



UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

December 12, 2024

Hampton Dellinger
Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, DC 20036-4505

Re: OSC File No. DI-24-000830

Dear Mr. Dellinger:

The enclosed report is in response to your August 6, 2024, letter to the U.S. Department of Education (ED) regarding a whistleblower disclosure alleging violations of law, rule, or regulation; gross mismanagement; and an abuse of authority. The Secretary has delegated to me the authority to review and sign written reports of investigation prepared in response to referrals from the Office of Special Counsel (OSC) regarding whistleblower disclosures; to submit these reports of investigations to OSC; and to take actions as a result of the investigation pursuant to 5 U.S.C. §§ 1213(d) and (f)(2).

In your letter, you asked ED to investigate an allegation that 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.

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

Sincerely,

A handwritten signature in cursive script that reads "Cindy Marten".

Cindy Marten
Deputy Secretary
U.S. Department of Education

Enclosures

**Report to the U.S. Office of Special Counsel
OSC File No. DI-24-000830**

Report Date: December 12, 2024

Introduction

On August 6, 2024, the U.S. Office of Special Counsel (OSC) sent the U.S. Department of Education (Department) a referral regarding a whistleblower complaint that alleged that employees of the Department’s Office for Civil Rights (OCR) are engaged in activity that may violate a July 15, 2022, court order that enjoined and restrained the Department from implementing three documents issued by OCR in June 2021.¹ On behalf of the Department, the Office of General Counsel investigated the allegation. This report provides the Department’s findings. The Department did not find support for the whistleblower’s allegation.

Background

1. Statutory and Regulatory Authorities

OCR’s mission is to ensure equal access to education and to promote educational excellence across the nation through the vigorous enforcement of civil rights laws. The office safeguards the rights of students through the investigation of possible violations of civil rights laws, including Title VI of the Civil Rights Act of 1964 (Title VI), Title IX of the Education Amendments of 1972 (Title IX), Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act of 1990 (Title II), the Age Discrimination Act of 1975, and the Boy Scouts of America Equal Access Act of 2001. These laws and their implementing regulations prohibit discrimination on the basis of race, color, national origin, sex, disability and age in all education programs and activities that receive financial assistance from the Department.

¹ These documents include: (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*” (June 22, 2021), <https://www.ed.gov/media/document/202106-titleix-noipdf>; (2) “Letter to Educators on Title IX’s 49 Anniversary,” <https://www.ed.gov/media/document/educator-202106-tixpdf>; and (3) “Confronting Anti-LGBTQI+ Harassment in Schools” <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>.

Title IX prohibits discrimination on the basis of sex in federally funded education programs and activities. 20 U.S.C. § 1681(a). The statute authorizes and directs the Department “to effectuate the provisions of section 1681 ... by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute.” *Id.* § 1682. Responsibility for the Department’s administration of Title IX has been delegated to the Assistant Secretary for Civil Rights (Assistant Secretary). 20 U.S.C. § 3413. On behalf of the Department, OCR enforces Title IX through administrative actions that can, if voluntary compliance is not reached, result in a termination of funding to educational programs or a request to the U.S. Department of Justice (DOJ) to initiate other legal action.

2. Administrative Enforcement

OCR’s administrative enforcement is carried out through a headquarters office and 12 regional offices located across the country. OCR’s headquarters and the DC Metro regional office are located in Washington, D.C. The remaining 11 regional enforcement offices are in Atlanta, Boston, Chicago, Cleveland, Dallas, Denver, Kansas City, New York, Philadelphia, San Francisco, and Seattle. Each regional office is led by a regional director whose leadership team includes a chief attorney and a program manager. Investigative staff in the regional offices carry out OCR’s mission by enforcing the civil rights statutes and regulations, using a variety of approaches to resolve complaints. OCR’s 12 regional offices are overseen by four Enforcement Directors. Those Enforcement Directors report to the Deputy Assistant Secretary for Enforcement (DAS for Enforcement), who reports to the Assistant Secretary.

In enforcing Title IX, OCR’s investigations typically begin with a complaint from a private party. 34 C.F.R. § 100.7(a), (b) (incorporated by 34 C.F.R. § 106.81). OCR generally must investigate any complaint that indicates a recipient’s “possible failure to comply” with a statute that OCR enforces. *Id.* § 100.7(c). OCR’s Case Processing Manual (CPM) describes the procedures to investigate and resolve complaints.² Upon receipt, complaints are sent to the appropriate OCR regional office for processing. Complaints are typically assigned to a regional office based on the location of the recipient who is alleged to have violated Title IX. The OCR regional office assigns the incoming complaint a docket number and establishes a case file for each complaint. After this processing, OCR regional office staff will evaluate the allegations to

² U.S. Department of Education, Office for Civil Rights, Case Processing Manual (July 18, 2022), <https://www.ed.gov/media/document/ocrcpmpdf>.

determine whether OCR has authority to investigate the allegations. In particular, OCR must have jurisdiction over the subject matter of the allegations; allegations over which OCR lacks subject matter jurisdiction are not subject to further processing and are dismissed without further investigation or analysis of the allegations. Pursuant to Title IX's statute and regulations, OCR has jurisdiction to investigate allegations that involve individuals allegedly being subjected to discrimination on the basis of sex under a recipient's education program or activity. Although anyone may file a complaint with OCR (and many do even if they have no personal knowledge of the matter), most allegations are filed by the recipient's students, parents, and employees. To establish subject matter jurisdiction, the complaint must allege, or OCR must be able to infer from the information available, a recipient's possible failure to comply with Title IX. OCR investigative staff are not limited to the facts and allegations as framed in the complaint and may rely on additional information in evaluating whether OCR has jurisdiction. For example, OCR staff may conduct initial interviews with complainants to gather additional information or may consider relevant information from public records. OCR may also consider whether the facts or information provided sufficiently allege possible discrimination under any of its statutory and regulatory authorities, not limited to the authorities or legal theories mentioned in the complaint.

Where OCR determines that it has subject matter jurisdiction and other requirements are satisfied, it can open the complaint's allegations for investigation. The assigned OCR regional office will issue letters of notification to the complainant and the recipient that contain, among other things, information about OCR's jurisdiction and the allegations OCR will investigate. Opening a complaint for investigation does not imply that OCR has made a determination on the merits of the complaint. During the investigation, OCR is a neutral fact-finder, collecting and analyzing relevant evidence and ensuring that its investigation is legally sufficient. If the investigation finds a "failure to comply," OCR must attempt to secure voluntary compliance through informal means. 34 C.F.R. § 100.7(d)(1). If such efforts fail, OCR will make a written finding that the recipient is in violation of Title IX and then, if further attempts at voluntary resolution are not successful, must either refer the matter to DOJ with a recommendation that appropriate proceedings be brought to enforce Title IX or begin administrative proceedings to suspend or terminate federal financial assistance. *Id.* §§ 100.7(d), 100.8(a).

3. June 2021 Documents

In June 2021, the Department issued three documents to assist schools and other educational institutions receiving federal financial assistance to understand how OCR interprets and enforces Title IX: (1) Notice of Interpretation (NOI) entitled “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) “Letter to Educators on Title IX’s 49th Anniversary;” and (3) a fact sheet entitled “Confronting Anti-LGBTQI+ Harassment in Schools.” Specifically, these documents discuss the Department’s interpretation of Title IX in light of the Supreme Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1744 (2020).³ In that decision, the Supreme Court held that discrimination on the basis of sexual orientation or transgender status is necessarily discrimination “because of sex” under Title VII. *Id.* at 1744. Each of these documents was non-binding and did not purport to have the force and effect of law.

On June 22, 2021, the Department published the NOI “to clarify [its] enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX” in light of *Bostock*, 140 S. Ct. 1731, 1744 (2020).⁴ The NOI explained that the interpretation would guide OCR in processing complaints and conducting investigations, but that “it does not itself determine the outcome in any particular case or set of facts.” A day later, the Department issued a “Dear Educator” letter highlighting its interpretation of Title IX as explained in the NOI. The letter noted that, consistent with the NOI, the Department “will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance.” The letter was accompanied by a fact sheet jointly issued by the Department and DOJ that provided examples of the types of incidents those agencies can investigate under Title IX, as well as information on how to file complaints.

4. June 2022 Court Order

In August 2021, 20 States filed suit challenging, among other things, the Department’s June 2021 documents and subsequently filed a motion for preliminary injunction asking the

³ *Supra* note 1.

⁴ *Id.*

district court to enjoin the Department from enforcing those documents.⁵ *Tennessee et al. v. U.S. Dep't of Educ. (Tennessee)*, Dkt. No. 1, No. 3:21-cv-00308 (E.D. Tenn. Aug. 30, 2021). Plaintiff States asserted various claims alleging procedural and substantive violations of the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, and constitutional violations, including that OCR's June 2021 documents failed to undergo notice and comment. The federal government filed a motion to dismiss the complaint and opposed the motion for a preliminary injunction.

On July 15, 2022, the district court issued a preliminary injunction, prohibiting the Department from "implementing" the challenged documents against the Plaintiff States (the Court's injunction).⁶ *Tennessee*, Dkt. No. 86, No. 3:21-cv-00308 (E.D. Tenn. Jul. 15, 2022). In granting the motion for a preliminary injunction, the district court held that the States were likely to succeed on the merits of their claim that the challenged documents are invalid because they are legislative rules that were promulgated without notice and comment as required by the Administrative Procedure Act. The district court did not address the States' claims that the challenged documents were substantively deficient, *i.e.*, either arbitrary and capricious or contrary to law.

After the district court issued its decision, DOJ filed a Notice of Compliance outlining the conduct that the Department believed was prohibited and the conduct that the Department believed was still permissible. *Tennessee*, Dkt. No. 97, No. 3:21-cv-00308 (E.D. Tenn. Aug. 25, 2022). As represented to the Court, the Notice of Compliance explained that the Department would not "cite, reference, treat as binding, or otherwise rely upon the challenged documents in any investigations of claims or enforcement or administrative actions, if there are any, against Plaintiffs." Dkt. No. 97 at 2. The Notice of Compliance explained, however, that the Department did not understand the injunction to prevent OCR from enforcing Title IX against Plaintiff States generally and that OCR would continue to investigate any claims brought against Plaintiff States and will support its investigations, enforcement, and administrative actions with "statutory text,

⁵ The lawsuit also named the Equal Employment Opportunity Commission (EEOC) as a defendant because it challenged a document issued by the EEOC concerning protections against employment discrimination based on sexual orientation and gender identity. DOJ was also named as a defendant because one of the documents challenged was a joint fact sheet issued by DOJ and the Department.

⁶ The full text of the Court's injunction reads as follows: "Accordingly, it is hereby ordered that Federal Defendants and all their respective officers, agents, employees, attorneys, and persons acting in concert or participation with them are ENJOINED and RESTRAINED from implementing the [Notice of] Interpretation, Dear Educator Letter, Fact Sheet, and the Technical Assistance Document against Plaintiffs." *Tennessee*, Dkt. No. 68, No. 3:21-cv-00308 (E.D. Tenn. July 15, 2022) (Memorandum Opinion and Order). The referenced Technical Assistance Document was issued by the EEOC.

implementing regulations, case law, and the specific facts and circumstances of each case.” *Id.* The Notice of Compliance explained that this understanding of the Court’s injunction aligned with how the courts of appeals have considered other injunctions issued in response to procedural APA violations. Specifically, the Notice of Compliance cites precedent to explain an injunction for failure to undergo notice and comment rulemaking does not necessarily bar the agency from enforcing any particular interpretation of the statute. Based on those considerations, the Notice of Compliance stated that the Department’s positions may be consistent with those in the challenged documents, but they would not be based on those documents. *Id.*

In the district court litigation, Plaintiffs filed a response to the Notice of Compliance, advocating for a broader view of the injunction. Response to Defendants’ Notice of Compliance, *Tennessee*, Dkt. No. 99, No. 3:21-cv-00308 (E.D. Tenn. Aug. 30, 2022). In that August 2022 response, Plaintiff States disagreed with the Department’s interpretation and argued that “[a]ny enforcement action against Plaintiff States consistent with the enjoined guidance . . . would be unlawful action based on the enjoined guidance.” Dkt. No. 99 at 4. Plaintiff States further argued that the Department “cannot sidestep the injunction merely by claiming that those enforcement actions are based on ‘regulations’ and ‘case law’ beyond the enjoined guidance.” Dkt. No. 99 at 4. Finally, Plaintiff States raised concerns that the Department would “circumvent the preliminary injunction by engaging in enforcement actions consistent with the enjoined guidance while strategically avoiding express references to them.” Dkt. No. 99 at 3. Plaintiff States concluded their response by stating that they would take appropriate action if the Department attempted to engage in such enforcement action.

As of the date of this report, the Court has not issued further direction to amend, revise, or otherwise clarify the scope of the injunction. Accordingly, the Court’s injunction as issued in July 2022 remains in effect with respect to the Department.⁷

⁷ On appeal, the Sixth Circuit affirmed the district court’s preliminary injunction on the same ground, *i.e.*, that the challenged documents were legislative rules that were promulgated without notice and comment as required by the Administrative Procedure Act. *See State of Tennessee v. Department of Education*, 104 F.4th 577, 615 (6th Cir. 2024).

Allegation

The whistleblower, who consented to the disclosure of their identity, is the chief attorney for the OCR regional office located in Kansas City, Missouri (OCR Kansas City). They alleged that OCR employees engaged in activity that may constitute a violation of law, rule, or regulation; gross mismanagement; and an abuse of authority. The OSC referral asks the Department to investigate the whistleblower's allegation that:

- The Department 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 in states where the injunction applies.

The whistleblower's allegation concerns the Department's compliance with the July 2022 injunction described in the "Background" section. The whistleblower disclosed that they became aware of the injunction relatively soon after it issued. They stated they received an email from the Assistant Secretary shortly after the injunction was issued by the court directing OCR staff to comply with the terms of the injunction. The whistleblower stated that they reviewed the injunction and understood the injunction to order the Department not to treat discrimination on the basis of sexual orientation or gender identity as sex discrimination under Title IX. They stated that they likewise considered the Assistant Secretary's email to mean the same. The whistleblower stated that after the injunction issued, they were told by OCR Kansas City's regional director to be "hands off" complaints that alleged discrimination on the basis of sexual orientation or gender identity, and that they advised their enforcement staff of the same.

The whistleblower alleged that they first became concerned that the Department was violating the injunction in late February 2024 when OCR Kansas City was directed to open a complaint for investigation alleging discrimination on the basis of gender identity. The whistleblower also alleged that, after they expressed concern that this directive violated the injunction, the complaint was transferred to a different OCR regional office which opened the complaint for investigation. The whistleblower identified 11 other OCR cases where they allege that OCR may be violating the injunction. Lastly, the whistleblower alleged that the Department may be attempting to circumvent the injunction by attempting to address discrimination on the basis of sexual orientation or gender identity under OCR's jurisdiction under Title II and Section 504 (regarding diagnoses of gender dysphoria).

Investigation

The investigation of the whistleblower complaint was conducted by a Senior Counsel and an attorney in Program Service in the Department's Office of the General Counsel. The investigation involved reviewing Title IX's statutory and regulatory provisions as well as relevant case law and OCR policy documents, including the three June 2021 documents described above in the "Background" section. The investigation also included reviewing the order and relevant court filings in *Tennessee*, No. 3:21-cv-00308 (E.D. Tenn.). The investigators reviewed the OCR internal case files associated with each of the OCR investigations identified by the whistleblower in the referral. Those case files typically included the complaint filed with OCR, case management documents, notes from interviews conducted by OCR enforcement staff, external correspondence with the complainant, recipients, and other relevant parties, and internal correspondence within OCR about the case. In total, the investigation team reviewed more than 700 documents from these files.

In addition to reviewing these materials, the investigation team conducted an interview with the whistleblower and interviews with nine other OCR employees, including the Assistant Secretary, two Deputy Assistant Secretaries, four Enforcement Directors, and certain staff in OCR regional offices. In some instances, the interviewee identified or provided additional documentation or information that was also reviewed by the investigation team.

Findings

The Department did not substantiate the whistleblower's allegation that OCR is violating the Court's injunction. The investigation determined that the whistleblower misunderstands the scope of the Court's injunction. Based on its express language, the Department, working with DOJ, correctly understands the Court's injunction to prohibit the Department from "implementing" the challenged documents, not prohibiting investigation of claims similar to those discussed in the challenged documents. The Department disclosed its approach to the Court, in a document available to the public, and provided consistent written instructions to staff.

Thus, for purposes of investigating the claims in this referral, the appropriate benchmark for evaluating the Department's compliance with the Court's injunction is whether actions taken by OCR are consistent with the Notice of Compliance filed by DOJ on behalf of the Department

in the district court litigation. The investigation found no evidence that the Department has failed to comply with or has otherwise operated in a manner inconsistent with the Notice of Compliance filed by DOJ on behalf of the Department in the district court litigation. The investigation examined each of the 12 cases cited in the referral and the Department found no evidence of OCR “implementing” the enjoined documents against Plaintiff States. Rather, the investigation determined that OCR took reasonable steps to ensure compliance with the Court’s injunction and takes seriously its obligation to comply with injunctions issued by Federal courts.

A. The Meaning of the Court’s Injunction

As stated in the referral, the whistleblower asserts that the Court’s injunction prohibits the agency from addressing gender identity and/or transgender status and sexual orientation based on Title IX in states where the injunction applies. The whistleblower’s statements during the course of the Department’s interview were consistent with that understanding of the Court’s injunction. Specifically, the whistleblower alleges that OCR violated the Court’s injunction by opening investigations into certain complaints alleging discrimination on the basis of gender identity or sexual orientation. Under the whistleblower’s interpretation, the Court enjoined OCR from opening any investigations into a possible violation of Title IX in Plaintiff States where the basis of that investigation is that Title IX’s prohibition on sex discrimination includes discrimination on the basis of gender identity or sexual orientation. The whistleblower reads the Court’s prohibition on “implementing” the challenged documents as barring OCR from taking certain enforcement actions that would be consistent with the interpretation in the challenged documents, even if those actions are based on OCR’s interpretation of the statute and regulations and not based on the challenged documents themselves.

The whistleblower’s interpretation is not supported by the text of the Court’s injunction, which is the primary guide to its meaning. Federal Rule of Civil Procedure 65(d) provides that every injunction must “state its terms specifically” and “describe in reasonable detail ... the act or acts restrained or required.” The Court’s order enjoins and restrains the Department from “implementing” the challenged documents against Plaintiff States. The injunction does not specifically or in reasonable detail enjoin the Department from engaging in enforcement actions consistent with those documents nor does it prohibit the Department from carrying out its charge to investigate all complaints alleging violations of Title IX’s statute or regulations, including

complaints of discrimination against LGBTQ+ students or discrimination based on sexual orientation or gender identity.

It is not unreasonable to expect such specificity from a court. The same documents at issue here were later enjoined by a different federal district court in Texas. *See Texas v. Cardona*, No. 4:23-CV-00604, 2024 WL 3658767 (N.D. Tex. Aug. 5, 2024). In that case, the injunction enjoined the Department from *both* “implementing” the challenged documents *and* “initiating, continuing, or concluding any investigation” against Texas based on the same interpretation contained in those documents. *Id.* at *52. The broader language in the Texas injunction is aligned with the fact that the district court in that case found the challenged documents to be both substantively and procedurally unlawful whereas the issuing court for the *Tennessee* injunction only found them likely to be procedurally unlawful. Following issuance of the injunction by the Texas district court, the Assistant Secretary promptly directed OCR enforcement staff to immediately stop all work on investigations, including opening complaints, involving claims of discrimination based on sexual orientation or gender identity against the Texas State Education Agency, Texas public schools, or any Texas public college or university.

In response to the Court’s injunction that covers the 20 States to which the whistleblower’s allegations pertain, however, the Assistant Secretary adopted the approach reflected in the Notice of Compliance that DOJ filed to inform the Court of actions taken by the Department to comply with that injunction. As described in the “Background” section, the Notice of Compliance informed the Court that the Department would not “cite, reference, treat as binding, or otherwise rely upon the challenged documents in any investigations of claims or enforcement or administrative actions, if there are any, against Plaintiffs.” *Tennessee*, Dkt. No. 97, No. 3:21-cv-00308 (E.D. Tenn. Aug. 25, 2022). The Notice of Compliance stated that the Department did not understand the injunction to prevent OCR from enforcing Title IX against Plaintiff States generally and that OCR would continue to investigate any claims brought against Plaintiff States and will support its investigations, enforcement, and administrative actions with “statutory text, implementing regulations, case law, and the specific facts and circumstances of each case.” Dkt. No. 97 at 2. On July 20, 2022, the Assistant Secretary notified all OCR staff that the district court enjoined the Department from “implementing” certain documents that address discrimination involving sexual orientation and gender identity against any of the 20

Plaintiff States. The Assistant Secretary provided additional instructions in an email to OCR staff on September 26, 2022, that stated the following:

“OCR will continue to carry out its statutorily required responsibilities. To ensure compliance with the preliminary injunction for casework that arises in any of the 20 States listed above, OCR staff should continue to rely on Title IX, its implementing regulations, case law, and the specific facts and circumstances of each case in evaluating, opening, investigating, and resolving complaints, compliance reviews, and directed investigations that touch on allegations of discrimination on the basis of sexual orientation and gender identity. The three documents identified in the preliminary injunction should not be relied upon in determining what the statute and regulations mean.”

These instructions to OCR staff have remained in effect since they were issued. In addition to these written instructions, the Assistant Secretary discussed the Court’s injunction on calls with Enforcement Directors and staff in OCR regional offices. While the Assistant Secretary expressed disappointment with the Court’s injunction during those calls, OCR enforcement staff were told to continue their work while complying with the Court’s injunction.

Simply put, the whistleblower disagrees with the Department’s interpretation of the Court’s injunction, and the referral’s allegations arise primarily as a result of that good faith disagreement. Based on the referral and the Department’s interview with the whistleblower, the whistleblower’s concerns are similar in nature to those laid out in the response by Plaintiff States. In their response to the Notice of Compliance, Plaintiff States argued that “[a]ny enforcement action against Plaintiff States consistent with the enjoined guidance . . . would be unlawful action based on the enjoined documents.” *Tennessee*, Dkt. No. 99 at 4. Plaintiff States further argued that the Department could not “sidestep the injunction merely by claiming that those enforcement actions are based on ‘regulations’ and ‘case law’ beyond the enjoined guidance.” *Id.* The whistleblower similarly views the Court’s injunction to prohibit the Department from taking enforcement action against Plaintiff States with respect to allegations of discrimination on the basis of sexual orientation or gender identity, even if the action is not based on the enjoined documents.

The Department appreciates the whistleblower’s commitment to abiding by the Court’s order and the Department shares in that commitment. To the extent the Court disagreed with the

Department's interpretation, the Notice of Compliance provided the Court with an opportunity to clarify the scope of its injunction more than two years ago. Nonetheless, the Court has not issued further direction to amend, revise, or otherwise clarify the scope of the injunction, despite Plaintiffs' response to the Notice of Compliance. Given the Court's silence, the Department's understanding of the injunction is, at minimum, a reasonable one. For the reasons discussed above, the Department continues to believe it adopted the best reading of the Court's injunction. Therefore, for purposes of investigating the claims in this referral, the Department believes the appropriate benchmark for evaluating the Department's compliance with the Court's injunction is consistency with the Notice of Compliance.

B. The Department's Investigations and Compliance with the Court's Injunction

To evaluate OCR's compliance with the Court's injunction, the Department's investigation examined both the specific cases identified by the whistleblower in the OSC referral and OCR's enforcement practices more broadly with respect to this particular injunction. Our investigation identified no evidence that the Department has failed to comply with the Court's injunction. To the extent OCR's enforcement actions were consistent with the challenged documents, those actions were based on OCR's interpretation of the statutory text, implementing regulations, case law, and the specific facts and circumstances of that case. Accordingly, as outlined in the preceding section, those actions are permissible under the Court's injunction. Further, the Department believes OCR has a process in place to ensure that all enforcement actions comply with the Court's injunction and followed that process in the cases identified by the whistleblower.

The OSC referral identified 12 examples of investigations opened by OCR that the whistleblower alleges evidence OCR's failure to comply with the Court's injunction. As part of its investigation, the Department reviewed the internal case files associated with each of those examples and interviewed the whistleblower as well as key OCR staff. Of the 12 identified examples, the whistleblower acknowledged that they only had personal knowledge and experience with OCR's enforcement actions with respect to two cases, one involving Owasso Public Schools in Oklahoma and the other involving Rogers Public Schools in Arkansas. Both cases involve allegations of discrimination against school districts located in the coverage area of OCR Kansas City. This report will address both of those cases in detail and address the allegations with respect to the remaining cases collectively, some of which remain open

investigations that OCR is actively working on. Lastly this report will address the issuance of a November 14, 2022, memorandum, “Opening Cases Potentially Involving Allegations of Gender Dysphoria” (November 2022 Memo) referenced in the OSC referral.

1. OCR’s Efforts to Ensure Compliance

OCR took reasonable steps to ensure its compliance with the Court’s injunction. As stated previously, the Assistant Secretary promptly notified OCR staff of the Court’s injunction and followed up with additional instructions. Those instructions were aligned with the Notice of Compliance filed by counsel at DOJ in the district court proceeding and the Department identified no further written instructions to OCR enforcement staff to the contrary. Additionally, the Department applied conspicuous disclaimers at the top of each document challenged in the litigation notifying the public that the Department had been preliminarily “enjoined and restrained from implementing” the document. It further listed each of the states where the injunction was in place and the date of the Court’s order. The versions of each document posted on the Department’s public website continue to reflect this disclaimer language.

OCR has preexisting internal processes that ensure that senior OCR leadership reviews and approves any meaningful enforcement steps in cases that could implicate the Court’s injunction. OCR maintains a Cases of Interest list to keep headquarters apprised of certain cases. For Title IX cases, headquarters review and approval are required before opening, dismissing, or resolving any complaints that could be read to involve discrimination based on sexual orientation or gender identity as well as sex stereotyping. Headquarters review and approval are also required for requests for mediation in these cases. Under the Cases of Interest guidelines, regional offices were not authorized to open for investigation these types of allegations absent approval by the Assistant Secretary or the DAS for Enforcement. At times, this approval would be communicated through the Enforcement Director after consultation with the DAS for Enforcement or the Assistant Secretary. As part of their review and approval, the Assistant Secretary or the DAS for Enforcement would take into consideration any applicable court injunctions. Further, regional offices must flag complaints in this area in a weekly update that is transmitted to headquarters. Centralized monitoring and approval were core aspects of OCR’s efforts to ensure compliance with the Court’s injunction. As discussed in detail below, this centralized process enabled OCR to ensure that each of the cases mentioned in the OSC referral were handled in a manner consistent with the Court’s injunction.

2. Owasso Public Schools

In [REDACTED] 2024, OCR received a complaint alleging that Owasso Public Schools discriminated against students by failing to respond appropriately to sex-based harassment, of which it had notice, at Owasso High School during the 2023-2024 school year. OCR received this complaint after [REDACTED] at Owasso High School whom the complaint alleged was [REDACTED]. Information provided to OCR indicated that the [REDACTED] [REDACTED] identified as non-binary and transgender.

During the interview, the whistleblower explained that they originally proposed opening the case for investigation. Because Owasso Public Schools are located in Oklahoma, the complaint was initially assigned to the OCR Kansas City. Given the nature of their role as Chief Attorney for OCR Kansas City, the whistleblower was responsible for advising regional office staff on the legal sufficiency of OCR enforcement actions, including whether OCR has jurisdiction to investigate a complaint. According to the whistleblower, other OCR Kansas City staff were not willing to open an investigation out of a concern that such action would violate the Court's injunction. Despite the concern of others, the whistleblower felt comfortable opening the complaint for investigation because the complaint indicated a possible failure to comply with Title IX.

Specifically, the whistleblower believed at the time that the investigation could proceed without violating the Court's injunction under a theory of discrimination on the basis of sex stereotypes. The whistleblower did not view the Court's injunction to prohibit the Department from investigating and resolving complaints of Title IX violations where the allegations involve sexual harassment of any student, including LGBTQ+ students, or discrimination based on sex stereotypes. In line with that view, the whistleblower submitted a recommendation on February 27, 2024, to the relevant Enforcement Director for review and approval. That recommendation included a draft letter to Owasso Public Schools to notify the parties of the issues being investigated by OCR. In that draft letter, the whistleblower proposed to open an investigation into whether Owasso Public Schools "failed to respond to notice of sex-based harassment predicated on sex stereotypes."

During the review and approval process, the whistleblower stated that they received edits to the letter that added explicit reference to "gender identity" after "sex-based harassment." Those proposed edits appeared in the section of the letter that described the complaint's

allegations and not to the description of the issue being investigated. While the whistleblower was comfortable with issuing the letter to investigate harassment as initially drafted, the whistleblower did not think it was appropriate to issue the letter with mention of “gender identity” in light of the Court’s injunction. The whistleblower discussed those concerns at the time with the Enforcement Director as well as the Assistant Secretary. Following those discussions and due to ongoing objections from the staff in the Kansas City regional office, the complaint was transferred to the Chicago regional office.

The Chicago regional office raised no objections to issuing the notification letter and promptly moved forward with opening an investigation. On March 1, 2024, OCR sent a letter from the Chicago Regional Office to the superintendent of Owasso Public Schools notifying them that OCR was opening for investigation the allegations in the complaint. Specifically, the notification letter stated that OCR was opening for investigation the issues of whether the Owasso Public Schools failed to appropriately respond to alleged harassment of students in a manner consistent with Title IX, Section 504, and Title II. The final notification letter contained no reference to gender identity or transgender status.

Now, in the context of this OSC referral, the whistleblower has raised the same concerns again – namely, that OCR was enjoined from opening this investigation. This concern stems from the whistleblower’s view that the Court enjoined the Department from opening for investigation claims of discrimination on the basis of gender identity and/or transgender status where those claims arise in Plaintiff States. This investigation found that the whistleblower – as well as other OCR Kansas City staff – held this view in good faith and raised this concern, in part, as a matter of legal ethics and professional responsibility. This concern, however, is misplaced for two primary reasons.

First, even if the basis of OCR’s investigation were gender identity discrimination, the Court’s injunction should not be construed to prohibit such action where, as was the case here, the action was based on OCR’s interpretation of the statutory text and its implementing regulations. The whistleblower’s concern appears to derive from language in interim draft versions of OCR correspondence, the scope of OCR’s investigation, and issue coding in OCR’s Case Management System (CMS) used for internal tracking of cases. None indicate that the Department relied upon or cited to the challenged documents in conducting this investigation.

Second, this investigation was ultimately resolved under a sexual harassment legal theory that the whistleblower acknowledged was not prohibited by the injunction. On November 13, 2024, the Department publicly announced the resolution of its Title IX sexual harassment investigation of Owasso Public Schools.⁸ The legal standard applied by the Department and its findings are described in the letter of resolution posted publicly on the Department’s website. That letter states that the Department’s Title IX regulations, as amended in 2020, were the applicable regulations for investigating the conduct at issue in this complaint. Under those regulations, the definition of sexual harassment may include harassment based on sex or sex stereotyping if a reasonable person would determine that the harassment is so severe, pervasive, and objectively offensive that it denies a person equal education access. *See* 85 Fed. Reg. 30179. Among other things, OCR determined that Owasso Public Schools failed to respond as required by the 2020 Title IX regulations in a number of instances over a three-year period, including [REDACTED] at Owasso High School. OCR found Owasso Public Schools’ pattern of inconsistent responses to reports it received of sexual harassment – infrequently responding under Title IX or not responding at all – rose to the level that the district’s response to some families’ sexual harassment reports was deliberately indifferent to students’ civil rights. In resolving this case, OCR’s resolution letter did not rely upon or cite to the challenged documents nor did it rely on the theory that Title IX’s prohibition on sex discrimination includes discrimination on the basis of gender identity. Accordingly, the Department has determined that OCR’s actions with respect to this complaint were in compliance with the Court’s injunction.

3. Rogers Public Schools

On [REDACTED] [REDACTED] 2023, OCR received a complaint against Rogers Public Schools alleging that the school district discriminated against a student on the basis of sex in violation of Title IX. The complainant was [REDACTED] who experienced the alleged sex discrimination. The complaint alleged that Rogers Public Schools discriminated against the student in the context of [REDACTED] was not allowed to [REDACTED] [REDACTED]

⁸ Press Release, U.S. Department of Education’s Office for Civil Rights Announces Resolution of Title IX Sexual Harassment Investigation of Owasso Public Schools in Oklahoma (Nov. 13, 2024), <https://www.ed.gov/about/news/press-release/us-department-of-educations-office-civil-rights-announces-resolution-of-title-ix-sexual-harassment-investigation-of-owasso-public-schools-oklahoma>.

██████████ which would align with the student's gender identity, and instead was required to ██████████, which aligned with the student's sex assigned at birth.

The complainant and Rogers Public Schools' staff and its counsel participated in OCR's early mediation process. Under Section 201(a) of OCR's CPM, complainants may request mediation at the time of filing the complaint. If the allegations are within OCR's jurisdiction or state a violation of one of the laws or regulations OCR enforces, then OCR will offer this resolution option to the parties. In this case, the complainant requested, and Rogers Public Schools agreed to, mediation. The parties each signed an Agreement to Participate in Mediation as well as a Confidentiality Agreement and met with the mediator to discuss ways to resolve the complaint. However, on ██████████ 2024, the parties were unable to reach an agreement to resolve the complaint through mediation. On ██████████ 2024, OCR notified the parties that because the parties were unable to reach an agreement to resolve the complaint through mediation, OCR would proceed with evaluating the complaint.

The whistleblower alleges that OCR violated the injunction by proceeding with the mediation. As stated in the interview, the whistleblower was notified of the request for mediation by OCR Kansas City staff assigned to this complaint. Both the assigned staff and the whistleblower believed the Court's injunction prohibited OCR from facilitating mediation of these allegations, because they alleged discrimination on the basis of gender identity. These concerns were raised contemporaneously with the relevant Enforcement Director; however, the Enforcement Director and the DAS for Enforcement disagreed with the assessment of OCR Kansas City. Instruction was given to move forward with the mediation.

Our investigation consisted of a review of the internal OCR case files associated with this complaint as well as interviews with relevant OCR Kansas City staff, the relevant Enforcement Director, and the DAS for Enforcement. Based on our review, the Department identified no evidence that OCR staff relied upon, cited, or otherwise implemented the challenged guidance documents in the context of this matter. To the extent the whistleblower views the Court's injunction as barring investigation or mediation of allegations of gender identity discrimination, the Department disagrees with that interpretation of the Court's injunction as stated previously.

On ██████████ 2024, OCR notified the parties that it was closing this complaint against Rogers Public Schools. The notification stated that OCR would take no further action on the complaint and that, in light of recent Federal court orders, OCR is not investigating claims

alleging discrimination on the basis of gender identity in those states and schools in which OCR is preliminarily enjoined from enforcing the Department’s 2024 Title IX Regulations.⁹

4. Other Cases Cited in the Referral

The OSC referral identified 10 other examples of investigations opened by OCR that the whistleblower alleges evidence OCR’s failure to comply with the Court’s injunction. These investigations span five different OCR regional offices, each of which proceeded with opening various allegations of sex discrimination for investigation. The whistleblower indicated that they did not have knowledge of how these cases were being processed by other OCR regional offices and that they had not spoken with the OCR staff working on these matters. The whistleblower indicated that they identified these cases by searching OCR’s Case Management System (CMS) for cases that were being processed under a basis, e.g., “Title IX - Gender Identity/Transgender,” that they believed violated the injunction. However, the investigation team observed that solely relying on this data field within CMS would yield cases the whistleblower would themselves consider permissible for OCR to investigate under this injunction. One such example is Owasso Public Schools, which was discussed above. While the Owasso Public Schools complaint was received alleging discrimination based on gender identity – and similarly coded in CMS – OCR evaluated and opened the complaint to determine whether there was a possible violation of Title IX and ultimately resolved the complaint on grounds other than gender identity discrimination.

⁹ On April 29, 2024, the Department published a final rule amending its Title IX implementing regulations (2024 Title IX Regulations). 89 Fed. Reg. 33,474. The final rule stated, among other things, that discrimination on the basis of sex includes discrimination on the basis of gender identity, applying the reasoning of the Supreme Court’s decision in *Bostock*. Lawsuits were filed in several federal district courts challenging provisions of the 2024 Title IX Regulations related to gender identity discrimination, among other provisions. In the months following publication of the final rule, preliminary injunctions were issued by federal district courts in Louisiana, see *Louisiana v. U.S. Dep’t of Educ.*, No. 3:24-cv-00563 (W.D. La. June 13, 2024); Kentucky, see *Tennessee v. Cardona*, No. 2: 24-072-DCR (E.D. Ky. June 17, 2024); Kansas, see *Kansas v. U.S. Dep’t of Educ.*, No. 24-4041-JWB (D. Kan. July 2, 2024); Texas, see *Texas v. United States*, No. 2:24CV86-Z (N. D. Tex. July 11, 2024), see also *Carroll Indep. Sch. Dist. v. Dep’t of Educ.*, No. 4:24-cv-00461-O (N.D. Tex. July 11, 2024); Missouri, see *Arkansas v. U.S. Dep’t of Educ.*, Case No. 4:24 CV 636 RWS (E.D. Mo. July 24, 2024); and Oklahoma, see *Oklahoma v. Cardona*, No. CIV-24-00461-JD (W.D. Okla. July 31, 2024). These Federal court orders varied in scope but they generally found the Department’s inclusion of discrimination on the basis of gender identity as discrimination on the basis of sex to be unlawful, and enjoined and restrained the Department from implementing, enacting, enforcing, or taking any action in any manner to enforce the 2024 Title IX Final Regulations against States and schools covered by the respective injunctions.

The investigation team reviewed the case files for the 10 examples the whistleblower identified. The cases concern a range of allegations of race, sex, and disability discrimination. A non-exhaustive list of the allegations of sex discrimination in these complaints includes:

- Retaliation against a student following the filing of a complaint of sex discrimination;
- Different treatment on the basis of sex by filing multiple incident reports about a transgender student and requiring him to sign a behavior contract;
- Failure to respond to harassment of students on the basis of sex, including harassment of members of LGBTQ+ student organization;
- Denial of a transgender student's access to restroom consistent with the student's gender identity;
- Denial of a transgender student's ability to participate on a female athletics team that was consistent with the student's gender identity; and
- Different treatment in providing health and insurance benefits or services to a transgender student compared to cisgender students.

After reviewing the internal case files associated with these 10 cited complaints as well as interviewing OCR staff with knowledge about these complaints, the Department found no evidence that OCR staff relied upon, cited, or otherwise implemented the challenged documents in these investigations. Of the 10 examples, OCR issued notification letters opening these complaints for investigation after the issuance of the Court's injunction in all but one instance. Those notification letters relied upon the statute and implementing regulations as the basis for opening the allegations for investigation. Further, OCR subsequently dismissed the Title IX allegations of three of these complaints, in light of court orders enjoining enforcement of the Department's 2024 Title IX Regulations¹⁰

5. November 2022 Memo

On November 14, 2022, the Assistant Secretary issued a Memo to regional directors informing them that, in response to a recent federal appellate decision, there may be circumstances under which complaints alleging discrimination against transgender individuals

¹⁰ On September 19, 2024, OCR dismissed the Title IX allegation in the complaint concerning Matanuska-Susitna Borough School District (AK) in light of the Federal court orders preliminarily enjoining the enforcement of the Department's 2024 Title IX Regulations. On October 1 and 3, 2024, OCR dismissed complaints concerning Bellbrook-Sugarcreek (OH) and Fairborn City Schools (OH), respectively, for the same reason.

may warrant finding subject-matter jurisdiction under Section 504 or Title II. The Memo references the *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. Aug. 22, 2022) decision as the recent federal appellate decision, which OCR's Principal Deputy Assistant Secretary confirmed was the catalyst for the Memo. The Memo notes that the Fourth Circuit in *Kincaid* held that individuals who are significantly limited in their major life activities due to gender dysphoria (which some, but not all, transgender individuals experience) are not precluded from showing they are individuals with disabilities on that basis. Although some statutes exclude from the definition of individuals with disabilities those who experience gender identity disorders not resulting from a physical impairment, the Fourth Circuit held that exclusion did not apply because gender dysphoria is distinct from gender identity disorder; and because the plaintiff sufficiently alleged their gender dysphoria was the result of a physical impairment. OCR's Principal Deputy Assistant Secretary stated that the Memo was not in any way meant to circumvent the injunction at issue in this referral.

The whistleblower indicates that they recognize OCR's authority to issue the Memo. The Court's injunction has no bearing on OCR's enforcement of Section 504 and Title II. To the extent that the whistleblower alleges that OCR has or is circumventing the injunction by asserting jurisdiction over claims based on Title IX under Section 504 or Title II, they provided no examples of such actions and our investigation uncovered no such instances of this conduct.

Conclusion

The investigation did not find evidence supporting the whistleblower's allegation.

I am submitting this report for the Department of Education under the authority delegated to my office by the Secretary of Education in Delegation EA/EB/176, dated July 13, 2018.



Cindy Marten
Deputy Secretary

U.S. Department of Education

Attachment A
Delegation of Authority



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20212

MEMORANDUM

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

I. DELEGATION

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

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

II. RESERVATIONS

None.

III. REDELEGATION

This authority may not be redelegated.

IV. CERTIFICATION AND EFFECTIVE DATE

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

Betsy DeVos

OGC Clearance and date: Approved February 7-13-18

CERTIFIED DATE: 1/13/2018
Jan Clemons
Departmental Delegations Control Officer
EALB/176
Control Number

DI-24-000830

Employee Key

Investigating Team:

1. [REDACTED], Senior Counsel, Office of the General Counsel
2. [REDACTED], Attorney, Division of Educational Equity, Office of the General Counsel

Interviewees:

1. [REDACTED], the Whistleblower
2. [REDACTED] Assistant Secretary, Office for Civil Rights
3. [REDACTED], Principal Deputy Assistant Secretary, Office for Civil Rights
4. [REDACTED] [REDACTED] Deputy Assistant Secretary for Enforcement, Office for Civil Rights
5. [REDACTED] [REDACTED] [REDACTED] Enforcement Director, Office for Civil Rights
6. [REDACTED], Enforcement Director, Office for Civil Rights
7. [REDACTED] [REDACTED] Enforcement Director, Office for Civil Rights
8. [REDACTED] [REDACTED] Enforcement Director, Office for Civil Rights
9. [REDACTED] [REDACTED] Chief Attorney, Seattle Regional Office, Office for Civil Rights
10. [REDACTED] [REDACTED] Regional Director, Kansas City Regional Office, Office for Civil Rights