tochluk, 2016). *These challenges can result in teachers* acting on their racial biases, *adopting a colorblind approach that can create a hostile learning environment for ERM students*, and hindering teachers' ability to establish strong relationships with their ERM students (Castro Atwater, 2008)."
Harvard grant, p. 65: "*The training is also designed to address ethnic-racial systemic inequities. Activities and training content will prepare teachers to understand and be able to explain how institutional racism has resulted in an educational system and practices that reproduce social inequalities and result in symptoms such as the academic achievement gap. Educators will be able to explain and provide at least one specific example of how institutional racism plays out in the U.S. education system in a manner that reproduces ethnic-racial inequalities in academic outcomes (e.g., by reifying the notion that Whites do not have an ethnic-racial identity and therefore are the "norm," thereby othering youth from ERM backgrounds).*"
Harvard grant, p. 92: "The learning goals for the second day of the training are to *build teachers' understanding of systemic inequities, practice teachers' facilitation strategies around race and ethnicity, and to reflect on historic and contemporary factors that contribute to ethnic-racial inequality (e.g., White supremacy) and to apply this understanding to their students' meaning making, interpretations, and social positions*. Day 2 of the summer camp intensive covers material related to Sessions 3 and 4 of the Identity Project curriculum. …..To meet the learning goals, *Day 2 also involves teachers in a series of activities and discussions focused on Whiteness including: learning shared definitions around White supremacy and how it shapes the context in which all students are developing their identities, examining the role of power and privilege in their own identities and classrooms*, and working through pedagogical strategies for addressing these ideas in their classrooms."
[2] V**odcast #1, Comments by Kathleen King Thorius, the principal investigator (PI):** "[A]s a white, non-disabled, cis[gender] woman, I and white people are socialized into racialized belief systems and racist policies, practices, and belief systems. […] We need resources to be able to sustain our attention to how we've benefitted from those as white people, how we have perpetuated, and how we need to sustain our efforts to disrupt those kinds of our racist systems in our schools and in our society, in our communities and in our families."

(3) the video entitled "Engaging in Anti-racist, Culturally Responsive Research Practices" on IES' YouTube channel and section of the ED.gov website, which was produced by Iheoma Iruka of UNC-Chapel Hill as part of the "Annual IES Principal Investigators Meeting: Advancing Equity and Inclusion in the Education Sciences"[3];

4) Failing to address applicable legal authorities for which there was "a substantial likelihood" of violations – i.e. failing to address *or even mention* the following:
    a. the Common Rule (34 CFR § 97 *et seq.*);
    b. ED's own regulations implementing Title VI (34 CFR §100 *et seq.*) and their *supposed* enforcement by ED's Office for Civil Rights (OCR);
    c. the Standards of Ethical Conduct (5 CFR § 2635.101);

Vodcast #1, Comments by Nickie Coomer: "I do want to point to a few of our resources that we've developed at the MAP Center that are related to antiracism. So I encourage our viewers to stop by our website at greatlakesequity.org and visit our online equity resource library. They'll find there a few different titles on our antiracism webpage, one of which is our Equilearn webinar, "Ensuring Every Student Succeeds: Understanding and Redressing Intersecting Oppressions of Racism, Sexism, and Classism", as well as our Equity Digest entitled "Race Matters in School"."

Vodcast #2, Comments by Perry Wilkinson referred to the "white supremacy culture" and "iceberg culture." He characterized the educational system as a "white system" which as a "white system" presented "oppression and barriers" to people of color. His comments also included the cynical view that "…if people of color are out front, we know the ones who will be let go first…"

Vodcast #3, Comments by Anthony Lewis: "And I like the way, I think, Dr. Kyser and Dr. Anderson both said, dismantle these systems of oppression. You know, some people say we want to disrupt, you know if I disrupt the room I can put the room back together, but I want to totally dismantle these systems of oppression. And in really examining yourself and educating yourself, really truly understanding the historical context of how we got here, really understanding from our Native American perspective, from our African-American perspective, in terms of being dehumanized, truly understanding that foundation of work of why and how America was built with these racist ideologies, with these racist practices."

Vodcast #3, Comments by Nicki Coomer: "Thanks so much Dr. Anderson and Dr. Lewis. I just wanted to add something that I heard from both of you. If there's a reason not to be liked, that's the reason not to be liked. And I think that ties in really importantly with the idea of being a co-conspirator and an accomplice. That means that you're giving something up in order to resist a system that is harmful, to be a co-conspirator, to be an accomplice means that you're ready to get into the work and you're ready to be un-liked, you're ready to get in trouble, to get in good trouble, to not only be disruptive, but to dismantle. And I think, again, to really call white colleagues to the table, when you know that you're positioned in a way where you get a benefit of a doubt that your Black colleagues do not get, acknowledge that publicly and say it out loud, and engage in that anti-racist work as well, to your detriment, and then prepare to bear the consequences of that."

Vodcast #6, Comments by Dr. New characterized the teachers in her school district as "80% white female who live outside the district" and that these teachers (as a group) "do not have the cultural competence" to teach children of color, concluding they "don't know how to work with students of color." Dr. New characterized children of color (as a group) as being taught that their "abilities are negated by my skin color." Dr. New's take on this is that children of color should be affirmed by people "who look like them" and that the white teachers have not experienced what the children of color experienced or not had the same "home learning." Dr. New characterized the white teachers as "people (who) don't worry about those things unless you are a person of color" and said that she hopes we get to a place "where people leave those prejudices, implicit biases and overt biases, in the past."

[3] **Iheoma Iruka, UNC-Chapel Hill:** "Just a couple of definitions that we're all sort of working through. So, first, anti-racism. It really is a conscious and intentional action that includes policies, programs and strategies that really eliminate hierarchy, privilege, marginalization and dehumanization based on race or skin color. So really, it's about you're working against issues of racism, which is a system of hierarchy and privilege. And so anti-racism is the act of fighting against racism. So you can't be not racist. You're either racist or anti-racist. And that's something really important that I hope we can make sure we get today.

"And then finally, equity. Which is like I tell people, equity is like the word "the" that everybody has in front of their sort of lexicon. And so just the definition that we're using today really is about, equity is assurance of the conditions for optimal outcomes for all people. … And then disparities will be eliminated when equity is fully achieved."

   d. the equal protection component of the Due Process clause of the Fifth Amendment (a.k.a. "reverse-incorporation") (a.k.a. "substantive due process"), which applies Equal Protection to the federal government;
   e. President Biden's Executive Order 13985 which defines "equity" as "the consistent and systematic fair, just, and *impartial* treatment of all *individuals*…" (emphasis added) *and does not define it as "equal outcomes"*; and
   f. ESRA's requirements "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**." 20 U.S.C. §§ 9511(b)(2)(B), 9514(f)(7), 9516(b)(8).

5) Adopting unreasonable *and even absurd* interpretations of the following legal authorities:
   a. Title VI (which the Report erroneously concluded does not apply to ED itself, the result being that ED believes it can fund racially discriminatory grants with impunity); and
   b. ESRA's requirement "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" (which the Report erroneously concluded meant *merely* "not religious" and prohibited nothing else).

After receiving the whistleblower's February 3, 2023 comments on the original ED report, on May 15, 2023 OSC requested that ED provide a supplemental report. The supplemental report was provided to OSC (then to the whistleblower's counsel) on June 23, 2023. The supplemental report:

1) Provided six case cites in support of ED's previous erroneous conclusion that Title VI does not apply to ED itself (the result being that ED still believes it can fund racially discriminatory grants with impunity). ***Not a single one of these cases addresses or supports ED's erroneous contention*** (see below, p. 24-32);
2) With no evidentiary support, concluded that neither the Harvard grant nor the Indiana University grant violated ED's regulations implementing Title VI (and ED reached this conclusion without ever addressing *or even mentioning* the ***clearly*** discriminatory language of those grants);
3) With no evidentiary support, simply stated that the Harvard grant did not violate ESRA's requirement "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.**"

These submissions are a flagrant disregard of what Congress intended a report to include and what it needs to address. In fact, the two ED reports are reflective of a continuing attitude of "we know best" and "trust us." As described later in these July 7, 2023 whistleblower comments on the supplemental report, the "collective" reports *remain critically deficient* because they:

1) Fail to properly address the conduct of the investigation (i.e. the Report and supplemental report being produced by a team of ED OGC attorneys with ***obvious*** conflicts of interest in violation of: The Standards of Ethical Conduct at 5 CFR § 2635.101, and the ABA and DC Rules of Professional Conduct);

2) Fail to address the issue of retaliation against the whistleblower (i.e. disregarding the requirement of 5 USC § 1213(d)(5)(B) to address "the restoration of any aggrieved employee");
3) Fail to address the issue of disciplinary action against any ED personnel (i.e. disregarding the requirement of 5 USC § 1213(d)(5)(C) to address "disciplinary action against any employee");
4) Fail to address salient facts (i.e. failing to address *or even mention* the most ***clearly*** discriminatory sections of: (1) the Harvard grant, (2) the Indiana University grant, and (3) the video entitled "Engaging in Anti-racist, Culturally Responsive Research Practices" on IES' YouTube channel and section of the ED.gov website, which was produced by Iheoma Iruka of UNC-Chapel Hill as part of the "Annual IES Principal Investigators Meeting: Advancing Equity and Inclusion in the Education Sciences";
5) Fail to explain, except in unacceptably broad terms, the investigation methodology, an assessment of the facts, and identification of which facts were relied on to support the conclusions;
6) Fail to address applicable legal authorities for which there was "a substantial likelihood" of violations – i.e. failing to provide an analysis of, *or even mention,* the following:
    a. the Common Rule (34 CFR § 97 *et seq.*);
    b. the Standards of Ethical Conduct (5 CFR § 2635.101);
    c. the equal protection component of the Due Process clause of the Fifth Amendment (a.k.a. "reverse-incorporation") (a.k.a. "substantive due process"), which applies Equal Protection to the federal government;
    d. President Biden's Executive Orders 13985 and 14035 which define "equity" as "the consistent and systematic fair, just, and *impartial* treatment of all *individuals*…" (emphasis added) *and do not define it as "equal outcomes,"*
    e. ESRA's requirement "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;"
    f. any analysis of whether Critical Race Theory, the Identity Project, or Ethnic Racial Identity "**are objective, secular, neutral, and nonideological and are free of partisan political influence and racial**, cultural, gender, or regional **bias** (which they clearly are not).

Furthermore, the "collective" reports are unreasonable because:

1) ED erroneously concluded that Title VI does not apply to ED itself, the result being that ED funds racially discriminatory grants with impunity;
2) ED erroneously concluded that neither the Harvard grant nor the Indiana University grant violated ED's regulations implementing Title VI (and ED reached this conclusion without ever addressing *or even mentioning* the ***clearly*** discriminatory language of those grants);
3) ED erroneously concluded that the Harvard grant did not violate ESRA's requirement "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", and

4) ED erroneously concluded that the UNC "Anti-racism" video posted on IES' YouTube channel and referenced by IES' section of the ED.gov website did not violate ESRA.

Moreover, the deficiencies listed above are so fundamental and important to any "report" that it would appear the omissions were intentional, part-and-parcel of willful avoidance conducted by ED and facilitated by OSC.

OSC appears to have initially required that additional deficiencies be addressed in the supplemental report, but caved to ED and backed-down from this requirement.

According to the ED supplemental report,

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

The "allegations 2 and 4" mentioned above refer to "a May 15, 2023, email from [redacted] [...] to [redacted] [that] generally finds that the ED failed to meaningfully address the grants awarded to Indiana University [...] and Harvard."[4]

This May 15, 2023 email from [redacted] (OSC) to [redacted] (ED OGC) *was neither quoted in the supplemental report, nor attached to the supplemental report, nor otherwise provided to the whistleblower*. When the whistleblower's attorney requested that OSC provide him with that May 15, 2023 email, OSC refused.

Based on the above, it appears that:

1) OSC had required a supplemental report that addressed *more than merely the salient facts of the Harvard and Indiana University grants*. (In addition to the fact that any minimally acceptable report was required to address the basis the complaints, there appears to have been a specific request to address the offensive aspects of the grants – and perhaps more. Since there is a basis to show that there was an OSC request, the record must reflect proper resolution of whether it was studiously ignored and if that avoidance was similarly ignored by OSC.)
2) ED complained to OSC about the <u>required</u> topics for the supplemental report enumerated in [redacted] May 15, 2023 email, then "after subsequent discussion with the Department," the record reflects that OSC *caved to ED* and *backed-down from requiring that additional topics be addressed in the supplemental report*. (This at a minimum is

[4] DSCM letter from ED Deputy Secretary Cindy Marten to OSC Special Counsel Henry Kerner dated June 23, 2023.

highly questionable and must be resolved to satisfy the implication that OSC has failed to execute its statutory duty.)

3) ED ignored, indeed *hid*, the fact that OSC had initially required that additional deficiencies in the original Report be addressed by not quoting from [redacted] May 15, 2023 email and failing to attach it to its supplemental report.
4) OSC then actively refused to address the issue when it refused to provide the May 15, 2023 email to the whistleblower's counsel upon request.

The Integrity Committee should investigate OSC's apparent "Abuse of authority in the exercise of official duties or while acting under color of office" and/or (2) "Conduct that undermines the independence or integrity reasonably expected of" the Special Counsel and PDSC.

The Integrity Committee of CIGIE has jurisdiction to investigate any "Covered Person" (including the Special Counsel and the Principal Deputy Special Counsel) for allegations of any/all of the following:

- Abuse of authority in the exercise of official duties or while acting under color of office;
- Substantial misconduct, such as: gross mismanagement, gross waste of funds, or a substantial violation of law, rule, or regulation; and/or
- Conduct that undermines the independence or integrity reasonably expected of a Covered Person

The whistleblower alleges that the OSC conduct described above (i.e. failing to refer additional deficiencies identified by the whistleblower in his previous comments when requesting a supplemental report from ED, and/or requiring in the May 15, 2023 email that additional deficiencies be addressed ***but later backing-down when ED complained***) qualified as: (1) an "Abuse of authority in the exercise of official duties or while acting under color of office" and/or (2) "Conduct that undermines the independence or integrity reasonably expected of a Covered Person" by Special Counsel Henry Kerner and/or the Principal Deputy Special Counsel. Furthermore, additional allegations are made later in these whistleblower comments.

Additionally, various Congressional oversight committees have jurisdiction over OSC. Congress can (and should) investigate OSC's repeated failures – independent of whatever the Integrity Committee decides to do.

Both ED and OSC failed to comply with the statutory requirements of 5 USC § 1213(d).

5 USC § 1213(d) lists the requirements for a disclosure Report, which are as follows:

> (d) Any report required under subsection (c) shall be reviewed and signed by the head of the agency and shall include—
>
> (1) a summary of the information with respect to which the investigation was initiated;

(2) a description of the conduct of the investigation;
(3) a summary of any evidence obtained from the investigation;
(4) a listing of any violation or apparent violation of any law, rule, or regulation; and
(5) a description of any action taken or planned as a result of the investigation, such as—
(A) changes in agency rules, regulations, or practices;
(B) the restoration of any aggrieved employee;
(C) disciplinary action against any employee; and
(D) referral to the Attorney General of any evidence of a criminal violation.

5 USC § 1213(d)(2) requires "a description of the conduct of the investigation." In his previous comments, the whistleblower thoroughly explained how (1) the "description of the conduct of the investigation" in the original report was deficient, and (2) the so-called "investigative team" of three ED OGC attorneys had irreconcilable conflicts of interest, including under 5 CFR § 2635.101 and the ABA and DC Rules of Professional Conduct.[5] These conflicts of interest were not addressed in the supplemental report. OSC should request another supplemental report addressing this issue.

The ED reports failed to address retaliation against the whistleblower and his "restoration," meaning both ED and OSC failed to comply with the statutory requirements of 5 USC § 1213(d)(5)(B).

5 USC § 1213(d)(5)(B) requires "a description of any action taken or planned as a result of the investigation, such as […] the restoration of any aggrieved employee." In a May 15, 2022 email to one of the so-called "investigators," the whistleblower specifically cited 5 USC § 1213(d)(5)(B) and mentioned that "the restoration of any aggrieved employee" was a statutory requirement for the ED disclosure report.[6]

The whistleblower again mentioned his wrongful termination and expected restoration during his first hour-long interview with the "investigators" on July 6, 2022, during which the whistleblower explained that the fact of OSC referring both the Harvard and Fort Wayne grants to ED for further investigation meant that OSC had indeed found "a substantial likelihood of wrongdoing" for both grants – based primarily on the whistleblower's emails to his former team leader and supervisor, which the whistleblower later submitted to OSC.[7] The whistleblower explained to the "investigators" that this is turn indicated that: (1) the whistleblower's belief that the grants were illegally discriminatory was ***reasonable***, and (2) ED's interrogatory responses in the EEOC hearing characterizing the whistleblower's concerns about the grants as "baseless" were erroneous characterizations, because concerns resulting in an OSC finding of "a ***substantial*** likelihood of wrongdoing" cannot be "baseless" (as these terms are mutually exclusive).

Despite the whistleblower's two reminders to the "investigators," the original ED report continuously failed to address the issue of retaliation against the whistleblower and assess the required topic of "the restoration of any aggrieved employee."

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[5] Whistleblower comments of February 3, 2023 on the original ED report, p. 28-37.
[6] Whistleblower comments of February 3, 2023 on the original ED report, Exhibit M, p. 841-845.
[7] Whistleblower comments of February 3, 2023 on the original ED report, Exhibit D, p. 103-141.

Supplemental Whistleblower Comments to DI-21-000533

Furthermore, in his previous comments on the ED report, the whistleblower wrote the following:

> "At the outset, the Report ignored the most obvious of the required topics of investigation – whether the whistleblower was fired in retaliation for his requests for legal review. This is not pardonable.
>
> **[…]**
>
> "Despite being fully aware of the fact that the whistleblower's employment was terminated by his supervisor because of the whistleblower's "repeating his concerns regarding both the Harvard and Fort Wayne grants," as admitted by ED in its discovery responses in a concurrent EEOC hearing,[9] and despite the element of "the restoration of any aggrieved employee" as listed by 5 § USC 1213(d)(5)(B), ED's "investigative team" failed to even mention this item in their Report.
>
> "Further, if ED had performed a real investigation, a "thorough" investigation of the facts and any related matters, it would have perceived the critical, numerous, and obvious factual inconsistencies, sometimes termed "lies," where the whistleblower's supervisor asserted facts that were contravened by sworn testimony of others, including: 1) the whistleblower's second line supervisor asserting he had nothing to do with the firing and the first line supervisor asserting he was involved, requested it, and approved it; 2) the first line supervisor stating that the whistleblower was "out of scope" of his job contravened by: A) the sworn statements of others that this was a part of his responsibilities and that it was acceptable to raise these concerns, and B) legal requirements to bring concerns to the fore; 3) the first line supervisor's excuse that members of the whistleblower's team stated they did not want to work with him being contravened by the sworn statements of those members to the contrary; and 4) the first line supervisor initially denying the need for any legal opinions, then suggesting the whistleblower write up his concerns for legal review (which was never sought), and then firing the whistleblower for bringing up these very concerns. The factually contradicted excuses point inexorably to a retaliatory firing – yet both the inquiry and the facts were somehow ignored in the Report.
>
> "Footnote 9: ED's responses to the whistleblower's interrogatories stated, in part:
> (1) "The Complainant often went outside the scope and role of his employment during weekly team meetings and during biweekly one-on-one meetings with his supervisor *by repeating his concerns regarding both the Harvard and Fort Wayne grants* after being instructed that he was exceeding the scope of his role." and
> (2) "*The Agency does not contend that other conduct by Complainant was one of the reasons for Complainant's termination.*""[8]

Despite the whistleblower's *third mention* of 5 USC § 1213(d)(5)(B) and "the restoration of any aggrieved employee," the supplemental report failed to address this issue.

It is clear that the "investigators" ***knew*** they were required by 5 USC § 1213(d)(5)(B) to address "the restoration of any aggrieved employee," yet failed to address the issue anyway. The reason for ED's intentional omission is obvious: if the "investigators" were to address the issue of the whistleblower's "reasonable" belief, the only reasonable conclusion they could reach would be to admit the whistleblower's employment was wrongfully terminated as illegal retaliation for whistleblowing in violation of the Whistleblower Protection Act (specifically, 5 USC §§ 2302(b)(8) and (b)(9)).

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[8] Whistleblower comments of February 3, 2023 on the original ED report, p. 5-6.

Supplemental Whistleblower Comments to DI-21-000533

The "investigators" would be forced to conclude that the whistleblower had been illegally retaliated against for several reasons. First, the *prima facie* elements of a (b)(8) claim are: (1) whether there was "any disclosure of information by an employee … which the employee … reasonably believes evidences …any violation of any law, rule, or regulation"; (2) whether there was a personnel action against the employee (e.g. a firing); and (3) whether there was a causal connection of ***at least*** "contributing factor" between the disclosure and the personnel action. Furthermore, 5 USC 2302(f)(1) specifically states:

> (1) A disclosure ***shall not be excluded*** from subsection (b)(8) because—
> (A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);
> (B) the disclosure revealed information that had been previously disclosed;
> (C) of the employee's or applicant's motive for making the disclosure;
> (D) the disclosure was not made in writing;

Here, the whistleblower was fired by his first-line supervisor, satisfying the second element.

ED's interrogatory responses in the EEOC hearing already admitted that the whistleblower's "concerns regarding both the Harvard and Fort Wayne grants" ***and no "other conduct"*** was the ***sole cause*** of his firing – which is far higher causation than "contributing factor," meaning the third element is satisfied.

Finally, the first element of "reasonable belief" is satisfied by the whistleblower's emails to his team leader and first-line supervisor regarding the Harvard and Fort Wayne grants, which evidence both (1) the whistleblower's subjective belief regarding illegal discrimination, and (2) the reasonable legal arguments he provided in support of his belief. Additionally, the reasonableness of the whistleblower's belief is evidenced by: (1) OSC finding "a ***substantial*** likelihood of wrongdoing" for both grants based primarily on ***the exact same emails the whistleblower sent to his team leader and first-line supervisor***, and **more important**, (2) the original ED report's admission that OCR found the Fort Wayne grant to *in fact* have an illegally discriminatory admissions policy under existing SCOTUS precedents on affirmative action in educational settings. Throughout the time he expressed his concerns through the point of termination, ED never informed the whistleblower of this OCR finding, again supporting the reasonableness – indeed truth – of his concerns. The OCR finding was the exact concern that the whistleblower alleged in his draft OGC email which he sent to both his team leader and his first-line supervisor (see, previous whistleblower comments, Exhibit D, p. 120-130), leading to his perfunctory termination.

It's important to note that the first element of a (b)(8) claim is merely "reasonable belief." To succeed in his claim of illegal whistleblower retaliation, the statutory standard is that the whistleblower does ***not*** need to show he was in fact correct about the grants being illegally discriminatory. (Ironically, the Fort Wayne grant was *in fact* found by ED itself to be discriminatory, and the whistleblower still contends that the Harvard grant is in fact discriminatory – despite ED's baseless assertions otherwise.) The whistleblower merely needs to prove that he ***believed*** the grants were illegal, and that his belief was reasonable. Therefore, if the so-called "investigators" were to address the statutory requirement of 5 USC § 1213(d)(5)(B) ("the restoration of any aggrieved employee"), they would have to admit the whistleblower was

wrongfully terminated and should be "restored" – ***even while erroneously concluding*** in the supplemental report that the Harvard grant was not in fact illegally discriminatory.

One unavoidable explanation for ED's intentional omission is that the whistleblower is currently litigating his whistleblower retaliation claims against ED via an Individual Right of Action (IRA) in an MSPB hearing. A non-deficient disclosure report that properly addressed the statutorily required "restoration of any aggrieved employee" would have to conclude that the whistleblower had indeed been illegally retaliated against and was entitled to "restoration," which would likely benefit the whistleblower during litigation – especially since the report would come from an "investigative team" of ED OGC attorneys that is *nominally* "impartial," *nominally* "objective," and *nominally* not associated with those *other* ED OGC attorneys representing ED against the whistleblower in litigation before the EEOC and MSPB. Thus, ED has avoided making this admission by refusing to address the statutory requirement of 5 USC § 1213(d)(5)(B) via intentional omission, resulting in an intentionally deficient report and supplemental report. This is inexcusable.

The estimated impact that addressing the required "restoration of any aggrieved employee" might have on ongoing litigation is ***not*** a legitimate reason for ED to have ignored the statutory requirement of 5 USC § 1213(d)(5)(B). Nor was it a legitimate reason when, after receiving the whistleblower's comments on the original report, OSC failed to refer this deficiency to ED when requesting a supplemental report.

OSC's failure here is particularly egregious for multiple reasons. First, because it violates all three of the following: 5 USC §§ 1213(d), (e)(2)(B), and (e)(5)(A). As mentioned above, 5 USC § 1213(d) lists the requirements for a disclosure report, which are as follows:

> (d) ***Any report required under subsection (c)*** shall be reviewed and signed by the head of the agency and ***shall include***—
>
> […]
>
> (5) a description of any action taken or planned as a result of the investigation, such as—
>
> (A) changes in agency rules, regulations, or practices;
>
> (B) ***the restoration of any aggrieved employee***;
>
> (C) ***disciplinary action against any employee***; and
>
> (D) referral to the Attorney General of any evidence of a criminal violation.
>
> (emphasis added)

Furthermore, 5 USC § 1213(e)(2)(B) states:

> (2) Upon receipt of any report that the head of an agency is required to submit under subsection (c), ***the Special Counsel shall review the report and determine whether***—
>
> (A) the findings of the head of the agency appear reasonable; and
>
> (B) if the Special Counsel requires the head of the agency to submit a supplemental report under paragraph (5), ***the reports submitted by the head of the agency collectively contain the information required under subsection (d).*** (emphasis added)

To reiterate, "the information required under subsection (d)" includes 5 USC § 1213(d)(5)(B), which requires "a description of any action taken or planned as a result of the investigation, such as […] the restoration of any aggrieved employee."

Since neither the original ED report nor the supplemental report "contain the information required under subsection (d)" – *including (d)(5)(B)* – the "collective" reports *remain* deficient. Thus, the Special Counsel must refer to 5 USC § (e)(5)(A), which states:

> (5) ***If***, after conducting a review of a report under paragraph (2), the Special Counsel concludes that ***the Special Counsel requires additional information or documentation to determine whether the report submitted by the head of an agency is*** reasonable and ***sufficient***, ***the Special Counsel may request*** that the head of the agency submit ***a supplemental report***—
>
> (A) ***containing the additional information*** or documentation identified by the Special Counsel; (emphasis added)

The keyword here is "sufficient." The ED reports are not "sufficient" because they do not "collectively contain the information required under subsection (d)" – *including (d)(5)(B)*. The "sufficient" standard is not met by a vacuum. The "collective" reports *remain* deficient.

Second, OSC's failure to refer this deficiency to ED is particularly egregious for another reason. In the whistleblower's initial filing of Form-14 with OSC, that filing contained disclosures of wrongdoing ***and*** a Prohibited Personnel Practice (PPP) complaint alleging illegal retaliation against the whistleblower *based on the same underlying fact pattern*.[9] OSC determined that two of the whistleblower's disclosures (the Harvard and Fort Wayne grants) evidenced "a substantial likelihood of wrongdoing," then referred those grants to ED for further investigation, resulting in the ED report and supplemental report.

However, OSC also conducted its own investigation of the PPP complaint (and thus the same underlying fact pattern) to determine for itself: (1) whether the whistleblower was retaliated against (i.e. whether any of the following was violated: 5 USC 2302(b)(8), and/or (b)(9)(A)(i), (B), (C), and/or (D)), (2) if retaliation occurred, whether OSC should recommend corrective action to MSPB on behalf of the whistleblower, and (3) if retaliation occurred, whether OSC should recommend disciplinary action against any supervisor(s).

Having performed its own investigation, OSC knows perfectly well that the whistleblower was indeed the object of illegal retaliation – which makes OSC's failure to enforce the statutory requirement of 5 USC § 1213(d)(5)(B) all the more questionable. By failing to require that the so-called "investigators" address "the restoration of any aggrieved employee," OSC is violating the law and allowing the ED "investigators" to violate the law – but worse yet, by allowing this omission OSC is *de facto* siding ***against*** a whistleblower it ***knows*** was the victim of illegal retaliation and siding ***with*** the perpetrator Agency. OSC thus betrays not only this particular whistleblower, but also its core mission to make whistleblowers "whole."

OSC's failure regarding 5 USC § 1213(d)(5)(B) is not the first time it has failed in this respect. As mentioned in the whistleblower's previous comments, OSC declined to recommend corrective action to MSPB for the sole reason that the whistleblower rejected ED's "no-fault" settlement offer of $45,000 plus attorney's fees and expungement of the termination from the whistleblower's personnel file, which OSC erroneously concluded was "as good or better than what we believe we could obtain on your behalf before the Board" (MSPB).[10] (This offer failed

[9] Whistleblower comments of February 3, 2023 on the original ED report, Exhibit A, p. 42-76.
[10] Whistleblower comments of February 3, 2023 on the original ED report, Exhibit M, p. 875.

to remedy the dilemma of the whistleblower's future job applications having to indicate he was fired from past employment.) In response to the whistleblower's objection to OSC that a settlement without any admission of fault by ED was not in fact "as good or better" than a finding from an MSPB Administrative Judge since it would not clear the whistleblower's name, OSC replied that:

> "While you may believe a formal admission of wrongdoing, a favorable judgment, or formal findings vindicating your position provide benefits beyond a rescission of the termination and expungement of all relevant documentation from agency files, OSC's longstanding policy in evaluating an agency's offer of corrective action is to compare the offer with the specific relief we could obtain before the Board rather than the collateral benefits of a factual finding in the individual's favor."[11]

OSC thus forced upon the whistleblower a Faustian bargain: accept the money without any admission of fault by ED to clear your name for future employment opportunities, or litigate the case yourself without any help from OSC (since OSC closed the case rather than recommending corrective action, thus declining to prosecute on behalf of the whistleblower).

The whistleblower refused the deficient "no-fault" settlement and instead is currently litigating before MSPB without assistance from OSC.

Perhaps the most intolerable part of OSC's refusal to prosecute is as follows:

> "***Assuming we could establish that the termination of your employment constituted a prohibited personnel practice***, current case law indicates that the agency has offered corrective action that is as good or better than we could obtain on your behalf before the Board."[12]

Thus, OSC closed the case because the whistleblower rejected ED's settlement offer – all the while refusing to state its own position on whether OSC believed the whistleblower was the subject of illegal retaliation or offering assistance to establish that the termination was the result of a prohibited personnel practice. Clearly the finding of illegal termination is exponentially better than a simple monetary settlement. OSC's policy in this regard is thus inherently wrong and violative of its statutory duty to protect whistleblowers.

In sum, the Special Counsel should request an additional supplemental report from ED addressing 5 USC § 1213(d)(5)(B) – and also 5 USC § 1213(d)(5)(C) (described below). Although OSC failed to specifically refer these deficiencies to ED when requesting the supplemental report via [redacted] May 15, 2023 email, OSC still can (and should) remedy these deficiencies by requesting an additional supplemental report.

The whistleblower requests that OSC intervene in his MSPB proceeding.

Additionally, 5 USC 1212(c) states that:

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[11] Whistleblower comments of February 3, 2023 on the original ED report, Exhibit M, p. 877.
[12] Whistleblower comments of February 3, 2023 on the original ED report, Exhibit M, p. 865.

> (1) Except as provided in paragraph (2), the Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board.
> (2) The Special Counsel may not intervene in an action brought by an individual under section 1221, or in an appeal brought by an individual under section 7701, without the consent of such individual.

Pursuant to 5 USC § 1212(c)(2), the whistleblower has in the past made it clear, and if not clear, hereby grants his consent for the Special Counsel to intervene in his MSPB proceeding (MSPB Docket No. DC-1221-23-0287-W-1). The whistleblower requests that the Special Counsel does intervene in his case pursuant to 5 USC § 1212(c)(1).

The ED reports failed to address "disciplinary action against any employee" meaning both ED and OSC failed to comply with the statutory requirements of 5 USC § 1213(d)(5)(C).

5 USC § 1213(d)(5)(C) requires "a description of any action taken or planned as a result of the investigation, such as […] disciplinary action against any employee." This requirement is addressed by neither the original ED report nor the supplemental report. Since neither of the reports "contain the information required under subsection (d)" – *including (d)(5)(C)* – the "collective" reports are not "sufficient" under 5 USC § (e)(5)(A) and *remain* deficient.

One likely reason for the so-called "investigators" refusing to address the statutory requirement of 5 USC § 1213(d)(5)(B) ("the restoration of any aggrieved employee") is that, if they did address it, reaching the only reasonable conclusion of "the whistleblower was illegally retaliated against" would also necessitate a recommendation of disciplinary action against the whistleblower's first-line supervisor pursuant to 5 USC § 1213(d)(5)(C) ("disciplinary action against any employee") – and perhaps also his second-line supervisor and/or the Deputy Director of IES (who discussed with the second-line supervisor the whistleblower's email requesting a legal opinion regarding the Harvard grant).

A conclusion by the ED "investigators" that "the whistleblower was illegally retaliated against" (i.e. finding a violation of 5 USC § 2302(b)(8)) would require disciplinary action because the only difference between a whistleblower's (b)(8) claim and recommending disciplinary action due to a (b)(8) violation is the causation element of the *prima facie* case. For the whistleblower to succeed before MSPB, he must prove that his protected activity (i.e. his whistleblowing) was a "*contributing factor*" in ED's decision to fire him. For a recommendation of disciplinary action against the supervisor(s), the whistleblower's protected activity must have been "*a significant motivating factor*" in the decision to fire him. In this particular case, ED already admitted in the EEOC hearing in its responses to the whistleblower's interrogatories that:

> (1) "The Complainant often went outside the scope and role of his employment during weekly team meetings and during biweekly one-on-one meetings with his supervisor ***by repeating his concerns regarding both the Harvard and Fort Wayne grants*** after being instructed that he was exceeding the scope of his role." (emphasis added) and
> (2) "The Agency does not contend that other conduct by Complainant was one of the reasons for Complainant's termination."

Essentially, ED has already admitted that the whistleblower's protected activity "regarding both the Harvard and Fort Wayne grants" was the ***sole cause*** of his firing – which is far higher causation than both "contributing factor" and "significant motivating factor." (ED's argument that the whistleblower's whistleblowing was "out of scope" is absurd.) Thus, the so-called "investigators" would be forced to recommend disciplinary action against the supervisor(s) who retaliated against the whistleblower if they addressed the statutory requirements of 5 USC § 1213(d)(5)(B) and (C).

By refusing to address 5 USC § 1213(d)(5)(B) and (C), the ED "investigators" may be violating the law for the purpose of protecting the ED manager(s) involved in illegal retaliation against the whistleblower. By refusing to require that ED address 5 USC § 1213(d)(5)(B) and (C), OSC is not discharging its duty under the law.

OSC's failure here is particularly concerning because, in addition to making whistleblowers "whole," OSC's core mission is to recommend disciplinary action "against any employee for having committed a prohibited personnel practice [or] violated the provisions of any law, rule, or regulation, or engaged in any other conduct within the jurisdiction of the Special Counsel as described in section 1216," per 5 USC § 1215(a)(1)(A) and (B). This is not discretionary. If a meaningful investigation is not engaged, the proper conclusion will not be drawn. As of yet, it appears that OSC has failed to hold anyone accountable for illegally retaliating against the whistleblower – since it appears that OSC has not recommended disciplinary action using its own authority under 5 USC § 1215,[13] nor has OSC required that the disclosure report(s) address the statutory requirement of 5 USC § 1213(d)(5)(C).

In sum, the Special Counsel should request an additional supplemental report from ED addressing 5 USC § 1213(d)(5)(C) – and also 5 USC § 1213(d)(5)(B) (described previously). Although OSC failed to specifically refer these deficiencies to ED when requesting the supplemental report via OSC's May 15, 2023 email, OSC still can (and should) remedy these deficiencies by requesting an additional supplemental report.

Even if ED and/or OSC did not violate the *letter* of 5 USC § 1213(d) by intentionally failing to address (d)(5)(B) and (d)(5)(C), they disregarded Congress' intent and the *spirit* of the law.

Again, 5 USC § 1213(d) lists the requirements for a disclosure Report, which are as follows:

> (d) ***Any report required under subsection (c)*** shall be reviewed and signed by the head of the agency and ***shall include***—
>
> (1) a summary of the information with respect to which the investigation was initiated;
> (2) a description of the conduct of the investigation;
> (3) a summary of any evidence obtained from the investigation;

[13] In response to the whistleblower's inquiry into whether OSC had yet recommended disciplinary action against the first-line supervisor or anyone else, [redacted] refused to either confirm or deny that disciplinary action had been recommended. Thus the whistleblower has no facts indicating that OSC has actually held anyone accountable yet.

> (4) a listing of any violation or apparent violation of any law, rule, or regulation; ***and***
> (5) a description of any action taken or planned as a result of the investigation, ***such as***—
> (A) changes in agency rules, regulations, or practices;
> (B) the restoration of any aggrieved employee;
> (C) disciplinary action against any employee; and
> (D) referral to the Attorney General of any evidence of a criminal violation.
> (emphasis added)

In relevant part, the statute requires that "Any report … shall include … a description of any action taken or planned as a result of the investigation, such as … the restoration of any aggrieved employee [and] disciplinary action against any employee." ED and/or OSC will almost certainly attempt to justify their knowing and intentional failure to address 5 USC §§ 1213(d)(5)(B) and (C) by arguing that the statute says "such as" rather than "including" – meaning that mentioning "the restoration of any aggrieved employee" and "disciplinary action against any employee" in the report(s) is only a *suggestion* from Congress, not a *requirement*.

The whistleblower believes otherwise: that ED and/or OSC's knowing and intentional failure to address 5 USC §§ 1213(d)(5)(B) and (C) *to purposely avoid documenting the objective truth* that the whistleblower was illegally retaliated against and that disciplinary action should be recommended against at least one supervisor is indeed a violation of law. However, even if no particular law were violated, ED and OSC's intentional omissions regarding 5 USC §§ 1213(d)(5)(B) and (C) indisputably evidence their hiding of relevant and material information from Congress, the President, and the American public generally – information that Congress thought was important enough that it is mentioned in the statute itself. ED and OSC's blatant disregard for the intent of Congress *certainly* violates the *spirit* of the law.

OSC's failure to require that ED address 5 USC §§ 1213(d)(5)(B) and (C) in the supplemental report qualified as: (1) Abuse of authority in the exercise of official duties or while acting under color of office, and/or (2) Conduct that undermines the independence or integrity reasonably expected of the Special Counsel and PDSC.

The Integrity Committee of CIGIE has jurisdiction to investigate any "Covered Person" (including the Special Counsel and Principal Deputy Special Counsel) for allegations of any/all of the following:

- Abuse of authority in the exercise of official duties or while acting under color of office;
- Substantial misconduct, such as: gross mismanagement, gross waste of funds, or a substantial violation of law, rule, or regulation; and/or
- Conduct that undermines the independence or integrity reasonably expected of a Covered Person

As mentioned, the whistleblower alleges that OSC's failure to require that the so-called "investigators" address 5 USC §§ 1213(d)(5)(B) and (C) in the original ED report, and OSC's second failure to require it in the supplemental report (despite the whistleblower specifically

mentioning (d)(5)(B) in his previous whistleblower comments), constituted violations of 5 USC §§ 1213(d)(5)(B), (d)(5)(C), (e)(2)(B), and (e)(5)(A) – but it is unclear to the whistleblower whether these failures constituted a "substantial" violation of law.

Even if there was not a "substantial" violation of law, the whistleblower alleges that these same failures to require that the "investigators" address 5 USC §§ 1213(d)(5)(B) and (C) qualified as (1) an "Abuse of authority in the exercise of official duties or while acting under color of office" and/or (2) "Conduct that undermines the independence or integrity reasonably expected of a Covered Person" by the Special Counsel and/or the Principal Deputy Special Counsel.

Furthermore, after submitting these second whistleblower comments to OSC, OSC will have another opportunity (its third chance) to require that the so-called "investigators" address 5 USC §§ 1213(d)(5)(B) and (C) by requesting an additional supplemental report.

The whistleblower alleges that, after receiving these second whistleblower comments, any additional failures by OSC to require that the "investigators" address 5 USC §§ 1213(d)(5)(B) and (C) by requesting an additional supplemental report would qualify as (1) an "Abuse of authority in the exercise of official duties or while acting under color of office" and/or (2) "Conduct that undermines the independence or integrity reasonably expected of a Covered Person" by the Special Counsel and/or the Principal Deputy Special Counsel.

Additionally, various Congressional oversight committees have jurisdiction over OSC. Congress can (and should) investigate OSC's repeated failures – independent of whatever the Integrity Committee decides to do.

Neither report mentions the systemic or individualized violations of the Common Rule (34 CFR 97), presumably because OSC failed to require that these violations be addressed by ED in either report.

In his original filing of Form-14 with OSC on May 6, 2021, the whistleblower included both disclosures of wrongdoing and PPP allegations (i.e. retaliation against the whistleblower).[14] He also submitted three "packets" of ED emails along with the Form-14.[15] Shortly afterward, he submitted a Timeline and two "Clarifying Questions" emails to OSC, which referenced the three email "packets."[16]

Some of the emails related to historic, ongoing, and systemic noncompliance with the Common Rule (34 CFR 97) by ED. For example, shortly after the whistleblower's start-date of July 5, 2020, the whistleblower attended a July 8, 2020 GPTD meeting in which "the backlog" was mentioned. Immediately after that meeting, the whistleblower emailed his team leader asking "I'm wondering what the HSR "backlog" is, that was mentioned in the meeting just now? Is it

[14] Whistleblower comments of February 3, 2023 on the original ED report, Exhibit A, starting p. 42.
[15] Whistleblower comments of February 3, 2023 on the original ED report, Exhibits D, E, and F.
[16] Whistleblower comments of February 3, 2023 on the original ED report, Exhibits B and C.

something I'll learn about later?"[17] His team leader replied with the following email, which states in part:[18]

> The "backlog" is an "interesting" question. As you may have detected from some details in this morning's GPTD meeting discussion of getting a FTE for a staffer to work on Common Rule issues, this is a challenging regulation in many ways.
>
> The queries facing the current GPTD request for a Common Rule position has a long history. The function has often been understaffed, including a long period in which I was the only ED staffer working to implement the regulation. The resulting workload has meant that some studies remained waiting in the queue of incoming studies for too long, and in some cases were never reviewed to determine whether they include nonexempt human subjects research.
>
> ED, along with many other Federal agencies, adopted the regulation in 1991. However, several years later a Presidential commission conducted a "survey" of the agencies to see what they were doing to implement the regulation. It turned out that ED and several other agencies (eg NSF) had adopted the reg but were doing little to actually implement it. The commission chair wrote to the President-and soon ED set up a point in the agency to implement the reg, adopt procedures for its implementation , etc.
>
> However, the lawyer in OGC who handled the reg used to kid me that he was "my only friend in the Department"-because the program offices etc. would prefer to not have to deal with the regulation, prefer to view ED studies as uniformly harmless, etc. ("The biggest risks study subjects will face is papercuts and boredom").
>
> More recently, while the function was located in the Office of Financial Management and I was the only one involved in implementing the reg at ED, I was frankly told by my supervisor that there was no interest in increasing staffing for the post beyond n=l-- that realistically nothing would happen to increase staffing until there was a crisis, until something "blew up".
>
> Long story short, there is a large number of studies that need ED determinations of whether they include nonexempt research, and human subjects clearance for those that do. This is largely a function of long periods of under staffing for the work, and resulting staff overload.
>
> ED tends to have periodic reorganizations. With the last reorganization, the function was moved from FMO to OGA/GPTD. The new supervisors were appropriately alarmed by the backlog and the potential risks it could pose to study subjects (and ED), and have put considerable effort into eliminating the backlog, moving staffers in (usually on a part time basis) to help with the work, etc. This has had problems of overloaded staffers moving in and out of the work and juggling diverse tasks.
>
> So within the office the term "backlog" is being used to refer to that portion of the pending studies that were received for review and clearance prior to the April 1, 2019 reorganization of the office. It is a very high priority to eliminate that backlog-while staying current with the incoming studies. (As we approach the end of the fiscal year in September, there should be a considerable number of new grants and contracts received for review.)

This email from the whistleblower's team leader (who "was the only ED staffer working to implement the regulation" (34 CFR 97) for "many years" between 1991 and 2020) stated that ED was noncompliant with 34 CFR 97 and failing to enforce that regulation between 1991 and 2020.

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[17] Whistleblower comments of February 3, 2023 on the original ED report, Exhibit E, p. 146.
[18] Whistleblower comments of February 3, 2023 on the original ED report, Exhibit E, p. 143-146.

34 CFR 97 requires that all ED-funded grants and contracts involving research with human subjects receive a compliance determination and clearance notice by ED (specifically, by the whistleblower's Human Subjects (HSR) team) of: "not covered research," "exempt research only," or "non-exempt research" prior to any ED funds being spent on any research involving human subjects. The problem is that, between 1991 and 2020, ED's noncompliance with and failure to enforce 34 CFR 97 meant that many, many grants and contracts involving research with human subjects were funded by ED without ED ever ensuring compliance with 34 CFR 97 (e.g. for these grants, ED never made any compliance determinations, never issued any clearance notices, and never requested any Institutional Review Board (IRB) certifications for "non-exempt research").

"The backlog" consists of over a hundred (and perhaps up to several hundred) grants that ED funded without ever ensuring compliance with 34 CFR 97, grants with human subjects-related research that had already been conducted (and many of the grants had already been "closed-out" by ED) – grants that ED put on a list called "the backlog" and for which it retroactively made Common Rule compliance determinations. At a minimum, this systemic problem reflected a disregard for compliance with the law.

The purpose of the Common Rule is to ensure that human subjects involved in federally-funded research are adequately protected from harm. A federal agency (like ED) is required to ensure these protections are in place by (1) assessing the grant application to determine whether human subjects ("non-exempt") research is involved, and (2) if human subjects research is involved, requiring that the grant applicant/grantee obtain approval from an IRB and provide the IRB certification to ED. This certification says, basically, "The IRB at [XXX] University reviewed this research proposal, and believes it is [not covered research, exempt research only, or nonexempt research]." If the IRB determined it was nonexempt research, the certification also means, basically, that "The IRB approved this nonexempt research because the IRB believes there are adequate protections for the human subjects involved in the research, the risks to human subjects have been minimized, and the expected results of the research outweigh the risks."

Essentially, the entire purpose of the Common Rule is to assess federally-funded research to ensure the risks are minimized and adequate protections are in place for the human subjects (in ED's case, the children) involved in the research before the research actually takes place (i.e. before the children are involved in the federally-funded experiment).

In light of this purpose, it should be obvious how absolutely absurd ED's retroactive Common Rule compliance determinations for hundreds of grants ("the backlog") actually was. A more brazen example of bureaucratic disregard of the law can hardly be imagined.

Furthermore, ED remained noncompliant with 34 CFR 97 throughout the whistleblower's employment – for both previously-funded grants ("the backlog") and also for new grants and contracts. A November 3, 2020 email from the whistleblower to his first-line supervisor on behalf of his entire 4-person team (an email which was edited and approved by his colleagues and team leader prior to sending) stated the following (two names in **BOLD** are redacted):[19]

[19] Whistleblower comments of February 3, 2023 on the original ED report, Exhibit E, p. 147.

Supplemental Whistleblower Comments to DI-21-000533

> Summary of HSR team meeting (Nov. 3):
>
> 1) Significant noncompliance with Common Rule by ED
>
> All grants and contracts involving research with human subjects should be referred to the HSR team for a determination of nonexempt/exempt only/not covered research. This should include all of the following:
> A) All discretionary grants
> B) All block grants to SEA/LEAs (per OGC's revised opinion)
> C) All contracts (citation to 34 CFR 97 included at the end) *
>
> Currently, only a small fraction of discretionary grants (A) are being referred to the HSR team- and only those that the program officers (with a limited working knowledge of the Common Rule) choose to send to us. Currently, no block grants (B) and very few contracts (C) are being referred to the HSR team.
>
> The fact that program officers make the initial determination about a grant, and can/do choose to not send a grant to the HSR team, is a problem. Currently, there is no system for automatically sending grants to the HSR team. (**HSR COLLEAGUE:** I'm not sure this is true. The program office does not make this determination, at least not for IES grants. They do not have the training to make that determination.)
>
> Up until OGC's recent revision, ED would block grant to an SEA/LEA, and that SEA/LEA was supposed to ensure compliance with the Common Rule (e.g. making an HSR determination, requesting & checking IRB approval certifications, etc.), so ED did not have that responsibility. However, in reality, most SEA/LEAs would completely ignore Common Rule requirements. Per OGC's revision, ED is now responsible for ensuring that sub-grantees comply with the Common Rule. However, there is currently no system/SOP for doing this.
>
> Currently, grants use the G5 system- but contracts do not use G5. It seems contracts use a system called CPSS (Contract Purchasing Support System). **FIRST-LINE SUPERVISOR**, can you contact CAM, asking how one or all of us four HSR team members can get access? The HSR team is supposed to be reviewing contracts for compliance with the Common Rule. *

As evidenced by the email, ED was still noncompliant with 34 CFR 97 as of November 3, 2020. Additionally, the whistleblower can testify that ED remained noncompliant as of his wrongful termination on February 5, 2021.

Despite providing these emails to OSC on May 6, 2021, OSC failed to refer ED's ***historic and ongoing*** systemic violations of 34 CFR 97 for further investigation. When the whistleblower asked about this failure to refer the Common Rule violations, [redacted] replied on June 14, 2021 that:

> "Regarding your other allegations, we either believed the issues were being sufficiently addressed already by the agency (and in such cases we do not refer the issue to the agency for investigation) or we did not believe there was sufficient evidence to warrant a referral. Regardless, if you wish to have your name shared privately with the investigators (which is common when we refer an anonymous disclosure), you may share with them any other allegations and evidence you have."

Subsequently, during the whistleblower's first hour-long interview with the so-called "investigators" on July 6, 2022, he mentioned three types of Common Rule violations: (1) the systemic problem of ED noncompliance with the Common Rule ever since adopting the regulation in 1991, which resulted in "the backlog"; (2) the Fort Wayne grant being funded in

2017 yet (as of 2022) still never receiving Common Rule clearance, per the sworn deposition testimony of the whistleblower's former colleague; and (3) the whistleblower and his team leader agreeing via email that the Harvard grant was "non-exempt" research under the Common Rule,[20] yet (after the whistleblower was fired) the team leader clearing/approving the Harvard grant under Exemption 1 ("normal educational practice") when pressured to do so by the first-line supervisor.

Despite discussing the Common Rule with the investigators, the regulation was not mentioned in the original ED report.

In his previous comments on the original ED report, the whistleblower pointed-out this omission, stating that:

> "Due to the absence of specific referrals from OSC, and because the ED investigators refused to investigate "any additional, related wrongdoing," ***violations of the Common Rule and the discriminatory trainings were never investigated***. For additional details on these, see Exhibits B, C, D, E, and F." (Whistleblower comments of Feb. 3, 2023, p. 8.)
>
> "The fact is that no grant funds can be spent on this grant without certification from the whistleblower's GPTD group that the grant complied with the terms of "The Common Rule" at 34 CFR § 97 et seq. The individual who was given responsibility for this certification after the whistleblower was removed from the grant file recently testified that there never had been any certification of that grant. This would mean that, if the grant had indeed been funded, as it seems from the Report language, funds were knowingly spent on human subject-related expenses without the certification required by law. The Report obviously ignored this issue." (Whistleblower comments of Feb. 3, 2023, p. 16-17.)
>
> "Assurance 14 relates to The Common Rule, 34 CFR § 97. This is the regulation that the whistleblower was responsible for checking compliance with on behalf of ED by reading each grant application and, if appropriate, certifying the proposal by "clearing" the grant. The Fort Wayne grant was funded prior to, and without ever receiving, this human subjects clearance. To this day, it has not received clearance. The Harvard grant provided an IRB determination of "exempt research only," which was rejected. (There is no excuse for a Harvard grant application to misapprehend Common Rule compliance.) After the grant was removed from the whistleblower's review, ED approved an improper exemption based on The Identity Project being "normal educational practice." This impropriety has never been reviewed." (Whistleblower comments of Feb. 3, 2023, p. 24.)

Again, the supplemental report fails to even mention 34 CFR 97. It appears that, once again, OSC failed to mention this deficiency to ED when requesting the supplemental report (despite the whistleblower identifying this deficiency in his previous comments).

Thus far, the whistleblower has not seen ***even a shred of evidence*** (from ED or from OSC) to support [redacted] assertion that OSC "believed the [Common Rule] issues were being sufficiently addressed already by the agency" or that these issues actually were and are being "sufficiently addressed already by the agency." In fact, the whistleblower has significant evidence to the contrary, indicative of both (1) ongoing systemic ED noncompliance with 34 CFR 97, and (2) ongoing specific noncompliance regarding both the Harvard and Fort Wayne grants (as uncovered by the whistleblower during discovery in his EEOC hearing).

[20] Whistleblower comments of February 3, 2023 on the original ED report, Exhibit D, p. 107-108.

Therefore, the "collective" reports *remain* deficient. OSC should request another supplemental report addressing this issue.

In the supplemental report, ED maintained its erroneous position that Title VI does not apply to ED.

The original ED report erroneously concluded that Title VI does not apply to ED. In his previous comments on the original report, the whistleblower argued the following:

> "the statutory language of Title VI (specifically, Section 601) clearly imposes a blanket prohibition:
>
> > "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."
>
> "Title VI does not say *who* is prohibited from discriminating; it does not prohibit discrimination by "recipients" of federal financial assistance *alone*. Instead, by omitting the "who," Title VI articulates a *blanket* prohibition against discrimination in federally-funded programs on the basis of race – prohibiting *all* discrimination, by *anyone* and *everyone* (including ED). Title VI is, essentially, a commandment from Congress: "No person … shall, on the ground of race … be subjected to discrimination." It is not only a commandment to "*recipients*" but to all persons.
>
> "Rather than acknowledging Title VI as a blanket prohibition, ED chose to apply the prohibition only to grant recipients, thus perverting the plain meaning of the statute, absolving itself from the prohibition, and providing an *ex post facto* justification for its award of discriminatory grants – as ED did award to Harvard, Fort Wayne, and Indiana University." (Whistleblower comments of Feb. 3, 2023, p. 11.)

The supplemental report maintains ED's erroneous position, stating:

> "this supplemental report details why Title VI does not apply to the Federal Government. … In its May 15, 2023, email, OSC questioned the Department's conclusion that the Department could not violate Title VI by awarding the grants at issue. The Department supplements its original report with legal support for its conclusion…
>
> "Courts have consistently held that Title VI does not apply to the Federal government itself. *See, e.g.*, *Halim v. Donovan*, 951 F. Supp. 2d 201, 207 (D.D.C. 2013) ("Title VI does not apply to programs conducted directly by federal agencies"); *Williams v. Glickman*, 936 F.Supp. 1, 5 (D.D.C.1996) (same); *Gary v. F.T.C.*, 526 F. App'x 146, 149 (3d Cir. 2013) ("Title VI does not apply to federal agencies"); *Maloney v. Soc. Sec. Admin.*, 517 F.3d 70, 75-76 (2d Cir. 2008) (concluding "that, as with Title VI, the Age Discrimination Act does not apply to a federal agency implementing a federal program")*; Keener v. United States*, No. 2:22-CV-1640-DCN, 2023 WL 2478367, at *8 (D.S.C. Mar. 13, 2023) ("Title VI does not apply to the United States or … a federal administrative agency")."
>
> "…*Est. of Boyland v. Young*, 242 F. Supp. 3d 24, 28 (D.D.C. 2017) ("This statutory definition excludes federal agencies, and therefore it is well-recognized that Title VI does not reach 'the operations of the federal government and its agencies.'") (quoting *DynaLantic Corp. v. U.S. Dep't*

> *of Defense*, 885 F.Supp.2d 237, 291 (D.D.C. 2012)); *Maloney*, 517 F.3d, at 75. (Supplemental report at p. 2-3).

A review of each of these cases provided by ED reveals that *none* of them actually support ED's position. The cases address different situations (primarily whether a particular program qualifies as a "program or activity" for purposes of Title VI) and none of them address the question of whether a federal agency itself could violate Title VI if the "program or activity" did qualify as a "program or activity" under Title VI (e.g. a federally-funded program operated by a college or university).

First, *Halim v. Donovan*, 951 F. Supp. 2d 201, 207 (D.D.C. 2013) involved a *pro-se* plaintiff alleging nationality-based discrimination under Title VI in federal housing units *directly* operated by the U.S. Dept. of Housing and Urban Development (HUD). The court did indeed hold that "Title VI does not apply to programs conducted directly by federal agencies", citing to 42 USC § 2000d–4a which defines "program or activity" as only programs administered by a state or local government (SEA or LEA) or a college or university. Because the statutory definition for "program or activity" does not include *programs* operated by a federal agency ***directly***, the court concluded that the federal housing units operated *directly* by HUD were not subject to Title VI's prohibition against discrimination on the basis of race, color, or national origin.

It's important to note two things: (1) the court held *only* that a program operated *directly* by a federal agency did not qualify as a "program or activity" under Title VI, and (2) the court never considered the question of whether a federal agency itself could violate Title VI if the "program or activity" in question qualified as a "program or activity" under Title VI (e.g. a federally-funded program operated by a state or local entity, or a college or university).

Here, the Harvard grant is indisputably subject to Title VI because it is operated by a college or university. The Indiana University grant is also indisputably subject to Title VI for the same reason.

If either grant does discriminate on the basis of race, color, or national origin (and the whistleblower believes both grants are *clearly* discriminatory – as described in his previous comments and again below), then Title VI has been violated. As mentioned in the whistleblower's previous comments,

> "Title VI does not say *who* is prohibited from discriminating; it does not prohibit discrimination by "recipients" of federal financial assistance *alone*. Instead, by omitting the "who," Title VI articulates a *blanket* prohibition against discrimination in federally-funded programs on the basis of race – prohibiting *all* discrimination, by *anyone* and *everyone* (including ED). Title VI is, essentially, a commandment from Congress: "No person … shall, on the ground of race … be subjected to discrimination." It is not only a commandment to "*recipients*" but to all persons.

Second, ED cited *Williams v. Glickman*, 936 F.Supp. 1, 5 (D.D.C.1996) for the same proposition, that Title VI does not apply to programs operated ***directly*** by federal agencies. This case involved Black and Hispanic farmers who applied for loans ***directly*** from the U.S. Dept. of Agriculture (USDA) and were denied, then alleged racial discrimination under Title VI. The

holding was the same as in *Halim*, hinging upon the program not being subject to the prohibition of Title VI because it was operated ***directly*** by a federal entity.

As mentioned above, the Harvard and Indiana University grants indisputably *are* subject to Title VI because they are operated by colleges or universities ***and not directly by ED***.

Again, this court never considered the question of whether a federal agency itself could violate Title VI if the "program or activity" did qualify as a "program or activity" under Title VI (e.g. a federally-funded program operated by a college or university).

Third, ED cited *Gary v. F.T.C.*, 526 F. App'x 146, 149 (3d Cir. 2013) for the proposition that "Title VI does not apply to federal agencies." Here, Robert Gary paid $1,049 to a credit adjuster to fix his credit, but the adjuster failed to do so. Gary then filed a complaint with the New Jersey Attorney General. The NJ AG sued the adjuster and obtained restitution for a small number of victims – not including Gary. Gary then filed a complaint with the FTC. The adjuster had defrauded at least 12,000 consumers, but the FTC anticipated a recovery of only $25,000 and, therefore, determined that it was impractical to provide restitution.

Gary then sued everyone involved, both federal and NJ state defendants, for their failure to provide him restitution. "Gary sought $100 million in damages and alleged violations of the First, Fifth, Seventh, Thirteenth, and Fourteenth Amendments, as well as violations of his civil rights under 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986, and 2000d, and claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346 (b)." The district court dismissed all claims. The Third Circuit affirmed, giving short shrift to Gary without in-depth analysis of any claim. A more complete quote than was offered by ED is as follows:

> "With respect to Gary's claim pursuant to 42 U.S.C. § 2000(d) (Title VI of the Civil Rights Act of 1964), we conclude that the District Court properly dismissed the claim because Title VI does not apply to federal agencies such as the FTC. *See Soveral-Perez v. Heckler*, 717 F.3d 36, 38 (2d Cir. 1983) (**Title VI "was meant to cover only those situations where federal funding is given to a non-federal entity**[.]")." (emphasis added)

As mentioned above, the Harvard and Indiana University grants indisputably ***are*** subject to Title VI because they are operated by colleges or universities ***and not directly by ED***.

Again, this court never considered the question of whether a federal agency itself could violate Title VI if the "program or activity" did qualify as a "program or activity" under Title VI (e.g. a federally-funded program operated by a college or university).

Fourth, ED cited *Maloney v. Soc. Sec. Admin.*, 517 F.3d 70, 75-76 (2d Cir. 2008) for the proposition "that, as with Title VI, the Age Discrimination Act does not apply to a federal agency implementing a federal program." The key word phrase here is "***a federal agency implementing*** a federal program" – which is ***exactly the same holding*** as in *Halim* and in *Williams*. Quoting from *Maloney*,

> "we considered a nearly identical question in the context of a similar statute, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq* ("Title VI"). The *Soberal-Perez* plaintiffs brought an action against the SSA pursuant to Section 601 of Title VI, which prohibits racial discrimination

> in the participation in or provision of benefits "under any program or activity receiving [f]ederal financial assistance," 42 U.S.C. § 2000d. After examining the language of Title VI, its legislative history, the relevant agency regulations, and the case law interpreting the statute, we found that the statute's term "program or activity receiving [f]ederal financial assistance," did not cover federal agencies administering their own budgets, such as the SSA. ***We concluded therefore that Title VI does not apply to programs directly administered by the federal government***," *Maloney v. Social Security Administration*, 517 F.3d 70, 75 (2d Cir. 2008). (emphasis added)

As mentioned above, the Harvard and Indiana University grants indisputably ***are*** subject to Title VI because they are operated by colleges or universities ***and not directly by ED***.

Again, this court never considered the question of whether a federal agency itself could violate Title VI if the "program or activity" did qualify as a "program or activity" under Title VI (e.g. a federally-funded program operated by a college or university).

Fifth, ED cited *Keener v. United States*, No. 2:22-CV-1640-DCN, 2023 WL 2478367, at *8 (D.S.C. Mar. 13, 2023) for the proposition that "Title VI does not apply to the United States or … a federal administrative agency". Before addressing the Title VI issue, the whistleblower would like to *profusely* thank ED for citing this case, in which the court begins the discussion section as follows:

> "Plaintiffs allege three causes of action. 2d Amend. Compl. ¶¶ 42-79. **First, plaintiffs allege a violation of the Fourteenth Amendment's due process and equal protection rights.** *Id.* ¶¶ 42-62. Second, plaintiffs allege a violation of Title VI- specifically, plaintiffs claim the federal government violated 42 U.S.C. § 2000d *et seq.,* which prohibits the exclusion of individuals from participation in or from denial of benefits from a federally funded program on the grounds of race, color, or national origin. *Id.* ¶¶ 63-72. Third, plaintiffs seek injunctive relief asking the court to require the defendants to fund plaintiffs' applications. *Id.* ¶¶ 73-79. Preliminarily, the first and third causes of action require the court to engage in a generous amount of interpretation of the arguments. **First, plaintiffs incorrectly bring a Fourteenth Amendment claim for equal protection and due process when they should bring a Fifth Amendment claim since the claim is against the federal government, not a state or local entity.[1]**
>
> "Footnote 1: **Under the Due Process Clause of the Fifth Amendment, no person may "be deprived of life, liberty or property, without due process of law." U.S. Const. amend. V. This guarantee has a procedural as well as a substantive component. *See Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 856 (1998); *Martin v. St. Mary's Dep't of Soc. Servs.,* 346 F.3d 502, 511 (4th Cir. 2003). Procedural due process ensures that the government employs fair procedures when it seeks to deprive an individual of liberty or property. *See Mathews v. Eldridge,* 424 U.S. 319, 332 (1976); *D.B. v. Cardall,* 826 F.3d 721, 741 (4th Cir. 2016). But, the Fifth Amendment assures "more than fair process." *Washington v. Glucksberg,* 521 U.S. 702, 719 (1997). Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores,* 507 U.S. 292, 301-02 (1993) (emphasis in original). In addition to procedural and substantive due process, the Supreme Court has held that the Fifth Amendment implicitly guarantees the right to equal treatment enshrined in the Fourteenth Amendment. *See Bolling v. Sharpe,* 347 U.S. 497 (1954); *see also United States v. Windsor,* 570 U.S. 744, 774 ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."). Thus, courts apply Fourteenth Amendment jurisprudence to equal protection claims brought against the federal government. *See Buckley v. Valeo,* 424 U.S. 1, 93 (1976) ("Equal protection analysis in the**

> **Fifth Amendment area is the same as that under the Fourteenth Amendment."); *accord Sessions v. Morales-Santana,* 582 U.S. 47, 52 n.1 (2017)."** (emphasis added)

The *Keener* court thus makes ***the exact same reverse-incorporation (a.k.a. substantive due process) argument that the whistleblower made*** in his previous comments to the original ED report.

And why wouldn't the court address this argument? Reverse-incorporation (a.k.a. substantive due process) is ***mandatory precedent*** directly from the U.S. Supreme Court. It is black letter law and the ***primary prohibition*** against racial discrimination engaged in ***directly*** by the federal government (including a federal agency like ED). ED's repeated failures to address this issue, and OSC's repeated failures to require that ED address it, are ***unforgiveable***.

Regarding the Title VI issues, the *Keener* court dismissed the Title VI claim for two reasons. First,

> The United States may not be sued without its consent. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Thus, the court only has jurisdiction over claims against the United States to the extent that it has waived its sovereign immunity. *Id*. A waiver of immunity must be clearly evidenced in the language of a statue. *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). The provisions of Title VI of the Civil Rights Act of 1964 do not waive sovereign immunity or provide grounds for liability against the United States. *See, e.g., Hervey v. United States*, 2019 WL 11690495, at *3 (D. Kan. Oct. 30, 2019). Thus, the court lacks subject matter jurisdiction over plaintiffs' Title VI claims against the federal government and they must be dismissed under Fed.R.Civ.P. 12(b)(1).

Essentially, the *Keene*r court found that, because the plain language of Title VI did not *expressly* waive sovereign immunity, there was no private right of action against the federal government. *This does not mean that Title VI does not apply to the federal government* – merely that there is no private right of action. Second,

> Even if the court were to consider the merits of plaintiffs' Title VI claim, it would find that plaintiffs have failed to state a claim for relief because Title VI claims cannot be brought against the federal government. Title VI of the Civil Rights Act of 1964 provides that "[n]o 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." 42 U.S.C. § 2000d. The statute defines "program or activity" and "program" to mean "all of the operations of" departments or instrumentalities of state or local governments, colleges and certain public systems of higher education, certain corporations and other private organizations, and other entities established by a combination of two or more of the foregoing entities. *See Id.* § 2000-d-4a. The statutory definitions of "program or activity" and "program" do not include federal agencies. Rather, courts have consistently held that Title VI does not apply to programs directed by federal agencies**.**

Essentially, the *Keener* court's holding is exactly the same as in *Halim*, and in *Williams*, and in *Maloney* – that "courts have consistently held that Title VI does not apply to programs directed by federal agencies."

As mentioned above, the Harvard and Indiana University grants indisputably ***are*** subject to Title VI because they are operated by colleges or universities ***and not directly by ED***.

Again, this court never considered the question of whether a federal agency itself could violate Title VI if the "program or activity" did qualify as a "program or activity" under Title VI (e.g. a federally-funded program operated by a college or university).

Sixth, ED cited *Est. of Boyland v. Young*, 242 F. Supp. 3d 24, 28 (D.D.C. 2017) for the proposition that "This statutory definition excludes federal agencies, and therefore it is well-recognized that Title VI does not reach 'the operations of the federal government and its agencies.'"

As background for this case, "Following decades of discrimination by the USDA against Black farmers in the denial, delay, or frustration of their applications for farm loans or other benefit programs, the federal government entered into a class settlement consent decree" in which "USDA awarded over one billion dollars in compensation and relief to approximately 16,000 successful claimants." "Over 60,000 additional claimants sought compensation under the Pigford I consent decree but were denied because their claims were untimely." Congress then allowed these denied claims by passing the 2008 Farm Bill, after which an additional one billion dollars was disbursed to approximately 40,000 claimants (Pigford II). During this same period, female and Hispanic farmers were denied class certification, after which the USDA voluntarily created an ADR administrative claims process for female and Hispanic farmers – an ADR process that USDA contracted with a private corporation ("Epiq") to administer.

The plaintiffs in *Est. of Boyland* were three Black male farmers who filed late and missed both of their chances at compensation under Pigford I and Pigford II, after which they filed claims via the USDA's ADR process and were denied because they were not female or Hispanic. They then brought suit under Title VI.

Quoting *Est. of Boyland* at 27:

> "Epiq argues that Plaintiffs' Title VI claims should be dismissed because (1) Title VI does not apply to the USDA's administrative claims process at issue here and (2) a Title VI claim cannot be brought against Epiq because it does not receive federal financial assistance. The court agrees."

Regarding (1):

> "*Title VI defines "program or activity" as the operations of a state or local government, a higher education institution, a local educational agency or school system, or corporations and other private entities "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation."* 42 U.S.C. § 2000d–4a(1) – (4). This statutory definition excludes federal agencies, and therefore it is well-recognized that Title VI does not reach "the operations of the federal government and its agencies." *DynaLantic Corp. v. U.S. Dep't of Defense* , 885 F.Supp.2d 237, 291 (D.D.C. 2012) ; *see also Wise v. Glickman* , 257 F.Supp.2d 123, 132 (D.D.C. 2003) ; *Williams v. Glickman* , 936 F.Supp. 1, 5 (D.D.C. 1996). *In the court's view, USDA's voluntary ADR process for resolving discrimination claims brought by Hispanic or female farmers against USDA is not a "program or activity" under the statutory definition because it does not involve any of the listed entities and therefore falls outside the scope of Title VI's coverage.* While USDA has contracted with Epiq—a private corporation—to process individuals' claims, Plaintiffs have not alleged any facts that Epiq is "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation" in order to fall within the statutory definition for a covered "program or activity" under Title VI." *Id*. (emphasis added)

Supplemental Whistleblower Comments to DI-21-000533

Essentially, the *Est. of Boyland* court's holding was the same as in ***every*** prior case cited by ED: USDA's ADR ***program*** was administered by a *private corporation* that was *not*: (1) a state or local entity, or (2) a college or university, or (3) a private entity "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation" – per Title VI's statutory definition for "program or activity" at 42 U.S.C. § 2000d–4a(1)–(4). Meaning the court held that USDA's ADR *program* did not qualify as a "program or activity" under Title VI.

Regarding (2),

> "Plaintiffs must further allege that Epiq receives federal financial assistance to carry out its program or activity. 42 U.S.C. § 2000d. While the term "financial assistance" is not defined by the statute, under USDA's Title VI regulations, promulgated pursuant to 42 U.S.C. § 2000d–1, "financial assistance" is defined as
>
> > (1) *grants and loans of Federal funds*, **[…]** and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.
>
> "7 C.F.R. § 15.2(g). The parties provided the court with no cases from this Circuit analyzing the scope of the term "financial assistance" in Title VI, particularly in the context of contracts to perform services for the federal government, and this question appears to be unresolved by the D.C. Circuit. However, in analyzing the scope of the term "federal financial assistance" in an analogous provision of the Rehabilitation Act, 29 U.S.C. § 704, other district judges in this Circuit have concluded that the statute does not extend to entities receiving contractual payments made by the federal government in exchange for services." *Id* at 29. (emphasis added)

As mentioned above, the Harvard and Indiana University grants indisputably ***are*** subject to Title VI because they are operated by colleges or universities. Furthermore, Harvard and Indiana University indisputably ***are*** receiving "federal financial assistance" subject to Title VI because they are receiving the grants.

Again, this court never considered the question of whether a federal agency itself could violate Title VI if the "program or activity" ***did*** qualify as a "program or activity" under Title VI (e.g. a federally-funded program operated by a college or university).

Furthermore, ED's "cherry-picking" of the *Est. of Boyland* quote (that "This statutory definition excludes federal agencies, and therefore it is well-recognized that Title VI does not reach 'the operations of the federal government and its agencies'") while ignoring the sentence immediately preceding that quote ***and*** the sentence immediately following it ***is unforgivably misleading***. Had ED pulled this nonsense in court, attempting to mislead a judge or AJ rather than attempting to mislead OSC, ED would have likely: (1) violated the Rules of Professional Conduct, and (2) risked being sanctioned.

In sum, not a single case cited by ED addressed the question of whether a federal agency itself could violate Title VI if the "program or activity" did qualify as a "program or activity" under Title VI (e.g. a federally-funded program operated by a college or university).

Supplemental Whistleblower Comments to DI-21-000533

Finally, the supplemental report's Footnote 3 (p. 3) states: "Courts have also held that Title VI does not create a cause of action against the federal government." The whistleblower is not disputing this; he is ***not*** alleging that he has ***a private right of action*** against ED. Instead, the whistleblower is merely alleging that Title VI is a blanket prohibition that applies to grantees ***and also to ED*** – one of innumerable laws, rules, and regulations that apply to ED (and that might potentially be violated by ED) without creating any corresponding private right of action against ED.

To reiterate, the whistleblower's position is as follows – and this is the argument ED has failed to directly address:

> "Title VI does not say *who* is prohibited from discriminating; it does not prohibit discrimination by "recipients" of federal financial assistance *alone*. Instead, by omitting the "who," Title VI articulates a *blanket* prohibition against discrimination in federally-funded programs on the basis of race – prohibiting *all* discrimination, by *anyone* and *everyone* (including ED). Title VI is, essentially, a commandment from Congress: "No person … shall, on the ground of race … be subjected to discrimination." It is not only a commandment to "*recipients*" but to all persons.
>
> "Rather than acknowledging Title VI as a blanket prohibition, ED chose to apply the prohibition only to grant recipients, thus perverting the plain meaning of the statute, absolving itself from the prohibition, and providing an *ex post facto* justification for its award of discriminatory grants – as ED did award to Harvard, Fort Wayne, and Indiana University." (Whistleblower comments of Feb. 3, 2023, p. 11.)

Furthermore, Title VI is markedly different from Title VII of the Civil Rights Act of 1964 (42 USC 2000-e2(a)), which states:

> It shall be an unlawful employment practice ***for an employer***—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (emphasis added)

Title VII *specifically* states that it applies to *employers*, meaning it prohibits discrimination *only by particular entities* (employers). Contrast this with Title VI, which focuses on the *object* of potential discrimination (the "person" being safeguarded from discrimination) rather than any entity that could potentially be discriminating (e.g. an individual, a "recipient" of federal funds, an employer, a government agency, or any other entity).

Congress *could have* chosen to structure Title VI the same way it structured Title VII by applying the prohibition only to "recipients" of federal funds – *but that's not what Congress did because that's not what Title VI actually says*. The fact that Title VI does not specify *who* it applies to means that it applies to everyone. Thus anyone could potentially violate Title VI and the only limits on its broad applicability are the statutory definitions for "program or activity" and "receiving Federal financial assistance." Regarding the Harvard and Indiana University grants, there is no dispute that these qualify as "program[s] or activit[ies] receiving Federal financial assistance."

Because neither report addressed the question of whether a federal agency itself could violate Title VI if the "program or activity" did qualify as a "program or activity" under Title VI (e.g. a federally-funded program operated by a college or university), the "collective" reports *remain* deficient. OSC should request another supplemental report addressing this issue.

ED caused, and is responsible for, violations of 34 CFR 100 *et seq*.

Title VI (Section 601) is, as previously stated, a blanket prohibition. "No person … shall, on the ground of race … be subjected to discrimination under any program or activity receiving Federal financial assistance." Some sections of ED's regulations promulgated under Section 602 (42 USC 2000d-1) are similar, while other sections are different. 34 CFR 100.1 states:

> The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end that 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 otherwise subjected to discrimination ***under any program or activity receiving Federal financial assistance from the Department of Education.*** (emphasis added)

34 CFR 100.2 states:

> ***This regulation applies to any program*** to which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal financial assistance listed in appendix A of this regulation. […] (emphasis added)

Thus 34 CFR 100.1 and .2 are similar to Title VI in that they apply to the ***program***, not the "recipient." However, 34 CFR 100.3 is different because *all* of the "Specific discriminatory actions prohibited" apply only to "a recipient." It was for this reason that the whistleblower argued that the Title VI *statute* applies to ED, Harvard, and Indiana University – while the ED regulations apply only to "recipients" (Harvard and Indiana University).

However, the situation at hand is different from your typical Title VI discrimination case. In a normal situation: 1) ED decides to fund a non-discriminatory grant application, 2) the grantee (usually a school) receives the federal funds, then 3) a student or parent files a Title VI complaint with OCR regarding racial discrimination at that school. Usually, the alleged discrimination occurred at the federally-funded school but was not present in the grant application approved by ED (i.e. the racial discrimination occurred *after* ED had made the funding decision, and thus ED could not be held accountable for the *later* discriminatory acts of others).

However, the situation with the Harvard grant is different because the racial discrimination was evidenced *in the grant application itself prior to ED's funding decision*. Thus Harvard violated Title VI when it submitted false assurances of compliance with Title VI when submitting its grant application – and ED *also* violated Title VI when the IES program officer reviewed the grant application containing such blatant racial discrimination and decided to fund it despite those discriminatory statements.

Supplemental Whistleblower Comments to DI-21-000533

Regarding ED's regulations, Harvard also violated 34 CFR 100 *et seq.* – and ED *aided and abetted* that violation by choosing to fund the discriminatory grant application. ED is thus an accomplice to Harvard's violation of ED's own regulations. This runs contrary to both Title VI (Section 601) and Section 602.

Neither report mentions reverse-incorporation (a.k.a. substantive due process), despite OSC's obligation to require that it be addressed by ED.

In his previous comments on the original ED report, the whistleblower wrote:

> "Taking ED's blatantly disingenuous argument on its own terms: even if ED *itself* could not violate Title VI because it is not "receiving" federal funds (which is untrue), ED indisputably is bound by the U.S. Constitution. This includes the equal protection component of the Due Process Clause, applicable to the federal government via reverse incorporation. Like Title VI, equal protection prohibits discrimination on the basis of race.
>
> "Under the doctrine of reverse incorporation, generally identified with the U.S. Supreme Court's decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court held that equal protection binds the federal government even though the Equal Protection Clause by its terms is addressed only to the states. Essentially, the Court interpreted an equal protection component into the Due Process clause, thus applying equal protection to the federal government – including to ED itself.
>
> "Per the whistleblower's "Clarifying Questions" email to OSC (Exhibit B), which the whistleblower later directly provided to the ED investigators, the ED was demonstrably aware of these issues as "relevant" to their inquiry. The whistleblower also mentioned these protections during his second hour-long discussion with the ED investigators. Despite this, the Report completely omits any mention of reverse-incorporation." (Whistleblower comments of Feb. 3, 2023, p. 15.)

Despite the whistleblower mentioning reverse-incorporation in his "Clarifying Questions" email to OSC, this issue was not examined or justified by the ED report, despite the importance of the issue to the circumstances.

The whistleblower provided the "Clarifying Questions" email to the "investigators" directly and also mentioned reverse-incorporation during a second hour-long interview with the "investigators" on July 8, 2022, during which the whistleblower specifically screen-shared his "Clarifying Questions" email and walked the "investigators" through relevant sections of the email line-by-line, the original ED report failed to mention reverse-incorporation.

Despite pointing-out this deficiency in previous whistleblower comments, the ED supplemental report failed to mention reverse-incorporation. This may have been because OSC failed to require that ED address this issue in its supplemental report or ED just ignored the inconvenient issue. However, the supplemental report did provide an insightful citation to *Keener v. United States*, No. 2:22-CV-1640-DCN, 2023 WL 2478367, at *8 (D.S.C. Mar. 13, 2023), which also stated:

> Footnote 1: Under the Due Process Clause of the Fifth Amendment, no person may "be deprived of life, liberty or property, without due process of law." U.S. Const. amend. V. This guarantee has a procedural as well as a substantive component. *See Cnty. of Sacramento v. Lewis,* 523 U.S. 833,

> 856 (1998); *Martin v. St. Mary's Dep't of Soc. Servs.*, 346 F.3d 502, 511 (4th Cir. 2003). Procedural due process ensures that the government employs fair procedures when it seeks to deprive an individual of liberty or property. *See Mathews v. Eldridge,* 424 U.S. 319, 332 (1976); *D.B. v. Cardall,* 826 F.3d 721, 741 (4th Cir. 2016). But, the Fifth Amendment assures "more than fair process." *Washington v. Glucksberg,* 521 U.S. 702, 719 (1997). Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores,* 507 U.S. 292, 301-02 (1993) (emphasis in original). In addition to procedural and substantive due process, the Supreme Court has held that the Fifth Amendment implicitly guarantees the right to equal treatment enshrined in the Fourteenth Amendment. *See Bolling v. Sharpe,* 347 U.S. 497 (1954); *see also United States v. Windsor,* 570 U.S. 744, 774 ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."). Thus, courts apply Fourteenth Amendment jurisprudence to equal protection claims brought against the federal government. *See Buckley v. Valeo,* 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *accord Sessions v. Morales-Santana,* 582 U.S. 47, 52 n.1 (2017).

ED's citing the Title VI issue in *Keener* while completely ignoring its reverse-incorporation (a.k.a. substantive due process) issue is ironic. The whistleblower hopes OSC and Congress will appreciate the irony.

ED's repeated failures to address this issue, and OSC's repeated failures to require that ED address it in the face of ED's failure, are unacceptable. Reverse-incorporation is mandatory precedent directly from the U.S. Supreme Court. It is black letter law and the primary prohibition against racial discrimination engaged in directly by the federal government (including a federal agency like ED).

Furthermore, OSC should consider the consequences of: (1) failing to properly assess ED's erroneous argument that Title VI does not apply to ED, combined with (2) failing to require that ED address the reverse-incorporation argument. If neither Title VI nor the doctrine of reverse-incorporation prevent ED from directly engaging in racial discrimination (e.g. by ED deciding to fund grant applications that clearly discriminate on the basis of race) – then in ED's view, there is no legal authority to prevent this.

OSC must analyze these issues and either refute ED's erroneous Title VI argument or require the "investigators" to address the reverse-incorporation argument. If not, OSC is endorsing the following conclusion: the federal government (including any/all federal agencies) can legally decide to fund racially discriminatory grants with impunity. This outcome should be shocking to Congress and to all Americans.

Unless reverse-incorporation (a.k.a. substantive due process) is addressed, the "collective" ED reports *remain* deficient. OSC should require an additional report addressing this issue.

Supplemental Whistleblower Comments to DI-21-000533

Neither report addressed the essential issue of differing definitions for "equity" – specifically, "the consistent and systematic fair, just, and impartial *treatment* of all *individuals*" (per President Biden's Executive Orders 13985 and 14035) or the illegally discriminatory definition of "equal outcomes between racial groups" *de facto* practiced by ED.

On June 7, 2021, while the whistleblower was still unrepresented and pursuing multiple administrative remedies *pro se*, the whistleblower replied to an OSC "Clarifying Questions" email (hereafter, the "Clarifying Questions" email) (see, Whistleblower comments of Feb. 3, 2023, Exhibit B, p. 78-97.) Excerpting from the whistleblower's email response:

> I am far from the first person to have noticed and understood these different "equity" definitions and the distinctions between them, along with the legal implications; in fact, I'm rather surprised [**the OSC legal intern**] asked me this question. This distinction is *the fundamental* legal distinction, manifested throughout our nation's legal history.
>
> Even Vice President Kamala Harris (who, it must be remembered, is a lawyer) pointed-out this distinction in a November 1, 2020 tweet (linked here):
>
> 
>
>
> VP Harris used slightly different terminology, but she described the same distinction I'll describe: "Equal treatment of individuals under law" (which she calls "equality"; although she "straw mans" it a little) v. "Equality of outcome" (which she calls "equity," and which she defines as "we all end up in the same place").
>
> The language of "we all end up in the same place" can mean two things, either:
> 1) "All individuals end up in the same place" -> which is called Marxism, Socialism, Communism (there are distinctions, but I won't go into them now); or
> 2) "All groups (e.g. Americans separated into groups by their race/skin color, or sex, or other irrelevant immutable characteristics) end up in the same place" -> which we call critical theory. As applied to race/skin color, this is called critical race theory – an ideology started by several American legal scholars in the 1970s, most notably Derrick Bell (lawyer and tenured professor at Harvard Law School) – and stemming from a derivation of Marxism.

Supplemental Whistleblower Comments to DI-21-000533

Critical race theory achieves its goal of racial "equality of outcome" by: 1) categorizing Americans in terms on their race/skin color, then 2) treating racial groups differently, by helping certain racial groups and hindering other racial groups; this includes: "hard" racial quota systems, "soft" racial quota systems, etc. Regarding (1), critical race theory is premised on separating Americans into groups based on race, meaning it is premised on discrimination based on race – a "suspect classification" requiring strict scrutiny.

Most government actions that discriminate based on race do not survive strict scrutiny; however, some do. The notable example is "affirmative action" – although, as I mentioned in the Fort Wayne emails, that was intended to be a narrow exception, and the Supreme Court banned more blatant forms of discrimination based on race in that same decision (e.g. banning quotas and separate admissions tracks). (If you watched the Scalia/Breyer debate linked earlier, Justice Breyer described how difficult a decision it was for him to vote in favor of even the narrow exception of affirmative action.)

"Equality of outcome"

[…]

The assumption:

The assumption underlying the speaker's statement is that the racial make-up of our nation should be the benchmark for comparison. If the percentage of "black or brown people" on an IRB is lower than the percentage of "black or brown people" in our nation's population generally, that can only (or at least primarily) be because of "implicit bias" (meaning implicit bias against black people, meaning racism against black people on the basis of their skin color). Same for when the percentage of African Americans participating in clinical trials is lower than in our nation's population generally – it must be racism. (I'm aware the speaker mentioned both "implicit bias" and past discrimination; I'll address both).

(This is the same assumption often used in other situations, such as (to use a legal example) when our nation's incarceration system is labeled "racist." More of "Minority Group [XXX]" are incarcerated than their share of the U.S. population – therefore, the prisons are racist!)

This is a flawed assumption (and I mentioned this in the context of the Fort Wayne grant on pages 25 and 26 of the PDF labeled "Harvard, Fort Wayne, Biden EO"). Humans are not identical widgets, and we're not living in a Randomized Controlled Trial where racism (past and/or present) is the *only* factor that can impact outcomes. There is *absolutely no reason* to believe that racism is the only factor, the primary factor, or *even a significant factor* in explaining differences *today* between representation of racial groups in the U.S. population as compared to on an IRB, in a clinical trial, or in the prison population. (E.g. A significant amount of evidence shows single motherhood to be a greater factor.) (And, to be clear, I'm not saying "Everything's A-OK in the prisons!" – I'm simply saying you cannot jump immediately from "too many incarcerated minorities" to racism.)

[…]

Regarding past discrimination – of course that has an effect on the present. Basically everyone agrees it does. However, evidence suggests there are factors other than discrimination (past or present) that have a greater impact on reality in the present day.

Additionally, with past discrimination, there is a serious problem of misattribution: the people who did the discriminating are already dead, as are the people who were discriminated against. The people now living were not directly harmed, nor are they directly responsible for any harm. In legal terms, there is a problem proving causation.

Supplemental Whistleblower Comments to DI-21-000533

The goal:

"Equality of outcome," is, quite simply, reaching that "goal" of every sub-division of the U.S. population (including, per the example, IRB compositions and clinical trial participant groups) matching the racial make-up of our nation.

Example: "Minority Group A" makes up 10% of the U.S. population? Then the desired "outcome" of IRB membership (or incoming freshman class, or corporate board membership, etc.) is at least 10% "Minority Group A." If it's less than 10%? "The system" must be racist ("systemic racism")! (regardless of other factors that may explain the difference).

(It's important to note how the term "systemic racism" has changed over time; originally, it meant a racially discriminatory law currently in effect (e.g. Jim Crow laws during the time of segregation). However, the critical race theorists now use the term "systemic racism" to mean systems that do not result in "equality of outcome" – meaning, basically, that every system allowing for liberty and freedom is "systemically racist," including our own system of government and our own Constitution.

(A quote from Lt. Col. [redacted] last month describing diversity, equity, inclusion training taught officially at his base is a good example of this new definition for "systemic racism": "at the time the country ratified the United States Constitution, it codified White supremacy as the law of the land. If you want to disagree with that, then you start [being] labeled all manner of things including racist.")

The speaker I mentioned above in my human subjects example advocated for instituting racial quotas: this is the popular method of achieving "equality of outcome." Blatant racial quotas are illegal (e.g. in the context of admissions to educations institutions, per Grutter), but critical race theorists still advocate for them, and they still happen de facto. Stopping de facto quota systems was the reason for the Trump DOJ (under Attorney General Bill Barr) suing Yale; and next week, the Supreme Court will consider whether to hear a similar case involving Harvard (Students for Fair Admissions, Inc. v. President and Fellows of Harvard College).

"Equality of outcome," critical race theory, and their many accompanying buzzwords are championed by, among others, Ibram X. Kendi. ED recently quoted Kendi when proposing new priorities for OESE discretionary grant competitions (OESE is one of the POs), here, which also referred favorably to the 1619 Project. It's important to note that Kendi also wrote the following:

"The only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination."

Let that sink in for a moment.

[…]

"Equal treatment of individuals under law":

Equal "treatment of all individuals" under law (per President Biden's EO 13985) is an idea variously phrased as: "Equal Justice Under Law," as inscribed on the SCOTUS building; and "equal protection of the laws," per the 14th Amendment - applicable to the federal government via reverse incorporation (Bolling v. Sharpe, 347 U.S. 497 (1954)). (There are, perhaps, slight differences between phrasings – but the general principle, the underlying value, is what they allude to, and is what I'm (inadequately) attempting to describe.)

Supplemental Whistleblower Comments to DI-21-000533

Basically, it's an *ideal* that all individuals be treated(/protected/punished/helped/burdened) equally by the law, regardless of various irrelevant immutable characteristics – most notably (as applied to the legal issues in my case) race/skin color, but also sex, sexual preference, etc. An ideal often expressed (at least partially) as Lady Justice with the blindfold, scales, and sword (an ancient lineage; the scales and sword stretch back to the Roman Empire, while the blindfold was added in the 1500s). An ideal that undergirds our nation's laws stretching back to our founding (including, for my particular case, the Constitution, the Civil Rights Act of 1964, and a *huge* amount of jurisprudence).

This ideal wasn't articulated fully-formed from the start, and it wasn't achieved/manifested in reality (usually in our nation's laws and their enforcement by our judiciary) immediately either. Our nation was built upon a legacy of striving towards, and making incremental progress towards, realizing this ideal – and our nation has, during its comparatively short history of 245 years, done more to realize this ideal than any other nation in world history. Our nation made progress towards more fully realizing this ideal at the following times (and this is, of course, a non-exhaustive list): 1776; 1789; 1865; 1920; 1964; etc.

This ideal is foundational to our system of government, invoked in notable speeches and writings by so many great Americans stretching back to our nation's founding. Examples are so numerous that it's difficult for me to choose just a few, but I'll try.

Quoting President Abraham Lincoln (who, it must be remembered, was a self-taught lawyer, admitted to the Illinois bar in 1836) (Debate at Alton, October 15, 1858):
"I think the authors of that notable instrument [the Declaration of Independence] intended to include all men, but they did not mean to declare all men equal in all respects. They did not mean to say all men were equal in color, size, intellect, moral development or social capacity. They defined with tolerable distinctness in what they did consider all men created equal — equal in certain inalienable rights, among which are life, liberty and the pursuit of happiness. This they said, and this they meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right so that the enforcement of it might follow as fast as circumstances should permit."

Quoting Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896):
"There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."

Quoting the line for which Dr. Martin Luther King Jr. is best known (1963):
"I have a dream that little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

At bottom, this ideal is inspirational, a truly *American* ideal. "The Land of the Free, and the Home of the Brave." A color-blind society, equal in the eyes of the law. An ideal *unique* among all nations, a *special* country founded upon that ideal and *striving* to actualize it over 245 years.

This "equal treatment of individuals under law" is consonant with our founding documents, with the Civil Rights Act, and with so much of our law.

[…]

President Biden's EO 13985:

This EO used a very particular definition for "equity": Equal "treatment of all individuals" under law, including many minorities that were previously discriminated against historically. The plain meaning indicates that it means "equal treatment of all individuals under law" – not "equality of outcome." Under the Scalia approach, that's the end of the analysis.

Supplemental Whistleblower Comments to DI-21-000533

> If one were to consider extrinsic sources of meaning, I recommend watching this exchange between then-candidate Biden and then-candidate Harris during the Democratic primary debate on September 12, 2019, here (Remember, they both are *lawyers*; this debate reveals their different legal philosophies.):
>
> [Moderator paraphrases Biden's statement that "you can't just ban assault rifles by executive order."]
> Harris: "Hey Joe, instead of saying "no, we can't," let's say "yes, we can.""
> Biden: "That's unconstitutional, we have a Constitution."
>
> The exchange shows that President Biden and VP Harris have held conflicting views of the Constitution and its importance on at least one issue for a long while now. What about "equal treatment of all individuals under law" v. "equality of outcome?" VP Harris endorsed "equality of outcome" very clearly – what about President Biden's view?
>
> The definition of "equity" chosen by EO 13985 indicates what President Biden's view is; *it's his signature on the EO*. His history as a *good man* who *cares about the Constitution and defends it* reinforces that his choice is likely "equal treatment of all individuals under law" – the interpretation *most* consistent with our Constitution (and, when compared with "equality of outcome," *the only* interpretation consistent with it).
>
> This is a legal matter, not a policy matter:
>
> I'm sure ED will argue "this is a policy matter, not a legal one!" That is, quite simply, absurd. This is a legal matter, dealt with by *lawyers* over the past *245 years*, and not just any legal matter – it's the *foundational* legal distinction. I am alleging violations of law – but I'm not the only one who believed that violations of law had occurred when the government acted similarly to how ED acted in my case.
>
> It was clear, by both the words and actions of the politicals, that the Trump administration sought to promote "equal treatment of all individuals under law" and that it believed "equality of outcome" was unconstitutional and otherwise illegal (just read EO 13950!). (In addition to actual legal authorities like the EO and OMB memos, prominent lawyers serving as politicals in the Trump administration, including OMB Director Russell Vought and Attorney General Bill Barr, made that administration's position clear.) Yet "equality of outcome" continued to be promoted at the career levels, including by funding of the Harvard and Fort Wayne grants. I remain astounded by the lack of accountability for career federal employees and the use of delegated authority in ways not intended by the politicals.

Despite the whistleblower's "Clarifying Questions" email (excerpted above), OSC failed to specifically refer the question of a violation of President Bidens E.O. 13985 in its initial referrals to ED, nor did OSC specifically refer the issue of conflicting definitions of "equity" – "the consistent and systematic fair, just, and impartial treatment of all individuals" (per President Biden's E.O. 13985) v. the illegally discriminatory definition of "equal outcomes between racial groups" *de facto* practiced by ED.

Despite the whistleblower directly providing the "Clarifying Questions" email to the "investigators" and also mentioning the "equity" definition distinction during the whistleblower's second hour-long interview with the "investigators" on July 8, 2022, during which the whistleblower screen-shared his "Clarifying Questions" email and walked the "investigators" through relevant sections of the email line-by-line, the original ED report failed to address violations of E.O. 13985, nor did it mention the "equity" definition distinction.

Supplemental Whistleblower Comments to DI-21-000533

In his previous whistleblower comments on the original ED report, the whistleblower again mentioned violations of E.O. 13985 and the "equity" definition distinction:

> "The initial and supplemental whistleblower disclosures that the U.S. Office of Special Counsel ("OSC") evaluated primarily relate to how ED funded grants and trainings that purveyed illegal discrimination on the basis of race (i.e. disparate racial treatment), including concepts of "Whiteness," "white privilege," "systemic racism," etc. These individual illegal funding decisions align with an illegal racial "equity" concept at ED, requiring reverse-racism to achieve "equal outcome" rather than assuring "equal opportunity."
>
> "Specifically, an illegal "equity" agenda in this context is an agenda that requires "equality of outcome between racial groups."[1] The evidence brought forward by the whistleblower shows that ED not only uses federal tax dollars to fund the proliferation of this agenda but in doing so disregards specific legal directives against such action. ED's adoption of this particular brand of "equity" is blatantly contrary to what is legal "equity" which, *even as defined by the current Administration's E.O. 13985*, means "the consistent and systematic fair, just, and *impartial* treatment of all *individuals*…" (Emphasis added.) Equity based on reverse racism is not impartial treatment of all individuals.
>
> "The whistleblower's disclosures about ED's illegal activities are grounded in the belief in these same concepts, i.e. fair, just, and impartial treatment of all *individuals* in the use of federal tax dollars for funding both grants and trainings. The whistleblower pointed out issues of illegality with specific ED grants and trainings. He made his disclosures about ED's illegal activity because the fair, just, and impartial treatment of all *individuals* concept is not discriminatory in achieving what all Americans, and the law, agree should be equal treatment under law. Treating racial groups differently to achieve an "equitable" or uniform *outcome* is, however, discriminatory. The whistleblower has at all times been aware of this principle, as recently affirmed by the U.S. District Court in *Greer's Ranch Café v. Isabella Casillas Guzman and United States Small Business Administration*, 540 F. Supp. 3d 638 (N.D. Texas, filed May 18, 2021)."
>
> "Footnote 1: This definition of "equity" is also the product of a politicized agenda. While this whistleblower matter is not a question of politics, the whistleblower notes that the Educational Sciences Reform Act of 2002 ("ESRA"), 20 USC § 9514(f)(7) prohibits ED grants that are NOT "objective, secular, neutral, and nonideological" and it specifically requires such grants to be "free of partisan political influence and racial, cultural, gender, or regional bias." This is the law. This matter involves respect for the law as it existed at the time of these events, nothing more. ED's practices may thus also be described as "political," "discriminatory," or "biased," but the fact is the ED practices subject to the whistleblower's complaint are prohibited under ESRA, the Code of Federal Regulations applicable to ED, ED's own code of ethical conduct, basic anti-discrimination statutory laws, and basic American constitutional principles. Notions of "equity"– aside from being discriminatory, illegal, and political – are explained further in a *Tablet* article by Michael Lind entitled "The Power-Mad Utopians" (January 30, 2023) (Exhibit N, starting p. 880). The article explains how the rote use of the bureaucratic phrase "diversity, equity, and inclusion" (DEI) is an effort to radically restructure the U.S. on the basis of racial quotas, so that all racial and ethnic groups are represented in equal proportions in all occupations, classes, academic curriculums, and even literary and artistic canons." (Whistleblower comments of Feb. 3, 2023, p. 3-4.)
>
> **[…]**
>
> "The "investigative" Report's disingenuous interpretation of E.O. 13950 – based on E.O. 13985's revoking it – still would not sanction ED's funding of discriminatory grants. E.O. 13985 itself did not sanction discrimination. It defines "equity," in Section 2, as "the consistent and systematic fair, just, and impartial treatment of all individuals…" Even under the

terms of E.O. 13985, the three grants containing "divisive concepts" *remained* discriminatory, illegal, and contrary to E.O. 13985's mandate for the "impartial treatment of all individuals."" (Whistleblower comments of Feb. 3, 2023, p. 26.)

[…]

"Having previously examined the Harvard grant in-depth, these whistleblower comments will not belabor that blatant discrimination. Instead, to preempt ED's rebuttal of "it's just a single grant, not a systemic problem," the IES website reveals additional discriminatory language that points towards a systemic problem. An April 6, 2022 post on the IES blog mentioned a January 2022 meeting that IES hosted on "Advancing Equity and Inclusion in the Education Sciences." Quoting the presenter:

> "Just a couple of definitions that we're all sort of working through. So, first, anti-racism. It really is a conscious and intentional action that includes policies, programs and strategies that really eliminate hierarchy, privilege, marginalization and dehumanization based on race or skin color. So really, it's about you're working against issues of racism, which is a system of hierarchy and privilege. And so anti-racism is the act of fighting against racism. So you can't be not racist. You're either racist or anti-racist. And that's something really important that I hope we can make sure we get today.
>
> "And then finally, equity. Which is like I tell people, equity is like the word "the" that everybody has in front of their sort of lexicon. And so just the definition that we're using today really is about, equity is assurance of the conditions for optimal outcomes for all people. … And then disparities will be eliminated when equity is fully achieved." (See, Exhibit K, p. 411-412.)

"Here, IES has embraced the lexicon of "equality of outcome" definition of equity – the opposite of legal "equity" as defined by the current Administration's E.O. 13985 as "the consistent and systematic fair, just, and *impartial* treatment of all *individuals*…" (Emphasis added.) As the presenter stated, first "eliminate hierarchy, privilege…" which as seen in the Identity Project means "White privilege" and a "racist educational system." Then comes the application of reverse racism until "disparities will be eliminated when equity is fully achieved."

"Disparities between what, one might ask? In traditional Marxism/Communism, disparities between individuals are eliminated, leading to "equality of outcome" between each person (i.e. making everyone equally poor). Here, though, it is disparities between racial groups that "will be eliminated when equity is fully achieved." IES has essentially endorsed racial Marxism, more commonly known as Critical Race Theory. This language should be shocking to any party interested in non-discriminatory agency practices.

"Seeking equitable outcomes necessitates illegal disparate treatment on the basis of race; specifically, rectifying historic injustices with a reverse-racist approach of simultaneously disadvantaging White (and Asian) "hierarchies and privileged oppressors" on a systemic basis while advantaging Black (and Hispanic) persons on a systematic basis. This is reflected in racial quotas, resulting in what some have described as a progressivist "Quota Project." (See, Exhibit N, starting at p. 880.)

"The record of whistleblower's revelations, in conjunction with IES personnel's sworn testimony reflecting an emphasis on "science" and IES's disregard for legal requirements in favor of a political ideology reflecting equal outcomes rather than equal opportunity, reflects that IES has pivoted from merely collecting statistics and researching methodology (i.e. doing "the science") to "challeng[ing] and chang[ing]" "current manifestations of racism" through reverse racist policies. This obviously points towards a systemic problem that must be rectified by the type of

> investigation by Congress to which IES feels "immune" under the rubric of being an "independent" agency." (Whistleblower comments of Feb. 3, 2023, p. 27-28.)

Despite pointing-out these issues and deficiencies in the whistleblower's comments to the original ED report, the ED supplemental report failed to address violations of E.O. 13985 and the "equity" definition distinction – presumably because OSC failed to require that ED address this issue in its supplemental report.

ED's repeated failures to address this issue, and OSC's repeated failures to require that ED address it, are surprising in the context of ED's knowledge of the issues pertaining to both E.O. 13950 (since the original ED report cited it) and E.O. 14035 (since the supplemental report cited it). The latter also defines "equity" as "the consistent and systematic fair, just, and impartial *treatment* of all *individuals*" – yet neither ED report addressed whether either E.O. was violated by any grant or by the clearly discriminatory content on IES' platforms (specifically, its ED.gov website and YouTube channel). The question arises, again, whether ED's omission was intentional – and, by not requiring the "investigators" to address these issues, OSC has not followed through on its mission to assure that this relevant issue is not forgotten.

Regarding reverse-incorporation (above), the whistleblower stated:

> If neither Title VI nor the doctrine of reverse-incorporation prevent ED from directly engaging in racial discrimination (e.g. by ED deciding to fund grant applications that clearly discriminate on the basis of race) – then in ED's view, there is no legal authority to prevent this.

Because Executive Orders 13985 and 14035 define "equity" as "the consistent and systematic fair, just, and impartial *treatment* of all *individuals*" rather than "equal outcomes between racial groups," both Executive Orders do prohibit ED from directly engaging in racial discrimination (e.g. they prohibit ED deciding to fund grant applications that clearly discriminate on the basis of race) – or at least they should, if ED properly adhered to "the consistent and systematic fair, just, and impartial *treatment* of all *individuals*" definition of "equity." The problem is that ED is not following that definition and instead is harboring the illegally discriminatory "equal outcomes between racial groups" definition of "equity," thus violating both Executive Orders.

Because violations of E.O. 13985 and the "equity" definition distinction are not addressed, the "collective" reports *remain* deficient. OSC should request another supplemental report addressing this issue.

The *Students for Fair Admissions v. Harvard*, 600 U.S. ___ (2023) decision validated the whistleblower's pointing out "that our Constitution is colorblind."

On June 29, 2023, the U.S. Supreme Court issued its landmark decision in *SFFA v. Harvard* and *SFFA v. UNC* (collectively, *Students for Fair Admissions v. Harvard*, 600 U.S. ___ (2023)). The six-justice majority opinion reads, in relevant part (see, Exhibit AA, p. 74-113) (**bold** added):

Supplemental Whistleblower Comments to DI-21-000533

Footnote 2: Title VI provides that "[n]o 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." 42 U. S. C. §2000d. **"We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI."** ***Gratz v. Bollinger***, 539 U. S. 244, 276, n. 23 (2003). Although JUSTICE GORSUCH questions that proposition, no party asks us to reconsider it. **We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself.**

[…]

By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal. The culmination of this approach came finally in *Brown v. Board of Education*. In that seminal decision, **we overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government**. **[citations omitted]**; see also Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown v. Board of Education*, O. T. 1953, p. 65 ("**That the Constitution is color blind is our dedicated belief.**"); post, at 39, n. 7 (THOMAS, J., concurring).

[…]

The time for making distinctions based on race had passed. *Brown*, the Court observed, "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional." **[…] "[T]he ideal of equality before the law which characterizes our institutions" demanded as much.**

[…]

In the decades that followed, **this Court continued to vindicate the Constitution's pledge of racial equality**. Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone, all **by a transformative promise "stemming from our American ideal of fairness": "'the Constitution . . . forbids . . . discrimination by the General Government, or by the States, against any citizen because of his race.'"** ***Bolling v. Sharpe*****, 347 U. S. 497, 499 (1954)** (quoting *Gibson v. Mississippi*, 162 U. S. 565, 591 (1896) (Harlan, J., for the Court)).

[…]

These decisions reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U. S. 429, 432 (1984) (footnote omitted). We have recognized that repeatedly.

[…]

Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo*, 118 U. S., at 369. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal. v. Bakke*, 438 U. S. 265, 289–290 (1978) (opinion of Powell, J.).

[…]

Our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice v. Cayetano*, 528 U. S. 495, 517 (2000) (quoting *Hirabayashi v. United States*, 320 U. S. 81, 100 (1943)). That principle cannot be overridden except in the most extraordinary case.

[…]

These limits, *Grutter* explained, **were intended to guard against** two dangers that all race-based government action portends. The first is **the risk that the use of race will devolve into "illegitimate . . . stereotyp[ing]."** ***Richmond v. J. A. Croson Co.***, 488 U. S. 469, 493 (1989) (plurality opinion). […] **But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. […] It observed that all "racial classifications, however compelling their goals," were "dangerous."** ***Grutter***, 539 U. S., at 342. And it cautioned that **all "race-based governmental action" should "remai[n] subject to continuing oversight**

Supplemental Whistleblower Comments to DI-21-000533

[…]
To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. *Id*., at 342. […] The importance of an end point was not just a matter of repetition. It was the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection. The Court recognized as much: "[e]nshrining a permanent justification for racial preferences," the Court explained, "would offend this fundamental equal protection principle." *Ibid*.; see also *id*., at 342–343 (quoting N. Nathanson & C. Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 58 Chi. Bar Rec. 282, 293 (May–June 1977), for the proposition that "**[i]t would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life**").
[…]
As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz v. Bollinger*, 539 U. S. 244, 270 (2003) (internal quotation marks omitted). The programs at issue here do not satisfy that standard.[5]

Footnote 5: For that reason, **one dissent candidly advocates abandoning the demands of strict scrutiny**. See *post*, at 24, 26–28 (opinion of JACKSON, J.) (**arguing the Court must "get out of the way," "leav[e] well enough alone," and defer to universities and "experts" in determining who should be discriminated against). An opinion professing fidelity to history (to say nothing of the law) should surely see the folly in that approach.**

The race-based admissions systems that respondents employ also fail to comply with the twin **commands of the Equal Protection Clause that race** may never be used as a "negative" and that it **may not operate as a stereotype**.
[…]
We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U. S., at 333 (internal quotation marks omitted). That requirement is found throughout our Equal Protection Clause jurisprudence more generally. See, e.g., *Schuette v. BAMN*, 572 U. S. 291, 308 (2014) (plurality opinion) ("In cautioning against 'impermissible racial stereotypes,' this Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike . . . .'" (quoting *Shaw v. Reno*, 509 U. S. 630, 647 (1993))).
[…]
"**One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities**." *Rice*, 528 U. S., at 517. But when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike," *Miller v. Johnson*, 515 U. S. 900, 911–912 (1995) (internal quotation marks omitted)—at the very least alike in the sense of being different from nonminority students. In doing so, **the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution**." *Id*., at 912 (internal quotation marks omitted). **Such stereotyping can only "cause[] continued hurt and injury,"** *Edmonson*, 500 U. S., at 631, **contrary as it is to the "core purpose" of the Equal Protection Clause**, *Palmore*, 466 U. S., at 432.
[…]
The dissenting opinions resist these conclusions. They would instead uphold respondents' admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. Although both opinions are thorough and thoughtful in many respects, this Court has long rejected their core thesis.
[…]

Supplemental Whistleblower Comments to DI-21-000533

The dissents here **[…]** fail to cite *Hunt*. They fail to cite *Croson*. They fail to mention that the entirety of their analysis of the Equal Protection Clause—the statistics, the cases, the history—has been considered and rejected before. There is a reason the principal dissent must invoke Justice Marshall's partial dissent in *Bakke* nearly a dozen times while mentioning Justice Powell's controlling opinion barely once (JUSTICE JACKSON's opinion ignores Justice Powell altogether). **For what one dissent denigrates as "rhetorical flourishes about colorblindness,"** *post*, at 14 (opinion of SOTOMAYOR, J.), **are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law.** We understand the dissents want that law to be different. They are entitled to that desire. But they surely cannot claim the mantle of *stare decisis* while pursuing it.
[…]
The principal dissent wrenches our case law from its context, going to lengths to ignore the parts of that law it does not like. The serious reservations that *Bakke*, *Grutter*, and *Fisher* had about racial preferences go unrecognized. The unambiguous requirements of the Equal Protection Clause—"the most rigid," "searching" scrutiny it entails—go without note. *Fisher I*, 570 U. S., at 310. And the repeated demands that race-based admissions programs must end go overlooked—contorted, worse still, into a demand that such programs never stop.

Most troubling of all is what the dissent must make these omissions to defend: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. **Separate but equal is "*inherently* unequal," said *Brown*. 347 U. S., at 495 (emphasis added). It depends, says the dissent.**

That is a remarkable view of the judicial role—remarkably wrong. Lost in the false pretense of judicial humility that the dissent espouses is a claim to power so radical, so destructive, that it required a Second Founding to undo. "Justice Harlan knew better," one of the dissents decrees. *Post*, at 5 (opinion of JACKSON, J.). **Indeed he did**:

> **"[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting).**

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, **involve racial stereotyping**, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.
[…]
But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. **(A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name."** *Cummings v. Missouri*, 4 Wall. 277, 325 (1867). **[…] the student must be treated based on his or her experiences as an individual—not on the basis of race**.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

The judgments of the Court of Appeals for the First Circuit and of the District Court for the Middle District of North Carolina are reversed.

> *It is so ordered.*

Justice Thomas' concurrence elaborates on the majority opinion (Exhibit AA, p 114-171) stating:

> I join the majority opinion in full. I write separately to offer an originalist defense of the colorblind Constitution; to explain further the flaws of the Court's *Grutter* jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination.

The June 29, 2023 majority opinion (and Justice Thomas' concurrence) articulated the exact same view that the whistleblower articulated in his June 7, 2021 "Clarifying Questions" email to OSC. Their shared view was conveyed most concisely by Justice Harlan in his *Plessy* dissent, as quoted by both SCOTUS and the whistleblower:

> "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."

In several ways, the majority opinion is applicable to the situation at hand (to the Harvard grant, to the Indiana University grant, and to discriminatory content on the IES website and YouTube channel (i.e. the Anti-racism video by Iheoma Iruka of UNC)). The majority opinion:

1) Reaffirmed the "color-blind Constitution" view of Equal Protection (which the whistleblower termed "equal treatment of all individuals under law," per E.O. 13985) while rejecting the antisubordination view (which seeks "equal outcomes") [21],[22],[23],[24] ;

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[21] Majority opinion: "For what one dissent denigrates as "rhetorical flourishes about **colorblindness**," *post*, at 14 (opinion of SOTOMAYOR, J.), are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—**they are defining statements of law**."

[22] Majority opinion: "Justice Harlan knew better," one of the dissents decrees. *Post*, at 5 (opinion of JACKSON, J.). **Indeed he did: "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy***, 163 U. S., at 559 (Harlan, J., dissenting)."

[23] Justice Thomas' concurrence elaborating on the majority opinion: "Despite the extensive evidence favoring the colorblind view, as detailed above, **it appears increasingly in vogue to embrace an "antisubordination" view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. Such a theory lacks any basis in the original meaning of the Fourteenth Amendment.** […] advocates of the [1865 Freedmen's Bureau Act] explicitly disclaimed any view rooted in modern conceptions of antisubordination. To the contrary, **they explicitly clarified that the equality sought by the law was not one in which all men shall be "six feet high"; rather, it strove to ensure that freedmen enjoy "equal rights before the law" such that "each man shall have the right to pursue in his own way life, liberty, and happiness."** […] Properly understood, our precedents have largely adhered to the Fourteenth Amendment's demand for color-blind laws."

[24] Justice Thomas' concurrence elaborating on the majority opinion: "**Both experience and logic have vindicated the Constitution's colorblind rule and confirmed that the universities' new narrative cannot stand.** Despite the Court's hope in *Grutter* that universities would voluntarily end their race-conscious programs and further the goal of racial equality, the opposite appears increasingly true. **Harvard and UNC now forthrightly state that they racially discriminate** when it comes to admitting students, arguing that such discrimination is consistent with this Court's precedents. **And they, along with today's dissenters, defend that discrimination as *good*. More broadly, it is becoming increasingly clear that discrimination on the basis of race—often packaged as** "affirmative action" or **"equity" programs—are based on the benighted notion "that it is possible to tell when discrimination helps, rather than hurts, racial minorities."** *Fisher I*, 570 U. S., at 328 (THOMAS, J.,

2) Reaffirmed that Title VI is "coextensive" with Equal Protection (i.e. racial discrimination that violates Equal Protection "committed by an institution that accepts federal funds also constitutes a violation of Title VI.") [25] ;
3) Reaffirmed that Equal Protection applies to the federal government (i.e. affirming the doctrine of reverse-incorporation/substantive due process) [26],[27],[28] ;
4) Reaffirmed that racial stereotyping is illegally discriminatory [29],[30],[31],[32] ;

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concurring). We cannot be guided by those who would desire less in our Constitution, or by those who would desire more. **"The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."** *Grutter*, 539 U. S., at 353 (opinion of THOMAS, J.)."

[25] Majority opinion: "Footnote 2: Title VI provides that "[n]o 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." 42 U. S. C. §2000d. **"We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI."** ***Gratz v. Bollinger***, 539 U. S. 244, 276, n. 23 (2003). Although JUSTICE GORSUCH questions that proposition, no party asks us to reconsider it. **We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself."**

[26] Majority opinion: "By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal. The culmination of this approach came finally in *Brown v. Board of Education*. In that seminal decision, **we** overturned *Plessy* for good and **set firmly on the path of invalidating all *de jure* racial discrimination by the** States and **Federal Government**."

[27] Majority opinion: "'**the Constitution . . . forbids . . . discrimination by the General Government**, or by the States, against any citizen because of his race.'" ***Bolling v. Sharpe***, 347 U. S. 497, 499 (1954) (quoting *Gibson v. Mississippi*, 162 U. S. 565, 591 (1896) (Harlan, J., for the Court))."

[28] *Keener v. United States*, No. 2:22-CV-1640-DCN, 2023 WL 2478367, at *n.1 (D.S.C. Mar. 13, 2023) (Footnote 1: […] **In addition to procedural and substantive due process, the Supreme Court has held that the Fifth Amendment implicitly guarantees the right to equal treatment enshrined in the Fourteenth Amendment. *See Bolling v. Sharpe,* *347 U.S. 497 (1954)*; *see also* *United States v. Windsor,* *570 U.S. 744*, 774 ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."). Thus, courts apply Fourteenth Amendment jurisprudence to equal protection claims brought against the federal government. *See Buckley v. Valeo,*** 424 U.S. 1, 93 (1976) **("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.");** *accord* ***Sessions v. Morales-Santana,*** 582 U.S. 47, 52 n.1 (2017).)

[29] Majority opinion: "These limits, *Grutter* explained, were intended to guard against **two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate . . . stereotyp[ing]."** *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 493 (1989) (plurality opinion). […] But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. […] It observed that **all "racial classifications, however compelling their goals," were "dangerous."** *Grutter*, 539 U. S., at 342."

[30] Majority opinion: "The race-based admissions systems that respondents employ also fail to comply with **the** twin **commands of the Equal Protection Clause that race** may never be used as a "negative" and that it **may not operate as a stereotype**."

[31] Majority opinion: "**the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution."** *Id.*, at 912 (internal quotation marks omitted). **Such stereotyping can only "cause[] continued hurt and injury,"** *Edmonson*, 500 U. S., at 631, **contrary as it is to the "core purpose" of the Equal Protection Clause**, *Palmore*, 466 U. S., at 432."

[32] Justice Thomas' concurrence elaborating on the majority opinion: "**In fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities. Of course, that is false.** See *ante*, at 28–30 (noting that the Court's Equal Protection Clause jurisprudence forbids such stereotyping)."

5) Reaffirmed that racial classifications alone (*even without any disparate treatment*) are subject to strict scrutiny – and, if they cannot survive that high standard, are illegally discriminatory [33],[34],[35] ;
6) Affirmed that the racial essentialism of the so-called "experts" (e.g. at Harvard and UNC) is illegally discriminatory [36],[37],[38],[39],[40].

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[33] Majority opinion: "**As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.**" *Gratz v. Bollinger*, 539 U. S. 244, 270 (2003) (internal quotation marks omitted)."

[34] Majority opinion: "**Separate but equal is "inherently *unequal*," said *Brown***. 347 U. S., at 495 (emphasis added). It depends, says the dissent."

[35] Justice Thomas' concurrence elaborating on the majority opinion: "This Court rightly reversed course in *Brown v. Board of Education*. […] **Importantly, in reaching this conclusion, *Brown* did not rely on the particular qualities of the Kansas schools. The mere separation of students on the basis of race—the "*segregation* complained of,"** *id*., at 495 (emphasis added)—**constituted a constitutional injury**. See *ante*, at 12 ("Separate cannot be equal"). […] **Today, our precedents place this principle beyond question.** In assessing racial segregation during a race-motivated prison riot, for example, **this Court applied strict scrutiny without requiring an allegation of unequal treatment among the segregated facilities**. *Johnson v. California*, 543 U. S. 499, 505–506 (2005). **The Court today reaffirms the rule, stating that, following *Brown*, "[t]he time for making distinctions based on race had passed."** *Ante*, at 13. **"What was wrong" when the Court decided *Brown* "in 1954 cannot be right today."** *Parents Involved*, 551 U. S., at 778 (THOMAS, J., concurring). Rather, **we must adhere to the promise of equality under the law declared by the Declaration of Independence and codified by the Fourteenth Amendment.**"

[36] Majority opinion: "**one dissent candidly advocates abandoning the demands of strict scrutiny**. See *post*, at 24, 26–28 (opinion of JACKSON, J.) (**arguing the Court must** "get out of the way," "leav[e] well enough alone," and **defer to universities and "experts" in determining who should be discriminated against**). **An opinion professing fidelity to history (to say nothing of the law) should surely see the folly in that approach.**"

[37] Majority opinion: "…**the student must be treated based on his or her experiences as an individual—not on the basis of race. Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.**"

[38] Justice Thomas' concurrence elaborating on the majority opinion: "Respondents and the dissents argue that the universities' race-conscious admissions programs ought to be permitted because they accomplish positive social goals. I would have thought that history had by now taught a "greater humility" when attempting to "distinguish good from harmful uses of racial criteria." *Id.*, at 742 (plurality opinion). […] **Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories**." *Parents Involved*, 551 U. S., at 780–781 (THOMAS, J., concurring). **We cannot now blink reality to pretend, as the dissents urge, that affirmative action should be legally permissible merely because the experts assure us that it is "good" for black students**. Though I do not doubt the sincerity of my dissenting colleagues' beliefs, **experts and elites have been wrong before—and they may prove to be wrong again. In part for this reason, the Fourteenth Amendment outlaws government-sanctioned racial discrimination of all types**."

[39] Justice Thomas' concurrence elaborating on the majority opinion: "**The solution to our Nation's racial problems thus cannot come from policies grounded in** affirmative action or some other conception of **equity. Racialism simply cannot be undone by different or more racialism. Instead, the solution announced in the second founding is incorporated in our Constitution: that we are all equal, and should be treated equally before the law without regard to our race. Only that promise can allow us to look past our differing skin colors and identities and see each other for what we truly are: individuals with unique thoughts, perspectives, and goals, but with equal dignity and equal rights under the law**."

[40] Justice Thomas' concurrence elaborating on the majority opinion: "**JUSTICE JACKSON has a different view**. […] As she sees things, we are all inexorably trapped in a fundamentally racist society, with the original sin of slavery and the historical subjugation of black Americans still determining our lives today. *Post*, at 1–26 (dissenting opinion). The panacea, she counsels, is to unquestioningly accede to the view of elite experts and reallocate society's riches by racial means as necessary to "level the playing field," all as judged by racial metrics. *Post*, at 26. I strongly disagree. […] JUSTICE JACKSON then builds from her faulty premise to call for action, arguing that courts should defer to "experts" and allow institutions to discriminate on the basis of race. **Make no mistake: Her**

Essentially, the six-justice majority endorsed "equal treatment of all individuals under law," while the three-justice minority endorsed "equal outcomes." However, it is important to remember that the majority opinion reflects the Constitutional mandate.

The conflict within the Court mirrors the conflict between the whistleblower and ED. It is precisely because ED knows that the whistleblower had correctly interpreted the law that ED refused to address or even mention the equal protection component of the Due Process Clause of the Fifth Amendment (a.k.a. reverse-incorporation) (a.k.a. substantive due process).

Apparently for this same reason, ED refused to address or even mention the clearly discriminatory sections of the Harvard grant – particularly the line that: "White teachers in particular … struggle with acknowledging their own privilege and recognizing racism." Because, if ED were to address this line, the only reasonable conclusion would be that it is obviously illegally discriminatory because: (1) it is a racial classification, and (2) it is a racial stereotype.

ED likely recognized the illegal discrimination of the Harvard grant from the moment it first read that line. At the very latest, the "investigators" certainly recognized the discrimination when the whistleblower pointed it out to them during his second hour-long interview on July 8, 2022. The whistleblower screenshared an email containing this quote, read it out-loud to the investigators, then explained that this constituted illegal disparate treatment on the basis of race because the quote (1) separated out white teachers "in particular" then (2) treated them differently from non-white teachers by ascribing negative characteristics to them (i.e. struggling to acknowledge their own privilege and recognize racism). There was then an awkward pause in the conversation, after which the "investigators" confirmed they understood and said they would require more time to complete their report.

For this same reason, ED refused to address or even mention the clearly discriminatory sections of the Indiana University grant and the Anti-racism video by Iheoma Iruka of UNC on the IES website and YouTube channel. (The whistleblower finds it particularly ironic that ***both*** Harvard ***and*** UNC were found to be illegally discriminating on the basis of race in their admissions processes, and now those exact same institutions are again illegally discriminating on the basis of race here – and this time, aided and abetted by ED.)

ED's repeated refusal to address the most clearly discriminatory quotations is astounding and should be concerning to OSC. By refusing to require that ED address the most salient aspects of these grants, OSC may be seen as facilitating ED's failures. If allowed to persist, however, ED would be willfully violating mandatory precedent directly from the U.S. Supreme Court. After

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dissent is not a vanguard of the innocent and helpless. It is instead a call to empower privileged elites, who will "tell us [what] is required to level the playing field" among castes and classifications that they alone can divine. *Post*, at 26; see also post, at 5–7 (GORSUCH, J., concurring) (explaining the arbitrariness of these classifications). **Then, after siloing us all into racial castes and pitting those castes against each other, the dissent somehow believes that we will be able—at some undefined point—to "march forward together" into some utopian vision.** *Post*, at 26 (opinion of JACKSON, J.). Social movements that invoke these sorts of rallying cries, historically, have ended disastrously. **Unsurprisingly, this tried-and-failed system defies both law and reason.** […] **History has taught us to abhor theories that call for elites to pick racial winners and losers in the name of sociological experimentation.**"

submitting these supplemental comments to OSC, the Special Counsel seems bound to require another supplemental report from ED addressing the Court's recent decision in *Students for Fair Admissions v. Harvard*, 600 U.S. ___ (2023) – along with *every* other deficiency identified by the whistleblower.

Specifically, the Special Counsel would be bound to require that ED perform an Equal Protection analysis (in light of the majority opinion in *SFFA v. Harvard*) to determinate each of the following:

1) Whether ED violated Title VI and/or the equal protection component of the Due Process Clause of the Fifth Amendment (since both apply to ED, and both use the same Equal Protection analysis) in relation to
    a. Funding the discriminatory content of the Harvard grant;
    b. The discriminatory content of the Indiana University grant; and
    c. Funding (and/or placing on the IES YouTube channel and IES section of the ED.gov website) the discriminatory UNC "Anti-racism" video;
2) Whether Harvard violated Title VI in relation to the discriminatory content of the Harvard grant;
3) Whether Indiana University violated Title VI and/or the Equal Protection Clause of the Fourteenth Amendment in relation to the discriminatory content funded by the Indiana University grant; and
4) Whether UNC violated Title VI and/or the Equal Protection Clause of the Fourteenth Amendment in relation to the discriminatory content of the UNC "Anti-racism" video.

Neither ED report addressed the discriminatory elements of the Harvard grant application.

On August 6, 2020, the whistleblower emailed his ED team leader some of his concerns regarding the Harvard grant being illegally discriminatory – a grant that the whistleblower had been assigned to read and assess, and which he did read as part of his job (as admitted by ED in the EEOC hearing). In that email, the whistleblower quoted sections of the Harvard grant application directly:

> "However, although teachers of all backgrounds vary in their own ERI formation and attitudes toward discussing racial issues, **White teachers in particular** (currently 80% of Kl2 educators; NCES, 2019) **struggle with acknowledging their own privilege and recognizing racism**, which can hinder productive conversations about race with students (Tatum, 1992; Utt & Tochluk, 2016). **These challenges can result in teachers** acting on their racial biases, **adopting a colorblind approach that can create a hostile learning environment for ERM students**, and hindering teachers' ability to establish strong relationships with their ERM students (Castro Atwater, 2008).
>
> "The training is also **designed to address ethnic-racial systemic inequities**. Activities and training content will **prepare teachers to understand and be able to explain how institutional racism has resulted in an educational system and practices that reproduce social inequalities and result in symptoms such as the academic achievement gap**. Educators will be able to explain and provide at least one specific example of how institutional

> racism plays out in the U.S. education system in a manner that reproduces ethnic-racial inequalities in academic outcomes (e.g., **by reifying the notion that Whites do not have an ethnic-racial identity and therefore are the "norm," thereby othering youth from ERM backgrounds**)." (Emphasis in original email to the whistleblower's team leader) (Whistleblower comments of February 3, 2023 on the original ED report, Exhibit D, p. 111-112)

On September 18, 2020, during a one-on-one meeting between the whistleblower and his first-line supervisor, the whistleblower opposed the illegally discriminatory Harvard grant by directly quoting the grant to his supervisor – specifically, the following quotations:

> "the Identity Project training program increases teachers' ERI development, reduces their colorblind racial ideology…"; "White teachers in particular struggle with acknowledging their own privilege and recognizing racism"; "The training is also designed to address ethnic-racial systemic inequities. … Educations will be able to explain and provide at least one example of how institutional racism plays out in the U.S. education system in a manner that reproduces ethnic-racial inequalities in academic outcomes (e.g. by reifying the notion that Whites do not have an ethnic-racial identity and therefore are the "norm," thereby othering youths from ERM backgrounds)."

During that same conversation, the first-line supervisor repeatedly interrupted and spoke-over the whistleblower while he was quoting the illegally discriminatory language of the Harvard grant. The first-line supervisor repeatedly interspersed the phrase "out of scope" directed to these issues with her interruptions, refusing to even listen to the discriminatory language of the grant application (a grant that she told the whistleblower she had not even read for herself. She admitted she read only the abstract).

It was this particular language of the Harvard grant application itself that the whistleblower reasonably believed to be illegally discriminatory – language which resulted in OSC finding "a substantial likelihood of wrongdoing" regarding the Harvard grant, causing OSC to refer the grant to ED for further investigation resulting in the ED report and supplemental report.

During the second hour-long interview with the "investigators" on July 8, 2022, the "investigators" brought-up the Harvard grant's abstract (not the grant application itself) and asked the whistleblower to point to the discriminatory language. The whistleblower then screenshared the aforementioned August 6, 2020 email and read it out-loud to the investigators (including the "White teachers in particular struggle with acknowledging their own privilege and recognizing racism" quote), then explained that this constituted illegal disparate treatment on the basis of race because the quote (1) separated out white teachers "in particular" then (2) treated them differently from non-white teachers by ascribing negative characteristics to them (i.e. struggling to acknowledge their own privilege and recognize racism). There was then an awkward pause in the conversation, after which the "investigators" confirmed they understood and said they would require more time to complete their report.

Despite knowing perfectly well which sections of the Harvard grant application the whistleblower was concerned about, and certainly under a charge to determine whether and to what extent similar illegal elements existed in that grant, ***the original ED report failed to address or even mention any of the above quotations let alone provide any comprehensive analysis.***

In his previous comments to the original ED report, the whistleblower pointed-out this deficiency and cited another particularly egregious quotation from the Harvard grant application:

> "The learning goals for the second day of the training are to build teachers' ***understanding of systemic inequities, practice teachers' facilitation strategies around race and ethnicity, and to reflect on historic and contemporary factors that contribute to ethnic-racial inequality (e.g., White supremacy)*** and to apply this understanding to their students' meaning making, interpretations, and social positions. Day 2 of the summer camp intensive covers material related to Sessions 3 and 4 of the Identity Project curriculum. …..To meet the learning goals, Day 2 also involves teachers in a series of activities and discussions focused on ***Whiteness*** including: learning shared definitions around ***White supremacy*** and how it shapes the context in which all students are developing their identities, ***examining the role of power and privilege*** in their own identities and classrooms, and working through pedagogical strategies for addressing these ideas in their classrooms." (Emphasis added.) (Harvard grant application, p. 92) (Whistleblower comments of February 3, 2023 on the original ED report, p. 21-22)

Despite including all of the above quotations in his previous whistleblower comments, the supplemental report still failed to address or even mention any of these quotations. Apparently, OSC failed to require that ED address these specific quotations.

It is obvious ED is avoiding addressing the illegally discriminatory language: the quotations are so clearly discriminatory on their face and form the basis of the whistleblower's complaints so that even ED cannot possibly or objectively assess the language as non-discriminatory. In any case, the failure to provide any analysis speaks volumes about the lack of quality and fidelity to the required statutory purpose of the report(s). Instead, while failing to address the most discriminatory quotes listed above, the supplemental report (p. 6, fn. 15) claims that:

> "What the whistleblower fails to note is that the principal investigator presents a scientifically valid reason for incorporating "cultural identification" into teaching, along with the positive effects of doing so. "Education scholars have noted that teachers' engagement in CSP represents a key lever of change to reduce ethnic-racial academic inequalities (Delpit, 2006; Hammond, 2015)…. **[…]** Thus, teacher training is an essential component of preparing teachers to implement an ERI-based curriculum, and implementation of such curriculum will provide teachers with concrete and manualized lesson plans to enact CSP in their classrooms.""

By using this more *seemingly* benign quote, ED attempts to portray the Harvard grant as *merely* "incorporating 'cultural identification' into teaching" – and ED further claims that there are "positive effects of doing so." The first problem is that ED's characterization of the Harvard grant is *totally* inaccurate given the ***clearly*** discriminatory quotes that ED omitted from both the original Report and the supplemental report. Further, a mere recitation of a justification for the grant's language instead of an analysis is not sufficient.

The second problem is that, per the majority opinion in *SFFA v. Harvard*, the Harvard grant is subject to strict scrutiny for numerous reasons (including: 1) its emphasis on race, 2) its use of racial classifications *at all* (*even without any disparate treatment*), and 3) its racial stereotypes and other forms of disparate treatment) – and that so-called "scientifically valid reason" ***cannot possibly*** survive the high ("exacting") standard of strict scrutiny. Yet ED addresses *none of this* in either report.

Therefore, the "collective" reports *remain* deficient. OSC should request another supplemental report addressing this issue.

The ED reports erroneously defended *without the required analysis* the assertion that the Harvard grant was not racially discriminatory in violation of Title VI and was "objective, secular, neutral, and nonideological and [was] free of partisan political influence and racial, cultural, gender, or regional bias." ED's mere "say so" is insufficient.

In his "Clarifying Questions" email to [redacted] on June 7, 2021, the whistleblower wrote the following (see, Whistleblower comments of Feb. 3, 2023, Exhibit B, p. 80-82):

> Regarding IES & the Harvard grant:
>
> Per 20 U.S.C. § 9514(f)(7):
> "(f) The duties of the Director shall include the following:
> "(7) 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.
>
> Chevron analysis, Step 1: Statute is likely unambiguous under both approaches: plain meaning (Scalia approach), and also if considering legislative history. If unambiguous, the "activity" of IES deciding to award, and then actually awarding, ED funding to the Harvard grant application almost certainly fails to fulfill all the statutory requirements (just *read the grant application itself*, with its language about reducing colorblind racial ideology, white privilege, etc. etc.).
>
> If ambiguous at Step 1, see below ("deference generally"), which applies to Chevron Step 2.
>
> **[…]**
>
> Deference generally:
>
> The set of facts I've alleged isn't "normal"; there's a deeper problem here, a problem with the grant-making process. In a "normal case," there are three premises:
> - First, that "the agency" *actually made* an interpretation of an ambiguous statute (Chevron deference) or regulation that "the agency" promulgated (Auer (now Kisor?) deference);
> - Second, that "the agency" *actually has* some "expertise and experience" *and actually used it when it made its interpretation* (Skidmore deference); and
> - Third, that "agencies ([u]nlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public" (Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019)) – and *this is the basis for the agency getting any kind of deference at all*.
>
> The facts I've alleged undermine all three premises.
>
> What exactly constitutes "the agency," and "the agency's interpretation"? I'm alleging that the agency's legal office (OGC) was essentially Missing in Action: no uniform, regular legal review of individual grant applications (14,000 funded annually, and many more applications unfunded) built into the process. That left only two offices that were "reviewing" the actual grant applications – the PO, and the HSR Team.

Supplemental Whistleblower Comments to DI-21-000533

[…]

So we're talking about a few career federal employees and/or contractors at the POs (the ones who *actually read the grant applications*) being "the agency," and the "score sheets" for the Harvard and Fort Wayne grants being both the "agency interpretations" and the reasoning.

The "score sheets" for the Harvard and Fort Wayne grants had not been uploaded into G5, so I had no clue whether someone at the PO had even noticed any of the same legal issues that I noticed, much less whether they'd reached a decision on those issues or provided any sort of reasoning in support of their decision. I thought it most likely that *nobody* at the PO had noticed the legal issues; as I mentioned, the PO staff have backgrounds in academia – they're not lawyers. Which is why I asked for OGC legal review.

[…]

It never got to the point where I was questioning an "agency interpretation" because, it seemed to me, *nobody* had addressed the legal issues that I noticed and *there was no agency interpretation* – and *nobody would tell me*: 1) *if* there was an agency interpretation, much less 2) what that interpretation *actually was*. (Why wouldn't anyone tell me? Getting back to the aforementioned "avoidance of accountability" and "culture of fear," I think it's likely that *nobody* wanted to be on record regarding *any* of this.)

If you decide to refer for investigation, I think it likely that (at least some, if not most, of) the "interpretation" and "reasoning" ED provides OSC will be *post hoc* – inadequate under Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

Regarding the third premise (of political accountability): The Court in Overton Park, like in most judicial decisions, talks about "review of the Secretary's decision," "the Secretary's construction of the evidence," "if the Secretary acted within the scope of his authority," etc. etc. But in the situation I described above, *the Secretary* (Betsy DeVos) likely *didn't know about any of this stuff*, primarily because she was a political appointee (and of the Trump administration at that), and us career federal employees *weren't telling the politicals what they needed to know* (see my previous email; **SECOND-LINE SUPERVISOR**'s comment at the **[January 14, 2021]** OAGA meeting **[that he knew it had "been difficult for all of you" (meaning us federal employees) "under this administration" (meaning the Trump administration)]** was particularly illustrative). If *the Secretary* had known exactly how *her* authority (delegated to us career employees) was being used, she almost certainly would have intervened (if her public statements and those of President Trump, among other things, are any indication) – which she did have the authority to do (see previous email).

In addition to providing the so-called "investigators" with his "Clarifying Questions" email, during his second hour-long interview with the "investigators" on July 8, 2022, the whistleblower screen-shared his email and walked the "investigators" through his *Chevron* analysis.

In the original report, ED erroneously concluded the Harvard grant was not racially discriminatory in violation of Title VI and was "objective, secular, neutral, and nonideological and [was] free of partisan political influence and racial, cultural, gender, or regional bias."

In his previous comments on the original ED report (p. 22-23), the whistleblower wrote:

Supplemental Whistleblower Comments to DI-21-000533

> As described above, the Harvard grant violated 20 USC § 9514(f)(7) ("ESRA") and Title VI because of its glaring racial discrimination. However, under ESRA, IES must ensure its programs are "objective, secular, neutral, and non-ideological and are free of partisan political influence and racial, cultural, gender, or regional bias."
>
> During the whistleblower's second meeting with the ED investigators, he pointed-out that the Harvard grant promotes more than just isolated racial discrimination. Rather, the grant's references to "Whiteness," "White privilege," "systemic racism," etc. are also part-and-parcel of a partisan discriminatory ideology of the political Left, often labeled Critical Race Theory. As such, the Harvard grant is clearly not "free of partisan political influence," nor is it "non-ideological" (since Critical Race theory is an ideology stemming from Marxism, another ideology). *See*, Exhibit B. In addition, the grant is not for merely studying an academic topic, but to actively teach this political ideology which also happens to be racist. No competent investigator could miss this related issue.
>
> Just to make the point clear, the whistleblower also pointed-out that the radical ideology purveyed by the Harvard grant (Critical Race Theory, and critical theory generally) fundamentally rejects the notion of objective truth, resulting in the grant not being "objective." While discussing with the investigators, the whistleblower pointed to a *Chevron* analysis within his "Clarifying Questions" email (Exhibit B) to indicate that the statutory language of "objective, secular, neutral, and non-ideological and are free of partisan political influence" means exactly that. See, Exhibit B, p. 80. The statute is not ambiguous, nor is the racism of the Harvard grant's political ideology.
>
> In its Report, ED refers to Establishment Clause jurisprudence, essentially arguing that "objective, secular, neutral, and non-ideological" means only "not religious." Evidently the Report stopped at the ESRA admonition that grants must be "free of partisan political influence." This is absurd on its face. The statute is clear, and it means what it says. ED's assertion otherwise reveals how desperate the investigators were to cover-up wrongdoing.

First, in the supplemental report, ED maintained its erroneous position that the Harvard grant was not racially discriminatory at all, violating neither Title VI nor ESRA's requirement that "activities conducted or supported by [IES be] free of … racial … bias." ED reached this erroneous conclusion because it ***intentionally*** failed to address the Harvard grant's most ***clearly*** discriminatory quotations (mentioned previously, above) in the original ED report and the supplemental report.

Second, in the supplemental report (Footnote 16, p. 7), ED maintained its erroneous position that:

> "To the extent that the Whistleblower alleges that this grant to Harvard University is not "nonideological," it is important to note that the statutory phrase "secular, neutral, and nonideological" is derived from the Supreme Court's Establishment Clause jurisprudence and the term "nonideological" cannot be read in isolation."

It appears that, to disingenuously maintain its assertion that "the term 'nonideological' cannot be read in isolation," ED egregiously failed to use the legally-required tool of statutory interpretation: a *Chevron* analysis.

The U.S. Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, Inc., 468 U.S. 837 (1984) is quite possibly ***the most important decision in all of administrative law***. Here, the Court created "the Chevron two-step" analysis – which is the legal framework for evaluating whether an Agency's interpretation of a statute is valid. This basic

framework (with only minor subsequent changes) has been the law of the land for the past 39 years ***and remains black letter law today***.

The first "step" is asking whether the statute in question is ambiguous. If the answer is "no, the statute is unambiguous," the analysis stops there. The correct interpretation of the statute is whatever interpretation the judge decided was unambiguous. Because the statute was unambiguous, the second "step" (considering whether the Agency's proposed interpretation is reasonable) is never taken.

Regarding 20 U.S.C. §§ 9511(b)(2)(B), 9514(f)(7), 9516(b)(8) (i.e. "ESRA", the statutes applicable to IES), the whistleblower's position is that the term "nonideological" is ***not*** ambiguous. It means exactly what it says – nonideological. And the Harvard grant is not "nonideological" because it promotes the ideologies of Critical Race Theory, Critical Theory, radical subjectivism, and Marxism.

ED is implicitly arguing all of the following: (1) the statute is ambiguous, and (2) because the statute is ambiguous, the second "step" of *Chevron* should be taken, and (3) the Agency's proposed interpretation of "secular, neutral, and nonideological" as meaning ***merely*** "not religious" ***and prohibiting nothing else*** is "reasonable." And ED is arguing all of this ***implicitly***, without ever doing a *Chevron* analysis.

The whistleblower's position on ED's assertion is that, even if the statute were ambiguous (which it is not), ED's proposed interpretation of "secular, neutral, and nonideological" as meaning merely "not religious" and prohibiting nothing else is neither "reasonable" nor defensible. If Congress meant to merely prohibit the funding of religious grants and other activities, Congress could have written the statute that way. Rather than the statute 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,"

Congress could have written the statute as ensuring

> "that activities conducted or supported by the Institute are free of **religious or** partisan political influence and racial, cultural, gender, or regional bias."

But that is not what Congress actually did. Instead, Congress included a prohibition against activities that are "secular, neutral, and nonideological" – so those words mean what they say. They do not mean ***merely*** "not religious"; they prohibit more than just that.

Third, the original ED report failed to address ESRA's requirement that IES' activities be "objective." It's important to note that ED's erroneous interpretation is ***only*** that "secular, neutral, and nonideological" means merely "not religious"; ED did not address the word "objective" at all – despite the whistleblower previously informing the so-called "investigators" during his second hour-long interview on July 8, 2022 that the Harvard grant was not "objective" because it was based on radical subjectivism that rejected the existence of objective truth.

Supplemental Whistleblower Comments to DI-21-000533

Despite the whistleblower's previous comments on the original ED report stating that "the radical ideology purveyed by the Harvard grant (Critical Race Theory, and critical theory generally) fundamentally rejects the notion of objective truth, resulting in the grant not being 'objective,'" the supplemental report failed to address ESRA's requirement that IES' activities be "objective."

Therefore, the "collective" reports *remain* deficient. OSC should request another supplemental report addressing this issue.

Fourth, the original ED report erroneously concluded that the Harvard grant did not violate ESRA's requirement that IES' activities be "free of partisan political influence" solely because

> "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." (Original ED report, p. 18.)

In his previous comments on the original report (p. 23), the whistleblower wrote:

> "the grant's references to "Whiteness," "White privilege," "systemic racism," etc. are also part-and-parcel of a partisan discriminatory ideology of the political Left, often labeled Critical Race Theory. As such, the Harvard grant is clearly not "free of partisan political influence," nor is it "non-ideological" (since Critical Race theory is an ideology stemming from Marxism, another ideology). *See*, Exhibit B. In addition, the grant is not for merely studying an academic topic, but to actively teach this political ideology which also happens to be racist."

In the supplemental report (p. 8-10), ED erroneously concluded that:

> "If the Department's political leadership had an opportunity to influence the Director into rejecting this proposal based on its content or on the leadership's opposition to diversity, equity, and inclusion training, or on the fact that "half the country wouldn't support funding it" then it could run afoul of the statutory responsibilities to ensure that activities of IES are carried out in a manner that is free of partisan political interference. The fact that none of those things occurred and that the grant to Harvard was funded, reinforces the fact that IES adhered to its statutory obligations.
> **[…]**
> "Investigating this allegation, the Department conducted a thorough review of the applicable laws and regulations, policies, practices, procedures, and memoranda specific to the Harvard grant. That review yielded no evidence that IES was pursuing a particular ideological or political objective around the topic of ethnic and racial identity **[…]** The Department found no evidence, and the whistleblower provided us no evidence, to support the assertion that IES was pushing a particular ideological or political agenda through this grant competition or by awarding the Harvard grant.
>
> "IES' mission is to provide scientific evidence on which to ground education practice and policy and to share this information in formats that are useful and accessible to educators, parents, policymakers, researchers, and the public. This mission would be compromised if individuals outside of the scientific community influenced/determined/decided what was worthy of scientific study/review based on partisan political influence, rather than a commitment to science. The record shows that IES maintained both its commitment to scientific objectivity and scientific decision-making by adhering to its principles of scientific peer review, as well as its commitment to ensuring that funding decisions are not subject to undue political interference."

Supplemental Whistleblower Comments to DI-21-000533

ED's arguments are truly absurd. ED disingenuously argued the following: First, that the ***entire*** Harvard grant is not illegally discriminatory on the basis of race (including the most ***clearly*** discriminatory sections that both reports ***intentionally*** failed to quote) and had no "particular ideological or political agenda" ***at all*** because funding the Harvard grant was IES "just following the science." This is the crux of the issue: ED erroneously concluded that funding illegally discriminatory Critical Race Theory is merely "scientific objectivity" and thus is "free of partisan political influence."

Second, ED disingenuously argued that "If the Department's political leadership had an opportunity to influence the Director into rejecting this proposal based on its content or on the leadership's opposition to diversity, equity, and inclusion training," that ***would*** qualify as "partisan political influence" and thus violate ESRA.

A recitation of the Harvard grant's ***clearly*** discriminatory quotations (which both reports intentionally failed to address or even mention) is instructive:

> "However, although teachers of all backgrounds vary in their own ERI formation and attitudes toward discussing racial issues, **White teachers in particular** (currently 80% of Kl2 educators; NCES, 2019) **struggle with acknowledging their own privilege and recognizing racism**, which can hinder productive conversations about race with students (Tatum, 1992; Utt & Tochluk, 2016). **These challenges can result in teachers** acting on their racial biases, **adopting a colorblind approach that can create a hostile learning environment for ERM students**, and hindering teachers' ability to establish strong relationships with their ERM students (Castro Atwater, 2008).
>
> "The training is also **designed to address ethnic-racial systemic inequities**. Activities and training content will **prepare teachers to understand and be able to explain how institutional racism has resulted in an educational system and practices that reproduce social inequalities and result in symptoms such as the academic achievement gap**. Educators will be able to explain and provide at least one specific example of how institutional racism plays out in the U.S. education system in a manner that reproduces ethnic-racial inequalities in academic outcomes (e.g., **by reifying the notion that Whites do not have an ethnic-racial identity and therefore are the "norm," thereby othering youth from ERM backgrounds**)." (Emphasis in original email to the whistleblower's team leader) (Whistleblower comments of February 3, 2023 on the original ED report, Exhibit D, p. 111-112)
>
> "The learning goals for the second day of the training are to build teachers' ***understanding of systemic inequities, practice teachers' facilitation strategies around race and ethnicity, and to reflect on historic and contemporary factors that contribute to ethnic-racial inequality (e.g., White supremacy)*** and to apply this understanding to their students' meaning making, interpretations, and social positions. Day 2 of the summer camp intensive covers material related to Sessions 3 and 4 of the Identity Project curriculum. …..To meet the learning goals, Day 2 also involves teachers in a series of activities and discussions focused on ***Whiteness*** including: learning shared definitions around ***White supremacy*** and how it shapes the context in which all students are developing their identities, ***examining the role of power and privilege*** in their own identities and classrooms, and working through pedagogical strategies for addressing these ideas in their classrooms." (Emphasis added.) (Harvard grant application, p. 92) (Whistleblower comments of February 3, 2023 on the original ED report, Exhibit D, p. 21-22)

Supplemental Whistleblower Comments to DI-21-000533

According to ED, if former President Trump or former Secretary Betsy DeVos had attempted to not fund or defund this Harvard grant because of its illegally discriminatory, politically partisan content, that would have qualified as "partisan political influence" in violation of ESRA.

Presumably, ED's stated position also prevents any *future* president or Secretary of Education from preventing IES from funding clearly illegally discriminatory, politically partisan grants or other activities.

Congress should be alarmed at ED's absurd position on this issue, if for nothing else than it is IES's proclamation that it is not subject to any supervision except "science." Further, ED's assertion that illegal discrimination is merely "science" is reminiscent of the argument that the infamous Tuskegee experiment was "scientific."

The Special Counsel should assess and call-out ED's position on this issue for what it is: "not reasonable."

Neither report addressed the most salient expressions of discrimination contained in the six video podcasts funded by the Indiana University grant.

During the whistleblower's third hour-long interview with the "investigators" on November 21, 2022, the whistleblower screen-shared transcripts of six "Anti-Racism" video podcasts funded by the OESE grant to Indiana University's Midwest and Plains (MAP) Equity Assistance Center (EAC) (hereafter, "the Indiana University grant") – transcripts that the whistleblower had previously emailed to the "investigators" and later included in his whistleblower comments on the original ED report (see, Exhibit J, p. 381-394).

Despite sharing and discussing these transcripts with the so-called "investigators" prior to their issuance of the original ED report, **not even a single** relevant quotation was included in the original ED report.

The whistleblower mentioned this omission in his previous comments on the original ED report and also listed the most relevant quotations, as follows (p. 17-18) (**bold** added):

> Vodcast #1. Comments by Kathleen King Thorius, the principal investigator (PI): "[**A]s a white, non-disabled, cis[gender] woman, I and white people are socialized into racialized belief systems and racist policies, practices, and belief systems**. […] We need resources to be able to sustain our attention to how we've benefitted from those as white people, **how we have perpetuated, and how we need to sustain our efforts to disrupt those kinds of our racist systems in our schools and in our society, in our communities and in our families.**"
>
> Vodcast #1. Comments by Nickie Coomer: "I do want to point to a few of our resources that we've developed at the MAP Center that are related to antiracism. So I encourage our viewers to stop by our website at greatlakesequity.org and visit our online equity resource library. They'll find there a few different titles on our antiracism webpage, one of which is our Equilearn webinar, "**Ensuring Every Student Succeeds: Understanding and Redressing Intersecting Oppressions**

of Racism, Sexism, and Classism", as well as our Equity Digest entitled "Race Matters in School"."

Vodcast #2. Comments by Perry Wilkinson referred to the "white supremacy culture" and "iceberg culture." **He characterized the educational system as a "white system" which as a "white system" presented "oppression and barriers" to people of color.** His comments also included the cynical view that **"…if people of color are out front, we know the ones who will be let go first…"**

Vodcast #3. Comments by Anthony Lewis: "And I like the way, I think, Dr. Kyser and Dr. Anderson both said, **dismantle these systems of oppression.** You know, some people say we want to disrupt, you know if I disrupt the room I can put the room back together, but I want to totally dismantle these systems of oppression. And in really examining yourself and educating yourself, really truly understanding the historical context of how we got here, **really understanding from our Native American perspective, from our African-American perspective, in terms of being dehumanized, truly understanding that foundation of work of why and how America was built with these racist ideologies, with these racist practices**."

Vodcast #3. Comments by Nicki Coomer: "Thanks so much Dr. Anderson and Dr. Lewis. I just wanted to add something that I heard from both of you. If there's a reason not to be liked, that's the reason not to be liked. And I think that ties in really importantly with the idea of being a co-conspirator and an accomplice. **That means that you're giving something up in order to resist a system that is harmful, to be a co-conspirator, to be an accomplice means that you're ready to get into the work and you're ready to be un-liked, you're ready to get in trouble, to get in good trouble, to not only be disruptive, but to dismantle. And I think, again, to really call white colleagues to the table, when you know that you're positioned in a way where you get a benefit of a doubt that your Black colleagues do not get, acknowledge that publicly and say it out loud, and engage in that anti-racist work as well, to your detriment, and then prepare to bear the consequences of that."**

Vodcast #6. **Comments by Dr. New characterized the teachers in her school district as "80% white female who live outside the district" and that these teachers (as a group) "do not have the cultural competence" to teach children of color, concluding they "don't know how to work with students of color." Dr. New characterized children of color (as a group) as being taught that their "abilities are negated by my skin color." Dr. New's take on this is that children of color should be affirmed by people "who look like them" and that the white teachers have not experienced what the children of color experienced or not had the same "home learning." Dr. New characterized the white teachers as "people (who) don't worry about those things unless you are a person of color" and said that she hopes we get to a place "where people leave those prejudices, implicit biases and overt biases, in the past.**"

Despite including all of the above quotations in his previous whistleblower comments, the supplemental report failed to address or even mention any of these quotations. Apparently, OSC failed to require that ED address these specific quotations.

The question arises as to why ED is avoiding addressing the discriminatory language cited above, quotations that are racist on their face. Instead, the ED supplemental report contained just a single conclusory statement (p. 12), without addressing any quotations from the "Anti-Racism" podcast transcripts or reflecting the benefit of any investigation or analysis:.

> With respect to the materials to which the whistleblower objects, the Department determined that these materials are within the scope of work that is typical and permissible by EACs, specifically, assisting schools in dealing with harassment, bullying, and prejudice reduction and instructing

> school officials on how to prevent harassment and combat biases.[33] Accordingly, the Department found no violation of statutory authority.
>
> Footnote 33: Moreover, as OCR notes in its previously discussed Fact Sheet, these types of activities – which fit squarely under the four examples of activities identified above – are not categorically prohibited by Title VI, and we found no evidence of a Title VI violation.

Because none of the quotations from the "Anti-Racism" podcast transcripts are even mentioned in either report, the "collective" reports remain statutorily deficient. OSC is under an obligation to request another supplemental report addressing this issue in a serious manner, i.e. with facts and analysis.

In addition to racial discrimination (Critical Race Theory), the Indiana University grant funds Critical Gender Theory/trans agenda and encourages teachers to evade and/or violate the law.

The whistleblower expressed serious concerns about the various EAC podcasts. His concerns have since been confirmed by events subsequent to the termination of his employment. For example, on June 19, 2023, the Daily Mail published an online article by James Reinl (see, Exhibit BB, p. 303) entitled:

> Midwest teachers trade tips on 'subversively and quietly' transitioning kids without telling their parents, and skirting Republican gender laws, in workshop funded by federal government

This article describes how Indiana University's Midwest and Plains (MAP) Equity Assistance Center (EAC) – funded by the exact same OESE grant to Indiana University – held an ED-funded online teacher training in which:

> Dozens of Midwestern teachers met online […] and traded tips on helping trans students change gender at school without their parents' knowledge, while criticizing a raft of new Republican laws on sex and identity.
>
> In the four-hour workshop, they discussed helping trans students in the face of new laws in Republican-run states on gender, pronouns, names, parents' rights, bathroom access, and sports teams.
>
> Some teachers said they followed the rules, but others discussed being 'subversive,' how their personal 'code of ethics' trumped laws, and how to 'hide' a trans student's new name and gender from their parents. […]
>
> Kicking off the workshop, Angel Nathan, the MAP specialist who hosted the session, said attendees would review the new laws in a bid to 'remedy the marginalizing effects and disrupt problematic policies.'
>
> In the discussion and role-play sessions that followed, the teachers, administrators, principals, and counselors spoke about trans students and their families in a way that would alarm many parents.
>
> Kimberly Martin, the DEI coordinator for Royal Oak Schools, which serves 5,000 K-12 students in Michigan, spoke about helping trans students keep their gender change a secret.

> 'We're working with our record-keeping system so that certain screens can't be seen by the parents … if there's a nickname in there we're trying to hide,' Martin told the online gathering.
>
> Jennifer Haglund, counselor for Ames Community Schools, which serves 5,000 K-12 Iowa students, complained about Republican Gov. Kim Reynolds in March signing a law that bars biological males from competing on female sports teams.
>
> She bragged about her 'own activism' and of taking part in protest marches.
>
> 'I know that I have my own right code of ethics, and that doesn't always go along with the law,' Haglund said.
>
> Shea Martin, an Ohio-based trans educator, who writes a 'socialist, feminist, and anti-racist' blog called Radical Teacher, said she worked against 'laws that prohibit or restrict trans advocacy.'
>
> 'The stakes are very high for trans youth,' Martin said.
>
> 'I think that requires working subversively and quietly sometimes to make sure that trans kids have what they need.'
>
> Martin did not describe any subversive acts, but, later spoke about teachers addressing 'sexuality' with elementary students, who are aged between five and 10.
>
> When talking about men, women, playground crushes, love, and marriage with youngsters, teachers should be wary of treating 'reinforced heterosexuality as the norm,' Martin said.
>
> Finally, Yesenia Jimenez-Captain, the director of educational services at Woodland School District, which serves some 4,600 K-8 students across four schools in Lake County, Illinois, slammed conservative teachers in a nearby district.

The Daily Mail stated it reached-out to ED for comment but never received a response. Furthermore, a June 22, 2023 Federalist article by Evita Duffy-Alfonso entitled "DOJ And Ed Department Silent After Teachers Use Taxpayer Money To Criminally Push Gender Ideology On Students" (see, Exhibit CC, p. 312) states:

> The Federalist reached out to the education department and asked if there would be an investigation launched into both MAP and the teachers who are using federal funds to spread information on how to break state laws. The department was also asked if, given that MAP is encouraging illegal activity, there are plans to defund MAP and revoke the more than $8 million in grant money already awarded to the organization. At the time of publication, a response has not been given.
>
> The Federalist also reached out to the DOJ and asked whether, given that the criminal organizing and activity spans across state lines, it will be launching an investigation into MAP. The DOJ did not respond.
>
> Lastly, the Federalist asked both agencies if, as a policy, they support efforts to give minors medical treatments without the knowledge or consent of their parents or legal guardians. Neither department has returned a request for comment.

Based on these articles and quotations, it appears confirmed that the ED-funded MAP EAC at Indiana University (which covers 13 states) is encouraging teachers to violate the law. One state within this EAC's jurisdiction is Iowa, which has already enacted laws that:

1) Ban sexual content that is not age-appropriate for schoolchildren, and also ban "any program, curriculum, test, survey, questionnaire, promotion, or instruction relating to gender identity or sexual orientation to students in kindergarten through grade six" (e.g. Senate File 496, signed into law by Governor Kim Reynolds on May 26, 2023) (i.e. banning Critical Gender Theory/the trans agenda in schools), and
2) Ban "Race and sex stereotyping" – Section 1: training prohibited by state and local governments; Section 2: training by institutions prohibited; Section 3: training and curriculum prohibited (e.g. House File 802, signed into law by Governor Kim Reynolds on June 8, 2021) (i.e. banning Critical Race Theory in schools – which includes banning illegally discriminatory curriculums similar to the Harvard grant's "Identity Project").

Another state within this EAC's jurisdiction is Ohio, which is currently working to pass a state laws banning Critical Gender Theory (e.g. House Bill 8, which passed the Ohio House on June 21, 2023 and is currently under consideration by the Ohio Senate).

Neither of the ED reports mentioned that the Indiana University grant is funding not only illegal discrimination on the basis of race, but also Critical Gender Theory/the trans agenda – encouraging teachers to violate state laws that ban teaching it in school.

Therefore, the "collective" reports *remain* deficient. OSC should request another supplemental report addressing this issue.

Recommendations:

Given ED's evident failure to address these serious issues (whether intentional or negligent) and OSC's failure to require ED to address these issues (as required by statute), in addition to his past recommendations, which are incorporated herein by reference, the whistleblower recommends that:

1) The appropriate Congressional oversight committees in both the House and Senate investigate ED for:
    a. ED's illegal funding of discriminatory grants and online content;
    b. ED's illegal retaliation against the whistleblower; and
    c. ED's illegal failure to redress the discriminatory funding practices and the illegal retaliation via neglect of duty and intentional avoidance of these issues.
2) The appropriate Congressional oversight committees in both the House and Senate investigate OSC for:
    a. failing to make correct "substantial likelihood of wrongdoing" determinations for, and failing to refer to ED for investigation, violations of: the Common Rule (34 CFR 97), E.O. 13985's definition of "equity" as "the consistent and systematic fair, just, and *impartial* treatment of all *individuals*," and the equal protection

component of the Due Process clause of the Fifth Amendment (a.k.a. reverse-incorporation) (a.k.a. substantive due process) when making the initial referrals to ED in June 2021.

b. apparently failing to refer to ED: the three deficiencies mentioned above; the requirement of 5 USC § 1213(d)(5)(B) to address "the restoration of any aggrieved employee"); and a request for investigation and comment on the omitted salient quotes from the Harvard grant, the Indiana University grant, and the UNC video on the IES website and YouTube channel when OSC requested a supplemental report form ED on May 15, 2023; and
c. if any of the above deficiencies actually were referred as part of the May 15, 2023 email request for a supplemental report, demonstrating "conduct that undermines the independence or integrity reasonably expected of" Special Counsel Henry Kerner and Principal Deputy Special Counsel Nicole Brightbill:
    i. when OSC failed to enforce its requirements and backed-down from requiring that additional topics must be addressed in the supplemental report; and
    ii. when OSC refused to provide the whistleblower's counsel with the May 15, 2023 email from OSC to ED.

3) The Integrity Committee should investigate Special Counsel Henry Kerner and Principal Deputy Special Counsel Nicole Brightbill for:
    a. Abuse of authority in the exercise of official duties or while acting under color of office; and/or
    b. Conduct that undermines the independence or integrity reasonably expected of a Covered Person.

Additionally, if the Special Counsel does not require from ED another supplemental report addressing *all* deficiencies identified by the whistleblower in these comments and his previous comments, the whistleblower recommends that both the Integrity Committee and the appropriate Congressional oversight committees investigate OSC for this additional failure.

Exhibit AA:

Students for Fair Admissions v. Harvard, 600 U.S. ___ (2023)

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

STUDENTS FOR FAIR ADMISSIONS, INC. *v.* PRESIDENT AND FELLOWS OF HARVARD COLLEGE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 20–1199. Argued October 31, 2022—Decided June 29, 2023*

Harvard College and the University of North Carolina (UNC) are two of the oldest institutions of higher learning in the United States. Every year, tens of thousands of students apply to each school; many fewer are admitted. Both Harvard and UNC employ a highly selective admissions process to make their decisions. Admission to each school can depend on a student's grades, recommendation letters, or extracurricular involvement. It can also depend on their race. The question presented is whether the admissions systems used by Harvard College and UNC are lawful under the Equal Protection Clause of the Fourteenth Amendment.

At Harvard, each application for admission is initially screened by a "first reader," who assigns a numerical score in each of six categories: academic, extracurricular, athletic, school support, personal, and overall. For the "overall" category—a composite of the five other ratings—a first reader can and does consider the applicant's race. Harvard's admissions subcommittees then review all applications from a particular geographic area. These regional subcommittees make recommendations to the full admissions committee, and they take an applicant's race into account. When the 40-member full admissions committee begins its deliberations, it discusses the relative breakdown of applicants by race. The goal of the process, according to Harvard's director of admissions, is ensuring there is no "dramatic drop-off" in minority admissions from the prior class. An applicant receiving a majority of

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*Together with No. 21–707, *Students for Fair Admissions, Inc.* v. *University of North Carolina et al.*, on certiorari before judgment to the United States Court of Appeals for the Fourth Circuit.

the full committee's votes is tentatively accepted for admission. At the end of this process, the racial composition of the tentative applicant pool is disclosed to the committee. The last stage of Harvard's admissions process, called the "lop," winnows the list of tentatively admitted students to arrive at the final class. Applicants that Harvard considers cutting at this stage are placed on the "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants."

UNC has a similar admissions process. Every application is reviewed first by an admissions office reader, who assigns a numerical rating to each of several categories. Readers are required to consider the applicant's race as a factor in their review. Readers then make a written recommendation on each assigned application, and they may provide an applicant a substantial "plus" depending on the applicant's race. At this stage, most recommendations are provisionally final. A committee of experienced staff members then conducts a "school group review" of every initial decision made by a reader and either approves or rejects the recommendation. In making those decisions, the committee may consider the applicant's race.

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization whose stated purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." SFFA filed separate lawsuits against Harvard and UNC, arguing that their race-based admissions programs violate, respectively, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. After separate bench trials, both admissions programs were found permissible under the Equal Protection Clause and this Court's precedents. In the Harvard case, the First Circuit affirmed, and this Court granted certiorari. In the UNC case, this Court granted certiorari before judgment.

Held: Harvard's and UNC's admissions programs violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 6–40.

(a) Because SFFA complies with the standing requirements for organizational plaintiffs articulated by this Court in *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, SFFA's obligations under Article III are satisfied, and this Court has jurisdiction to consider the merits of SFFA's claims.

The Court rejects UNC's argument that SFFA lacks standing because it is not a "genuine" membership organization. An organizational plaintiff can satisfy Article III jurisdiction in two ways, one of which is to assert "standing solely as the representative of its mem-

bers," *Warth* v. *Seldin,* 422 U. S. 490, 511, an approach known as representational or organizational standing. To invoke it, an organization must satisfy the three-part test in *Hunt*. Respondents do not suggest that SFFA fails *Hunt*'s test for organizational standing. They argue instead that SFFA cannot invoke organizational standing at all because SFFA was not a genuine membership organization at the time it filed suit. Respondents maintain that, under *Hunt*, a group qualifies as a genuine membership organization only if it is controlled and funded by its members. In *Hunt*, this Court determined that a state agency with no traditional members could still qualify as a genuine membership organization in substance because the agency represented the interests of individuals and otherwise satisfied *Hunt*'s three-part test for organizational standing. See 432 U. S., at 342. *Hunt*'s "indicia of membership" analysis, however, has no applicability here. As the courts below found, SFFA is indisputably a voluntary membership organization with identifiable members who support its mission and whom SFFA represents in good faith. SFFA is thus entitled to rely on the organizational standing doctrine as articulated in *Hunt*. Pp. 6–9.

(b) Proposed by Congress and ratified by the States in the wake of the Civil War, the Fourteenth Amendment provides that no State shall "deny to any person . . . the equal protection of the laws." Proponents of the Equal Protection Clause described its "foundation[al] principle" as "not permit[ing] any distinctions of law based on race or color." Any "law which operates upon one man," they maintained, should "operate equally upon all." Accordingly, as this Court's early decisions interpreting the Equal Protection Clause explained, the Fourteenth Amendment guaranteed "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States."

Despite the early recognition of the broad sweep of the Equal Protection Clause, the Court—alongside the country—quickly failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U. S. 537.

After *Plessy*, "American courts . . . labored with the doctrine [of separate but equal] for over half a century." *Brown* v. *Board of Education*, 347 U. S. 483, 491. Some cases in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students educational opportunities equal to—even if formally separate from—those enjoyed by white students. See, *e.g.*, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 349–350. But the

inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U. S. 637, 640–642. By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown* v. *Board of Education,* 347 U. S. 483. There, the Court overturned the separate but equal regime established in *Plessy* and began on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. The conclusion reached by the *Brown* Court was unmistakably clear: the right to a public education "must be made available to all on equal terms." 347 U. S., at 493. The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown* v. *Board of Education,* 349 U. S. 294, 300–301.

In the years that followed, *Brown*'s "fundamental principle that racial discrimination in public education is unconstitutional," *id.,* at 298, reached other areas of life—for example, state and local laws requiring segregation in busing, *Gayle* v. *Browder*, 352 U. S. 903 (*per curiam*); racial segregation in the enjoyment of public beaches and bathhouses *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877 (*per curiam*); and antimiscegenation laws, *Loving* v. *Virginia,* 388 U. S. 1. These decisions, and others like them, reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore* v. *Sidoti*, 466 U. S. 429, 432.

Eliminating racial discrimination means eliminating all of it. Accordingly, the Court has held that the Equal Protection Clause applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 289–290.

Any exceptions to the Equal Protection Clause's guarantee must survive a daunting two-step examination known as "strict scrutiny," *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227, which asks first whether the racial classification is used to "further compelling governmental interests," *Grutter* v. *Bollinger,* 539 U. S. 306, 326, and second whether the government's use of race is "narrowly tailored," *i.e.,* "necessary," to achieve that interest, *Fisher* v. *University of Tex. at Austin,* 570 U. S. 297, 311–312. Acceptance of race-based state action

is rare for a reason: "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice* v. *Cayetano*, 528 U. S. 495, 517. Pp. 9–16.

(c) This Court first considered whether a university may make race-based admissions decisions in *Bakke,* 438 U. S. 265. In a deeply splintered decision that produced six different opinions, Justice Powell's opinion for himself alone would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U. S., at 323. After rejecting three of the University's four justifications as not sufficiently compelling, Justice Powell turned to its last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. Justice Powell found that interest to be "a constitutionally permissible goal for an institution of higher education," which was entitled as a matter of academic freedom "to make its own judgments as to . . . the selection of its student body." 438 U. S., at 311–312. But a university's freedom was not unlimited—"[r]acial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." *Id.*, at 291. Accordingly, a university could not employ a two-track quota system with a specific number of seats reserved for individuals from a preferred ethnic group. *Id.,* at 315. Neither still could a university use race to foreclose an individual from all consideration. *Id.,* at 318. Race could only operate as "a 'plus' in a particular applicant's file," and even then it had to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Id.,* at 317. Pp. 16–19.

(d) For years following *Bakke*, lower courts struggled to determine whether Justice Powell's decision was "binding precedent." *Grutter*, 539 U. S., at 325. Then, in *Grutter* v. *Bollinger*, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Ibid.* The *Grutter* majority's analysis tracked Justice Powell's in many respects, including its insistence on limits on how universities may consider race in their admissions programs. Those limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate . . . stereotyp[ing]." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493 (plurality opinion). Admissions programs could thus not operate on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U. S., at 333 (internal

quotation marks omitted). The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341.

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs: At some point, the Court held, they must end. *Id.,* at 342. Recognizing that "[e]nshrining a permanent justification for racial preferences would offend" the Constitution's unambiguous guarantee of equal protection, the Court expressed its expectation that, in 25 years, "the use of racial preferences will no longer be necessary to further the interest approved today." *Id.,* at 343. Pp. 19–21.

(e) Twenty years have passed since *Grutter*, with no end to race-based college admissions in sight. But the Court has permitted race-based college admissions only within the confines of narrow restrictions: such admissions programs must comply with strict scrutiny, may never use race as a stereotype or negative, and must—at some point—end. Respondents' admissions systems fail each of these criteria and must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment. Pp. 21–34.

(1) Respondents fail to operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny. *Fisher* v. *University of Tex. at Austin*, 579 U. S. 365, 381. First, the interests that respondents view as compelling cannot be subjected to meaningful judicial review. Those interests include training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens. While these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. It is unclear how courts are supposed to measure any of these goals, or if they could, to know when they have been reached so that racial preferences can end. The elusiveness of respondents' asserted goals is further illustrated by comparing them to recognized compelling interests. For example, courts can discern whether the temporary racial segregation of inmates will prevent harm to those in the prison, see *Johnson* v. *California,* 543 U. S. 499, 512–513, but the question whether a particular mix of minority students produces "engaged and productive citizens" or effectively "train[s] future leaders" is standardless.

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, respondents measure the racial composition of their classes using racial categories

that are plainly overbroad (expressing, for example, no concern whether *South* Asian or *East* Asian students are adequately represented as "Asian"); arbitrary or undefined (the use of the category "Hispanic"); or underinclusive (no category at all for Middle Eastern students). The unclear connection between the goals that respondents seek and the means they employ preclude courts from meaningfully scrutinizing respondents' admissions programs.

The universities' main response to these criticisms is "trust us." They assert that universities are owed deference when using race to benefit some applicants but not others. While this Court has recognized a "tradition of giving a degree of deference to a university's academic decisions," it has made clear that deference must exist "within constitutionally prescribed limits." *Grutter*, 539 U. S., at 328. Respondents have failed to present an exceedingly persuasive justification for separating students on the basis of race that is measurable and concrete enough to permit judicial review, as the Equal Protection Clause requires. Pp. 22–26.

(2) Respondents' race-based admissions systems also fail to comply with the Equal Protection Clause's twin commands that race may never be used as a "negative" and that it may not operate as a stereotype. The First Circuit found that Harvard's consideration of race has resulted in fewer admissions of Asian-American students. Respondents' assertion that race is never a negative factor in their admissions programs cannot withstand scrutiny. College admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter.

Respondents admissions programs are infirm for a second reason as well: They require stereotyping—the very thing *Grutter* foreswore. When a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike." *Miller* v. *Johnson*, 515 U. S. 900, 911–912. Such stereotyping is contrary to the "core purpose" of the Equal Protection Clause. *Palmore*, 466 U. S., at 432. Pp. 26–29.

(3) Respondents' admissions programs also lack a "logical end point" as *Grutter* required. 539 U. S., at 342. Respondents suggest that the end of race-based admissions programs will occur once meaningful representation and diversity are achieved on college campuses. Such measures of success amount to little more than comparing the racial breakdown of the incoming class and comparing it to some other metric, such as the racial makeup of the previous incoming class or the population in general, to see whether some proportional goal has been reached. The problem with this approach is well established: "[O]utright racial balancing" is "patently unconstitutional." *Fisher,*

570 U. S., at 311. Respondents' second proffered end point—when students receive the educational benefits of diversity—fares no better. As explained, it is unclear how a court is supposed to determine if or when such goals would be adequately met. Third, respondents suggest the 25-year expectation in *Grutter* means that race-based preferences must be allowed to continue until at least 2028. The Court's statement in *Grutter*, however, reflected only that Court's expectation that race-based preferences would, by 2028, be unnecessary in the context of racial diversity on college campuses. Finally, respondents argue that the frequent reviews they conduct to determine whether racial preferences are still necessary obviates the need for an end point. But *Grutter* never suggested that periodic review can make unconstitutional conduct constitutional. Pp. 29–34.

(f) Because Harvard's and UNC's admissions programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points, those admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. At the same time, nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university. Many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice. Pp. 39–40.

No. 20–1199, 980 F. 3d 157; No. 21–707, 567 F. Supp. 3d 580, reversed.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., filed a concurring opinion. GORSUCH, J., filed a concurring opinion, in which THOMAS, J., joined. KAVANAUGH, J., filed a concurring opinion. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN, J., joined, and in which JACKSON, J., joined as it applies to No. 21–707. JACKSON, J., filed a dissenting opinion in No. 21–707, in which SOTOMAYOR and KAGAN, JJ., joined. JACKSON, J., took no part in the consideration or decision of the case in No. 20–1199.

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

SUPREME COURT OF THE UNITED STATES

Nos. 20–1199 and 21–707

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
20–1199 *v.*
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
21–707 *v.*
UNIVERSITY OF NORTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 29, 2023]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In these cases we consider whether the admissions systems used by Harvard College and the University of North Carolina, two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment.

I

A

Founded in 1636, Harvard College has one of the most

selective application processes in the country. Over 60,000 people applied to the school last year; fewer than 2,000 were admitted. Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. See 980 F. 3d 157, 166–169 (CA1 2020). It can also depend on your race.

The admissions process at Harvard works as follows. Every application is initially screened by a "first reader," who assigns scores in six categories: academic, extracurricular, athletic, school support, personal, and overall. *Ibid.* A rating of "1" is the best; a rating of "6" the worst. *Ibid.* In the academic category, for example, a "1" signifies "near-perfect standardized test scores and grades"; in the extracurricular category, it indicates "truly unusual achievement"; and in the personal category, it denotes "outstanding" attributes like maturity, integrity, leadership, kindness, and courage. *Id.*, at 167–168. A score of "1" on the overall rating—a composite of the five other ratings—"signifies an exceptional candidate with >90% chance of admission." *Id.*, at 169 (internal quotation marks omitted). In assigning the overall rating, the first readers "can and do take an applicant's race into account." *Ibid.*

Once the first read process is complete, Harvard convenes admissions subcommittees. *Ibid.* Each subcommittee meets for three to five days and evaluates all applicants from a particular geographic area. *Ibid.* The subcommittees are responsible for making recommendations to the full admissions committee. *Id.*, at 169–170. The subcommittees can and do take an applicant's race into account when making their recommendations. *Id.*, at 170.

The next step of the Harvard process is the full committee meeting. The committee has 40 members, and its discussion centers around the applicants who have been recommended by the regional subcommittees. *Ibid.* At the beginning of the meeting, the committee discusses the relative

breakdown of applicants by race. The "goal," according to Harvard's director of admissions, "is to make sure that [Harvard does] not hav[e] a dramatic drop-off" in minority admissions from the prior class. 2 App. in No. 20–1199, pp. 744, 747–748. Each applicant considered by the full committee is discussed one by one, and every member of the committee must vote on admission. 980 F. 3d, at 170. Only when an applicant secures a majority of the full committee's votes is he or she tentatively accepted for admission. *Ibid.* At the end of the full committee meeting, the racial composition of the pool of tentatively admitted students is disclosed to the committee. *Ibid.*; 2 App. in No. 20–1199, at 861.

The final stage of Harvard's process is called the "lop," during which the list of tentatively admitted students is winnowed further to arrive at the final class. Any applicants that Harvard considers cutting at this stage are placed on a "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. 980 F. 3d, at 170. The full committee decides as a group which students to lop. 397 F. Supp. 3d 126, 144 (Mass. 2019). In doing so, the committee can and does take race into account. *Ibid.* Once the lop process is complete, Harvard's admitted class is set. *Ibid.* In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants." *Id.*, at 178.

B

Founded shortly after the Constitution was ratified, the University of North Carolina (UNC) prides itself on being the "nation's first public university." 567 F. Supp. 3d 580, 588 (MDNC 2021). Like Harvard, UNC's "admissions process is highly selective": In a typical year, the school "receives approximately 43,500 applications for

its freshman class of 4,200." *Id.*, at 595.

Every application the University receives is initially reviewed by one of approximately 40 admissions office readers, each of whom reviews roughly five applications per hour. *Id.*, at 596, 598. Readers are required to consider "[r]ace and ethnicity . . . as one factor" in their review. *Id.*, at 597 (internal quotation marks omitted). Other factors include academic performance and rigor, standardized testing results, extracurricular involvement, essay quality, personal factors, and student background. *Id.*, at 600. Readers are responsible for providing numerical ratings for the academic, extracurricular, personal, and essay categories. *Ibid.* During the years at issue in this litigation, underrepresented minority students were "more likely to score [highly] on their personal ratings than their white and Asian American peers," but were more likely to be "rated lower by UNC readers on their academic program, academic performance, . . . extracurricular activities," and essays. *Id.*, at 616–617.

After assessing an applicant's materials along these lines, the reader "formulates an opinion about whether the student should be offered admission" and then "writes a comment defending his or her recommended decision." *Id.*, at 598 (internal quotation marks omitted). In making that decision, readers may offer students a "plus" based on their race, which "may be significant in an individual case." *Id.*, at 601 (internal quotation marks omitted). The admissions decisions made by the first readers are, in most cases, "provisionally final." *Students for Fair Admissions, Inc.* v. *University of N. C. at Chapel Hill*, No. 1:14–cv–954 (MDNC, Nov. 9, 2020), ECF Doc. 225, p. 7, ¶52.

Following the first read process, "applications then go to a process called 'school group review' . . . where a committee composed of experienced staff members reviews every [initial] decision." 567 F. Supp. 3d, at 599. The review committee receives a report on each student which contains,

among other things, their "class rank, GPA, and test scores; the ratings assigned to them by their initial readers; and their status as residents, legacies, or special recruits." *Ibid.* (footnote omitted). The review committee either approves or rejects each admission recommendation made by the first reader, after which the admissions decisions are finalized. *Ibid.* In making those decisions, the review committee may also consider the applicant's race. *Id.*, at 607; 2 App. in No. 21–707, p. 407.[1]

C

Petitioner, Students for Fair Admissions (SFFA), is a

[1] JUSTICE JACKSON attempts to minimize the role that race plays in UNC's admissions process by noting that, from 2016–2021, the school accepted a lower "percentage of the most academically excellent in-state Black candidates"—that is, 65 out of 67 such applicants (97.01%)—than it did similarly situated Asian applicants—that is, 1118 out of 1139 such applicants (98.16%). *Post*, at 20 (dissenting opinion); see also 3 App. in No. 21–707, pp. 1078–1080. It is not clear how the rejection of just two black applicants over five years could be "indicative of a genuinely holistic [admissions] process," as JUSTICE JACKSON contends. *Post*, at 20–21. And indeed it cannot be, as the *overall* acceptance rates of academically excellent applicants to UNC illustrates full well. According to SFFA's expert, over 80% of all black applicants in the top academic decile were admitted to UNC, while under 70% of white and Asian applicants in that decile were admitted. 3 App. in No. 21–707, at 1078–1083. In the second highest academic decile, the disparity is even starker: 83% of black applicants were admitted, while 58% of white applicants and 47% of Asian applicants were admitted. *Ibid.* And in the third highest decile, 77% of black applicants were admitted, compared to 48% of white applicants and 34% of Asian applicants. *Ibid.* The dissent does not dispute the accuracy of these figures. See *post*, at 20, n. 94 (opinion of JACKSON, J.). And its contention that white and Asian students "receive a diversity plus" in UNC's race-based admissions system blinks reality. *Post*, at 18.

The same is true at Harvard. See Brief for Petitioner 24 ("[A]n African American [student] in [the fourth lowest academic] decile has a higher chance of admission (12.8%) than an Asian American in the *top* decile (12.7%)." (emphasis added)); see also 4 App. in No. 20–1199, p. 1793 (black applicants in the top four academic deciles are between four and ten times more likely to be admitted to Harvard than Asian applicants in those deciles).

nonprofit organization founded in 2014 whose purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." 980 F. 3d, at 164 (internal quotation marks omitted). In November 2014, SFFA filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. §2000d *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.[2] See 397 F. Supp. 3d, at 131–132; 567 F. Supp. 3d, at 585–586. The District Courts in both cases held bench trials to evaluate SFFA's claims. See 980 F. 3d, at 179; 567 F. Supp. 3d, at 588. Trial in the Harvard case lasted 15 days and included testimony from 30 witnesses, after which the Court concluded that Harvard's admissions program comported with our precedents on the use of race in college admissions. See 397 F. Supp. 3d, at 132, 183. The First Circuit affirmed that determination. See 980 F. 3d, at 204. Similarly, in the UNC case, the District Court concluded after an eight-day trial that UNC's admissions program was permissible under the Equal Protection Clause. 567 F. Supp. 3d, at 588, 666.

We granted certiorari in the Harvard case and certiorari before judgment in the UNC case. 595 U. S. ___ (2022).

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[2] Title VI provides that "[n]o 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." 42 U. S. C. §2000d. "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz* v. *Bollinger*, 539 U. S. 244, 276, n. 23 (2003). Although JUSTICE GORSUCH questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself.

II

Before turning to the merits, we must assure ourselves of our jurisdiction. See *Summers* v. *Earth Island Institute*, 555 U. S. 488, 499 (2009). UNC argues that SFFA lacks standing to bring its claims because it is not a "genuine" membership organization. Brief for University Respondents in No. 21–707, pp. 23–26. Every court to have considered this argument has rejected it, and so do we. See *Students for Fair Admissions, Inc.* v. *University of Tex. at Austin*, 37 F. 4th 1078, 1084–1086, and n. 8 (CA5 2022) (collecting cases).

Article III of the Constitution limits "[t]he judicial power of the United States" to "cases" or "controversies," ensuring that federal courts act only "as a necessity in the determination of real, earnest and vital" disputes. *Muskrat* v. *United States*, 219 U. S. 346, 351, 359 (1911) (internal quotation marks omitted). "To state a case or controversy under Article III, a plaintiff must establish standing." *Arizona Christian School Tuition Organization* v. *Winn*, 563 U. S. 125, 133 (2011). That, in turn, requires a plaintiff to demonstrate that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 338 (2016).

In cases like these, where the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways. Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert "standing solely as the representative of its members." *Warth* v. *Seldin*, 422 U. S. 490, 511 (1975). The latter approach is known as representational or organizational standing. *Ibid.*; *Summers*, 555 U. S., at 497–498. To invoke it, an organization must demonstrate that "(a) its members would otherwise have standing to sue in their own right;

(b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 343 (1977).

Respondents do not contest that SFFA satisfies the three-part test for organizational standing articulated in *Hunt*, and like the courts below, we find no basis in the record to conclude otherwise. See 980 F. 3d, at 182–184; 397 F. Supp. 3d, at 183–184; No. 1:14–cv–954 (MDNC, Sept. 29, 2018), App. D to Pet. for Cert. in No. 21–707, pp. 237–245 (2018 DC Opinion). Respondents instead argue that SFFA was not a "genuine 'membership organization'" when it filed suit, and thus that it could not invoke the doctrine of organizational standing in the first place. Brief for University Respondents in No. 21–707, at 24. According to respondents, our decision in *Hunt* established that groups qualify as genuine membership organizations only if they are controlled and funded by their members. And because SFFA's members did neither at the time this litigation commenced, respondents' argument goes, SFFA could not represent its members for purposes of Article III standing. Brief for University Respondents in No. 21–707, at 24 (citing *Hunt*, 432 U. S., at 343).

Hunt involved the Washington State Apple Advertising Commission, a state agency whose purpose was to protect the local apple industry. The Commission brought suit challenging a North Carolina statute that imposed a labeling requirement on containers of apples sold in that State. The Commission argued that it had standing to challenge the requirement on behalf of Washington's apple industry. See *id.*, at 336–341. We recognized, however, that as a state agency, "the Commission [wa]s not a traditional voluntary membership organization . . . , for it ha[d] no members at all." *Id.*, at 342. As a result, we could not easily apply the three-part test for organizational standing, which asks

whether an organization's *members* have standing. We nevertheless concluded that the Commission had standing because the apple growers and dealers it represented were *effectively* members of the Commission. *Id.*, at 344. The growers and dealers "alone elect[ed] the members of the Commission," "alone . . . serve[d] on the Commission," and "alone finance[d] its activities"—they possessed, in other words, "all of the indicia of membership." *Ibid.* The Commission was therefore a genuine membership organization in substance, if not in form. And it was "clearly" entitled to rely on the doctrine of organizational standing under the three-part test recounted above. *Id.*, at 343.

The indicia of membership analysis employed in *Hunt* has no applicability in these cases. Here, SFFA *is* indisputably a voluntary membership organization with identifiable members—it is not, as in *Hunt*, a state agency that concededly has no members. See 2018 DC Opinion 241–242. As the First Circuit in the Harvard litigation observed, at the time SFFA filed suit, it was "a validly incorporated 501(c)(3) nonprofit with forty-seven members who joined voluntarily to support its mission." 980 F. 3d, at 184. Meanwhile in the UNC litigation, SFFA represented four members in particular—high school graduates who were denied admission to UNC. See 2018 DC Opinion 234. Those members filed declarations with the District Court stating "that they have voluntarily joined SFFA; they support its mission; they receive updates about the status of the case from SFFA's President; and they have had the opportunity to have input and direction on SFFA's case." *Id.*, at 234–235 (internal quotation marks omitted). Where, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates. Because SFFA complies with the standing requirements demanded of organizational plaintiffs in *Hunt*, its obligations under Article III are satisfied.

III

A

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall "deny to any person . . . the equal protection of the laws." Amdt. 14, §1. To its proponents, the Equal Protection Clause represented a "foundation[al] principle"—"the absolute equality of all citizens of the United States politically and civilly before their own laws." Cong. Globe, 39th Cong., 1st Sess., 431 (1866) (statement of Rep. Bingham) (Cong. Globe). The Constitution, they were determined, "should not permit any distinctions of law based on race or color," Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1 etc., p. 41 (detailing the history of the adoption of the Equal Protection Clause), because any "law which operates upon one man [should] operate *equally* upon all," Cong. Globe 2459 (statement of Rep. Stevens). As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold "over every American citizen, without regard to color, the protecting shield of law." *Id.*, at 2462. And in doing so, said Senator Jacob Howard of Michigan, the Amendment would give "to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.*, at 2766. For "[w]ithout this principle of equal justice," Howard continued, "there is no republican government and none that is really worth maintaining." *Ibid.*

At first, this Court embraced the transcendent aims of the Equal Protection Clause. "What is this," we said of the Clause in 1880, "but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States?" *Strauder* v. *West Virginia*, 100 U. S. 303, 307–309. "[T]he broad and benign provisions of the

Fourteenth Amendment" apply "to all persons," we unanimously declared six years later; it is "hostility to . . . race and nationality" "which in the eye of the law is not justified." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 368–369, 373–374 (1886); see also *id.*, at 368 (applying the Clause to "aliens and subjects of the Emperor of China"); *Truax* v. *Raich*, 239 U. S. 33, 36 (1915) ("a native of Austria"); semble *Strauder*, 100 U. S., at 308–309 ("Celtic Irishmen") (dictum).

Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U. S. 537 (1896). The aspirations of the framers of the Equal Protection Clause, "[v]irtually strangled in [their] infancy," would remain for too long only that—aspirations. J. Tussman & J. tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 381 (1949).

After *Plessy*, "American courts . . . labored with the doctrine [of separate but equal] for over half a century." *Brown* v. *Board of Education*, 347 U. S. 483, 491 (1954). Some cases in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students educational opportunities equal to—even if formally separate from—those enjoyed by white students. See, *e.g.*, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 349–350 (1938) ("The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups . . . ."). But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subse-

quently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U. S. 637, 640–642 (1950) ("It is said that the separations imposed by the State in this case are in form merely nominal. . . . But they signify that the State . . . sets [petitioner] apart from the other students."). By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown* v. *Board of Education*. In that seminal decision, we overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. 347 U. S., at 494–495. *Brown* concerned the permissibility of racial segregation in public schools. The school district maintained that such segregation was lawful because the schools provided to black students and white students were of roughly the same quality. But we held such segregation impermissible "*even though* the physical facilities and other 'tangible' factors may be equal." *Id.*, at 493 (emphasis added). The mere act of separating "children . . . because of their race," we explained, itself "generate[d] a feeling of inferiority." *Id.*, at 494.

The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education "must be made available to all on equal terms." *Id.*, at 493. As the plaintiffs had argued, "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I*, O. T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952); see also Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our

dedicated belief."); *post*, at 39, n. 7 (THOMAS, J., concurring). The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown* v. *Board of Education*, 349 U. S. 294, 300–301 (1955). The time for making distinctions based on race had passed. *Brown*, the Court observed, "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional." *Id.*, at 298.

So too in other areas of life. Immediately after *Brown*, we began routinely affirming lower court decisions that invalidated all manner of race-based state action. In *Gayle* v. *Browder*, for example, we summarily affirmed a decision invalidating state and local laws that required segregation in busing. 352 U. S. 903 (1956) (*per curiam*). As the lower court explained, "[t]he equal protection clause requires equality of treatment before the law for all persons without regard to race or color." *Browder* v. *Gayle*, 142 F. Supp. 707, 715 (MD Ala. 1956). And in *Mayor and City Council of Baltimore* v. *Dawson*, we summarily affirmed a decision striking down racial segregation at public beaches and bathhouses maintained by the State of Maryland and the city of Baltimore. 350 U. S. 877 (1955) (*per curiam*). "It is obvious that racial segregation in recreational activities can no longer be sustained," the lower court observed. *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 386, 387 (CA4 1955) (*per curiam*). "[T]he ideal of equality before the law which characterizes our institutions" demanded as much. *Ibid.*

In the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality. Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone, all by a transformative promise "stemming from our American ideal of fairness": "'the Constitution . . . forbids . . . discrimination by the General Government, or by the States,

against any citizen because of his race.'" *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954) (quoting *Gibson* v. *Mississippi*, 162 U. S. 565, 591 (1896) (Harlan, J., for the Court)). As we recounted in striking down the State of Virginia's ban on interracial marriage 13 years after *Brown*, the Fourteenth Amendment "proscri[bes] . . . all invidious racial discriminations." *Loving* v. *Virginia*, 388 U. S. 1, 8 (1967). Our cases had thus "consistently denied the constitutionality of measures which restrict the rights of citizens on account of race." *Id.*, at 11–12; *s*ee also *Yick Wo*, 118 U. S., at 373–375 (commercial property); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948) (housing covenants); *Hernandez* v. *Texas*, 347 U. S. 475 (1954) (composition of juries); *Dawson*, 350 U. S., at 877 (beaches and bathhouses); *Holmes* v. *Atlanta*, 350 U. S. 879 (1955) (*per curiam*) (golf courses); *Browder*, 352 U. S., at 903 (busing); *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U. S. 54 (1958) (*per curiam*) (public parks); *Bailey* v. *Patterson*, 369 U. S. 31 (1962) (*per curiam*) (transportation facilities); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1 (1971) (education); *Batson* v. *Kentucky*, 476 U. S. 79 (1986) (peremptory jury strikes).

These decisions reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore* v. *Sidoti*, 466 U. S. 429, 432 (1984) (footnote omitted). We have recognized that repeatedly. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388 U. S., at 10; see also *Washington* v. *Davis*, 426 U. S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964) ("[T]he historical fact [is] that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination.").

Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo*, 118 U. S., at 369. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 289–290 (1978) (opinion of Powell, J.). "If both are not accorded the same protection, then it is not equal." *Id.*, at 290.

Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995). Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." *Grutter* v. *Bollinger*, 539 U. S. 306, 326 (2003). Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest. *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297, 311–312 (2013) (*Fisher I*) (internal quotation marks omitted).

Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. See, *e.g.*, *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 720 (2007); *Shaw* v. *Hunt*, 517 U. S. 899, 909–910 (1996); *post*, at 19–20, 30–31 (opinion of THOMAS, J.). The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. See *Johnson* v. *California*, 543 U. S. 499, 512–513 (2005).[3]

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[3]The first time we determined that a governmental racial classification satisfied "the most rigid scrutiny" was 10 years before *Brown* v.

Our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice* v. *Cayetano*, 528 U. S. 495, 517 (2000) (quoting *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943)). That principle cannot be overridden except in the most extraordinary case.

B

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in *Regents of University of California* v. *Bakke*, which involved a set-aside admissions program used by the University of California, Davis, medical school. 438 U. S., at 272–276. Each year, the school held 16 of its 100 seats open for members of certain minority groups, who were reviewed on a special admissions track separate from those in the main admissions pool. *Id.*, at

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Board of Education, 347 U. S. 483 (1954), in the infamous case *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944). There, the Court upheld the internment of "all persons of Japanese ancestry in prescribed West Coast . . . areas" during World War II because "the military urgency of the situation demanded" it. *Id.*, at 217, 223. We have since overruled *Korematsu*, recognizing that it was "gravely wrong the day it was decided." *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (slip op., at 38). The Court's decision in *Korematsu* nevertheless "demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification" and that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 236 (1995) (internal quotation marks omitted).

The principal dissent, for its part, claims that the Court has also permitted "the use of race when that use burdens minority populations." *Post*, at 38–39 (opinion of SOTOMAYOR, J.). In support of that claim, the dissent cites two cases that have nothing to do with the Equal Protection Clause. See *ibid.* (citing *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975) (Fourth Amendment case), and *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976) (another Fourth Amendment case)).

272–275. The plaintiff, Allan Bakke, was denied admission two years in a row, despite the admission of minority applicants with lower grade point averages and MCAT scores. *Id.*, at 276–277. Bakke subsequently sued the school, arguing that its set-aside program violated the Equal Protection Clause.

In a deeply splintered decision that produced six different opinions—none of which commanded a majority of the Court—we ultimately ruled in part in favor of the school and in part in favor of Bakke. Justice Powell announced the Court's judgment, and his opinion—though written for himself alone—would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U. S., at 323.

Justice Powell began by finding three of the school's four justifications for its policy not sufficiently compelling. The school's first justification of "reducing the historic deficit of traditionally disfavored minorities in medical schools," he wrote, was akin to "[p]referring members of any one group for no reason other than race or ethnic origin." *Bakke*, 438 U. S., at 306–307 (internal quotation marks omitted). Yet that was "discrimination for its own sake," which "the Constitution forbids." *Id.*, at 307 (citing, *inter alia*, *Loving*, 388 U. S., at 11). Justice Powell next observed that the goal of "remedying . . . the effects of 'societal discrimination'" was also insufficient because it was "an amorphous concept of injury that may be ageless in its reach into the past." *Bakke*, 438 U. S., at 307. Finally, Justice Powell found there was "virtually no evidence in the record indicating that [the school's] special admissions program" would, as the school had argued, increase the number of doctors working in underserved areas. *Id.*, at 310.

Justice Powell then turned to the school's last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. That interest, in his view, was "a constitutionally permissible goal for

an institution of higher education." *Id.*, at 311–312. And that was so, he opined, because a university was entitled as a matter of academic freedom "to make its own judgments as to . . . the selection of its student body." *Id.*, at 312.

But a university's freedom was not unlimited. "Racial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." *Id.*, at 291. A university could not employ a quota system, for example, reserving "a specified number of seats in each class for individuals from the preferred ethnic groups." *Id.*, at 315. Nor could it impose a "multitrack program with a prescribed number of seats set aside for each identifiable category of applicants." *Ibid.* And neither still could it use race to foreclose an individual "from all consideration . . . simply because he was not the right color." *Id.*, at 318.

The role of race had to be cabined. It could operate only as "a 'plus' in a particular applicant's file." *Id.*, at 317. And even then, race was to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Ibid.* Justice Powell derived this approach from what he called the "illuminating example" of the admissions system then used by Harvard College. *Id.*, at 316. Under that system, as described by Harvard in a brief it had filed with the Court, "the race of an applicant may tip the balance in his favor just as geographic origin or a life [experience] may tip the balance in other candidates' cases." *Ibid.* (internal quotation marks omitted). Harvard continued: "A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer." *Ibid.* (internal quotation marks omitted). The result, Harvard proclaimed, was that "race has been"—and should be—"a factor in some admission decisions." *Ibid.* (internal

quotation marks omitted).

No other Member of the Court joined Justice Powell's opinion. Four Justices instead would have held that the government may use race for the purpose of "remedying the effects of past societal discrimination." *Id.*, at 362 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices, meanwhile, would have struck down the Davis program as violative of Title VI. In their view, it "seem[ed] clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government." *Id.*, at 416 (Stevens, J., joined by Burger, C. J., and Stewart and Rehnquist, JJ., concurring in judgment in part and dissenting in part). The Davis program therefore flatly contravened a core "principle imbedded in the constitutional *and* moral understanding of the times": the prohibition against "racial discrimination." *Id.*, at 418, n. 21 (internal quotation marks omitted).

C

In the years that followed our "fractured decision in *Bakke*," lower courts "struggled to discern whether Justice Powell's" opinion constituted "binding precedent." *Grutter*, 539 U. S., at 325. We accordingly took up the matter again in 2003, in the case *Grutter* v. *Bollinger*, which concerned the admissions system used by the University of Michigan law school. *Id.*, at 311. There, in another sharply divided decision, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.*, at 325.

The Court's analysis tracked Justice Powell's in many respects. As for compelling interest, the Court held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Id.*, at 328. In achieving that goal, however, the Court

made clear—just as Justice Powell had—that the law school was limited in the means that it could pursue. The school could not "establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks." *Id.*, at 334. Neither could it "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." *Ibid.* Nor still could it desire "some specified percentage of a particular group merely because of its race or ethnic origin." *Id.*, at 329–330 (quoting *Bakke*, 438 U. S., at 307 (opinion of Powell, J.)).

These limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate . . . stereotyp[ing]." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493 (1989) (plurality opinion). Universities were thus not permitted to operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U. S., at 333 (internal quotation marks omitted). The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341.

But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. The Court stressed the fundamental principle that "there are serious problems of justice connected with the idea of [racial] preference itself." *Ibid.* (quoting *Bakke*, 438 U. S., at 298 (opinion of Powell, J.)). It observed that all "racial classifications, however compelling their goals," were "dangerous." *Grutter*, 539 U. S., at 342. And it cautioned that all "race-based governmental action" should "remai[n] subject to continuing oversight to assure that it will

work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 341 (internal quotation marks omitted).

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. *Id.*, at 342. This requirement was critical, and *Grutter* emphasized it repeatedly. "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the norm of equal treatment" must be "a temporary matter." *Ibid.* (internal quotation marks omitted). The importance of an end point was not just a matter of repetition. It was the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection. The Court recognized as much: "[e]nshrining a permanent justification for racial preferences," the Court explained, "would offend this fundamental equal protection principle." *Ibid.*; see also *id.,* at 342–343 (quoting N. Nathanson & C. Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 58 Chi. Bar Rec. 282, 293 (May–June 1977), for the proposition that "[i]t would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life").

Grutter thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U. S., at 343.

IV

Twenty years later, no end is in sight. "Harvard's view about when [race-based admissions will end] doesn't have a date on it." Tr. of Oral Arg. in No. 20–1199, p. 85; Brief for Respondent in No. 20–1199, p. 52. Neither does UNC's. 567 F. Supp. 3d, at 612. Yet both insist that the use of race in their admissions programs must continue.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[4]

A

Because "[r]acial discrimination [is] invidious in all contexts," *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 619 (1991), we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny, *Fisher* v. *University of Tex. at Austin*, 579 U. S. 365, 381 (2016) (*Fisher II*). "Classifying and assigning" students based on their race "requires more than . . . an amorphous end to justify it." *Parents Involved*, 551 U. S., at 735.

Respondents have fallen short of satisfying that burden.

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[4] The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.

First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." 980 F. 3d, at 173–174. UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." 567 F. Supp. 3d, at 656.

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? *Ibid.*; 980 F. 3d, at 173–174. Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient "innovation and problem-solving," or students who are appropriately "engaged and productive." 567 F. Supp. 3d, at 656. Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.

Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for

example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison. See *Johnson*, 543 U. S., at 512–513. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class "whole for [the] injuries [they] suffered." *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747, 763 (1976) (internal quotation marks omitted). And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students "compar[able] to what it would have been in the absence of such constitutional violations." *Dayton Bd. of Ed.* v. *Brinkman*, 433 U. S. 406, 420 (1977).

Nothing like that is possible when it comes to evaluating the interests respondents assert here. Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces "engaged and productive citizens," sufficiently "enhance[s] appreciation, respect, and empathy," or effectively "train[s] future leaders" is standardless. 567 F. Supp. 3d, at 656; 980 F. 3d, at 173–174. The interests that respondents seek, though plainly worthy, are inescapably imponderable.

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, UNC works to avoid the underrepresentation of minority groups, 567 F. Supp. 3d, at 591–592, and n. 7, while Harvard likewise "guard[s] against inadvertent drop-offs in representation" of certain minority groups from year to year, Brief for Respondent in No. 20–1199, at 16. To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. See, *e.g.*, 397

F. Supp. 3d, at 137, 178; 3 App. in No. 20–1199, at 1278, 1280–1283; 3 App. in No. 21–707, at 1234–1241. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. See, *e.g.*, M. Lopez, J. Krogstad, & J. Passel, Pew Research Center, Who is Hispanic? (Sept. 15, 2022) (referencing the "long history of changing labels [and] shifting categories . . . reflect[ing] evolving cultural norms about what it means to be Hispanic or Latino in the U. S. today"). And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question." Tr. of Oral Arg. in No. 21–707, p. 107; cf. *post*, at 6–7 (GORSUCH, J., concurring) (detailing the "incoherent" and "irrational stereotypes" that these racial categories further).

Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. Yet "[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is 'broadly

diverse.'" *Parents Involved*, 551 U. S., at 724 (quoting *Grutter*, 539 U. S., at 329). And given the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use.

The universities' main response to these criticisms is, essentially, "trust us." None of the questions recited above need answering, they say, because universities are "owed deference" when using race to benefit some applicants but not others. Brief for University Respondents in No. 21–707, at 39 (internal quotation marks omitted). It is true that our cases have recognized a "tradition of giving a degree of deference to a university's academic decisions." *Grutter*, 539 U. S., at 328. But we have been unmistakably clear that any deference must exist "within constitutionally prescribed limits," *ibid.*, and that "deference does not imply abandonment or abdication of judicial review," *Miller–El* v. *Cockrell*, 537 U. S. 322, 340 (2003). Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz* v. *Bollinger*, 539 U. S. 244, 270 (2003) (internal quotation marks omitted). The programs at issue here do not satisfy that standard.[5]

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[5] For that reason, one dissent candidly advocates abandoning the demands of strict scrutiny. See *post*, at 24, 26–28 (opinion of JACKSON, J.) (arguing the Court must "get out of the way," "leav[e] well enough alone," and defer to universities and "experts" in determining who should be discriminated against). An opinion professing fidelity to history (to say nothing of the law) should surely see the folly in that approach.

B

The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype.

First, our cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. 980 F. 3d, at 170, n. 29. And the District Court observed that Harvard's "policy of considering applicants' race . . . overall results in fewer Asian American and white students being admitted." 397 F. Supp. 3d, at 178.

Respondents nonetheless contend that an individual's race is never a negative factor in their admissions programs, but that assertion cannot withstand scrutiny. Harvard, for example, draws an analogy between race and other factors it considers in admission. "[W]hile admissions officers may give a preference to applicants likely to excel in the Harvard-Radcliffe Orchestra," Harvard explains, "that does not mean it is a 'negative' not to excel at a musical instrument." Brief for Respondent in No. 20–1199, at 51. But on Harvard's logic, while it gives preferences to applicants with high grades and test scores, "that does not mean it is a 'negative'" to be a student with lower grades and lower test scores. *Ibid.* This understanding of the admissions process is hard to take seriously. College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.

Respondents also suggest that race is not a negative factor because it does not impact many admissions decisions. See *id.*, at 49; Brief for University Respondents in No. 21–707, at 2. Yet, at the same time, respondents also maintain that the demographics of their admitted classes would

meaningfully change if race-based admissions were abandoned. And they acknowledge that race is determinative for at least some—if not many—of the students they admit. See, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67; 567 F. Supp. 3d, at 633. How else but "negative" can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been? The "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley*, 334 U. S., at 22.[6]

Respondents' admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U. S., at 333 (internal quotation marks omitted). That requirement is found throughout our Equal Protection Clause jurisprudence more generally. See, *e.g.*, *Schuette* v. *BAMN*, 572 U. S. 291, 308 (2014) (plurality opinion) ("In cautioning against 'impermissible racial stereotypes,' this Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike . . . .'" (quoting *Shaw* v. *Reno*, 509 U. S.

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[6]JUSTICE JACKSON contends that race does not play a "determinative role for applicants" to UNC. *Post*, at 24. But even the principal dissent acknowledges that race—and race alone—explains the admissions decisions for hundreds if not thousands of applicants to UNC each year. *Post*, at 33, n. 28 (opinion of SOTOMAYOR, J.); see also *Students for Fair Admissions, Inc.* v. *University of N. C. at Chapel Hill*, No. 1:14–cv–954 (MDNC, Dec. 21, 2020), ECF Doc. 233, at 23–27 (UNC expert testifying that race explains 1.2% of in state and 5.1% of out of state admissions decisions); 3 App. in No. 21–707, at 1069 (observing that UNC evaluated 57,225 in state applicants and 105,632 out of state applicants from 2016–2021). The suggestion by the principal dissent that our analysis relies on extra-record materials, see *post*, at 29–30, n. 25 (opinion of SOTOMAYOR, J.), is simply mistaken.

630, 647 (1993))).

Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke*, 438 U. S., at 316 (opinion of Powell, J.) (internal quotation marks omitted); see also Tr. of Oral Arg. in No. 20–1199, at 92. UNC is much the same. It argues that race in itself "says [something] about who you are." Tr. of Oral Arg. in No. 21–707, at 97; see also *id.*, at 96 (analogizing being of a certain race to being from a rural area).

We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." *Shaw*, 509 U. S., at 647. The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.

"One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice*, 528 U. S., at 517. But when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike," *Miller* v. *Johnson*, 515 U. S. 900, 911–912 (1995) (internal quotation marks omitted)—at the very least alike in the sense of being different from nonminority students. In

doing so, the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.*, at 912 (internal quotation marks omitted). Such stereotyping can only "cause[] continued hurt and injury," *Edmonson*, 500 U. S., at 631, contrary as it is to the "core purpose" of the Equal Protection Clause, *Palmore*, 466 U. S., at 432.

C

If all this were not enough, respondents' admissions programs also lack a "logical end point." *Grutter*, 539 U. S., at 342.

Respondents and the Government first suggest that respondents' race-based admissions programs will end when, in their absence, there is "meaningful representation and meaningful diversity" on college campuses. Tr. of Oral Arg. in No. 21–707, at 167. The metric of meaningful representation, respondents assert, does not involve any "strict numerical benchmark," *id.*, at 86; or "precise number or percentage," *id.*, at 167; or "specified percentage," Brief for Respondent in No. 20–1199, at 38 (internal quotation marks omitted). So what does it involve?

Numbers all the same. At Harvard, each full committee meeting begins with a discussion of "how the breakdown of the class compares to the prior year in terms of racial identities." 397 F. Supp. 3d, at 146. And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the Admissions Committee may decide to give additional attention to applications from students within that group." *Ibid.*; see also *id.*, at 147 (District Court finding that Harvard uses race to "trac[k] how each class is shaping up relative to previous years with an eye towards achieving a level of racial diversity"); 2 App. in No. 20–1199,

at 821–822.

The results of the Harvard admissions process reflect this numerical commitment. For the admitted classes of 2009 to 2018, black students represented a tight band of 10.0%–11.7% of the admitted pool. The same theme held true for other minority groups:

Share of Students Admitted to Harvard by Race			
	African-American Share of Class	Hispanic Share of Class	Asian-American Share of Class
Class of 2009	11%	8%	18%
Class of 2010	10%	10%	18%
Class of 2011	10%	10%	19%
Class of 2012	10%	9%	19%
Class of 2013	10%	11%	17%
Class of 2014	11%	9%	20%
Class of 2015	12%	11%	19%
Class of 2016	10%	9%	20%
Class of 2017	11%	10%	20%
Class of 2018	12%	12%	19%

Brief for Petitioner in No. 20–1199 etc., p. 23. Harvard's focus on numbers is obvious.[7]

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[7]The principal dissent claims that "[t]he fact that Harvard's racial shares of admitted applicants varies relatively little . . . is unsurprising and reflects the fact that the racial makeup of Harvard's applicant pool also varies very little over this period." *Post*, at 35 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). But that is exactly the point: Harvard must use precise racial preferences year in and year out to maintain the unyielding demographic composition of its class. The dissent is thus left to attack the numbers themselves, arguing they were "handpicked" "from a truncated period." *Ibid.*, n. 29 (opinion of SOTOMAYOR, J.). As supposed proof, the dissent notes that the share of

UNC's admissions program operates similarly. The University frames the challenge it faces as "the admission and enrollment of underrepresented minorities," Brief for University Respondents in No. 21–707, at 7, a metric that turns solely on whether a group's "percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina," 567 F. Supp. 3d, at 591, n. 7; see also Tr. of Oral Arg. in No. 21–707, at 79. The University "has not yet fully achieved its diversity-related educational goals," it explains, in part due to its failure to obtain closer to proportional representation. Brief for University Respondents in No. 21–707, at 7; see also 567 F. Supp. 3d, at 594.

The problem with these approaches is well established. "[O]utright racial balancing" is "patently unconstitutional." *Fisher I*, 570 U. S., at 311 (internal quotation marks omitted). That is so, we have repeatedly explained, because "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller,* 515 U. S., at 911 (internal quotation marks omitted). By promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on its head. Their admissions programs "effectively assure[] that race will always be relevant . . . and that the ultimate goal of eliminating" race as a criterion "will never be achieved." *Croson*, 488 U. S., at 495 (internal

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Asian students at Harvard varied significantly from 1980 to 1994—a 14-year period that ended nearly three decades ago. 4 App. in No. 20–1199, at 1770. But the relevance of that observation—handpicked and truncated as it is—is lost on us. And the dissent does not and cannot dispute that the share of black and Hispanic students at Harvard—"the primary beneficiaries" of its race-based admissions policy—has remained consistent for decades. 397 F. Supp. 3d, at 178; 4 App. in No. 20–1199, at 1770. For all the talk of holistic and contextual judgments, the racial preferences at issue here in fact operate like clockwork.

quotation marks omitted).

Respondents' second proffered end point fares no better. Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or "productive citizens and leaders" have been created. 567 F. Supp. 3d, at 656. Nor is there any way to know whether those goals would adequately be met in the absence of a race-based admissions program. As UNC itself acknowledges, these "qualitative standard[s]" are "difficult to measure." Tr. of Oral Arg. in No. 21–707, at 78; but see *Fisher II*, 579 U. S., at 381 (requiring race-based admissions programs to operate in a manner that is "sufficiently measurable").

Third, respondents suggest that race-based preferences must be allowed to continue for at least five more years, based on the Court's statement in *Grutter* that it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary." 539 U. S., at 343. The 25-year mark articulated in *Grutter*, however, reflected only that Court's view that race-based preferences would, by 2028, be unnecessary to ensure a requisite level of racial diversity on college campuses. *Ibid.* That expectation was oversold. Neither Harvard nor UNC believes that race-based admissions will in fact be unnecessary in five years, and both universities thus expect to continue using race as a criterion well beyond the time limit that *Grutter* suggested. See Tr. of Oral Arg. in No. 20–1199, at 84–85; Tr. of Oral Arg. in No. 21–707, at 85–86. Indeed, the high school applicants that Harvard and UNC will evaluate this fall using their race-based admissions systems are expected to graduate in 2028—25 years after *Grutter* was decided.

Finally, respondents argue that their programs need not have an end point at all because they frequently review

them to determine whether they remain necessary. See Brief for Respondent in No. 20–1199, at 52; Brief for University Respondents in No. 21–707, at 58–59. Respondents point to language in *Grutter* that, they contend, permits "the durational requirement [to] be met" with "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." 539 U. S., at 342. But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional. To the contrary, the Court made clear that race-based admissions programs eventually had to end—despite whatever periodic review universities conducted. *Ibid.*; see also *supra*, at 18.

Here, however, Harvard concedes that its race-based admissions program has no end point. Brief for Respondent in No. 20–1199, at 52 (Harvard "has not set a sunset date" for its program (internal quotation marks omitted)). And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. Tr. of Oral Arg. in No. 20–1199, at 91. UNC's race-based admissions program is likewise not set to expire any time soon—nor, indeed, any time at all. The University admits that it "has not set forth a proposed time period in which it believes it can end all race-conscious admissions practices." 567 F. Supp. 3d, at 612. And UNC suggests that it might soon use race to a *greater* extent than it currently does. See Brief for University Respondents in No. 21–707, at 57. In short, there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon.

V

The dissenting opinions resist these conclusions. They would instead uphold respondents' admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. Although

both opinions are thorough and thoughtful in many respects, this Court has long rejected their core thesis.

The dissents' interpretation of the Equal Protection Clause is not new. In *Bakke*, four Justices would have permitted race-based admissions programs to remedy the effects of societal discrimination. 438 U. S., at 362 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). But that minority view was just that—a minority view. Justice Powell, who provided the fifth vote and controlling opinion in *Bakke*, firmly rejected the notion that societal discrimination constituted a compelling interest. Such an interest presents "an amorphous concept of injury that may be ageless in its reach into the past," he explained. *Id.*, at 307. It cannot "justify a [racial] classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the [race-based] admissions program are thought to have suffered." *Id.*, at 310.

The Court soon adopted Justice Powell's analysis as its own. In the years after *Bakke*, the Court repeatedly held that ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action. "[A]n effort to alleviate the effects of societal discrimination is not a compelling interest," we said plainly in *Hunt*, a 1996 case about the Voting Rights Act. 517 U. S., at 909–910. We reached the same conclusion in *Croson*, a case that concerned a preferential government contracting program. Permitting "past societal discrimination" to "serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group." 488 U. S., at 505. Opening that door would shutter another—"[t]he dream of a Nation of equal citizens . . . would be lost," we observed, "in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Id.*, at 505–506. "[S]uch a result would be contrary to both the letter and spirit of a

constitutional provision whose central command is equality." *Id.*, at 506.

The dissents here do not acknowledge any of this. They fail to cite *Hunt*. They fail to cite *Croson*. They fail to mention that the entirety of their analysis of the Equal Protection Clause—the statistics, the cases, the history—has been considered and rejected before. There is a reason the principal dissent must invoke Justice Marshall's partial dissent in *Bakke* nearly a dozen times while mentioning Justice Powell's controlling opinion barely once (JUSTICE JACKSON's opinion ignores Justice Powell altogether). For what one dissent denigrates as "rhetorical flourishes about colorblindness," *post*, at 14 (opinion of SOTOMAYOR, J.), are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law. We understand the dissents want that law to be different. They are entitled to that desire. But they surely cannot claim the mantle of *stare decisis* while pursuing it.[8]

The dissents are no more faithful to our precedent on race-based admissions. To hear the principal dissent tell it, *Grutter* blessed such programs indefinitely, until "racial inequality will end." *Post*, at 54 (opinion of SOTOMAYOR, J.). But *Grutter* did no such thing. It emphasized—not once or twice, but at least six separate times—that race-based ad-

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[8] Perhaps recognizing as much, the principal dissent at one point attempts to press a different remedial rationale altogether, stating that both respondents "have sordid legacies of racial exclusion." *Post*, at 21 (opinion of SOTOMAYOR, J.). Such institutions should perhaps be the very *last* ones to be allowed to make race-based decisions, let alone be accorded deference in doing so. In any event, neither university defends its admissions system as a remedy for past discrimination—their own or anyone else's. See Tr. of Oral Arg. in No. 21–707, at 90 ("[W]e're not pursuing any sort of remedial justification for our policy."). Nor has any decision of ours permitted a remedial justification for race-based college admissions. Cf. *Bakke*, 438 U. S., at 307 (opinion of Powell, J.).

missions programs "must have reasonable durational limits" and that their "deviation from the norm of equal treatment" must be "a temporary matter." 539 U. S., at 342. The Court also disclaimed "[e]nshrining a permanent justification for racial preferences." *Ibid.* Yet the justification for race-based admissions that the dissent latches on to is just that—unceasing.

The principal dissent's reliance on *Fisher II* is similarly mistaken. There, by a 4-to-3 vote, the Court upheld a "*sui generis*" race-based admissions program used by the University of Texas, 579 U. S., at 377, whose "goal" it was to enroll a "critical mass" of certain minority students, *Fisher I*, 570 U. S., at 297. But neither Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means. See 1 App. in No. 21–707, at 402 ("[N]o one has directed anybody to achieve a critical mass, and I'm not even sure we would know what it is." (testimony of UNC administrator)); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from Harvard administrator).

Fisher II also recognized the "enduring challenge" that race-based admissions systems place on "the constitutional promise of equal treatment." 579 U. S., at 388. The Court thus reaffirmed the "continuing obligation" of universities "to satisfy the burden of strict scrutiny." *Id.*, at 379. To drive the point home, *Fisher II* limited itself just as *Grutter* had—in duration. The Court stressed that its decision did "*not* necessarily mean the University may rely on the same policy" going forward. 579 U. S., at 388 (emphasis added); see also *Fisher I*, 570 U. S., at 313 (recognizing that "*Grutter* . . . approved the plan at issue upon concluding that it . . . was limited in time"). And the Court openly acknowl-

edged that its decision offered limited "prospective guidance." *Fisher II*, 579 U. S., at 379.[9]

The principal dissent wrenches our case law from its context, going to lengths to ignore the parts of that law it does not like. The serious reservations that *Bakke*, *Grutter*, and *Fisher* had about racial preferences go unrecognized. The unambiguous requirements of the Equal Protection Clause—"the most rigid," "searching" scrutiny it entails—go without note. *Fisher I*, 570 U. S., at 310. And the repeated demands that race-based admissions programs must end go overlooked—contorted, worse still, into a demand that such programs never stop.

Most troubling of all is what the dissent must make these omissions to defend: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. Separate but equal is "*inherently* unequal," said *Brown*. 347 U. S., at 495 (emphasis added). It depends, says the dissent.

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[9]The principal dissent rebukes the Court for not considering adequately the reliance interests respondents and other universities had in *Grutter*. But as we have explained, *Grutter* itself limited the reliance that could be placed upon it by insisting, over and over again, that race-based admissions programs be limited in time. See *supra*, at 20. *Grutter* indeed went so far as to suggest a specific period of reliance—25 years—precluding the indefinite reliance interests that the dissent articulates. Cf. *post*, at 2–4 (KAVANAUGH, J., concurring). Those interests are, moreover, vastly overstated on their own terms. Three out of every five American universities do *not* consider race in their admissions decisions. See Brief for Respondent in No. 20–1199, p. 40. And several States—including some of the most populous (California, Florida, and Michigan)—have prohibited race-based admissions outright. See Brief for Oklahoma et al. as *Amici Curiae* 9, n. 6.

That is a remarkable view of the judicial role—remarkably wrong. Lost in the false pretense of judicial humility that the dissent espouses is a claim to power so radical, so destructive, that it required a Second Founding to undo. "Justice Harlan knew better," one of the dissents decrees. *Post*, at 5 (opinion of JACKSON, J.). Indeed he did:

> "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting).

VI

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. See, *e.g.*, 4 App. in No. 21–707, at 1725–1726, 1741; Tr. of Oral Arg. in No. 20–1199, at 10. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing,

not the name." *Cummings* v. *Missouri*, 4 Wall. 277, 325 (1867). A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

The judgments of the Court of Appeals for the First Circuit and of the District Court for the Middle District of North Carolina are reversed.

It is so ordered.

JUSTICE JACKSON took no part in the consideration or decision of the case in No. 20–1199.

SUPREME COURT OF THE UNITED STATES

Nos. 20–1199 and 21–707

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
20–1199 *v.*
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
21–707 *v.*
UNIVERSITY OF NORTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 29, 2023]

JUSTICE THOMAS, concurring.

In the wake of the Civil War, the country focused its attention on restoring the Union and establishing the legal status of newly freed slaves. The Constitution was amended to abolish slavery and proclaim that all persons born in the United States are citizens, entitled to the privileges or immunities of citizenship and the equal protection of the laws. Amdts. 13, 14. Because of that second founding, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting).

This Court's commitment to that equality principle has ebbed and flowed over time. After forsaking the principle for decades, offering a judicial *imprimatur* to segregation

and ushering in the Jim Crow era, the Court finally corrected course in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), announcing that primary schools must either desegregate with all deliberate speed or else close their doors. See also *Brown* v. *Board of Education*, 349 U. S. 294 (1955) (*Brown II*). It then pulled back in *Grutter* v. *Bollinger*, 539 U. S. 306 (2003), permitting universities to discriminate based on race in their admissions process (though only temporarily) in order to achieve alleged "educational benefits of diversity." *Id.*, at 319. Yet, the Constitution continues to embody a simple truth: Two discriminatory wrongs cannot make a right.

I wrote separately in *Grutter*, explaining that the use of race in higher education admissions decisions—regardless of whether intended to help or to hurt—violates the Fourteenth Amendment. *Id.*, at 351 (opinion concurring in part and dissenting in part). In the decades since, I have repeatedly stated that *Grutter* was wrongly decided and should be overruled. *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297, 315, 328 (2013) (concurring opinion) (*Fisher I*); *Fisher* v. *University of Tex. at Austin*, 579 U. S. 365, 389 (2016) (dissenting opinion). Today, and despite a lengthy interregnum, the Constitution prevails.

Because the Court today applies genuine strict scrutiny to the race-conscious admissions policies employed at Harvard and the University of North Carolina (UNC) and finds that they fail that searching review, I join the majority opinion in full. I write separately to offer an originalist defense of the colorblind Constitution; to explain further the flaws of the Court's *Grutter* jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination.

I

In the 1860s, Congress proposed and the States ratified the Thirteenth and Fourteenth Amendments. And, with the authority conferred by these Amendments, Congress passed two landmark Civil Rights Acts. Throughout the debates on each of these measures, their proponents repeatedly affirmed their view of equal citizenship and the racial equality that flows from it. In fact, they held this principle so deeply that their crowning accomplishment—the Fourteenth Amendment—ensures racial equality *with no textual reference to race whatsoever*. The history of these measures' enactment renders their motivating principle as clear as their text: All citizens of the United States, regardless of skin color, are equal before the law.

I do not contend that all of the individuals who put forth and ratified the Fourteenth Amendment universally believed this to be true. Some Members of the proposing Congress, for example, opposed the Amendment. And, the historical record—particularly with respect to the debates on ratification in the States—is sparse. Nonetheless, substantial evidence suggests that the Fourteenth Amendment was passed to "establis[h] the broad constitutional principle of full and complete equality of all persons under the law," forbidding "all legal distinctions based on race or color." Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1 etc., p. 115 (U. S. *Brown* Reargument Brief).

This was Justice Harlan's view in his lone dissent in *Plessy*, where he observed that "[o]ur Constitution is color-blind." 163 U. S., at 559. It was the view of the Court in *Brown*, which rejected "'any authority . . . to use race as a factor in affording educational opportunities.'" *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 747 (2007). And, it is the view adopted in the Court's opinion today, requiring "the absolute equality of all citizens" under the law. *Ante*, at 10 (internal quotation

marks omitted).

A

In its 1864 election platform, the Republican Party pledged to amend the Constitution to accomplish the "utter and complete extirpation" of slavery from "the soil of the Republic." 2 A. Schlesinger, History of U. S. Political Parties 1860–1910, p. 1303 (1973). After their landslide victory, Republicans quickly moved to make good on that promise. Congress proposed what would become the Thirteenth Amendment to the States in January 1865, and it was ratified as part of the Constitution later that year. The new Amendment stated that "[n]either slavery nor involuntary servitude . . . shall exist" in the United States "except as a punishment for crime whereof the party shall have been duly convicted." §1. It thus not only prohibited States from themselves enslaving persons, but also obligated them to end enslavement by private individuals within their borders. Its Framers viewed the text broadly, arguing that it "allowed Congress to legislate not merely against slavery itself, but against all the badges and relics of a slave system." A. Amar, America's Constitution: A Biography 362 (2005) (internal quotation marks omitted). The Amendment also authorized "Congress . . . to enforce" its terms "by appropriate legislation"—authority not granted in any prior Amendment. §2. Proponents believed this enforcement clause permitted legislative measures designed to accomplish the Amendment's broader goal of equality for the freedmen.

It quickly became clear, however, that further amendment would be necessary to safeguard that goal. Soon after the Thirteenth Amendment's adoption, the reconstructed Southern States began to enact "Black Codes," which circumscribed the newly won freedoms of blacks. The Black Code of Mississippi, for example, "imposed all sorts of disabilities" on blacks, "including limiting their freedom of

movement and barring them from following certain occupations, owning firearms, serving on juries, testifying in cases involving whites, or voting." E. Foner, The Second Founding 48 (2019).

Congress responded with the landmark Civil Rights Act of 1866, 14 Stat. 27, in an attempt to pre-empt the Black Codes. The 1866 Act promised such a sweeping form of equality that it would lead many to say that it exceeded the scope of Congress' authority under the Thirteenth Amendment. As enacted, it stated:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The text of the provision left no doubt as to its aim: All persons born in the United States were equal citizens entitled to the same rights and subject to the same penalties as white citizens in the categories enumerated. See M. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 958 (1995) ("Note that the bill neither

forbade racial discrimination generally nor did it guarantee particular rights to all persons. Rather, it required an equality in certain specific rights"). And, while the 1866 Act used the rights of "white citizens" as a benchmark, its rule was decidedly colorblind, safeguarding legal equality for *all* citizens "of every race and color" and providing the same rights to all.

The 1866 Act's evolution further highlights its rule of equality. To start, *Dred Scott* v. *Sandford*, 19 How. 393 (1857), had previously held that blacks "were not regarded as a portion of the people or citizens of the Government" and "had no rights which the white man was bound to respect." *Id.*, at 407, 411. The Act, however, would effectively overrule *Dred Scott* and ensure the equality that had been promised to blacks. But the Act went further still. On January 29, 1866, Senator Lyman Trumbull, the bill's principal sponsor in the Senate, proposed text stating that "all persons of African descent born in the United States are hereby declared to be citizens." Cong. Globe, 39th Cong., 1st Sess., 474. The following day, Trumbull revised his proposal, removing the reference to "African descent" and declaring more broadly that "all persons born in the United States, and not subject to any foreign Power," are "citizens of the United States." *Id.*, at 498.

"In the years before the Fourteenth Amendment's adoption, jurists and legislators often connected citizenship with equality," where "the absence or presence of one entailed the absence or presence of the other." *United States* v. *Vaello Madero*, 596 U. S. ___, ___ (2022) (THOMAS, J., concurring) (slip op., at 6). The addition of a citizenship guarantee thus evidenced an intent to broaden the provision, extending beyond recently freed blacks and incorporating a more general view of equality for *all* Americans. Indeed, the drafters later included a specific carveout for "Indians not taxed," demonstrating the breadth of the bill's other-

wise general citizenship language. 14 Stat. 27.[1] As Trumbull explained, the provision created a bond between all Americans; "any statute which is not equal to *all*, and which deprives any citizen of civil rights which are secured to other citizens," was "an unjust encroachment upon his liberty" and a "badge of servitude" prohibited by the Constitution. Cong. Globe, 39th Cong., 1st Sess., at 474 (emphasis added).

Trumbull and most of the Act's other supporters identified the Thirteenth Amendment as a principal source of constitutional authority for the Act's nondiscrimination provisions. See, *e.g.*, *id.*, at 475 (statement of Sen. Trumbull); *id.*, at 1152 (statement of Rep. Thayer); *id.*, at 503–504 (statement of Sen. Howard). In particular, they explained that the Thirteenth Amendment allowed Congress not merely to legislate against slavery itself, but also to counter measures "which depriv[e] any citizen of civil rights which are secured to other citizens." *Id.*, at 474.

But opponents argued that Congress' authority did not sweep so broadly. President Andrew Johnson, for example, contended that Congress lacked authority to pass the measure, seizing on the breadth of the citizenship text and emphasizing state authority over matters of state citizenship. See S. Doc. No. 31, 39th Cong., 1st Sess., 1, 6 (1866) (Johnson veto message). Consequently, "doubts about the constitutional authority conferred by that measure led supporters to supplement their Thirteenth Amendment arguments with other sources of constitutional authority." R. Williams, Originalism and the Other Desegregation Decision, 99 Va. L. Rev. 493, 532–533 (2013) (describing appeals to the naturalization power and the inherent power to protect

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[1] In fact, Indians would not be considered citizens until several decades later. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (declaring that all Indians born in the United States are citizens).

the rights of citizens). As debates continued, it became increasingly apparent that safeguarding the 1866 Act, including its promise of black citizenship and the equal rights that citizenship entailed, would require further submission to the people of the United States in the form of a proposed constitutional amendment. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., at 498 (statement of Sen. Van Winkle).

B

Critically, many of those who believed that Congress lacked the authority to enact the 1866 Act also supported the principle of racial equality. So, almost immediately following the ratification of the Thirteenth Amendment, several proposals for further amendments were submitted in Congress. One such proposal, approved by the Joint Committee on Reconstruction and then submitted to the House of Representatives on February 26, 1866, would have declared that "[t]he Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." *Id.*, at 1033–1034. Representative John Bingham, its drafter, was among those who believed Congress lacked the power to enact the 1866 Act. See *id.*, at 1291. Specifically, he believed the "very letter of the Constitution" already required equality, but the enforcement of that requirement "is of the reserved powers of the States." Cong. Globe, 39th Cong., 1st Sess., at 1034, 1291 (statement of Rep. Bingham). His proposed constitutional amendment accordingly would provide a clear constitutional basis for the 1866 Act and ensure that future Congresses would be unable to repeal it. See W. Nelson, The Fourteenth Amendment 48–49 (1988).

Discussion of Bingham's initial draft was later postponed in the House, but the Joint Committee on Reconstruction

continued its work. See 2 K. Lash, The Reconstruction Amendments 8 (2021). In April, Representative Thaddeus Stevens proposed to the Joint Committee an amendment that began, "[n]o discrimination shall be made by any State nor by the United States as to the civil rights of persons because of race, color, or previous condition of servitude." S. Doc. No. 711, 63d Cong., 1st Sess., 31–32 (1915) (reprinting the Journal of the Joint Committee on Reconstruction for the Thirty-Ninth Congress). Stevens' proposal was later revised to read as follows: "'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" *Id.*, at 39. This revised text was submitted to the full House on April 30, 1866. Cong. Globe, 39th Cong., 1st Sess., at 2286–2287. Like the eventual first section of the Fourteenth Amendment, this proposal embodied the familiar Privileges or Immunities, Due Process, and Equal Protection Clauses. And, importantly, it also featured an enforcement clause—with text borrowed from the Thirteenth Amendment—conferring upon Congress the power to enforce its provisions. *Ibid.*

Stevens explained that the draft was intended to "allo[w] Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." *Id.*, at 2459. Moreover, Stevens' later statements indicate that he did not believe there was a difference "in substance between the new proposal and" earlier measures calling for impartial and equal treatment without regard to race. U. S. *Brown* Reargument Brief 44 (noting a distinction only with respect to a suffrage provision). And, Bingham argued that the need for the proposed text was "one of the lessons that have been taught . . . by the history of the past four years of terrific conflict" during the Civil War. Cong. Globe, 39th Cong., 1st Sess., at 2542.

The proposal passed the House by a vote of 128 to 37. *Id.*, at 2545.

Senator Jacob Howard introduced the proposed Amendment in the Senate, powerfully asking, "Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?" *Id.*, at 2766. In keeping with this view, he proposed an introductory sentence, declaring that "'all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.'" *Id.*, at 2869. This text, the Citizenship Clause, was the final missing element of what would ultimately become §1 of the Fourteenth Amendment. Howard's draft for the proposed citizenship text was modeled on the Civil Rights Act of 1866's text, and he suggested the alternative language to "remov[e] all doubt as to what persons are or are not citizens of the United States," a question which had "long been a great desideratum in the jurisprudence and legislation of this country." *Id.*, at 2890. He further characterized the addition as "simply declaratory of what I regard as the law of the land already." *Ibid.*

The proposal was approved in the Senate by a vote of 33 to 11. *Id.*, at 3042. The House then reconciled differences between the two measures, approving the Senate's changes by a vote of 120 to 32. See *id.*, at 3149. And, in June 1866, the amendment was submitted to the States for their consideration and ratification. Two years later, it was ratified by the requisite number of States and became the Fourteenth Amendment to the United States Constitution. See 15 Stat. 706–707; *id.*, at 709–711. Its opening words instilled in our Nation's Constitution a new birth of freedom:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." §1.

As enacted, the text of the Fourteenth Amendment provides a firm statement of equality before the law. It begins by guaranteeing citizenship status, invoking the "longstanding political and legal tradition that closely associated the status of citizenship with the entitlement to legal equality." *Vaello Madero*, 596 U. S., at ___ (THOMAS, J., concurring) (slip op., at 6) (internal quotation marks omitted). It then confirms that States may not "abridge the rights of national citizenship, including whatever civil equality is guaranteed to 'citizens' under the Citizenship Clause." *Id.*, at ___, n. 3 (slip op., at 13, n. 3). Finally, it pledges that even noncitizens must be treated equally "as individuals, and not as members of racial, ethnic, or religious groups." *Missouri* v. *Jenkins*, 515 U. S. 70, 120–121 (1995) (THOMAS, J., concurring).

The drafters and ratifiers of the Fourteenth Amendment focused on this broad equality idea, offering surprisingly little explanation of which term was intended to accomplish which part of the Amendment's overall goal. "The available materials . . . show," however, "that there were widespread expressions of a general understanding of the broad scope of the Amendment similar to that abundantly demonstrated in the Congressional debates, namely, that the first section of the Amendment would establish the full constitutional right of all persons to equality before the law and would prohibit legal distinctions based on race or color."

U. S. *Brown* Reargument Brief 65 (citation omitted). For example, the Pennsylvania debate suggests that the Fourteenth Amendment was understood to make the law "what justice is represented to be, blind" to the "color of [one's] skin." App. to Pa. Leg. Record XLVIII (1867) (Rep. Mann).

The most commonly held view today—consistent with the rationale repeatedly invoked during the congressional debates, see, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., at 2458–2469—is that the Amendment was designed to remove any doubts regarding Congress' authority to enact the Civil Rights Act of 1866 and to establish a nondiscrimination rule that could not be repealed by future Congresses. See, *e.g.*, J. Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L. J. 1385, 1388 (1992) (noting that the "primary purpose" of the Fourteenth Amendment "was to mandate certain rules of racial equality, especially those contained in Section 1 of the Civil Rights Act of 1866").[2] The Amendment's phrasing supports this view, and there does not appear to have been any argument to the contrary predating *Brown*.

Consistent with the Civil Rights Act of 1866's aim, the Amendment definitively overruled Chief Justice Taney's opinion in *Dred Scott* that blacks "were not regarded as a portion of the people or citizens of the Government" and "had no rights which the white man was bound to respect." 19 How., at 407, 411. And, like the 1866 Act, the Amendment also clarified that American citizenship conferred

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[2] There is "some support" in the history of enactment for at least "four interpretations of the first section of the proposed amendment, and in particular of its Privileges [or] Immunities Clause: it would authorize Congress to enforce the Privileges and Immunities Clause of Article IV; it would forbid discrimination between citizens with respect to fundamental rights; it would establish a set of basic rights that all citizens must enjoy; and it would make the Bill of Rights applicable to the states." D. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 406 (2008) (citing sources). Notably, those four interpretations are all color-blind.

rights not just against the Federal Government but also the government of the citizen's State of residence. Unlike the Civil Rights Act, however, the Amendment employed a wholly race-neutral text, extending privileges or immunities to all "citizens"—even if its practical effect was to provide all citizens with the same privileges then enjoyed by whites. That citizenship guarantee was often linked with the concept of equality. *Vaello Madero*, 596 U. S., at ___ (THOMAS, J., concurring) (slip op., at 10). Combining the citizenship guarantee with the Privileges or Immunities Clause and the Equal Protection Clause, the Fourteenth Amendment ensures protection for all equal citizens of the Nation without regard to race. Put succinctly, "[o]ur Constitution is color-blind." *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting).

C

In the period closely following the Fourteenth Amendment's ratification, Congress passed several statutes designed to enforce its terms, eliminating government-based Black Codes—systems of government-imposed segregation—and criminalizing racially motivated violence. The marquee legislation was the Civil Rights Act of 1875, ch. 114, 18 Stat. 335–337, and the justifications offered by proponents of that measure are further evidence for the color-blind view of the Fourteenth Amendment.

The Civil Rights Act of 1875 sought to counteract the systems of racial segregation that had arisen in the wake of the Reconstruction era. Advocates of so-called separate-but-equal systems, which allowed segregated facilities for blacks and whites, had argued that laws permitting or requiring such segregation treated members of both races precisely alike: Blacks could not attend a white school, but symmetrically, whites could not attend a black school. See *Plessy*, 163 U. S., at 544 (arguing that, in light of the social

circumstances at the time, racial segregation did not "necessarily imply the inferiority of either race to the other"). Congress was not persuaded. Supporters of the soon-to-be 1875 Act successfully countered that symmetrical restrictions did not constitute equality, and they did so on colorblind terms.

For example, they asserted that "free government demands the abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). And, they submitted that "[t]he time has come when all distinctions that grew out of slavery ought to disappear." Cong. Globe, 42d Cong., 2d Sess., 3193 (1872) ("[A]s long as you have distinctions and discriminations between white and black in the enjoyment of legal rights and privileges[,] you will have discontent and parties divided between black and white"). Leading Republican Senator Charles Sumner compellingly argued that "any rule excluding a man on account of his color is an indignity, an insult, and a wrong." *Id.*, at 242; see also *ibid.* ("I insist that by the law of the land all persons without distinction of color shall be equal before the law"). Far from conceding that segregation would be perceived as inoffensive if race roles were reversed, he declared that "[t]his is plain oppression, which you . . . would feel keenly were it directed against you or your child." *Id.*, at 384. He went on to paraphrase the English common-law rule to which he subscribed: "[The law] makes no discrimination on account of color." *Id.*, at 385.

Others echoed this view. Representative John Lynch declared that "[t]he duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned." 3 Cong. Rec. 945 (1875). Senator John Sherman believed that the route to peace was to "[w]ipe out all legal discriminations between white and black [and] make no distinction between black and white." Cong. Globe, 42d Cong., 2d Sess., at 3193. And, Senator Henry Wilson

sought to "make illegal all distinctions on account of color" because "there should be no distinction recognized by the laws of the land." *Id.*, at 819; see also 3 Cong. Rec., at 956 (statement of Rep. Cain) ("[M]en [are] formed of God equally . . . . The civil-rights bill simply declares this: that there shall be no discriminations between citizens of this land so far as the laws of the land are concerned"). The view of the Legislature was clear: The Constitution "neither knows nor tolerates classes among citizens." *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting).

D

The earliest Supreme Court opinions to interpret the Fourteenth Amendment did so in colorblind terms. Their statements characterizing the Amendment evidence its commitment to equal rights for all citizens, regardless of the color of their skin. See *ante*, at 10–11.

In the *Slaughter-House Cases*, 16 Wall. 36 (1873), the Court identified the "pervading purpose" of the Reconstruction Amendments as "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.*, at 67–72. Yet, the Court quickly acknowledged that the language of the Amendments did not suggest "that no one else but the negro can share in this protection." *Id.*, at 72. Rather, "[i]f Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, [the Thirteenth Amendment] may safely be trusted to make it void." *Ibid.* And, similarly, "if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent." *Ibid.*

The Court thus made clear that the Fourteenth Amendment's equality guarantee applied to members of *all* races, including Asian Americans, ensuring all citizens equal treatment under law.

Seven years later, the Court relied on the *Slaughter-House* view to conclude that "[t]he words of the [Fourteenth A]mendment . . . contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored." *Strauder* v. *West Virginia*, 100 U. S. 303, 307–308 (1880). The Court thus found that the Fourteenth Amendment banned "expres[s]" racial classifications, no matter the race affected, because these classifications are "a stimulant to . . . race prejudice." *Id.*, at 308. See also *ante*, at 10–11. Similar statements appeared in other cases decided around that time. See *Virginia* v. *Rives*, 100 U. S. 313, 318 (1880) ("The plain object of these statutes [enacted to enforce the Fourteenth Amendment], as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same"); *Ex parte Virginia*, 100 U. S. 339, 344–345 (1880) ("One great purpose of [the Thirteenth and Fourteenth Amendments] was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States").

This Court's view of the Fourteenth Amendment reached its nadir in *Plessy*, infamously concluding that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." 163 U. S., at 544. That holding stood in sharp contrast to the Court's earlier embrace of the Fourteenth Amendment's equality

ideal, as Justice Harlan emphasized in dissent: The Reconstruction Amendments had aimed to remove "the race line from our systems of governments." *Id.*, at 563. For Justice Harlan, the Constitution was colorblind and categorically rejected laws designed to protect "a dominant race—a superior class of citizens," while imposing a "badge of servitude" on others. *Id.*, at 560–562.

History has vindicated Justice Harlan's view, and this Court recently acknowledged that *Plessy* should have been overruled immediately because it "betrayed our commitment to 'equality before the law.'" *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ___, ___ (2022) (slip op., at 44). Nonetheless, and despite Justice Harlan's efforts, the era of state-sanctioned segregation persisted for more than a half century.

E

Despite the extensive evidence favoring the colorblind view, as detailed above, it appears increasingly in vogue to embrace an "antisubordination" view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. Such a theory lacks any basis in the original meaning of the Fourteenth Amendment. Respondents cite a smattering of federal and state statutes passed during the years surrounding the ratification of the Fourteenth Amendment. And, JUSTICE SOTOMAYOR's dissent argues that several of these statutes evidence the ratifiers' understanding that the Equal Protection Clause "permits consideration of race to achieve its goal." *Post*, at 6. Upon examination, however, it is clear that these statutes are fully consistent with the colorblind view.

Start with the 1865 Freedmen's Bureau Act. That Act established the Freedmen's Bureau to issue "provisions, clothing, and fuel . . . needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children" and the setting

"apart, for the use of loyal refugees and freedmen," abandoned, confiscated, or purchased lands, and assigning "to every male citizen, whether refugee or freedman, . . . not more than forty acres of such land." Ch. 90, §§2, 4, 13 Stat. 507. The 1866 Freedmen's Bureau Act then expanded upon the prior year's law, authorizing the Bureau to care for all loyal refugees and freedmen. Ch. 200, 14 Stat. 173–174. Importantly, however, the Acts applied to *freedmen* (and refugees), a formally race-neutral category, not blacks writ large. And, because "not all blacks in the United States were former slaves," "'freedman'" was a decidedly underinclusive proxy for race. M. Rappaport, Originalism and the Colorblind Constitution, 89 Notre Dame L. Rev. 71, 98 (2013) (Rappaport). Moreover, the Freedmen's Bureau served newly freed slaves alongside white refugees. P. Moreno, Racial Classifications and Reconstruction Legislation, 61 J. So. Hist. 271, 276–277 (1995); R. Barnett & E. Bernick, The Original Meaning of the Fourteenth Amendment 119 (2021). And, advocates of the law explicitly disclaimed any view rooted in modern conceptions of antisubordination. To the contrary, they explicitly clarified that the equality sought by the law was not one in which all men shall be "six feet high"; rather, it strove to ensure that freedmen enjoy "equal rights before the law" such that "each man shall have the right to pursue in his own way life, liberty, and happiness." Cong. Globe, 39th Cong., 1st Sess., at 322, 342.

Several additional federal laws cited by respondents appear to classify based on race, rather than previous condition of servitude. For example, an 1866 law adopted special rules and procedures for the payment of "colored" servicemen in the Union Army to agents who helped them secure bounties, pensions, and other payments that they were due. 14 Stat. 367–368. At the time, however, Congress believed that many "black servicemen were significantly overpaying for these agents' services in part because [the servicemen]

did not understand how the payment system operated." Rappaport 110; see also S. Siegel, The Federal Government's Power To Enact Color-Conscious Laws: An Originalist Inquiry, 92 Nw. U. L. Rev. 477, 561 (1998). Thus, while this legislation appears to have provided a discrete race-based benefit, its aim—to prohibit race-based exploitation—may not have been possible at the time without using a racial screen. In other words, the statute's racial classifications may well have survived strict scrutiny. See Rappaport 111–112. Another law, passed in 1867, provided funds for "freedmen or destitute colored people" in the District of Columbia. Res. of Mar. 16, 1867, No. 4, 15 Stat. 20. However, when a prior version of this law targeting only blacks was criticized for being racially discriminatory, "it was defended on the grounds that there were various places in the city where former slaves . . . lived in densely populated shantytowns." Rappaport 104–105 (citing Cong. Globe, 39th Cong., 1st Sess., at 1507). Congress thus may have enacted the measure not because of race, but rather to address a special problem in shantytowns in the District where blacks lived.

These laws—even if targeting race as such—likely were also constitutionally permissible examples of Government action "undo[ing] the effects of past discrimination in [a way] that do[es] not involve classification by race," even though they had "a racially disproportionate impact." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 526 (1989) (Scalia, J., concurring in judgment) (internal quotation marks omitted). The government can plainly remedy a race-based injury that it has inflicted—though such remedies must be meant to further a colorblind government, not perpetuate racial consciousness. See *id.*, at 505 (majority opinion). In that way, "[r]ace-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were . . . not inconsistent with the colorblind Constitution." *Parents Involved*, 551 U. S., at 772, n. 19 (THOMAS, J., concurring).

Moreover, the very same Congress passed both these laws *and* the unambiguously worded Civil Rights Act of 1866 that clearly prohibited discrimination on the basis of race.[3] And, as noted above, the proponents of these laws explicitly sought equal rights without regard to race while disavowing any antisubordination view.

JUSTICE SOTOMAYOR argues otherwise, pointing to "a number of race-conscious" federal laws passed around the time of the Fourteenth Amendment's enactment. *Post*, at 6 (dissenting opinion). She identifies the Freedmen's Bureau Act of 1865, already discussed above, as one such law, but she admits that the programs did not benefit blacks exclusively. She also does not dispute that legislation targeting the needs of newly freed blacks in 1865 could be understood as directly remedial. Even today, nothing prevents the States from according an admissions preference to identified victims of discrimination. See *Croson*, 488 U. S., at 526 (opinion of Scalia, J.) ("While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race*" (emphasis in original)); see also *ante*, at 39.

JUSTICE SOTOMAYOR points also to the Civil Rights Act of 1866, which as discussed above, mandated that all citizens have the same rights as those "enjoyed by white citizens." 14 Stat. 27. But these references to the station of white citizens do not refute the view that the Fourteenth Amendment is colorblind. Rather, they specify that, in meeting the Amendment's goal of equal citizenship, States must level up. The Act did not single out a group of citizens for

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[3] UNC asserts that the Freedmen's Bureau gave money to Berea College at a time when the school sought to achieve a 50–50 ratio of black to white students. Brief for University Respondents in No. 21–707, p. 32. But, evidence suggests that, at the relevant time, Berea conducted its admissions without distinction by race. S. Wilson, Berea College: An Illustrated History 2 (2006) (quoting Berea's first president's statement that the school "would welcome 'all races of men, without distinction'").

special treatment—rather, all citizens were meant to be treated the same as those who, at the time, had the full rights of citizenship. Other provisions of the 1866 Act reinforce this view, providing for equality in civil rights. See Rappaport 97. Most notably, §14 stated that the basic civil rights of citizenship shall be secured "without respect to race or color." 14 Stat. 176–177. And, §8 required that funds from land sales must be used to support schools "without distinction of color or race, . . . in the parishes of" the area where the land had been sold. *Id.*, at 175.

In addition to these federal laws, Harvard also points to two state laws: a South Carolina statute that placed the burden of proof on the defendant when a "colored or black" plaintiff claimed a violation, 1870 S. C. Acts pp. 387–388, and Kentucky legislation that authorized a county superintendent to aid "negro paupers" in Mercer County, 1871 Ky. Acts pp. 273–274. Even if these statutes provided race-based benefits, they do not support respondents' and JUSTICE SOTOMAYOR's view that the Fourteenth Amendment was contemporaneously understood to permit differential treatment based on race, prohibiting only caste legislation while authorizing antisubordination measures. Cf., *e.g.*, O. Fiss, Groups and the Equal Protection Clause, 5 Philos. & Pub. Aff. 107, 147 (1976) (articulating the antisubordination view); R. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over *Brown*, 117 Harv. L. Rev. 1470, 1473, n. 8 (2004) (collecting scholarship). At most, these laws would support the kinds of discrete remedial measures that our precedents have permitted.

If services had been given only to white persons up to the Fourteenth Amendment's adoption, then providing those same services only to previously excluded black persons would work to equalize treatment against a concrete baseline of government-imposed inequality. It thus may have been the case that Kentucky's county-specific, race-based

public aid law was necessary because that particular county was not providing certain services to local poor blacks. Similarly, South Carolina's burden-shifting framework (where the substantive rule being applied remained notably race neutral) may have been necessary to streamline litigation around the most commonly litigated type of case: a lawsuit seeking to remedy discrimination against a member of the large population of recently freed black Americans. See 1870 S. C. Acts, at 386 (documenting "persist[ent]" racial discrimination by state-licensed entities).

Most importantly, however, there was a wide range of federal and state statutes enacted at the time of the Fourteenth Amendment's adoption and during the period thereafter that explicitly sought to discriminate *against* blacks on the basis of race or a proxy for race. See Rappaport 113–115. These laws, hallmarks of the race-conscious Jim Crow era, are precisely the sort of enactments that the Framers of the Fourteenth Amendment sought to eradicate. Yet, proponents of an antisubordination view necessarily do not take those laws as evidence of the Fourteenth Amendment's true meaning. And rightly so. Neither those laws, nor a small number of laws that appear to target blacks for preferred treatment, displace the equality vision reflected in the history of the Fourteenth Amendment's enactment. This is particularly true in light of the clear equality requirements present in the Fourteenth Amendment's text. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. ___, ___–___ (2022) (slip op., at 26–27) (noting that text controls over inconsistent postratification history).

II

Properly understood, our precedents have largely adhered to the Fourteenth Amendment's demand for color-blind laws.[4] That is why, for example, courts "must subject

[4]The Court has remarked that Title VI is coextensive with the Equal Protection Clause. See *Gratz* v. *Bollinger*, 539 U. S. 244, 276, n. 23

all racial classifications to the strictest of scrutiny." *Jenkins*, 515 U. S., at 121 (THOMAS, J., concurring); see also *ante*, at 15, n. 4 (emphasizing the consequences of an insufficiently searching inquiry). And, in case after case, we have employed strict scrutiny vigorously to reject various forms of racial discrimination as unconstitutional. See *Fisher I*, 570 U. S., at 317–318 (THOMAS, J., concurring). The Court today rightly upholds that tradition and acknowledges the consequences that have flowed from *Grutter*'s contrary approach.

Three aspects of today's decision warrant comment: First, to satisfy strict scrutiny, universities must be able to establish an actual link between racial discrimination and educational benefits. Second, those engaged in racial discrimination do not deserve deference with respect to their reasons for discriminating. Third, attempts to remedy past governmental discrimination must be closely tailored to address *that* particular past governmental discrimination.

A

To satisfy strict scrutiny, universities must be able to establish a compelling reason to racially discriminate. *Grutter* recognized "only one" interest sufficiently compelling to justify race-conscious admissions programs: the "educational benefits of a diverse student body." 539 U. S., at 328,

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(2003) ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI"); *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 287 (1978) (opinion of Powell, J.) ("Title VI . . . proscribe[s] only those racial classifications that would violate the Equal Protection Clause"). As JUSTICE GORSUCH points out, the language of Title VI makes no allowance for racial considerations in university admissions. See *post*, at 2–3 (concurring opinion). Though I continue to adhere to my view in *Bostock* v. *Clayton County*, 590 U. S. ___, ___–___ (2020) (ALITO, J., dissenting) (slip op., at 1–54), I agree with JUSTICE GORSUCH's concurrence in this case. The plain text of Title VI reinforces the colorblind view of the Fourteenth Amendment.

333. Expanding on this theme, Harvard and UNC have offered a grab bag of interests to justify their programs, spanning from "'training future leaders in the public and private sectors'" to "'enhancing appreciation, respect, and empathy,'" with references to "'better educating [their] students through diversity'" in between. *Ante*, at 22–23. The Court today finds that each of these interests are too vague and immeasurable to suffice, *ibid.*, and I agree.

Even in *Grutter*, the Court failed to clearly define "the educational benefits of a diverse student body." 539 U. S., at 333. Thus, in the years since *Grutter*, I have sought to understand exactly how racial diversity yields *educational* benefits. With nearly 50 years to develop their arguments, neither Harvard nor UNC—two of the foremost research institutions in the world—nor any of their *amici* can explain that critical link.

Harvard, for example, offers a report finding that meaningful representation of racial minorities promotes several goals. Only one of those goals—"producing new knowledge stemming from diverse outlooks," 980 F. 3d 157, 174 (CA1 2020)—bears any possible relationship to educational benefits. Yet, it too is extremely vague and offers no indication that, for example, student test scores increased as a result of Harvard's efforts toward racial diversity.

More fundamentally, it is not clear how racial diversity, as opposed to other forms of diversity, uniquely and independently advances Harvard's goal. This is particularly true because Harvard blinds itself to other forms of applicant diversity, such as religion. See 2 App. in No. 20–1199, pp. 734–743. It may be the case that exposure to different perspectives and thoughts can foster debate, sharpen young minds, and hone students' reasoning skills. But, it is not clear how diversity with respect to race, *qua* race, furthers this goal. Two white students, one from rural Appalachia and one from a wealthy San Francisco suburb, may well

have more diverse outlooks on this metric than two students from Manhattan's Upper East Side attending its most elite schools, one of whom is white and other of whom is black. If Harvard cannot even *explain* the link between racial diversity and education, then surely its interest in racial diversity cannot be compelling enough to overcome the constitutional limits on race consciousness.

UNC fares no better. It asserts, for example, an interest in training students to "live together in a diverse society." Brief for University Respondents in No. 21–707, p. 39. This may well be important to a university experience, but it is a *social* goal, not an educational one. See *Grutter*, 539 U. S., at 347–348 (Scalia, J., concurring in part and dissenting in part) (criticizing similar rationales as divorced from educational goals). And, again, UNC offers no reason why seeking a diverse society would not be equally supported by admitting individuals with diverse perspectives and backgrounds, rather than varying skin pigmentation.

Nor have *amici* pointed to any concrete and quantifiable *educational* benefits of racial diversity. The United States focuses on alleged civic benefits, including "increasing tolerance and decreasing racial prejudice." Brief for United States as *Amicus Curiae* 21–22. Yet, when it comes to educational benefits, the Government offers only one study purportedly showing that "college diversity experiences are significantly and positively related to cognitive development" and that "interpersonal interactions with racial diversity are the most strongly related to cognitive development." N. Bowman, College Diversity Experiences and Cognitive Development: A Meta-Analysis, 80 Rev. Educ. Research 4, 20 (2010). Here again, the link is, at best, tenuous, unspecific, and stereotypical. Other *amici* assert that diversity (generally) fosters the even-more nebulous values of "creativity" and "innovation," particularly in graduates' future workplaces. See, *e.g.*, Brief for Major American Busi-

ness Enterprises as *Amici Curiae* 7–9; Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 16–17 (describing experience at IBM). Yet, none of those assertions deals exclusively with *racial* diversity—as opposed to cultural or ideological diversity. And, none of those *amici* demonstrate measurable or concrete benefits that have resulted from universities' race-conscious admissions programs.

Of course, even if these universities had shown that racial diversity yielded any concrete or measurable benefits, they would still face a very high bar to show that their interest is compelling. To survive strict scrutiny, any such benefits would have to outweigh the tremendous harm inflicted by sorting individuals on the basis of race. See *Cooper* v. *Aaron*, 358 U. S. 1, 16 (1958) (following *Brown*, "law and order are not here to be preserved by depriving the Negro children of their constitutional rights"). As the Court's opinions in these cases make clear, all racial stereotypes harm and demean individuals. That is why "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a pressing public necessity" sufficient to satisfy strict scrutiny today. *Grutter*, 539 U. S., at 353 (opinion of THOMAS, J.) (internal quotations marks omitted). Cf. *Lee* v. *Washington*, 390 U. S. 333, 334 (1968) (Black, J., concurring) (protecting prisoners from violence might justify narrowly tailored discrimination); *Croson*, 488 U. S., at 521 (opinion of Scalia, J.) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify [racial discrimination]"). For this reason, "just as the alleged educational benefits of segregation were insufficient to justify racial discrimination [in the 1950s], see *Brown* v. *Board of Education*, the alleged educational benefits of diversity cannot justify racial discrimination today." *Fisher I*, 570 U. S., at 320 (THOMAS, J., concurring) (citation omitted).

B

The Court also correctly refuses to defer to the universities' own assessments that the alleged benefits of race-conscious admissions programs are compelling. It instead demands that the "interests [universities] view as compelling" must be capable of being "subjected to meaningful judicial review." *Ante*, at 22. In other words, a court must be able to measure the goals asserted and determine when they have been reached. *Ante*, at 22–24. The Court's opinion today further insists that universities must be able to "articulate a meaningful connection between the means they employ and the goals they pursue." *Ante*, at 24. Again, I agree. Universities' self-proclaimed righteousness does not afford them license to discriminate on the basis of race.

In fact, it is error for a court to defer to the views of an alleged discriminator while assessing claims of racial discrimination. See *Grutter*, 539 U. S., at 362–364 (opinion of THOMAS, J.); see also *Fisher I*, 570 U. S., at 318–319 (THOMAS, J., concurring); *United States* v. *Virginia*, 518 U. S. 515, 551, n. 19 (1996) (refusing to defer to the Virginia Military Institute's judgment that the changes necessary to accommodate the admission of women would be too great and characterizing the necessary changes as "manageable"). We would not offer such deference in any other context. In employment discrimination lawsuits under Title VII of the Civil Rights Act, for example, courts require only a minimal prima facie showing by a complainant before shifting the burden onto the shoulders of the alleged-discriminator employer. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 803–805 (1973). And, Congress has passed numerous laws—such as the Civil Rights Act of 1875—under its authority to enforce the Fourteenth Amendment, each designed to counter discrimination and each relying on courts to bring a skeptical eye to alleged discriminators.

This judicial skepticism is vital. History has repeatedly

shown that purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct. Take, for example, the university respondents here. Harvard's "holistic" admissions policy began in the 1920s when it was developed to exclude Jews. See M. Synnott, The Half-Opened Door: Discrimination and Admission at Harvard, Yale, and Princeton, 1900–1970, pp. 58–59, 61, 69, 73–74 (2010). Based on *de facto* quotas that Harvard quietly implemented, the proportion of Jews in Harvard's freshman class declined from 28% as late as 1925 to just 12% by 1933. J. Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton 172 (2005). During this same period, Harvard played a prominent role in the eugenics movement. According to then-President Abbott Lawrence Lowell, excluding Jews from Harvard would help maintain admissions opportunities for Gentiles and perpetuate the purity of the Brahmin race—New England's white, Protestant upper crust. See D. Okrent, The Guarded Gate 309, and n. * (2019).

UNC also has a checkered history, dating back to its time as a segregated university. It admitted its first black undergraduate students in 1955—but only after being ordered to do so by a court, following a long legal battle in which UNC sought to keep its segregated status. Even then, UNC did not turn on a dime: The first three black students admitted as undergraduates enrolled at UNC but ultimately earned their bachelor's degrees elsewhere. See M. Beauregard, Column: The Desegregation of UNC, The Daily Tar Heel, Feb. 16, 2022. To the extent past is prologue, the university respondents' histories hardly recommend them as trustworthy arbiters of whether racial discrimination is necessary to achieve educational goals.

Of course, none of this should matter in any event; courts have an independent duty to interpret and uphold the Constitution that no university's claimed interest may override.

See *ante*, at 26, n. 5. The Court today makes clear that, in the future, universities wishing to discriminate based on race in admissions must articulate and justify a compelling and measurable state interest based on concrete evidence. Given the strictures set out by the Court, I highly doubt any will be able to do so.

C

In an effort to salvage their patently unconstitutional programs, the universities and their *amici* pivot to argue that the Fourteenth Amendment permits the use of race to benefit only certain racial groups—rather than applicants writ large. Yet, this is just the latest disguise for discrimination. The sudden narrative shift is not surprising, as it has long been apparent that "'diversity [was] merely the current rationale of convenience'" to support racially discriminatory admissions programs. *Grutter*, 539 U. S., at 393 (Kennedy, J., dissenting). Under our precedents, this new rationale is also lacking.

To start, the case for affirmative action has emphasized a number of rationales over the years, including: (1) restitution to compensate those who have been victimized by past discrimination, (2) fostering "diversity," (3) facilitating "integration" and the destruction of perceived racial castes, and (4) countering longstanding and diffuse racial prejudice. See R. Kennedy, For Discrimination: Race, Affirmative Action, and the Law 78 (2013); see also P. Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 22–46 (2002). Again, this Court has only recognized one interest as compelling: the educational benefits of diversity embraced in *Grutter*. Yet, as the universities define the "diversity" that they practice, it encompasses social and aesthetic goals far afield from the education-based interest discussed in *Grutter*. See *supra*, at 23. The dissents too attempt to stretch the diversity rationale, suggesting that it supports broad remedial interests. See, *e.g.*, *post*,

at 23, 43, 67 (opinion of SOTOMAYOR, J.) (noting that UNC's black admissions percentages "do not reflect the diversity of the State"; equating the diversity interest under the Court's precedents with a goal of "integration in higher education" more broadly; and warning of "the dangerous consequences of an America where its leadership does not reflect the diversity of the People"); *post*, at 23 (opinion of JACKSON, J.) (explaining that diversity programs close wealth gaps). But language—particularly the language of controlling opinions of this Court—is not so elastic. See J. Pieper, Abuse of Language—Abuse of Power 23 (L. Krauth transl. 1992) (explaining that propaganda, "in contradiction to the nature of language, intends not to communicate but to manipulate" and becomes an "[i]nstrument of power" (emphasis deleted)).

The Court refuses to engage in this lexicographic drift, seeing these arguments for what they are: a remedial rationale in disguise. See *ante*, at 34–35. As the Court points out, the interest for which respondents advocate has been presented to and rejected by this Court many times before. In *Regents of University of California* v. *Bakke*, 438 U. S. 265 (1978), the University of California made clear its rationale for the quota system it had established: It wished to "counteract effects of generations of pervasive discrimination" against certain minority groups. Brief for Petitioner, O. T. 1977, No. 76–811, p. 2. But, the Court rejected this distinctly remedial rationale, with Justice Powell adopting in its place the familiar "diversity" interest that appeared later in *Grutter*. See *Bakke*, 438 U. S., at 306 (plurality opinion). The Court similarly did not adopt the broad remedial rationale in *Grutter*; and it rejects it again today. Newly and often minted theories cannot be said to be commanded by our precedents.

Indeed, our precedents have repeatedly and soundly distinguished between programs designed to compensate vic-

tims of past governmental discrimination from so-called benign race-conscious measures, such as affirmative action. *Croson*, 488 U. S., at 504–505; *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 226–227 (1995). To enforce that distinction, our precedents explicitly require that any attempt to compensate victims of past governmental discrimination must be concrete and traceable to the *de jure* segregated system, which must have some discrete and continuing discriminatory effect that warrants a present remedy. See *United States* v. *Fordice*, 505 U. S. 717, 731 (1992). Today's opinion for the Court reaffirms the need for such a close remedial fit, hewing to the same line we have consistently drawn. *Ante*, at 24–25.

Without such guardrails, the Fourteenth Amendment would become self-defeating, promising a Nation based on the equality ideal but yielding a quota- and caste-ridden society steeped in race-based discrimination. Even *Grutter* itself could not tolerate this outcome. It accordingly imposed a time limit for its race-based regime, observing that "'a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.'" 539 U. S., at 341–342 (quoting *Palmore* v. *Sidoti*, 466 U. S. 429, 432 (1984); alterations omitted).

The Court today enforces those limits. And rightly so. As noted above, both Harvard and UNC have a history of racial discrimination. But, neither have even attempted to explain how their current racially discriminatory programs are even remotely traceable to their past discriminatory conduct. Nor could they; the current race-conscious admissions programs take no account of ancestry and, at least for Harvard, likely have the effect of discriminating against some of the very same ethnic groups against which Harvard previously discriminated (*i.e.*, Jews and those who are not part of the white elite). All the while, Harvard and UNC ask us to blind ourselves to the burdens imposed on the millions of innocent applicants denied admission because of

their membership in a currently disfavored race.

The Constitution neither commands nor permits such a result. "Purchased at the price of immeasurable human suffering," the Fourteenth Amendment recognizes that classifications based on race lead to ruinous consequences for individuals and the Nation. *Adarand Constructors*, *Inc.*, 515 U. S., at 240 (THOMAS, J., concurring in part and concurring in judgment). Consequently, "*all*" racial classifications are "inherently suspect," *id.*, at 223–224 (majority opinion) (emphasis added; internal quotation marks omitted), and must be subjected to the searching inquiry conducted by the Court, *ante*, at 21–34.

III

Both experience and logic have vindicated the Constitution's colorblind rule and confirmed that the universities' new narrative cannot stand. Despite the Court's hope in *Grutter* that universities would voluntarily end their race-conscious programs and further the goal of racial equality, the opposite appears increasingly true. Harvard and UNC now forthrightly state that they racially discriminate when it comes to admitting students, arguing that such discrimination is consistent with this Court's precedents. And they, along with today's dissenters, defend that discrimination as *good*. More broadly, it is becoming increasingly clear that discrimination on the basis of race—often packaged as "affirmative action" or "equity" programs—are based on the benighted notion "that it is possible to tell when discrimination helps, rather than hurts, racial minorities." *Fisher I*, 570 U. S., at 328 (THOMAS, J., concurring).

We cannot be guided by those who would desire less in our Constitution, or by those who would desire more. "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and

makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter*, 539 U. S., at 353 (opinion of THOMAS, J.).

A

The Constitution's colorblind rule reflects one of the core principles upon which our Nation was founded: that "all men are created equal." Those words featured prominently in our Declaration of Independence and were inspired by a rich tradition of political thinkers, from Locke to Montesquieu, who considered equality to be the foundation of a just government. See, *e.g.*, J. Locke, Second Treatise of Civil Government 48 (J. Gough ed. 1948); T. Hobbes, Leviathan 98 (M. Oakeshott ed. 1962); 1 B. Montesquieu, The Spirit of Laws 121 (T. Nugent transl., J. Prichard ed. 1914). Several Constitutions enacted by the newly independent States at the founding reflected this principle. For example, the Virginia Bill of Rights of 1776 explicitly affirmed "[t]hat all men are by nature equally free and independent, and have certain inherent rights." Ch. 1, §1. The State Constitutions of Massachusetts, Pennsylvania, and New Hampshire adopted similar language. Pa. Const., Art. I (1776), in 2 Federal and State Constitutions 1541 (P. Poore ed. 1877); Mass. Const., Art. I (1780), in 1 *id.*, at 957; N. H. Const., Art. I (1784), in 2 *id.*, at 1280.[5] And, prominent Founders

[5] In fact, the Massachusetts Supreme Court in 1783 declared that slavery was abolished in Massachusetts by virtue of the newly enacted Constitution's provision of equality under the law. See *The Quock Walker Case*, in 1 H. Commager, Documents of American History 110 (9th ed. 1973) (Cushing, C. J.) ("[W]hatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty . . . . And upon this ground our Constitution of Government . . . sets out with declaring that all men are born free and equal . . . and in short is totally repugnant to the idea of being born slaves").

publicly mused about the need for equality as the foundation for government. *E.g.*, 1 Cong. Register 430 (T. Lloyd ed. 1789) (Madison, J.); 1 Letters and Other Writings of James Madison 164 (J. Lippincott ed. 1867); N. Webster, The Revolution in France, in 2 Political Sermons of the Founding Era, 1730–1805, pp. 1236–1299 (1998). As Jefferson declared in his first inaugural address, "the minority possess their equal rights, which equal law must protect." First Inaugural Address (Mar. 4, 1801), in 8 The Writings of Thomas Jefferson 4 (Washington ed. 1854).

Our Nation did not initially live up to the equality principle. The institution of slavery persisted for nearly a century, and the United States Constitution itself included several provisions acknowledging the practice. The period leading up to our second founding brought these flaws into bold relief and encouraged the Nation to finally make good on the equality promise. As Lincoln recognized, the promise of equality extended to *all people*—including immigrants and blacks whose ancestors had taken no part in the original founding. See Speech at Chicago, Ill. (July 10, 1858), in 2 The Collected Works of Abraham Lincoln 488–489, 499 (R. Basler ed. 1953). Thus, in Lincoln's view, "'the natural rights enumerated in the Declaration of Independence'" extended to blacks as his "'equal,'" and "'the equal of every living man.'" The Lincoln-Douglas Debates 285 (H. Holzer ed. 1993).

As discussed above, the Fourteenth Amendment reflected that vision, affirming that equality and racial discrimination cannot coexist. Under that Amendment, the color of a person's skin is irrelevant to that individual's equal status as a citizen of this Nation. To treat him differently on the basis of such a legally irrelevant trait is therefore a deviation from the equality principle and a constitutional injury.

Of course, even the promise of the second founding took time to materialize. Seeking to perpetuate a segregationist

system in the wake of the Fourteenth Amendment's ratification, proponents urged a "separate but equal" regime. They met with initial success, ossifying the segregationist view for over a half century. As this Court said in *Plessy*:

> "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." 163 U. S., at 543.

Such a statement, of course, is precisely antithetical to the notion that all men, regardless of the color of their skin, are born equal and must be treated equally under the law. Only one Member of the Court adhered to the equality principle; Justice Harlan, standing alone in dissent, wrote: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Id.*, at 559. Though Justice Harlan rightly predicted that *Plessy* would, "in time, prove to be quite as pernicious as the decision made . . . in the *Dred Scott* case," the *Plessy* rule persisted for over a half century. *Ibid.* While it remained in force, Jim Crow laws prohibiting blacks from entering or utilizing public facilities such as schools, libraries, restaurants, and theaters sprang up across the South.

This Court rightly reversed course in *Brown* v. *Board of Education*. The *Brown* appellants—those challenging segregated schools—embraced the equality principle, arguing that "[a] racial criterion is a constitutional irrelevance, and is not saved from condemnation even though dictated by a sincere desire to avoid the possibility of violence or race friction." Brief for Appellants in *Brown* v. *Board of Education*,

O. T. 1952, No. 1, p. 7 (citation omitted).[6] Embracing that view, the Court held that "in the field of public education the doctrine of 'separate but equal' has no place" and "[s]eparate educational facilities are inherently unequal." *Brown*, 347 U. S., at 493, 495. Importantly, in reaching this conclusion, *Brown* did not rely on the particular qualities of the Kansas schools. The mere separation of students on the basis of race—the "*segregation* complained of," *id.*, at 495 (emphasis added)—constituted a constitutional injury. See *ante*, at 12 ("Separate cannot be equal").

Just a few years later, the Court's application of *Brown* made explicit what was already forcefully implied: "[O]ur decisions have foreclosed any possible contention that . . . a statute or regulation" fostering segregation in public facilities "may stand consistently with the Fourteenth Amendment." *Turner* v. *Memphis*, 369 U. S. 350, 353 (1962) (*per curiam*); cf. A. Blaustein & C. Ferguson, Desegregation and the Law: The Meaning and Effect of the School Segregation Cases 145 (rev. 2d ed. 1962) (arguing that the Court in *Brown* had "adopt[ed] a constitutional standard" declaring "that all classification by race is unconstitutional *per se*").

Today, our precedents place this principle beyond question. In assessing racial segregation during a race-motivated prison riot, for example, this Court applied strict scrutiny without requiring an allegation of unequal treatment among the segregated facilities. *Johnson* v. *California*, 543 U. S. 499, 505–506 (2005). The Court today reaffirms the rule, stating that, following *Brown*, "[t]he time for

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[6] Briefing in a case consolidated with *Brown* stated the colorblind position forthrightly: Classifications "[b]ased [s]olely on [r]ace or [c]olor" "can never be" constitutional. Juris. Statement in *Briggs* v. *Elliott*, O. T. 1951, No. 273, pp. 20–21, 25, 29; see also Juris. Statement in *Davis* v. *County School Bd. of Prince Edward Cty.*, O. T. 1952, No. 191, p. 8 ("Indeed, we take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action. . . . For this reason alone, we submit, the state separate school laws in this case must fall").

making distinctions based on race had passed." *Ante*, at 13. "What was wrong" when the Court decided *Brown* "in 1954 cannot be right today." *Parents Involved*, 551 U. S., at 778 (THOMAS, J., concurring). Rather, we must adhere to the promise of equality under the law declared by the Declaration of Independence and codified by the Fourteenth Amendment.

B

Respondents and the dissents argue that the universities' race-conscious admissions programs ought to be permitted because they accomplish positive social goals. I would have thought that history had by now taught a "greater humility" when attempting to "distinguish good from harmful uses of racial criteria." *Id.*, at 742 (plurality opinion). From the Black Codes, to discriminatory and destructive social welfare programs, to discrimination by individual government actors, bigotry has reared its ugly head time and again. Anyone who today thinks that some form of racial discrimination will prove "helpful" should thus tread cautiously, lest racial discriminators succeed (as they once did) in using such language to disguise more invidious motives.

Arguments for the benefits of race-based solutions have proved pernicious in segregationist circles. Segregated universities once argued that race-based discrimination was needed "to preserve harmony and peace and at the same time furnish equal education to both groups." Brief for Respondents in *Sweatt* v. *Painter*, O. T. 1949, No. 44, p. 94; see also *id.*, at 79 ("'[T]he *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions'"). And, parties consistently attempted to convince the Court that the time was not right to disrupt segregationist systems. See Brief for Appellees in *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, O. T. 1949, No. 34, p. 12 (claiming that a holding rejecting separate but equal

would "necessarily result . . . [i]n the *abandoning* of many of the state's existing educational establishments" and the "*crowding* of other such establishments"); Brief for State of Kansas on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1, p. 56 ("We grant that segregation may not be the ethical or political ideal. At the same time we recognize that practical considerations may prevent realization of the ideal"); Tr. of Oral Arg. in *Davis* v. *School Bd. of Prince Edward Cty.*, O. T. 1954, No. 3, p. 208 ("We are up against the proposition: What does the Negro profit if he procures an immediate detailed decree from this Court now and then impairs or mars or destroys the public school system in Prince Edward County"). Litigants have even gone so far as to offer straight-faced arguments that segregation has practical benefits. Brief for Respondents in *Sweatt* v. *Painter*, at 77–78 (requesting deference to a state law, observing that "'the necessity for such separation [of the races] still exists in the interest of public welfare, safety, harmony, health, and recreation . . .'" and remarking on the reasonableness of the position); Brief for Appellees in *Davis* v. *County School Bd. of Prince Edward Cty.*, O. T. 1952, No. 3, p. 17 ("Virginia has established segregation in certain fields as a part of her public policy to prevent violence and reduce resentment. The result, in the view of an overwhelming Virginia majority, has been to improve the relationship between the different races"); *id.*, at 25 ("If segregation be stricken down, the general welfare will be definitely harmed . . . there would be more friction developed" (internal quotation marks omitted)). In fact, slaveholders once "argued that slavery was a 'positive good' that civilized blacks and elevated them in every dimension of life," and "segregationists similarly asserted that segregation was not only benign, but good for black students." *Fisher I*, 570 U. S., at 328–329 (THOMAS, J., concurring).

"Indeed, if our history has taught us anything, it has

taught us to beware of elites bearing racial theories." *Parents Involved*, 551 U. S., at 780–781 (THOMAS, J., concurring). We cannot now blink reality to pretend, as the dissents urge, that affirmative action should be legally permissible merely because the experts assure us that it is "good" for black students. Though I do not doubt the sincerity of my dissenting colleagues' beliefs, experts and elites have been wrong before—and they may prove to be wrong again. In part for this reason, the Fourteenth Amendment outlaws government-sanctioned racial discrimination of all types. The stakes are simply too high to gamble.[7] Then, as now, the views that motivated *Dred Scott* and *Plessy* have not been confined to the past, and we must remain ever vigilant against *all* forms of racial discrimination.

C

Even taking the desire to help on its face, what initially seems like aid may in reality be a burden, including for the very people it seeks to assist. Take, for example, the college admissions policies here. "Affirmative action" policies do nothing to increase the overall number of blacks and Hispanics able to access a college education. Rather, those racial policies simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended. See

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[7] Indeed, the lawyers who litigated *Brown* were unwilling to take this bet, insisting on a colorblind legal rule. See, *e.g.*, Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief"); Brief for Appellants in *Brown* v. *Board of Education*, O. T. 1952, No. 1, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone"). In fact, Justice Marshall viewed Justice Harlan's *Plessy* dissent as "a 'Bible' to which he turned during his most depressed moments"; no opinion "buoyed Marshall more in his pre-*Brown* days." In Memoriam: Honorable Thurgood Marshall, Proceedings of the Bar and Officers of the Supreme Court of the United States, p. X (1993) (remarks of Judge Motley).

T. Sowell, Affirmative Action Around the World 145–146 (2004). In doing so, those policies sort at least some blacks and Hispanics into environments where they are less likely to succeed academically relative to their peers. *Ibid.* The resulting mismatch places "many blacks and Hispanics who likely would have excelled at less elite schools . . . in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I*, 570 U. S., at 332 (THOMAS, J., concurring).

It is self-evident why that is so. As anyone who has labored over an algebra textbook has undoubtedly discovered, academic advancement results from hard work and practice, not mere declaration. Simply treating students as though their grades put them at the top of their high school classes does nothing to enhance the performance level of those students or otherwise prepare them for competitive college environments. In fact, studies suggest that large racial preferences for black and Hispanic applicants have led to a disproportionately large share of those students receiving mediocre or poor grades once they arrive in competitive collegiate environments. See, *e.g.*, R. Sander, A Systemic Analysis of Affirmative Action in American Law Schools, 57 Stan. L. Rev. 367, 371–372 (2004); see also R. Sander & R. Steinbuch, Mismatch and Bar Passage: A School-Specific Analysis (Oct. 6, 2017), https://ssrn.com/abstract=3054208. Take science, technology, engineering, and mathematics (STEM) fields, for example. Those students who receive a large admissions preference are more likely to drop out of STEM fields than similarly situated students who did not receive such a preference. F. Smith & J. McArdle, Ethnic and Gender Differences in Science Graduation at Selective Colleges With Implications for Admission Policy and College Choice, 45 Research in Higher Ed. 353 (2004). "Even if most minority students are able to meet the normal standards at the 'average' range of colleges

and universities, the systematic mismatching of minority students begun at the top can mean that such students are generally overmatched throughout all levels of higher education." T. Sowell, Race and Culture 176–177 (1994).[8]

These policies may harm even those who succeed academically. I have long believed that large racial preferences in college admissions "stamp [blacks and Hispanics] with a badge of inferiority." *Adarand*, 515 U. S., at 241 (opinion of THOMAS, J.). They thus "tain[t] the accomplishments of all those who are admitted as a result of racial discrimination" as well as "all those who are the same race as those admitted as a result of racial discrimination" because "no one can distinguish those students from the ones whose race played a role in their admission." *Fisher I*, 570 U. S., at 333 (opinion of THOMAS, J.). Consequently, "[w]hen blacks" and, now, Hispanics "take positions in the highest places of government, industry, or academia, it is an open question . . . whether their skin color played a part in their advancement." *Grutter*, 539 U. S., at 373 (THOMAS, J., concurring). "The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those . . . who would succeed without discrimination." *Ibid.*

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[8] JUSTICE SOTOMAYOR rejects this mismatch theory as "debunked long ago," citing an *amicus* brief. *Post*, at 56. But, in 2016, the Journal of Economic Literature published a review of mismatch literature—coauthored by a critic and a defender of affirmative action—which concluded that the evidence for mismatch was "fairly convincing." P. Arcidiacono & M. Lovenheim, Affirmative Action and the Quality-Fit Tradeoff, 54 J. Econ. Lit. 3, 20 (Arcidiacono & Lovenheim). And, of course, if universities wish to refute the mismatch theory, they need only release the data necessary to test its accuracy. See Brief for Richard Sander as *Amicus Curiae* 16–19 (noting that universities have been unwilling to provide the necessary data concerning student admissions and outcomes); accord, Arcidiacono & Lovenheim 20 ("Our hope is that better datasets soon will become available").

Yet, in the face of those problems, it seems increasingly clear that universities are focused on "aesthetic" solutions unlikely to help deserving members of minority groups. In fact, universities' affirmative action programs are a particularly poor use of such resources. To start, these programs are overinclusive, providing the same admissions bump to a wealthy black applicant given every advantage in life as to a black applicant from a poor family with seemingly insurmountable barriers to overcome. In doing so, the programs may wind up helping the most well-off members of minority races without meaningfully assisting those who struggle with real hardship. Simultaneously, the programs risk continuing to ignore the academic underperformance of "the purported 'beneficiaries'" of racial preferences and the racial stigma that those preferences generate. *Grutter*, 539 U. S., at 371 (opinion of THOMAS, J.). Rather than performing their academic mission, universities thus may "see[k] only a facade—it is sufficient that the class looks right, even if it does not perform right." *Id.*, at 372.

D

Finally, it is not even theoretically possible to "help" a certain racial group without causing harm to members of other racial groups. "It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others." *Adarand*, 515 U. S., at 241, n. * (opinion of THOMAS, J.). And, even purportedly benign race-based discrimination has secondary effects on members of other races. The antisubordination view thus has never guided the Court's analysis because "whether a law relying upon racial taxonomy is 'benign' or 'malign' either turns on 'whose ox is gored' or on distinctions found only in the eye of the beholder." *Ibid.* (citations and some internal quotation marks omitted). Courts are not suited to the impossible task of determining which racially discriminatory programs are helping which members of which races—and

whether those benefits outweigh the burdens thrust onto other racial groups.

As the Court's opinion today explains, the zero-sum nature of college admissions—where students compete for a finite number of seats in each school's entering class—aptly demonstrates the point. *Ante*, at 27.[9] Petitioner here represents Asian Americans who allege that, at the margins, Asian applicants were denied admission because of their race. Yet, Asian Americans can hardly be described as the beneficiaries of historical racial advantages. To the contrary, our Nation's first immigration ban targeted the Chinese, in part, based on "worker resentment of the low wage rates accepted by Chinese workers." U. S. Commission on Civil Rights, Civil Rights Issues Facing Asian Americans in the 1990s, p. 3 (1992) (Civil Rights Issues); Act of May 6, 1882, ch. 126, 22 Stat. 58–59.

In subsequent years, "strong anti-Asian sentiments in the Western States led to the adoption of many discriminatory laws at the State and local levels, similar to those aimed at blacks in the South," and "segregation in public facilities, including schools, was quite common until after the Second World War." Civil Rights Issues 7; see also S. Hinnershitz, A Different Shade of Justice: Asian American

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[9] JUSTICE SOTOMAYOR apparently believes that race-conscious admission programs can somehow increase the chances that members of certain races (blacks and Hispanics) are admitted without decreasing the chances of admission for members of other races (Asians). See *post*, at 58–59. This simply defies mathematics. In a zero-sum game like college admissions, any sorting mechanism that takes race into account in any way, see *post*, at 27 (opinion of JACKSON, J.) (defending such a system), has discriminated based on race to the benefit of some races and the detriment of others. And, the universities here admit that race is determinative in at least some of their admissions decisions. See, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67; 567 F. Supp. 3d 580, 633 (MDNC 2021); see also 397 F. Supp. 3d 126, 178 (Mass. 2019) (noting that, for Harvard, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants"); *ante*, at 5, n. 1 (describing the role that race plays in the universities' admissions processes).

Civil Rights in the South 21 (2017) (explaining that while both Asians and blacks have at times fought "against similar forms of discrimination," "[t]he issues of citizenship and immigrant status often defined Asian American battles for civil rights and separated them from African American legal battles"). Indeed, this Court even sanctioned this segregation—in the context of schools, no less. In *Gong Lum* v. *Rice*, 275 U. S. 78, 81–82, 85–87 (1927), the Court held that a 9-year-old Chinese-American girl could be denied entry to a "white" school because she was "a member of the Mongolian or yellow race."

Also, following the Japanese attack on the U. S. Navy base at Pearl Harbor, Japanese Americans in the American West were evacuated and interned in relocation camps. See Exec. Order No. 9066, 3 CFR 1092 (1943). Over 120,000 were removed to camps beginning in 1942, and the last camp that held Japanese Americans did not close until 1948. National Park Service, Japanese American Life During Internment, www.nps.gov/articles/japanese-american-internment-archeology.htm. In the interim, this Court endorsed the practice. *Korematsu* v. *United States*, 323 U. S. 214 (1944).

Given the history of discrimination against Asian Americans, especially their history with segregated schools, it seems particularly incongruous to suggest that a past history of segregationist policies toward blacks should be remedied at the expense of Asian American college applicants.[10] But this problem is not limited to Asian Americans; more

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[10] Even beyond Asian Americans, it is abundantly clear that the university respondents' racial categories are vastly oversimplistic, as the opinion of the Court and JUSTICE GORSUCH's concurrence make clear. See *ante*, at 24–25; *post*, at 5–7 (opinion of GORSUCH, J.). Their "affirmative action" programs do not help Jewish, Irish, Polish, or other "white" ethnic groups whose ancestors faced discrimination upon arrival in America, any more than they help the descendants of those Japanese-American citizens interned during World War II.

broadly, universities' discriminatory policies burden millions of applicants who are not responsible for the racial discrimination that sullied our Nation's past. That is why, "[i]n the absence of special circumstances, the remedy for *de jure* segregation ordinarily should not include educational programs for students who were not in school (or even alive) during the period of segregation." *Jenkins*, 515 U. S., at 137 (THOMAS, J., concurring). Today's 17-year-olds, after all, did not live through the Jim Crow era, enact or enforce segregation laws, or take any action to oppress or enslave the victims of the past. Whatever their skin color, today's youth simply are not responsible for instituting the segregation of the 20th century, and they do not shoulder the moral debts of their ancestors. Our Nation should not punish today's youth for the sins of the past.

IV

Far from advancing the cause of improved race relations in our Nation, affirmative action highlights our racial differences with pernicious effect. In fact, recent history reveals a disturbing pattern: Affirmative action policies appear to have prolonged the asserted need for racial discrimination. Parties and *amici* in these cases report that, in the nearly 50 years since *Bakke*, 438 U. S. 265, racial progress on campuses adopting affirmative action admissions policies has stagnated, including making no meaningful progress toward a colorblind goal since *Grutter*. See *ante*, at 21–22. Rather, the legacy of *Grutter* appears to be ever increasing and strident demands for *yet more* racially oriented solutions.

A

It has become clear that sorting by race does not stop at the admissions office. In his *Grutter* opinion, Justice Scalia criticized universities for "talk[ing] of multiculturalism and

racial diversity," but supporting "tribalism and racial segregation on their campuses," including through "minority only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies." 539 U. S., at 349 (opinion concurring in part and dissenting in part). This trend has hardly abated with time, and today, such programs are commonplace. See Brief for Gail Heriot et al. as *Amici Curiae* 9. In fact, a recent study considering 173 schools found that 43% of colleges offered segregated housing to students of different races, 46% offered segregated orientation programs, and 72% sponsored segregated graduation ceremonies. D. Pierre & P. Wood, Neo-Segregation at Yale 16–17 (2019); see also D. Pierre, Demands for Segregated Housing at Williams College Are Not News, Nat. Rev., May 8, 2019. In addition to contradicting the universities' claims regarding the need for interracial interaction, see Brief for National Association of Scholars as *Amicus Curiae* 4–12, these trends increasingly encourage our Nation's youth to view racial differences as important and segregation as routine.

Meanwhile, these discriminatory policies risk creating new prejudices and allowing old ones to fester. I previously observed that "[t]here can be no doubt" that discriminatory affirmative action policies "injur[e] white and Asian applicants who are denied admission because of their race." *Fisher I*, 570 U. S., at 331 (concurring opinion). Petitioner here clearly demonstrates this fact. Moreover, "no social science has disproved the notion that this discrimination 'engenders attitudes of superiority or, alternatively, provokes resentment among those who believe that they have been wronged by the government's use of race.'" *Grutter*, 539 U. S., at 373 (opinion of THOMAS, J.) (quoting *Adarand*, 515 U. S., at 241 (opinion of THOMAS, J.) (alterations omitted)). Applicants denied admission to certain colleges may

come to believe—accurately or not—that their race was responsible for their failure to attain a life-long dream. These individuals, and others who wished for their success, may resent members of what they perceive to be favored races, believing that the successes of those individuals are unearned.

What, then, would be the endpoint of these affirmative action policies? Not racial harmony, integration, or equality under the law. Rather, these policies appear to be leading to a world in which everyone is defined by their skin color, demanding ever-increasing entitlements and preferences on that basis. Not only is that *exactly* the kind of factionalism that the Constitution was meant to safeguard against, see The Federalist No. 10 (J. Madison), but it is a factionalism based on ever-shifting sands.

That is because race is a social construct; we may each identify as members of particular races for any number of reasons, having to do with our skin color, our heritage, or our cultural identity. And, over time, these ephemeral, socially constructed categories have often shifted. For example, whereas universities today would group all white applicants together, white elites previously sought to exclude Jews and other white immigrant groups from higher education. In fact, it is impossible to look at an individual and know definitively his or her race; some who would consider themselves black, for example, may be quite fair skinned. Yet, university admissions policies ask individuals to identify themselves as belonging to one of only a few reductionist racial groups. With boxes for only "black," "white," "Hispanic," "Asian," or the ambiguous "other," how is a Middle Eastern person to choose? Someone from the Philippines? See *post*, at 5–7 (GORSUCH, J., concurring). Whichever choice he makes (in the event he chooses to report a race at all), the form silos him into an artificial category. Worse, it sends a clear signal that the category matters.

But, under our Constitution, race is irrelevant, as the

Court acknowledges. In fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities. Of course, that is false. See *ante*, at 28–30 (noting that the Court's Equal Protection Clause jurisprudence forbids such stereotyping). Members of the same race do not all share the exact same experiences and viewpoints; far from it. A black person from rural Alabama surely has different experiences than a black person from Manhattan or a black first-generation immigrant from Nigeria, in the same way that a white person from rural Vermont has a different perspective than a white person from Houston, Texas. Yet, universities' racial policies suggest that racial identity "*alone constitutes the being* of the race or the man." J. Barzun, Race: A Study in Modern Superstition 114 (1937). That is the same naked racism upon which segregation itself was built. Small wonder, then, that these policies are leading to increasing racial polarization and friction. This kind of reductionist logic leads directly to the "disregard for what does not jibe with preconceived theory," providing a "cloa[k] to conceal complexity, argumen[t] to the crown for praising or damning without the trouble of going into details"—such as details about an individual's ideas or unique background. *Ibid.* Rather than forming a more pluralistic society, these policies thus strip us of our individuality and undermine the very diversity of thought that universities purport to seek.

The solution to our Nation's racial problems thus cannot come from policies grounded in affirmative action or some other conception of equity. Racialism simply cannot be undone by different or more racialism. Instead, the solution announced in the second founding is incorporated in our Constitution: that we are all equal, and should be treated equally before the law without regard to our race. Only that promise can allow us to look past our differing skin colors

and identities and see each other for what we truly are: individuals with unique thoughts, perspectives, and goals, but with equal dignity and equal rights under the law.

B

JUSTICE JACKSON has a different view. Rather than focusing on individuals as individuals, her dissent focuses on the historical subjugation of black Americans, invoking statistical racial gaps to argue in favor of defining and categorizing individuals by their race. As she sees things, we are all inexorably trapped in a fundamentally racist society, with the original sin of slavery and the historical subjugation of black Americans still determining our lives today. *Post*, at 1–26 (dissenting opinion). The panacea, she counsels, is to unquestioningly accede to the view of elite experts and reallocate society's riches by racial means as necessary to "level the playing field," all as judged by racial metrics. *Post*, at 26. I strongly disagree.

First, as stated above, any statistical gaps between the average wealth of black and white Americans is constitutionally irrelevant. I, of course, agree that our society is not, and has never been, colorblind. *Post*, at 2 (JACKSON, J., dissenting); see also *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting). People discriminate against one another for a whole host of reasons. But, under the Fourteenth Amendment, the law must disregard all racial distinctions:

> "[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Ibid.*

With the passage of the Fourteenth Amendment, the people of our Nation proclaimed that the law may not sort citizens based on race. It is this principle that the Framers of the Fourteenth Amendment adopted in the wake of the Civil War to fulfill the promise of equality under the law. And it is this principle that has guaranteed a Nation of equal citizens the privileges or immunities of citizenship and the equal protection of the laws. To now dismiss it as "two-dimensional flatness," *post*, at 25 (JACKSON, J., dissenting), is to abdicate a sacred trust to ensure that our "honored dead . . . shall not have died in vain." A. Lincoln, Gettysburg Address (1863).

Yet, JUSTICE JACKSON would replace the second Founders' vision with an organizing principle based on race. In fact, on her view, almost all of life's outcomes may be unhesitatingly ascribed to race. *Post*, at 24–26. This is so, she writes, because of statistical disparities among different racial groups. See *post*, at 11–14. Even if some whites have a lower household net worth than some blacks, what matters to JUSTICE JACKSON is that the *average* white household has more wealth than the *average* black household. *Post*, at 11.

This lore is not and has never been true. Even in the segregated South where I grew up, individuals were not the sum of their skin color. Then as now, not all disparities are based on race; not all people are racist; and not all differences between individuals are ascribable to race. Put simply, "the fate of abstract categories of wealth statistics is not the same as the fate of a given set of flesh-and-blood human beings." T. Sowell, Wealth, Poverty and Politics 333 (2016). Worse still, JUSTICE JACKSON uses her broad observations about statistical relationships between race and select measures of health, wealth, and well-being to label all blacks as victims. Her desire to do so is unfathomable to me. I cannot deny the great accomplishments of black Americans, including those who succeeded despite long

odds.

Nor do JUSTICE JACKSON's statistics regarding a correlation between levels of health, wealth, and well-being between selected racial groups prove anything. Of course, none of those statistics are capable of drawing a direct causal link between race—rather than socioeconomic status or any other factor—and individual outcomes. So JUSTICE JACKSON supplies the link herself: the legacy of slavery and the nature of inherited wealth. This, she claims, locks blacks into a seemingly perpetual inferior caste. Such a view is irrational; it is an insult to individual achievement and cancerous to young minds seeking to push through barriers, rather than consign themselves to permanent victimhood. If an applicant has less financial means (because of generational inheritance or otherwise), then surely a university may take that into account. If an applicant has medical struggles or a family member with medical concerns, a university may consider that too. What it cannot do is use the applicant's skin color as a heuristic, assuming that because the applicant checks the box for "black" he therefore conforms to the university's monolithic and reductionist view of an abstract, average black person.

Accordingly, JUSTICE JACKSON's race-infused world view falls flat at each step. Individuals are the sum of their unique experiences, challenges, and accomplishments. What matters is not the barriers they face, but how they choose to confront them. And their race is not to blame for everything—good or bad—that happens in their lives. A contrary, myopic world view based on individuals' skin color to the total exclusion of their personal choices is nothing short of racial determinism.

JUSTICE JACKSON then builds from her faulty premise to call for action, arguing that courts should defer to "experts" and allow institutions to discriminate on the basis of race. Make no mistake: Her dissent is not a vanguard of the in-

nocent and helpless. It is instead a call to empower privileged elites, who will "tell us [what] is required to level the playing field" among castes and classifications that they alone can divine. *Post*, at 26; see also *post*, at 5–7 (GORSUCH, J., concurring) (explaining the arbitrariness of these classifications). Then, after siloing us all into racial castes and pitting those castes against each other, the dissent somehow believes that we will be able—at some undefined point—to "march forward together" into some utopian vision. *Post*, at 26 (opinion of JACKSON, J.). Social movements that invoke these sorts of rallying cries, historically, have ended disastrously.

Unsurprisingly, this tried-and-failed system defies both law and reason. Start with the obvious: If social reorganization in the name of equality may be justified by the mere fact of statistical disparities among racial groups, then that reorganization must continue until these disparities are fully eliminated, regardless of the reasons for the disparities and the cost of their elimination. If blacks fail a test at higher rates than their white counterparts (regardless of whether the reason for the disparity has anything at all to do with race), the only solution will be race-focused measures. If those measures were to result in blacks failing at yet higher rates, the only solution would be to double down. In fact, there would seem to be no logical limit to what the government may do to level the racial playing field—outright wealth transfers, quota systems, and racial preferences would all seem permissible. In such a system, it would not matter how many innocents suffer race-based injuries; all that would matter is reaching the race-based goal.

Worse, the classifications that JUSTICE JACKSON draws are themselves race-based stereotypes. She focuses on two hypothetical applicants, John and James, competing for admission to UNC. John is a white, seventh-generation legacy at the school, while James is black and would be the

first in his family to attend UNC. *Post*, at 3. JUSTICE JACKSON argues that race-conscious admission programs are necessary to adequately compare the two applicants. As an initial matter, it is not clear why James's race is the only factor that could encourage UNC to admit him; his status as a first-generation college applicant seems to contextualize his application. But, setting that aside, why is it that John should be judged based on the actions of his great-great-great-grandparents? And what would JUSTICE JACKSON say to John when deeming him not as worthy of admission: Some statistically significant number of white people had advantages in college admissions seven generations ago, and you have inherited their incurable sin?

Nor should we accept that John or James represent all members of their respective races. All racial groups are heterogeneous, and blacks are no exception—encompassing northerners and southerners, rich and poor, and recent immigrants and descendants of slaves. See, *e.g.*, T. Sowell, Ethnic America 220 (1981) (noting that the great success of West Indian immigrants to the United States—disproportionate among blacks more broadly—"seriously undermines the proposition that color is a fatal handicap in the American economy"). Eschewing the complexity that comes with individuality may make for an uncomplicated narrative, but lumping people together and judging them based on assumed inherited or ancestral traits is nothing but stereotyping.[11]

To further illustrate, let's expand the applicant pool beyond John and James. Consider Jack, a black applicant and the son of a multimillionaire industrialist. In a world of race-based preferences, James' seat could very well go to

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[11] Again, universities may offer admissions preferences to students from disadvantaged backgrounds, and they need not withhold those preferences from students who happen to be members of racial minorities. Universities may not, however, assume that all members of certain racial minorities are disadvantaged.

Jack rather than John—both are black, after all. And what about members of the numerous other racial and ethnic groups in our Nation? What about Anne, the child of Chinese immigrants? Jacob, the grandchild of Holocaust survivors who escaped to this Nation with nothing and faced discrimination upon arrival? Or Thomas, the great-grandchild of Irish immigrants escaping famine? While articulating her black and white world (literally), JUSTICE JACKSON ignores the experiences of other immigrant groups (like Asians, see *supra*, at 43–44) and white communities that have faced historic barriers.

Though JUSTICE JACKSON seems to think that her race-based theory can somehow benefit everyone, it is an immutable fact that "every time the government uses racial criteria to 'bring the races together,' someone gets excluded, and the person excluded suffers an injury solely because of his or her race." *Parents Involved*, 551 U. S., at 759 (THOMAS, J., concurring) (citation omitted). Indeed, JUSTICE JACKSON seems to have no response—no explanation at all—for the people who will shoulder that burden. How, for example, would JUSTICE JACKSON explain the need for race-based preferences to the Chinese student who has worked hard his whole life, only to be denied college admission in part because of his skin color? If such a burden would seem difficult to impose on a bright-eyed young person, that's because it should be. History has taught us to abhor theories that call for elites to pick racial winners and losers in the name of sociological experimentation.

Nor is it clear what another few generations of race-conscious college admissions may be expected to accomplish. Even today, affirmative action programs that offer an admissions boost to black and Hispanic students discriminate against those who identify themselves as members of other races that do not receive such preferential treatment. Must others in the future make sacrifices to re-

level the playing field for this new phase of racial subordination? And then, out of whose lives should the debt owed to those further victims be repaid? This vision of meeting social racism with government-imposed racism is thus self-defeating, resulting in a never-ending cycle of victimization. There is no reason to continue down that path. In the wake of the Civil War, the Framers of the Fourteenth Amendment charted a way out: a colorblind Constitution that requires the government to, at long last, put aside its citizens' skin color and focus on their individual achievements.

C

Universities' recent experiences confirm the efficacy of a colorblind rule. To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means. For example, the University of California purportedly recently admitted its "most diverse undergraduate class ever," despite California's ban on racial preferences. T. Watanabe, UC Admits Largest, Most Diverse Class Ever, But It Was Harder To Get Accepted, L. A. Times, July 20, 2021, p. A1. Similarly, the University of Michigan's 2021 incoming class was "among the university's most racially and ethnically diverse classes, with 37% of first-year students identifying as persons of color." S. Dodge, Largest Ever Student Body at University of Michigan This Fall, Officials Say, MLive.com (Oct. 22, 2021), https://www.mlive.com/news/ann-arbor/2021/10/largest-ever-student-body-at-university-of-michigan-this-fall-officials-say.html. In fact, at least one set of studies suggests that, "when we consider the higher education system as a whole, it is clear that the vast majority of schools would be as racially integrated, or more racially integrated, under a system of no preferences than under a system of large preferences." Brief for Richard Sander as *Amicus Curiae* 26. Race-neutral policies may thus achieve the same benefits of racial harmony and equality without

any of the burdens and strife generated by affirmative action policies.

In fact, meritocratic systems have long refuted bigoted misperceptions of what black students can accomplish. I have always viewed "higher education's purpose as imparting knowledge and skills to students, rather than a communal, rubber-stamp, credentialing process." *Grutter*, 539 U. S., at 371–372 (opinion concurring in part and dissenting in part). And, I continue to strongly believe (and have never doubted) that "blacks can achieve in every avenue of American life without the meddling of university administrators." *Id.*, at 350. Meritocratic systems, with objective grading scales, are critical to that belief. Such scales have always been a great equalizer—offering a metric for achievement that bigotry could not alter. Racial preferences take away this benefit, eliminating the very metric by which those who have the most to prove can clearly demonstrate their accomplishments—both to themselves and to others.

Schools' successes, like students' grades, also provide objective proof of ability. Historically Black Colleges and Universities (HBCUs) do not have a large amount of racial diversity, but they demonstrate a marked ability to improve the lives of their students. To this day, they have proved "to be extremely effective in educating Black students, particularly in STEM," where "HBCUs represent seven of the top eight institutions that graduate the highest number of Black undergraduate students who go on to earn [science and engineering] doctorates." W. Wondwossen, The Science Behind HBCU Success, Nat. Science Foundation (Sept. 24, 2020), https://beta.nsf.gov/science-matters/science-behind-hbcu-success. "HBCUs have produced 40% of all Black engineers." Presidential Proclamation No. 10451, 87 Fed. Reg. 57567 (2022). And, they "account for 80% of Black judges, 50% of Black doctors, and 50% of Black lawyers."

M. Hammond, L. Owens, & B. Gulko, Social Mobility Outcomes for HBCU Alumni, United Negro College Fund 4 (2021) (Hammond), https://cdn.uncf.org/wp-content/uploads/Social-Mobility-Report-FINAL.pdf; see also 87 Fed. Reg. 57567 (placing the percentage of black doctors even higher, at 70%). In fact, Xavier University, an HBCU with only a small percentage of white students, has had better success at helping its low-income students move into the middle class than Harvard has. See Hammond 14; see also Brief for Oklahoma et al. as *Amici Curiae* 18. And, each of the top 10 HBCUs have a success rate above the national average. Hammond 14.[12]

Why, then, would this Court need to allow other universities to racially discriminate? Not for the betterment of those black students, it would seem. The hard work of HBCUs and their students demonstrate that "black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement." *Jenkins*, 515 U. S., at 122

[12] Such black achievement in "racially isolated" environments is neither new nor isolated to higher education. See T. Sowell, Education: Assumptions Versus History 7–38 (1986). As I have previously observed, in the years preceding *Brown*, the "most prominent example of an exemplary black school was Dunbar High School," America's first public high school for black students. *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 763 (2007) (concurring opinion). Known for its academics, the school attracted black students from across the Washington, D. C., area. "[I]n the period 1918–1923, Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan." Sowell, Education: Assumptions Versus History, at 29. Dunbar produced the first black General in the U. S. Army, the first black Federal Court Judge, and the first black Presidential Cabinet member. A. Stewart, First Class: The Legacy of Dunbar 2 (2013). Indeed, efforts towards racial integration ultimately precipitated the school's decline. When the D. C. schools moved to a neighborhood-based admissions model, Dunbar was no longer able to maintain its prior admissions policies—and "[m]ore than 80 years of quality education came to an abrupt end." T. Sowell, Wealth, Poverty and Politics 194 (2016).

(THOMAS, J., concurring) (citing *Fordice*, 505 U. S., at 748 (THOMAS, J., concurring)). And, because race-conscious college admissions are plainly not necessary to serve even the interests of blacks, there is no justification to compel such programs more broadly. See *Parents Involved*, 551 U. S., at 765 (THOMAS, J., concurring).

* * *

The great failure of this country was slavery and its progeny. And, the tragic failure of this Court was its misinterpretation of the Reconstruction Amendments, as Justice Harlan predicted in *Plessy*. We should not repeat this mistake merely because we think, as our predecessors thought, that the present arrangements are superior to the Constitution.

The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled. And, it sees the universities' admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes. Those policies fly in the face of our colorblind Constitution and our Nation's equality ideal. In short, they are plainly—and boldly—unconstitutional. See *Brown II*, 349 U. S., at 298 (noting that the *Brown* case one year earlier had "declare[d] the fundamental principle that racial discrimination in public education is unconstitutional").

While I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination, I hold out enduring hope that this country will live up to its principles so clearly enunciated in the Declaration of Independence and the Constitution of the United States: that all men are created equal, are equal citizens, and must be treated equally before the law.

SUPREME COURT OF THE UNITED STATES

Nos. 20–1199 and 21–707

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
20–1199 *v.*
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
21–707 *v.*
UNIVERSITY OF NORTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 29, 2023]

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring.

For many students, an acceptance letter from Harvard or the University of North Carolina is a ticket to a brighter future. Tens of thousands of applicants compete for a small number of coveted spots. For some time, both universities have decided which applicants to admit or reject based in part on race. Today, the Court holds that the Equal Protection Clause of the Fourteenth Amendment does not tolerate this practice. I write to emphasize that Title VI of the Civil Rights Act of 1964 does not either.

I

"[F]ew pieces of federal legislation rank in significance

with the Civil Rights Act of 1964." *Bostock* v. *Clayton County*, 590 U. S. ___, ___ (2020) (slip op., at 2). Title VI of that law contains terms as powerful as they are easy to understand: "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." 42 U. S. C. §2000d. The message for these cases is unmistakable. Students for Fair Admissions (SFFA) brought claims against Harvard and UNC under Title VI. That law applies to both institutions, as they elect to receive millions of dollars of federal assistance annually. And the trial records reveal that both schools routinely discriminate on the basis of race when choosing new students—exactly what the law forbids.

A

When a party seeks relief under a statute, our task is to apply the law's terms as a reasonable reader would have understood them at the time Congress enacted them. "After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 590 U. S., at ___ (slip op., at 4).

The key phrases in Title VI at issue here are "subjected to discrimination" and "on the ground of." Begin with the first. To "discriminate" against a person meant in 1964 what it means today: to "trea[t] that individual worse than others who are similarly situated." *Id.*, at ___ (slip op., at 7); see also Webster's New International Dictionary 745 (2d ed. 1954) ("[t]o make a distinction" or "[t]o make a difference in treatment or favor (of one as compared with others)"); Webster's Third New International Dictionary 648 (1961) ("to make a difference in treatment or favor on a class or categorical basis"). The provision of Title VI before us, this Court has also held, "prohibits only intentional discrimination." *Alexander* v. *Sandoval*, 532 U. S. 275, 280 (2001).

From this, we can safely say that Title VI forbids a recipient of federal funds from intentionally treating one person worse than another similarly situated person on the ground of race, color, or national origin.

What does the statute's second critical phrase—"on the ground of"—mean? Again, the answer is uncomplicated: It means "because of." See, *e.g.,* Webster's New World Dictionary 640 (1960) ("because of"); Webster's Third New International Dictionary, at 1002 (defining "grounds" as "a logical condition, physical cause, or metaphysical basis"). "Because of" is a familiar phrase in the law, one we often apply in cases arising under the Civil Rights Act of 1964, and one that we usually understand to invoke "the 'simple' and 'traditional' standard of but-for causation." *Bostock*, 590 U. S., at ___ (slip op., at 5) (quoting *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 346, 360 (2013); some internal quotation marks omitted). The but-for-causation standard is a "sweeping" one too. *Bostock*, 590 U. S., at ___ (slip op., at 5). A defendant's actions need not be the primary or proximate cause of the plaintiff's injury to qualify. Nor may a defendant avoid liability "just by citing some *other* factor that contributed to" the plaintiff's loss. *Id.*, at ___ (slip op., at 6). All that matters is that the plaintiff's injury would not have happened *but for* the defendant's conduct. *Ibid.*

Now put these pieces back together and a clear rule emerges. Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin. It does not matter if the recipient can point to "some other . . . factor" that contributed to its decision to disfavor that individual. *Id.,* at ___–___ (slip op., at 14–15). It does not matter if the recipient discriminates in order to advance some further benign "intention" or "motivation." *Id.,* at ___ (slip op., at 13); see also *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U. S. 187, 199 (1991) ("the absence of a

malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect" or "alter [its] intentionally discriminatory character"). Nor does it matter if the recipient discriminates against an individual member of a protected class with the idea that doing so might "favor" the interests of that "class" as a whole or otherwise "promot[e] equality at the group level." *Bostock*, 590 U. S., at ___, ___ (slip op., at 13, 15). Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race, color, or national origin and without regard to any other reason or motive the recipient might assert. Without question, Congress in 1964 could have taken the law in various directions. But to safeguard the civil rights of all Americans, Congress chose a simple and profound rule. One holding that a recipient of federal funds may never discriminate based on race, color, or national origin—period.

If this exposition of Title VI sounds familiar, it should. Just next door, in Title VII, Congress made it "unlawful . . . for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." §2000e–2(a)(1). Appreciating the breadth of this provision, just three years ago this Court read its essentially identical terms the same way. See *Bostock*, 590 U. S., at ___–___ (slip op., at 4–9). This Court has long recognized, too, that when Congress uses the same terms in the same statute, we should presume they "have the same meaning." *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34 (2005). And that presumption surely makes sense here, for as Justice Stevens recognized years ago, "[b]oth Title VI and Title VII" codify a categorical rule of "individual equality, without regard to race." *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 416, n. 19 (1978) (opinion concurring in judgment in part and dissenting in part) (emphasis deleted).

B

Applying Title VI to the cases now before us, the result is plain. The parties debate certain details of Harvard's and UNC's admissions practices. But no one disputes that both universities operate "program[s] or activit[ies] receiving Federal financial assistance." §2000d. No one questions that both institutions consult race when making their admissions decisions. And no one can doubt that both schools intentionally treat some applicants worse than others at least in part because of their race.

1

Start with how Harvard and UNC use race. Like many colleges and universities, those schools invite interested students to complete the Common Application. As part of that process, the trial records show, applicants are prompted to tick one or more boxes to explain "how you identify yourself." 4 App. in No. 21–707, p. 1732. The available choices are American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; Hispanic or Latino; or White. Applicants can write in further details if they choose. *Ibid.*; see also 397 F. Supp. 3d 126, 137 (Mass. 2019); 567 F. Supp. 3d 580, 596 (MDNC 2021).

Where do these boxes come from? Bureaucrats. A federal interagency commission devised this scheme of classifications in the 1970s to facilitate data collection. See D. Bernstein, The Modern American Law of Race, 94 S. Cal. L. Rev. 171, 196–202 (2021); see also 43 Fed. Reg. 19269 (1978). That commission acted "without any input from anthropologists, sociologists, ethnologists, or other experts." Brief for David E. Bernstein as *Amicus Curiae* 3 (Bernstein *Amicus* Brief). Recognizing the limitations of their work, federal regulators cautioned that their classifications "should not be interpreted as being scientific or anthropological in nature, *nor should they be viewed as determinants of eligibility*

for participation in any Federal program." 43 Fed. Reg. 19269 (emphasis added). Despite that warning, others eventually used this classification system for that very purpose—to "sor[t] out winners and losers in a process that, by the end of the century, would grant preference[s] in jobs . . . and university admissions." H. Graham, The Origins of Official Minority Designation, in The New Race Question: How the Census Counts Multiracial Individuals 289 (J. Perlmann & M. Waters eds. 2002).

These classifications rest on incoherent stereotypes. Take the "Asian" category. It sweeps into one pile East Asians (*e.g.,* Chinese, Korean, Japanese) and South Asians (*e.g.,* Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world's population. Bernstein *Amicus* Brief 2, 5. This agglomeration of so many peoples paves over countless differences in "language," "culture," and historical experience. *Id.*, at 5–6. It does so even though few would suggest that all such persons share "similar backgrounds and similar ideas and experiences." *Fisher* v. *University of Tex. at Austin*, 579 U. S. 365, 414 (2016) (ALITO, J., dissenting). Consider, as well, the development of a separate category for "Native Hawaiian or Other Pacific Islander." It seems federal officials disaggregated these groups from the "Asian" category only in the 1990s and only "in response to political lobbying." Bernstein *Amicus* Brief 9–10. And even that category contains its curiosities. It appears, for example, that Filipino Americans remain classified as "Asian" rather than "Other Pacific Islander." See 4 App. in No. 21–707, at 1732.

The remaining classifications depend just as much on irrational stereotypes. The "Hispanic" category covers those whose ancestral language is Spanish, Basque, or Catalan—but it also covers individuals of Mayan, Mixtec, or Zapotec descent who do not speak any of those languages and whose ancestry does not trace to the Iberian Peninsula but bears deep ties to the Americas. See Bernstein *Amicus* Brief 10–

11. The "White" category sweeps in anyone from "Europe, Asia west of India, and North Africa." *Id.*, at 14. That includes those of Welsh, Norwegian, Greek, Italian, Moroccan, Lebanese, Turkish, or Iranian descent. It embraces an Iraqi or Ukrainian refugee as much as a member of the British royal family. Meanwhile, "Black or African American" covers everyone from a descendant of enslaved persons who grew up poor in the rural South, to a first-generation child of wealthy Nigerian immigrants, to a Black-identifying applicant with multiracial ancestry whose family lives in a typical American suburb. See *id.,* at 15–16.

If anything, attempts to divide us all up into a handful of groups have become only more incoherent with time. American families have become increasingly multicultural, a fact that has led to unseemly disputes about whether someone is *really* a member of a certain racial or ethnic group. There are decisions denying Hispanic status to someone of Italian-Argentine descent, *Marinelli Constr. Corp.* v. *New York*, 200 App. Div. 2d 294, 296–297, 613 N. Y. S. 2d 1000, 1002 (1994), as well as someone with one Mexican grandparent, *Major Concrete Constr., Inc.* v. *Erie County*, 134 App. Div. 2d 872, 873, 521 N. Y. S. 2d 959, 960 (1987). Yet there are also decisions granting Hispanic status to a Sephardic Jew whose ancestors fled Spain centuries ago, *In re Rothschild-Lynn Legal & Fin. Servs.*, SBA No. 499, 1995 WL 542398, *2–*4 (Apr. 12, 1995), and bestowing a "sort of Hispanic" status on a person with one Cuban grandparent, Bernstein, 94 S. Cal. L. Rev., at 232 (discussing *In re Kist Corp.*, 99 F. C. C. 2d 173, 193 (1984)).

Given all this, is it any surprise that members of certain groups sometimes try to conceal their race or ethnicity? Or that a cottage industry has sprung up to help college applicants do so? We are told, for example, that one effect of lumping so many people of so many disparate backgrounds into the "Asian" category is that many colleges consider "Asians" to be "overrepresented" in their admission pools.

Brief for Asian American Coalition for Education et al. as *Amici Curiae* 12–14, 18–19. Paid advisors, in turn, tell high school students of Asian descent to downplay their heritage to maximize their odds of admission. "'We will make them appear less Asian when they apply,'" one promises. *Id.,* at 16. "'If you're given an option, don't attach a photograph to your application,'" another instructs. *Ibid.*[1] It is difficult to imagine those who receive this advice would find comfort in a bald (and mistaken) assurance that "race-conscious admissions benefit . . . the Asian American community," *post*, at 60 (SOTOMAYOR, J., dissenting). See 397 F. Supp. 3d, at 178 (district court finding that "overall" Harvard's race-conscious admissions policy "results in fewer Asian American[s]" being admitted). And it is hard not to wonder whether those left paying the steepest price are those least able to afford it—children of families with no chance of hiring the kind of consultants who know how to play this game.[2]

2

Just as there is no question Harvard and UNC consider race in their admissions processes, there is no question both schools intentionally treat some applicants worse than others because of their race. Both schools frequently choose to

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[1] See also A. Qin, Aiming for an Ivy and Trying to Seem 'Less Asian,' N. Y. Times, Dec. 3, 2022, p. A18, col. 1 ("[T]he rumor that students can appear 'too Asian' has hardened into a kind of received wisdom within many Asian American communities," and "college admissions consultants [have] spoke[n] about trying to steer their Asian American clients away from so-called typically Asian activities such as Chinese language school, piano and Indian classical instruments.").

[2] Though the matter did not receive much attention in the proceedings below, it appears that the Common Application has evolved in recent years to allow applicants to choose among more options to describe their backgrounds. The decisions below do not disclose how much Harvard or UNC made use of this further information (or whether they make use of it now). But neither does it make a difference. Title VI no more tolerates discrimination based on 60 racial categories than it does 6.

award a "tip" or a "plus" to applicants from certain racial groups but not others. These tips or plusses are just what they sound like—"factors that might tip an applicant into [an] admitted class." 980 F. 3d 157, 170 (CA1 2020). And in a process where applicants compete for a limited pool of spots, "[a] tip for one race" necessarily works as "a penalty against other races." Brief for Economists as *Amici Curiae* 20. As the trial court in the Harvard case put it: "Race conscious admissions will always penalize to some extent the groups that are not being advantaged by the process." 397 F. Supp. 3d, at 202–203.

Consider how this plays out at Harvard. In a given year, the university's undergraduate program may receive 60,000 applications for roughly 1,600 spots. Tr. of Oral Arg. in No. 20–1199, p. 60. Admissions officers read each application and rate students across several categories: academic, extracurricular, athletic, school support, personal, and overall. 980 F. 3d, at 167. Harvard says its admissions officers "should not" consider race or ethnicity when assigning the "personal" rating. *Id.,* at 169 (internal quotation marks omitted). But Harvard did not make this instruction explicit until *after* SFFA filed this suit. *Ibid.* And, in any event, Harvard concedes that its admissions officers "*can* and *do* take an applicant's race into account when assigning an *overall* rating." *Ibid.* (emphasis added). At that stage, the lower courts found, applicants of certain races may receive a "tip" in their favor. *Ibid.*

The next step in the process is committee review. Regional subcommittees may consider an applicant's race when deciding whether to recommend admission. *Id.*, at 169–170. So, too, may the full admissions committee. *Ibid.* As the Court explains, that latter committee "discusses the relative breakdown of applicants by race." *Ante*, at 2–3. And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the [committee]

may decide to give additional attention to applications from students within that group." 397 F. Supp. 3d, at 146.

The last step is "lopping," where the admissions committee trims the list of "prospective admits" before settling on a final class. *Id.,* at 144 (internal quotation marks omitted). At this stage, again, the committee considers the "characteristics of the admitted class," including its "racial composition." *Ibid.* Once more, too, the committee may consider each applicant's race in deciding whom to "lop off." *Ibid.*

All told, the district court made a number of findings about Harvard's use of race-based tips. For example: "[T]he tip[s] given for race impac[t] who among the highly-qualified students in the applicant pool will be selected for admission." *Id.*, at 178. "At least 10% of Harvard's admitted class . . . would most likely not be admitted in the absence of Harvard's race-conscious admissions process." *Ibid.* Race-based tips are "determinative" in securing favorable decisions for a significant percentage of "African American and Hispanic applicants," the "primary beneficiaries" of this system. *Ibid.* There are clear losers too. "[W]hite and Asian American applicants are unlikely to receive a meaningful race-based tip," *id.,* at 190, n. 56, and "overall" the school's race-based practices "resul[t] in fewer Asian American and white students being admitted," *id.*, at 178. For these reasons and others still, the district court concluded that "Harvard's admissions process is not facially neutral" with respect to race. *Id.,* at 189–190; see also *id.*, at 190, n. 56 ("The policy cannot . . . be considered facially neutral from a Title VI perspective.").

Things work similarly at UNC. In a typical year, about 44,000 applicants vie for 4,200 spots. 567 F. Supp. 3d, at 595. Admissions officers read each application and rate prospective students along eight dimensions: academic programming, academic performance, standardized tests, extracurriculars, special talents, essays, background, and personal. *Id.,* at 600. The district court found that "UNC's

admissions policies mandate that race is taken into consideration" in this process as a "'plus' facto[r]." *Id.,* at 594–595. It is a plus that is "sometimes" awarded to "underrepresented minority" or "URM" candidates—a group UNC defines to include "'those students identifying themselves as African American or [B]lack; American Indian or Alaska Native; or Hispanic, Latino, or Latina,'" but not Asian or white students. *Id.*, at 591–592, n. 7, 601.

At UNC, the admissions officers' decisions to admit or deny are "'provisionally final.'" *Ante*, at 4 (opinion for the Court). The decisions become truly final only after a committee approves or rejects them. 567 F. Supp. 3d, at 599. That committee may consider an applicant's race too. *Id.*, at 607. In the end, the district court found that "race plays a role"—perhaps even "a determinative role"—in the decision to admit or deny some "URM students." *Id.,* at 634; see also *id.,* at 662 ("race may tip the scale"). Nor is this an accident. As at Harvard, officials at UNC have made a "deliberate decision" to employ race-conscious admissions practices. *Id.,* at 588–589.

While the district courts' findings tell the full story, one can also get a glimpse from aggregate statistics. Consider the chart in the Court's opinion collecting Harvard's data for the period 2009 to 2018. *Ante,* at 31. The racial composition of each incoming class remained steady over that time—remarkably so. The proportion of African Americans hovered between 10% and 12%; the proportion of Hispanics between 8% and 12%; and the proportion of Asian Americans between 17% and 20%. *Ibid.* Might this merely reflect the demographics of the school's applicant pool? Cf. *post*, at 35 (opinion of SOTOMAYOR, J.). Perhaps—at least assuming the applicant pool looks much the same each year and the school rather mechanically admits applicants based on objective criteria. But the possibility that it instead betrays the school's persistent focus on numbers of this race and numbers of that race is entirely consistent with the findings

recounted above. See, *e.g.,* 397 F. Supp. 3d, at 146 ("if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the [committee] may decide to give additional attention to applications from students within that group"); cf. *ante,* at 31–32, n. 7 (opinion for the Court).

C

Throughout this litigation, the parties have spent less time contesting these facts than debating other matters.

For example, the parties debate *how much* of a role race plays in admissions at Harvard and UNC. Both schools insist that they consider race as just one of many factors when making admissions decisions in their self-described "holistic" review of each applicant. SFFA responds with trial evidence showing that, whatever label the universities use to describe their processes, they intentionally consult race and, by design, their race-based tips and plusses benefit applicants of certain groups to the detriment of others. See Brief for Petitioner 20–35, 40–45.

The parties also debate the *reasons* both schools consult race. SFFA observes that, in the 1920s, Harvard began moving away from "test scores" and toward "plac[ing] greater emphasis on character, fitness, and other subjective criteria." *Id.*, at 12–13 (internal quotation marks omitted). Harvard made this move, SFFA asserts, because President A. Lawrence Lowell and other university leaders had become "alarmed by the growing number of Jewish students who were testing in," and they sought some way to cap the number of Jewish students without "'stat[ing] frankly'" that they were "'directly excluding all [Jews] beyond a certain percentage.'" *Id.,* at 12; see also 3 App. in No. 20–1199, pp. 1131–1133. SFFA contends that Harvard's current "holistic" approach to admissions works similarly to disguise

the school's efforts to assemble classes with a particular racial composition—and, in particular, to limit the number of Asian Americans it admits. Brief for Petitioner 12–14, 25–32. For its part, Harvard expresses regret for its past practices while denying that they resemble its current ones. Tr. of Oral Arg. in No. 20–1199, at 51. And both schools insist that their student bodies would lack sufficient diversity without race-conscious admissions. Brief for Respondent in No. 20–1199, pp. 52–54; Brief for University Respondents in No. 21–707, pp. 54–59.

When it comes to defining and measuring diversity, the parties spar too. SFFA observes that the racial categories the universities employ in the name of diversity do not begin to reflect the differences that exist within each group. See Part I–B–1, *supra*. Instead, they lump together white and Asian students from privileged backgrounds with "Jewish, Irish, Polish, or other 'white' ethnic groups whose ancestors faced discrimination" and "descendants of those Japanese-American citizens interned during World War II." *Ante*, at 45, n. 10 (THOMAS, J., concurring). Even putting all that aside, SFFA stresses that neither Harvard nor UNC is willing to quantify how much racial and ethnic diversity they think sufficient. And, SFFA contends, the universities may not wish to do so because their stated goal implies a desire to admit some fixed number (or quota) of students from each racial group. See Brief for Petitioner 77, 80; Tr. of Oral Arg. in No. 21–707, p. 180. Besides, SFFA asks, if it is diversity the schools are after, why do they exhibit so little interest in other (non-racial) markers of it? See Brief for Petitioner 78, 83–86. While Harvard professes interest in socioeconomic diversity, for example, SFFA points to trial testimony that there are "23 times as many rich kids on campus as poor kids." 2 App. in No. 20–1199,

p. 756.[3]

Even beyond all this, the parties debate the availability of alternatives. SFFA contends that both Harvard and UNC could obtain significant racial diversity without resorting to race-based admissions practices. Many other universities across the country, SFFA points out, have sought to do just that by reducing legacy preferences, increasing financial aid, and the like. Brief for Petitioner 85–86; see also Brief for Oklahoma et al. as *Amici Curiae* 9–19.[4] As part of its affirmative case, SFFA also submitted evidence that Harvard could nearly replicate the current racial composition of its student body without resorting to race-based practices if it: (1) provided socioeconomically

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[3] See also E. Bazelon, Why Is Affirmative Action in Peril? One Man's Decision, N. Y. Times Magazine, Feb. 15, 2023, p. 41 ("In the Ivy League, children whose parents are in the top 1 percent of the income distribution are 77 times as likely to attend as those whose parents are in the bottom 20 percent of the income bracket."); *ibid.* ("[A] common critique . . . is that schools have made a bargain with economic elites of all races, with the exception of Asian Americans, who are underrepresented compared with their level of academic achievement.").

[4] The principal dissent chides me for "reach[ing] beyond the factfinding below" by acknowledging SFFA's argument that other universities have employed various race-neutral tools. *Post,* at 29–30, n. 25 (opinion of SOTOMAYOR, J.). Contrary to the dissent's suggestion, however, I do not purport to find facts about those practices; all I do here is recount what SFFA has argued every step of the way. See, *e.g.,* Brief for Petitioner 55, 66–67; 1 App. in No. 20–1199, pp. 415–416, 440; 2 App. in No. 21–707, pp. 551–552. Nor, of course, is it somehow remarkable to acknowledge the parties' arguments. The principal dissent itself recites SFFA's arguments about Harvard's and other universities' practices too. See, *e.g., post,* at 30–31, 50 (opinion of SOTOMAYOR, J.). In truth, it is the dissent that reaches beyond the factfinding below when it argues from studies recited in a dissenting opinion in a different case decided almost a decade ago. *Post,* at 29–30, n. 25 (opinion of SOTOMAYOR, J.); see also *post,* at 18–21 (opinion of SOTOMAYOR, J.) (further venturing beyond the trial records to discuss data about employment, income, wealth, home ownership, and healthcare).

disadvantaged applicants just *half* of the tip it gives recruited athletes; and (2) eliminated tips for the children of donors, alumni, and faculty. Brief for Petitioner 33–34, 81; see 2 App. in No. 20–1199, at 763–765, 774–775. Doing these two things would barely affect the academic credentials of each incoming class. Brief for Petitioner 33–34. And it would not require Harvard to end tips for recruited athletes, who as a group are much weaker academically than non-athletes.[5]

At trial, however, Harvard resisted this proposal. Its preferences for the children of donors, alumni, and faculty are no help to applicants who cannot boast of their parents' good fortune or trips to the alumni tent all their lives. While race-neutral on their face, too, these preferences undoubtedly benefit white and wealthy applicants the most. See 980 F. 3d, at 171. Still, Harvard stands by them. See Brief for Respondent in No. 20–1199, at 52–54; Tr. of Oral Arg. in No. 21–1199, at 48–49. As a result, athletes and the children of donors, alumni, and faculty—groups that together "make up less than 5% of applicants to Harvard"—constitute "around 30% of the applicants admitted each year." 980 F. 3d, at 171.

To be sure, the parties' debates raise some hard-to-answer questions. Just how many admissions decisions turn on race? And what really motivates the universities' race-conscious admissions policies and their refusal to modify other preferential practices? Fortunately, Title VI does not require an answer to any of these questions. It does not ask

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[5] See Brief for Defense of Freedom Institute for Policy Studies as *Amicus Curiae* 11 (recruited athletes make up less than 1% of Harvard's applicant pool but represent more than 10% of the admitted class); P. Arcidiacono, J. Kinsler, & T. Ransom, Legacy and Athlete Preferences at Harvard, 40 J. Lab. Econ. 133, 141, n. 17 (2021) (recruited athletes were the only applicants admitted with the lowest possible academic rating and 79% of recruited athletes with the next lowest rating were admitted compared to 0.02% of other applicants with the same rating).

how much a recipient of federal funds discriminates. It does not scrutinize a recipient's reasons or motives for discriminating. Instead, the law prohibits covered institutions from intentionally treating *any* individual worse even *in part* because of race. So yes, of course, the universities consider many non-racial factors in their admissions processes too. And perhaps they mean well when they favor certain candidates over others based on the color of their skin. But even if all that is true, their conduct violates Title VI just the same. See Part I–A, *supra*; see also *Bostock*, 590 U. S., at ___, ___–___ (slip op., at 6, 12–15).

D

The principal dissent contends that this understanding of Title VI is contrary to precedent. *Post*, at 26–27, n. 21 (opinion of SOTOMAYOR, J.). But the dissent does not dispute that everything said here about the meaning of Title VI tracks this Court's precedent in *Bostock* interpreting materially identical language in Title VII. That raises two questions: Do the dissenters think *Bostock* wrongly decided? Or do they read the same words in neighboring provisions of the same statute—enacted at the same time by the same Congress—to mean different things? Apparently, the federal government takes the latter view. The Solicitor General insists that there is "ambiguity in the term 'discrimination'" in Title VI but no ambiguity in the term "discriminate" in Title VII. Tr. of Oral Arg. in No. 21–707, at 164. Respectfully, I do not see it. The words of the Civil Rights Act of 1964 are not like mood rings; they do not change their message from one moment to the next.

Rather than engage with the statutory text or our precedent in *Bostock*, the principal dissent seeks to sow confusion about the facts. It insists that all applicants to Harvard and UNC are "eligible" to receive a race-based tip. *Post*, at 32, n. 27 (opinion of SOTOMAYOR, J.); cf. *post*, at 17 (JACKSON, J., dissenting). But the question in these cases

is not who could *hypothetically* receive a race-based tip. It is who *actually* receives one. And on that score the lower courts left no doubt. The district court in the Harvard case found that the school's admissions policy "cannot . . . be considered facially neutral from a Title VI perspective given that admissions officers provide [race-based] tips to African American and Hispanic applicants, while white and Asian American applicants are unlikely to receive a meaningful race-based tip." 397 F. Supp. 3d, at 190, n. 56; see also *id.,* at 189–190 ("Harvard's admissions process is not facially neutral."). Likewise, the district court in the UNC case found that admissions officers "sometimes" award race-based plusses to URM candidates—a category that excludes Asian American and white students. 567 F. Supp. 3d, at 591–592, n. 7, 601.[6]

Nor could anyone doubt that these cases are about intentional discrimination just because Harvard in particular "'does not *explicitly* prioritize any particular racial group over any other.'" *Post,* at 32, n. 27 (opinion of SOTOMAYOR, J.) (emphasis added). Forget for a moment the universities' concessions about how they deliberately consult race when deciding whom to admit. See *supra,* at 12–13.[7] Look past

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[6]The principal dissent suggests "some Asian American applicants are actually advantaged by Harvard's use of race." *Post,* at 60 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). What is the dissent's basis for that claim? The district court's finding that "considering applicants' race *may* improve the admission chances of *some* Asian Americans *who connect their racial identities with particularly compelling narratives*." 397 F. Supp. 3d, at 178 (emphasis added). The dissent neglects to mention those key qualifications. Worse, it ignores completely the district court's further finding that "*overall*" Harvard's race-conscious admissions policy "results in fewer Asian American[s] . . . being admitted." *Ibid*. (emphasis added). So much for affording the district court's "careful factfinding" the "deference it [is] owe[d]." *Post,* at 29–30, n. 25 (opinion of SOTOMAYOR, J.).

[7]See also, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67, 84, 91; Tr. of Oral Arg. in No. 21–707, at 70–71, 81, 84, 91–92, 110.

the lower courts' findings recounted above about how the universities intentionally give tips to students of some races and not others. See *supra,* at 8–12, 16–17. Put to the side telling evidence that came out in discovery.[8] Ignore, too, our many precedents holding that it does not matter how a defendant "label[s]" its practices, *Bostock*, 590 U. S., at ___ (slip op., at 14); that intentional discrimination between individuals is unlawful whether "motivated by a wish to achieve classwide equality" or any other purpose, *id.*, at ___ (slip op., at 13); and that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a [merely] discriminatory effect," *Johnson Controls*, 499 U. S., at 199. Consider just the dissents in these cases. From start to finish and over the course of nearly 100 pages, they defend the universities' purposeful discrimination between applicants based on race. "[N]eutrality," they insist, is not enough. *Post,* at 12, 68 (opinion of SOTOMAYOR, J.); cf. *post*, at 21 (opinion of JACKSON, J.). "[T]he use of race," they stress, "is critical." *Post,* at 59–60 (opinion of SOTOMAYOR, J.); see *id.,* at 2, 33, 39, 43–45; cf. *post,* at 2, 26 (opinion of JACKSON, J.). Plainly, Harvard and UNC choose to treat some students worse than others in part because of race. To suggest otherwise—or to cling to the fact that the schools do not always say the quiet part aloud—is to deny reality.[9]

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[8] Messages among UNC admissions officers included statements such as these: "[P]erfect 2400 SAT All 5 on AP one B in 11th [grade]." "Brown?!" "Heck no. Asian." "Of course. Still impressive."; "If it[']s brown and above a 1300 [SAT] put them in for [the] merit/Excel [scholarship]."; "I just opened a brown girl who's an 810 [SAT]."; "I'm going through this trouble because this is a bi-racial (black/white) male."; "[S]tellar academics for a Native Amer[ican]/African Amer[ican] kid." 3 App. in No. 21–707, pp. 1242–1251.

[9] Left with no reply on the statute or its application to the facts, the principal dissent suggests that it violates "principles of party presentation" and abandons "judicial restraint" even to look at the text of Title VI.

II

So far, we have seen that Title VI prohibits a recipient of federal funds from discriminating against individuals even in part because of race. We have seen, too, that Harvard and UNC do just what the law forbids. One might wonder, then, why the parties have devoted years and fortunes litigating other matters, like how much the universities discriminate and why they do so. The answer lies in *Bakke*.

A

Bakke concerned admissions to the medical school at the University of California, Davis. That school set aside a certain number of spots in each class for minority applicants. See 438 U. S., at 272–276 (opinion of Powell, J.). Allan Bakke argued that the school's policy violated Title VI and the Equal Protection Clause of the Fourteenth Amendment. *Id.,* at 270. The Court agreed with Mr. Bakke. In a fractured decision that yielded six opinions, a majority of the Court held that the school's set-aside system went too far. At the same time, however, a different coalition of five Justices ventured beyond the facts of the case to suggest that, in other circumstances not at issue, universities may sometimes permissibly use race in their admissions processes. See *ante*, at 16–19 (opinion for the Court).

As important as these conclusions were some of the interpretive moves made along the way. Justice Powell (writing only for himself) and Justice Brennan (writing for himself

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Post, at 26–27, n. 21 (opinion of SOTOMAYOR, J.). It is a bewildering suggestion. SFFA sued Harvard and UNC under Title VI. And when a party seeks relief under a statute, our task is to apply the law's terms as a reasonable reader would have understood them when Congress enacted them. *Bostock* v. *Clayton County*, 590 U. S. ___, ___ (2020) (slip op., at 4). To be sure, parties are free to frame their arguments. But they are not free to stipulate to a statute's meaning and no party may "waiv[e]" the proper interpretation of the law by "fail[ing] to invoke it." *EEOC* v. *FLRA*, 476 U. S. 19, 23 (1986) (*per curiam*) (internal quotation marks omitted); see also *Young* v. *United States*, 315 U. S. 257, 258–259 (1942).

and three others) argued that Title VI is coterminous with the Equal Protection Clause. Put differently, they read Title VI to prohibit recipients of federal funds from doing whatever the Equal Protection Clause prohibits States from doing. Justice Powell and Justice Brennan then proceeded to evaluate racial preferences in higher education directly under the Equal Protection Clause. From there, however, their paths diverged. Justice Powell thought some racial preferences might be permissible but that the admissions program at issue violated the promise of equal protection. 438 U. S., at 315–320. Justice Brennan would have given a wider berth to racial preferences and allowed the challenged program to proceed. *Id.*, at 355–379.

Justice Stevens (also writing for himself and three others) took an altogether different approach. He began by noting the Court's "settled practice" of "avoid[ing] the decision of a constitutional issue if a case can be fairly decided on a statutory ground." *Id.,* at 411. He then turned to the "broad prohibition" of Title VI, *id.,* at 413, and summarized his views this way: "The University . . . excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. The plain language of the statute therefore requires" finding a Title VI violation. *Id.,* at 412 (footnote omitted).

In the years following *Bakke*, this Court hewed to Justice Powell's and Justice Brennan's shared premise that Title VI and the Equal Protection Clause mean the same thing. See *Gratz* v. *Bollinger*, 539 U. S. 244, 276, n. 23 (2003); *Grutter* v. *Bollinger*, 539 U. S. 306, 343 (2003). Justice Stevens's statute-focused approach receded from view. As a result, for over four decades, every case about racial preferences in school admissions under Title VI has turned into a case about the meaning of the Fourteenth Amendment.

And what a confused body of constitutional law followed. For years, this Court has said that the Equal Protection

Clause requires any consideration of race to satisfy "strict scrutiny," meaning it must be "narrowly tailored to further compelling governmental interests." *Grutter*, 539 U. S., at 326 (internal quotation marks omitted). Outside the context of higher education, "our precedents have identified only two" interests that meet this demanding standard: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," and "avoiding imminent and serious risks to human safety in prisons." *Ante,* at 15 (opinion for the Court).

Within higher education, however, an entirely distinct set of rules emerged. Following *Bakke*, this Court declared that judges may simply "defer" to a school's assertion that "diversity is essential" to its "educational mission." *Grutter*, 539 U. S., at 328. Not all schools, though—elementary and secondary schools apparently do not qualify for this deference. See *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 724–725 (2007). Only colleges and universities, the Court explained, "occupy a special niche in our constitutional tradition." *Grutter*, 539 U. S., at 329. Yet even they (wielding their "special niche" authority) cannot simply assert an interest in diversity and discriminate as they please. *Fisher*, 579 U. S., at 381. Instead, they may consider race only as a "plus" factor for the purpose of "attaining a critical mass of underrepresented minority students" or "a diverse student body." *Grutter*, 539 U. S., at 335–336 (internal quotation marks omitted). At the same time, the Court cautioned, this practice "must have a logical end point." *Id.,* at 342. And in the meantime, "outright racial balancing" and "quota system[s]" remain "patently unconstitutional." *Id.*, at 330, 334. Nor may a college or university ever provide "mechanical, predetermined diversity bonuses." *Id.*, at 337 (internal quotation marks omitted). Only a "tip" or "plus" is constitutionally tolerable, and only for a limited time. *Id.*, at 338–339, 341.

If you cannot follow all these twists and turns, you are

not alone. See, *e.g., Fisher*, 579 U. S., at 401–437 (ALITO, J., dissenting); *Grutter*, 539 U. S., at 346–349 (Scalia, J., joined by THOMAS, J., concurring in part and dissenting in part); 1 App. in No. 21–707, pp. 401–402 (testimony from UNC administrator: "[M]y understanding of the term 'critical mass' is that it's a . . . I'm trying to decide if it's an analogy or a metaphor[.] I think it's an analogy. . . . I'm not even sure we would know what it is."); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from a Harvard administrator). If the Court's post-*Bakke* higher-education precedents ever made sense, they are by now incoherent.

Recognizing as much, the Court today cuts through the kudzu. It ends university exceptionalism and returns this Court to the traditional rule that the Equal Protection Clause forbids the use of race in distinguishing between persons unless strict scrutiny's demanding standards can be met. In that way, today's decision wakes the echoes of Justice John Marshall Harlan: "The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (dissenting opinion).

B

If *Bakke* led to errors in interpreting the Equal Protection Clause, its first mistake was to take us there. These cases arise under Title VI and that statute is "more than a simple paraphrasing" of the Equal Protection Clause. 438 U. S., at 416 (opinion of Stevens, J.). Title VI has "independent force, with language and emphasis in addition to that found in the Constitution." *Ibid.* That law deserves our respect and its terms provide us with all the direction we need.

Put the two provisions side by side. Title VI says: "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." §2000d. The Equal Protection Clause reads: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, §1. That such differently worded provisions should mean the same thing is implausible on its face.

Consider just some of the obvious differences. The Equal Protection Clause operates on States. It does not purport to regulate the conduct of private parties. By contrast, Title VI applies to recipients of federal funds—covering not just many state actors, but many private actors too. In this way, Title VI reaches entities and organizations that the Equal Protection Clause does not.

In other respects, however, the relative scope of the two provisions is inverted. The Equal Protection Clause addresses all manner of distinctions between persons and this Court has held that it implies different degrees of judicial scrutiny for different kinds of classifications. So, for example, courts apply strict scrutiny for classifications based on race, color, and national origin; intermediate scrutiny for classifications based on sex; and rational-basis review for classifications based on more prosaic grounds. See, *e.g.*, *Fisher*, 579 U. S., at 376; *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493–495 (1989) (plurality opinion); *United States* v. *Virginia*, 518 U. S. 515, 555–556 (1996); *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 366–367 (2001). By contrast, Title VI targets only certain classifications—those based on race, color, or national origin. And that law does not direct courts to subject these classifications to one degree of scrutiny or another. Instead, as we have seen, its rule is as uncomplicated as it is momentous. Under Title VI, it is *always* unlawful to discriminate among persons even in part because of race, color, or national origin.

In truth, neither Justice Powell's nor Justice Brennan's opinion in *Bakke* focused on the text of Title VI. Instead,

both leapt almost immediately to its "voluminous legislative history," from which they proceeded to divine an implicit "congressional intent" to link the statute with the Equal Protection Clause. 438 U. S., at 284–285 (opinion of Powell, J.); *id.,* at 328–336 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.). Along the way, as Justice Stevens documented, both opinions did more than a little cherry-picking from the legislative record. See *id.*, at 413–417. Justice Brennan went so far as to declare that "any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history." *Id.,* at 340. And once liberated from the statute's firm rule against discrimination based on race, both opinions proceeded to devise their own and very different arrangements in the name of the Equal Protection Clause.

The moves made in *Bakke* were not statutory interpretation. They were judicial improvisation. Under our Constitution, judges have never been entitled to disregard the plain terms of a valid congressional enactment based on surmise about unenacted legislative intentions. Instead, it has always been this Court's duty "to give effect, if possible, to every clause and word of a statute," *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883), and of the Constitution itself, see *Knowlton* v. *Moore*, 178 U. S. 41, 87 (1900). In this country, "[o]nly the written word is the law, and all persons are entitled to its benefit." *Bostock*, 590 U. S., at ___ (slip op., at 2). When judges disregard these principles and enforce rules "inspired only by extratextual sources and [their] own imaginations," they usurp a lawmaking function "reserved for the people's representatives." *Id.*, at ___ (slip op., at 4).

Today, the Court corrects course in its reading of the Equal Protection Clause. With that, courts should now also correct course in their treatment of Title VI. For years, they

have read a solo opinion in *Bakke* like a statute while reading Title VI as a mere suggestion. A proper respect for the law demands the opposite. Title VI bears independent force beyond the Equal Protection Clause. Nothing in it grants special deference to university administrators. Nothing in it endorses racial discrimination to any degree or for any purpose. Title VI is more consequential than that.

*

In the aftermath of the Civil War, Congress took vital steps toward realizing the promise of equality under the law. As important as those initial efforts were, much work remained to be done—and much remains today. But by any measure, the Civil Rights Act of 1964 stands as a landmark on this journey and one of the Nation's great triumphs. We have no right to make a blank sheet of any of its provisions. And when we look to the clear and powerful command Congress set forth in that law, these cases all but resolve themselves. Under Title VI, it is never permissible "'to say "yes" to one person . . . but to say "no" to another person'" even in part "'because of the color of his skin.'" *Bakke*, 438 U. S., at 418 (opinion of Stevens, J.).

SUPREME COURT OF THE UNITED STATES

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[June 29, 2023]

JUSTICE KAVANAUGH, concurring.

I join the Court's opinion in full. I add this concurring opinion to further explain why the Court's decision today is consistent with and follows from the Court's equal protection precedents, including the Court's precedents on race-based affirmative action in higher education.

Ratified in 1868 in the wake of the Civil War, the Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, §1. In accord with the Fourteenth Amendment's text and history, this Court considers all racial classifications to be constitutionally suspect. See *Grutter* v. *Bollinger*, 539 U. S. 306, 326 (2003); *Strauder* v. *West Virginia*, 100 U. S. 303,

306–308 (1880). As a result, the Court has long held that racial classifications by the government, including race-based affirmative action programs, are subject to strict judicial scrutiny.

Under strict scrutiny, racial classifications are constitutionally prohibited unless they are narrowly tailored to further a compelling governmental interest. *Grutter*, 539 U. S., at 326–327. Narrow tailoring requires courts to examine, among other things, whether a racial classification is "necessary"—in other words, whether race-neutral alternatives could adequately achieve the governmental interest. *Id.,* at 327, 339–340; *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 507 (1989).

Importantly, even if a racial classification is otherwise narrowly tailored to further a compelling governmental interest, a "deviation from the norm of equal treatment of all racial and ethnic groups" must be "a temporary matter"—or stated otherwise, must be "limited in time." *Id.,* at 510 (plurality opinion of O'Connor, J.); *Grutter*, 539 U. S., at 342.

In 1978, five Members of this Court held that race-based affirmative action in higher education did not violate the Equal Protection Clause or Title VI of the Civil Rights Act, so long as universities used race only as a factor in admissions decisions and did not employ quotas. See *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 325–326 (1978) (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.); *id.,* at 287, 315–320 (opinion of Powell, J.). One Member of the Court's five-Justice majority, Justice Blackmun, added that race-based affirmative action should exist only as a temporary measure. He expressed hope that such programs would be "unnecessary" and a "relic of the past" by 1988—within 10 years "at the most," in his words—although he doubted that the goal could be achieved by then. *Id.,* at 403 (opinion of Blackmun, J.).

In 2003, 25 years after *Bakke*, five Members of this Court

again held that race-based affirmative action in higher education did not violate the Equal Protection Clause or Title VI. *Grutter*, 539 U. S., at 343. This time, however, the Court also specifically indicated—despite the reservations of Justice Ginsburg and Justice Breyer—that race-based affirmative action in higher education would *not* be constitutionally justified after another 25 years, at least absent something not "expect[ed]." *Ibid.* And various Members of the Court wrote separate opinions explicitly referencing the Court's 25-year limit.

- Justice O'Connor's opinion for the Court stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Ibid.*
- JUSTICE THOMAS expressly concurred in "the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years." *Id.,* at 351 (opinion concurring in part and dissenting in part).
- JUSTICE THOMAS, joined here by Justice Scalia, reiterated "the Court's holding" that race-based affirmative action in higher education "will be unconstitutional in 25 years" and "that in 25 years the practices of the Law School will be illegal," while also stating that "they are, for the reasons I have given, illegal now." *Id.,* at 375–376.
- Justice Kennedy referred to "the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now." *Id.,* at 394 (dissenting opinion).
- Justice Ginsburg, joined by Justice Breyer, acknowledged the Court's 25-year limit but questioned it, writing that "one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely

equal opportunity will make it safe to sunset affirmative action." *Id.,* at 346 (concurring opinion).

In allowing race-based affirmative action in higher education for another generation—and only for another generation—the Court in *Grutter* took into account competing considerations. The Court recognized the barriers that some minority applicants to universities still faced as of 2003, notwithstanding the progress made since *Bakke*. See *Grutter*, 539 U. S., at 343. The Court stressed, however, that "there are serious problems of justice connected with the idea of preference itself." *Id.,* at 341 (internal quotation marks omitted). And the Court added that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Ibid.* (internal quotation marks omitted).

The *Grutter* Court also emphasized the equal protection principle that racial classifications, even when otherwise permissible, must be a "'temporary matter,'" and "must be limited in time." *Id.,* at 342 (quoting *Croson*, 488 U. S., at 510 (plurality opinion of O'Connor, J.)). The requirement of a time limit "reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle." *Grutter*, 539 U. S., at 342.

Importantly, the *Grutter* Court saw "no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point." *Ibid.* The Court reasoned that the "requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Ibid.* (internal

quotation marks and alteration omitted). The Court therefore concluded that race-based affirmative action programs in higher education, like other racial classifications, must be "limited in time." *Ibid.*

The *Grutter* Court's conclusion that race-based affirmative action in higher education must be limited in time followed not only from fundamental equal protection principles, but also from this Court's equal protection precedents applying those principles. Under those precedents, racial classifications may not continue indefinitely. For example, in the elementary and secondary school context after *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court authorized race-based student assignments for several decades—but not indefinitely into the future. See, *e.g., Board of Ed. of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237, 247–248 (1991); *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U. S. 424, 433–434, 436 (1976); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 31–32 (1971); cf. *McDaniel* v. *Barresi*, 402 U. S. 39, 41 (1971).

In those decisions, this Court ruled that the race-based "injunctions entered in school desegregation cases" could not "operate in perpetuity." *Dowell*, 498 U. S., at 248. Consistent with those decisions, the *Grutter* Court ruled that race-based affirmative action in higher education likewise could not operate in perpetuity.

As of 2003, when *Grutter* was decided, many race-based affirmative action programs in higher education had been operating for about 25 to 35 years. Pointing to the Court's precedents requiring that racial classifications be "temporary," *Croson*, 488 U. S., at 510 (plurality opinion of O'Connor, J.), the petitioner in *Grutter*, joined by the United States, argued that race-based affirmative action in higher education could continue no longer. See Brief for Petitioner 21–22, 30–31, 33, 42, Brief for United States 26–27, in *Grutter* v. *Bollinger*, O. T. 2002, No. 02–241.

The *Grutter* Court rejected those arguments for ending race-based affirmative action in higher education in 2003. But in doing so, the Court struck a careful balance. The Court ruled that narrowly tailored race-based affirmative action in higher education could continue for another generation. But the Court also explicitly rejected any "permanent justification for racial preferences," and therefore ruled that race-based affirmative action in higher education could continue *only* for another generation. 539 U. S., at 342–343.

Harvard and North Carolina would prefer that the Court now ignore or discard *Grutter*'s 25-year limit on race-based affirmative action in higher education, or treat it as a mere aspiration. But the 25-year limit constituted an important part of Justice O'Connor's nuanced opinion for the Court in *Grutter*. Indeed, four of the separate opinions in *Grutter* discussed the majority opinion's 25-year limit, which belies any suggestion that the Court's reference to it was insignificant or not carefully considered.

In short, the Court in *Grutter* expressly recognized the serious issues raised by racial classifications—particularly permanent or long-term racial classifications. And the Court "assure[d] all citizens" throughout America that "the deviation from the norm of equal treatment" in higher education could continue for another generation, and only for another generation. *Ibid.* (internal quotation marks omitted).

A generation has now passed since *Grutter*, and about 50 years have gone by since the era of *Bakke* and *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974), when race-based affirmative action programs in higher education largely began. In light of the Constitution's text, history, and precedent, the Court's decision today appropriately respects and abides by *Grutter*'s explicit temporal limit on the use of race-based affirmative action in higher

education.[1]

JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE JACKSON disagree with the Court's decision. I respect their views. They thoroughly recount the horrific history of slavery and Jim Crow in America, cf. *Bakke*, 438 U. S., at 395–402 (opinion of Marshall, J.), as well as the continuing effects of that history on African Americans today. And they are of course correct that for the last five decades, *Bakke* and *Grutter* have allowed narrowly tailored race-based affirmative action in higher education.

But I respectfully part ways with my dissenting colleagues on the question of whether, under this Court's precedents, race-based affirmative action in higher education may extend indefinitely into the future. The dissents suggest that the answer is yes. But this Court's precedents make clear that the answer is no. See *Grutter*, 539 U. S., at 342–343; *Dowell*, 498 U. S., at 247–248; *Croson*, 488 U. S., at 510 (plurality opinion of O'Connor, J.).

To reiterate: For about 50 years, many institutions of higher education have employed race-based affirmative action programs. In the abstract, it might have been debatable how long those race-based admissions programs could continue under the "temporary matter"/"limited in time" equal protection principle recognized and applied by this Court. *Grutter*, 539 U. S., at 342 (internal quotation marks omitted); cf. *Dowell*, 498 U. S., at 247–248. But in 2003, the *Grutter* Court applied that temporal equal

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[1] The Court's decision will first apply to the admissions process for the college class of 2028, which is the next class to be admitted. Some might have debated how to calculate *Grutter*'s 25-year period—whether it ends with admissions for the college class of 2028 or instead for the college class of 2032. But neither Harvard nor North Carolina argued that *Grutter*'s 25-year period ends with the class of 2032 rather than the class of 2028. Indeed, notwithstanding the 25-year limit set forth in *Grutter*, neither university embraced *any* temporal limit on race-based affirmative action in higher education, or identified any end date for its continued use of race in admissions. *Ante,* at 30–34.

protection principle and resolved the debate: The Court declared that race-based affirmative action in higher education could continue for another generation, and only for another generation, at least absent something unexpected. *Grutter*, 539 U. S., at 343. As I have explained, the Court's pronouncement of a 25-year period—as both an extension of *and* an outer limit to race-based affirmative action in higher education—formed an important part of the carefully constructed *Grutter* decision. I would abide by that temporal limit rather than discarding it, as today's dissents would do.

To be clear, although progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist. Federal and state civil rights laws serve to deter and provide remedies for current acts of racial discrimination. And governments and universities still "can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race." *Croson*, 488 U. S., at 526 (Scalia, J., concurring in judgment) (internal quotation marks omitted); see *id.,* at 509 (plurality opinion of O'Connor, J.) ("the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races"); *ante,* at 39–40; Brief for Petitioner 80–86; Reply Brief in No. 20–1199, pp. 25–26; Reply Brief in No. 21–707, pp. 23–26.

In sum, the Court's opinion today is consistent with and follows from the Court's equal protection precedents, and I join the Court's opinion in full.

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[June 29, 2023]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join,* dissenting.

The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court recognized the constitutional necessity of racially integrated schools in light of the

*JUSTICE JACKSON did not participate in the consideration or decision of the case in No. 20–1199 and joins this opinion only as it applies to the case in No. 21–707.

harm inflicted by segregation and the "importance of education to our democratic society." *Id.*, at 492–495. For 45 years, the Court extended *Brown*'s transformative legacy to the context of higher education, allowing colleges and universities to consider race in a limited way and for the limited purpose of promoting the important benefits of racial diversity. This limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses. Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution's guarantee of equality and have promoted *Brown*'s vision of a Nation with more inclusive schools.

Today, this Court stands in the way and rolls back decades of precedent and momentous progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society. Because the Court's opinion is not grounded in law or fact and contravenes the vision of equality embodied in the Fourteenth Amendment, I dissent.

I

A

Equal educational opportunity is a prerequisite to achieving racial equality in our Nation. From its founding, the United States was a new experiment in a republican form of government where democratic participation and the capacity to engage in self-rule were vital. At the same time, American society was structured around the profitable institution that was slavery, which the original Constitution

protected. The Constitution initially limited the power of Congress to restrict the slave trade, Art. I, §9, cl. 1, accorded Southern States additional electoral power by counting three-fifths of their enslaved population in apportioning congressional seats, §2, cl. 3, and gave enslavers the right to retrieve enslaved people who escaped to free States, Art. IV, §2, cl. 3. Because a foundational pillar of slavery was the racist notion that Black people are a subordinate class with intellectual inferiority, Southern States sought to ensure slavery's longevity by prohibiting the education of Black people, whether enslaved or free. See H. Williams, Self-Taught: African American Education in Slavery and Freedom 7, 203–213 (2005) (Self-Taught). Thus, from this Nation's birth, the freedom to learn was neither colorblind nor equal.

With time, and at the tremendous cost of the Civil War, abolition came. More than two centuries after the first African enslaved persons were forcibly brought to our shores, Congress adopted the Thirteenth Amendment to the Constitution, which abolished "slavery" and "involuntary servitude, except as a punishment for crime." §1. "Like all great historical transformations," emancipation was a movement, "not a single event" owed to any single individual, institution, or political party. E. Foner, The Second Founding 21, 51–54 (2019) (The Second Founding).

The fight for equal educational opportunity, however, was a key driver. Literacy was an "instrument of resistance and liberation." Self-Taught 8. Education "provided the means to write a pass to freedom" and "to learn of abolitionist activities." *Id.*, at 7. It allowed enslaved Black people "to disturb the power relations between master and slave," which "fused their desire for literacy with their desire for freedom." *Ibid.* Put simply, "[t]he very feeling of inferiority which slavery forced upon [Black people] fathered an intense desire to rise out of their condition by means of education." W. E. B. Du Bois, Black Reconstruction in America

1860–1880, p. 638 (1935); see J. Anderson, The Education of Blacks in the South 1860–1935, p. 7 (1988). Black Americans thus insisted, in the words of Frederick Douglass, "that in a country governed by the people, like ours, education of the youth of all classes is vital to its welfare, prosperity, and to its existence." Address to the People of the United States (1883), in 4 P. Foner, The Life and Writings of Frederick Douglass 386 (1955). Black people's yearning for freedom of thought, and for a more perfect Union with educational opportunity for all, played a crucial role during the Reconstruction era.

Yet emancipation marked the beginning, not the end, of that era. Abolition alone could not repair centuries of racial subjugation. Following the Thirteenth Amendment's ratification, the Southern States replaced slavery with "a system of 'laws which imposed upon [Black people] onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.'" *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 390 (1978) (opinion of Marshall, J.) (quoting *Slaughter-House Cases*, 16 Wall. 36, 70 (1873)). Those so-called "Black Codes" discriminated against Black people on the basis of race, regardless of whether they had been previously enslaved. See, *e.g.*, 1866 N. C. Sess. Laws pp. 99, 102.

Moreover, the criminal punishment exception in the Thirteenth Amendment facilitated the creation of a new system of forced labor in the South. Southern States expanded their criminal laws, which in turn "permitted involuntary servitude as a punishment" for convicted Black persons. D. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans From the Civil War to World War II, pp. 7, 53 (2009) (Slavery by Another Name). States required, for example, that Black people "sign a labor contract to work for a white employer or face prosecution for vagrancy." The Second Founding 48. State laws

then forced Black convicted persons to labor in "plantations, mines, and industries in the South." *Id.*, at 50. This system of free forced labor provided tremendous benefits to Southern whites and was designed to intimidate, subjugate, and control newly emancipated Black people. See Slavery by Another Name 5–6, 53. The Thirteenth Amendment, without more, failed to equalize society.

Congress thus went further and embarked on months of deliberation about additional Reconstruction laws. Those efforts included the appointment of a Committee, the Joint Committee on Reconstruction, "to inquire into the condition of the Confederate States." Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., 1 (1866) (hereinafter Joint Comm. Rep.). Among other things, the Committee's Report to Congress documented the "deep-seated prejudice" against emancipated Black people in the Southern States and the lack of a "general disposition to place the colored race, constituting at least two-fifths of the population, upon terms even of civil equality." *Id.*, at 11. In light of its findings, the Committee proposed amending the Constitution to secure the equality of "rights, civil and political." *Id.*, at 7.

Congress acted on that recommendation and adopted the Fourteenth Amendment. Proponents of the Amendment declared that one of its key goals was to "protec[t] the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." Cong. Globe, 39th Cong., 1st Sess., 2766 (1866) (Cong. Globe) (statement of Sen. Howard). That is, the Amendment sought "to secure to a race recently emancipated, a race that through many generations [was] held in slavery, all the civil rights that the superior race enjoy." *Plessy* v. *Ferguson*, 163 U. S. 537, 555–556 (1896) (Harlan, J., dissenting) (internal quotation marks omitted).

To promote this goal, Congress enshrined a broad guarantee of equality in the Equal Protection Clause of the

Amendment. That Clause commands that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, §1. Congress chose its words carefully, opting for expansive language that focused on equal protection and rejecting "proposals that would have made the Constitution explicitly color-blind." A. Kull, The Color-Blind Constitution 69 (1992); see also, *e.g.*, Cong. Globe 1287 (rejecting proposed language providing that "no State . . . shall . . . recognize any distinction between citizens . . . on account of race or color"). This choice makes it clear that the Fourteenth Amendment does not impose a blanket ban on race-conscious policies.

Simultaneously with the passage of the Fourteenth Amendment, Congress enacted a number of race-conscious laws to fulfill the Amendment's promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race to achieve its goal. One such law was the Freedmen's Bureau Act, enacted in 1865 and then expanded in 1866, which established a federal agency to provide certain benefits to refugees and newly emancipated freedmen. See Act of Mar. 3, 1865, ch. 90, 13 Stat. 507; Act of July 16, 1866, ch. 200, 14 Stat. 173. For the Bureau, education "was the foundation upon which all efforts to assist the freedmen rested." E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, p. 144 (1988). Consistent with that view, the Bureau provided essential "funding for black education during Reconstruction." *Id.*, at 97.

Black people were the targeted beneficiaries of the Bureau's programs, especially when it came to investments in education in the wake of the Civil War. Each year surrounding the passage of the Fourteenth Amendment, the Bureau "educated approximately 100,000 students, nearly all of them black," and regardless of "degree of past disadvantage." E. Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev.

753, 781 (1985). The Bureau also provided land and funding to establish some of our Nation's Historically Black Colleges and Universities (HBCUs). *Ibid.*; see also Brief for HBCU Leaders et al. as *Amici Curiae* 13 (HBCU Brief). In 1867, for example, the Bureau provided Howard University tens of thousands of dollars to buy property and construct its campus in our Nation's capital. 2 O. Howard, Autobiography 397–401 (1907). Howard University was designed to provide "special opportunities for a higher education to the newly enfranchised of the south," but it was available to all Black people, "whatever may have been their previous condition." Bureau Refugees, Freedmen and Abandoned Lands, Sixth Semi-Annual Report on Schools for Freedmen 60 (July 1, 1868).[1] The Bureau also "expended a total of $407,752.21 on black colleges, and only $3,000 on white colleges" from 1867 to 1870. Schnapper, 71 Va. L. Rev., at 798, n. 149.

Indeed, contemporaries understood that the Freedmen's Bureau Act benefited Black people. Supporters defended the law by stressing its race-conscious approach. See, *e.g.*, Cong. Globe 632 (statement of Rep. Moulton) ("[T]he true object of this bill is the amelioration of the condition of the colored people"); Joint Comm. Rep. 11 (reporting that "the Union men of the south" declared "with one voice" that the Bureau's efforts "protect[ed] the colored people"). Opponents argued that the Act created harmful racial classifications that favored Black people and disfavored white Americans. See, *e.g.*, Cong. Globe 397 (statement of Sen. Willey) (the Act makes "a distinction on account of color between the two races"), 544 (statement of Rep. Taylor) (the Act is

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[1] As JUSTICE THOMAS acknowledges, the HBCUs, including Howard University, account for a high proportion of Black college graduates. *Ante*, at 56–57 (concurring opinion). That reality cannot be divorced from the history of anti-Black discrimination that gave rise to the HBCUs and the targeted work of the Freedmen's Bureau to help Black people obtain a higher education. See HBCU Brief 13–15.

"legislation for a particular class of the blacks to the exclusion of all whites"), App. to Cong. Globe, 39th Cong., 1st Sess., 69–70 (statement of Rep. Rousseau) ("You raise a spirit of antagonism between the black race and the white race in our country, and the law-abiding will be powerless to control it"). President Andrew Johnson vetoed the bill on the basis that it provided benefits "to a particular class of citizens," 6 Messages and Papers of the Presidents 1789–1897, p. 425 (J. Richardson ed. 1897) (Messages & Papers) (A. Johnson to House of Rep. July 16, 1866), but Congress overrode his veto. Cong. Globe 3849–3850. Thus, rejecting those opponents' objections, the same Reconstruction Congress that passed the Fourteenth Amendment eschewed the concept of colorblindness as sufficient to remedy inequality in education.

Congress also debated and passed the Civil Rights Act of 1866 contemporaneously with the Fourteenth Amendment. The goal of that Act was to eradicate the Black Codes enacted by Southern States following ratification of the Thirteenth Amendment. See *id.*, at 474. Because the Black Codes focused on race, not just slavery-related status, the Civil Rights Act explicitly recognized that white citizens enjoyed certain rights that non-white citizens did not. Section 1 of the Act provided that all persons "of every race and color . . . shall have the same right[s]" as those "enjoyed by white citizens." Act of Apr. 9, 1866, 14 Stat. 27. Similarly, Section 2 established criminal penalties for subjecting racial minorities to "different punishment . . . by reason of . . . color or race, than is prescribed for the punishment of white persons." *Ibid.* In other words, the Act was not colorblind. By using white citizens as a benchmark, the law classified by race and took account of the privileges enjoyed only by white people. As he did with the Freedmen's Bureau Act, President Johnson vetoed the Civil Rights Act in part because he viewed it as providing Black citizens with special treatment. See Messages and Papers 408, 413 (the Act is

designed "to afford discriminating protection to colored persons," and its "distinction of race and color . . . operate[s] in favor of the colored and against the white race"). Again, Congress overrode his veto. Cong. Globe 1861. In fact, Congress reenacted race-conscious language in the Civil Rights Act of 1870, two years after ratification of the Fourteenth Amendment, see Act of May 31, 1870, §16, 16 Stat. 144, where it remains today, see 42 U. S. C. §§1981(a) and 1982 (Rev. Stat. §§1972, 1978).

Congress similarly appropriated federal dollars explicitly and solely for the benefit of racial minorities. For example, it appropriated money for "'the relief of destitute colored women and children,'" without regard to prior enslavement. Act of July 28, 1866, 14 Stat. 317. Several times during and after the passage of the Fourteenth Amendment, Congress also made special appropriations and adopted special protections for the bounty and prize money owed to "colored soldiers and sailors" of the Union Army. 14 Stat. 357, Res. No. 46, June 15, 1866; Act of Mar. 3, 1869, ch. 122, 15 Stat. 301; Act of Mar. 3, 1873, 17 Stat. 528. In doing so, it rebuffed objections to these measures as "class legislation" "applicable to colored people and not . . . to the white people." Cong. Globe, 40th Cong., 1st Sess., 79 (1867) (statement of Sen. Grimes). This history makes it "inconceivable" that race-conscious college admissions are unconstitutional. *Bakke*, 438 U. S., at 398 (opinion of Marshall, J.).[2]

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[2] By the time the Fourteenth Amendment was ratified by the States in 1868, "education had become a right of state citizenship in the constitution of every readmitted state," including in North Carolina. D. Black, The Fundamental Right to Education, 94 Notre Dame L. Rev. 1059, 1089 (2019); see also Brief for Black Women Scholars as *Amici Curiae* 9 ("The herculean efforts of Black reformers, activists, and lawmakers during the Reconstruction Era forever transformed State constitutional law; today, thanks to the impact of their work, every State constitution contains language guaranteeing the right to public education").

B

The Reconstruction era marked a transformational point in the history of American democracy. Its vision of equal opportunity leading to an equal society "was short-lived," however, "with the assistance of this Court." *Id.*, at 391. In a series of decisions, the Court "sharply curtailed" the "substantive protections" of the Reconstruction Amendments and the Civil Rights Acts. *Id.*, at 391–392 (collecting cases). That endeavor culminated with the Court's shameful decision in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), which established that "equality of treatment" exists "when the races are provided substantially equal facilities, even though these facilities be separate." *Brown*, 347 U. S., at 488. Therefore, with this Court's approval, government-enforced segregation and its concomitant destruction of equal opportunity became the constitutional norm and infected every sector of our society, from bathrooms to military units and, crucially, schools. See *Bakke*, 438 U. S., at 393–394 (opinion of Marshall, J.); see also generally R. Rothstein, The Color of Law 17–176 (2017) (discussing various federal policies that promoted racial segregation).

In a powerful dissent, Justice Harlan explained in *Plessy* that the Louisiana law at issue, which authorized segregation in railway carriages, perpetuated a "caste" system. 163 U. S., at 559–560. Although the State argued that the law "prescribe[d] a rule applicable alike to white and colored citizens," all knew that the law's purpose was not "to exclude white persons from railroad cars occupied by blacks," but "to exclude colored people from coaches occupied by or assigned to white persons." *Id.*, at 557. That is, the law "proceed[ed] on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.*, at 560. Although "[t]he white race deems itself to be the dominant race . . . in prestige, in achievements, in education, in wealth, and in power," Justice Harlan explained, there is "no superior,

dominant, ruling class of citizens" in the eyes of the law. *Id.*, at 559. In that context, Justice Harlan thus announced his view that "[o]ur constitution is color-blind." *Ibid.*

It was not until half a century later, in *Brown*, that the Court honored the guarantee of equality in the Equal Protection Clause and Justice Harlan's vision of a Constitution that "neither knows nor tolerates classes among citizens." *Ibid.* Considering the "effect[s] of segregation" and the role of education "in the light of its full development and its present place in American life throughout the Nation," *Brown* overruled *Plessy*. 347 U. S., at 492–495. The *Brown* Court held that "[s]eparate educational facilities are inherently unequal," and that such racial segregation deprives Black students "of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.*, at 494–495. The Court thus ordered segregated schools to transition to a racially integrated system of public education "with all deliberate speed," "ordering the immediate admission of [Black children] to schools previously attended only by white children." *Brown* v. *Board of Education*, 349 U. S. 294, 301 (1955).

Brown was a race-conscious decision that emphasized the importance of education in our society. Central to the Court's holding was the recognition that, as Justice Harlan emphasized in *Plessy*, segregation perpetuates a caste system wherein Black children receive inferior educational opportunities "solely because of their race," denoting "inferiority as to their status in the community." 347 U. S., at 494, and n. 10. Moreover, because education is "the very foundation of good citizenship," segregation in public education harms "our democratic society" more broadly as well. *Id.*, at 493. In light of the harmful effects of entrenched racial subordination on racial minorities and American democracy, *Brown* recognized the constitutional necessity of a racially integrated system of schools where education is "available to all on equal terms." *Ibid.*

The desegregation cases that followed *Brown* confirm that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness. In *Green* v. *School Bd. of New Kent Cty.*, 391 U. S. 430 (1968), for example, the Court held that the New Kent County School Board's "freedom of choice" plan, which allegedly allowed "every student, regardless of race, . . . 'freely' [to] choose the school he [would] attend," was insufficient to effectuate "the command of [*Brown*]." *Id.*, at 437, 441–442. That command, the Court explained, was that schools dismantle "well-entrenched dual systems" and transition "to a unitary, nonracial system of public education." *Id.*, at 435–436. That the board "opened the doors of the former 'white' school to [Black] children and the ['Black'] school to white children" on a race-blind basis was not enough. *Id.*, at 437. Passively eliminating race classifications did not suffice when *de facto* segregation persisted. *Id.*, at 440–442 (noting that 85% of Black children in the school system were still attending an all-Black school). Instead, the board was "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.*, at 437–438. Affirmative steps, this Court held, are constitutionally necessary when mere formal neutrality cannot achieve *Brown*'s promise of racial equality. See *Green*, 391 U. S., at 440–442; see also *North Carolina Bd. of Ed.* v. *Swann*, 402 U. S. 43, 45–46 (1971) (holding that North Carolina statute that forbade the use of race in school busing "exploits an apparently neutral form to control school assignment plans by directing that they be 'colorblind'; that requirement, against the background of segregation, would render illusory the promise of *Brown*"); *Dayton Bd. of Ed.* v. *Brinkman*, 443 U. S. 526, 538 (1979) (school board "had to do more than abandon

its prior discriminatory purpose"; it "had an affirmative responsibility" to integrate); *Keyes* v. *School Dist. No. 1, Denver*, 413 U. S. 189, 200 (1973) ("[T]he State automatically assumes an affirmative duty" under *Brown* to eliminate the vestiges of segregation).[3]

In so holding, this Court's post-*Brown* decisions rejected arguments advanced by opponents of integration suggesting that "restor[ing] race as a criterion in the operation of the public schools" was at odds with "the *Brown* decisions." Brief for Respondents in *Green* v. *School Bd. of New Kent Cty.*, O. T. 1967, No. 695, p. 6 (*Green* Brief). Those opponents argued that *Brown* only required the admission of Black students "to public schools on a racially nondiscriminatory basis." *Id.*, at 11 (emphasis deleted). Relying on Justice Harlan's dissent in *Plessy*, they argued that the use of race "is improper" because the "'Constitution is colorblind.'" *Green* Brief 6, n. 6 (quoting *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting)). They also incorrectly claimed that their views aligned with those of the *Brown* litigators, arguing that the *Brown* plaintiffs "understood" that *Brown*'s "mandate" was colorblindness. *Green* Brief 17. This Court rejected that characterization of "the thrust of *Brown*." *Green*, 391 U. S., at 437. It made clear that indifference to race "is not an end in itself" under that watershed decision. *Id.*, at 440. The ultimate goal is racial equality of opportunity.

Those rejected arguments mirror the Court's opinion today. The Court claims that *Brown* requires that students

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[3]The majority suggests that "it required a Second Founding to undo" programs that help ensure racial integration and therefore greater equality in education. *Ante*, at 38. At the risk of stating the blindingly obvious, and as *Brown* recognized, the Fourteenth Amendment was intended to undo the effects of a world where laws systematically subordinated Black people and created a racial caste system. Cf. *Dred Scott* v. *Sandford*, 19 How. 393, 405 (1857). *Brown* and its progeny recognized the need to take affirmative, race-conscious steps to eliminate that system.

be admitted "'on a racially nondiscriminatory basis.'" *Ante*, at 13. It distorts the dissent in *Plessy* to advance a colorblindness theory. *Ante*, at 38–39; see also *ante*, at 22 (GORSUCH, J., concurring) ("[T]oday's decision wakes the echoes of Justice John Marshall Harlan [in *Plessy*]"); *ante*, at 3 (THOMAS, J., concurring) (same). The Court also invokes the *Brown* litigators, relying on what the *Brown* "plaintiffs had argued." *Ante*, at 12; *ante*, at 35–36, 39, n. 7 (opinion of THOMAS, J.).

If there was a Member of this Court who understood the *Brown* litigation, it was Justice Thurgood Marshall, who "led the litigation campaign" to dismantle segregation as a civil rights lawyer and "rejected the hollow, race-ignorant conception of equal protection" endorsed by the Court's ruling today. Brief for NAACP Legal Defense and Educational Fund, Inc., et al. as *Amici Curiae* 9. Justice Marshall joined the *Bakke* plurality and "applaud[ed] the judgment of the Court that a university may consider race in its admissions process." 438 U. S., at 400. In fact, Justice Marshall's view was that *Bakke*'s holding should have been even more protective of race-conscious college admissions programs in light of the remedial purpose of the Fourteenth Amendment and the legacy of racial inequality in our society. See *id.*, at 396–402 (arguing that "a class-based remedy" should be constitutionally permissible in light of the hundreds of "years of class-based discrimination against [Black Americans]"). The Court's recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness.

C

Two decades after *Brown*, in *Bakke*, a plurality of the Court held that "the attainment of a diverse student body" is a "compelling" and "constitutionally permissible goal for

an institution of higher education." 438 U. S., at 311–315. Race could be considered in the college admissions process in pursuit of this goal, the plurality explained, if it is one factor of many in an applicant's file, and each applicant receives individualized review as part of a holistic admissions process. *Id.*, at 316–318.

Since *Bakke*, the Court has reaffirmed numerous times the constitutionality of limited race-conscious college admissions. First, in *Grutter* v. *Bollinger*, 539 U. S. 306 (2003), a majority of the Court endorsed the *Bakke* plurality's "view that student body diversity is a compelling state interest that can justify the use of race in university admissions," 539 U. S., at 325, and held that race may be used in a narrowly tailored manner to achieve this interest, *id.*, at 333–344; see also *Gratz* v. *Bollinger*, 539 U. S. 244, 268 (2003) ("for the reasons set forth [the same day] in *Grutter*," rejecting petitioners' arguments that race can only be considered in college admissions "to remedy identified discrimination" and that diversity is "'too open-ended, ill-defined, and indefinite to constitute a compelling interest'").

Later, in the *Fisher* litigation, the Court twice reaffirmed that a limited use of race in college admissions is constitutionally permissible if it satisfies strict scrutiny. In *Fisher* v. *University of Texas at Austin*, 570 U. S. 297 (2013) (*Fisher I*), seven Members of the Court concluded that the use of race in college admissions comports with the Fourteenth Amendment if it "is narrowly tailored to obtain the educational benefits of diversity." *Id.*, at 314, 337. Several years later, in *Fisher* v. *University of Texas at Austin*, 579 U. S. 365, 376 (2016) (*Fisher II*), the Court upheld the admissions program at the University of Texas under this framework. *Id.*, at 380–388.

Bakke, *Grutter*, and *Fisher* are an extension of *Brown*'s legacy. Those decisions recognize that "'experience lend[s] support to the view that the contribution of diversity is substantial.'" *Grutter*, 539 U. S., at 324 (quoting *Bakke*, 438

U. S., at 313). Racially integrated schools improve cross-racial understanding, "break down racial stereotypes," and ensure that students obtain "the skills needed in today's increasingly global marketplace . . . through exposure to widely diverse people, cultures, ideas, and viewpoints." 539 U. S., at 330. More broadly, inclusive institutions that are "visibly open to talented and qualified individuals of every race and ethnicity" instill public confidence in the "legitimacy" and "integrity" of those institutions and the diverse set of graduates that they cultivate. *Id.*, at 332. That is particularly true in the context of higher education, where colleges and universities play a critical role in "maintaining the fabric of society" and serve as "the training ground for a large number of our Nation's leaders." *Id.*, at 331–332. It is thus an objective of the highest order, a "compelling interest" indeed, that universities pursue the benefits of racial diversity and ensure that "the diffusion of knowledge and opportunity" is available to students of all races. *Id.*, at 328–333.

This compelling interest in student body diversity is grounded not only in the Court's equal protection jurisprudence but also in principles of "academic freedom," which "'long [have] been viewed as a special concern of the First Amendment.'" *Id.*, at 324 (quoting *Bakke*, 438 U. S., at 312). In light of "the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," this Court's precedents recognize the imperative nature of diverse student bodies on American college campuses. 539 U. S., at 329. Consistent with the First Amendment, student body diversity allows universities to promote "th[e] robust exchange of ideas which discovers truth out of a multitude of tongues [rather] than through any kind of authoritative selection." *Bakke*, 438 U. S., at 312 (internal quotation marks omitted). Indeed, as the Court recently reaffirmed in another

school case, "learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society'" under our constitutional tradition. *Kennedy* v. *Bremerton School Dist.*, 597 U. S. ___, ___ (2022) (slip op., at 29); cf. *Khorrami* v. *Arizona*, 598 U. S. ___, ___ (2022) (GORSUCH, J., dissenting from denial of certiorari) (slip op., at 8) (collecting research showing that larger juries are more likely to be racially diverse and "deliberate longer, recall information better, and pay greater attention to dissenting voices").

In short, for more than four decades, it has been this Court's settled law that the Equal Protection Clause of the Fourteenth Amendment authorizes a limited use of race in college admissions in service of the educational benefits that flow from a diverse student body. From *Brown* to *Fisher*, this Court's cases have sought to equalize educational opportunity in a society structured by racial segregation and to advance the Fourteenth Amendment's vision of an America where racially integrated schools guarantee students of all races the equal protection of the laws.

D

Today, the Court concludes that indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions. That interpretation of the Fourteenth Amendment is not only contrary to precedent and the entire teachings of our history, see *supra*, at 2–17, but is also grounded in the illusion that racial inequality was a problem of a different generation. Entrenched racial inequality remains a reality today. That is true for society writ large and, more specifically, for Harvard and the University of North Carolina (UNC), two institutions with a long history of racial exclusion. Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.

1

After more than a century of government policies enforcing racial segregation by law, society remains highly segregated. About half of all Latino and Black students attend a racially homogeneous school with at least 75% minority student enrollment.[4] The share of intensely segregated minority schools (*i.e.*, schools that enroll 90% to 100% racial minorities) has sharply increased.[5] To this day, the U. S. Department of Justice continues to enter into desegregation decrees with schools that have failed to "eliminat[e] the vestiges of *de jure* segregation."[6]

Moreover, underrepresented minority students are more likely to live in poverty and attend schools with a high concentration of poverty.[7] When combined with residential segregation and school funding systems that rely heavily on local property taxes, this leads to racial minority students attending schools with fewer resources. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 72–86 (1973) (Marshall, J., dissenting) (noting school funding disparities that result from local property taxation).[8] In

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[4] See GAO, Report to the Chairman, Committee on Education and Labor, House of Representatives, K–12 Education: Student Population Has Significantly Diversified, but Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines 13 (GAO–22–104737, June 2022) (hereinafter GAO Report).

[5] G. Orfield, E. Frankenberg, & J. Ayscue, Harming Our Common Future: America's Segregated Schools 65 Years After *Brown* 21 (2019).

[6] *E.g.*, *Bennett* v. *Madison Cty. Bd. of Ed.*, No. 5:63–CV–613 (ND Ala., July 5, 2022), ECF Doc. 199, p. 19; *id.*, at 6 (requiring school district to ensure "the participation of black students" in advanced courses).

[7] GAO Report 6, 13 (noting that 80% of predominantly Black and Latino schools have at least 75% of their students eligible for free or reduced-price lunch—a proxy for poverty).

[8] See also L. Clark, Barbed Wire Fences: The Structural Violence of Education Law, 89 U. Chi. L. Rev. 499, 502, 512–517 (2022); Albert Shanker Institute, B. Baker, M. DiCarlo, & P. Greene, Segregation and

turn, underrepresented minorities are more likely to attend schools with less qualified teachers, less challenging curricula, lower standardized test scores, and fewer extracurricular activities and advanced placement courses.[9] It is thus unsurprising that there are achievement gaps along racial lines, even after controlling for income differences.[10]

Systemic inequities disadvantaging underrepresented racial minorities exist beyond school resources. Students of color, particularly Black students, are disproportionately disciplined or suspended, interrupting their academic progress and increasing their risk of involvement with the criminal justice system.[11] Underrepresented minorities are less likely to have parents with a postsecondary education who may be familiar with the college application process.[12] Further, low-income children of color are less likely to attend preschool and other early childhood education programs that increase educational attainment.[13] All of these

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School Funding: How Housing Discrimination Reproduces Unequal Opportunity 17–19 (Apr. 2022).

[9] See Brief for 25 Harvard Student and Alumni Organizations as *Amici Curiae* 6–15 (collecting sources).

[10] GAO Report 7; see also Brief for Council of the Great City Schools as *Amicus Curiae* 11–14 (collecting sources).

[11] See J. Okonofua & J. Eberhardt, Two Strikes: Race and the Disciplining of Young Students, 26 Psychol. Sci. 617 (2015) (a national survey showed that "Black students are more than three times as likely to be suspended or expelled as their White peers"); Brief for Youth Advocates and Experts on Educational Access as *Amici Curiae* 14–15 (describing investigation in North Carolina of a public school district, which found that Black students were 6.1 times more likely to be suspended than white students).

[12] See, *e.g.*, Dept. of Education, National Center for Education Statistics, Digest of Education Statistics (2021) (Table 104.70) (showing that 59% of white students and 78% of Asian students have a parent with a bachelor's degree or higher, while the same is true for only 25% of Latino students and 33% of Black students).

[13] R. Crosnoe, K. Purtell, P. Davis-Kean, A. Ansari, & A. Benner, The Selection of Children From Low-Income Families into Preschool, 52 J.

interlocked factors place underrepresented minorities multiple steps behind the starting line in the race for college admissions.

In North Carolina, the home of UNC, racial inequality is deeply entrenched in K–12 education. State courts have consistently found that the State does not provide underrepresented racial minorities equal access to educational opportunities, and that racial disparities in public schooling have increased in recent years, in violation of the State Constitution. See, *e.g.*, *Hoke Cty. Bd. of Ed.* v. *State*, 2020 WL 13310241, *6, *13 (N. C. Super. Ct., Jan. 21, 2020); *Hoke Cty. Bd. of Ed.* v. *State*, 382 N. C. 386, 388–390, 879 S. E. 2d 193, 197–198 (2022).

These opportunity gaps "result in fewer students from underrepresented backgrounds even applying to" college, particularly elite universities. Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 32. "Because talent lives everywhere, but opportunity does not, there are undoubtedly talented students with great academic potential who have simply not had the opportunity to attain the traditional indicia of merit that provide a competitive edge in the admissions process." Brief for Harvard Student and Alumni Organizations as *Amici Curiae* 16. Consistent with this reality, Latino and Black students are less likely to enroll in institutions of higher education than their white peers.[14]

Given the central role that education plays in breaking the cycle of racial inequality, these structural barriers reinforce other forms of inequality in communities of color. See E. Wilson, Monopolizing Whiteness, 134 Harv. L. Rev.

Developmental Psychology 11 (2016); A. Kenly & A. Klein, Early Childhood Experiences of Black Children in a Diverse Midwestern Suburb, 24 J. African American Studies 130, 136 (2020).

[14] Dept. of Education, National Center for Education, Institute of Educational Science, The Condition of Education 2022, p. 24 (2020) (fig. 16).

2382, 2416 (2021) ("[E]ducational opportunities . . . allow for social mobility, better life outcomes, and the ability to participate equally in the social and economic life of the democracy"). Stark racial disparities exist, for example, in unemployment rates,[15] income levels,[16] wealth and homeownership,[17] and healthcare access.[18] See also *Schuette* v. *BAMN*, 572 U. S. 291, 380–381 (2014) (SOTOMAYOR, J., dissenting) (noting the "persistent racial inequality in society"); *Gratz*, 539 U. S., at 299–301 (Ginsburg, J., dissenting) (cataloging racial disparities in employment, poverty, healthcare, housing, consumer transactions, and education).

Put simply, society remains "inherently unequal." *Brown*, 347 U. S., at 495. Racial inequality runs deep to this very day. That is particularly true in education, the "'most vital civic institution for the preservation of a democratic system of government.'" *Plyler* v. *Doe*, 457 U. S. 202, 221, 223 (1982). As I have explained before, only with eyes open to this reality can the Court "carry out the guarantee of equal protection." *Schuette*, 572 U. S., at 381 (dissenting opinion).

2

Both UNC and Harvard have sordid legacies of racial exclusion. Because "[c]ontext matters" when reviewing race-conscious college admissions programs, *Grutter*, 539 U. S.,

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[15] ProQuest Statistical Abstract of the United States: 2023, p. 402 (Table 622) (noting Black and Latino adults are more likely to be unemployed).

[16] *Id.*, at 173 (Table 259).

[17] A. McCargo & J. Choi, Closing the Gaps: Building Black Wealth Through Homeownership (2020) (fig. 1).

[18] Dept. of Commerce, Census Bureau, Health Insurance Coverage in the United States: 2021, p. 9 (fig. 5); *id.*, at 29 (Table C–1), https://www.census.gov/library/publications/2022/demo/p60-278.html (noting racial minorities, particularly Latinos, are less likely to have health insurance coverage).

at 327, this reality informs the exigency of respondents' current admissions policies and their racial diversity goals.

i

For much of its history, UNC was a bastion of white supremacy. Its leadership included "slaveholders, the leaders of the Ku Klux Klan, the central figures in the white supremacy campaigns of 1898 and 1900, and many of the State's most ardent defenders of Jim Crow and race-based Social Darwinism in the twentieth century." 3 App. 1680. The university excluded all people of color from its faculty and student body, glorified the institution of slavery, enforced its own Jim Crow regulations, and punished any dissent from racial orthodoxy. *Id.*, at 1681–1683. It resisted racial integration after this Court's decision in *Brown*, and was forced to integrate by court order in 1955. 3 App. 1685. It took almost 10 more years for the first Black woman to enroll at the university in 1963. See Karen L. Parker Collection, 1963–1966, UNC Wilson Special Collections Library. Even then, the university admitted only a handful of underrepresented racial minorities, and those students suffered constant harassment, humiliation, and isolation. 3 App. 1685. UNC officials openly resisted racial integration well into the 1980s, years after the youngest Member of this Court was born.[19] *Id.*, at 1688–1690. During that period,

[19] In 1979, prompted by lawsuits filed by civil rights lawyers under Title VI, the U. S. Department of Health, Education, and Welfare "revoked UNC's federal funding for its continued noncompliance" with *Brown*. 3 App. 1688; see *Adams* v. *Richardson*, 351 F. Supp. 636, 637 (DC 1972); *Adams* v. *Califano*, 430 F. Supp. 118, 121 (DC 1977). North Carolina sued the Federal Government in response, and North Carolina Senator Jesse Helms introduced legislation to block federal desegregation efforts. 3 App. 1688. UNC praised those actions by North Carolina public officials. *Ibid.* The litigation ended in 1981, after the Reagan administration settled with the State. See *North Carolina* v. *Department of Education*, No. 79–217–CIV–5 (EDNC, July 17, 1981) (Consent Decree).

Black students faced racial epithets and stereotypes, received hate mail, and encountered Ku Klux Klan rallies on campus. 2 *id.*, at 781–784; 3 *id.*, at 1689.

To this day, UNC's deep-seated legacy of racial subjugation continues to manifest itself in student life. Buildings on campus still bear the names of members of the Ku Klux Klan and other white supremacist leaders. *Id.*, at 1683. Students of color also continue to experience racial harassment, isolation, and tokenism.[20] Plus, the student body remains predominantly white: approximately 72% of UNC students identify as white, while only 8% identify as Black. *Id.*, at 1647. These numbers do not reflect the diversity of the State, particularly Black North Carolinians, who make up 22% of the population. *Id.*, at 1648.

ii

UNC is not alone. Harvard, like other Ivy League universities in our country, "stood beside church and state as the third pillar of a civilization built on bondage." C. Wilder, Ebony & Ivy: Race, Slavery, and the Troubled History of America's Universities 11 (2013). From Harvard's founding, slavery and racial subordination were integral parts of the institution's funding, intellectual production, and campus life. Harvard and its donors had extensive financial ties to, and profited from, the slave trade, the labor of enslaved people, and slavery-related investments. As Harvard now recognizes, the accumulation of this wealth was "vital to the University's growth" and establishment as an

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[20] See 1 App. 20–21 (campus climate survey showing *inter alia* that "91 percent of students heard insensitive or disparaging racial remarks made by other students"); 2 *id.*, at 1037 (Black student testifying that a white student called him "the N word" and, on a separate occasion at a fraternity party, he was "told that no slaves were allowed in"); *id.*, at 955 (student testifying that he was "the only African American student in the class," which discouraged him from speaking up about racially salient issues); *id.*, at 762–763 (student describing that being "the only Latina" made it "hard to speak up" and made her feel "foreign" and "an outsider").

elite, national institution. Harvard & the Legacy of Slavery, Report by the President and Fellows of Harvard College 7 (2022) (Harvard Report). Harvard suppressed antislavery views, and enslaved persons "served Harvard presidents and professors and fed and cared for Harvard students" on campus. *Id.*, at 7, 15.

Exclusion and discrimination continued to be a part of campus life well into the 20th century. Harvard's leadership and prominent professors openly promoted "'race science,'" racist eugenics, and other theories rooted in racial hierarchy. *Id.*, at 11. Activities to advance these theories "took place on campus," including "intrusive physical examinations" and "photographing of unclothed" students. *Ibid.* The university also "prized the admission of academically able Anglo-Saxon students from elite backgrounds—including wealthy white sons of the South." *Id.*, at 44. By contrast, an average of three Black students enrolled at Harvard each year during the five decades between 1890 and 1940. *Id.*, at 45. Those Black students who managed to enroll at Harvard "excelled academically, earning equal or better academic records than most white students," but faced the challenges of the deeply rooted legacy of slavery and racism on campus. *Ibid.* Meanwhile, a few women of color attended Radcliffe College, a separate and overwhelmingly white "women's annex" where racial minorities were denied campus housing and scholarships. *Id.*, at 51. Women of color at Radcliffe were taught by Harvard professors, but "women did not receive Harvard degrees until 1963." *Ibid.*; see also S. Bradley, Upending the Ivory Tower: Civil Rights, Black Power, and the Ivy League 17 (2018) (noting that the historical discussion of racial integration at the Ivy League "is necessarily male-centric," given the historical exclusion of women of color from these institutions).

Today, benefactors with ties to slavery and white supremacy continue to be memorialized across campus through "statues, buildings, professorships, student houses, and the

like." Harvard Report 11. Black and Latino applicants account for only 20% of domestic applicants to Harvard each year. App. to Pet. for Cert. in No. 20–1199, p. 112. "Even those students of color who beat the odds and earn an offer of admission" continue to experience isolation and alienation on campus. Brief for 25 Harvard Student and Alumni Organizations as *Amici Curiae* 30–31; 2 App. 823, 961. For years, the university has reported that inequities on campus remain. See, *e.g.*, 4 App. 1564–1601. For example, Harvard has reported that "far too many black students at Harvard experience feelings of isolation and marginalization," 3 *id.*, at 1308, and that "student survey data show[ed] that only half of Harvard undergraduates believe that the housing system fosters exchanges between students of different backgrounds," *id.*, at 1309.

* * *

These may be uncomfortable truths to some, but they are truths nonetheless. "Institutions can and do change," however, as societal and legal changes force them "to live up to [their] highest ideals." Harvard Report 56. It is against this historical backdrop that Harvard and UNC have reckoned with their past and its lingering effects. Acknowledging the reality that race has always mattered and continues to matter, these universities have established institutional goals of diversity and inclusion. Consistent with equal protection principles and this Court's settled law, their policies use race in a limited way with the goal of recruiting, admitting, and enrolling underrepresented racial minorities to pursue the well-documented benefits of racial integration in education.

II

The Court today stands in the way of respondents' commendable undertaking and entrenches racial inequality in higher education. The majority opinion does so by turning

a blind eye to these truths and overruling decades of precedent, "content for now to disguise" its ruling as an application of "established law and move on." *Kennedy*, 597 U. S., at ___ (SOTOMAYOR, J., dissenting) (slip op., at 29). As JUSTICE THOMAS puts it, "*Grutter* is, for all intents and purposes, overruled." *Ante*, at 58.

It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*. The Court simply moves the goalposts, upsetting settled expectations and throwing admissions programs nationwide into turmoil. In the end, however, it is clear why the Court is forced to change the rules of the game to reach its desired outcome: Under a faithful application of the Court's settled legal framework, Harvard and UNC's admissions programs are constitutional and comply with Title VI of the Civil Rights Act of 1964, 42 U. S. C. §2000d *et seq*.[21]

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[21] The same standard that applies under the Equal Protection Clause guides the Court's review under Title VI, as the majority correctly recognizes. See *ante*, at 6, n. 2; see also *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 325 (1978) (Brennan, J., concurring). JUSTICE GORSUCH argues that "Title VI bears independent force" and holds universities to an even higher standard than the Equal Protection Clause. *Ante*, at 25. Because no party advances JUSTICE GORSUCH's argument, see *ante*, at 6, n. 2, the Court properly declines to address it under basic principles of party presentation. See *United States* v. *Sineneng-Smith*, 590 U. S. ___, ___ (2020) (slip op., at 3). Indeed, JUSTICE GORSUCH's approach calls for even more judicial restraint. If petitioner could prevail under JUSTICE GORSUCH's statutory analysis, there would be no reason for this Court to reach the constitutional question. See *Escambia County* v. *McMillan*, 466 U. S. 48, 51 (1984) (*per curiam*). In a statutory case, moreover, *stare decisis* carries "enhanced force," as it would be up to Congress to "correct any mistake it sees" with "our interpretive decisions." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015). JUSTICE GORSUCH wonders why the dissent, like the majority, does not "engage" with his statutory arguments. *Ante*, at 16. The answer is simple: This Court plays "the role of neutral arbiter of matters the parties present." *Greenlaw* v. *United States*, 554 U. S. 237, 243 (2008). Petitioner made a

A

Answering the question whether Harvard's and UNC's policies survive strict scrutiny under settled law is straightforward, both because of the procedural posture of these cases and because of the narrow scope of the issues presented by petitioner Students for Fair Admissions, Inc. (SFFA).[22]

These cases arrived at this Court after two lengthy trials. Harvard and UNC introduced dozens of fact witnesses, expert testimony, and documentary evidence in support of their admissions programs. Brief for Petitioner 20, 40. SFFA, by contrast, did not introduce a single fact witness and relied on the testimony of two experts. *Ibid.*

After making detailed findings of fact and conclusions of law, the District Courts entered judgment in favor of Harvard and UNC. See 397 F. Supp. 3d 126, 133–206 (Mass. 2019) (*Harvard I*); 567 F. Supp. 3d 580, 588–667 (MDNC 2021) (*UNC*). The First Circuit affirmed in the *Harvard* case, finding "no error" in the District Court's thorough opinion. 980 F. 3d 157, 204 (2020) (*Harvard II*). SFFA then filed petitions for a writ of certiorari in both cases, which the Court granted. 595 U. S. ___ (2022).[23]

The Court granted certiorari on three questions: (1) whether the Court should overrule *Bakke*, *Grutter*, and

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strategic litigation choice, and in our adversarial system, it is not up to this Court to come up with "wrongs to right" on behalf of litigants. *Id.*, at 244 (internal quotation marks omitted).

[22] SFFA is a 501(c)(3) nonprofit organization founded after this Court's decision in *Fisher I*, 570 U. S. 297 (2013). App. to Pet. for Cert. in No. 20–1199, p. 10. Its original board of directors had three self-appointed members: Edward Blum, Abigail Fisher (the plaintiff in *Fisher*), and Richard Fisher. See *ibid.*

[23] Bypassing the Fourth Circuit's opportunity to review the District Court's opinion in the *UNC* case, SFFA sought certiorari before judgment, urging that, "[p]aired with *Harvard*," the *UNC* case would "allow the Court to resolve the ongoing validity of race-based admissions under both Title VI and the Constitution." Pet. for Cert. in No. 21–707, p. 27.

Fisher; or, alternatively, (2) whether UNC's admissions program is narrowly tailored, and (3) whether Harvard's admissions program is narrowly tailored. See Brief for Petitioner in No. 20–1199, p. i; Brief for Respondent in No. 20–1199, p. i; Brief for University Respondents in No. 21–707, p. i. Answering the last two questions, which call for application of settled law to the facts of these cases, is simple: Deferring to the lower courts' careful findings of fact and credibility determinations, Harvard's and UNC's policies are narrowly tailored.

B

1

As to narrow tailoring, the only issue SFFA raises in the *UNC* case is that the university cannot use race in its admissions process because race-neutral alternatives would promote UNC's diversity objectives. That issue is so easily resolved in favor of UNC that SFFA devoted only three pages to it at the end of its 87-page brief. Brief for Petitioner 83–86.

The use of race is narrowly tailored unless "workable" and "available" race-neutral approaches exist, meaning race-neutral alternatives promote the institution's diversity goals and do so at "'tolerable administrative expense.'" *Fisher I*, 570 U. S., at 312 (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 280, n. 6 (1986) (plurality opinion)). Narrow tailoring does not mean perfect tailoring. The Court's precedents make clear that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Grutter*, 539 U. S., at 339. "Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Ibid.*

As the District Court found after considering extensive expert testimony, SFFA's proposed race-neutral alternatives do not meet those criteria. *UNC*, 567 F. Supp. 3d,

at 648. All of SFFA's proposals are methodologically flawed because they rest on "'terribly unrealistic'" assumptions about the applicant pools. *Id.*, at 643–645, 647. For example, as to one set of proposals, SFFA's expert "unrealistically assumed" that "all of the top students in the candidate pools he use[d] would apply, be admitted, and enroll." *Id.*, at 647. In addition, some of SFFA's proposals force UNC to "abandon its holistic approach" to college admissions, *id.*, at 643–645, n. 43, a result "in deep tension with the goal of educational diversity as this Court's cases have defined it," *Fisher II*, 579 U. S., at 386–387. Others are "largely impractical—not to mention unprecedented—in higher education." 567 F. Supp. 3d, at 647. SFFA's proposed top percentage plans,[24] for example, are based on a made-up and complicated admissions index that requires UNC to "access . . . real-time data for all high school students." *Ibid.* UNC is then supposed to use that index, which "would change every time any student took a standardized test," to rank students based on grades and test scores. *Ibid.* One of SFFA's top percentage plans would even "nearly erase the Native American incoming class" at UNC. *Id.*, at 646. The courts below correctly concluded that UNC is not required to adopt SFFA's unrealistic proposals to satisfy strict scrutiny.[25]

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[24] Generally speaking, top percentage plans seek to enroll a percentage of the graduating high school students with the highest academic credentials. See, *e.g.*, *Fisher II*, 579 U. S., at 373 (describing the University of Texas' Top Ten Percent Plan).

[25] SFFA and JUSTICE GORSUCH reach beyond the factfinding below and argue that universities in States that have banned the use of race in college admissions have achieved racial diversity through efforts such as increasing socioeconomic preferences, so UNC could do the same. Brief for Petitioner 85–86; *ante*, at 14. Data from those States disprove that theory. Institutions in those States experienced "'an immediate and precipitous decline in the rates at which underrepresented-minority students applied . . . were admitted . . . and enrolled.'" *Schuette* v. *BAMN*,

2

Harvard's admissions program is also narrowly tailored under settled law. SFFA argues that Harvard's program is not narrowly tailored because the university "has workable race-neutral alternatives," "does not use race as a mere plus," and "engages in racial balancing." Brief for Petitioner 75–83. As the First Circuit concluded, there was "no error" in the District Court's findings on any of these issues. *Harvard II*, 980 F. 3d, at 204.[26]

Like UNC, Harvard has already implemented many of SFFA's proposals, such as increasing recruitment efforts and financial aid for low-income students. *Id.*, at 193. Also like UNC, Harvard "carefully considered" other race-neutral ways to achieve its diversity goals, but none of them are "workable." *Id.*, at 193–194. SFFA's argument before this Court is that Harvard should adopt a plan designed by SFFA's expert for purposes of trial, which increases preferences for low-income applicants and eliminates the use of race and legacy preferences. *Id.*, at 193; Brief for Petitioner

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572 U. S. 291, 384–390 (2014) (SOTOMAYOR, J., dissenting); see *infra*, at 63–64. In addition, UNC "already engages" in race-neutral efforts focused on socioeconomic status, including providing "exceptional levels of financial aid" and "increased and targeted recruiting." *UNC*, 567 F. Supp. 3d, at 665.

JUSTICE GORSUCH argues that he is simply "recount[ing] what SFFA has argued." *Ante*, at 14, n. 4. That is precisely the point: SFFA's arguments were not credited by the court below. "[W]e are a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). JUSTICE GORSUCH also suggests it is inappropriate for the dissent to respond to the majority by relying on materials beyond the findings of fact below. *Ante*, at 14, n. 4. There would be no need for the dissent to do that if the majority stuck to reviewing the District Court's careful fact-finding with the deference it owes to the trial court. Because the majority has made a different choice, the dissent responds.

[26] SFFA also argues that Harvard discriminates against Asian American students. Brief for Petitioner 72–75. As explained below, this claim does not fit under *Grutter*'s strict scrutiny framework, and the courts below did not err in rejecting that claim. See *infra*, at 59–60.

81. Under SFFA's model, however, Black representation would plummet by about 32%, and the admitted share of applicants with high academic ratings would decrease, as would the share with high extracurricular and athletic ratings. 980 F. 3d, at 194. SFFA's proposal, echoed by JUSTICE GORSUCH, *ante*, at 14–15, requires Harvard to "make sacrifices on almost every dimension important to its admissions process," 980 F. 3d, at 194, and forces it "to choose between a diverse student body and a reputation for academic excellence," *Fisher II*, 579 U. S., at 385. Neither this Court's precedents nor common sense impose that type of burden on colleges and universities.

The courts below also properly rejected SFFA's argument that Harvard does not use race in the limited way this Court's precedents allow. The Court has explained that a university can consider a student's race in its admissions process so long as that use is "contextual and does not operate as a mechanical plus factor." *Id.*, at 375. The Court has also repeatedly held that race, when considered as one factor of many in the context of holistic review, "can make a difference to whether an application is accepted or rejected." *Ibid.* After all, race-conscious admissions seek to improve racial diversity. Race cannot, however, be "'decisive' for virtually every minimally qualified underrepresented minority applicant." *Gratz*, 539 U. S., at 272 (quoting *Bakke*, 438 U. S., at 317).

That is precisely how Harvard's program operates. In recent years, Harvard has received about 35,000 applications for a class with about 1,600 seats. 980 F. 3d, at 165. The admissions process is exceedingly competitive; it involves six different application components. Those components include interviews with alumni and admissions officers, as well as consideration of a whole range of information, such as grades, test scores, recommendation letters, and personal essays, by several committees. *Id.*, at 165–166. Consistent with that "individualized, holistic review process,"

admissions officers may, but need not, consider a student's self-reported racial identity when assigning overall ratings. *Id.*, at 166, 169, 180. Even after so many layers of competitive review, Harvard typically ends up with about 2,000 tentative admits, more students than the 1,600 or so that the university can admit. *Id.*, at 170. To choose among those highly qualified candidates, Harvard considers "plus factors," which can help "tip an applicant into Harvard's admitted class." *Id.*, at 170, 191. To diversify its class, Harvard awards "tips" for a variety of reasons, including geographic factors, socioeconomic status, ethnicity, and race. *Ibid.*

There is "no evidence of any mechanical use of tips." *Id.*, at 180. Consistent with the Court's precedents, Harvard properly "considers race as part of a holistic review process," "values all types of diversity," "does not consider race exclusively," and "does not award a fixed amount of points to applicants because of their race." *Id.*, at 190.[27] Indeed, Harvard's admissions process is so competitive and the use of race is so limited and flexible that, as "SFFA's own expert's analysis" showed, "Harvard rejects more than two-thirds of Hispanic applicants and slightly less than half of all African-American applicants who are among the top 10% most academically promising applicants." *Id.*, at 191.

The courts below correctly rejected SFFA's view that Harvard's use of race is unconstitutional because it impacts overall Hispanic and Black student representation by 45%. See Brief for Petitioner 79. That 45% figure shows that

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[27] JUSTICE GORSUCH suggests that only "applicants of certain races may receive a 'tip' in their favor." *Ante*, at 9. To the extent JUSTICE GORSUCH means that some races are not eligible to receive a tip based on their race, there is no evidence in the record to support this statement. Harvard "does not explicitly prioritize any particular racial group over any other and permits its admissions officers to evaluate the racial and ethnic identity of every student in the context of his or her background and circumstances." *Harvard I*, 397 F. Supp. 3d 126, 190, n. 56 (Mass. 2019).

eliminating the use of race in admissions "would reduce African American representation . . . from 14% to 6% and Hispanic representation from 14% to 9%." *Harvard II*, 980 F. 3d, at 180, 191. Such impact of Harvard's limited use of race on the makeup of the class is less than this Court has previously upheld as narrowly tailored. In *Grutter*, for example, eliminating the use of race would have reduced the underrepresented minority population by 72%, a much greater effect. 539 U. S., at 320. And in *Fisher II*, the use of race helped increase Hispanic representation from 11% to 16.9% (a 54% increase) and African-American representation from 3.5% to 6.8% (a 94% increase). 579 U. S., at 384.[28]

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[28] Relying on a single footnote in the First Circuit's opinion, the Court claims that Harvard's program is unconstitutional because it "has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard." *Ante*, at 27. The Court of Appeals, however, merely noted that the United States, at the time represented by a different administration, argued that "absent the consideration of race, [Asian American] representation would increase from 24% to 27%," an 11% increase. *Harvard II*, 980 F. 3d, at 191, n. 29. Taking those calculations as correct, the Court of Appeals recognized that such an impact from the use of race on the overall makeup of the class is consistent with the impact that this Court's precedents have tolerated. *Ibid*.

The Court also notes that "race is determinative for at least some—if not many—of the students" admitted at UNC. *Ante*, at 27. The District Court in the *UNC* case found that "race plays a role in a very small percentage of decisions: 1.2% for in-state students and 5.1% for out-of-state students." 567 F. Supp. 3d 580, 634 (MDNC 2021). The limited use of race at UNC thus has a smaller effect than at Harvard and is also consistent with the Court's precedents. In addition, contrary to the majority's suggestion, such effect does not prove that "race alone . . . explains the admissions decisions for hundreds if not thousands of applicants to UNC each year." *Ante,* at 28, n. 6. As the District Court found, UNC (like Harvard) "engages a highly individualized, holistic review of each applicant's file, which considers race flexibly as a 'plus factor' as one among many factors in its individualized consideration of each and every applicant." 567 F. Supp. 3d, at 662; see *id.,* at 658 (finding that UNC "rewards different kinds of diversity, and evaluates a candidate within

Finally, the courts below correctly concluded that Harvard complies with this Court's repeated admonition that colleges and universities cannot define their diversity interest "as 'some specified percentage of a particular group merely because of its race or ethnic origin.'" *Fisher I*, 570 U. S., at 311 (quoting *Bakke*, 438 U. S., at 307). Harvard does not specify its diversity objectives in terms of racial quotas, and "SFFA did not offer expert testimony to support its racial balancing claim." *Harvard II*, 980 F. 3d, at 180, 186–187. Harvard's statistical evidence, by contrast, showed that the admitted classes across racial groups varied considerably year to year, a pattern "inconsistent with the imposition of a racial quota or racial balancing." *Harvard I*, 397 F. Supp. 3d, at 176–177; see *Harvard II*, 980 F. 3d, at 180, 188–189.

Similarly, Harvard's use of "one-pagers" containing "a snapshot of various demographic characteristics of Harvard's applicant pool" during the admissions review process is perfectly consistent with this Court's precedents. *Id.*, at 170–171, 189. Consultation of these reports, with no "specific number firmly in mind," "does not transform [Harvard's] program into a quota." *Grutter*, 539 U. S., at 335–336. Rather, Harvard's ongoing review complies with the Court's command that universities periodically review the necessity of the use of race in their admissions programs. *Id.*, at 342; *Fisher II*, 579 U. S., at 388.

The Court ignores these careful findings and concludes that Harvard engages in racial balancing because its "focus on numbers is obvious." *Ante*, at 31. Because SFFA failed to offer an expert and to prove its claim below, the majority

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the context of their lived experience"); *id.,* at 659 ("The parties stipulated, and the evidence shows, that readers evaluate applicants by taking into consideration dozens of criteria," and even SFFA's expert "concede[d] that the University's admissions process is individualized and holistic"). Stated simply, race is not "a defining feature of any individual application." *Id.,* at 662; see also *infra*, at 48.

is forced to reconstruct the record and conduct its own factual analysis. It thus relies on a single chart from SFFA's brief that truncates relevant data in the record. Compare *ibid.* (citing Brief for Petitioner in No. 20–1199, p. 23) with 4 App. in No. 20–1199, p. 1770. That chart cannot displace the careful factfinding by the District Court, which the First Circuit upheld on appeal under clear error review. See *Harvard II*, 980 F. 3d, at 180–182, 188–189.

In any event, the chart is misleading and ignores "the broader context" of the underlying data that it purports to summarize. *Id.*, at 188. As the First Circuit concluded, what the data actually show is that admissions have increased for all racial minorities, including Asian American students, whose admissions numbers have "increased roughly five-fold since 1980 and roughly two-fold since 1990." *Id.*, at 180, 188. The data also show that the racial shares of admitted applicants fluctuate more than the corresponding racial shares of total applicants, which is "the opposite of what one would expect if Harvard imposed a quota." *Id.*, at 188. Even looking at the Court's truncated period for the classes of 2009 to 2018, "the same pattern holds." *Ibid.* The fact that Harvard's racial shares of admitted applicants "varies relatively little in absolute terms for [those classes] is unsurprising and reflects the fact that the racial makeup of Harvard's applicant pool also varies very little over this period." *Id.*, at 188–189. Thus, properly understood, the data show that Harvard "does not utilize quotas and does not engage in racial balancing." *Id.*, at 189.[29]

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[29] The majority does not dispute that it has handpicked data from a truncated period, ignoring the broader context of that data and what the data reflect. Instead, the majority insists that its selected data prove that Harvard's "precise racial preferences" "operate like clockwork." *Ante*, at 31–32, n. 7. The Court's conclusion that such racial preferences must be responsible for an "unyielding demographic composition of [the]

III

The Court concludes that Harvard's and UNC's policies are unconstitutional because they serve objectives that are insufficiently measurable, employ racial categories that are imprecise and overbroad, rely on racial stereotypes and disadvantage nonminority groups, and do not have an end point. *Ante*, at 21–34, 39. In reaching this conclusion, the Court claims those supposed issues with respondents' programs render the programs insufficiently "narrow" under the strict scrutiny framework that the Court's precedents command. *Ante*, at 22. In reality, however, "the Court today cuts through the kudzu" and overrules its "higher-education precedents" following *Bakke*. *Ante*, at 22 (GORSUCH, J., concurring).

There is no better evidence that the Court is overruling the Court's precedents than those precedents themselves. "Every one of the arguments made by the majority can be found in the dissenting opinions filed in [the] cases" the majority now overrules. *Payne* v. *Tennessee*, 501 U. S. 808, 846 (1991) (Marshall, J., dissenting); see, *e.g.*, *Grutter*, 539 U. S., at 354 (THOMAS, J., concurring in part and dissenting in part) ("Unlike the majority, I seek to define with precision the interest being asserted"); *Fisher II*, 579 U. S., at 389 (THOMAS, J., dissenting) (race-conscious admissions

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class," *ibid.*, misunderstands basic principles of statistics. A number of factors (most notably, the demographic composition of the applicant pool) affect the demographic composition of the entering class. Assume, for example, that Harvard admitted students based solely on standardized test scores. If test scores followed a normal distribution (even with different averages by race) and were relatively constant over time, and if the racial shares of total applicants were also relatively constant over time, one would expect the same "unyielding demographic composition of [the] class." *Ibid.* That would be true even though, under that hypothetical scenario, Harvard does not consider race in admissions at all. In other words, the Court's inference that precise racial preferences must be the cause of relatively constant racial shares of admitted students is specious.

programs "res[t] on pernicious assumptions about race"); *id.*, at 403 (ALITO, J., joined by ROBERTS, C. J., and THOMAS, J., dissenting) (diversity interests "are laudable goals, but they are not concrete or precise"); *id.*, at 413 (race-conscious college admissions plan "discriminates against Asian-American students"); *id.*, at 414 (race-conscious admissions plan is unconstitutional because it "does not specify what it means to be 'African-American,' 'Hispanic,' 'Asian American,' 'Native American,' or 'White'"); *id.*, at 419 (race-conscious college admissions policies rest on "pernicious stereotype[s]").

Lost arguments are not grounds to overrule a case. When proponents of those arguments, greater now in number on the Court, return to fight old battles anew, it betrays an unrestrained disregard for precedent. It fosters the People's suspicions that "bedrock principles are founded . . . in the proclivities of individuals" on this Court, not in the law, and it degrades "the integrity of our constitutional system of government." *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986). Nowhere is the damage greater than in cases like these that touch upon matters of representation and institutional legitimacy.

The Court offers no justification, much less "a 'special justification,'" for its costly endeavor. *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ___, ___ (2022) (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (slip op., at 31) (quoting *Gamble* v. *United States*, 587 U. S. ___, ___ (2019) (slip op., at 11)). Nor could it. There is no basis for overruling *Bakke*, *Grutter*, and *Fisher*. The Court's precedents were correctly decided, the opinion today is not workable and creates serious equal protection problems, important reliance interests favor respondents, and there are no legal or factual developments favoring the Court's reckless course. See 597 U. S., at ___ (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (slip op., at 31); *id.*, at ___–___ (KAVANAUGH, J., concurring) (slip

op., at 6–7). At bottom, the six unelected members of today's majority upend the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law.

A

1

A limited use of race in college admissions is consistent with the Fourteenth Amendment and this Court's broader equal protection jurisprudence. The text and history of the Fourteenth Amendment make clear that the Equal Protection Clause permits race-conscious measures. See *supra*, at 2–9. Consistent with that view, the Court has explicitly held that "race-based action" is sometimes "within constitutional constraints." *Adarand Constructors*, *Inc.* v. *Peña*, 515 U. S. 200, 237 (1995). The Court has thus upheld the use of race in a variety of contexts. See, *e.g.*, *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 737 (2007) ("[T]he obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect"); *Johnson* v. *California*, 543 U. S. 499, 512 (2005) (use of race permissible to further prison's interest in "'security'" and "'discipline'"); *Cooper* v. *Harris*, 581 U. S. 285, 291–293 (2017) (use of race permissible when drawing voting districts in some circumstances).[30]

Tellingly, in sharp contrast with today's decision, the Court has allowed the use of race when that use burdens minority populations. In *United States* v. *Brignoni-Ponce*,

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[30] In the context of policies that "benefit rather than burden the minority," the Court has adhered to a strict scrutiny framework despite multiple Members of this Court urging that "the mandate of the Equal Protection Clause" favors applying a less exacting standard of review. *Schuette*, 572 U. S., at 373–374 (SOTOMAYOR, J., dissenting) (collecting cases).

422 U. S. 873 (1975), for example, the Court held that it is unconstitutional for border patrol agents to rely on a person's skin color as "a single factor" to justify a traffic stop based on reasonable suspicion, but it remarked that "Mexican appearance" could be "a relevant factor" out of many to justify such a stop "at the border and its functional equivalents." *Id.*, at 884–887; see also *id.*, at 882 (recognizing that "the border" includes entire metropolitan areas such as San Diego, El Paso, and the South Texas Rio Grande Valley).[31] The Court thus facilitated racial profiling of Latinos as a law enforcement tool and did not adopt a race-blind rule. The Court later extended this reasoning to border patrol agents selectively referring motorists for secondary inspection at a checkpoint, concluding that "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, [there is] no constitutional violation." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 562–563 (1976) (footnote omitted).

The result of today's decision is that a person's skin color may play a role in assessing individualized suspicion, but it cannot play a role in assessing that person's individualized contributions to a diverse learning environment. That indefensible reading of the Constitution is not grounded in law and subverts the Fourteenth Amendment's guarantee of equal protection.

2

The majority does not dispute that some uses of race are constitutionally permissible. See *ante*, at 15. Indeed, it agrees that a limited use of race is permissible in some college admissions programs. In a footnote, the Court exempts military academies from its ruling in light of "the potentially distinct interests" they may present. *Ante*, at 22, n. 4.

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[31] The Court's "dictum" that Mexican appearance can be one of many factors rested on now-outdated quantitative premises. *United States* v. *Montero-Camargo*, 208 F. 3d 1122, 1132 (CA9 2000).

To the extent the Court suggests national security interests are "distinct," those interests cannot explain the Court's narrow exemption, as national security interests are also implicated at civilian universities. See *infra*, at 64–65. The Court also attempts to justify its carveout based on the fact that "[n]o military academy is a party to these cases." *Ante*, at 22, n. 4. Yet the same can be said of many other institutions that are not parties here, including the religious universities supporting respondents, which the Court does not similarly exempt from its sweeping opinion. See Brief for Georgetown University et al. as *Amici Curiae* 18–29 (Georgetown Brief) (Catholic colleges and universities noting that they rely on the use of race in their holistic admissions to further not just their academic goals, but also their religious missions); see also *Harvard II*, 980 F. 3d, at 187, n. 24 ("[S]chools that consider race are diverse on numerous dimensions, including in terms of religious affiliation, location, size, and courses of study offered"). The Court's carveout only highlights the arbitrariness of its decision and further proves that the Fourteenth Amendment does not categorically prohibit the use of race in college admissions.

The concurring opinions also agree that the Constitution tolerates some racial classifications. JUSTICE GORSUCH agrees with the majority's conclusion that racial classifications are constitutionally permissible if they advance a compelling interest in a narrowly tailored way. *Ante*, at 23. JUSTICE KAVANAUGH, too, agrees that the Constitution permits the use of race if it survives strict scrutiny. *Ante*, at 2.[32] JUSTICE THOMAS offers an "originalist defense of the

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[32] JUSTICE KAVANAUGH agrees that the effects from the legacy of slavery and Jim Crow continue today, citing Justice Marshall's opinion in *Bakke*. *Ante*, at 7 (citing 438 U. S., at 395–402). As explained above, Justice Marshall's view was that *Bakke* covered only a portion of the Fourteenth Amendment's sweeping reach, such that the Court's higher education precedents must be expanded, not constricted. See 438 U. S.,

colorblind Constitution," but his historical analysis leads to the inevitable conclusion that the Constitution is not, in fact, colorblind. *Ante*, at 2. Like the majority opinion, JUSTICE THOMAS agrees that race can be used to remedy past discrimination and "to equalize treatment against a concrete baseline of government-imposed inequality." *Ante*, at 18–21. He also argues that race can be used if it satisfies strict scrutiny more broadly, and he considers compelling interests those that prevent anarchy, curb violence, and segregate prisoners. *Ante*, at 26. Thus, although JUSTICE THOMAS at times suggests that the Constitution only permits "directly remedial" measures that benefit "identified victims of discrimination," *ante*, at 20, he agrees that the Constitution tolerates a much wider range of race-conscious measures.

In the end, when the Court speaks of a "colorblind" Constitution, it cannot really mean it, for it is faced with a body of law that recognizes that race-conscious measures are permissible under the Equal Protection Clause. Instead, what the Court actually lands on is an understanding of the Constitution that is "colorblind" *sometimes*, when the Court so chooses. Behind those choices lie the Court's own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures.

Overruling decades of precedent, today's newly constituted Court singles out the limited use of race in holistic college admissions. It strikes at the heart of *Bakke*, *Grutter*, and *Fisher* by holding that racial diversity is an "inescapably imponderable" objective that cannot justify race-conscious affirmative action, *ante*, at 24, even though respondents' objectives simply "mirror the 'compelling interest' this Court

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at 395–402 (opinion dissenting in part). Justice Marshall's reading of the Fourteenth Amendment does not support JUSTICE KAVANAUGH'S and the majority's opinions.

has approved" many times in the past. *Fisher II*, 579 U. S., at 382; see, *e.g.*, *UNC*, 567 F. Supp. 3d, at 598 ("the [university's admissions policy] repeatedly cites Supreme Court precedent as guideposts").[33] At bottom, without any new factual or legal justification, the Court overrides its longstanding holding that diversity in higher education is of compelling value.

To avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation. None of this Court's precedents, however, requires that a compelling interest meet some threshold level of precision to be deemed sufficiently compelling. In fact, this Court has recognized as compelling plenty of interests that are equally or more amorphous, including the "intangible" interest in preserving "public confidence in judicial integrity," an interest that "does not easily reduce to precise definition." *Williams-Yulee* v. *Florida Bar*, 575 U. S. 433, 447, 454 (2015) (ROBERTS, C. J., for the Court); see also, *e.g.*, *Ramirez* v. *Collier*, 595 U. S. ___, ___ (2022) (ROBERTS, C. J., for the Court) (slip op., at 18) ("[M]aintaining solemnity and decorum in the execution chamber" is a "compelling" interest); *United States* v. *Alvarez*, 567 U. S. 709, 725 (2012) (plurality opinion) ("[P]rotecting the integrity of the Medal of Honor" is a "compelling interes[t]"); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989) ("[P]rotecting the physical and psychological well-being of minors" is a "compelling interest"). Thus, although

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[33] There is no dispute that respondents' compelling diversity objectives are "substantial, long-standing, and well documented." *UNC*, 567 F. Supp. 3d, at 655; *Harvard II*, 980 F. 3d, at 186–187. SFFA did not dispute below that respondents have a compelling interest in diversity. See *id.*, at 185; *Harvard I*, 397 F. Supp. 3d, at 133; Tr. of Oral Arg. in No. 21–707, p. 121. And its expert agreed that valuable educational benefits flow from diversity, including richer and deeper learning, reduced bias, and more creative problem solving. 2 App. in No. 21–707, p. 546. SFFA's counsel also emphatically disclaimed the issue at trial. 2 App. in No. 20–1199, p. 548 ("Diversity and its benefits are not on trial here").

the Members of this majority pay lip service to respondents' "commendable" and "worthy" racial diversity goals, *ante*, at 23–24, they make a clear value judgment today: Racial integration in higher education is not sufficiently important to them. "Today, the proclivities of individuals rule." *Dobbs*, 597 U. S., at ___ (dissenting opinion) (slip op., at 6).

The majority offers no response to any of this. Instead, it attacks a straw man, arguing that the Court's cases recognize that remedying the effects of "societal discrimination" does not constitute a compelling interest. *Ante*, at 34–35. Yet as the majority acknowledges, while *Bakke* rejected that interest as insufficiently compelling, it upheld a limited use of race in college admissions to promote the educational benefits that flow from diversity. 438 U. S., at 311–315. It is that narrower interest, which the Court has reaffirmed numerous times since *Bakke* and as recently as 2016 in *Fisher II*, see *supra*, at 14–15, that the Court overrules today.

B

The Court's precedents authorizing a limited use of race in college admissions are not just workable—they have been working. Lower courts have consistently applied them without issue, as exemplified by the opinions below and SFFA's and the Court's inability to identify any split of authority. Today, the Court replaces this settled framework with a set of novel restraints that create troubling equal protection problems and share one common purpose: to make it impossible to use race in a holistic way in college admissions, where it is much needed.

1

The Court argues that Harvard's and UNC's programs must end because they unfairly disadvantage some racial groups. According to the Court, college admissions are a "zero-sum" game and respondents' use of race unfairly "ad-

vantages" underrepresented minority students "at the expense of" other students. *Ante*, at 27.

That is not the role race plays in holistic admissions. Consistent with the Court's precedents, respondents' holistic review policies consider race in a very limited way. Race is only one factor out of many. That type of system allows Harvard and UNC to assemble a diverse class on a multitude of dimensions. Respondents' policies allow them to select students with various unique attributes, including talented athletes, artists, scientists, and musicians. They also allow respondents to assemble a class with diverse viewpoints, including students who have different political ideologies and academic interests, who have struggled with different types of disabilities, who are from various socioeconomic backgrounds, who understand different ways of life in various parts of the country, and—yes—students who self-identify with various racial backgrounds and who can offer different perspectives because of that identity.

That type of multidimensional system benefits all students. In fact, racial groups that are not underrepresented tend to benefit disproportionately from such a system. Harvard's holistic system, for example, provides points to applicants who qualify as "ALDC," meaning "athletes, legacy applicants, applicants on the Dean's Interest List [primarily relatives of donors], and children of faculty or staff." *Harvard II*, 980 F. 3d, at 171 (noting also that "SFFA does not challenge the admission of this large group"). ALDC applicants are predominantly white: Around 67.8% are white, 11.4% are Asian American, 6% are Black, and 5.6% are Latino. *Ibid.* By contrast, only 40.3% of non-ALDC applicants are white, 28.3% are Asian American, 11% are Black, and 12.6% are Latino. *Ibid.* Although "ALDC applicants make up less than 5% of applicants to Harvard," they constitute "around 30% of the applicants admitted each year." *Ibid.* Similarly, because of achievement gaps that result from entrenched racial inequality in K–12 education, see *infra*, at

18–21, a heavy emphasis on grades and standardized test scores disproportionately disadvantages underrepresented racial minorities. Stated simply, race is one small piece of a much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities. That is precisely why underrepresented racial minorities remain *under*represented. The Court's suggestion that an already advantaged racial group is "disadvantaged" because of a limited use of race is a myth.

The majority's true objection appears to be that a limited use of race in college admissions does, in fact, achieve what it is designed to achieve: It helps equalize opportunity and advances respondents' objectives by increasing the number of underrepresented racial minorities on college campuses, particularly Black and Latino students. This is unacceptable, the Court says, because racial groups that are not underrepresented "would be admitted in greater numbers" without these policies. *Ante*, at 28. Reduced to its simplest terms, the Court's conclusion is that an increase in the representation of racial minorities at institutions of higher learning that were historically reserved for white Americans is an unfair and repugnant outcome that offends the Equal Protection Clause. It provides a license to discriminate against white Americans, the Court says, which requires the courts and state actors to "pic[k] the right races to benefit." *Ante*, at 38.

Nothing in the Fourteenth Amendment or its history supports the Court's shocking proposition, which echoes arguments made by opponents of Reconstruction-era laws and this Court's decision in *Brown*. *Supra*, at 2–17. In a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law, including at Harvard and UNC. Quite the opposite: A racially integrated vision of so-

ciety, in which institutions reflect all sectors of the American public and where "the sons of former slaves and the sons of former slave owners [are] able to sit down together at the table of brotherhood," is precisely what the Equal Protection Clause commands. Martin Luther King "I Have a Dream" Speech (Aug. 28, 1963). It is "essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U. S., at 332.[34]

By singling out race, the Court imposes a special burden on racial minorities for whom race is a crucial component of their identity. Holistic admissions require "truly individualized consideration" of the whole person. *Id.*, at 334. Yet, "by foreclosing racial considerations, colorblindness denies those who racially self-identify the full expression of their identity" and treats "racial identity as inferior" among all "other forms of social identity." E. Boddie, The Indignities of Colorblindness, 64 UCLA L. Rev. Discourse, 64, 67 (2016). The Court's approach thus turns the Fourteenth Amendment's equal protection guarantee on its head and creates an equal protection problem of its own.

There is no question that minority students will bear the burden of today's decision. Students of color testified at

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[34] The Court suggests that promoting the Fourteenth Amendment's vision of equality is a "radical" claim of judicial power and the equivalent of "pick[ing] winners and losers based on the color of their skin." *Ante*, at 38. The law sometimes requires consideration of race to achieve racial equality. Just like drawing district lines that comply with the Voting Rights Act may require consideration of race along with other demographic factors, achieving racial diversity in higher education requires consideration of race along with "age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw* v. *Reno*, 509 U. S. 630, 646 (1993) ("[R]ace consciousness does not lead inevitably to impermissible race discrimination"). Moreover, in ordering the admission of Black children to all-white schools "with all deliberate speed" in *Brown* v. *Board of Education*, 349 U. S. 294, 301 (1955), this Court did not decide that the Black children should receive an "advantag[e] . . . at the expense of" white children. *Ante*, at 27. It simply enforced the Equal Protection Clause by leveling the playing field.

trial that racial self-identification was an important component of their application because without it they would not be able to present a full version of themselves. For example, Rimel Mwamba, a Black UNC alumna, testified that it was "really important" that UNC see who she is "holistically and how the color of [her] skin and the texture of [her] hair impacted [her] upbringing." 2 App. in No. 21–707, p. 1033. Itzel Vasquez-Rodriguez, who identifies as Mexican-American of Cora descent, testified that her ethnoracial identity is a "core piece" of who she is and has impacted "every experience" she has had, such that she could not explain her "potential contributions to Harvard without any reference" to it. 2 App. in No. 20–1199, at 906, 908. Sally Chen, a Harvard alumna who identifies as Chinese American, explained that being the child of Chinese immigrants was "really fundamental to explaining who" she is. *Id.*, at 968–969. Thang Diep, a Harvard alumnus, testified that his Vietnamese identity was "such a big part" of himself that he needed to discuss it in his application. *Id.*, at 949. And Sarah Cole, a Black Harvard alumna, emphasized that "[t]o try to not see [her] race is to try to not see [her] simply because there is no part of [her] experience, no part of [her] journey, no part of [her] life that has been untouched by [her] race." *Id.*, at 932.

In a single paragraph at the end of its lengthy opinion, the Court suggests that "nothing" in today's opinion prohibits universities from considering a student's essay that explains "how race affected [that student's] life." *Ante*, at 39. This supposed recognition that universities can, in some situations, consider race in application essays is nothing but an attempt to put lipstick on a pig. The Court's opinion circumscribes universities' ability to consider race in any form by meticulously gutting respondents' asserted diversity interests. See *supra*, at 41–43. Yet, because the Court cannot escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear

attuned to reality. No one is fooled.

Further, the Court's demand that a student's discussion of racial self-identification be tied to individual qualities, such as "courage," "leadership," "unique ability," and "determination," only serves to perpetuate the false narrative that Harvard and UNC currently provide "preferences on the basis of race alone." *Ante*, at 28–29, 39; see also *ante*, at 28, n. 6 (claiming without support that "race alone . . . explains the admissions decisions for hundreds if not thousands of applicants"). The Court's precedents already require that universities take race into account holistically, in a limited way, and based on the type of "individualized" and "flexible" assessment that the Court purports to favor. *Grutter*, 539 U. S., at 334; see Brief for Students and Alumni of Harvard College as *Amici Curiae* 15–17 (Harvard College Brief) (describing how the dozens of application files in the record "uniformly show that, in line with Harvard's 'whole-person' admissions philosophy, Harvard's admissions officers engage in a highly nuanced assessment of each applicant's background and qualifications"). After extensive discovery and two lengthy trials, neither SFFA nor the majority can point to a single example of an underrepresented racial minority who was admitted to Harvard or UNC on the basis of "race alone."

In the end, the Court merely imposes its preferred college application format on the Nation, not acting as a court of law applying precedent but taking on the role of college administrators to decide what is better for society. The Court's course reflects its inability to recognize that racial identity informs some students' viewpoints and experiences in unique ways. The Court goes as far as to claim that *Bakke*'s recognition that Black Americans can offer different perspectives than white people amounts to a "stereotype." *Ante*, at 29.

It is not a stereotype to acknowledge the basic truth that

young people's experiences are shaded by a societal structure where race matters. Acknowledging that there is something special about a student of color who graduates valedictorian from a predominantly white school is not a stereotype. Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students. "For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." *Utah* v. *Strieff*, 579 U. S. 232, 254 (2016) (SOTOMAYOR, J., dissenting). Those conversations occur regardless of socioeconomic background or any other aspect of a student's self-identification. They occur because of race. As Andrew Brennen, a UNC alumnus, testified, "running down the neighborhood . . . people don't see [him] as someone that is relatively affluent; they see [him] as a black man." 2 App. in No. 21–707, at 951–952.

The absence of racial diversity, by contrast, actually contributes to stereotyping. "[D]iminishing the force of such stereotypes is both a crucial part of [respondents'] mission, and one that [they] cannot accomplish with only token numbers of minority students." *Grutter*, 539 U. S., at 333. When there is an increase in underrepresented minority students on campus, "racial stereotypes lose their force" because diversity allows students to "learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Id.*, at 319–320. By preventing respondents from achieving their diversity objectives, it is the Court's opinion that facilitates stereotyping on American college campuses.

To be clear, today's decision leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications. Universities should continue to use those tools as best they can to

recruit and admit students from different backgrounds based on all the other factors the Court's opinion does not, and cannot, touch. Colleges and universities can continue to consider socioeconomic diversity and to recruit and enroll students who are first-generation college applicants or who speak multiple languages, for example. Those factors are not "interchangeable" with race. *UNC*, 567 F. Supp. 3d, at 643; see, *e.g.*, 2 App. in No. 21–707, at 975–976 (Laura Ornelas, a UNC alumna, testifying that her Latina identity, socioeconomic status, and first-generation college status are all important but different "parts to getting a full picture" of who she is and how she "see[s] the world"). At SFFA's own urging, those efforts remain constitutionally permissible. See Brief for Petitioner 81–86 (emphasizing "race-neutral" alternatives that Harvard and UNC should implement, such as those that focus on socioeconomic and geographic diversity, percentage plans, plans that increase community college transfers, and plans that develop partnerships with disadvantaged high schools); see also *ante*, at 51, 53, 55–56 (THOMAS, J., concurring) (arguing universities can consider "[r]ace-neutral policies" similar to those adopted in States such as California and Michigan, and that universities can consider "status as a first-generation college applicant," "financial means," and "generational inheritance or otherwise"); *ante*, at 8 (KAVANAUGH, J., concurring) (citing SFFA's briefs and concluding that universities can use "race-neutral" means); *ante*, at 14, n. 4 (GORSUCH, J., concurring) ("recount[ing] what SFFA has argued every step of the way" as to "race-neutral tools").

The Court today also does not adopt SFFA's suggestion that college admissions should be a function of academic metrics alone. Using class rank or standardized test scores as the only admissions criteria would severely undermine multidimensional diversity in higher education. Such a system "would exclude the star athlete or musician whose grades suffered because of daily practices and training. It

would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class." *Fisher II*, 579 U. S., at 386. A myopic focus on academic ratings "does not lead to a diverse student body." *Ibid.*[35]

2

As noted above, this Court suggests that the use of race in college admissions is unworkable because respondents' objectives are not sufficiently "measurable," "focused," "concrete," and "coherent." *Ante*, at 23, 26, 39. How much more precision is required or how universities are supposed to meet the Court's measurability requirement, the Court's opinion does not say. That is exactly the point. The Court is not interested in crafting a workable framework that promotes racial diversity on college campuses. Instead, it announces a requirement designed to ensure all race-conscious plans fail. Any increased level of precision runs the risk of violating the Court's admonition that colleges and universities operate their race-conscious admissions policies with no "'specified percentage[s]'" and no "specific number[s] firmly in mind." *Grutter*, 539 U. S., at 324, 335. Thus, the majority's holding puts schools in an untenable position. It creates a legal framework where race-conscious plans *must* be measured with precision but also *must not* be measured with precision. That holding is not meant to infuse clarity into the strict scrutiny framework; it is designed to render strict scrutiny "'fatal in fact.'" *Id.*, at 326 (quoting *Adarand*

[35] Today's decision is likely to generate a plethora of litigation by disappointed college applicants who think their credentials and personal qualities should have secured them admission. By inviting those challenges, the Court's opinion promotes chaos and incentivizes universities to convert their admissions programs into inflexible systems focused on mechanical factors, which will harm all students.

Constructors, Inc., 515 U. S., at 237). Indeed, the Court gives the game away when it holds that, to the extent respondents are actually measuring their diversity objectives with any level of specificity (for example, with a "focus on numbers" or specific "numerical commitment"), their plans are unconstitutional. *Ante*, at 30–31; see also *ante*, at 29 (THOMAS, J., concurring) ("I highly doubt any [university] will be able to" show a "measurable state interest").

3

The Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they rely on racial categories that are "imprecise," "opaque," and "arbitrary." *Ante*, at 25. To start, the racial categories that the Court finds troubling resemble those used across the Federal Government for data collection, compliance reporting, and program administration purposes, including, for example, by the U. S. Census Bureau. See, *e.g.*, 62 Fed. Reg. 58786–58790 (1997). Surely, not all "'federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies'" that flow from census data collection, *Department of Commerce* v. *New York*, 588 U. S. ___, ___ (2019) (slip op., at 2), are constitutionally suspect.

The majority presumes that it knows better and appoints itself as an expert on data collection methods, calling for a higher level of granularity to fix a supposed problem of overinclusiveness and underinclusiveness. Yet it does not identify a single instance where respondents' methodology has prevented any student from reporting their race with the level of detail they preferred. The record shows that it is up to students to choose whether to identify as one, multiple, or none of these categories. See *Harvard I*, 397 F. Supp. 3d, at 137; *UNC*, 567 F. Supp. 3d, at 596. To the extent students need to convey additional information, students can select subcategories or provide more detail in

their personal statements or essays. See *Harvard I*, 397 F. Supp. 3d, at 137. Students often do so. See, *e.g.*, 2 App. in No. 20–1199, at 906–907 (student respondent discussing her Latina identity on her application); *id.*, at 949 (student respondent testifying he "wrote about [his] Vietnamese identity on [his] application"). Notwithstanding this Court's confusion about racial self-identification, neither students nor universities are confused. There is no evidence that the racial categories that respondents use are unworkable.[36]

4

Cherry-picking language from *Grutter*, the Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they do not have a specific expiration date. *Ante*, at 30–34. This new durational requirement is also not grounded in law, facts, or common sense. *Grutter* simply announced a general "expect[ation]" that "the use of racial preferences [would] no longer be necessary" in the future. 539 U. S., at 343. As even SFFA acknowledges, those remarks were nothing but aspirational statements by the *Grutter* Court. Tr. of Oral Arg. in No. 21–707, p. 56.

Yet this Court suggests that everyone, including the Court itself, has been misreading *Grutter* for 20 years.

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[36] The Court suggests that the term "Asian American" was developed by respondents because they are "uninterested" in whether Asian American students "are adequately represented." *Ante*, at 25; see also *ante*, at 5 (GORSUCH, J., concurring) (suggesting that "[b]ureaucrats" devised a system that grouped all Asian Americans into a single racial category). That argument offends the history of that term. "The term 'Asian American' was coined in the late 1960s by Asian American activists—mostly college students—to unify Asian ethnic groups that shared common experiences of race-based violence and discrimination and to advocate for civil rights and visibility." Brief for Asian American Legal Defense and Education Fund et al. as *Amici Curiae* 9 (AALDEF Brief).

Grutter, according to the majority, requires that universities identify a specific "end point" for the use of race. *Ante*, at 33. JUSTICE KAVANAUGH, for his part, suggests that *Grutter* itself automatically expires in 25 years, after either "the college class of 2028" or "the college class of 2032." *Ante*, at 7, n. 1. A faithful reading of this Court's precedents reveals that *Grutter* held nothing of the sort.

True, *Grutter* referred to "25 years," but that arbitrary number simply reflected the time that had elapsed since the Court "first approved the use of race" in college admissions in *Bakke*. *Grutter*, 539 U. S., at 343. It is also true that *Grutter* remarked that "race-conscious admissions policies must be limited in time," but it did not do so in a vaccum, as the Court suggests. *Id.*, at 342. Rather than impose a fixed expiration date, the Court tasked universities with the responsibility of periodically assessing whether their race-conscious programs "are still necessary." *Ibid.* *Grutter* offered as examples sunset provisions, periodic reviews, and experimenting with "race-neutral alternatives as they develop." *Ibid.* That is precisely how this Court has previously interpreted *Grutter*'s command. See *Fisher II*, 579 U. S., at 388 ("It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies").

Grutter's requirement that universities engage in periodic reviews so the use of race can end "as soon as practicable" is well grounded in the need to ensure that race is "employed no more broadly than the interest demands." 539 U. S., at 343. That is, it is grounded in strict scrutiny. By contrast, the Court's holding is based on the fiction that racial inequality has a predictable cutoff date. Equality is an ongoing project in a society where racial inequality persists. See *supra*, at 17–25. A temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable. There is a sound reason

why this Court's precedents have never imposed the majority's strict deadline: Institutions cannot predict the future. Speculating about a day when consideration of race will become unnecessary is arbitrary at best and frivolous at worst. There is no constitutional duty to engage in that type of shallow guesswork.[37]

Harvard and UNC engage in the ongoing review that the Court's precedents demand. They "use [their] data to scrutinize the fairness of [their] admissions program[s]; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures [they] dee[m] necessary." *Fisher II*, 579 U. S., at 388. The Court holds, however, that respondents' attention to numbers amounts to unconstitutional racial balancing. *Ante*, at 30–32. But "'[s]ome attention to numbers'" is both necessary and permissible. *Grutter*, 539 U. S., at 336 (quoting *Bakke*, 438 U. S., at 323). Universities cannot blindly operate their limited race-conscious programs without regard for any quantitative information. "Increasing minority enrollment [is] instrumental to th[e] educational benefits" that respondents seek to achieve, *Fisher II*, 579 U. S., at 381, and statistics, data, and numbers "have some value

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[37] JUSTICE KAVANAUGH's reading, in particular, is quite puzzling. Unlike the majority, which concludes that respondents' programs should have an end point, JUSTICE KAVANAUGH suggests that *Grutter* itself has an expiration date. He agrees that racial inequality persists, *ante*, at 7–8, but at the same time suggests that race-conscious affirmative action was only necessary in "another generation," *ante*, at 4. He attempts to analogize expiration dates of court-ordered injunctions in desegregation cases, *ante*, at 5, but an expiring injunction does not eliminate the underlying constitutional principle. His musings about different college classes, *ante*, at 7, n. 1, are also entirely beside the point. Nothing in *Grutter*'s analysis turned on whether someone was applying for the class of 2028 or 2032. That reading of *Grutter* trivializes the Court's precedent by reducing it to an exercise in managing academic calendars. *Grutter* is no such thing.

as a gauge of [respondents'] ability to enroll students who can offer underrepresented perspectives." *Id.*, at 383–384. By removing universities' ability to assess the success of their programs, the Court obstructs these institutions' ability to meet their diversity goals.

5

JUSTICE THOMAS, for his part, offers a multitude of arguments for why race-conscious college admissions policies supposedly "burden" racial minorities. *Ante*, at 39. None of them has any merit.

He first renews his argument that the use of race in holistic admissions leads to the "inevitable" "underperformance" by Black and Latino students at elite universities "because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I*, 570 U. S., at 332 (concurring opinion). JUSTICE THOMAS speaks only for himself. The Court previously declined to adopt this so-called "mismatch" hypothesis for good reason: It was debunked long ago. The decades-old "studies" advanced by the handful of authors upon whom JUSTICE THOMAS relies, *ante*, at 40–41, have "major methodological flaws," are based on unreliable data, and do not "meet the basic tenets of rigorous social science research." Brief for Empirical Scholars as *Amici Curiae* 3, 9–25. By contrast, "[m]any social scientists have studied the impact of elite educational institutions on student outcomes, and have found, among other things, that attending a more selective school is associated with higher graduation rates and higher earnings for [underrepresented minority] students—conclusions directly contrary to mismatch." *Id.*, at 7–9 (collecting studies). This extensive body of research is supported by the most obvious data point available to this institution today: The three Justices of color on this Court graduated from elite universities and law schools with race-

conscious admissions programs, and achieved successful legal careers, despite having different educational backgrounds than their peers. A discredited hypothesis that the Court previously rejected is no reason to overrule precedent.

JUSTICE THOMAS claims that the weight of this evidence is overcome by a single more recent article published in 2016. *Ante*, at 41, n. 8. That article, however, explains that studies supporting the mismatch hypothesis "yield misleading conclusions," "overstate the amount of mismatch," "preclude one from drawing any concrete conclusions," and rely on methodologically flawed assumptions that "lea[d] to an upwardly-biased estimate of mismatch." P. Arcidiacono & M. Lovenheim, Affirmative Action and the Quality-Fit Trade-off, 54 J. Econ. Lit. 3, 17, 20 (2016); see *id.*, at 6 ("economists should be very skeptical of the mismatch hypothesis"). Notably, this refutation of the mismatch theory was coauthored by one of SFFA's experts, as JUSTICE THOMAS seems to recognize.

Citing nothing but his own long-held belief, JUSTICE THOMAS also equates affirmative action in higher education with segregation, arguing that "racial preferences in college admissions 'stamp [Black and Latino students] with a badge of inferiority.'" *Ante*, at 41 (quoting *Adarand*, 515 U. S., at 241 (THOMAS, J., concurring in part and concurring in judgment)). Studies disprove this sentiment, which echoes "tropes of stigma" that "were employed to oppose Reconstruction policies." A. Onwuachi-Willig, E. Houh, & M. Campbell, Cracking the Egg: Which Came First—Stigma or Affirmative Action? 96 Cal. L. Rev. 1299, 1323 (2008); see, *e.g.*, *id.*, at 1343–1344 (study of seven law schools showing that stigma results from "racial stereotypes that have attached historically to different groups, regardless of affirmative action's existence"). Indeed, equating state-sponsored segregation with race-conscious admissions policies that promote racial integration trivializes the harms of segregation and offends

Brown's transformative legacy. School segregation "has a detrimental effect" on Black students by "denoting the inferiority" of "their status in the community" and by "'depriv[ing] them of some of the benefits they would receive in a racial[ly] integrated school system.'" 347 U. S., at 494. In sharp contrast, race-conscious college admissions ensure that higher education is "visibly open to" and "inclusive of talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U. S., at 332. These two uses of race are not created equal. They are not "equally objectionable." *Id.*, at 327.

Relatedly, JUSTICE THOMAS suggests that race-conscious college admissions policies harm racial minorities by increasing affinity-based activities on college campuses. *Ante*, at 46. Not only is there no evidence of a causal connection between the use of race in college admissions and the supposed rise of those activities, but JUSTICE THOMAS points to no evidence that affinity groups cause any harm. Affinity-based activities actually help racial minorities improve their visibility on college campuses and "decreas[e] racial stigma and vulnerability to stereotypes" caused by "conditions of racial isolation" and "tokenization." U. Jayakumar, Why Are All Black Students *Still* Sitting Together in the Proverbial College Cafeteria?, Higher Education Research Institute at UCLA (Oct. 2015); see also Brief for Respondent-Students in No. 21–707, p. 42 (collecting student testimony demonstrating that "affinity groups beget important academic and social benefits" for racial minorities); 4 App. in No. 20–1199, at 1591 (Harvard Working Group on Diversity and Inclusion Report) (noting that concerns "that culturally specific spaces or affinity-themed housing will isolate" student minorities are misguided because those spaces allow students "to come together . . . to deal with intellectual, emotional, and social challenges").

Citing no evidence, JUSTICE THOMAS also suggests that race-conscious admissions programs discriminate against

Asian American students. *Ante*, at 43–44. It is true that SFFA "allege[d]" that Harvard discriminates against Asian American students. *Ante*, at 43. Specifically, SFFA argued that Harvard discriminates against Asian American applicants vis-à-vis white applicants through the use of the personal rating, an allegedly "highly subjective" component of the admissions process that is "susceptible to stereotyping and bias." *Harvard II*, 980 F. 3d, at 196; see Brief for Professors of Economics as *Amici Curiae* 24. It is also true, however, that there was a lengthy trial to test those allegations, which SFFA lost. JUSTICE THOMAS points to no legal or factual error below, precisely because there is none.

To begin, this part of SFFA's discrimination claim does not even fall under the strict scrutiny framework in *Grutter* and its progeny, which concerns the use of racial classifications. The personal rating is a facially race-*neutral* component of Harvard's admissions policy.[38] Therefore, even assuming for the sake of argument that Harvard engages in racial discrimination through the personal rating, there is no connection between that rating and the remedy that SFFA sought and that the majority grants today: ending the limited use of race in the entire admissions process. In any event, after assessing the credibility of fact witnesses and considering extensive documentary evidence and expert testimony, the courts below found "no discrimination against Asian Americans." *Harvard II*, 980 F. 3d, at 195, n. 34, 202; see *id.*, at 195–204.

There is no question that the Asian American community continues to struggle against potent and dehumanizing stereotypes in our society. It is precisely because racial discrimination persists in our society, however, that the use of

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[38] Before 2018, Harvard's admissions procedures were silent on the use of race in connection with the personal rating. *Harvard II*, 980 F. 3d, at 169. Harvard later modified its instructions to say explicitly that "'an applicant's race or ethnicity should not be considered in assigning the personal rating.'" *Ibid.*

race in college admissions to achieve racially diverse classes is critical to improving cross-racial understanding and breaking down racial stereotypes. See *supra*, at 16. Indeed, the record shows that some Asian American applicants are actually "advantaged by Harvard's use of race," *Harvard II*, 980 F. 3d, at 191, and "eliminating consideration of race would significantly disadvantage at least some Asian American applicants," *Harvard I*, 397 F. Supp. 3d, at 194. Race-conscious holistic admissions that contextualize the racial identity of each individual allow Asian American applicants "who would be less likely to be admitted without a comprehensive understanding of their background" to explain "the value of their unique background, heritage, and perspective." *Id.*, at 195. Because the Asian American community is not a monolith, race-conscious holistic admissions allow colleges and universities to "consider the vast differences within [that] community." AALDEF Brief 4–14. Harvard's application files show that race-conscious holistic admissions allow Harvard to "valu[e] the diversity of Asian American applicants' experiences." Harvard College Brief 23.

Moreover, the admission rates of Asian Americans at institutions with race-conscious admissions policies, including at Harvard, have "been steadily increasing for decades." *Harvard II*, 980 F. 3d, at 198.[39] By contrast, Asian American enrollment declined at elite universities that are prohibited by state law from considering race. See AALDEF Brief 27; Brief for 25 Diverse, California-Focused Bar Associations et al. as *Amici Curiae* 19–20, 23. At bottom, race-conscious admissions benefit all students, including racial minorities. That includes the Asian American community.

Finally, JUSTICE THOMAS belies reality by suggesting that "experts and elites" with views similar to those "that

[39] At Harvard, "Asian American applicants are accepted at the same rate as other applicants and now make up more than 20% of Harvard's admitted classes," even though "only about 6% of the United States population is Asian American." *Harvard I*, 397 F. Supp. 3d, at 203.

motivated *Dred Scott* and *Plessy*" are the ones who support race conscious admissions. *Ante*, at 39. The plethora of young students of color who testified in favor of race-consciousness proves otherwise. See *supra*, at 46–47; see also *infra*, at 64–67 (discussing numerous *amici* from many sectors of society supporting respondents' policies). Not a single student—let alone any racial minority—affected by the Court's decision testified in favor of SFFA in these cases.

C

In its "radical claim to power," the Court does not even acknowledge the important reliance interests that this Court's precedents have generated. *Dobbs*, 597 U. S., at ___ (dissenting opinion) (slip op., at 53). Significant rights and expectations will be affected by today's decision nonetheless. Those interests supply "added force" in favor of *stare decisis*. *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991).

Students of all backgrounds have formed settled expectations that universities with race-conscious policies "will provide diverse, cross-cultural experiences that will better prepare them to excel in our increasingly diverse world." Brief for Respondent-Students in No. 21–707, at 45; see Harvard College Brief 6–11 (collecting student testimony).

Respondents and other colleges and universities with race-conscious admissions programs similarly have concrete reliance interests because they have spent significant resources in an effort to comply with this Court's precedents. "Universities have designed courses that draw on the benefits of a diverse student body," "hired faculty whose research is enriched by the diversity of the student body," and "promoted their learning environments to prospective students who have enrolled based on the understanding that they could obtain the benefits of diversity of all kinds." Brief for Respondent in No. 20–1199, at 40–41 (internal

quotation marks omitted). Universities also have "expended vast financial and other resources" in "training thousands of application readers on how to faithfully apply this Court's guardrails on the use of race in admissions." Brief for University Respondents in No. 21–707, p. 44. Yet today's decision abruptly forces them "to fundamentally alter their admissions practices." *Id.*, at 45; see also Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 25–26; Brief for Amherst College et al. as *Amici Curiae* 23–25 (Amherst Brief). As to Title VI in particular, colleges and universities have relied on *Grutter* for decades in accepting federal funds. See Brief for United States as *Amicus Curiae* in No. 20–1199, p. 25 (United States Brief); Georgetown Brief 16.

The Court's failure to weigh these reliance interests "is a stunning indictment of its decision." *Dobbs*, 597 U. S., at ___ (dissenting opinion) (slip op., at 55).

IV

The use of race in college admissions has had profound consequences by increasing the enrollment of underrepresented minorities on college campuses. This Court presupposes that segregation is a sin of the past and that race-conscious college admissions have played no role in the progress society has made. The fact that affirmative action in higher education "has worked and is continuing to work" is no reason to abandon the practice today. *Shelby County* v. *Holder*, 570 U. S. 529, 590 (2013) (Ginsburg, J., dissenting) ("[It] is like throwing away your umbrella in a rainstorm because you are not getting wet").

Experience teaches that the consequences of today's decision will be destructive. The two lengthy trials below simply confirmed what we already knew: Superficial color-blindness in a society that systematically segregates opportunity will cause a sharp decline in the rates at which underrepresented minority students enroll in our Nation's

colleges and universities, turning the clock back and undoing the slow yet significant progress already achieved. See *Schuette*, 572 U. S., at 384–390 (SOTOMAYOR, J., dissenting) (collecting statistics from States that have banned the use of race in college admissions); see also Amherst Brief 13 (noting that eliminating the use of race in college admissions will take Black student enrollment at elite universities back to levels this country saw in the early 1960s).

After California amended its State Constitution to prohibit race-conscious college admissions in 1996, for example, "freshmen enrollees from underrepresented minority groups dropped precipitously" in California public universities. Brief for President and Chancellors of the University of California as *Amici Curiae* 4, 9, 11–13. The decline was particularly devastating at California's most selective campuses, where the rates of admission of underrepresented groups "dropped by 50% or more." *Id.*, at 4, 12. At the University of California, Berkeley, a top public university not just in California but also nationally, the percentage of Black students in the freshman class dropped from 6.32% in 1995 to 3.37% in 1998. *Id.*, at 12–13. Latino representation similarly dropped from 15.57% to 7.28% during that period at Berkeley, even though Latinos represented 31% of California public high school graduates. *Id.*, at 13. To this day, the student population at California universities still "reflect[s] a persistent inability to increase opportunities" for all racial groups. *Id.*, at 23. For example, as of 2019, the proportion of Black freshmen at Berkeley was 2.76%, well below the pre-constitutional amendment level in 1996, which was 6.32%. *Ibid.* Latinos composed about 15% of freshmen students at Berkeley in 2019, despite making up 52% of all California public high school graduates. *Id.*, at 24; see also Brief for University of Michigan as *Amicus Curiae* 21–24 (noting similar trends at the University of Michigan from 2006, the last admissions cycle before Michigan's ban on race-conscious admissions took effect,

through present); *id.*, at 24–25 (explaining that the university's "experience is largely consistent with other schools that do not consider race as a factor in admissions," including, for example, the University of Oklahoma's most prestigious campus).

The costly result of today's decision harms not just respondents and students but also our institutions and democratic society more broadly. Dozens of *amici* from nearly every sector of society agree that the absence of race-conscious college admissions will decrease the pipeline of racially diverse college graduates to crucial professions. Those *amici* include the United States, which emphasizes the need for diversity in the Nation's military, see United States Brief 12–18, and in the federal workforce more generally, *id.*, at 19–20 (discussing various federal agencies, including the Federal Bureau of Investigation and the Office of the Director of National Intelligence). The United States explains that "the Nation's military strength and readiness depend on a pipeline of officers who are both highly qualified and racially diverse—and who have been educated in diverse environments that prepare them to lead increasingly diverse forces." *Id.*, at 12. That is true not just at the military service academies but "at civilian universities, including Harvard, that host Reserve Officers' Training Corps (ROTC) programs and educate students who go on to become officers." *Ibid.* Top former military leaders agree. See Brief for Adm. Charles S. Abbot et al. as *Amici Curiae* 3 (noting that in *amici*'s "professional judgment, the status quo—which permits service academies and civilian universities to consider racial diversity as one factor among many in their admissions practices—is essential to the continued vitality of the U. S. military").

Indeed, history teaches that racial diversity is a national security imperative. During the Vietnam War, for example, lack of racial diversity "threatened the integrity and perfor-

mance of the Nation's military" because it fueled "perceptions of racial/ethnic minorities serving as 'cannon fodder' for white military leaders." Military Leadership Diversity Comm'n, From Representation to Inclusion: Diversity Leadership for the 21st-Century Military xvi, 15 (2011); see also, *e.g.*, R. Stillman, Racial Unrest in the Military: The Challenge and the Response, 34 Pub. Admin. Rev. 221, 221–222 (1974) (discussing other examples of racial unrest). Based on "lessons from decades of battlefield experience," it has been the "longstanding military judgment" across administrations that racial diversity "is essential to achieving a mission-ready" military and to ensuring the Nation's "ability to compete, deter, and win in today's increasingly complex global security environment." United States Brief 13 (internal quotation marks omitted). The majority recognizes the compelling need for diversity in the military and the national security implications at stake, see *ante*, at 22, n. 4, but it ends race-conscious college admissions at civilian universities implicating those interests anyway.

Amici also tell the Court that race-conscious college admissions are critical for providing equitable and effective public services. State and local governments require public servants educated in diverse environments who can "identify, understand, and respond to perspectives" in "our increasingly diverse communities." Brief for Southern Governors as *Amici Curiae* 5–8 (Southern Governors Brief). Likewise, increasing the number of students from underrepresented backgrounds who join "the ranks of medical professionals" improves "healthcare access and health outcomes in medically underserved communities." Brief for Massachusetts et al. as *Amici Curiae* 10; see Brief for Association of American Medical Colleges et al. as *Amici Curiae* 5 (noting also that *all* physicians become better practitioners when they learn in a racially diverse environment). So too, greater diversity within the teacher workforce improves student academic achievement in primary public

schools. Brief for Massachusetts et al. as *Amici Curiae* 15–17; see Brief for American Federation of Teachers as *Amicus Curiae* 8 ("[T]here are few professions with broader social impact than teaching"). A diverse pipeline of college graduates also ensures a diverse legal profession, which demonstrates that "the justice system serves the public in a fair and inclusive manner." Brief for American Bar Association as *Amicus Curiae* 18; see also Brief for Law Firm Antiracism Alliance as *Amicus Curiae* 1, 6 (more than 300 law firms in all 50 States supporting race-conscious college admissions in light of the "influence and power" that lawyers wield "in the American system of government").

Examples of other industries and professions that benefit from race-conscious college admissions abound. American businesses emphasize that a diverse workforce improves business performance, better serves a diverse consumer marketplace, and strengthens the overall American economy. Brief for Major American Business Enterprises as *Amici Curiae* 5–27. A diverse pipeline of college graduates also improves research by reducing bias and increasing group collaboration. Brief for Individual Scientists as *Amici Curiae* 13–14. It creates a more equitable and inclusive media industry that communicates diverse viewpoints and perspectives. Brief for Multicultural Media, Telecom and Internet Council, Inc., et al. as *Amici Curiae* 6. It also drives innovation in an increasingly global science and technology industry. Brief for Applied Materials, Inc., et al. as *Amici Curiae* 11–20.

Today's decision further entrenches racial inequality by making these pipelines to leadership roles less diverse. A college degree, particularly from an elite institution, carries with it the benefit of powerful networks and the opportunity for socioeconomic mobility. Admission to college is therefore often the entry ticket to top jobs in workplaces where important decisions are made. The overwhelming majority

of Members of Congress have a college degree.[40] So do most business leaders.[41] Indeed, many state and local leaders in North Carolina attended college in the UNC system. See Southern Governors Brief 8. More than half of judges on the North Carolina Supreme Court and Court of Appeals graduated from the UNC system, for example, and nearly a third of the Governor's cabinet attended UNC. *Ibid.* A less diverse pipeline to these top jobs accumulates wealth and power unequally across racial lines, exacerbating racial disparities in a society that already dispenses prestige and privilege based on race.

The Court ignores the dangerous consequences of an America where its leadership does not reflect the diversity of the People. A system of government that visibly lacks a path to leadership open to every race cannot withstand scrutiny "in the eyes of the citizenry." *Grutter*, 539 U. S., at 332. "[G]ross disparity in representation" leads the public to wonder whether they can ever belong in our Nation's institutions, including this one, and whether those institutions work for them. Tr. of Oral Arg. in No. 21–707, p. 171 ("The Court is going to hear from 27 advocates in this sitting of the oral argument calendar, and two are women, even though women today are 50 percent or more of law school graduates. And I think it would be reasonable for a woman to look at that and wonder, is that a path that's open to me, to be a Supreme Court advocate?" (remarks of Solicitor General Elizabeth Prelogar)).[42]

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[40] K. Schaeffer, Pew Research Center, The Changing Face of Congress in 8 Charts (Feb. 7, 2023).

[41] See J. Martelli & P. Abels, The Education of a Leader: Educational Credentials and Other Characteristics of Chief Executive Officers, J. of Educ. for Bus. 216 (2010); see also J. Moody, Where the Top Fortune 500 CEOs Attended College, U. S. News & World Report (June 16, 2021).

[42] Racial inequality in the pipeline to this institution, too, will deepen. See J. Fogel, M. Hoopes, & G. Liu, Law Clerk Selection and Diversity: Insights From Fifty Sitting Judges of the Federal Courts of Appeals 7–8

By ending race-conscious college admissions, this Court closes the door of opportunity that the Court's precedents helped open to young students of every race. It creates a leadership pipeline that is less diverse than our increasingly diverse society, reserving "positions of influence, affluence, and prestige in America" for a predominantly white pool of college graduates. *Bakke*, 438 U. S., at 401 (opinion of Marshall, J.). At its core, today's decision exacerbates segregation and diminishes the inclusivity of our Nation's institutions in service of superficial neutrality that promotes indifference to inequality and ignores the reality of race.

* * *

True equality of educational opportunity in racially diverse schools is an essential component of the fabric of our democratic society. It is an interest of the highest order and a foundational requirement for the promotion of equal protection under the law. *Brown* recognized that passive race neutrality was inadequate to achieve the constitutional guarantee of racial equality in a Nation where the effects of segregation persist. In a society where race continues to matter, there is no constitutional requirement that institutions attempting to remedy their legacies of racial exclusion must operate with a blindfold.

Today, this Court overrules decades of precedent and imposes a superficial rule of race blindness on the Nation. The devastating impact of this decision cannot be overstated. The majority's vision of race neutrality will entrench racial

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(2022) (noting that from 2005 to 2017, 85% of Supreme Court law clerks were white, 9% were Asian American, 4% were Black, and 1.5% were Latino, and about half of all clerks during that period graduated from two law schools: Harvard and Yale); Brief for American Bar Association as *Amicus Curiae* 25 (noting that more than 85% of lawyers, more than 70% of Article III judges, and more than 80% of state judges in the United States are white, even though white people represent about 60% of the population).

segregation in higher education because racial inequality will persist so long as it is ignored.

Notwithstanding this Court's actions, however, society's progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on. Although the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society's needs for diversity in education. Despite the Court's unjustified exercise of power, the opinion today will serve only to highlight the Court's own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, "the arc of the moral universe" will bend toward racial justice despite the Court's efforts today to impede its progress. Martin Luther King "Our God is Marching On!" Speech (Mar. 25, 1965).

SUPREME COURT OF THE UNITED STATES

Nos. 20–1199 and 21–707

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
20–1199 *v.*
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
21–707 *v.*
UNIVERSITY OF NORTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 29, 2023]

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.*

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal. Yet, today, the Court determines that

*JUSTICE JACKSON did not participate in the consideration or decision of the case in No. 20–1199, and issues this opinion with respect to the case in No. 21–707.

holistic admissions programs like the one that the University of North Carolina (UNC) has operated, consistent with *Grutter* v. *Bollinger*, 539 U. S. 306 (2003), are a problem with respect to achievement of that aspiration, rather than a viable solution (as has long been evident to historians, sociologists, and policymakers alike).

JUSTICE SOTOMAYOR has persuasively established that nothing in the Constitution or Title VI prohibits institutions from taking race into account to ensure the racial diversity of admits in higher education. I join her opinion without qualification. I write separately to expound upon the universal benefits of considering race in this context, in response to a suggestion that has permeated this legal action from the start. Students for Fair Admissions (SFFA) has maintained, both subtly and overtly, that it is *unfair* for a college's admissions process to consider race as one factor in a holistic review of its applicants. See, *e.g.*, Tr. of Oral Arg. 19.

This contention blinks both history and reality in ways too numerous to count. But the response is simple: Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented "intergenerational transmission of inequality" that still plagues our citizenry.[1]

It is *that* inequality that admissions programs such as UNC's help to address, to the benefit of us all. Because the majority's judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.

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[1] M. Oliver & T. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 128 (1997) (Oliver & Shapiro) (emphasis deleted).

I

A

Imagine two college applicants from North Carolina, John and James. Both trace their family's North Carolina roots to the year of UNC's founding in 1789. Both love their State and want great things for its people. Both want to honor their family's legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?

To answer that question, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). Many chapters of America's history appear necessary, given the opinions that my colleagues in the majority have issued in this case.

Justice Thurgood Marshall recounted the genesis:

> "Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave." *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 387–388 (1978).

Slavery should have been (and was to many) self-evidently dissonant with our avowed founding principles. When the time came to resolve that dissonance, eleven States chose slavery. With the Union's survival at stake, Frederick Douglass noted, Black Americans in the South "were almost the only reliable friends the nation had," and "but for their help . . . the Rebels might have succeeded in

breaking up the Union."[2] After the war, Senator John Sherman defended the proposed Fourteenth Amendment in a manner that encapsulated our Reconstruction Framers' highest sentiments: "We are bound by every obligation, by [Black Americans'] service on the battlefield, by their heroes who are buried in our cause, by their patriotism in the hours that tried our country, we are bound to protect them and all their natural rights."[3]

To uphold that promise, the Framers repudiated this Court's holding in *Dred Scott* v. *Sandford*, 19 How. 393 (1857), by crafting Reconstruction Amendments (and associated legislation) that transformed our Constitution and society.[4] Even after this Second Founding—when the need to right historical wrongs should have been clear beyond cavil—opponents insisted that vindicating equality in this manner slighted White Americans. So, when the Reconstruction Congress passed a bill to secure all citizens "the same [civil] right[s]" as "enjoyed by white citizens," 14 Stat. 27, President Andrew Johnson vetoed it because it "discriminat[ed] . . . in favor of the negro."[5]

That attitude, and the Nation's associated retreat from Reconstruction, made prophesy out of Congressman Thaddeus Stevens's fear that "those States will all . . . keep up

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[2] An Appeal to Congress for Impartial Suffrage, Atlantic Monthly (Jan. 1867), in 2 The Reconstruction Amendments: The Essential Documents 324 (K. Lash ed. 2021) (Lash).

[3] Speech of Sen. John Sherman (Sept. 28, 1866) (Sherman), in *id.*, at 276; see also W. Du Bois, Black Reconstruction in America 162 (1998) (Du Bois).

[4] See Sherman 276; M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 48, 71–75, 91, 173 (1986).

[5] Message Accompanying Veto of the Civil Rights Bill (Mar. 27, 1866), in Lash 145.

this discrimination, and crush to death the hated freedmen."[6] And this Court facilitated that retrenchment.[7] Not just in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), but "in almost every instance, the Court chose to restrict the scope of the second founding."[8] Thus, thirteen years pre-*Plessy*, in the *Civil Rights Cases*, 109 U. S. 3 (1883), our predecessors on this Court invalidated Congress's attempt to enforce the Reconstruction Amendments via the Civil Rights Act of 1875, lecturing that "there must be some stage . . . when [Black Americans] tak[e] the rank of a mere citizen, and ceas[e] to be the special favorite of the laws." *Id.*, at 25. But Justice Harlan knew better. He responded: "What the nation, through Congress, has sought to accomplish in reference to [Black people] is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.*, at 61 (dissenting opinion).

Justice Harlan dissented alone. And the betrayal that this Court enabled had concrete effects. Enslaved Black people had built great wealth, but only for enslavers.[9] No surprise, then, that freedmen leapt at the chance to control their own labor and to build their own financial security.[10] Still, White southerners often "simply refused to sell land to blacks," even when not selling was economically foolish.[11] To bolster private exclusion, States sometimes passed laws forbidding such sales.[12] The inability to build wealth

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[6] Speech Introducing the [Fourteenth] Amendment (May 8, 1866), in *id.*, at 159; see Du Bois 670–710.

[7] E. Foner, The Second Founding 125–167 (2019) (Foner).

[8] *Id.*, at 128.

[9] M. Baradaran, The Color of Money: Black Banks and the Racial Wealth Gap 9–11 (2017) (Baradaran).

[10] Foner 179; see also Baradaran 15–16; I. Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration 37 (2010) (Wilkerson).

[11] Baradaran 18.

[12] *Ibid.*

through that most American of means forced Black people into sharecropping roles, where they somehow always tended to find themselves in debt to the landowner when the growing season closed, with no hope of recourse against the ever-present cooking of the books.[13]

Sharecropping is but one example of race-linked obstacles that the law (and private parties) laid down to hinder the progress and prosperity of Black people. Vagrancy laws criminalized free Black men who failed to work for White landlords.[14] Many States barred freedmen from hunting or fishing to ensure that they could not live without entering *de facto* reenslavement as sharecroppers.[15] A cornucopia of laws (*e.g.*, banning hitchhiking, prohibiting encouraging a laborer to leave his employer, and penalizing those who prompted Black southerners to migrate northward) ensured that Black people could not freely seek better lives elsewhere.[16] And when statutes did not ensure compliance, state-sanctioned (and private) violence did.[17]

Thus emerged Jim Crow—a system that was, as much as anything else, a comprehensive scheme of economic exploitation to replace the Black Codes, which themselves had replaced slavery's form of comprehensive economic exploitation.[18] Meanwhile, as Jim Crow ossified, the Federal

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[13] R. Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 154 (2017) (Rothstein); Baradaran 33–34; Wilkerson 53–55.

[14] Baradaran 20–21; Du Bois 173–179, 694–696, 698–699; R. Goluboff, The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 Duke L. J. 1609, 1656–1659 (2001) (Goluboff); Wilkerson 152 (noting persistence of this practice "well into the 1940s").

[15] Baradaran 20.

[16] Goluboff 1656–1659 (recounting presence of these practices well into the 20th century); Wilkerson 162–163.

[17] Rothstein 154.

[18] C. Black, The Lawfulness of the Segregation Decisions, 69 Yale L. J. 421, 424 (1960); Foner 47–48; Du Bois 179, 696; Baradaran 38–39.

Government was "giving away land" on the western frontier, and with it "the opportunity for upward mobility and a more secure future," over the 1862 Homestead Act's three-quarter-century tenure.[19] Black people were exceedingly unlikely to be allowed to share in those benefits, which by one calculation may have advantaged approximately 46 million Americans living today.[20]

Despite these barriers, Black people persisted. Their so-called Great Migration northward accelerated during and after the First World War.[21] Like clockwork, American cities responded with racially exclusionary zoning (and similar policies).[22] As a result, Black migrants had to pay disproportionately high prices for disproportionately subpar housing.[23] Nor did migration make it more likely for Black people to access home ownership, as banks would not lend to Black people, and in the rare cases banks would fund home loans, exorbitant interest rates were charged.[24] With Black people still locked out of the Homestead Act giveaway, it is no surprise that, when the Great Depression arrived, race-based wealth, health, and opportunity gaps were the norm.[25]

Federal and State Governments' selective intervention further exacerbated the disparities. Consider, for example,

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[19] T. Shanks, The Homestead Act: A Major Asset-Building Policy in American History, in Inclusion in the American Dream: Assets, Poverty, and Public Policy 23–25 (M. Sherraden ed. 2005) (Shanks); see also Baradaran 18.

[20] Shanks 32–37; Oliver & Shapiro 37–38.

[21] Wilkerson 8–10; Rothstein 155.

[22] *Id.*, at 43–50; Baradaran 90–92.

[23] *Ibid.*; Rothstein 172–173; Wilkerson 269–271.

[24] Baradaran 90.

[25] I. Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 29–35 (2005) (Katznelson).

the federal Home Owners' Loan Corporation (HOLC), created in 1933.[26] HOLC purchased mortgages threatened with foreclosure and issued new, amortized mortgages in their place.[27] Not only did this mean that recipients of these mortgages could gain equity while paying off the loan, successful full payment would make the recipient a homeowner.[28] Ostensibly to identify (and avoid) the riskiest recipients, the HOLC "created color-coded maps of every metropolitan area in the nation."[29] Green meant safe; red meant risky. And, regardless of class, every neighborhood with Black people earned the red designation.[30]

Similarly, consider the Federal Housing Administration (FHA), created in 1934, which insured highly desirable bank mortgages. Eligibility for this insurance required an FHA appraisal of the property to ensure a low default risk.[31] But, nationwide, it was FHA's established policy to provide "no guarantees for mortgages to African Americans, or to whites who might lease to African Americans," irrespective of creditworthiness.[32] No surprise, then, that "[b]etween 1934 and 1968, 98 percent of FHA loans went to white Americans," with whole cities (ones that had a disproportionately large number of Black people due to housing segregation) sometimes being deemed ineligible for FHA intervention on racial grounds.[33] The Veterans Administration operated similarly.[34]

One more example: the Federal Home Loan Bank Board

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[26] D. Massey & N. Denton, American Apartheid: Segregation and the Making of the Underclass 51–53 (1993); Oliver & Shapiro 16–18.
[27] Rothstein 63.
[28] *Id.*, at 63–64.
[29] *Id.*, at 64; see Oliver & Shapiro 16–18; Baradaran 105.
[30] Rothstein 64.
[31] *Ibid.*
[32] *Id.*, at 67.
[33] Baradaran 108; see Rothstein 69–75.
[34] *Id.*, at 9, 13, 70.

"chartered, insured, and regulated savings and loan associations from the early years of the New Deal."[35] But it did "not oppose the denial of mortgages to African Americans until 1961" (and even then opposed discrimination ineffectively).[36]

The upshot of all this is that, due to government policy choices, "[i]n the suburban-shaping years between 1930 and 1960, fewer than one percent of all mortgages in the nation were issued to African Americans."[37] Thus, based on their race, Black people were "[l]ocked out of the greatest mass-based opportunity for wealth accumulation in American history."[38]

For present purposes, it is significant that, in so excluding Black people, government policies affirmatively operated—one could say, affirmatively acted—to dole out preferences to those who, if nothing else, were not Black. Those past preferences carried forward and are reinforced today by (among other things) the benefits that flow to homeowners and to the holders of other forms of capital that are hard to obtain unless one already has assets.[39]

This discussion of how the existing gaps were formed is merely illustrative, not exhaustive. I will pass over Congress's repeated crafting of family-, worker-, and retiree-protective legislation to channel benefits to White people, thereby excluding Black Americans from what was otherwise "a revolution in the status of most working Americans."[40] I will also skip how the G. I. Bill's "creation of . . .

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[35] *Id.*, at 108.

[36] *Ibid.*

[37] R. Schragger, The Limits of Localism, 100 Mich. L. Rev. 371, 411, n. 144 (2001); see also Rothstein 182–183.

[38] Oliver & Shapiro 18.

[39] *Id.*, at 43–44; Baradaran 109, 253–254; A. Dickerson, Shining a Bright Light on the Color of Wealth, 120 Mich. L. Rev. 1085, 1100 (2022) (Dickerson).

[40] Katznelson 53; see *id.*, at 22, 29, 42–48, 53–61; Rothstein 31, 155–156.

middle-class America" (by giving $95 billion to veterans and their families between 1944 and 1971) was "deliberately designed to accommodate Jim Crow."[41] So, too, will I bypass how Black people were prevented from partaking in the consumer credit market—a market that helped White people who could access it build and protect wealth.[42] Nor will time and space permit my elaborating how local officials' racial hostility meant that even those benefits that Black people could formally obtain were unequally distributed along racial lines.[43] And I could not possibly discuss every way in which, in light of this history, facially race-blind policies *still* work race-based harms today (*e.g.*, racially disparate tax-system treatment; the disproportionate location of toxic-waste facilities in Black communities; or the deliberate action of governments at all levels in designing interstate highways to bisect and segregate Black urban communities).[44]

The point is this: Given our history, the origin of persistent race-linked gaps should be no mystery. It has never been a deficiency of Black Americans' desire or ability to, in Frederick Douglass's words, "stand on [their] own legs."[45] Rather, it was always simply what Justice Harlan recognized 140 years ago—the persistent and pernicious denial of "what had already been done in every State of the Union for the white race." *Civil Rights Cases*, 109 U. S., at 61 (dissenting opinion).

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[41] Katznelson 113–114; see *id.*, at 113–141; see also, *e.g.*, *id.*, at 139–140 (Black veterans, North and South, were routinely denied loans that White veterans received); Rothstein 167.

[42] Baradaran 112–113.

[43] Katznelson 22–23; Rothstein 167.

[44] *Id.*, at 54–56, 65, 127–131, 217; Stanford Institute for Economic Policy Research, Measuring and Mitigating Disparities in Tax Audits 1–7 (2023); Dickerson 1096–1097.

[45] What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, in 4 The Frederick Douglass Papers 68 (J. Blassingame & J. McKivigan eds. 1991).

B

History speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.

Start with wealth and income. Just four years ago, in 2019, Black families' median wealth was approximately $24,000.[46] For White families, that number was approximately eight times as much (about $188,000).[47] These wealth disparities "exis[t] at every income and education level," so, "[o]n average, white families with college degrees have over $300,000 more wealth than black families with college degrees."[48] This disparity has also accelerated over time—from a roughly $40,000 gap between White and Black household median net worth in 1993 to a roughly $135,000 gap in 2019.[49] Median income numbers from 2019 tell the same story: $76,057 for White households, $98,174 for Asian households, $56,113 for Latino households, and $45,438 for Black households.[50]

These financial gaps are unsurprising in light of the link

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[46] Dickerson 1086 (citing data from 2019 Federal Reserve Survey of Consumer Finances); see also Rothstein 184 (reporting, in 2017, even lower median-wealth number of $11,000).

[47] Dickerson 1086; see also Rothstein 184 (reporting even larger relative gap in 2017 of $134,000 to $11,000).

[48] Baradaran 249; see also Dickerson 1089–1090; Oliver & Shapiro 94–95, 100–101, 110–111, 197.

[49] See Brief for National Academy of Education as *Amicus Curiae* 14–15 (citing U. S. Census Bureau statistics).

[50] *Id.*, at 14 (citing U. S. Census Bureau statistics); Rothstein 184 (reporting similarly stark White/Black income gap numbers in 2017). Early returns suggest that the COVID–19 pandemic exacerbated these disparities. See E. Derenoncourt, C. Kim, M. Kuhn, & M. Schularick, Wealth of Two Nations: The U. S. Racial Wealth Gap, 1860–2020, p. 22 (Fed. Reserve Bank of Minneapolis, Opportunity & Inclusive Growth Inst., Working Paper No. 59, June 2022) (Wealth of Two Nations); L. Bollinger & G. Stone, A Legacy of Discrimination: The Essential Constitutionality of Affirmative Action 103 (2023) (Bollinger & Stone).

between home ownership and wealth. Today, as was true 50 years ago, Black home ownership trails White home ownership by approximately 25 percentage points.[51] Moreover, Black Americans' homes (relative to White Americans') constitute a greater percentage of household wealth, yet tend to be worth less, are subject to higher effective property taxes, and generally lost more value in the Great Recession.[52]

From those markers of social and financial unwellness flow others. In most state flagship higher educational institutions, the percentage of Black undergraduates is lower than the percentage of Black high school graduates in that State.[53] Black Americans in their late twenties are about half as likely as their White counterparts to have college degrees.[54] And because lower family income and wealth force students to borrow more, those Black students who do graduate college find themselves four years out with about $50,000 in student debt—nearly twice as much as their White compatriots.[55]

As for postsecondary professional arenas, despite being about 13% of the population, Black people make up only about 5% of lawyers.[56] Such disparity also appears in the business realm: Of the roughly 1,800 chief executive officers to have appeared on the well-known Fortune 500 list, fewer than 25 have been Black (as of 2022, only six are Black).[57] Furthermore, as the COVID–19 pandemic raged, Black-owned small businesses failed at dramatically higher rates

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[51] *Id.*, at 87; Wealth of Two Nations 77–79.
[52] *Id.*, at 78, 89; Bollinger & Stone 94–95; Dickerson 1101.
[53] Bollinger & Stone 99–100.
[54] *Id.*, at 99, and n. 58.
[55] Dickerson 1088; Bollinger & Stone 100, and n. 63.
[56] ABA, Profile of the Legal Profession 33 (2020).
[57] Bollinger & Stone 106; Brief for HR Policy Association as *Amicus Curiae* 18–19.

than White-owned small businesses, partly due to the disproportionate denial of the forgivable loans needed to survive the economic downturn.[58]

Health gaps track financial ones. When tested, Black children have blood lead levels that are twice the rate of White children—"irreversible" contamination working irremediable harm on developing brains.[59] Black (and Latino) children with heart conditions are more likely to die than their White counterparts.[60] Race-linked mortality-rate disparity has also persisted, and is highest among infants.[61]

So, too, for adults: Black men are twice as likely to die from prostate cancer as White men and have lower 5-year cancer survival rates.[62] Uterine cancer has spiked in recent years among all women—but has spiked highest for Black women, who die of uterine cancer at nearly twice the rate of "any other racial or ethnic group."[63] Black mothers are up to four times more likely than White mothers to die as a result of childbirth.[64] And COVID killed Black Americans at higher rates than White Americans.[65]

"Across the board, Black Americans experience the highest rates of obesity, hypertension, maternal mortality, infant mortality, stroke, and asthma."[66] These and other disparities—the predictable result of opportunity disparities—

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[58] Dickerson 1102.

[59] Rothstein 230.

[60] Brief for Association of American Medical Colleges et al. as *Amici Curiae* 8 (AMC Brief).

[61] C. Caraballo et al., Excess Mortality and Years of Potential Life Lost Among the Black Population in the U. S., 1999–2020, 329 JAMA 1662, 1663, 1667 (May 16, 2023) (Caraballo).

[62] Bollinger & Stone 101.

[63] S. Whetstone et al., Health Disparities in Uterine Cancer: Report From the Uterine Cancer Evidence Review Conference, 139 Obstetrics & Gynecology 645, 647–648 (2022).

[64] AMC Brief 8–9.

[65] Bollinger & Stone 101; Caraballo 1663–1665, 1668.

[66] Bollinger & Stone 101 (footnotes omitted).

lead to at least 50,000 excess deaths a year for Black Americans vis-à-vis White Americans.[67] That is 80 million excess years of life lost from just 1999 through 2020.[68]

Amici tell us that "race-linked health inequities pervad[e] nearly every index of human health" resulting "in an overall reduced life expectancy for racial and ethnic minorities that cannot be explained by genetics."[69] Meanwhile—tying health and wealth together—while she lays dying, the typical Black American "pay[s] more for medical care and incur[s] more medical debt."[70]

C

We return to John and James now, with history in hand. It is hardly John's fault that he is the seventh generation to graduate from UNC. UNC should permit him to honor that legacy. Neither, however, was it James's (or his family's) fault that he would be the first. And UNC ought to be able to consider why.

Most likely, seven generations ago, when John's family was building its knowledge base and wealth potential on the university's campus, James's family was enslaved and laboring in North Carolina's fields. Six generations ago, the North Carolina "Redeemers" aimed to nullify the results of the Civil War through terror and violence, marauding in hopes of excluding all who looked like James from equal citizenship.[71] Five generations ago, the North Carolina Red Shirts finished the job.[72] Four (and three) generations ago, Jim Crow was so entrenched in the State of North Carolina

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[67] Caraballo 1667.

[68] *Ibid.*

[69] AMC Brief 9.

[70] Bollinger & Stone 100.

[71] See Report on the Alleged Outrages in the Southern States, S. Rep. No. 1, 42d Cong., 1st Sess., I–XXXII (1871).

[72] See D. Tokaji, Realizing the Right To Vote: The Story of *Thornburg v. Gingles*, in Election Law Stories 133–139 (J. Douglas & E. Mazo eds. 2016); see Foner xxii.

that UNC "enforced its own Jim Crow regulations."[73] Two generations ago, North Carolina's Governor still railed against "'integration for integration's sake'"—and UNC Black enrollment was minuscule.[74] So, at bare minimum, one generation ago, James's family was six generations behind because of their race, making John's six generations ahead.

These stories are not every student's story. But they are many students' stories. To demand that colleges ignore race in today's admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters.[75] It also condemns our society to never escape the past that explains *how and why* race matters to the very concept of who "merits" admission.

Permitting (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment's core promise. UNC considers race as one of many factors in order to best assess the entire unique import of John's and James's individual lives and inheritances *on an equal basis*. Doing so involves acknowledging (not ignoring) the seven generations' worth of historical privileges and disadvantages that each of these applicants was born with when his own life's journey started a mere 18 years ago.

II

Recognizing all this, UNC has developed a holistic review process to evaluate applicants for admission. Students

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[73] 3 App. 1683.

[74] *Id.*, at 1687–1688.

[75] See O. James, Valuing Identity, 102 Minn. L. Rev. 127, 162 (2017); P. Karlan & D. Levinson, Why Voting Is Different, 84 Cal. L. Rev. 1201, 1217 (1996).

must submit standardized test scores and other conventional information.[76] But applicants are *not* required to submit demographic information like gender and race.[77] UNC considers whatever information each applicant submits using a nonexhaustive list of 40 criteria grouped into eight categories: "academic performance, academic program, standardized testing, extracurricular activity, special talent, essay criteria, background, and personal criteria."[78]

Drawing on those 40 criteria, a UNC staff member evaluating John and James would consider, with respect to each, his "engagement outside the classroom; persistence of commitment; demonstrated capacity for leadership; contributions to family, school, and community; work history; [and his] unique or unusual interests."[79] Relevant, too, would be his "relative advantage or disadvantage, as indicated by family income level, education history of family members, impact of parents/guardians in the home, or formal education environment; experience of growing up in rural or center-city locations; [and his] status as child or stepchild of Carolina alumni."[80] The list goes on. The process is holistic, through and through.

So where does race come in? According to UNC's admissions-policy document, reviewers may also consider "the race or ethnicity of any student" (if that information is provided) in light of UNC's interest in diversity.[81] And, yes, "the race or ethnicity of *any* student may—or may not—receive a 'plus' in the evaluation process depending on the in-

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[76] 567 F. Supp. 3d 580, 595 (MDNC 2021).

[77] *Id.*, at 596; 1 App. 348; Decl. of J. Rosenberg in No. 1:14–cv–954 (MDNC, Jan. 18, 2019), ECF Doc. 154–7, ¶10 (Rosenberg).

[78] 1 App. 350; see also 3 *id.*, at 1414–1415.

[79] *Id.*, at 1414.

[80] *Id.*, at 1415.

[81] *Id.*, at 1416; see also 2 *id.*, at 706; Rosenberg ¶22.

dividual circumstances revealed in the student's application."[82] Stephen Farmer, the head of UNC's Office of Undergraduate Admissions, confirmed at trial (under oath) that UNC's admissions process operates in this fashion.[83]

Thus, to be crystal clear: *Every* student who chooses to disclose his or her race is eligible for such a race-linked plus, just as any student who chooses to disclose his or her unusual interests can be credited for what those interests might add to UNC. The record supports no intimation to the contrary. Eligibility is just that; a plus is never automatically awarded, never considered in numerical terms, and never automatically results in an offer of admission.[84] There are no race-based quotas in UNC's holistic review process.[85] In fact, during the admissions cycle, the school prevents anyone who knows the overall racial makeup of the admitted-student pool from reading any applications.[86]

More than that, every applicant is also eligible for a diversity-linked plus (beyond race) more generally.[87] And, notably, UNC understands diversity broadly, including "socioeconomic status, first-generation college status . . . political beliefs, religious beliefs . . . diversity of thoughts, experiences, ideas, and talents."[88]

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[82] 3 App. 1416 (emphasis added); see also 2 *id.*, at 631–639.

[83] 567 F. Supp. 3d, at 591, 595; 2 App. 638 (Farmer, when asked how race could "b[e] a potential plus" for "students other than underrepresented minority students," pointing to a North Carolinian applicant, originally from Vietnam, who identified as "Asian and Montagnard"); *id.*, at 639 (Farmer stating that "the whole of [that student's] background was appealing to us when we evaluated her applicatio[n]," and noting how her "story reveals sometimes how hard it is to separate race out from other things that we know about a student. That was integral to that student's story. It was part of our understanding of her, and it played a role in our deciding to admit her").

[84] 3 *id.*, at 1416; Rosenberg ¶25.

[85] 2 App. 631.

[86] *Id.*, at 636–637, 713.

[87] 3 *id.*, at 1416; 2 *id.*, at 699–700.

[88] *Id.*, at 699; see also Rosenberg ¶24.

A plus, by its nature, can certainly matter to an admissions case. But make no mistake: When an applicant chooses to disclose his or her race, UNC treats that aspect of identity on par with other aspects of applicants' identity that affect who they are (just like, say, where one grew up, or medical challenges one has faced).[89] And race is considered alongside any other factor that sheds light on what attributes applicants will bring to the campus and whether they are likely to excel once there.[90] A reader of today's majority opinion could be forgiven for misunderstanding how UNC's program really works, or for missing that, under UNC's holistic review process, a White student could receive a diversity plus while a Black student might not.[91]

UNC does not do all this to provide handouts to either John or James. It does this to ascertain who among its tens

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[89] 2 App. 706, 708; 3 *id.*, at 1415–1416.

[90] 2 *id.*, at 706, 708; 3 *id.*, at 1415–1416.

[91] A reader might miss this because the majority does not bother to drill down on how UNC's holistic admissions process operates. Perhaps that explains its failure to apprehend (by reviewing the evidence presented at trial) that everyone, no matter their race, is eligible for a diversity-linked plus. Compare *ante*, at 5, and n. 1, with 3 App. 1416, and *supra*, at 17. The majority also repeatedly mischaracterizes UNC's holistic admissions-review process as a "race-based admissions system," and insists that UNC's program involves "separating students on the basis of race" and "pick[ing only certain] races to benefit." *Ante*, at 5, and n. 1, 26, 38. These claims would be concerning if they had any basis in the record. The majority appears to have misunderstood (or categorically rejected) the established fact that UNC treats race as merely one of the many aspects of an applicant that, in the real world, matter to understanding the whole person. Moreover, its holistic review process involves reviewing a wide variety of personal criteria, not just race. Every applicant competes against thousands of other applicants, each of whom has personal qualities that are taken into account and that other applicants do not—and could not—have. Thus, the elimination of the race-linked plus would *still* leave SFFA's members competing against thousands of other applicants to UNC, each of whom has potentially plus-conferring qualities that a given SFFA member does not.

of thousands of applicants has the capacity to take full advantage of the opportunity to attend, and contribute to, this prestigious institution, and thus merits admission.[92] And UNC has concluded that ferreting this out requires understanding the *full* person, which means taking seriously not just SAT scores or whether the applicant plays the trumpet, but also any way in which the applicant's race-linked experience bears on his capacity and merit. In this way, UNC is able to value what it means for James, whose ancestors received no race-based advantages, to make himself competitive for admission to a flagship school nevertheless. Moreover, recognizing this aspect of James's story does not preclude UNC from valuing John's legacy or any obstacles that his story reflects.

So, to repeat: UNC's program permits, but does not require, admissions officers to value both John's and James's love for their State, their high schools' rigor, and whether either has overcome obstacles that are indicative of their "persistence of commitment."[93] It permits, but does not require, them to value John's identity as a child of UNC alumni (or, perhaps, if things had turned out differently, as a first-generation White student from Appalachia whose family struggled to make ends meet during the Great Recession). And it permits, but does not require, them to value James's race—not in the abstract, but as an element of who he is, no less than his love for his State, his high school courses, and the obstacles he has overcome.

Understood properly, then, what SFFA caricatures as an unfair race-based preference cashes out, in a holistic system, to a personalized assessment of the advantages and disadvantages that every applicant might have received by accident of birth plus all that has happened to them since. It ensures a full accounting of everything that bears on the

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[92] See 3 App. 1409, 1414, 1416.

[93] *Id.*, at 1414–1415.

individual's resilience and likelihood of enhancing the UNC campus. It also forecasts his potential for entering the wider world upon graduation and making a meaningful contribution to the larger, collective, societal goal that the Equal Protection Clause embodies (its guarantee that the United States of America offers genuinely equal treatment to every person, regardless of race).

Furthermore, and importantly, the fact that UNC's holistic process ensures a full accounting makes it far from clear that any particular applicant of color will finish ahead of any particular nonminority applicant. For example, as the District Court found, a higher percentage of the most academically excellent in-state Black candidates (as SFFA's expert defined academic excellence) were denied admission than similarly qualified White and Asian American applicants.[94] That, if nothing else, is indicative of a genuinely

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[94] See 567 F. Supp. 3d, at 617, 619; 3 App. 1078–1080. The majority cannot deny this factual finding. Instead, it conducts its own back-of-the-envelope calculations (its numbers appear nowhere in the District Court's opinion) regarding "the *overall* acceptance rates of academically excellent applicants to UNC," in an effort to trivialize the District Court's conclusion. *Ante*, at 5, n. 1. I am inclined to stick with the District Court's findings over the majority's unauthenticated calculations. Even when the majority's ad hoc statistical analysis is taken at face value, it hardly supports what the majority wishes to intimate: that Black students are being admitted based on UNC's myopic focus on "race—and race alone." *Ante*, at 28, n. 6. As the District Court observed, if these Black students "were largely defined in the admissions process by their race, one would expect to find that *every*" such student "demonstrating academic excellence . . . would be admitted." 567 F. Supp. 3d, at 619 (emphasis added). Contrary to the majority's narrative, "race does not even act as a tipping point for some students with otherwise exceptional qualifications." *Ibid.* Moreover, as the District Court also found, UNC does not even use the bespoke "academic excellence" metric that SFFA's expert "'invented'" for this litigation. *Id.*, at 617, 619; see also *id.*, at 624–625. The majority's calculations of overall acceptance rates by race on *that* metric bear scant relationship to, and thus are no indictment of, how UNC's admissions process actually works (a recurring theme in its opinion).

holistic process; it is evidence that, both in theory and in practice, UNC recognizes that race—like any other aspect of a person—may bear on where both John and James start the admissions relay, but will not fully determine whether either eventually crosses the finish line.

III

A

The majority seems to think that race blindness solves the problem of race-based disadvantage. But the irony is that requiring colleges to ignore the initial race-linked opportunity gap between applicants like John and James will inevitably widen that gap, not narrow it. It will delay the day that every American has an equal opportunity to thrive, regardless of race.

SFFA similarly asks us to consider how much longer UNC will be able to justify considering race in its admissions process. Whatever the answer to that question was yesterday, today's decision will undoubtedly extend the duration of our country's need for such race consciousness, because the justification for admissions programs that account for race is inseparable from the race-linked gaps in health, wealth, and well-being that still exist in our society (the closure of which today's decision will forestall).

To be sure, while the gaps are stubborn and pernicious, Black people, and other minorities, have generally been doing better.[95] But those improvements have only been made possible because institutions like UNC have been willing to grapple forthrightly with the burdens of history. SFFA's complaint about the "indefinite" use of race-conscious admissions programs, then, is a non sequitur. These programs respond to deep-rooted, objectively measurable problems; their definite end will be when we succeed, together, in solving those problems.

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[95] See Bollinger & Stone 86, 103.

Accordingly, while there are many perversities of today's judgment, the majority's failure to recognize that programs like UNC's carry with them the seeds of their own destruction is surely one of them. The ultimate goal of recognizing James's full story and (potentially) admitting him to UNC is to give him the necessary tools to contribute to closing the equity gaps discussed in Part I, *supra*, so that he, his progeny—and therefore all Americans—can compete without race mattering in the future. That intergenerational project is undeniably a worthy one.

In addition, and notably, that end is not fully achieved just because James is admitted. Schools properly care about preventing racial isolation on campus because research shows that it matters for students' ability to learn and succeed while in college if they live and work with at least some other people who look like them and are likely to have similar experiences related to that shared characteristic.[96] Equally critical, UNC's program ensures that students who don't share the same stories (like John and James) will interact in classes and on campus, and will thereby come to understand each other's stories, which *amici* tell us improves cognitive abilities and critical-thinking skills, reduces prejudice, and better prepares students for postgraduate life.[97]

Beyond campus, the diversity that UNC pursues for the betterment of its students and society is not a trendy slogan. It saves lives. For marginalized communities in North Carolina, it is critically important that UNC and other area institutions produce highly educated professionals of color. Research shows that Black physicians are more likely to accurately assess Black patients' pain tolerance and treat

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[96] See, *e.g.*, Brief for University of Michigan as *Amicus Curiae* 6, 24; Brief for President and Chancellors of University of California as *Amici Curiae* 20–29; Brief for American Psychological Association et al. as *Amici Curiae* 14–16, 21–23 (APA Brief).

[97] *Id.*, at 14–20, 23–27.

them accordingly (including, for example, prescribing them appropriate amounts of pain medication).[98] For high-risk Black newborns, having a Black physician more than doubles the likelihood that the baby will live, and not die.[99] Studies also confirm what common sense counsels: Closing wealth disparities through programs like UNC's—which, beyond diversifying the medical profession, open doors to every sort of opportunity—helps address the aforementioned health disparities (in the long run) as well.[100]

Do not miss the point that ensuring a diverse student body in higher education helps *everyone*, not just those who, due to their race, have directly inherited distinct disadvantages with respect to their health, wealth, and well-being. *Amici* explain that students of every race will come to have a greater appreciation and understanding of civic virtue, democratic values, and our country's commitment to equality.[101] The larger economy benefits, too: When it comes down to the brass tacks of dollars and cents, ensuring diversity will, if permitted to work, help save hundreds of billions of dollars annually (by conservative estimates).[102]

Thus, we should be celebrating the fact that UNC, once a stronghold of Jim Crow, has now come to understand this.

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[98] AMC Brief 4, 14; see also Brief for American Federation of Teachers as *Amicus Curiae* 10 (AFT Brief) (collecting further studies on the "tangible benefits" of patients' access to doctors who look like them).

[99] AMC Brief 4.

[100] National Research Council, New Horizons in Health: An Integrative Approach 100–111 (2001); Pollack et al., Should Health Studies Measure Wealth? A Systematic Review, 33 Am. J. Preventative Med. 250, 252, 261–263 (2007); see also Part I–B, *supra*.

[101] See APA Brief 14–20, 23–27 (collecting studies); AFT Brief 11–12 (same); Brief for National School Boards Association et al. as *Amici Curiae* 6–11 (same); see also 567 F. Supp. 3d, at 592–593, 655–656 (factual findings in this case with respect to these benefits).

[102] LaVeist et al., The Economic Burden of Racial, Ethnic, and Educational Health Inequities in the U. S., 329 JAMA 1682, 1683–1684, 1689, 1691 (May 16, 2023).

The flagship educational institution of a former Confederate State has embraced its constitutional obligation to afford genuine equal protection to applicants, and, by extension, to the broader polity that its students will serve after graduation. Surely that is progress for a university that once engaged in the kind of patently offensive race-dominated admissions process that the majority decries.

With its holistic review process, UNC now treats race as merely one aspect of an applicant's life, when race played a totalizing, all-encompassing, and singularly determinative role for applicants like James for most of this country's history: No matter what else was true about him, being Black meant he had no shot at getting in (the ultimate race-linked uneven playing field). Holistic programs like UNC's reflect the reality that Black students have only relatively recently been permitted to get into the admissions game at all. Such programs also reflect universities' clear-eyed optimism that, one day, race *will* no longer matter.

So much upside. Universal benefits ensue from holistic admissions programs that allow consideration of *all* factors material to merit (including race), and that thereby facilitate diverse student populations. Once trained, those UNC students who have thrived in the university's diverse learning environment are well equipped to make lasting contributions in a variety of realms and with a variety of colleagues, which, in turn, will steadily decrease the salience of race for future generations. Fortunately, UNC and other institutions of higher learning are already on this beneficial path. In fact, all that they have needed to continue moving this country forward (toward full achievement of our Nation's founding promises) is for this Court to get out of the way and let them do their jobs. To our great detriment, the majority cannot bring itself to do so.

B

The overarching reason the majority gives for becoming

an impediment to racial progress—that its own conception of the Fourteenth Amendment's Equal Protection Clause leaves it no other option—has a wholly self-referential, two-dimensional flatness. The majority and concurring opinions rehearse this Court's idealistic vision of racial equality, from *Brown* forward, with appropriate lament for past indiscretions. See, *e.g.*, *ante*, at 11. But the race-linked gaps that the law (aided by this Court) previously founded and fostered—which indisputably define our present reality—are strangely absent and do not seem to matter.

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems.

No one benefits from ignorance. Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today's ruling makes things worse, not better. The best that can be said of the majority's perspective is that it proceeds (ostrich-like) from the hope that preventing consideration of race will end racism. But if that is its motivation, the majority proceeds in vain. If the colleges of this country are required to ignore a thing that matters, it will not just go away. It will take *longer* for racism to leave us. And, ultimately, ignoring race just makes it matter more.[103]

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[103] JUSTICE THOMAS's prolonged attack, *ante*, at 49–55 (concurring opinion), responds to a dissent I did not write in order to assail an admissions program that is not the one UNC has crafted. He does not dispute any historical or present fact about the origins and continued existence of race-based disparity (nor could he), yet is somehow persuaded that these realities have no bearing on a fair assessment of "individual achieve-

The only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish.

* * *

As the Civil War neared its conclusion, General William T. Sherman and Secretary of War Edwin Stanton convened a meeting of Black leaders in Savannah, Georgia. During the meeting, someone asked Garrison Frazier, the group's spokesperson, what "freedom" meant to him. He answered, "'placing us where we could reap the fruit of our own labor, and take care of ourselves . . . to have land, and turn it and

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ment," *ante*, at 51. JUSTICE THOMAS's opinion also demonstrates an obsession with race consciousness that far outstrips my or UNC's holistic understanding that race can be a factor that affects applicants' unique life experiences. How else can one explain his detection of "an organizing principle based on race," a claim that our society is "fundamentally racist," and a desire for Black "victimhood" or racial "silo[s]," *ante*, at 49–52, in this dissent's approval of an admissions program that advances all Americans' shared pursuit of true equality by treating race "on par with" other aspects of identity, *supra*, at 18? JUSTICE THOMAS ignites too many more straw men to list, or fully extinguish, here. The takeaway is that those who demand that no one think about race (a classic pink-elephant paradox) refuse to see, much less solve for, the elephant in the room—the race-linked disparities that continue to impede achievement of our great Nation's full potential. Worse still, by insisting that obvious truths be ignored, they prevent our problem-solving institutions from directly addressing the real import and impact of "social racism" and "government-imposed racism," *ante*, at 55 (THOMAS, J., concurring), thereby deterring our collective progression toward becoming a society where race no longer matters.

till it by our own labor.'"[104]

Today's gaps exist because that freedom was denied far longer than it was ever afforded. Therefore, as JUSTICE SOTOMAYOR correctly and amply explains, UNC's holistic review program pursues a righteous end—legitimate "'because it is defined by the Constitution itself. The end is the maintenance of freedom.'" *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 443–444 (1968) (quoting Cong. Globe, 39th Cong., 1st Sess., 1118 (1866) (Rep. Wilson)).

Viewed from this perspective, beleaguered admissions programs such as UNC's are not pursuing a patently unfair, ends-justified ideal of a multiracial democracy at all. Instead, they are engaged in an earnest effort to secure a more functional one. The admissions rubrics they have constructed now recognize that an individual's "merit"—his ability to succeed in an institute of higher learning and ultimately contribute something to our society—cannot be fully determined without understanding that individual in full. There are no special favorites here.

UNC has thus built a review process that *more accurately* assesses merit than most of the admissions programs that have existed since this country's founding. Moreover, in so doing, universities like UNC create pathways to upward mobility for long excluded and historically disempowered racial groups. Our Nation's history more than justifies this course of action. And our present reality indisputably establishes that such programs are still needed—for the general public good—because after centuries of state-sanctioned (and enacted) race discrimination, the aforementioned intergenerational race-based gaps in health, wealth, and well-being stubbornly persist.

Rather than leaving well enough alone, today, the majority is having none of it. Turning back the clock (to a time before the legal arguments and evidence establishing the

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[104] Foner 179.

soundness of UNC's holistic admissions approach existed), the Court indulges those who either do not know our Nation's history or long to repeat it. Simply put, the race-blind admissions stance the Court mandates from this day forward is unmoored from critical real-life circumstances. Thus, the Court's meddling not only arrests the noble generational project that America's universities are attempting, it also launches, in effect, a dismally misinformed sociological experiment.

Time will reveal the results. Yet the Court's own missteps are now both eternally memorialized and excruciatingly plain. For one thing—based, apparently, on nothing more than Justice Powell's initial say so—it drastically discounts the primary reason that the racial-diversity objectives it excoriates are needed, consigning race-related historical happenings to the Court's own analytical dustbin. Also, by latching onto arbitrary timelines and professing insecurity about missing metrics, the Court sidesteps unrefuted proof of the compelling benefits of holistic admissions programs that factor in race (hard to do, for there is plenty), simply proceeding as if no such evidence exists. Then, ultimately, the Court surges to vindicate equality, but Don Quixote style—pitifully perceiving itself as the sole vanguard of legal high ground when, in reality, its perspective is not constitutionally compelled and will hamper the best judgments of our world-class educational institutions about who they need to bring onto their campuses right now to benefit every American, no matter their race.[105]

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[105] JUSTICE SOTOMAYOR has fully explained why the majority's analysis is legally erroneous and how UNC's holistic review program is entirely consistent with the Fourteenth Amendment. My goal here has been to highlight the interests at stake and to show that holistic admissions programs that factor in race are warranted, just, and universally beneficial. All told, the Court's myopic misunderstanding of what the Constitution permits will impede what experts and evidence tell us is required (as a matter of social science) to solve for pernicious race-based inequities that are themselves rooted in the persistent denial of equal protection. "[T]he

The Court has come to rest on the bottom-line conclusion that racial diversity in higher education is only worth potentially preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom (a particularly awkward place to land, in light of the history the majority opts to ignore).[106] It would be deeply unfortunate if the Equal Protection Clause actually demanded this perverse, ahistorical, and counterproductive outcome. To impose this result in that Clause's name when it requires no such thing, and to thereby obstruct our collective progress toward the full realization of the Clause's promise, is truly a tragedy for us all.

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potential consequences of the [majority's] approach, as measured against the Constitution's objectives . . . provides further reason to believe that the [majority's] approach is legally unsound." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 858 (2007) (Breyer, J., dissenting). I fear that the Court's folly brings our Nation to the brink of coming "full circle" once again. *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 402 (1978) (opinion of Marshall, J.).

[106] Compare *ante*, at 22, n. 4, with *ante*, at 22–30, and *supra*, at 3–4, and nn. 2–3.

Exhibit BB:

“Midwest teachers trade tips on 'subversively and quietly' transitioning kids without telling their parents, and skirting Republican gender laws, in workshop funded by federal government” by James Reinl, published in the Daily Mail on June 19, 2023

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EXCLUSIVE: The trans school conspiracy exposed: Midwest teachers trade tips on 'subversively and quietly' transitioning kids without telling their parents, and skirting Republican gender laws, in workshop funded by federal government

- **DailyMail.com gained access to a private online meet of Midwestern teachers**
- **Many parents would be horrified by what they said about trans students**
- **They discussed keeping gender changes a secret from worried moms and dads**
- **Read more about the growing nationwide rift between parents and teachers**

By JAMES REINL, SOCIAL AFFAIRS CORRESPONDENT, FOR DAILYMAIL.COM
PUBLISHED: 09:42 EDT, 19 June 2023 | **UPDATED:** 14:16 EDT, 20 June 2023

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Dozens of Midwestern teachers met online this week and traded tips on helping trans students change **gender** at school without their parents' knowledge, while criticizing a raft of new **Republican** laws on sex and identity.

DailyMail.com gained access to an online session hosted by the Midwest and Plains Equity Assistance Center (MAP), which is funded by the Department of Education, attended by some 30 teachers from Michigan, **Iowa**, Ohio, **Illinois** and beyond.

In the four-hour workshop, they discussed helping trans students in the face of new laws in Republican-run states on gender, pronouns, names, parents' rights, bathroom access, and sports teams.

Some teachers said they followed the rules, but others discussed being 'subversive,'

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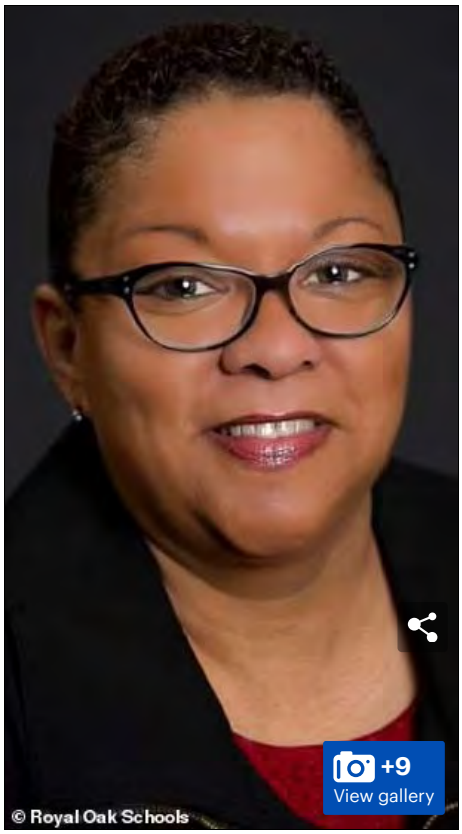
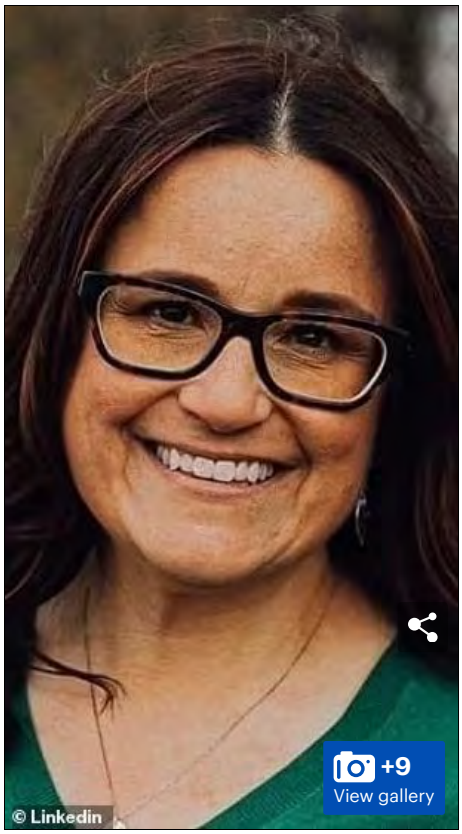
how their personal 'code of ethics' trumped laws, and how to 'hide' a trans student's new name and gender from their parents.







Kimberly Martin (left), a Michigan educator, and Jennifer Haglund of Iowa, say they'll go above and beyond to help trans students

TRENDING



The spiritual father of trans movement John Money and his experiment



'We're coming for your children': Activists, drag queens spark outrage



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The exposé comes amid growing tensions between traditional parents, who worry about newfangled gender ideas in schools, and some progressive teachers, who say they need to protect trans students from their own families.

Kicking off the workshop, Angel Nathan, the MAP specialist who hosted the session, said attendees would review the new laws in a bid to 'remedy the marginalizing effects and disrupt problematic policies.'

In the discussion and role-play sessions that followed, the teachers, administrators, principals, and counselors spoke about trans students and their families in a way that would alarm many parents.

Kimberly Martin, the DEI coordinator for Royal Oak Schools, which serves 5,000 K-12 students in Michigan, spoke about helping trans students keep their gender change a secret.

'We're working with our record-keeping system so that certain screens can't be seen by the parents ... if there's a nickname in there we're trying to hide,' Martin told the online gathering.

Jennifer Haglund, counselor for Ames Community Schools, which serves 5,000 K-12 Iowa students, complained about Republican Gov. Kim Reynolds in March signing a law that bars biological males from competing on female sports teams.

She bragged about her 'own activism' and of taking part in protest marches.

'I know that I have my own right code of ethics, and that doesn't always go along with the law,' Haglund said.

Poll

Should kids be able to transition at school without their parents knowing?

Yes

No

Not sure

Shea Martin, an Ohio-based trans educator, who writes a 'socialist, feminist, and anti-racist' **blog** called Radical Teacher, said she worked against 'laws that prohibit or restrict trans advocacy.'

'The stakes are very high for trans youth,' Martin said.

'I think that requires working subversively and quietly sometimes to make sure that trans kids have what they need.'

reveals the 'irritating' things customers do that mean she won't come back (so, are YOU guilty of any?)



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Eyes down, David! Beckham avoids taking snap of lingerie-clad Gigi Hadid, 28, in front of wife Victoria at the Jacquemus PFW show (but isn't too scared to snap the other models)



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School board meetings across the Midwest, like this one in North Dakota, have seen tense exchanges over trans students and parents' rights

Martin did not describe any subversive acts, but, later spoke about teachers addressing 'sexuality' with elementary students, who are aged between five and 10.

When talking about men, women, playground crushes, love, and marriage with youngsters, teachers should be wary of treating 'reinforced heterosexuality as the norm,' Martin said.

Finally, Yesenia Jimenez-Captain, the director of educational services at Woodland School District, which serves some 4,600 K-8 students across four schools in Lake County, Illinois, slammed conservative teachers in a nearby district.

Parents and teachers across Illinois have in recent years been angered by Democrat-led efforts to put tampons and sanitary napkins in boys' bathrooms, so that trans female-to-male students can access them.

Jimenez-Captain told her colleagues about a nearby school board meeting that 'exploded in violence' over the tampon controversy.

'That became a big violent issue cause the individuals who were involved are also educators ... which is sickening.'

At no point in the session did any teacher say parents might know what's best for their own kids, nor question whether affirmation-on-demand was the only way to help a trans-identified student.

Teaching new wave gender ideology in schools and secretly affirming trans-identified students have become hot-button issues in America's culture wars between liberals and conservatives.

Some traditional parents worry about activist teachers influencing kids with radical gender ideas, and even encouraging them to transition.

Tensions have led to lawsuits and violent school board meetings across the country.

Republican politicians in Red states have introduced more than 500 bills affecting LGBTQ people this year, with dozens already signed into law, says the Human Rights Campaign, an LGBTQ advocacy group.

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Whether male-to-female trans student athletes can compete against schoolgirls has become a divisive issue in schools, like this one in California



Maia Kobabe's graphic memoir Gender Queer (bottom right) is among the books that parents have tried to ban from school libraries

fabulously sculpted arms? (A clue: coffee, pizza, frozen food and alcohol are all banned...)



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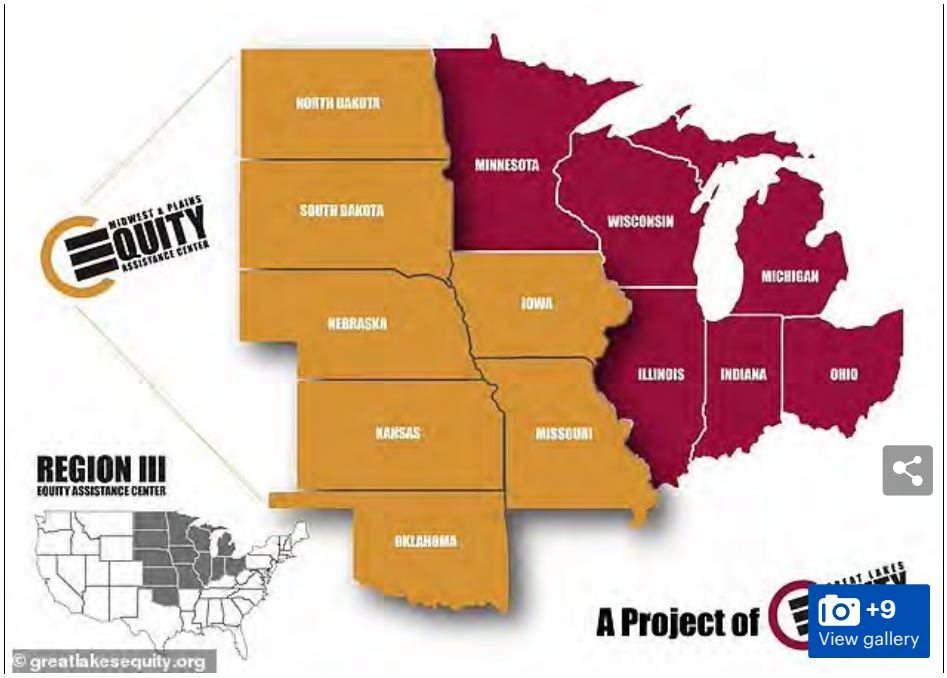
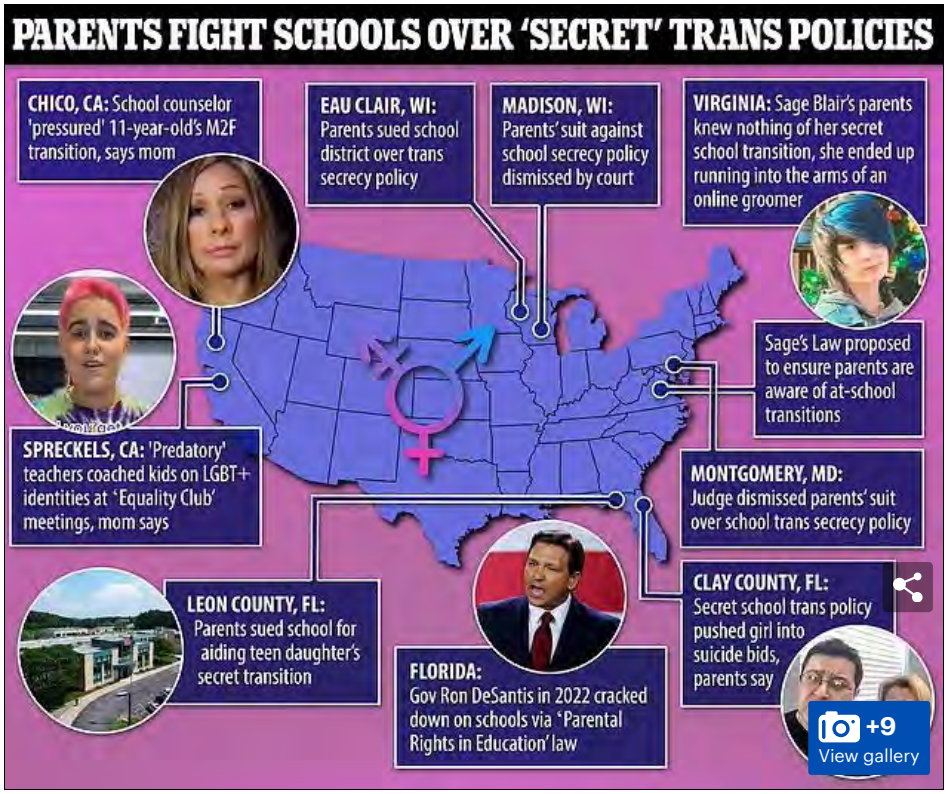


The Midwest and Plains Equity Assistance Center (MAP) serves 11.2 million students in 7,025 school districts across 13 states



Parents are clashing with teachers across the US over whether transgender teenagers can transition in classrooms without their knowledge - and most cases are not always solved in the principals' office, and often end up in court

They include laws requiring teachers to tell parents about a student's new name or pronoun, whether trans students can use bathrooms that don't correspond with their birth sex, or ban trans girls from participating in girls' sports.

Conservative parents' groups have sought to ban books from classrooms and school libraries, including Maia Kobabe's graphic memoir Gender Queer, about the author's struggle with their own sexual and gender identity.

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Schools are under pressure to assist trans students in this fractious political environment, where the 'gender-affirming' model touted by the American Academy of Pediatrics and other bodies, is increasingly called into question.

MAP, which hosted the workshop, is part of the Great Lakes Equity Center. Funded by the federal government under Title IV of the 1964 Civil Rights Act, it serves 11.2 million students in 7,025 school districts across 13 states.

In November, MAP announced that it had secured an $8.5 million funding arrangement with the Department of Education, and millions more elsewhere. The department did not immediately answer DailyMail.com's request for comment.

MAP operates across Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, and Wisconsin. It covers states with pro-trans laws and others with a more cautious approach.

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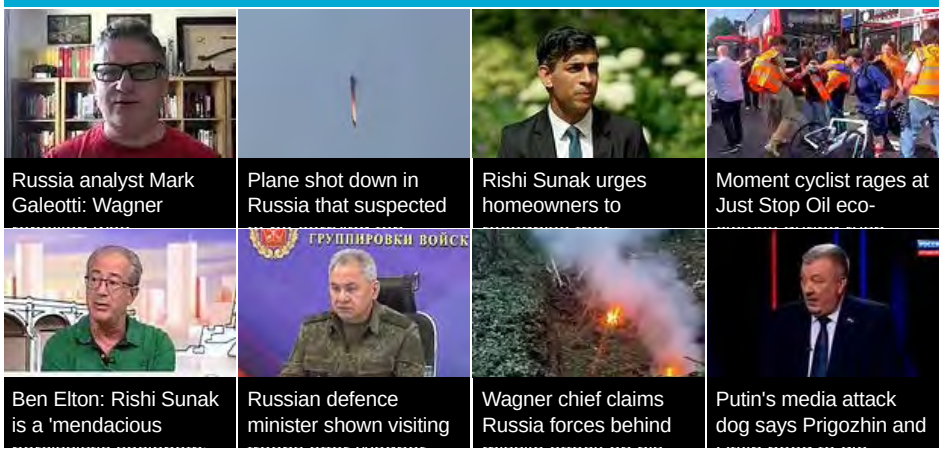

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VRE, Plymouth, United States, 2 days ago

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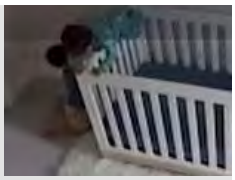
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“DOJ And Ed Department Silent After Teachers Use Taxpayer Money To Criminally Push Gender Ideology On Students” by Evita Duffy-Alfonso, published in The Federalist on June 22, 2023

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EDUCATION

DOJ And Ed Department Silent After Teachers Use Taxpayer Money To Criminally Push Gender Ideology On Students

BY: EVITA DUFFY-ALFONSO

JUNE 22, 2023

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The U.S. Department of Justice (DOJ) and Department of Education (ED) are silent after dozens of teachers used an ED-funded online workshop last week to "trade tips" on how to break state laws protecting children from radical gender ideology and help transgender-identifying students transition at school without their parents knowing.

According to the Daily Mail, event host Angel Nathan started the session by telling the teachers they would study new state laws in order to "remedy the marginalizing effects and disrupt problematic policies."

"Some teachers said they followed the rules, but others discussed being 'subversive,'" wrote the Daily Mail. One unnamed teacher reportedly stated that his or her own "code of ethics" was above the law and discussed "how to 'hide' a trans student's new name and gender from their parents."

"The stakes are very high for trans youth," said Shea Martin, an Ohio-based trans-identifying educator who writes a socialist, feminist, and anti-racist blog called "Radical Teacher." Martin said, "I think that requires working subversively and quietly sometimes to make sure that trans kids have what they need."

Kimberly Martin, the DEI coordinator of a Michigan school district, said, "We're working with our record-keeping system so that certain screens can't be seen by the parents ... if there's a nickname in there we're trying to hide."

The online session was organized by the Midwest and Plains Equity Assistance Center (MAP), an organization funded by the Department of Education under Title IV of the 1964 Civil Rights Act. Last November, MAP was given $8.5 million in federal funding.

The Federalist reached out to the education department and asked if there would be an investigation launched into both MAP and the teachers who are using federal funds to spread information on how to break state laws. The department was also asked if, given that MAP is encouraging illegal activity, there are plans to defund MAP and revoke the more than $8 million in grant money already awarded to the organization. At the time of

publication, a response has not been given.

The Federalist also reached out to the DOJ and asked whether, given that the criminal organizing and activity spans across state lines, it will be launching an investigation into MAP. The DOJ did not respond.

Lastly, The Federalist asked both agencies if, as a policy, they support efforts to give minors medical treatments without the knowledge or consent of their parents or legal guardians. Neither department has returned a request for comment.

To recap, a number of public school teachers have admitted to breaking state laws and are using federal funds to teach their colleagues how to violate laws protecting children. The Department of Education appears content in funding criminal activity, and the DOJ is too busy prosecuting Trump, covering up the Biden bribery scandal, targeting peaceful pro-lifers, and investigating "terrorist" parents at school board meetings to care.

The Daily Mail also exposed the radical views held by educators regarding sex and gender ideology, which, while not illegal, greatly impacts the worldview of the students they teach for eight hours a day. Martin discussed how to present "sexuality" to elementary students between the ages of five and 10, arguing that teachers should be careful about treating 'reinforced heterosexuality as the norm' when discussing romantic relationships with their students.

"At no point in the session did any teacher say parents might

know what's best for their own kids," reported the Daily Mail, "nor question whether affirmation-on-demand was the only way to help a trans-identified student."

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