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

The Special Counsel

February 29, 2024

The President
The White House
Washington, DC 20510

Re: OSC File Nos. DI-21-000533

Dear Mr. President:

I am forwarding reports transmitted to the U.S. Office of Special Counsel (OSC) by the U.S. Department of Education (ED) in response to the Special Counsel's referral of disclosures of wrongdoing at the agency.[1] The whistleblower, [redacted], a former Pathways Intern in the Grants Policy and Training Division, consented to the release of his name.[2] I have reviewed the agency reports and whistleblower comments and, in accordance with 5 U.S.C. § 1213(e), provide the following summary of the reports, whistleblower comments, and my determination.

As explained below, the agency did not substantiate any of the allegations. However, I have determined that the agency's findings are unreasonable for two primary reasons. First, the agency declined to have external investigators look at the allegations, instead relying on internal counsel—one in the Division of Legislative Counsel and two in the Division of Educational Equity, which is implicated in the disclosure allegations—to conduct the investigation. While the agency OIG declined to investigate these allegations, the agency could have opted to avoid an obvious conflict of interest by outsourcing the investigation to external investigators.

Second, the agency's reports do not appear to address the specific allegations OSC referred for investigation in a meaningful way and the reports use unnecessary condescending language when discussing the whistleblower's claims. The agency ignored some of the allegations altogether—substituting their own or circumscribing their scope—to avoid taking a hard look at the disclosure. While OSC allowed ED to produce a supplemental report to correct these identified deficiencies in the first report, the second report generally restated the findings of the first report. Therefore, I have determined that the findings of the agency head do not appear reasonable.

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[1] OSC referred the whistleblower's allegations to Secretary Miguel Cardona for investigation and a report pursuant to 5 U.S.C. §1213(c) and (d) on June 14, 2021. OSC added additional allegations for investigation on July 19, 2022. ED's Office of Inspector General (OIG) declined to investigate the allegations, after which the agency tasked the Office of General Counsel (OGC) with investigating the allegations.

[2] The whistleblower first requested to remain anonymous but later requested that his name be used.

The Allegations

OSC referred the following allegations for investigation:

- ED has a systemic practice of providing federal financial assistance for activities or programs that discriminate on the basis of race, in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI); 20 U.S.C. §§ 9511(b)(2)(B), 9514(f)(7), 9516(b)(8); and 34 C.F.R. §§ 100.6 and 100.7.
- 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, which are 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).
- ED's Office of Elementary and Secondary Education (OESE), in funding ED Grant Award Nos. 12D004D110021 and S004D160011 to Indiana University, Indianapolis, Indiana, for the Midwest and Plains Equity Assistance Center (EAC), is violating Title VI; 34 C.F.R. §§ 100.6 and 100.7; and/or abusing its authority.
- The issuance of Grant Award No. R305A200278 to Harvard University[3] for the Identity Project violates Title VI and IES statutory authority because the project is racially biased in nature; and
- The issuance of Grant Award No. U165A170062 to Fort Wayne Community Schools (FWCS)[4] violates Title VI and current U.S. Supreme Court precedent on affirmative action in educational settings.

The Agency Reports

The agency did not substantiate the allegations. First, ED found that it did not maintain a systemic practice of funding discriminatory activities because the whistleblower's purported evidence of a systemic problem—a list of grants compiled to comply with now-rescinded Executive Order (E.O.) 13950, Combatting Race and Sex Stereotyping—was, in fact, a list of grants for which the government could require the recipient to certify that it would not use federal funds to promote divisive concepts. ED further found no discrimination relating to the four grants specifically identified by the whistleblower as problematic (discussed below).

Second, ED found that IES did not fund, conduct, or support racially discriminatory content on its platforms, based on information pertaining to a January 2022 IES conference. ED focused on the whistleblower's objection to the definition of "equity," which the conference materials defined, in part, as an "assurance of the conditions for optimal outcomes for all people," and found that the term was not being "used as a proxy for ensuring equal outcomes for all groups," as alleged. The report did not state the scope of its investigation into whether

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[3] Copy of grant description available at https://ies.ed.gov/funding/grantsearch/details.asp?ID=4474.
[4] Copy of grant available at https://oese.ed.gov/files/2018/11/0062-Ft.-Wayne-Community-Schools.pdf.

IES promoted racially discriminatory research funding practices—the allegation referred by OSC. Rather, it addressed IES research funding decisions in the context of an IES contract. In reviewing the purpose of and actions taken under that contract, as well as diversity statements posted on the IES blog, ED found there was "nothing to suggest that IES is employing an individualized use of race to support its diversity initiatives," including when seeking to increase participation of people and institutions historically underrepresented in education research.[5]

Third, ED concluded that the materials developed with federal grant funding by Indiana University's Midwest and Plains EAC were consistent with the types of projects authorized under the EAC program and aligned with activities to reduce prejudice and combat biases.

Fourth, ED found that Harvard's Identity Project grant was not racially biased, was designed to benefit all students, and that nothing therein indicated that it was intended to reduce colorblindness and induce differential treatment of students. It also noted that no benefit or disadvantage was provided to any individual based on race and that the grant did not contain religious content and was not "ideological" under Establishment Clause jurisprudence.

Finally, ED found that the FWCS grant did not violate U.S. Supreme Court precedent on affirmative action. Despite FWCS's original grant application stating that it would select students for oversubscribed schools using an individualized consideration of race, which the report implied would be impermissible, the Office of Civil Rights (OCR) identified and addressed the issue during its compliance review. FWCS updated its application to use socio-economic status as the grouping factor for the lotteries, after which OCR allowed the grant application to move forward, but did not communicate the change to OESE, which issued the award. In response, the report recommended that OCR share with OESE amended application information and that OESE—which generally made public the original grant submission—publicly post any changes as part of its programmatic or civil rights review. Both offices agreed.

After a close review of the initial report, the Special Counsel determined that the agency's findings did not appear reasonable. OSC provided ED with an assessment of the report's shortcomings. The agency thereafter provided a supplemental report that generally reaffirmed its initial conclusions. Additionally, ED noted that it analyzed whether the Harvard and EAC grantees' actions in carrying out their respective grant activities violated Title VI and concluded that they did not. ED also found that IES did not pursue a particular ideological or political objective in conducting the grant competition or awarding it to Harvard.

The Whistleblower's Comments

The whistleblower asserted that the agency's reports are deficient and that the allegations warrant further investigation. He noted that the investigation, conducted by ED's OGC with competing client interests and professional obligations, was inherently compromised. He further criticized the reports for (1) failing to make findings of fact or to address with specificity discriminatory quotes in grants and grant-supported content, rendering its legal

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[5] Despite reaching this conclusion, ED does not define IES's method to increase participation of historically underrepresented people and institutions.

analyses deficient; (2) substituting conclusory statements for legal analyses; (3) emphasizing scientific validity to avoid the question of legality; (4) focusing on irrelevant material, rather than on whether the agency funded discriminatory, ideological, politically partisan, and non-objective grants, and whether it was legally obligated not to fund such grants; (5) mischaracterizing ED's legal obligations under Title VI by ignoring relevant regulations implementing Title VI—specifically, 34 C.F.R. Part 100 and the Executive Branch Standards of Ethical Conduct; (6) misinterpreting the term "nonideological" in 20 U.S.C. § 9514(f)(7) to mean only "non-religious;"[6] (7) not examining whether OCR failed in its role to enforce Title VI as it applies to ED-funded programs and activities, and (8) failing to investigate and address all his allegations such as those regarding training and systemic violations of the Federal Policy for the Protection of Human Subjects, and his allegations of whistleblower retaliation.[7]

The Special Counsel's Determination Regarding Reasonableness and Sufficiency

The agency has agreed to ensure that changes to grant applications are shared internally and that the publicly available versions are accurate. Despite this action, the findings of the agency head do not appear reasonable, and the reports do not contain all of the information required by statute. The reports' overall defects are as follows:

<u>Deficient legal analyses</u> - ED's analyses of the allegations regarding the Harvard and Indiana University grants were conclusory and otherwise deficient. The report relied on narrow legal interpretations or circumscribed the scope of the legal questions, and thus did not fully investigate the allegations. The agency misinterpreted Title VI as only restricting the actions of federal funding recipients.[8] The cases cited by the agency are not on point insofar as they

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[6] The whistleblower noted that, independent of the rescinded E.O., divisive concepts are illegal and repeatedly referenced the Equal Protection Clause of the U.S. Constitution, Title VI and its regulations, and E.O. 13985.
[7] Whistleblower retaliation is a prohibited personnel practice under 5 U.S.C. § 2302(b)(8) and (9). OSC has direct authority to investigate such claims under 5 U.S.C. § 1214 and does not refer these matters under 5 U.S.C. § 1213.
[8] Section 601 of Title VI provides: "No person in the United States shall, on the ground of race. . . be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Contrary to the agency's argument that the "plain language of the statute" was directed only at prohibiting a federal funding recipient from discriminating, the U.S. Supreme Court in *Cannon v. Univ. of Chicago*, explained that Title VI in its final form was phrased "as a declaration of an absolute individual right not to have federal funds spent in aid of discrimination." 441 U.S. 677, fn. 51 (1979). *See also NAACP, Western Region v. Brennan*, 360 F. Supp. 1006, 1012 (D.D.C. 1973); *United States v. Chicago*, 395 F. Supp. 329, 342-43 (N.D. Ill. 1975) ("Where recipients of federal funds have engaged in unlawful discrimination, courts have been quick to require that federal agencies refrain from participating in the discriminatory practices, and exercise affirmative duties to police compliance and prevent constitutionally and statutorily proscribed discrimination."); *Nat'l Black Police Ass'n v. Velde*, 712 F.2d 569, 574-577 (D.C. Cir. 1983) ("federal funding agencies must do *something* to effect compliance" with Title VI) (emphasis in original); *Murguía v. Childers*, 2022 U.S. Dist. LEXIS 130870, *2-3 (D.W.D. Ark. 2022) (citing *NAACP, Western Region v. Brennan*, 360 F. Supp. 1006, 1012 (D.D.C. 1973)).

Nor does the Department of Justice's (DOJ) Title VI Legal Manual provide a blanket freedom from responsibility. ED relies on the Manual's explanation of 28 C.F.R. § 42.102(f) and (g), which define the terms "recipient" and "primary recipient," to exclude the Federal Government from any obligation under Title VI. Yet, this should not be taken to mean that it has no responsibility to ensure Title VI compliance. DOJ guidance also states, "[i]f a recipient of federal assistance is found to have discriminated and voluntary compliance cannot be achieved, the federal

conclude that "Title VI does not apply to programs conducted directly by federal agencies,"[9] where the grants at issue here were awarded to non-federal entities. Further, ED summarily concluded that the EAC grantee's actions did not violate Title VI, while failing to provide a thorough explanation for that determination, other than noting that OCR had received no complaints alleging Title VI discrimination under the EAC grants. The agency's initial report also characterized the language and themes identified by the whistleblower regarding activities supported by the EAC grants as "divisive concepts," as defined in now-rescinded E.O. 13950, and thus without legal import "unless those terms are independently required by other laws or regulations."[10] ED did not address whether federal financial support of such concepts was otherwise improper (i.e., in violation of 34 C.F.R. §§ 100.6 and 100.7, or an abuse of authority).

Limited Factual Inquiry - Regarding the Harvard and Indiana University grants, ED artificially limited the factual inquiry to materials that the government directly reviewed or funded. The law governing IES, which funded the Harvard grant, specifically requires the IES Director 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."[11] (Emphasis added.) ED dismissed the whistleblower's concerns with the content of Harvard's Identity Project materials by indicating that the grant's focus was to test various modalities for delivering the pre-existing curriculum, and not to create it. As such, ED found that it bore no responsibility for reviewing the content. Yet, it is not a stretch to see that the curriculum materials would be significant, if not integral, to the grant's purpose. As for the OESE grants to Indiana University, the report also implied that the whistleblower's allegations were flawed because they addressed materials developed and published with grant funds rather than addressing the grants themselves.[12]

ED also substituted a legal analysis of specific facts involving the Harvard and Indiana University grants with generalized descriptions and conclusory statements. Instead of providing an analysis of the grants and materials referenced by the whistleblower, ED reaffirmed that it conducted a "fulsome inquiry into the whistleblower's allegation." Yet, the agency generally continued to examine only materials included "in the original grant application" and directly reviewed by ED. Without an analysis of materials and activities specifically alleged to be problematic, ED's reports did not address the referred allegations and the conclusions do not appear reasonable.

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agency providing the assistance should either initiate fund termination proceedings or refer the matter…" DOJ, Title VI of the Civil Rights Act of 1964, https://www.justice.gov/crt/fcs/TitleVI (last visited February 14, 2023). Moreover, ED regulations require it "to the fullest extent practicable seek the cooperation of recipients in obtaining compliance" with the Title VI nondiscrimination mandate, including requiring periodic compliance reviews. 34 C.F.R. § 100.6 and 100.7. As to institutions of higher education, ED's regulations require assurances of nondiscrimination pertaining to any "practice[] relating to the treatment of students." 34 C.F.R. § 100.4(d)(1).

[9] *See, e.g., Halim v. Donovan*, 951 F. Supp. 2d 201, 207 (D.D.C. 2013).

[10] *See* footnote 25 of the agency's report.

[11] 20 U.S.C. § 9514(f)(7).

[12] The report did acknowledge that the agency conducted regular, active reviews of the EAC's grant activities, suggesting that it recognizes it has some responsibility for the grantee's actions.

Mischaracterization of Issues and Failure to Fully Investigate the Allegations - The agency mischaracterized OSC's referred allegation as an assertion that "the department's [EAC] grants to Indiana University violates its statutory authority" pertaining to EACs.[13] OSC did not ask ED to investigate compliance with those legal authorities but to investigate whether, in funding the grants, it was (1) violating Title VI; (2) violating 34 C.F.R. §§ 100.6 and 100.7, which effectuate Title VI and discuss ED's responsibility to ensure grantee compliance with Title VI; and (3) abusing its authority. This mischaracterization allowed the agency to avoid undertaking a comprehensive and thorough investigation of the referred questions. While the agency acknowledged it plays a significant role in enforcing Title VI requirements via OCR, it never addressed whether OCR failed in its compliance obligations. ED also disregarded OSC's allegation of abuse of authority in funding the EAC grants. Limiting its investigation to the materials provided to it by the whistleblower, the agency summarily concluded that they fell within the scope of work typical and permissible by EACs. ED also mischaracterized the allegations involving the Harvard and Indiana University grants by (1) asserting that "neither OSC nor the whistleblower allege" anyone was subjected to race-based discrimination, but that there was merely a speculative concern for harm and (2) implying that the allegations amounted to an objection to furthering diversity generally. These characterizations do not answer the specific allegations raised by the whistleblower and referred for investigation.[14]

Conflation of Issues - Instead of analyzing the legality of certain language and themes used or supported by the Indiana University and Harvard grants, the reports highlighted the grants' beneficial purposes (e.g., to reduce prejudice and biases or to improve student outcomes). With the Harvard grant, the agency also heavily relied on the IES grants' scientific review process to justify its funding decision, conflating compliance with the peer review process for scientific merit with a review for compliance with antidiscrimination laws. The law establishing IES itself distinguishes between ensuring that its work is scientifically valid and is "objective, secular, neutral, and nonideological and are free of partisan political influence and racial, cultural, gender, or regional bias" by listing these responsibilities separately.[15]

Conflict of Interest - The agency's choice to delegate investigation to internal counsel presented an obvious conflict of interest. While the agency could not rely on OIG to investigate, it could have opted to outsource the investigation. Instead, it relied on internal counsel—including two attorneys with the Division of Educational Equity, which is implicated in the disclosure—to conduct the investigation.

I thank the whistleblower for bringing these allegations to OSC's attention. As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency report, this letter, and the whistleblower's comments to the Chairs and Ranking Members of the House Committee on Education and the Workforce and the Senate Committee on Health, Education, Labor, and

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[13] Title IV of the Civil Rights Act of 1964, and its regulations at 34 C.F.R. Part 270, authorize the Secretary to render technical assistance regarding desegregation to governmental units responsible for operating public schools.

[14] The initial report noted that the whistleblower directed investigators to specific materials hosted or developed by the EAC, including a vodcast series on YouTube and resources on its webpage, which used concepts and language that appeared to negatively target White people based on race.

[15] *See* 20 U.S.C. §§ 9514(f)(5), (7), 9516(b)(7)-(8).

Pensions. I have also filed redacted copies of these documents and a copy of our original referral letter in our public file, which is available at www.osc.gov. This matter is now closed.

Respectfully,

Karen Gorman
Acting Special Counsel

Enclosures