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The Special Counsel

August 6, 2024

The Honorable Dr. Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Re: OSC File No. DI-24-000830
Request for Investigation - 5 U.S.C. § 1213(c)

Dear Secretary Cardona:

I am referring to you for investigation a whistleblower disclosure concerning employees of the Department of Education (ED), Office for Civil Rights (OCR), Kansas City, Missouri. The whistleblower, [REDACTED], Chief Attorney for the Kansas City Office, OCR, who consented to the release of his name, alleged that ED employees engaged in activity that may constitute a violation of law, rule, or regulation; gross mismanagement; and an abuse of authority. A report of your investigation on the allegation and any related matters is due to the Office of Special Counsel (OSC) by October 7, 2024.

The allegation to be investigated is as follows:

- ED is failing to comply with a court injunction that prohibits the agency from addressing gender identity and/or transgender status and sexual orientation based on Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., (Title IX) in states where the injunction applies.

While OSC generally defers to the judicial process in matters that involve pending litigation, the whistleblower's allegations -- particularly with regard to local school districts not party to the litigation -- give grounds for concern. Because of the whistleblower's position and role at ED, he is likely privy to information regarding the agency's response to the court injunction that other parties to the suit may not be in a position to know, and thus, be able to address through the appropriate court process.

On January 20, 2021, President Joe Biden issued Executive Order 13988, "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation."¹ In

¹ 86 Fed. Reg. 7023 (Jan. 25, 2021).

response, OCR issued three documents in June 2021: (1) “Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*,”² (2) “Letter to Educators on Title IX’s 49th Anniversary,”³ which references a fact sheet and the final document; and (3) “Confronting Anti-LGBTQ+ Harassment in Schools;”⁴ collectively, referred to as the “Guidance Documents.”

According to the Guidance Documents, ED interprets the prohibition on sex discrimination in Title IX to encompass discrimination based on sexual orientation and gender identity. According to the whistleblower, prior to the issuance of the Guidance Documents, ED’s position was that it did not have jurisdiction over claims of discrimination based on gender identity and/or transgender status, as well as sexual orientation, pursuant to Title IX.

On August 30, 2021, twenty states brought suit in the U.S. District Court for the Eastern District of Tennessee (injunction states),⁵ challenging the legality of the Guidance Documents.⁶ On July 15, 2022, the Court issued an order granting the plaintiff states’ Motion for Preliminary Injunction, which enjoined and restrained ED from implementing the Guidance Documents in those twenty states (Order).⁷

According to the whistleblower, ED filed a Notice of Compliance stating that, while its position on claims may be consistent with the Guidance Documents, it would not cite, reference, treat as binding, or otherwise rely upon the challenged documents in any investigations of claims or in enforcement or administrative actions in the injunction states. However, the whistleblower alleged that, despite the Notice of Compliance, OCR is not following the court order.⁸

For example, on [REDACTED] 2023, OCR Seattle opened an investigation in injunction state Alaska regarding whether a school district is discriminating based on sex [REDACTED]

² 86 Fed. Reg. 32,637 (June 22, 2021).

³ <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf>.

⁴ This document was issued jointly with the U.S. Department of Justice and can be found at <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>.

⁵ The plaintiff states are Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia. Subsequently, the whistleblower learned that Arizona withdrew from the litigation.

⁶ See *Tennessee v. U.S. Dep’t of Educ.*, No. 21-308 (E.D. Tenn.).

⁷ *Id.* (July 15, 2022) (Memorandum Opinion and Order) [ECF Doc. 86].

⁸ Federal injunctions are issued pursuant to Rule 65 of the Federal Rules of Civil Procedure, which are authorized under 28 U.S.C. § 2072. Injunctions have the force of law and qualify as a “law, rule, or regulation” under 5 U.S.C. § 1213(a)(1)(A) because they compel obedience. Refusal to obey a court order can lead to contempt under 18 U.S.C. § 401, and a violation of Attorney Bar Rules. In this instance, failure to obey the court order can also be a violation of the Administrative Procedure Act, 5 U.S.C. §§ 551–559, as discussed in the court’s order granting the injunction. See Order at 38-43.

[REDACTED] The whistleblower asserted that both of these allegations involve discrimination based on gender identity and/or transgender status under Title IX. In another instance, on January 29, 2024, OCR issued notification letters to the Complainant and Bryan County Schools in injunction state Georgia, opening a case for investigation, where at least two of the allegations to be investigated were claims of discrimination based on gender identity and/or transgender status under Title IX.⁹

Another example involved the [REDACTED] Owasso High School in the injunction state of Oklahoma. The whistleblower asserted that in [REDACTED] 2024, ED employees asked him to issue a notification letter in this case that stated, in part, “Your complaint alleges that the District discriminated against students by failing to respond appropriately to sex-based harassment (gender identity) . . .” When the whistleblower reminded ED employees that Oklahoma is an injunction state and refused to issue the letter, ED employees deleted the term “gender identity” and issued the letter through another regional office. Although that phrase was removed, the content and substance of the investigation remains the same, which is further corroborated by OCR’s internal case tracker that indicates the Title IX issue under investigation in this case is “Gender Identity” and/or “Transgender” status, despite the injunction.

The whistleblower provided nine additional examples of claims in injunction states in which OCR is allegedly failing to comply with the court order.¹⁰

Further, on November 14, 2022, OCR issued a memorandum, “Opening Cases Potentially Involving Allegations of Gender Dysphoria” (November 2022 Memo), in which it asserts that, in addition to its authority under Title IX, claims regarding transgender people who also have gender dysphoria, may also be addressed under two of ED’s other governing statutes, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and Title II of the Americans with Disability Act, 42 U.S.C. § 12101 et seq. Thus, OCR may contend that, because of the November

⁹ One allegation queried whether “the District discriminated against the Student on the basis of sex, in violation of Title IX, when it [REDACTED]

[REDACTED] Another allegation questioned whether “the District retaliated against the Student based on disability, in violation of Section 504 and Title II, and based on sex, in violation of Title IX, when it [REDACTED]

¹⁰ Memphis-Shelby County Schools ([REDACTED]); Metro Nashville Schools ([REDACTED]); Ivy Tech Community College ([REDACTED]); Rogers School District ([REDACTED]); Montana State University-Bozeman ([REDACTED]); Bellbrook-Sugarcreek Local School District ([REDACTED]); Fairborn City Schools ([REDACTED]); Oberlin College ([REDACTED]); and Spartanburg County School District ([REDACTED]).

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2022 Memo, it has the ability to open such cases in injunction states, including under Title IX, which the whistleblower disputes in light of the court order.¹¹

Please note that specific allegations are not intended to be exclusive. If, in the course of your investigation, you discover additional wrongdoing, please include your findings on these additional matters in the report to OSC. As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency report, along with the whistleblower's comments and any comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can also be accessed at <https://osc.gov/Documents/PublicFiles/1213Appendix.pdf>. If your investigators have questions regarding the statutory process or the report required under section 1213, please contact [REDACTED], Chief, Retaliation and Disclosure Unit, at [REDACTED] for assistance. I am also available for any questions you may have.

Sincerely,



Hampton Dellinger
Special Counsel

Enclosure

cc: The Honorable Sandra D. Bruce, Inspector General

¹¹ The November 2022 Memo further states that cases may be opened for investigation based on Title IX in situations where it is "relevant and permissible. While the whistleblower recognizes OCR's authority to issue the memo, he maintained that OCR cannot rely on it to open investigations in injunction states involving transgender people who may have gender dysphoria when the claim is based on Title IX, as it would lead ED essentially to take the same action prohibited by the injunction, which contradicts the court's intent.

APPENDIX

AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

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

RETALIATION AGAINST WHISTLEBLOWERS

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

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

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

EVIDENCE OF CRIMINAL CONDUCT

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