



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

February 19, 2026

[REDACTED]
Acting Deputy Chief
Retaliation and Disclosure Unit
U.S. Office of Special Counsel
1730 M St., N.W. Ste. 300
Washington, D.C. 20036-4505

Re: Responses to Supplemental OSC Questions
OSC File No. DI-24-000830

Dear Acting Deputy Chief [REDACTED]:

This is in response to your inquiry regarding the above-referenced matter. More particularly, you have asked the Department to provide responses to the following questions:

**Questions Presented to the U.S. Department of Education
by the U.S. Office of Special Counsel**

Question 1: The whistleblower (WB) contends that the **agency did not interview a wide enough scope of employees**, which has significantly impacted the results of the investigation.

Question 2: The WB asserts that “...**corrective action was proposed at the regional level in three additional cases identified by the whistleblower**. In these cases, the regional offices paused investigations or drafted dismissal letters in cases subject to the 2022 Injunction.

Question 3: The WB asserts that the **agency’s report omitted material information from Kansas City’s Regional Director concerning OCR’s compliance efforts**.

Question 4: Please provide **any additional responsive information** that may be helpful for OSC’s review.

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Summary of Responses by the U.S. Department of Education to the U.S. Office of Special Counsel

Response to Question 1:

It appears that the WB's assertions are accurate. Key personnel involved in the matter who should have, in the ordinary course of an investigation, been interviewed, appear not to have been interviewed prior to the Department's Dec. 12, 2024, response ("Report")¹ to the Office of Special Counsel's ("OSC") inquiry, as would have been appropriate in these circumstances.

Response to Question 2:

It appears that the WB's assertions are accurate. The Department does not appear to have disclosed these additional matters to OSC, as would have been appropriate in these circumstances.

Response to Question 3:

It appears that the WB's assertions are accurate. The Department appears to have failed to include written assertions and testimony material to the matter, including a highly detailed Memorandum provided by the Regional Director to the Department's Office of the General Counsel ("OGC") in its response to OSC, as would have been appropriate in these circumstances.

Response to Question 4:

The Department's subsequent investigation has revealed significant shortcomings in the Dec. 12, 2024, response to OSC's inquiry (*i.e.*, the "Report"), including a failure to more accurately assess readily available materials, conduct additional interviews, and forthrightly respond to the WB's core allegation that the Department's Office for Civil Rights ("OCR"), under the leadership of Assistant Secretary Catherine Lhamon, deliberately failed to abide by a federal district court's order granting a Motion for Preliminary Injunction ("Injunction"), which Injunction prevented the Department from enforcing the Department's recent guidance addressing Title IX's prohibition on sex discrimination as it relates to gender identity and sexual orientation ("Order").²

In fact, it appears that in response to the Injunction, OCR's leadership actively engaged in efforts to thwart at least one OCR regional office (Region VII) from following the plain and unambiguous meaning of the order. OCR's leadership may also have engaged in efforts to

¹ Attachment 1, (Letter from Deputy Secretary Cindy Marten, U.S. Department of Education, to Special Counsel Hampton Dellinger, U.S. Office of Special Counsel (Dec. 12, 2024), at 1 (Dept.'s 2024 "Report").

² *Tennessee v. U.S. Dep't of Educ.*, Case No. 3:21-cv-00308 (E.D. Tenn. July 15, 2022) (Memorandum Opinion and Order) [ECF Doc. 86], *aff'd Tennessee v. U.S. Dep't of Educ.*, 104 F.4th 577 (6th Cir. 2024).

conceal those efforts, including efforts to coerce and intimidate (in possible violation of prohibited personnel practices).

Background and Timeline

In June 2021, OCR issued various guidance documents as part of its effort to implement Executive Order 13988 (“EO 13988”), issued by President Joseph Biden on Jan. 20, 2021 (“Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation”).³ Purporting to provide guidance to schools and other educational institutions following the Supreme Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1744 (2020), OCR issued the following three guidance documents:

- “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*, 86 Fed. Reg. 32,637 (June 22, 2021) (“Interpretation”)
- “Letter to Educators on Title IX’s 49th Anniversary” (June 23, 2021) (“Dear Educator Letter” or “DEL”)
- “Confronting Anti-LGBTQI+ Harassment in Schools (June 2021) (“Fact Sheet”)

On August 30, 2021, twenty states filed a suit in the U.S. District Court for the Eastern District of Tennessee challenging the constitutionality of the policy directives provided in the Department’s guidance documents as exceeding the Department’s authority under Title IX and failing to meet the requirements of the Administrative Procedure Act. Plaintiff states then filed a motion for preliminary injunction, asking the court to enjoin the Department from enforcing the guidance contained in the Department’s guidance documents.⁴

On July 15, 2022, Judge Charles E. Atchley, Jr., issued an order granting the plaintiff states’ Motion for Preliminary Injunction. The order enjoined OCR from enforcing, in any of the states that are plaintiffs in the litigation, any guidance that addressed Title IX’s prohibition on sex discrimination as it relates to gender identity and sexual orientation.⁵ J. Atchley’s order specifically identified OCR’s guidance materials (“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 Interpretation, Dear Education Letter, Fact Sheet, and the Technical Assistance Document against Plaintiffs.”⁶

³ 86 Fed. Reg. 32,637 (Jan. 25, 2021).

⁴ *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).

⁵ Injunction at 46.

⁶ *Id.*

On July 26, 2022, Kansas City Office for Civil Rights (Region VII) Regional Director ██████ participated in a virtual meeting with OCR Assistant Secretary Lhamon, who stated that she planned to disregard the advice provided by the Department’s OGC and the U.S. Department of Justice (“DOJ”) in navigating OCR’s response to the Injunction.⁷

On August 25, 2022, DOJ filed a Notice of Compliance⁸ in which it represented to the court that while it would not “cite, reference, treat as binding, or otherwise rely upon the challenged documents in any investigations of claims or enforcement or administrative actions” it would nonetheless continue to pursue investigative and enforcement “positions [that] may be consistent with those in the challenged documents, but they will not be based on those documents.”⁹

On April 5, 2024, the Chief Attorney (WB) for the Kansas City Office for Civil Rights (Region VII) notified OSC that Assistant Secretary Lhamon had led OCR in investigation and enforcement efforts which may have violated the court’s Injunction and that Lhamon had threatened adverse personnel actions against the Regional Director and Chief Attorney (“Whistleblower” or “WB”) for “refusing to obey an order that [WB] believed would require him to violate a law, rule, or regulation (a prohibited personnel practice under 5 U.S.C. § 2302(b)(9)(D)).”¹⁰

In a letter dated August 6, 2024, OSC advised the Department of the WB’s allegations and asked it to conduct an investigation to determine if OCR had failed 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.”¹¹

The Department responded to OSC in a “Report” dated Dec. 12, 2024, which found no violations of the court’s order by OCR (“[t]he 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.”¹²

The Report then blamed the WB for failing to correctly interpret the “text of the Court’s injunction, which is the primary guide to its meaning” before essentially deflecting the WB’s concerns by attacking the court’s construction of the Injunction (*i.e.*, “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.

⁷ Attachment 2, (Regional Director ██████ ██████ Nov. 22, 2024, Memorandum) at 6-7 and interview with ██████ (May 28, 2025).

⁸ *Tennessee*, Dkt. No. 97, No. 3:21-cv-00308 (E.D. Tenn. Aug. 25, 2022).

⁹ *Id.* at 2-3.

¹⁰ Attachment 3, (Whistleblower’s Complaint, Apr. 5, 2024) at 1.

¹¹ Report at 1.

¹² *Id.* at 8.

The injunction does not specifically or in reasonable detail enjoin the Department from engaging in enforcement actions consistent with those documents . . .”¹³

In a letter dated Jan. 25, 2025, WB’s counsel replied (“WB’s Reply”)¹⁴ to the Dept.’s 2024 Report, alleging that in its Report, the Department:

- Analyzed the wrong issue;
- Mischaracterized the guidance documents and the Court’s 2022 Injunction;
- Contained false and misleading statements;
- Omitted material facts; and
- Continued to violate the Court’s 2022 Injunction.

In further response to OCS’s request that the Department further examine and respond to WB’s Reply to the Department’s 2024 Report, the Department now addresses the issues of concern with important information.

Discussion of the Department’s Previous Responses to OSC

Question 1: The whistleblower (WB) contends that the **agency did not interview a wide enough scope of employees**, which has significantly impacted the results of the investigation.

According to the Dept.’s December 2024 Report, its findings were based on interviews with ten OCR employees, including the Assistant Secretary, two Deputy Assistant Secretaries, four Enforcement Directors, the Whistleblower, and “certain [unspecified] staff in OCR regional offices.”¹⁵ The Report indicates that two OGC attorneys reviewed “Title IX’s statutory and regulatory provisions as well as relevant case law and OCR policy documents . . . [and] the order and relevant court filings . . . [and] internal case files . . . case management notes, 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.”¹⁶

As noted by the WB, it appears that the Dept.’s 2024 Report relied on interviews with a limited number of potential OCR employees – not including other regional OCR employees who may well have had familiarity with the subject matter of the Complaint. The Department interviewed three OCR employees, including the Kansas City Regional Director, the Kansas City Chief Attorney (*i.e.*, the WB), and the Seattle Regional Chief Attorney. Other staff in the Kansas City and Seattle offices and in other regional offices impacted by the Injunction (Chicago, Atlanta, and Cleveland) appear not to have been interviewed.

¹³ *Id.* at 9.

¹⁴ Attachment 4 (Whistleblower’s Reply to Report, Jan. 25, 2025).

¹⁵ Report at 8.

¹⁶ *Id.* at 8.

Beginning in May 2025, in response to this concern, Office of the General Counsel (“OGC”) attorneys conducted interviews with current and former Departmental personnel concerning this matter (note: several attorneys employed by the Department leading up to the Dept.’s 2024 Report were no longer employed by the Department in 2025). OGC counsel has subsequently interviewed and obtained related email records from various OCR and OGC attorneys, including [REDACTED] [REDACTED] and [REDACTED] [REDACTED] who had previously been assigned to review this matter.

Additional interviews were conducted with Kansas City Regional Director [REDACTED] [REDACTED] [REDACTED] provided email records with former OCR Chief of Staff [REDACTED], who on Sept. 30, 2024, had written to [REDACTED] that [REDACTED] and/or [REDACTED] would be contacting them to conduct an interview of [REDACTED] regarding how the Injunction impacted the Kansas City Regional Office’s enforcement efforts (approximately two months later, [REDACTED] received a calendar invitation for a meeting from [REDACTED]).

On Nov. 22, 2024, [REDACTED] provided a 25-page Memorandum (“[REDACTED] Memo”)¹⁷ addressed to OGC’s [REDACTED] [REDACTED] and [REDACTED] [REDACTED] [REDACTED] had been interviewed by OGC attorneys on Nov. 22, 2024, and provided the Memorandum to OGC’s attorneys ([REDACTED] and [REDACTED] after the interview. The [REDACTED] Memo was not referenced or otherwise included in the Dept.’s 2024 Report to OSC.

Significantly, in OGC’s May 2025 interview with [REDACTED] (and in his Nov. 22, 2024, Memorandum) he clearly recalled a virtual meeting with OCR Assistant Secretary Lhamon in which Lhamon had threatened both he and the WB that they “would be choosing to lose [their] jobs if [they] didn’t act as [Lhamon] instructed” (regarding implementation of Lhamon’s views of enforcement of the substance of OCR’s guidance documents despite the Injunction’s clear prohibitions).

This action and other related and similar actions (described *infra*) by Assistant Secretary Lhamon may constitute violations of 5 U.S.C. § 2302(b)(9)(D), which provides that any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority – take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of refusing to obey an order that would require the individual to violate a law, rule, or regulation.

[REDACTED] also recalled a July 26, 2022, virtual meeting with Lhamon in which Lhamon “stated she believes the Court overstepped its authority and that the preliminary injunction really doesn’t accomplish anything because it says we cannot enforce the guidance, but that’s not what we do, we enforce the law, not guidance. The Assistant Secretary stated *she disagrees with the guidance from OGC and DOJ attorneys working on the federal litigation regarding the preliminary injunction, and she wanted to send us an email explaining what she wants us to do but she was persuaded to not make a written record of it, so she decided to have this call instead.*”¹⁸

¹⁷ Attachment 2 (Memorandum of Regional Director [REDACTED] [REDACTED] dated Nov. 22, 2024).

¹⁸ Interview with [REDACTED] (May 28, 2025) and [REDACTED] Memo at 6 (emphasis added).

██████████ ██████████ Region VII Program Manager and Supervisory Attorney, described the environment in the office as “hostile” because of the adverse involvement of Enforcement Director ██████████ ██████████ who (the record indicates) was deeply involved in opposing the legal concerns raised by ██████████ and the WB about Assistant Secretary Lhamon’s post-Injunction directives to continue opening SOGI investigations.¹⁹ ██████████ interview confirmed, without prompting, the same timeline and substance of events experienced by the Kansas City Regional Office, as reported by ██████████ and the WB. ██████████ who has since left her position with OCR in large part because of the atmosphere that emerged in the office related to the responses to the Injunction, stated that she “no longer felt comfortable working with [Enforcement Director] ██████████ ██████████ even though she had previously viewed ██████████ as a mentor “but that had changed as a result of the management and operations following the preliminary injunction.”²⁰

The record indicates that Assistant Secretary Lhamon had, at this point, made clear her evolving intent to defy the court’s order and had begun the process of forcing her OCR subordinates to adopt her posture – and to do so without creating a written record in opposition to or further legal consideration of that effort.

Interviews with ██████████ and then-Deputy Assistant Secretary for Civil Rights ██████████ ██████████ revealed that Lhamon conducted multiple virtual meetings related to the Injunction and conveyed her initial disagreement with guidance from OGC and DOJ in how to respond to the Injunction – although the content of that alleged guidance (oral or written) has not been identified through this investigation.

In a virtual meeting with Lhamon, ██████████ and the WB on Feb. 29, 2024, Lhamon addressed Region VII’s concerns regarding a particular OCR compliant implicated by the Injunction (*i.e.*, the Rogers matter) by stating “we cannot enforce the guidance . . . but that’s not what we do. We enforce the law, not the guidance.”²¹ Lhamon’s message was unmistakable: continue with the substance of the Department’s SOGI guidance without deploying the actual guidance documents.

Lhamon also instructed all OCR regional and enforcement directors to “continue opening and investigating SOGI [sexual orientation and gender identity] cases”²² – continued openings and investigations which did, in fact, then occur.

In his Memorandum and interviews, ██████████ recalled ██████████ attempting to persuade regional OCR officials to continue opening SOGI matters – despite the terms of the Injunction and legal concerns raised by Region VII attorneys – observing that the legal risk would only fall on her (Lhamon) and other senior staff and that if any regional staff were found in contempt, she (Lhamon) would be willing to pay any fines and for personal legal representation either through the Department or through personal resources.²³

¹⁹ Interview with ██████████ (June 12, 2025).

²⁰ *Id.*

²¹ Interview with ██████████ (May 28, 2025) and ██████████ Memo at 6.

²² Interview with ██████████ (May 28, 2025) and ██████████ Memo at 19.

²³ Interview with ██████████ (May 28, 2025) and ██████████ Memo at 18-20.

Lhamon had begun to thread the needle of appearing to comply with the Injunction while openly defying it. She then compelled – through coercion and inducement - subordinate OCR career attorneys to do the same.

According to [REDACTED] and the WB, Lhamon “stated she does not appreciate email traffic on this topic (same discussion regarding [the] Owasso [matter]...), ‘that’s not how we roll,’ and she expects us to operate the same way she does, that is to have a conversation and not to send email about it. She has concerns about staff creating records of dissent and FOIA requests in such a highly regulated environment.”²⁴

Given the Department’s well-known, long-term practice of redacting written internal communications which are deliberative and/or pre-decisional in responses to FOIA requests, these apparent concerns by Lhamon are misplaced, at best, and appear to be chiefly aimed at stifling further internal legal discussions, pending Lhamon’s forthcoming directives.

Responding to Region VII leadership’s concerns about continuing SOGI investigations implicated by the Injunction, Lhamon told [REDACTED] and the WB that “each of us has very difficult decisions we have to make at various times. She said we have to look at our own souls about what we’re comfortable with and make decisions about what we’re doing. The Assistant Secretary stated that she has experienced where people have left OCR because they did not feel comfortable with a particular path she had chosen. She stated that’s a choice, she doesn’t think it has to be the choice, so let’s figure out what the options are.”²⁵

Once again, Lhamon’s course of action was to insist on being obeyed – legal and ethical concerns of senior career OCR attorneys aside - and for her subordinates to vigorously pursue her alternative construct for continuing the substance of the Dept.’s June 2021 SOGI guidance without engaging in obvious violations of the Injunction by utilizing the guidance documents. The message to Region VII career attorneys was unmistakable: either pull the trigger and execute enjoined SOGI enforcement policies pursuant to Lhamon’s directives or jeopardize their careers and livelihood.

Question 2: The WB asserts that “...**corrective action was proposed at the regional level in three additional cases identified by the whistleblower.** In these cases, the regional offices paused investigations or drafted dismissal letters in cases subject to the 2022 Injunction.

Corrective action continued to be proposed in additional cases identified by the WB - despite the applicability of the Injunction to the states in which the schools were located (*i.e.*, plaintiff states). The Kansas City Regional Office resisted acting on clear directives from the Assistant Enforcement Director to proceed with mediation on matters in which the Department’s SOGI guidance had been prohibited by the court. Repeatedly, the WB (and other Region VII attorneys) attempted to follow the directives from OCR leadership without violating their obligations to act within the constraints of the Injunction. At all times, Region VII’s attorneys (including the WB) went to great lengths to explain their legal concerns in writing and orally during virtual meetings.

²⁴ Interview with [REDACTED] (May 28, 2025) and [REDACTED] Memo at 19.

²⁵ Interview with [REDACTED] (May 28, 2025) and [REDACTED] Memo at 22.

In response, OCR leadership rejected the WB’s principled efforts by assigning matters to other regional offices (Chicago and Seattle) where subordinates were more compliant with OCR leadership’s directives to pursue investigations through notification letters that clearly continued the OCR SOGI policies which had been enjoined by the court.

In an interview with ██████████ ██████████ who served as a Deputy Assistant Secretary in OCR during Lhamon’s activities described in this matter, ██████████ acknowledged that it was extremely unusual for OCR’s leadership to transfer an enforcement matter from one regional office to another. In this situation, ██████████ noted that the Rogers matter (discussed at length in the Complaint) had been transferred from the Kansas City Regional Office to the Chicago Regional Office – the latter not falling within a Plaintiff state. To ██████████ recollection, the only other recent occasion where such a reassignment had occurred involved transferring matters from the New York City Regional Office to other regional offices following the terrorist attacks of 9/11/01.²⁶

██████████ also mentioned that it was unusual for Lhamon to “weigh in” on individual enforcement matters, except if it was a “high profile case” and that the Owasso matter (discussed at length in the Complaint) fell into that category.²⁷

Deputy Assistant Secretary ██████████ stated that while Lhamon relied heavily on what she indicated was DOJ support and guidance in the Department’s response to the Injunction, ██████████ had never seen or otherwise been provided with an opportunity to review any such DOJ support and guidance.²⁸

As noted in the WB’s Jan. 2025 Reply, “. . . most of the cases investigated and mediated by OCR in violation of the 2022 Injunction are identical, or very similar to, specific examples provided in the challenged documents.”²⁹

In the Department’s review of the matters identified by the WB, it is clear that OCR leadership continued to pursue investigations and corrective actions in SOGI matters which were substantively prohibited by the Injunction. As the WB described OCR leadership’s approach, “[t]he Department contends that ‘implementing’ the challenged documents is not the same as ‘engaging in enforcement actions consistent with those documents’ [] but this is a distinction without a difference.”³⁰

Based on its review of the testimony and official records, the Department does not dispute WB’s characterization and identification of corrective actions continuing to be proposed at the regional level, despite efforts by the regional office to comply with the 2022 Injunction.

²⁶ Interview with ██████████ ██████████ (Aug. 20, 2025).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Reply at 9.

³⁰ Reply at 4.

Question 3: The WB asserts that the **agency’s report omitted material information from Kansas City’s Regional Director concerning OCR’s compliance efforts.**

On Nov. 22, 2024, the Kansas City Regional Director provided a detailed 25-page Memorandum (the “██████ Memo”) to OGC attorneys ██████ ██████ and ██████ ██████. It included recitations of very specific instructions from Assistant Secretary Lhamon and Enforcement Director ██████ ██████ on how to proceed with opening and investigating SOGI matters despite the clear impact of the Injunction.

Inexplicably, the Dept.’s 2024 Report to OSC failed to reference or otherwise consider extensive relevant details and other documentation provided by ██████ in his Memorandum – which Memorandum had been submitted to the two OGC attorneys then leading the Department’s investigation on Nov. 22, 2024, and which Memorandum should have, but did not, inform the Dept.’s 2024 Report.

██████ memorialized his July 26, 2022, meeting with Assistant Secretary Lhamon, who gave clear instructions to move forward on SOGI investigations, despite the Injunction:

“The Assistant Secretary stated she disagrees with the guidance from OGC [Office of the General Counsel] and DOJ attorneys working on the federal litigation regarding the preliminary injunction, and she wanted to send us an email explaining what she wants us to do but she was persuaded to not make a written record of it, so she decided to have this [virtual] call instead. **She wants us to continue opening and investigating Title IX SOGI [sexual orientation and gender identity] complaints including those covered by the preliminary injunction**, and stated that there is a chance we may be found in violation of the injunction if we continue to move forward on these cases, but she feels it is a risk that should only apply to her and senior staff, not field staff, but in the event one of us is found in contempt for violating the injunction and fined, she is offering to pay our legal representation and to pay any fines for us, either through the department or by her personally. She said we should not be fined by the Court for doing our job, and this is a fight worth having.”³¹

Despite the credible source and concerning level of detail, the Dept.’s 2024 Report failed to include any reference to the ██████ Memo.

As further described in the ██████ Memo and in interviews with ██████ and the WB, Lhamon repeatedly “stated *we should be moving forward with opening SOGI investigations, even in injunction states*, but before any letters opening investigations or dismissing complaints are issued, they should be sent to the Enforcement Director for approval. The Assistant Secretary stated that *no one should have pencils down, people should have pencils up*, in all the states.”³²

³¹ ██████ Memo at 6-7 (emphasis added).

³² ██████ Memo at 7, ██████ interview (May 28, 2025), and WB interview (Dec. 27, 2025).

The Department finds no reason to dispute the veracity of these assertions by Regional Director [REDACTED]. Instead, in its Dec. 2024 Report, the Department simply ignored the Memo and its highly relevant details.

Soon after the July 26, 2022, virtual meeting with Lhamon, OCR leadership appears to have repeated similar instructions during a virtual meeting on July 29, 2024, with [REDACTED] and Deputy Assistant Secretary [REDACTED] and Enforcement Director [REDACTED].

[REDACTED] informed [REDACTED] “of an immediate one week pause on all SOGI cases across all 50 states, not just the states subject to the preliminary injunction. [REDACTED] indicated more guidance was coming from Assistant Secretary Lhamon and Program Legal Group (PLG) soon, but she believes we will be operating under the 2020 Title IX Amendments for a while. She indicated headquarters is trying to minimize communications in writing because this is just more stuff for discovery.”³³

Question 4: Please provide **any additional responsive information** that may be helpful for OSC’s review.

The “Findings” in the Dept.’s 2024 Report provided valuable insight into how the Department viewed its obligations in response to the Injunction:

“. . . 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.”

As indicated, the Department’s primary concern was its fidelity to the Notice of Compliance filed by a sister agency (DOJ) with the court – rather than compliance with the court’s order. This construct was clearly adopted by OCR leadership (and foisted upon Regional OCR leadership) in the weeks, months, and years following the Injunction to facilitate OCR’s continued pursuit of SOGI matters in the Plaintiff states, despite the court’s order.

The Department’s 2024 Report found that it had complied – with the Notice of Compliance, if not the Injunction – all the while questioning the clear meaning of the court’s directives as lacking in sufficiently reasonable detail:

³³ [REDACTED] Memo at 9.

“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.”³⁴

The Department’s Report continued to repeat Lhamon’s attack on J. Atchley’s order (despite the appellate court’s affirmation of the lower court’s order – an affirmation that goes entirely without mention in the Department’s Report³⁵):

“It is not unreasonable to expect such specificity from a court . . . 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.”³⁶

If the Department professed to have clarity from the Injunction that it simply could not use the particular June 2021 guidance documents in OCR’s SOGI enforcement efforts, it is unclear why the Department would find it nonetheless necessary to continue in its efforts to undermine the validity of the Injunction.

The Department’s rejection of the WB’s assertions was hardly a surprise, given that the WB was analyzing the investigatory orders the Region VII office was receiving against what he and other Region VII attorneys found to be the Injunction’s unambiguous requirements.

The Dept.’s 2024 Report even acknowledges the relatively simple – if profound - differences in perspective between the WB (and his Region VII colleagues) and Assistant Secretary Lhamon:

“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....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* ³⁷*opportunity to clarify the scope of its injunction more than two years ago.*”

³⁴ Report at 9-10.

³⁵ *Tennessee, et al., Plaintiffs-Appellees, v. Dep’t of Educ., et al., Defendants-Appellants*, 2022 WL 17901086.

³⁶ *Id.* at 10.

³⁷ Report at 11-12 (emphasis added).

Notably, on July 26, 2022 – days after the Injunction was issued - Assistant Secretary Lhamon told OCR Regional and Enforcement Directors that she “believes the Court overstepped its authority” and that she “disagrees with the guidance from OGC and DOJ attorneys working on the federal litigation regarding the preliminary injunction”³⁸

By Sept. 26, 2022, Assistant Secretary Lhamon had identified an alternative route for continuing OCR’s SOGI enforcement efforts without interference from the district court’s order: OCR would simply not use those particular guidance documents issued by the Department in June 2021 as it continued to conduct investigatory and enforcement efforts according to the very substance and policies contained in those documents:

“This is a follow-up to my July 20, 2022, email regarding the preliminary injunction entered against the Department of Education, the Department of Justice, and the EEOC on July 15. As I noted at the time, the district court enjoined ED (and other agencies) from ‘implementing’ certain documents that address discrimination involving sexual orientation and gender identity against any of the 20 States that are Plaintiffs in the action

*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 [], OCR staff should continue to rely on Title IX, its implementing regulations, case law, and the specific facts and circumstances of each case The three documents identified in the preliminary injunction should not be relied upon in determining what the statute and regulations mean.”*³⁹

Based on the Department’s current review of available records, including additional interviews and materials not cited in the Dept.’s 2024 Report, there is reason to believe that in response to the court’s Injunction, OCR leadership created a path for carrying out its preferred SOGI policies in the Plaintiff States, in contravention of the court’s order. It then directed OCR Regional Offices (*i.e.*, subordinates) to act in defiance of the Injunction.

Rather, the Department continued to open and resolve SOGI investigations based precisely on the interpretation of Title IX set forth in the Department’s guidance documents (June 2021), despite the court’s order.

As noted by the WB, in its order the district court repeatedly referenced the “content of the guidance”⁴⁰ (as the subject matter Plaintiffs had challenged as being unlawful), ultimately holding that “Defendant’s guidance documents advance new interpretations of . . . Title IX and

³⁸ [REDACTED] Memo at 6.

³⁹ [REDACTED] Memo at 7-8 (emphasis added).

⁴⁰ *Tennessee*, Case No. 3:21-cv-00308 at 31.

impose new legal obligations on regulated entities”⁴¹ and, further, that the “guidance creates rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity that appear nowhere in *Bostock*, Title IX, or its implementing regulations.”⁴²

Indeed, the court had not only enjoined the use of the Department’s guidance documents in the plaintiff states, but also implementation of the new [SOGI] interpretations of OCR’s enforcement and investigatory interests identified within those guidance documents.

Based on full consideration of the evidence available to the Department through additional interviews and record reviews, the Department does not dispute the characterization by WB’s counsel that it would be “nonsensical and renders the 2022 Injunction meaningless” to accept the Department’s evolving interpretation of the court’s order by attributing to the court the intent to enjoin the use of the challenged documents without “enjoining OCR from implementing what the challenged documents plainly say.”⁴³

Credibility Considerations

The written and verbal testimonies of the WB and of Regional Director ██████████ ██████████ – both longtime, well-respected civil servants – is entirely uncontested by any other testimony and available records. Even in the Dept.’s 2024 Report, as discussed *supra*, then-Deputy Secretary Marten observed that the WB’s allegations arose “primarily as a result of that good faith disagreement” (*i.e.*, disagreement over the Department’s interpretation of its obligations vis-à-vis the Injunction).⁴⁴

The information provided in multiple interviews with the WB and Regional Director ██████████ has not been contradicted or even brought into question by any other records or testimony. Perhaps unsurprisingly, their memories remain vivid as these events concerned potential violations of legal and ethical obligations and involved explicit and implicit threats by senior OCR leadership to their careers and livelihoods.

The Department’s findings, as reflected in its Dec. 2024 Report, involve a great deal of unpersuasive parsing of otherwise clear court orders. Unlike the WB, the Department’s evolving efforts to evade following the district court’s order involved an unusual degree of contortion, logical dexterity, and varying degrees of suspension of disbelief by the reader. In stark contrast, the WB’s actions reveal careful, respectful adherence to the court’s order and similarly patient attempts to mollify superiors following an agenda at variance with the court’s order.

Conclusion

⁴¹ *Id.* at 31.

⁴² *Id.* at 41.

⁴³ Reply at 4.

⁴⁴ Report at 11.

The allegations set forth by the Whistleblower are entirely supported by the lengthy and detailed memorialization by the Regional Director for OCR Region VII (*i.e.*, [REDACTED] Memo). Extensive review of associated records and additional lengthy virtual and telephonic interviews have, likewise, failed to produce any facts or inferences at variance with the Whistleblower's allegations.

The record reveals that then-OCR leadership engaged in extremely heavy-handed tactics in repeated attempts to coerce OCR's Region VII's longtime career attorneys to accept and follow the Department's post-Injunction interpretation of the limited applicability of the Injunction to OCR leadership's SOGI enforcement and investigative initiatives (a post-Injunction interpretation identified by then-Deputy Secretary Marten as consistent with the Notice of Compliance provided to the court – if not the actual Injunction).

Assistant Secretary Lhamon's insistence on subduing the well-founded, respectfully presented, and carefully considered legal viewpoints of OCR Region VII career attorneys in senior leadership positions is, at best, dismaying. Although the Whistleblower's notice to OSC occurred in 2024, highly questionable supervisory efforts appear to have permeated the post-Injunction OCR enforcement environment for a significant period of time (*i.e.*, July 2021 – Jan. 2025).

In a relentless effort to continue executing the Department's preferred sexual orientation and gender identity (SOGI) policies nationwide, it appears that OCR's leadership chose to elude the court's clear prohibitions on OCR's SOGI enforcement efforts in the plaintiff states and opted instead to adopt (and insist that OCR Regional offices adopt) its own innovative construct of how it would observe the court's order – which innovation appears to have been substantively contrary to that order.

OCR's leadership provided the appearance of accepting the court's order by not relying on the specific documents it had issued in June 2021 even as OCR continued to aggressively enforce the very substance contained in those documents in the plaintiff states – and throughout the country. In so doing, senior OCR leadership may also have violated prohibited personnel practices, as alleged by the Whistleblower.

Please contact me if you have any questions.

Sincerely,

[REDACTED]

Deputy General Counsel & Chief Investigative Counsel
Office of the General Counsel
U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202

ATTACHMENTS

Attachment 1



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] 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] 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]

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-education-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.

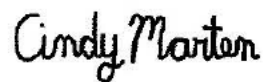
may warrant finding subject-matter jurisdiction under Section 504 or Title II. The Memo references the *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. Aug. 22, 2022) decision as the recent federal appellate decision, which OCR's Principal Deputy Assistant Secretary confirmed was the catalyst for the Memo. 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 20202

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: School Funding 7-13-18

CERTIFIED DATE 7/13/2018

Departmental Delegations Control Officer
Control Number EA181176

Attachment 2

MEMORANDUM

To: [REDACTED] Office of General Counsel; and
[REDACTED] Office of General Counsel

From: [REDACTED] Regional Director, OCR Kansas City [REDACTED]

Re: OSC Inquiry regarding *Tennessee, et al., v United States Department of Education, et al.*
Injunction

Date: November 22, 2024

Thank you for taking time to meet this morning to discuss the whistleblower complaint the Department received from the U.S. Office of Special Counsel alleging the Department is failing to comply with a court order issued in July 2022, by the U.S. District Court for the Eastern District of Tennessee.

As we discussed, below is a breakdown of the timeline, communications, and actions I am aware of regarding this matter. Please let me know if you need additional information. I will also send a copy of the dismissal letters in Rogers School District you requested at the end of our call today.

Background on Case Processing and the Preliminary Injunction

On January 21, 2021, OCR Deputy Assistant Secretary of Civil Rights, [REDACTED] issued instructions to all Regional Directors and Enforcement Directors entitled "Pause" stating all OCR complaints under any stage of evaluation were on pause with the exception of disability-related cases, until further notice. The "pause" was gradually lifted over time for many types of cases. There was a period of time after the "pause" was lifted sexual orientation or gender identity complaints could be opened without approval from headquarters, but those investigations could not be resolved without approval from headquarters. Currently, all cases involving sexual orientation or gender identity (SOGI) and sex stereotyping must be submitted to headquarters for approval before any action can be taken on those complaints.

Around February 2021, the Regional Directors were informed during a series of meetings that the 2020 Amendments to Title IX from the previous administration were "put on hold."

On May 10, 2021, Acting Assistant Secretary for Civil Rights, [REDACTED] issued an email to OCR Enforcement Directors and Regional Directors "not for circulation" including an attached draft "Notice of interim final interpretation" seeking comments and feedback. The draft notice related to applying the U.S. Supreme Court's analysis in *Bostock v Clayton County* (2020) to Title IX.

On June 16, 2021, Acting Assistant Secretary for Civil Rights, ██████████ issued an email to all OCR staff informing staff OCR had “issued a Notice of Interpretation making clear that OCR’s enforcement of Title IX encompasses discrimination based on sexual orientation and gender identity.” ██████████ noted “the interpretation of Title IX follows the U.S. Supreme Court’s analysis in *Bostock v Clayton County* (2020)” and is “consistent with the DOJ’s memorandum on the interpretation of Title IX issued earlier this year.”

On June 22, 2021, OCR published an “Interpretation” in the Federal Register, stating effective immediately, OCR was interpreting Title IX to follow the U.S. Supreme Court’s analysis in *Bostock v Clayton County* (2020).

On July 15, 2022, U.S. District Court Judge, Charles E. Atchley, Jr. (Eastern District of Tennessee) issued a Memorandum and Order in *The State of Tennessee, et al., v United States Department of Education, et al.*, in case number 3:21-cv-308 (Doc. 86), granting the Plaintiffs’ Motion for Preliminary Injunction (Injunction). The Injunction applies only to the Plaintiff States, consisting of: Tennessee, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia. (Injunction, fn. 1 and 18).

In the Memorandum Opinion and Order, the Court identified certain documents published by the U.S. Department of Education as being subject to the Court’s jurisdiction and Order. Those relevant documents subject to the Injunction were identified by the Court as: (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*.” 86 Fed. Reg. 32637 (June 22, 2021), hereinafter identified as the “Interpretation”; (2) “Letter to Educators on Title IX’s 49th Anniversary” (June 23, 2021), hereinafter identified as the “Dear Educator Letter”; and (3) “U.S. Dep’t of Justice & U.S. Dep’t of Educ., Confronting Anti-LGBTQI+ Harassment in Schools” (June 2021), hereinafter “Fact Sheet.”

“Interpretation”: <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>;

“Dear Educator Letter”:

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

“Fact Sheet”: <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>

The Court specifically noted that the Department has stated, in accordance with the Interpretation, 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 from the Department” and that “the Interpretation will guide the Department in processing complaints and conducting investigations.” (Doc. 86, p. 4).

The most relevant portion of the “Interpretation” identified by the Court states:

For the reasons set out below, the Department has determined that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*— that discrimination “because of . . . sex” encompasses discrimination based on sexual orientation and gender identity— properly guides the Department’s interpretation of discrimination “on the basis of sex” under Title IX and **leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.** [Emphasis added]. ([Interpretation](#), 86 Fed. Reg. 32638 (June 22, 2021), and [Doc. 86](#), p. 4).

The “Dear Educator letter” likewise states in relevant part: “Consistent with this notice, OCR 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 from the Department.” [Dear Educator Letter](#), p. 2, and [Doc. 86](#), p. 4.

The [Fact Sheet](#) published by the U.S. Department of Education states in part:

**Confronting Anti-LGBTQI+ Harassment in Schools
A Resource for Students and Families**

Many students face bullying, harassment, and discrimination based on sex stereotypes and assumptions about what it means to be a boy or a girl. Students who are lesbian, gay, bisexual, transgender, queer, intersex, nonbinary, or otherwise gender non-conforming may face harassment based on how they dress or act, or for simply being who they are. It is important to know that discrimination against students based on their sexual orientation or gender identity is a form of sex discrimination prohibited by federal law. It is also important that LGBTQI+ students feel safe and know what to do if they experience discrimination.

Public elementary and secondary schools, as well as public and private colleges and universities, have a responsibility to investigate and address sex discrimination, including sexual harassment, against students because of their perceived or actual sexual orientation or gender identity. When schools fail to respond appropriately, the Educational Opportunities Section of the Civil Rights Division (CRT) at the U.S. Department of Justice and the Office for Civil Rights (OCR) at the U.S. Department of Education can help by enforcing federal laws that protect students from

discrimination. CRT and OCR can also provide information to assist schools in meeting their legal obligations. (Fact Sheet, and Doc. 86, p. 6).

In granting the Plaintiffs' Motion for Preliminary Injunction, the Court ordered that "the Federal Defendants [including the U.S. Department of Education] and all their respective officers, agents, employees, attorneys, and persons acting in concert or participation with them are ENJOINED and RESTRAINED from implementing the Interpretation, Dear Educator Letter, Fact Sheet, and the [EEOC publication entitled] Technical Assistance Document against Plaintiffs." (Doc. 86, p. 46).

The Injunction was appealed to the 6th Circuit Court of Appeals, who upheld the Injunction. The Department of Education filed an emergency application for partial stay of Injunction with the U.S. Supreme Court on July 22, 2024. The Supreme Court denied the application on August 16, 2024.

Department of Education Notice to Staff Regarding the Injunction

On July 18, 2022, after hearing from the OCR Cleveland Regional Director [REDACTED] of a possible Injunction regarding Title IX, OCR Kansas City Regional Director [REDACTED] sent the following email to Deputy Assistant Secretary of Enforcement [REDACTED] and Enforcement Director [REDACTED]

From: [REDACTED]@ed.gov>
Sent: Monday, July 18, 2022 9:39 AM
To: [REDACTED]@ed.gov>; [REDACTED]@ed.gov>
Cc: [REDACTED]@ed.gov>; [REDACTED]@ed.gov>
Subject: FW: Preliminary Injunction re Title IX wrt LGBTQ
Importance: High

Good morning [REDACTED]

Please see the attached Injunction that [REDACTED] forwarded to the RDs this morning.

We need guidance on how to proceed. The plaintiffs include all of the states in Region VII, so it looks like this will impact our evaluations and investigations given the Department's guidance regarding Bostock's application to Title IX, which is referenced on page 3 of the Injunction.

Footnote 18 seems to say that the injunction only applies to plaintiff states, not a nationwide injunction, but for us, it applies to all of Region VII.

Please advise on next steps.

Thank you,



Regional Director, Region VII
U.S. Department of Education
Office for Civil Rights
1010 Walnut Street, Suite 320
Kansas City, Missouri 64106



Deputy Assistant Secretary [redacted] responded that same day, "Understood. Will get back to you."

OCR Guidance Regarding the Injunction

It is important to note, as illustrated below, there has been a clear difference between the written guidance distributed by Headquarters on this topic compared to the verbal instructions given during MS Teams calls.

On July 20, 2022, U.S. Department of Education, Assistant Secretary for Civil Rights, Catherine E. Lhamon, distributed an email to all OCR users, with the subject line: "Subject: Important information about a court injunction regarding sexual orientation and gender identity." The email informed staff of the Injunction and provided guidance on how staff should proceed in States that are subject to the Injunction. The email states as follows:

From: Lhamon, Catherine E. <[redacted]@ed.gov>
Sent: Wednesday, July 20, 2022 12:35 PM
To: OCR All Users [redacted]@ed.gov>
Subject: Important information about a court injunction regarding sexual orientation and gender identity

All:

On Friday, July 15, 2022, a district court issued the attached opinion and preliminary injunction against the Department of Education, the

Department of Justice, and the EEOC. The district court enjoined ED (and other agencies) from “implementing” certain documents that address discrimination involving sexual orientation and gender identity against any of the 20 States that are Plaintiffs in the action.

The three documents subject to the preliminary injunction relevant to ED are:

- Notice of Interpretation: “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*.” 86 Fed. Reg. 32637 (June 22, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf>
- “Letter to Educators on Title IX’s 49th Anniversary” (June 23, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf>;
- Fact Sheet: “Confronting Anti-LGBTQI+ Harassment in Schools” (June 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>.

The 20 States as to which ED is preliminarily enjoined from implementing those documents 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.

As has been our practice, if you are working on a case that alleges discrimination based on sexual orientation and gender identity, please inform your Enforcement Director (ED). If you have any questions, you should also contact your ED.

Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education

On July 26, 2022, the OCR Regional Directors, Enforcement Directors, and Assistant Secretary Lhamon, participated in a phone call over MS Teams regarding the preliminary injunction. The Assistant Secretary stated she believes the Court overstepped its authority and that the preliminary injunction really doesn’t accomplish anything because it says we cannot enforce the guidance, but that’s not what we do, we enforce the law, not guidance. The Assistant Secretary stated she disagrees with the guidance from OGC and DOJ attorneys working on the federal litigation regarding the preliminary injunction, and she wanted to send us an email explaining what she wants us to do but she was persuaded to not make a written record of it, so she decided to have this call instead. She wants us to continue opening and investigating Title IX SOGI

complaints including those covered by the preliminary injunction, and stated there is a chance we may be found in violation of the injunction if we continue to move forward on these cases, but she feels it is a risk that should only apply to her and senior staff, not field staff, but in the event one of us is found in contempt for violating the injunction and fined, she is offering to pay for our legal representation and to pay any fines for us, either through the department or by her personally. She said we should not be fined by the Court for doing our job, and this is a fight worth having.

Regional Director [REDACTED] immediately notified Chief Attorney [REDACTED] of the conversation and told him notwithstanding the Assistant Secretary's instructions and assurances, we will not be taking any action that will violate the preliminary injunction. He agreed. [REDACTED] later also informed Program Manager [REDACTED] and the Kansas City Team Leaders of the general topics covered during the call and the instruction and assurance that we will not be taking any action that may violate the preliminary injunction. Staff all agreed and said they appreciated the assurance and support.

On August 24, 2022, the OCR Regional Directors, Enforcement Directors, and Assistant Secretary Lhamon, participated in a follow-up phone call over MS Teams regarding the preliminary injunction. The Assistant Secretary stated we should be moving forward with opening SOGI investigations, even in injunction states, but before any letters opening investigations or dismissing complaints are issued, they should be sent to the Enforcement Director for approval. The Assistant Secretary stated no one should have pencils down, people should have pencils up, in all the states.

The Assistant Secretary sent a follow-up email to all-staff on September 26, 2022. That email stated:

From: Lhamon, Catherine E. <[REDACTED]@ed.gov>
Sent: Monday, September 26, 2022 11:57 AM
To: OCR All Users <[REDACTED]@ed.gov>
Subject: RE: Important information about a court injunction regarding sexual orientation and gender identity

All:

This is a follow-up to my July 20, 2022, email regarding the preliminary injunction entered against the Department of Education, the Department of Justice, and the EEOC on July 15. As I noted at the time, the district court enjoined ED (and other agencies) from "implementing" certain documents that address discrimination involving sexual orientation and gender identity against any of the 20 States that are Plaintiffs in the action.

The three documents subject to the preliminary injunction relevant to ED are:

- Notice of Interpretation: “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*.” 86 Fed. Reg. 32637 (June 22, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>;
- “Letter to Educators on Title IX’s 49th Anniversary” (June 23, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf>;
- Fact Sheet: “Confronting Anti-LGBTQI+ Harassment in Schools” (June 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>.

The 20 States that ED is preliminarily enjoined from implementing those documents against 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.

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.

As has been our practice, if you are working on a case that alleges discrimination based on sexual orientation and gender identity, please inform your Enforcement Director (ED). If you have any questions about how to proceed, you should also contact your ED.

Catherine E. Lhamon
 Assistant Secretary for Civil Rights
 U.S. Department of Education

On November 14, 2022, Assistant Secretary Lhamon issued an email directive to all staff along with a Memorandum entitled *Opening Cases Potentially Involving Allegations of Gender Dysphoria*. The memorandum was “in response to a recent federal appellate decision” and

provided suggestions to staff on how to broaden complaints alleging discrimination against transgender individuals to also include disability based discrimination under Section 504 and/or Title II. It was explained on subsequent calls over MS Teams that the current injunction only covers Title IX, not Section 504 or Title II, so this was an avenue OCR should try to take to avoid Court scrutiny regarding the injunction.

On July 29, 2024, Regional Director [REDACTED] received a call from Enforcement Director [REDACTED] via MS Teams stating she just got off a call with Deputy Assistant Secretary [REDACTED] and they are informing us of an immediate one week pause on all SOGI cases across all 50 states, not just the states subject to the preliminary injunction. [REDACTED] indicated more guidance was coming from Assistant Secretary Lhamon and Program Legal Group (PLG) soon, but she believes we will be operating under the 2020 Title IX Amendments for a while. [REDACTED] stated this was pencils down for a week at the recommendation of DOJ. She indicated headquarters is trying to minimize communications in writing because this is just more stuff for discovery.

On August 1, 2024, Assistant Secretary Lhamon sent an email to the Regional Directors, entitled: Important instructions about the 2024 Title IX Final Rule effective date and court injunctions.:

From: Lhamon, Catherine E. [REDACTED]@ed.gov>
Sent: Thursday, August 1, 2024 10:03 AM
To: OCR Regional Directors [REDACTED]@ed.gov>;
[REDACTED]@ed.gov>; [REDACTED]
[REDACTED]@ed.gov>; [REDACTED]
[REDACTED]@ed.gov>; [REDACTED]
[REDACTED]@ed.gov>
Cc: [REDACTED]@ed.gov>; [REDACTED]
[REDACTED]@ed.gov>
Subject: Important instructions about the 2024 Title IX Final Rule effective date and court injunctions

Regional Directors:

This is an update regarding OCR's work to effectuate the 2024 Title IX Final Rule while complying with preliminary injunctions 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/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); Oklahoma, see Oklahoma v. Cardona, No. CIV-24-00461-JD (W.D. Okla. July 31, 2024); and the federal court of appeals for the Eleventh Circuit, see Alabama v. U.S. Sec'y of Educ., No. 24-12444 (11th Cir. July 31, 2024). Please either share this email directly with your staff or relay its substance in any manner you think appropriate. These instructions will be updated to reflect any new court orders that affect the enforceability of the 2024 Title IX Final Rule.

Pursuant to these federal court orders, the Department is currently enjoined from enforcing the 2024 Title IX Final Rule:

- in Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; and
- against the schools on the attached PDF list filed with the court in one of the cases (Kansas). This updated PDF will replace the list that is currently posted online. Per court order, this list of schools may be supplemented at subsequent times. For your convenience and reference, please find a SharePoint link to a spreadsheet for those schools, including their associated state and school district (when a K-12 school). The spreadsheet includes the schools on lists submitted through July 26, 2024, and will be updated to include the list filed on July 31, 2024. Both the SharePoint spreadsheet and the online PDF will continue to be updated if supplemental lists are received.

The Department's Title IX regulations, as amended in 2020, remain in effect in these states and schools, pending further court orders.

On behalf of the Department, the Department of Justice asked the Supreme Court on July 22, 2024, to stay portions of the preliminary injunctions in the first two of the cases that entered injunctions (Louisiana and Kentucky) so that unchallenged provisions of the 2024 Title IX Final Rule can be enforced in those states. The Department of Justice is hopeful that we will receive a decision from the Court soon.

Until you receive further written instructions, in response to an OCR complaint that alleges sex discrimination related to conduct that occurred on or after August 1, 2024, consult the list of enjoined states (above) and schools (SharePoint link) to determine whether the school identified in the complaint is a school that is covered by an injunction. (If the school is located in one of the states in which OCR is enjoined from enforcing the 2024 Title IX Final Rule, there is currently no need to determine whether the school is also on the separate list of schools.) In addition, consult with your Enforcement Director for a complaint against a school that is highlighted on the list or an online postsecondary institution that is not on the list.

- If the complaint is about a state or school where OCR is enjoined from enforcing the 2024 Title IX Final Rule, analyze any Title IX allegations consistent with the Department's Title IX regulations as amended in 2020. Please include the following text in official correspondence, such as a letter of notification or resolution letter, in which jurisdiction under Title IX is set out:

Pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 Title IX Final Rule in [STATE or SCHOOL]. Pending further court orders, the Department's Title IX regulations, as amended in 2020 (2020 Title IX regulations) remain in effect in [STATE or SCHOOL]. Therefore, the 2020 Title IX regulations serve as the basis for OCR's determination in this matter.

- If the complaint is not from a state or about a school in which OCR is enjoined from enforcing the 2024 Title IX Final Rule, analyze the Title IX allegations consistent with the 2024 Title IX regulations for conduct alleged to have occurred on or after August 1, 2024. Note that there may be instances, such as when a pattern of sex-based harassment spans a period prior to and after August 1, 2024, in which OCR will evaluate the recipient's compliance with both the 2020 Title IX regulations and the 2024 Title IX Final Rule. Any resolution agreements would require the recipient to come into compliance with the 2024 Title IX Final Rule.

If you have any questions, please email

████████████████████@usdedeop.onmicrosoft.com to seek guidance. This is an inbox that is internal to ED and monitored by PLG. Inquiries from the public should be directed to ██████████@ed.gov.

Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education

On August 19, 2024, Assistant Secretary Lhamon sent an email to the Regional Directors, including instructions relating to complaints alleging gender identity discrimination with an attached model dismissal letter and the following information:

From: Lhamon, Catherine E. <Catherine.E.Lhamon@ed.gov>
Sent: Monday, August 19, 2024 11:03 AM
To: OCR Regional Directors [REDACTED]@ed.gov>;
[REDACTED]@ed.gov>;
[REDACTED]@ed.gov>;
[REDACTED]@ed.gov>;
[REDACTED]@ed.gov>;
Cc: [REDACTED]@ed.gov>; [REDACTED]@ed.gov>
Subject: Important instructions relating to allegations of gender identity discrimination in states and schools where the 2020 Title IX Final Rule remains in effect

Regional Directors:

This is a further update regarding OCR's work to effectuate the 2024 Title IX Final Rule while complying with preliminary injunctions 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); Missouri, see Arkansas v. U.S. Dep't of Educ., Case No. 4:24 CV 636 RWS (E.D. Mo. July 24, 2024); Oklahoma, see Oklahoma v. Cardona, No. CIV-24-00461-JD (W.D. Okla. July 31, 2024); and the federal court of appeals for the Eleventh Circuit, see Alabama v. U.S. Sec'y of Educ., No. 24-12444 (11th Cir. July 31, 2024). Please either share this email directly with your staff or relay its substance in any manner you think appropriate.

I will send a separate update to the Dallas Regional office regarding the preliminary injunctions regarding the 2024 Title IX Final Rule in Texas, see Texas v. United States, No. 2:24CV86-Z

(N.D. Tex. July 11, 2024), and *Carroll Indep. Sch. Dist. v. Dep't of Educ.*, No. 4:24-cv-00461-O (N.D. Tex. July 11, 2024); and the permanent injunction arising out of the challenge to OCR's Bostock Notice of Interpretation in Texas, see *Texas v. Cardona*, No. 4:23-cv-00604 (N.D. Tex. Aug. 5, 2024).

On behalf of the Department, the Department of Justice asked the Supreme Court on July 22, 2024, to stay portions of the preliminary injunctions in the first two of the cases that entered injunctions (Louisiana and Kentucky) so that unchallenged provisions of the 2024 Title IX Final Rule can be enforced in those states. While the Supreme Court decided on August 16, 2024, not to stay the preliminary injunctions, appeals are currently pending in multiple circuits about the injunctions.

My August 1, 2024, instructions addressed what set of Title IX regulations should apply to the evaluation, investigation, and resolution of particular allegations involving conduct on or after August 1, 2024. These further instructions address how to process allegations of gender identity discrimination regardless of when the alleged conduct occurred in those states (other than in Texas) and schools in which the Department is currently enjoined from enforcing the 2024 Title IX Final Rule and is applying the Title IX regulations as amended in 2020.

As a reminder, pursuant to these federal court orders, the Department is currently enjoined from enforcing the 2024 Title IX Final Rule:

- in Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; and
- against the schools on the PDF lists filed with the court in one of the cases (Kansas), as linked on our website and for those schools, including their associated state and school district (when a K-12 school). Both the SharePoint spreadsheet and the online PDF will continue to be updated if supplemental lists are received. The Department's Title IX regulations, as amended in 2020, remain in effect in these states and schools, pending further court orders.

Until you receive further written instructions, any allegation (whether in evaluation, investigation, or negotiation) in these states (other than Texas) and schools should be dismissed/closed if it claims an individual was:

- denied access to a sex-separate restroom, locker room, living facility, class, or extracurricular activity based on a policy or practice that limits access to those spaces to individuals whose gender identity aligns with the sex they were assigned at birth;
- denied access to a sex-separate athletic team based on a policy or practice that limits access to the team to individuals whose gender identity aligns with the sex they were assigned at birth; or
- subjected to different treatment (other than harassment) because of their gender identity.

In addition, any allegation (whether in evaluation, investigation, or negotiation) in these states (other than Texas) and schools should be dismissed/closed if it involves harassment that would not meet the definition of “sexual harassment” in 106.30(a) of the 2020 regulations, as further clarified in the preamble to the 2020 Title IX Final Regulation (85 FR 30026, 30179 (2020)):

These final regulations focus on prohibited conduct, irrespective of a person’s * * * gender identity. *** These final regulations include sexual harassment as unwelcome conduct on the basis of sex that a reasonable person would determine is so severe, pervasive, and objectively offensive that it denies a person equal educational access; this includes but is not limited to unwelcome conduct of a sexual nature, and may consist of unwelcome conduct based on sex or sex stereotyping. The Department will not tolerate sexual harassment as defined in § 106.30 against any student, including LGBTQ students.

If an allegation must be dismissed/closed, use the language in the sample dismissal letter. If a complaint involves multiple allegations, only some of which must be dismissed/closed, then use the language in the sample dismissal letter making clear that the other allegations remain pending for evaluation or investigation.

Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education

indicate the school district has offered mediation to [REDACTED] or [REDACTED], but the [REDACTED] were not interested in that offer. The complainant requested that OCR facilitate mediation of the complaint, which would be conducted pursuant to Section 201(a) of OCR's Case Processing Manual. The receipt of the complaint was included in the Weekly Update because it was considered a Case of Interest having alleged Title IX discrimination based on Gender Identity, and because it implicates the Injunction.

In January 2024, staff began preparing the case for mediation, but soon recognized the Case Processing Manual had been amended on July 19, 2022, a fact not previously communicated to regional staff by Headquarters. In reviewing the differences between the Case Processing Manual versions, the team concluded that OCR could mediate the complaint only if OCR utilized the new Interpretation of Title IX relating to Gender Identity, and the related guidance documents that are all subject to the Injunction. Otherwise, the team determined the complaint would have to be dismissed according to Section 108(f) of the Case Processing Manual, because the complaint fails to state a violation of the law under the 2020 Amendments to Title IX, which were being utilized under the Injunction.

On or around February 1, 2024, the team asked Enforcement Director [REDACTED] to ask the Office of General Counsel for guidance regarding the Case Processing Manual mediation guidelines and the restrictions of the Injunction as they relate to the Rogers complaint. The request was not approved.

Regional Director [REDACTED], Chief Attorney [REDACTED], and Program Manager [REDACTED] (also referred to as the OCR KC triad), communicated with Enforcement Director [REDACTED] over MS Teams during a series of calls informing her that upon the team realizing that the Case Processing Manual had been amended, proceeding with scheduling the Rogers complaint for mediation would require utilization of the new Interpretation of Title IX and would violate the Injunction. Regional Director [REDACTED] also shared an email with Enforcement Director [REDACTED] on February 8, 2024, demonstrating the relevant change to the Case Processing Manual concerning mediation. Enforcement Director [REDACTED] indicated she believed we would need to mediate the complaint anyway but stated she would speak with Deputy Assistant Secretary of Enforcement [REDACTED] and get back to us.

On or around February 8, 2024, Regional Director [REDACTED], Chief Attorney [REDACTED], and Program Manager [REDACTED] spoke with Enforcement Director [REDACTED]. The OCR KC triad reiterated to Enforcement Director [REDACTED] that we believe the instruction from Enforcement Director [REDACTED] for the OCR KC triad to assign a mediator to mediate the Rogers complaint would require regional staff to violate the Injunction and we were not willing to do that. Enforcement Director [REDACTED] told the OCR KC triad she did not believe mediating the Rogers complaint would violate the Injunction and even if it did, the mediation is confidential, so the Court would not find out. The OCR KC triad informed Enforcement Director [REDACTED] that under the 2020 Title IX Amendments, of which we were supposed to be enforcing while the Injunction was pending, the Rogers complaint would be dismissed for failing to state a violation of one of the

laws or regulations OCR enforces pursuant to OCR Case Processing Manual Section 108(f) as required by Case Processing Manual Section 201(a). Only if OCR were to implement the interpretation of Title IX that the Department has been enjoined and restrained from using in the processing of complaints and conducting investigations, could OCR mediate the complaint as Enforcement Director ██████ had instructed.

Enforcement Director ██████ restated her opinion that mediating the Rogers complaint would not violate the injunction. Regional Director ██████ again asked Enforcement Director ██████ if the OCR KC triad could get an opinion from the Department of Education Office of General Counsel as to whether proceeding with mediating the Rogers complaint would violate the Injunction, but Enforcement Director ██████ informed Regional Director ██████ that no such request will be made or approved. Enforcement Director ██████ stated she would raise our concerns again with the Deputy Assistant Secretary of Enforcement, ██████ and get back to us about our concerns.

On February 13, 2024, Regional Director ██████ had a call with Enforcement Director ██████ via MS Teams to have further discussions about the concerns with OCR mediating the Rogers complaint in light of the Injunction. Enforcement Director ██████ stated the Case Processing Manual was distributed to staff for training, and after that training, there were some slight tweaks to the Case Processing Manual (metadata indicates the document available online was created July 18, 2022, and modified July 19, 2022), because staff were putting complaints into mediation that should have been dismissed. Enforcement Director ██████ stated this was occurring because the version of the Case Processing Manual staff had received and were trained on, allowed for that to happen. Headquarters revised the Case Processing Manual so that did not continue. Regional Director ██████ pointed out to Enforcement Director ██████ that is precisely the concern that the regional staff had been expressing to Enforcement Director ██████. In accordance with the revisions to the Case Processing Manual, the Rogers complaint should be dismissed, not mediated. Enforcement Director ██████ said the Deputy Assistant Secretary of Enforcement felt "quite strongly" that we needed to move forward on mediation anyway. Enforcement Director ██████ stated that the Deputy Assistant Secretary of Enforcement feels this is an agency decision, a national direction.

Enforcement Director ██████ argued that the Injunction only relates to the use of certain documents and OCR is not relying on those documents. We discussed the difference between OCR implementing the new Interpretation and guidance documents versus OCR enforcing the specific guidance documents, and how the Injunction was in fact broader than merely enjoining the use of certain documents, it involved enjoining application of the new Interpretation of Title IX relating to sexual orientation and gender identity. Regional Director ██████ explained his reading of the Court's Order which clearly indicates OCR cannot use the Interpretation that Title IX prohibits discrimination based on sexual orientation and gender identity in education programs and activities that receive federal financial assistance, in both the processing of complaints and conducting investigations. The Court's discussion of the specific restrictions is found in large part on page 4 of the Injunction. Regional Director ██████ reiterated that without implementing the new interpretation, the Rogers complaint should be dismissed, and the only way the complaint is not dismissed and instead sent to mediation, is if the new interpretation of Title IX is implemented, in violation of the Injunction.

Enforcement Director ██████ said OCR has “plenty of SOGI cases that are in mediation.” Enforcement Director ██████ also argued transgender is different than gender identity and is not covered by the Injunction. Enforcement Director ██████ said the Deputy Assistant Secretary feels we have a position on this as an agency, so we need to proceed with mediation. Enforcement Director ██████ said she would raise it again with the Deputy Assistant Secretary of Enforcement. Enforcement Director ██████ also indicated she would probably ask another OCR Region to handle the mediation since we have these concerns.

On February 19, 2024, Program Manager ██████ who manages the regional mediation program for OCR Kansas City, called Regional Director ██████ to inform him that Enforcement Director ██████ called and informed her that the Deputy Assistant Secretary of Enforcement decided OCR Kansas City needs to proceed with mediating the Rogers complaint despite our concerns related to the Injunction.

On February 20, 2024, Regional Director ██████ asked Chief Attorney ██████ to tell the team to hold off on proceeding with the mediation request in Rogers until we received clarification from Headquarters. Chief Attorney ██████ sent an email to the team stating the case is on hold pending further guidance.

On February 26, 2024, Regional Director ██████ Chief Attorney ██████ and Program Manager ██████ spoke with Enforcement Director ██████ during a call over MS Teams, reaffirming our position that proceeding with mediation in the Rogers complaint will require us to violate the Injunction. We reiterated that given the change in the Case Processing Manual, OCR must first determine, before a complaint is sent to mediation, that the complaint states a violation of one of the laws or regulations OCR enforces. Accordingly, moving the Rogers complaint to mediation, instead of dismissing it, would necessarily require us to implement the Interpretation in direct violation of the Injunction. We noted that the facts alleged in the Rogers complaint fit squarely within one of the scenarios in the Fact Sheet which is one of the documents subject to the Injunction. Enforcement Director ██████ dismissed our concerns and indicated she has shared our concerns with the Deputy Assistant Secretary of Enforcement and they both are ordering us to proceed with mediation.

Enforcement Director ██████ told the OCR KC triad that the Administration has made the decision to proceed in this manner and said: “there’s an entire body of these that have happened in other offices, even in preliminary injunction states.” Enforcement Director ██████ indicated we could speak with the Deputy Assistant Secretary of Enforcement to hear it from him directly if we needed to. Regional Director ██████ responded by asking Enforcement Director ██████ to email us a written order to mediate the complaint with an explanation of why she does not believe proceeding to mediation will violate the Injunction so we will have a written record of the instruction given the fact that we believe the instruction to mediate the complaint will violate the Injunction. Enforcement Director ██████ stated that no such written instruction or order will be sent, and they do not want a paper trail of this. Regional Director ██████ told Enforcement Director ██████ that if the Regional Director was called to testify before the Court regarding the injunction, he would have to testify that in his opinion, mediating the Rogers complaint would violate the Injunction.

Regional Director ██████ told Enforcement Director ██████ that before we proceeded any further, the team would like to speak with the Deputy Assistant Secretary of Enforcement about this decision. Regional Director ██████ instructed the regional team to stand down on mediating the complaint until further notice. The meeting with the Deputy Assistant Secretary of Enforcement to discuss this decision never occurred.

On February 29, 2024, Regional Director ██████ and Chief Attorney ██████ met with Assistant Secretary for Civil Rights, Catherine Lhamon, via MS Teams to wrap up the Assistant Secretary's visit with regional staff that day. We discussed, in part, the instruction we received to mediate the Rogers complaint. We explained that we and the Program Manager had been expressing our belief that mediating the complaint will cause us to violate the Injunction, and that we have explained those concerns to Enforcement Director ██████ over the last several weeks, but we have been told the decision has been made by headquarters for us to facilitate mediation of the complaint despite our concerns. We explained the requirement in the Case Processing Manual that OCR first determine whether the Rogers complaint states a violation of a law or regulation OCR enforces, necessarily requires OCR to implement the Interpretation, otherwise the complaint should be dismissed. We noted that the facts alleged in the Rogers complaint fit squarely within one of the scenarios in the Fact Sheet, which is also one of the documents subject to the Injunction.

The Assistant Secretary stated she does not appreciate email traffic on this topic (same discussion regarding Owasso, see below), "that's not how we roll," and she expects us to operate the same way she does, that is to have a conversation and not to send email about it. She has concerns about staff creating records of dissent and FOIA requests in such a highly regulated environment. The Assistant Secretary then stated she understood our concerns and would speak with the Deputy Assistant Secretary of Enforcement and Enforcement Director ██████ about whether we should proceed with mediating the Rogers complaint and either she or Enforcement Director ██████ will let us know how she wants us to proceed. The Assistant Secretary said she agrees that we need to be careful and not take risks with the Injunction. The Assistant Secretary stated that the preamble to the 2020 Regulations is where we stand, and she is not interested in violating the Court Order. She said she wants to be in a place where all of us are comfortable to do our job that we signed up to do, and that we do our job to enforce the statutes and regulations that we have, even when we don't agree with them. The Assistant Secretary also indicated if a decision to proceed with mediation in Rogers is made by her, then it will be our job to implement it even if we disagree with the decision or believe it will violate the injunction.

The Assistant Secretary concluded her discussion regarding both the Rogers complaint and another case related to the Injunction (Owasso Public Schools, OCR Case number ██████) by stating each of us have very difficult decisions we have to make at various times. She said we have to look at our own souls about what we're comfortable with and make decisions about what we're doing. The Assistant Secretary stated that she has experienced where people have left OCR because they did not feel comfortable with a particular path she had chosen. She stated that is a choice. She stated she doesn't think it has to be the choice, so let's figure out what the other options are. She concluded by saying she will discuss the matter and let us know next steps either through Enforcement Director ██████ or she will tell us herself.

On March 8, 2024, Regional Director [REDACTED], Chief Attorney [REDACTED] and Program Manager [REDACTED] had a call with Enforcement Director [REDACTED] to discuss various cases. At the end of the call, Enforcement Director [REDACTED] informed the OCR KC triad, that the Deputy Assistant Secretary of Enforcement decided the Rogers complaint needs to proceed with mediation and there can no longer be a delay. Enforcement Director [REDACTED] asked the OCR KC triad if they would assign the complaint to [REDACTED], a mediator in OCR Denver. The OCR KC triad each said that they believe it would violate the injunction and would not do it. Enforcement Director [REDACTED] stated she would make the call to [REDACTED] herself and ask him to mediate the complaint. Regional Director [REDACTED] asked to speak with the Deputy Assistant Secretary about the Decision based on the court records that we had reviewed, and Enforcement Director [REDACTED] said no, the instruction came directly from Deputy Assistant Secretary of Enforcement [REDACTED].

At some point, Enforcement Director [REDACTED] coordinated with OCR Denver to attempt mediating the Rogers complaint. It is my understanding that mediation was not successful, and the case was dismissed and refiled with a new docket number, in accordance with Case Processing Manual Section 110(o). That complaint, OCR case number [REDACTED] was subsequently dismissed on October 15, 2024, because of the Injunction.

- **Owasso Public Schools (Oklahoma), OCR Case number [REDACTED]**

On [REDACTED] 2024, Regional Director [REDACTED] and Enforcement Director [REDACTED] received an email from Deputy Assistant Secretary of Enforcement [REDACTED] instructing [REDACTED] to review an attached letter from the Human Rights Campaign regarding a “Request for Investigation on the Incidents Leading to the [REDACTED] to treat the letter as a complaint against the Owasso School District, and to have draft Letters of Notification to him by no later than [REDACTED] 2024, noon eastern time. The Human Rights Campaign letter alleged, in part, that the school district had failed to address documented instances of bullying, violence, and harassment against [REDACTED].

Chief Attorney [REDACTED] presented a draft Notification Letter package to Deputy Assistant Secretary [REDACTED] as instructed on [REDACTED] 2024, at 10:42 am central. The letters were drafted to open an investigation into whether the school district failed to respond to notice of sex-based harassment, predicated on sex stereotypes, in violation of Title IX. The letters from the Chief Attorney were drafted precisely to comply with the September 26, 2022, guidance from the Assistant Secretary, and in a manner not to conflict with the Injunction. The Chief Attorney provided an explanation in the email to the Deputy Assistant Secretary of why he proposed opening the investigation as he did, and his concerns with not running afoul of the Injunction.

On February 29, 2024, Enforcement Director [REDACTED] emailed a revised Notification Letter package to Chief Attorney [REDACTED], Regional Director [REDACTED] and Program Manager [REDACTED]. The draft Notification Letters originally presented by Chief Attorney [REDACTED] were amended to include the term gender identity and an allegation involving disability harassment that had not

been alleged in the complaint. It is noted the disability related allegation tracked the November 14, 2022, guidance sent by Assistant Secretary Lhamon entitled: "Opening Cases Potentially Involving Allegations of Gender Dysphoria." Chief Attorney ██████ responded by stating if he was to sign the draft letters, as amended, it would clearly violate the Injunction, so ██████ declined to sign the amended Notification Letters.

Shortly after sending Chief Attorney ██████ email declining to sign the amended draft Notification Letters, Regional Director ██████ and Chief Attorney ██████ met with Assistant Secretary Lhamon via MS Teams. Program Manager ██████ was unable to participate in the call. The call coincided with the Assistant Secretary's visit with the region and was scheduled as a wrap up/ review of the visit. That call concluded with a conversation about ██████ refusal to sign the revised Notification Letters because it would violate the Injunction.

The Assistant Secretary stated the following:

She understands that we are all declining to sign and participate in the opening of the investigation. She wants to make sure we have some information, and she wants us to think hard about the position we are taking. She stated we [the Department of Education] told the Court that we are enforcing statute and the regulations still. She stated that is not a position we have not briefed to the Court, and the Court is aware of and has not told us not to do. She stated nobody is enforcing the new interpretation. The 2020 regulation and its preamble say that it applies to LGBT students, and it says that the sexual harassment requirements apply to transgender and nonbinary kids. Nobody is asking you to do anything that violates the order. Lhamon stated they told the Court that we were doing this. Before we made a plan to open this case, we confirmed that with our OGC here in ED and we confirmed it with DOJ, who are our litigators, so you are taking a position that no other lawyer is taking related to this work, and I really think you should think hard about whether that's the position you want to take moving forward.

We engaged in a brief discussion about investigating sex stereotype discrimination versus gender identity harassment, as it relates to the Injunction, the 2020 Title IX Amendments and guidance, and court decisions.

The Assistant Secretary then stated she does not appreciate email traffic on this topic, "that's not how we roll," and she expects us to operate the same way she does, that is to have a conversation and not to send email about it or put these things in writing. She said she has concerns about staff creating records of dissent and FOIA requests in such a highly regulated environment. The Assistant Secretary said she agrees that we need to be careful and not take risks with the Injunction. The Assistant Secretary stated that the preamble to the 2020 Regulations is where we stand, and she is not interested in violating the Court Order. She said she wants to be in a place where all of us are comfortable to do our job that we signed up to do, and that we do our job to enforce the statutes and regulations that we have, even when we don't agree with them, and it's not OK with her for us not to do our jobs. The Assistant Secretary also stated that she will make a decision about the language in the letters opening the Owasso complaint, then it will be our job

to implement her decision even if we disagree with the decision or believe it will violate the injunction.

The Assistant Secretary concluded her discussion regarding both the Owasso complaint and the Rogers complaint by stating each of us has very difficult decisions we have to make at various times. She said we have to look at our own souls about what we're comfortable with and make decisions about what we're doing. The Assistant Secretary stated that she has experienced where people have left OCR because they did not feel comfortable with a particular path she had chosen. She stated that's a choice, she doesn't think it has to be the choice, so let's figure out what the other options are. She concluded by saying she will discuss the matter and let us know next steps either through Enforcement Director [REDACTED] or she will tell us herself.

It is noted that Assistant Secretary Lhamon did say during the February 29, 2024, call that she was not asking us to violate the Injunction, yet we kept receiving pressure from Headquarters to take action in Owasso and Rogers that would violate the Injunction. Assistant Secretary Lhamon's February 29, 2024, comments stood in stark contrast to her July 26, 2022, and August 24, 2022, instructions that we should open and investigate SOGI complaints despite the Injunction, and the pressure we were receiving continued to be consistent with that same direction. Nevertheless, we informed Headquarters we would not proceed with actions that would violate the Injunction.

On March 1, 2024, the OCR KC triad learned via news media reports (<https://www.hrc.org/press-releases/formal-complaint-from-hrc-triggers-department-of-education-investigation-into-owasso-public-schools-following-attacks-on-nex-benedict>: <https://www.usatoday.com/story/news/nation/2024/03/01/nex-benedict-death-bullying-lgbtq/72809560007/>) that the complaint against Owasso Public Schools was opened by OCR Chicago staff in coordination with OCR headquarters, even though Oklahoma is not in OCR Chicago's Region. The case was assigned OCR case number [REDACTED]. OCR headquarters did not communicate the highly unusual out-of-region assignment with any member of the OCR KC triad until after it had occurred.

On March 5, 2024, Enforcement Director [REDACTED] informed Regional Director [REDACTED] over an MS Teams call that with Owasso, there was a need for urgency, so they just had Chicago open the Owasso investigation. Headquarters decided the Owasso related complaints and an additional new complaint against Owasso alleging race discrimination, were to be assigned to OCR Chicago for processing and investigation. Enforcement Director [REDACTED] told [REDACTED] to delete Kansas City's Owasso case files and records, and that OCR Chicago would be using a Chicago case file for the investigation. [REDACTED] informed Enforcement Director [REDACTED] that would likely violate the litigation hold and suggested keeping the OCR Kansas City case files and just reassigning the cases to Chicago and giving OCR Chicago access to the records. That way all the records would be preserved. Enforcement Director [REDACTED] said she would get back to Regional Director [REDACTED] with further instructions. At the end of the Owasso conversation, [REDACTED] reiterated

his position to [REDACTED] that the Rogers complaint should not be mediated by OCR because of the injunction.

On March 6, 2024, Enforcement Director [REDACTED] called Regional Director [REDACTED] and stated the decision was to preserve the OCR Kansas City case files as suggested by [REDACTED], and for OCR Kansas City to transfer all the Owasso complaints and related records to OCR Chicago. OCR Chicago then processed all Owasso complaints relating to the Owasso Title IX complaint. On November 14, 2024, OCR announced the Owasso school district had entered into a Resolution Agreement to resolve the investigation.

- **Leavenworth U.S.D. 453 (Kansas), OCR Case number [REDACTED]**

On [REDACTED] 2023, OCR Kansas City received a complaint alleging the Leavenworth U.S.D. 453 was violating Title IX with the school board's approval of a District policy regarding library resources. The complaint alleges the policy prohibits any LGBTQ/transgender books, characters, or theme below middle school, and restricts sexually explicit and/or implied action and thought. The complaint was included in the Weekly Update because it alleges Title IX discrimination based on Sexual Orientation and Gender Identity, and implicates the Injunction.

In an email dated May 29, 2024, Regional Director [REDACTED] sent a draft dismissal letter to Enforcement Director [REDACTED] proposing to dismiss the complaint pursuant to Case Processing Manual, Section 108(f) - the allegation fails to state a violation of one of the laws or regulations that OCR enforces. Regional Director [REDACTED] proposed dismissing the complaint because federal statute states OCR has no jurisdiction over school library resources and because the complaint would not state a violation of the law under the 2020 Title IX Amendments which were the guiding regulations because of the Injunction.

On June 4, 2024, Enforcement Director [REDACTED] sent an email to Regional Director [REDACTED] stating: "This case needs to open. I consulted with [REDACTED] on it this morning and he agrees. Curriculum does not include the books offered in a library."

The Enforcement Director provided case law summaries to support her instruction to open the complaint. The case law summaries provided included:

See: Board of Education v. Pico, 457 U.S. 853 (1982) (plurality) ("While petitioners might rightfully claim absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values in schools, petitioners' reliance upon that duty is misplaced where they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom into the school library and the regime of voluntary inquiry that there holds sway."); *id.* at 921 (O'Connor, J., dissenting) ("If the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide

which books to discontinue or remove from the school library so long as it does not interfere with the right of students to read the material and to discuss it.”)

Enforcement Director ██████ further stated OCR has opened other cases with similar allegations.

On August 19, 2024, Assistant Secretary Lhamon circulated a draft form letter for general SOGI cases that are implicated by the preliminary injunctions. On September 18, 2024, Regional Director ██████ sent a revised dismissal letter to Enforcement Director ██████ again proposing to dismiss the Leavenworth U.S.D. 453 complaint. In the email, ██████ pointed out that the draft dismissal letter was different than the August 19, 2024, draft form letter Assistant Secretary Lhamon circulated for general SOGI cases that are implicated by the preliminary injunctions, but that was because the Leavenworth complaint was on different footing.

The Leavenworth complaint deals with library resources. The Department of Education Organization Act, at 20 U.S.C. § 3403(b), specifically states the Department is not authorized “to exercise any direction, supervision, or control over...the selection or content of library resources...” This is supported by the similar prohibition found in 20 U.S.C. 1232a which states: “No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control. . . over the selection of library resources. . . by any educational institution or school system...”

Regional Director ██████ agreed with Enforcement Director ██████ that curriculum might not necessarily include a decision on which books are offered in a school library, but 20 U.S.C. § 3403(b) and 20 U.S.C. § 1232a seem to be directly on point, and indicate OCR has no jurisdiction over the selection of library resources. Additionally, the case summaries regarding school curriculum provided by Enforcement Director ██████ are distinguished from the Leavenworth scenario. The *Board of Education v. Pico*, 457 U.S. 853 (1982) case involved action taken by a local Board of Education, not the U.S. Department of Education, and the *Monteiro v. Tempe Union High School District* case out of the 9th Circuit in 1998 involved actions of a local school district, not OCR action. ██████ indicated neither case is applicable to the Leavenworth complaint or override 20 U.S.C. § 3403(b) or 20 U.S.C. § 1232a.

The draft dismissal letter is still awaiting a final decision by Headquarters.

General Summary of How SOGI Complaints Have Been Processed in OCR Kansas City

With the exception of the three cases described above (Owasso, Rogers, and Leavenworth), the following is a general summary of how OCR Kansas City processed SOGI complaints relating to the Injunction.

SOGI complaints that should be dismissed regardless of which Title IX interpretation is used have dismissal letters submitted to Headquarters for review and approval on a rolling basis.

SOGI complaints that should be dismissed under the 2020 Title IX regulations but opened for investigation under the new Interpretation and/or under the 2024 Title IX Final Rule, which are subject to the injunction, were handled differently based on their relation to the Injunction:

- Two complaints, ██████████ Springfield R-XII School District, and ██████████ - Adams Central Public Schools, were opened for investigation on May 2, 2022, and May 12, 2022, in accordance with the existing Cases of Interest guidance. This occurred prior to the issuance of the Preliminary Injunction. Once the Injunction guidance was received by Regional Staff, the investigations were paused. Draft dismissal letters based on the model dismissal letter provided by Headquarters on August 19, 2024, have been submitted to Headquarters and are pending approval.
- One complaint, ██████████ - Greenville R-II School District, was opened for investigation on July 19, 2022, in accordance with the existing Cases of Interest guidance. That was a few days after the Preliminary Injunction had issued but before OCR Regional Staff received guidance from Headquarters regarding the Injunction. That guidance was not provided until July 20, 2022. Once the Injunction guidance was received, the investigation was paused. Draft dismissal letters based on the model dismissal letter provided by Headquarters on August 19, 2024, are in the case file awaiting further instructions from Headquarters. The last instructions were for us to standby until PLG decides the best avenue to take on these.
- The remaining complaints that would be dismissed under the 2020 Title IX Regulation but opened under the new Interpretation/2024 Title IX Final Rule have been kept in Evaluation status in CMS, but they have not been worked. Some of those complaints had draft dismissal letters based on the model dismissal letter provided by Headquarters on August 19, 2024, saved in the case file awaiting further instructions from Headquarters. Others did not yet have dismissal letters drafted. The last instructions were for us to standby until PLG decides the best avenue to take on these. Those complaints were not submitted to Headquarters to open because doing so would have violated the Injunction, and they were not previously submitted as dismissals because of the verbal instructions provided by Headquarters.

END

Exhibit N

Attachment 3

EMPOWER OVERSIGHT

Whistleblowers & Research



EMPOWR.us

April 5, 2024

U.S. Office of Special Counsel
1730 M Street NW, Suite 218
Washington, D.C.

To whom it may concern:

I represent [REDACTED] Chief Attorney for the Kansas City Office (Region VII) of the Department of Education's Office for Civil Rights (OCR). I write to disclose that by ignoring a court order issued by the Federal District Court for the Eastern District of Tennessee, OCR is in violation of law, rule, or regulation under 5 U.S.C. § 1213(a)(1)(A).

Furthermore, when [REDACTED] disclosed this violation to his chain of command, OCR Assistant Secretary Catherine Lhamon committed two prohibited personnel practices. First, she directed him not to put in writing anything that reflects disagreement with the Department, implementing a nondisclosure policy in violation of 5 U.S.C. § 2302(b)(13). Then, she subtly threatened a personnel action for disclosing a violation of the law, rule, or regulation (a prohibited personnel practice under 5 U.S.C. § 2302(b)(8)(A)) and for refusing to obey an order that [REDACTED] believed would require him to violate a law, rule, or regulation (a prohibited personnel practice under 5 U.S.C. § 2302(b)(9)(D)).

I. Background

On January 20, 2021, President Joseph Biden issued Executive Order 13988 (EO 13988), "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." 86 Fed. Reg. 7023 (Jan. 25, 2021). EO 13988 extended the holding of the Supreme Court's June 2020 decision in *Bostock v. Clayton County* (a Title VII case) to Title IX. To implement EO 13988, OCR issued the following 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*" (hereinafter "Interpretation"), 86 Fed. Reg. 32,637 (June 22, 2021);
2. "Letter to Educators on Title IX's 49th Anniversary" (hereinafter "Dear Educator Letter"), (June 23, 2021); and
3. U.S. Department of Justice (hereinafter "DOJ") & U.S. Department of Education, "Confronting Anti-LGBTQI+ Harassment in Schools" (June 2021).

On August 30, 2021, twenty states brought suit in the U.S. District Court for the Eastern District of Tennessee, *Tennessee v. U.S. Dep't of Educ.*, No. 21-308 (E.D. Tenn.).¹ They challenged the constitutionality of the guidance in these documents, alleged that the guidance exceeded the Department's authority under Title IX, and argued that the procedural requirements of the Administrative Procedure Act had not been met in issuing these documents.

On July 15, 2022, Judge Charles E. Atchley, Jr., issued an order granting the plaintiff states' Motion for Preliminary Injunction. *Tennessee v. U.S. Dep't of Educ.*, No. 21-308 (E.D. Tenn. July 15, 2022) (Memorandum Opinion and Order) [ECF Doc. 86] (hereinafter "Order"). The Court found that "the challenged guidance documents 'regulate the States by telling them what they can or cannot do' within their jurisdiction with respect to their treatment of individuals based on sexual orientation and gender identity." Order at 16. Accordingly, the Order enjoined OCR from enforcing, in any of the states that are plaintiffs in the litigation ("injunction states"), any guidance that addressed Title IX's prohibition on sex discrimination as it relates to gender identity and sexual orientation. *Id.* at 46. The Order specifically identified the aforementioned guidance documents. ("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 Interpretation, Dear Educator Letter, Fact Sheet, and the Technical Assistance Document against Plaintiffs." *Id.*)

Following the Court's order granting the injunction, OCR filed a "Notice of Compliance" stating that it would "not cite, reference, treat as binding, or otherwise rely upon the challenged documents in any investigations of claims or enforcement or administrative actions" in the injunction states. *Tennessee v. U.S. Dep't of Educ.*, No. 21-308 (E.D. Tenn. Aug. 25, 2022) (Notice of Compliance) [ECF Doc. 97] at 2. OCR clarified that its "positions may be consistent with those in the challenged documents, but they will not be based on those documents." *Id.* at 3. The plaintiff states filed a response objecting to OCR engaging in "investigations, enforcement, or administrative actions against Plaintiff States that are 'consistent with' agency positions 'in the challenged documents' so long as Defendants simply avoid express references to those enjoined directives." *Tennessee v. U.S. Dep't of Educ.*, No. 21-308 (E.D. Tenn. Aug. 25, 2022) (Response to Defendants' Notice of Compliance) (E.D. Tenn. Aug. 30, 2022) [ECF Doc. 99] at 3. The Court made no ruling with respect to either filing.

The preamble to the current Title IX regulation states: "[T]he Department declines to address discrimination on the basis of gender identity or other issues raised in the Department's 2015 letter regarding transgender students' access to facilities such as restrooms..." 85 Fed. Reg. 30,179 (May 19, 2020). Because the Title IX regulation is silent on the issues of "discrimination on the basis of gender identity" and "transgender students' access to facilities such as restrooms," the investigation of these issues under Title IX can only come from the guidance documents issued by OCR which are subject to the preliminary injunction.

On July 26, 2022, [REDACTED] had a call with his supervisor, Region VII Director [REDACTED]. Director [REDACTED] had recently participated in a call that Assistant Secretary Catherine Lhamon held with the Enforcement Directors and Regional Directors in OCR. Following the call, Director [REDACTED] advised [REDACTED] of the following:

- Secretary Lhamon stated that she planned to disregard advice provided to her by the Dept. of Education's General Counsel's Office and the Department of Justice (DOJ) concerning the court order.

¹ 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.

- Secretary Lhamon further stated that she wanted to share her intentions via email, but chose not to do so to avoid making an (electronic) paper trail.
- Secretary Lhamon intended to continue processing transgender cases irrespective of the court order, although she conceded that OCR's ability to move to enforcement would be limited, if the DOJ would not agree to take these cases.
- Secretary Lhamon acknowledged staff might be held in contempt of court, but promised that staff would be provided representation by the government if that occurred, and further claimed that legal responsibility would fall on her, as the head of OCR.

██████████ was concerned by the information relayed to him by Director ██████████ and drafted notes documenting the conversation the same day. ██████████ and Director ██████████ agreed that, regardless of Secretary Lhamon's directions, they would abide by the court's order.

On September 26, 2022, Assistant Secretary Catherine Lhamon sent an email to all staff at OCR with the following directive with respect to the injunction states:

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.

Subsequently, on November 14, 2022, Assistant Secretary Lhamon issued a memorandum to Regional Directors entitled, "Opening Cases Potentially Involving Allegations of Gender Dysphoria" (hereafter "the Memorandum"). The Memorandum provides direction on how to address "complaints by or on behalf of individuals who allege discrimination by their educational institutions because they are transgender." Specifically, the Memorandum states:

When appropriate and consistent with the Case Processing Manual, OCR staff should open for investigation complaints that are framed by a complainant in terms of discrimination on the basis of gender identity or transgender status as disability discrimination claims under Section 504 and Title II in addition, as relevant and permissible, to discrimination claims under Title IX.

The Memorandum directed OCR staff "when appropriate" to investigate complaints alleging discrimination based on gender identity under federal disability laws, even if the complainant did not raise this allegation.

II. Disclosure to OSC

At this time, OCR is investigating several cases in violation of the July 15, 2022 court injunction. While a court order is not a traditional legislative "law," it has the force of law and should thus still be covered by the definition of "any law" under 5 U.S.C. § 1213(a)(1)(A). A court order is a "rule," or ruling, of the court. Violating a federal injunction may also be considered violating a "rule" under 5 U.S.C. § 1213(a)(1)(A) because federal injunctions are issued pursuant to Rule 65 of the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure are authorized by statute at 28 U.S.C. § 2072, giving them further force of law.

Disobeying or resisting a lawful court “order, rule, decree, or command” is punishable as contempt under 18 U.S.C. § 401. Under the Virginia Rules of Professional Conduct, which [REDACTED] is subject to as a member of the Virginia Bar Association, it would violate Rule 8.4 for a lawyer to “commit a deliberately wrongful act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness to practice law.”

Moreover, in this instance, the Court’s July 15, 2022 injunction in the plaintiff states was issued because the Court found a likelihood of success to the plaintiff states’ claim that the guidance documents violated the Administrative Procedure Act. Order at 38-43. Implementing the guidance likely violates at least the Administrative Procedure Act in addition to the Court’s injunction.

Some of the cases opened by OCR that violate the injunction follow.

Matanuska-Susitna Borough School District (10-23-1063)

On September 11, 2023, the internal OCR Weekly Update, which is circulated to all OCR employees, read:

On September 1, 2023, the Peninsula Clarion reported on the Alaska State Board of Education taking action to limit membership of girls’ athletics teams to students who were assigned female at birth. OCR Seattle is currently evaluating a complaint against an Alaska school district regarding this issue (MatanuskaSusitna Borough SD - I 0231063).

The next week, OCR’s Weekly Update read:

On September 19, 2023, OCR Seattle opened an investigation regarding whether district is discriminating based on sex by: restricting student eligibility to participate on female interscholastic sports teams to female students who were assigned female at birth; and prohibiting students from accessing restroom facilities and changing room areas that are aligned with their gender identity.

This case remains open for investigation.

The issue of gender identity as it relates to athletic team participation is not addressed anywhere in Title IX or its implementing regulations, only in the OCR guidance, which is subject to the preliminary injunction in Alaska. Therefore, OCR is in violation of law, rule, or regulation under 5 U.S.C. § 1213(a)(1)(A).

Bryan County Schools (04-24-1037)

On January 29, 2024, OCR issued notification letters to the complainant and Bryan County Schools, located in Black Creek, Georgia, opening a case for investigation. According to the notification letters, the complainant alleged the following:



In response to this complaint, OCR wrote in its notification letters that it “will investigate the following”:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]

This case remains open for investigation.

The issues of gender identity as it relates to bathroom usage and pronouns are not addressed anywhere in Title IX or its implementing regulations, only in the OCR guidance, which is subject to the preliminary injunction in Georgia. Therefore, OCR is in violation of law, rule, or regulation under 5 U.S.C. § 1213(a)(1)(A).

Other Potential Violations

OCR’s case tracker indicates that other cases involving “Gender Identity” and/or “Transgender” status have been opened by OCR for investigation under Title IX after July 15, 2022. Some of these cases, including the ones listed below, are in injunction states:

- Memphis-Shelby County Schools (04-22-1555);
- Metro Nashville Schools (04-23-1071);
- Insight Academy of Arizona (08-23-1050);
- Ivy Tech Community College (05-23-2037);
- Montana State University-Bozeman (10-23-2171);
- Bellbrook-Sugarcreek Local School District (15-22-1273);
- Fairborn City Schools (15-23-1130);
- Oberlin College (15-22-2194); and
- Spartanburg County School District (11-22-1508).

III. Disclosure to OCR and OSC

Rogers School District (07-23-1482)

OCR received a complaint against the Rogers School District, located in Rogers, Arkansas. The complaint alleged the following:

The Superintendent informed us by way of the [REDACTED]

changed prior to this. [The Student's] gender marker on [the Student's] Arkansas

I made an audio recording of this meeting where the decision was told to us in person by RHS Superintendent [] and where he explained his rationalization for violating [the Student's] rights. He repeatedly refused to acknowledge that [the] ultimately our desire to have [the Student's] rights respected went unrealized.

The complainant in Rogers requested "early mediation," which is available under Section 201(a) of OCR's Case Processing Manual. That section provides, in pertinent part, as follows:

Complainants may request mediation at the time of filing of the complaint. If the allegation(s) is within OCR's jurisdiction, is filed timely (or OCR granted a waiver), provides sufficient detail, states a violation of one of the laws or regulations OCR enforces, and the complainant has provided a signed Consent Form, OCR will contact the recipient and offer this resolution option.

Thus, only a case that "states a violation of one of the laws or regulations OCR enforces" should proceed to early mediation under Section 201(a). Additionally, Section 202(a) of the Case Processing Manual states that OCR's role in the mediation includes reviewing "the allegations with the parties and assist[ing] both parties in understanding the pertinent legal standards and possible remedies." Since OCR's most recent guidance on the issue of accommodations and gender identity is subject to the injunction in Arkansas, explaining the pertinent legal standard would place any OCR staff serving as mediator in the difficult position of potentially violating the injunction.

Notably, a previous version of OCR's Case Processing Manual did not limit "early mediation" under Section 201(a) to cases that state a violation of a law enforced by OCR. Working from the prior version of the Case Processing Manual, OCR staff in Kansas City originally referred this case for mediation under the impression that even cases which did not state a violation of a law enforced by OCR could be mediated. A Team Leader in the Kansas City office noticed the change in the language of the Case Processing Manual, and brought it to the attention of [] Program Manager [] and Region VII Director []. In light of the Case Processing Manual language, Mr. [], Ms. [], and Director [] agreed the Kansas City office should not assist with or facilitate the mediation.

On multiple occasions over a period of weeks between January and March 2024, [] and Director [] disclosed to Enforcement Director [] their view that mediating this case would violate the Court injunction. Yet as described below, [] insisted that the Kansas City Office move forward with mediation.

On March 8, 2024, Enforcement Director [] was on a virtual meeting with [] Director [] and the Program Manager. [] asked if anyone was willing to forward this case to a member of the Denver Office's staff for mediation. All three Kansas City officials declined to do so. Then Director [] asked permission to discuss the matter with Deputy Assistant Secretary for Enforcement []. Enforcement Director [] explained that Deputy Assistant Secretary [] disagreed and had already asked her to move the case into mediation. Enforcement Director [] stated that she would forward the case herself for mediation in the Denver Office.

Owasso Public Schools (05-24-1363)

On February 22, 2024, [] received an email from Enforcement Director [] forwarding a complaint from the Human Rights Campaign. The

complaint involved [REDACTED] at Owasso High School in Owasso, Oklahoma. Enforcement Director [REDACTED] email originated with Deputy Assistant Secretary [REDACTED] who requested that the Kansas City Office (Region VII) prepare notification letters no later than Tuesday, February 27, 2024, opening a complaint for investigation. Pursuant to this request, Mr. [REDACTED] drafted notification letters for the case on February 27 and forwarded them to Deputy Assistant Secretary [REDACTED] copying Enforcement Director [REDACTED].

In the notification letters [REDACTED] drafted in this case, he wrote: "You allege that the District discriminated against students on the basis of sex by failing to adequately respond to notice of sex-based harassment at Owasso High School during the 2023-2024 school year." In order to comply with the injunction, he proposed opening the following issue for investigation: "Whether the District failed to respond to notice of sex-based harassment, predicated on sex stereotypes, in a manner consistent with the requirements of Title IX, in violation of 34 C.F.R §§ 106.44 and 106.45."

While the Title IX regulation is silent on the issues of "discrimination on the basis of gender identity" and "transgender students' access to facilities such as restrooms," the regulation is clear that discrimination based on sex stereotypes is prohibited under Title IX. Specifically, the preamble to the current Title IX regulation states as follows:

- "Nothing in these final regulations, or the way that sexual harassment is defined in § 106.30, precludes a theory of sex stereotyping from underlying unwelcome conduct on the basis of sex that constitutes sexual harassment as defined in § 106.30." See 85 Fed. Reg. 30,178 (May 19, 2020).
- "These final regulations include sexual harassment as unwelcome conduct on the basis of sex that a reasonable person would determine is so severe, pervasive, and objectively offensive that it denies a person equal educational access; this includes but is not limited to unwelcome conduct of a sexual nature, and may consist of unwelcome conduct based on sex or sex stereotyping. The Department will not tolerate sexual harassment as defined in § 106.30 against any student, including LGBTQ students." See 85 Fed. Reg. 30,179 (May 19, 2020).

Not only was the proposal to open the case under theory of sex stereotyping consistent with existing Title IX regulation, but this proposal was also consistent with the information available at the time. While the complaint filed by the Human Rights Campaign described the

[REDACTED] The available information, therefore, was consistent with investigating the case as sex discrimination, predicated on sex stereotypes.

On Thursday, February 29, 2024, Mr. [REDACTED] received an email from Enforcement Director [REDACTED] requesting that he issue revised notification letters. The letters had been substantively revised. They now read: "Your complaint alleges that the District discriminated against students by failing to respond appropriately to sex-based harassment (gender identity), of which it had notice, at Owasso High School during the 2023-2024 school year." This would change the case opened from a sex stereotype case to a gender identity case. Additionally, the issues opened for investigation were changed to:

1. Whether the District failed to appropriately respond to alleged harassment of students in a manner consistent with the requirements of Title IX.

2. Whether the District failed to appropriately respond to alleged harassment of students in a manner consistent with the requirements of Section 504 and Title II.

The issues opened for investigation are consistent with Secretary Lhamon's Memorandum directing staff to "open for investigation complaints that are framed by a complainant in terms of discrimination on the basis of gender identity or transgender status as disability discrimination claims under Section 504 and Title II in addition, as relevant and permissible, to discrimination claims under Title IX," even if the complaint does not allege disability discrimination. OCR's internal case tracker indicates that the TIX issue under investigation in this case is "Gender Identity" and/or "Transgender" status.

The same day [REDACTED] received the aforementioned email from Enforcement Director [REDACTED] the Kansas City Office had a virtual meeting scheduled with Assistant Secretary for Enforcement [REDACTED]. The meeting was positive, productive, and generally uneventful. Assistant Secretary Lhamon provided useful feedback to the office on moving cases forward, and [REDACTED] was happy to see her meet and interact directly with several new staff members.

After the last large-group meeting with Assistant Secretary Lhamon and her staff, but before a final meeting [REDACTED] and Region VII Director [REDACTED] had scheduled with the Assistant Secretary, Enforcement Director [REDACTED] called to tell [REDACTED] that Region VII needed to issue the notification letters. [REDACTED] advised [REDACTED] that he had prepared an email response, and hit send on the following email:

As you know, I was concerned about the possibility of violating the injunction that remains in place in Oklahoma when we discussed opening this case for investigation last week. I worked on the case over the weekend and concluded that we could investigate the case without violating the injunction, as long as we clearly applied the Title IX interpretation and guidance that existed prior to the Title IX interpretation and guidance that are subject to the injunction.

OCR has been investigating sex stereotype cases for many years, and it is my belief that as long as we clearly indicate in the notification letter that sex stereotypes – not gender identity – is the issue under investigation, and we stick with that issue during the investigation, then we can investigate the case without violating the injunction. I forwarded notification letters to [the Deputy Assistant Secretary] consistent with that conclusion on Tuesday and indicated my willingness to sign them. I stand by that opinion and offer.

The letters you have sent me today for my signature, however, would clearly violate the injunction. The letters state that the issue alleged is that "the District discriminated against students by failing to respond appropriately to sex-based harassment (gender identity)" and based on this allegation, we will investigate "whether the District failed to appropriately respond to alleged harassment of students in a manner consistent with the requirements of Title IX."

That is the exact Title IX interpretation and related guidance that we are currently enjoined from implementing! The injunction states:

"Plaintiffs can show that the Department of Education's guidance creates rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity that appear nowhere in Bostock, Title IX, or its implementing regulations...." (page 41)

and

"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 Interpretation, Dear Educator Letter, Fact Sheet, and the Technical Assistance Document against Plaintiffs." (page 46).

The hardest part of my job as Chief Attorney is giving advice that I know people are not looking for. Usually, it involves asking staff to re-write letters or telling them a case needs more investigation. But today, I have to recommend that OCR not issue the proposed notification letters because doing so would violate the law.

As you know, this is a high-profile case and these notification letters will surely be presented to the Eastern District of Tennessee sooner than later. Under oath, at a hearing, I would have to admit that signing these letters constitutes a knowing violation of the law. As an officer of the court, I cannot violate a court order and cannot ask anyone on staff at OCR-Kansas City to do so either.

I considered sending this email sooner, but I thought that maybe the request to sign and issue these letters would not come. Unfortunately, it has. I hope that OCR will reconsider how to proceed in this case.

While on the phone [REDACTED] acknowledged receiving the email, stated she would follow up with [REDACTED] and quickly ended the call.

IV. Prohibited Personnel Practices

A short time later on the afternoon of Thursday, February 29, [REDACTED] joined Regional Director [REDACTED] for a final virtual meeting with Assistant Secretary Lhamon. Mr. [REDACTED] had been warned by senior staff that Assistant Secretary Lhamon had previously fired a Regional Director and had a reputation for retaliation. Fearing the worst, [REDACTED] recorded the final meeting. It started positively, with an overview of the officewide meeting. The call then turned to the Owasso case. Assistant Secretary Lhamon stated:

LHAMON: I want to talk to you all about the [REDACTED] case. I understand that you all, uh, are at the moment declining to sign and to participate in the opening. I want to make sure you have some information. You don't have to say anything to me now. **I think you should think hard about the position that you're taking**, but that you should know we told the court that we are enforcing the statute and the regulation still. That is not a position that we have not briefed to the court, and the court is aware of and has not told us not to do. Nobody is enforcing the new interpretation. The 2020 regulation and its preamble says that it applies to LGBT students and it says that the, the sexual harassment requirements apply to transgender and nonbinary kids. Nobody's asking you to do anything that violates the order. We told the court that. Before we made a plan to open this case, we confirmed that with our OCG here in ED, and we confirmed it with DOJ, who are our litigators. So, you're taking a position that no other lawyer is taking related to this order. **And I really think you should think hard about whether that's the position that you want to take moving forward...** You don't have to talk to me about it.

* * *

[REDACTED] So [REDACTED] let me just, for a minute... We've thought very, very hard about this, the whole team, even all the way down to who was going to originally mediate it flat-out refused.

LHAMON: What do you mean who was going to mediate this? This wasn't opened for mediation...

██████████ I'm sorry, I'm thinking Rogers. This is Owasso. The thing was, we put a lot of thought into it. We've looked at, very carefully at the language in the injunction and the documents, the interpretation, the fact sheet, the Dear Educator Letter. We've spoken to ██████████ about this, about our concerns, and, and... ██████████ email was draft us a notification letter, based off of this letter that we've received. And obviously, looking at the that guidance you've sent out, we need to – when we get these complaints – we need to work within the framework that existed prior to the interpretation, the fact sheet, and the Dear Educator letter, um, and continue to work on our cases. And your email was very clear, you did a follow-up that clarified it even more. Um, and so, ██████████ worked very hard to fit a notification letter packet, which was requested, to ██████████ that fit both the parameters of your written guidance and what the injunction says. And... It was very clear to ██████████ that, look, if we use words like gender identity, sexual orientation as they relate to harassment under Title IX, which is what the interpretation says, that he's got his, he's putting his license in jeopardy with the injunction. But he does think that he, he can sit before the judge any day and testify that sex stereotype has always been the law, way before the injunction. The guidance documents don't change that, so he drafted it based on sex stereotype, and... That was disregarded, it was edited out, and gender identity was plugged back in... Ok, well ██████████ told ██████████ very clearly, "Look, this is what I have, this is what I can sign. I will sign it. Nobody else in the office will sign it. We talked to all the team leaders, we talked to other staff, and everybody's opinion is, putting those key words in there that are specifically prohibited by the court, that's just asking for trouble and it would be very difficult to defend. But if we say sex stereotype, we can investigate that. And so please, here it is." And, and, as soon as it's sent up he checked in DM, and it was being amended, and gender identity's being added. And it was sort of like "We don't care what you have to say – this is what it's going to say, sign it." And ██████████ very uncomfortable with it and I'm uncomfortable with it...

He's willing to sign the sex stereotype language that he sent up, but we were told that's not an option... We've gone round and round and round with this with conversations on Teams. I've asked, "Can we get some guidance in writing?" "No." "Can we get OGC... to weigh in on whether this would violate the injunction?" "No." And so, we're like, ██████████ like, "I don't know what else to do but to send something in writing saying I'm not going to sign" –

LHAMON: Just to be clear we have, we have checked the letters to OGC and to DOJ to confirm that they're –

██████████ We don't have that. We don't know that. That's the first time we've heard that.

LHAMON: Okay, so I am sharing that with you so you can consider what position you want to take. And I am sharing with you we told the court that we are going to continue to enforce the statute and regulation. I actually don't feel strongly that the gender identity text be in there. So I didn't know that was the issue that you're worrying about. And I... And, to be clear among us, just so that we're... You know where I stand on that, and that I... **I'm asking you to do your jobs.** I'm not asking you to put your jobs in jeopardy. So, I hear you what your worries are. **I do not appreciate the email traffic about it,** so, I, you know, I think that's not the way we roll, and **you all should be able to operate the same way that I do, which is we can have a conversation, we don't send an email about it,** so... I want to flag that for you. But the... But the... Um... I went back and looked at what we

said in the preamble to the 2020 regulations about the topic. And that I can assure myself that we would be investigating something that the Department said when we issued the 2020 regulations was the way that we understood the law to apply. That nothing new, that there's not a, you know, a new interpretation that we wouldn't be able to defend, that we are clear about – that we are enforcing the law as it stands. I agree with you – I'm not interested to flout a court order either. So, you know, I agree with you that we need to be worried about it, and that we don't need to take risks on it, and that **we do our jobs to enforce the statute and regulations that we have, even when we don't...agree with them**, which is a frequent part of my job, also. So I really do, I hear the worry and I hear the ethics concern and I also hear not putting your bar license in jeopardy. And I am saying to you, I have checked with DOJ who are our litigators, and I have checked with OGC to make sure that what we are doing here is of a piece with the way that we want to proceed consistent with the obligation that we live with. **I'm not asking you to do something I wouldn't do myself**. I do want us to be operating under regular order. I'm not going to ask somebody else to do something that's unethical, and I am also – **it's not okay with me to not do our job. So, I really want to be in a place where all of us are willing to do the job that we signed up to do here.**

██████████ I agree and, look, and I understand that the email traffic is concerning, but we were at a point where the conversations didn't matter, and so, ██████████ didn't have any other choice.

* * *

It was explained that this has been vetted with... ██████████ had been working, and the implication is, with you. And this is the language, that the gender – the sex stereotype was not acceptable and was not going to be, and, and so I, I didn't want to feel like I was calling to tattle on ██████████ Uh, I mean... What we – the message we received is, "Doesn't matter, this is – you're signing this." And that's... And ██████████ mean, it's his livelihood. He loses his license, I mean, they sell their house, and they, you know... It's a disaster. It's life-altering. Um... So...

LHAMON: And that's why there's a path, right? That's why... If you feel like we're going to do something that's unlawful, you got to tell me. And, you know, I have no interest in doing that. And I have no interest in putting our work in jeopardy. And I have every interest in fully enforcing the law that is in our jurisdiction. So, it sounds like we are on the same page about what we're willing to do... So, this is a productive conversation. I want to invite you to have a conversation with me if you need to in the future and I really want to say to you, **DO NOT put in writing things, in a heavily oversight environment that is always contentious, that reflects disagreement.** We can talk about that.

* * *

LHAMON: If the issue is that you don't want gender identity or sexual orientation, that's an easy... I can fix that.

██████████ Yeah, I know, that's the... Those are the words in the injunction as applied to Title IX, and so, if those aren't in there, and the investigation truly is sex stereotype, because based on what the facts are, at least...published in the media, it seems to be what this is...is that... I think they were taunting the student based on clothing... Um, so... Ok.

* * *

██████████ Well, and Catherine, like you and I spoke when we talked about it on Monday... And I thought... Honestly the way I read the conversation, and I shared it with ██████████ is I, I felt like we actually were on the same page as far as the sex stereotype... I mean you flat-out said, you said, "Look, there are political pressures out there for us to do certain things,

but there are guide rails that direct what we can and cannot do." You said that very specifically...

Look, we think the world of [REDACTED] We think the world of [REDACTED] I know that she's angry with us. She's angry with us for this and for the Rogers mediation, which is another issue... Um...

LHAMON: Well, let me get to the Rogers mediation, just so you know. I don't know enough about the facts, but here are the things I do know. And so, I will say this and see if it's useful, and if it's not, we can have another conversation if we need to. But every case can be mediated. The mediation... What we would be addressing is what's in our jurisdiction. What we say when we mediate a case is we don't mediate if we don't have jurisdiction over it. If there's something we do have jurisdiction over, we take it, and we let the parties negotiate what they negotiate. And we're not responsible for it, because we don't say, yes, you should spend a million dollars. We don't say, yes, you should agree to have this person come and do the presentation. That's what the parties are doing. But we told the court that we were still going to be doing this.

And, and, frankly that, was... What you've explained, and that was my understanding, [REDACTED] understanding... [REDACTED] when we first got this thing started down the road of mediation – contact the recipient, see if they're interested – we narrowly tailored the issue, so it wouldn't violate the injunction, um, to be mediated. But then it was pointed out to us by the mediator, frankly, that, yeah, but how do you get around the provision that before we can refer it to mediation the complaint has to state a violation of the law that we enforce. And under the old interpretation this does not state a violation – it would be dismissed. Under the new interpretation, it would state a violation, so we'd mediate it.

LHAMON: What's the claim that came in?

The claim is that the student – born female, identifies as male – [REDACTED] the state of Oklahoma. Um, they go [REDACTED] which was in direct violation of state statute. And the school said no. [REDACTED]

[REDACTED] I mean that fits squarely – I mean, that is squarely in the injunction. And, and, and so we've had the same conversation with [REDACTED] and she's been speaking with [REDACTED] like, "No, you're mediating it, the decision's been made." And, so the last discussion with [REDACTED] was, [REDACTED] said if you want to talk with him about this and hear from him directly then have that discussion, but that's the instruction." And I said, "Well I would like to talk to [REDACTED] because I'm not comfortable moving forward on it based on...the facts in the case." I mean, it's almost like it's cut out of the fact sheet. The first paragraph of the fact sheet that we're not allowed to use – it's almost this scenario. And... Um... We just haven't had that convers... I mean it's... Tim, was this Monday or Tuesday we had this talk with [REDACTED]

I mean, it's been kinda ongoing. I mean, the other thing that's kinda funny is [REDACTED] is under the impression that a lot of these cases are mediating in injunction states, but I've checked, you know, CMS... Like, these are not getting mediated in injunction states. So... I'm not really sure why [REDACTED] remains convinced that this is happening when it seems pretty clear to me that it's not. Um... I'm not sure.

My understanding from review of CMS – review of CMS and discussions with the program manager is we will be the first state to mediate something that is, that is very clearly addressed by the injunction in an injunction state through mediation. Nobody else has done it. And that puts us way out on a limb. Um... And even if other states...even if other regions were doing it, I mean, it seems to be a very clear... Um... It's... Under old interpretation it's dismissed, under new interpretation it's opened. Since the CPM was changed to include that section that you have to state a violation of the law before it can be mediated, it just... It squares up to... I couldn't... If I got called in to testify, I could not defend it. I would not have a defense. I would say, "Judge, you're right." In my opinion it violates the injunction. And I told that, and it upset her. Um... But, I have to be honest. I can't just...

LHAMON: No... You need to raise any concern you have. And then we can have a conversation. And if you find yourself boxed, then we can have a conversation too. So... You know... I am... As you see, I am detail-oriented.

Yes you are, and we are too. And not everybody is.

LHAMON: And I care a lot about this and I care about you all. I care about all of our staff. I don't want you to be in a place where you feel like you're talking about whether your house is in jeopardy... **Let's figure out how we act here... able to do your job and clear about our expectations that we all are going to do the job.** But it sounds like you are clear about that. I hear what your worry is about Owasso. Let me get that addressed, let me come back to you about the mediation, so that...And, we can have more nuanced conversations about what are the things that we're doing.

Thank you, I appreciate that. That's a huge – I mean, I've got to tell you, we've been losing sleep over this. We've been looking at what's gonna happen if we lose our job... It's, you know... It's, it's... We have put a lot of effort into this. And we didn't – Tim didn't send that email lightly, I can tell you... We've been up at 1 o'clock in the morning for the last several nights.

LHAMON: I hope in the future we don't get to a place where that's the way that we have to handle it... But here we are, so... * * *

I tried to just express myself as clear as I could to um, in my email. Um, I do think there's a path forward to investigate Owasso, and I worked really hard to try to formulate a path that I thought could investigate what happened while also surviving the injunction. And I really continue to think that what I proposed originally was the very best way to accomplish that, and I just still feel that way. * * *

And I also wanted to... wasn't on the call, but I wanted to express to you, is the one who facilitates the mediations and she is not comfortable on Rogers, moving it forward. She's just... She's got... And she's worried as, as much as we are... So, just... I wanted... I told her that if we had this discussion and Rogers came up, I would share that.

LHAMON: Yeah. I mean... Um... Each of us has very difficult decisions that we make at different points in our job. And we have to look at our own souls about what we're comfortable with, and, uh, make decisions about what we're doing. And, I have had the experience where people left OCR because they did not felt comfortable with a particular path. That is a choice. I don't think that has to be the choice. Uh, and so... Let's figure out what the other options are, also.

██████████ takeaway from the meeting was that he needed to acquiesce to headquarters' demand to issue the notification letters or there was not a place for him at OCR – and there could even be adverse professional consequences.

Later that day, between 4:00 and 5:00 pm, Enforcement Director ██████████ called ██████████ and asked whether he would sign the letters if the phrase “gender identity” was removed from the letters. ██████████ responded that because the complaint was so focused on gender identity and sexual orientation, he believed the only path forward for complying with the injunction was to explicitly open the case as a “sex stereotype” investigation. He added that including Section 504 and Title II as issues was counterproductive, as the inclusion of disability as an issue only confirmed that OCR viewed the case as a gender identity case. ██████████ was very polite and ended the call without saying more.

On Sunday, March 3, 2024—the weekend following the events outlined above—██████████ and his colleagues learned from the *Washington Post* that OCR had sent the notification letters in the Owasso case. See Molly Hennessey-Fiske, *Federal probe to look into Okla. school's actions before teen's death*, WASH. POST, Mar. 1, 2024.² ██████████ discovered the notification letters had been signed and issued by the Chicago Office (Region V). The original case number assigned to the the Owasso complaint in the Kansas City Office was 07-24-1254; after being assigned to Chicago, it was assigned the case number 05-24-1363. No one at the Kansas City Office was contacted again about sending the notification letters. The Owasso case remains under investigation.

Implementing a Nondisclosure Policy (b)(13)

Under 5 U.S.C. § 2302(b)(13)(B), any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement—prohibits or restricts an employee or applicant for employment from disclosing to Congress, the Special Counsel, the Inspector General of an agency, or any other agency component responsible for internal investigation or review any information that relates to any violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or any other whistleblower protection.

As outlined above, in the February 29, 2024 meeting Assistant Secretary Lhamon stated to ██████████ and Director ██████████ protected disclosure: “I do not appreciate the email traffic about it... You all should be able to operate the same way that I do, which is we can have a conversation, we don't send an email about it... DO NOT put in writing things, in a heavily oversight environment that is always contentious, that reflects [sic] disagreement.” By instructing ██████████ not to make written disclosures or even express disagreement in writing, Assistant Secretary Lhamon imposed a nondisclosure policy and violated 5 U.S.C. § 2302(b)(13).³

² Available at <https://www.washingtonpost.com/nation/2024/03/01/nonbinary-teen-death-oklahoma-federal-investigation>.

³ Assistant Secretary Lhamon also violated the Grassley Anti-Gag Rider in appropriations law, which has been in place since the late 1980s and was renewed by Congress just a few days ago. It reads: “No funds appropriated in this or any other Act may be used to implement...any...nondisclosure policy, form, or agreement” that does not contain language making clear the supremacy of whistleblower protections. Further Consolidated Appropriations Act, 2024, Pub. L. 118-47 Div. B § 743 (2024).

Threatening a Personnel Action for Making a Protected Disclosure ((b)(8)(A))

Not only is imposing a nondisclosure agreement a violation of 5 U.S.C. § 2302(b)(13), it is also a personnel action in its own right under 5 U.S.C. § 2302(a)(2)(A)(xi), making it an additional prohibited personnel practice to impose it “because of” a protected disclosure.

Under 5 U.S.C. § 2302(b)(8)(A), any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

- (i) any violation of any law, rule, or regulation, or
- (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

As described above, [REDACTED] has a variety of reasons for reasonably believing that opening these aforementioned cases under Title IX violates the court injunction, a violation of “law, rule, or regulation” under Section 2302(b)(8)(A). He clearly articulated his belief in his February 29, 2024 email:

The letters you have sent me today for my signature, however, would clearly violate the injunction... That is the exact Title IX interpretation and related guidance that we are currently enjoined from implementing! ... I have to recommend that OCR not issue the proposed notification letters because doing so would violate the law... Under oath, at a hearing, I would have to admit that signing these letters constitutes a knowing violation of the law. As an officer of the court, I cannot violate a court order and cannot ask anyone on staff at OCR-Kansas City to do so either.

Because Assistant Secretary Lhamon’s instruction – “DO NOT put in writing things, in a heavily oversight environment that is always contentious, that reflect disagreement” – was a direct response to [REDACTED] protected disclosures, it is a personnel action that violates of Section 2302(b)(8). Moreover, Assistant Secretary Lhamon may have further violated (b)(8) by threatening that [REDACTED] might need to leave OCR.

Threatening a Personnel Action for Refusing to Violate a Law, Rule, or Regulation ((b)(9)(D))

Under 5 U.S.C. § 2302(b)(9)(D), any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—refusing to obey an order that would require the individual to violate a law, rule, or regulation.

Assistant Secretary Lhamon also articulated several times in the February 29, 2024 meeting that she expected [REDACTED] to issue the notification letters they believed were illegal: “We do our jobs to enforce the statute and regulations that we have, even when we don’t...agree with them... I am not asking you to do something I wouldn’t do myself. I do want us to be operating under regular order... It’s not okay with me to not do our job. So, I really want to be in a place where all of us are willing to do the job that we signed up to do here.”

Then, when [REDACTED] made clear they were willing to issue the original notification letters but had no intention of issuing the revised letters despite her direction, Ms. Lhamon stated: "Each of us has very difficult decisions that we make at different points in our job. And we have to look at our own souls about what we're comfortable with, and, uh, make decisions about what we're doing. And, I have had the experience where people left OCR because they did not felt comfortable with a particular path. That is a choice."

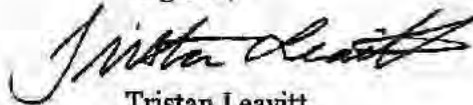
By threatening that [REDACTED] might need to leave OCR if he was not willing to issue the notification letters – despite him clearly expressing that he viewed the letters as illegal – Assistant Secretary Lhamon committed a prohibited personnel practice. Ms. Lhamon has clear authority to take personnel actions, and threatened a personnel action because of [REDACTED] refusing to obey an order that would require him to violate a law, rule, or regulation.

V. Summary

OCR's continued failure to abide by the July 15, 2022 court injunction – despite being informed by [REDACTED] and Director [REDACTED] that they were in violation of the order – constitutes a violation of law, rule, or regulation under 5 U.S.C. § 1213(a)(1)(A).

Furthermore, Assistant Secretary Lhamon committed several prohibited personnel practices when she responded to [REDACTED] protected disclosures by implementing a nondisclosure policy (a personnel action implemented in a violation of (b)(8), and a violation of (b)(13) in its own right), continued to insist it was his job to issue the letters he considered illegal, and threatened that he might otherwise have to leave OCR (a violation of (b)(9)(D)).

Regards,



Tristan Leavitt
President
Empower Oversight

Attachment 4

EMPOWER OVERSIGHT

Whistleblowers & Research



EMPOWR.us

January 21, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Hampton Dellinger
Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C., 20036-4505

RE: U.S. DEPARTMENT OF EDUCATION MISCONDUCT

Dear Mr. Dellinger:

Thank you for providing a copy of the response from the U.S. Department of Education (Department), dated December 12, 2024, to the inquiry opened by the Office of Special Counsel (OSC). The inquiry concerned the Department's compliance with an injunction (hereafter the "2022 Injunction") issued by a federal district court concerning guidance documents promulgated by the Department's Office for Civil Rights (OCR).¹ The allegation OSC referred to the Department on August 6, 2024, for investigation read:

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.

In its response, the Department acknowledged the 2022 Injunction remains in effect. The Department, however, advised OSC that it "did not substantiate the [] allegation that OCR is violating the Court's injunction" and "determined that OCR took reasonable steps to ensure compliance with the Court's injunction." (Reply at 8--9).

The whistleblower disagrees with the Department's conclusion for five reasons:

1. The Department analyzed the wrong issue;
2. The Department mischaracterized the guidance documents and the Court's 2022 Injunction;
3. The Department's report contains false and misleading statements;
4. The Department's report omitted material facts; and
5. The Department continues to violate the Court's 2022 Injunction.

The Department's reply is a master class in obfuscation, misdirection, gaslighting, and half-truths intended to defend a position the Department knows is wrong.

¹ See Tennessee v. U.S. Dep't of Educ., Case No. 3:21-cv-00308 (E.D. Tenn. July 15, 2022), aff'd Tennessee v. U.S. Dep't of Educ., 104 F.4th 577, 615 (6th Cir. 2024).

1. The Department analyzed the wrong issue.

The most remarkable aspect of the Department's response to OSC is what it *does not* claim, namely, that the Department complied with the Court's 2022 Injunction. Instead, the Department engages in a bait-and-switch with respect to the Department's compliance. Specifically, the Department asserts:

[T]he 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.

(Reply at 8–9, 11). Rather than analyzing whether actions taken by OCR are consistent with the 2022 Injunction, the Department *instead* analyzed “whether actions taken by OCR are consistent with the Notice of Compliance.”

The Department offers two rationales for adopting this approach. First, the Department contends that the 2022 Injunction was deficient under Federal Rule of Civil Procedure 65(d), which requires that an injunction must “state its terms specifically” and “describe in reasonable detail . . . the act or acts restrained or required.” (Reply at 9–10). Second, the Department asserts that “[t]o 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” and “[g]iven the Court's silence, the Department's understanding of the injunction is, at minimum, a reasonable one.” (Reply at 11–12). Neither of these arguments is availing.

With respect to the Federal Rules of Civil Procedure, the Department is making this claim for the first time in response to the OSC referral. The Notice of Compliance, on which the Department relies, does not allege the 2022 Injunction is vague. Before the Sixth Circuit, the Department argued the Court granted “relief that was overbroad” – not that the injunction was vague.² The issue of vagueness, therefore, was never raised on appeal. The whistleblower and the Kansas City Regional Director discussed the 2022 Injunction with the Assistant Secretary, who never claimed it was vague. In effect, the Department is asking OSC to find the 2022 Injunction deficient, even though the Sixth Circuit affirmed the 2022 Injunction on appeal.³

Relying on the Court's silence in response to the Department's Notice of Compliance is even less persuasive. Significantly, the Department never filed a motion for a hearing on its Notice of Compliance. It is unsurprising, therefore, that the Court never ruled on the Department's Notice of Compliance, as the Department never asked it to do so. It is black letter law that “a court speaks only through its orders.” Goldman v. Comm'r, 388 F.2d 476, 478 (6th Cir. 1967).⁴ The Court's silence, therefore, cannot be construed as acquiescence to or approval of the Department's Notice of Compliance. The Department's argument appears to be that “silence is consent” with respect to the Court—a position the Department knows is indefensible and offers no legal authority to support.

² Brief for Appellants, Tennessee, et al., Plaintiffs-Appellees, v. Dep't of Educ., et al., Defendants-Appellants, 2022 WL 17901086, at *59.

³ It would be helpful if the Department cited some legal authority – any authority at all – in support of its contention that the Court's injunction fails to comply with Federal Rule of Civil Procedure 65(d). However, All the Department offers is a similar injunction issued by a federal district court in Texas by way of comparison. It is not surprising, then, that the Department did not advance this argument on appeal.

⁴ See also Perkins v. LeCureux, 58 F.3d 214, 220 (6th Cir. 1995) (“It is a cardinal principle of Anglo-American jurisprudence that a court speaks only through its minutes”), Transcon. Leasing, Inc. v. Michigan Nat. Bank Detroit, NBA, 943 F.2d 52, 1991 WL 170904 at *3 (6th Cir. 1991) (“The district court speaks through its orders . . .”), Williams v. Brown, 921 F.2d 277, 1990 WL 208669 at *1 (6th Cir. 1990) (“Since a court speaks through its orders and judgments, the language in the judgment is controlling”).

OSC had it right when it asked the Department to investigate whether “[t]he Department is failing to comply with a court injunction.” Despite the Department’s attempt to change the subject, the plain language of the 2022 Injunction – not the Department’s self-serving interpretation of the injunction – is the standard to which the Department should be held. Compliance with the 2022 Injunction was the basis of the whistleblower’s complaint. In that sense, the Department has failed to respond to the referral from OSC or the whistleblower’s complaint, which in and of itself is an admission.

2. The Department mischaracterized the guidance documents and the Court’s 2022 Injunction.

a. The Department intentionally mischaracterized the guidance documents as non-binding.

In its reply, the Department explains that OCR “issued three documents to assist schools and other educational institutions receiving federal financial assistance to understand how OCR interprets and enforces Title IX” (hereafter the “challenged documents” or “guidance documents”). (Reply at 4). According to the Department, the challenged documents “discuss the Department’s interpretation of Title IX in light of the Supreme Court’s decision in *Bostock v. Clayton County*” and “clarify [its] enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX” *Id.* The challenged documents explicitly state that “the Department ‘will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity. . .’” *Id.*

The Department’s report claims the challenged documents were “non-binding and did not purport to have the force and effect of law,” even though the Court already rejected this argument. The Court held that the Department’s “self-serving labels are not controlling.” *Tennessee*, Case No. 3:21-cv-00308 at *27. Citing the Sixth Circuit, the Court stated, “the particular label placed upon [guidance] is not necessarily conclusive, for it is the *substance* of what the [agency] has purported to do and has done which is decisive.” *Id.*, citing *Detroit Edison Co. v. EPA*, 496 F.2d 244, 249 (6th Cir. 1974) (emphasis in original). Accordingly, the Court held the Department’s “guidance determines the ‘rights and obligations’ of those subject to . . . Title IX, and thus constitute final agency action.” *Id.*

The Department’s position with respect to the challenged documents is disingenuous. Although the Department claims the documents are non-binding, OCR has repeatedly opened investigations—and resolved investigations—based on the interpretation of Title IX set forth in the challenged documents. So, the Department’s representation to OSC that the challenged documents are non-binding was not only rejected by the Court, but is also contradicted by OCR’s own actions.

b. The Department’s interpretation of the Court’s 2022 Injunction misrepresents what the Court held and is nonsensical.

The Department mischaracterizes the Court’s injunction as merely enjoining OCR from citing the challenged documents. The Department’s position is wrong for two reasons. First, the Department misrepresents what the Court actually stated in its opinion. Second, the Department’s interpretation of the Court’s 2022 Injunction is nonsensical. In discussing the Court’s opinion, the Department conveniently leaves out the first four words of the Court’s conclusion: “For the foregoing reasons.” The “foregoing reasons” addressed by the Court make it perfectly clear that the Court enjoined OCR’s novel interpretation of Title IX, not just a few pieces of paper that comprise the challenged documents.

In its opinion, the Court held as follows,

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction is **GRANTED** . . . Accordingly, it is hereby ordered that Federal Defendants . . . are **ENJOINED** and **RESTRAINED** from implementing the [guidance documents].

Tennessee, Case No. 3:21-cv-00308 at *46. The Court explained in its opinion that the Plaintiffs “challenge[d] the **content of the guidance** as being unlawful.” Id. at 19 (emphasis added). The Court noted that the guidance documents “guide the Department in processing complaints and conducting investigations” and “dictate[] how the Department will enforce Title IX going forward and requires the Department to investigate and pursue enforcement action . . . when discrimination based on sexual orientation and gender identity is alleged.” Id. at 27–28. Specifically, the Court held that “**Defendant’s guidance documents advance new interpretations of . . . Title IX and impose new legal obligations** on regulated entities.” Id. at 31. Clearly, the Court’s injunction encompasses the “content of the guidance” and the “*new* interpretations of . . . Title IX.”

Nevertheless, the Department claims that—notwithstanding the injunction—it can still 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.” (Reply at 9–10). Contrast this assertion with the Court’s opinion. In enjoining OCR from implementing the guidance documents, the Court held: “The Department of Education’s guidance creates rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity that appear nowhere in Bostock, Title IX, or its implementing regulations.” Tennessee, Case No. 3:21-cv-00308 at *41.

The Department’s position is pure sophistry. The Department contends that “‘implementing’ the challenged documents” is not the same as “engaging in enforcement actions consistent with those documents.” (Reply at 9), but this is a distinction without a difference. The Court, according to the Department, somehow enjoined implementation of the challenged documents without enjoining OCR from implementing what the challenged documents plainly say. Not only is this a misrepresentation of the Court’s opinion, but the Department’s interpretation is nonsensical and renders the 2022 Injunction meaningless.

3. The Department’s report contains false and misleading statements.

i. The Department misrepresented its investigation into Owasso Public Schools.

On February 21, 2024, the President of the Human Rights Campaign sent a letter directly to Secretary Cardona expressing concern that “efforts to stoke hate and discrimination across the country are having a direct, negative impact on the lives of trans and gender-expansive students.” The letter concluded by asking “the Department to urgently investigate whether Owasso High School unlawfully failed to address the discrimination and harassment to which [REDACTED] [REDACTED].” The same day, the Secretary of Education posted the following statement:



In retrospect, it is apparent that once Secretary Cardona posted this message, the Department (through OCR) was committed to investigating discrimination based on gender identity in Owasso Public Schools, regardless of any federal injunction.

The whistleblower referred this case to OSC after (1) the Deputy Assistant Secretary of OCR requested that the Kansas City Regional Office open an investigation into Owasso Public Schools based on the letter from the Human Rights Campaign, (2) the Enforcement Director responsible for the Kansas City Office changed the subject of the investigation from “sex stereotypes” to “gender identity,” and (3) the Assistant Secretary of OCR demanded that the Kansas City Office investigate discrimination based on gender identity as part of the case. When the whistleblower refused on behalf of the Kansas City Office, OCR transferred the case to the Chicago Regional Office.

The Department does not deny any of these facts. Instead, the Department claims that “even if the basis of OCR’s investigation were gender identity discrimination, the Court’s injunction should not be construed to prohibit such action.” (Reply at 16). The Department then makes an astonishing claim:

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.

Id. (emphasis added). This claim, however, is belied by a review of OCR’s Resolution Letter in the Owasso Public Schools case.

The assertion that OCR did not “rely on the theory that Title IX’s prohibition on sex discrimination includes discrimination on the basis of gender identity” is inconsistent with OCR’s investigation and resolution of the case. OCR’s Resolution Letter documents the following findings by OCR in the “Facts” section of the letter (with emphasis added in bold font) :

Page 6: Both policies prohibit discrimination, harassment, and retaliation based on sex (real or perceived) and **gender identity or expression**. Policy 1.22 also states that “sexual harassment may occur between persons of the same gender or sex.”

Page 9: [REDACTED] was assigned the female sex and given a female name at birth. In approximately the [REDACTED] began expressing a different **gender identity**.

Page 10: [REDACTED] as **non-binary and transgender** during their conversation . . . [REDACTED] that she discussed with Student A’s mother the use of Student A’s preferred name at this time but said they did not discuss Student A’s pronouns or **gender identity**.

Page 10: [redacted] told OCR that, at this time, she “assumed but did not know” [redacted] **gender identity**, and she used “they/them” pronouns for [redacted] . . . [redacted] told OCR that although no one told her specifically, she assumed based on Student A’s preferred name and pronoun use that [redacted] was **transgender**.

Page 10: [redacted] mother told OCR that during the 2023–2024 school year [redacted] instead using a **gender-neutral name**. Student A’s mother told OCR that Student [redacted] had a mostly LGBTQ+ friend group at school, and expressed his **gender identity** [redacted]

Page 11: According to [redacted] were **gender nonconforming** [redacted] told [redacted] who were also [redacted content] at that time.

Pages 12–13: [redacted] told them that Student A had been attacked because of his **gender** and [redacted] Assistant Principal B did not confirm to OCR that Student A’s mother said Student A had been attacked because of his **gender** but told OCR that Student A’s mother alleged during this conversation that Student A had been bullied by Students 1, 2, and 3.

Page 13: Most of the reports listed the type of bullying or harassment that Student A experienced as based on sex or **gender**. One report described “a school environment and culture that promotes bullying and abuse especially when it comes to **LGBTQ+ students**.” Another report stated that Student A’s mother had publicly asserted that Student A had been “repeatedly subject[ed] to **anti-trans bullying**.”

Page 14: A student, Student K, informed OCR that someone wrote what he perceived to be an alleged slur against **transgender individuals** on the white board of Teacher C’s classroom at the High School . . . In this context, Teacher C said he understood “trannies” to refer to transmissions, not **transgender individuals**.

Page 16: . . . Student P identified three male students who he said repeatedly [redacted] [redacted] and asked him about his [redacted] Student P said that the “teacher knows because she sees the stuff going on.” The students who allegedly harassed Student P admitted to some misconduct in their interviews, and a student witness also substantiated some bullying and harassment, including **related to gender**.

Not only is the “Facts” section of the Resolution Letter replete with references to gender identity, but the “Analysis” section incorporates and specifically addresses the issue of gender identity as well.

Pages 17–18: OCR notes that, according to Student A’s mother, Students A, B and C experienced harassment that week from the same perpetrators during an in-school placement, in which **the perpetrator students called Students A, B [redacted] Students A, B, and C dressed, which could have been due to their gender nonconformity. That this harassment of gender-nonconforming students**

occurred within the context of an in-school placement, supervised by High School staff, **suggests that the District did have actual knowledge of conduct that could meet the regulatory definition of sexual harassment for Students A, B, and C.**

It is incontrovertible that the issues of gender identity, as well as sexual orientation, are woven throughout OCR's Resolution Letter in the Owasso Public Schools case. In fact, the terms "gender identity," "gender-neutral," "gender," or "gender nonconformity" are collectively used 20 times, the term "gay" appears 6 times, and the term "pronouns" is used 9 times in the Resolution Letter. The Department's claim, therefore, that it did not "rely on the theory that Title IX's prohibition on sex discrimination includes discrimination on the basis of gender identity" is both implausible and disingenuous.

ii. **The Department falsely claimed that it dismissed cases identified by the whistleblower because the 2024 Title IX Regulations were enjoined.**

The 2022 Injunction was issued by the Eastern District of Tennessee on July 15, 2022. The whistleblower's complaint, filed with OSC on April 5, 2024, concerned OCR's violation of the 2022 Injunction. All the cases identified by the whistleblower that potentially violated the 2022 Injunction necessarily involved conduct that pre-dated the whistleblower's submission to OSC on April 5, 2024. Therefore, the time period addressed by OSC's referral ranges from July 15, 2022 (when the 2022 Injunction was issued) to April 5, 2024 (when the whistleblower's complaint was filed).

OCR issued Title IX Regulations on April 29, 2024, after the whistleblower's complaint was filed with OSC. The 2024 Title IX Regulations (which are not retroactive) went into effect on August 1, 2024.⁵ While numerous federal district courts have enjoined the 2024 Title IX Regulations, none of these injunctions have any bearing on the cases identified by the whistleblower, as OCR had not even published the 2024 Title IX Regulations when the whistleblower's complaint was filed with OSC.

Nevertheless, the Department informed OSC that it dismissed four cases identified by the whistleblower because the 2024 Title IX Regulations were enjoined. With respect to Rogers Public Schools, the Department stated:

OCR notified the parties that it was closing this complaint . . . [t]he notification stated 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.

(Reply at 17–18). The Department further stated that OCR dismissed three additional cases identified by the whistleblower "in light of court orders enjoining enforcement of the Department's 2024 Title IX Regulations." (Reply at 19, Footnote 10).

⁵ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33476 (April 29, 2024) (to be codified at 34 C.F.R. pts. 106) ("As detailed more extensively below, the Department recognizes the practical necessity of allowing recipients of Federal financial assistance time to plan for implementing these final regulations. Taking into account the need for the time to plan, as well as consideration of public comments about an effective date as explained in the discussion of Effective Date and Retroactivity (Section VII.F), the Department has determined that these final regulations are effective August 1, 2024"), *see also* 89 Fed. Reg. 33482 ("While the Department understands commenters' desire to ensure that former students who were subjected to sex discrimination prior to the effective date of these regulations can still pursue a complaint, the Department does not intend the final regulations to be enforced retroactively").

The fig leaf the Department hides behind to justify this obviously false claim is language incorporated into OCR dismissal letters at the direction of the Deputy Assistant Secretary. The Deputy Assistant Secretary circulated specific language for the dismissal of cases involving transgender status and gender identity:

In light of recent Federal court orders, in those states and schools in which OCR is preliminarily enjoined from enforcing the 2024 Title IX Regulations, OCR is not investigating claims alleging discrimination on the basis of gender identity. Therefore, OCR is closing the complaint as of the date of this letter and will take no further action on this complaint.

In an email dated September 16, 2024, the Deputy Assistant Secretary directed an Enforcement Director to be sure “that all the letters KC sent up follow [this] format.” In an email dated September 19, 2024, the Enforcement Director advised the Kansas City Regional Director, “I think he wants us to follow directly the template.”⁶

Instead of acknowledging the need for corrective actions, OCR used the *same* dismissal language in *all* cases dismissed due to *any* federal injunction, even when the 2024 Title IX Regulations could not possibly be implicated. This subterfuge obscured OCR’s dismissal of cases that were investigated or mediated in violation of the 2022 Injunction. The Department’s claim that OCR dismissed cases identified by the whistleblower due to federal courts enjoining the 2024 Title IX Regulation – and not the 2022 Injunction – is a blatant misrepresentation.

iii. The Department falsely claimed it found no evidence that OCR staff relied upon, cited, or otherwise implemented the challenged documents.

The whistleblower’s complaint identified twelve cases opened or mediated by OCR that potentially implicated the 2022 Injunction. (Reply at 12). The Department acknowledged that all but one of these cases was opened for investigation or mediated *after* the 2022 Injunction went into effect. (Reply at 19). In its reply, the Department advised OSC that “after reviewing the internal case files . . . 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.” (Reply at 19) (emphasis added). The Department’s claim is false and misleading for four reasons.

First, the Department’s investigative team only interviewed three regional staff in two regional offices: the Kansas City Chief Attorney (the whistleblower), the Kansas City Regional Director, and the Seattle Chief Attorney. According to the Department, however, the cases identified by the whistleblower “span five different OCR regional offices.” (Reply at 18).⁷ The investigative team did not interview any regional staff from the Chicago, Atlanta, Metro, or Cleveland regional offices – all of which handled cases subject to the 2022 Injunction. The investigative team also did not interview any other staff in the Kansas City Regional Office, including the Program Manager, who would have confirmed the information provided by the whistleblower. Unsurprisingly, the Department “found no evidence” that OCR staff implemented the challenged documents when it failed to interview the OCR staff handling the cases.

Second, OCR dismissed four cases identified by the whistleblower following the referral

⁶ See the attached email chain, including an email dated September 16, 2024, from the Deputy Assistant Secretary to the Enforcement Director and an email dated September 19, 2024, from the Enforcement Director to the Kansas City Regional Director.

⁷ In fact, more than five regional offices handled cases subject to the 2022 Injunction. These regional offices include Chicago, Metro, Atlanta, Seattle, Kansas City, and Cleveland. If one includes the Denver office mediating the Rogers Public School case, the total rises to seven.

from OSC. The Department claims these cases were dismissed “in light of court orders enjoining enforcement of the Department’s 2024 Title IX Regulations.” *Id.* at 19. In reality, all four cases identified by the whistleblower and subsequently dismissed by OCR were opened for investigation or mediation before the Department’s 2024 Title IX Regulations were even published, much less effective. As explained above, the justification offered by the Department is simply wrong.

Third, corrective action was proposed at the regional level in three additional cases identified by the whistleblower. In these cases, the regional offices paused investigations or drafted dismissal letters in cases subject to the 2022 Injunction. The Department did not disclose any of these cases to OSC, which makes the Department’s failure to interview more than three regional staff even more troubling. *This brings the total number of cases identified by the whistleblower in which corrective actions were either taken by OCR or proposed by OCR regional offices up to 7 of 12.*

Fourth, most of the cases investigated and mediated by OCR in violation of the 2022 Injunction are identical, or very similar to, specific examples provided in the challenged documents. The challenged documents include “Confronting Anti-LGBTQ+ Harassment in Schools,” which lists the following “examples of the kinds of incidents [that] OCR can investigate”:

- An elementary school student with intersex traits dresses in a **gender-neutral** way, identifies as **nonbinary**, and **uses they/them pronouns**. The student’s teacher laughs when other students ask if they are “a boy or a girl” and comments that there is “only one way to find out.”
- On her way to the girls’ **restroom**, a **transgender** high school girl is stopped by the principal, who bars her entry. The principal tells the student to use the boys’ **restroom** or nurse’s office because her school records identify her as “male.” Later, the student joins her friends to try out for the girls’ cheerleading **team**, and the coach turns her away from **tryouts** solely because she is **transgender**. When the student complains, the principal tells her, “those are the district’s policies.”
- When he starts middle school, a **transgender** boy introduces himself as Brayden and tells his classmates he uses **he/him pronouns**. Some of his former elementary school classmates “out” him to others, and every day during physical education class, call him **transphobic slurs**, push him, and call him by his former name.

(Emphasis added). Nevertheless, the Department asserts the cases listed below merely concern “a range of allegations of race, sex, and disability harassment.” This claim is misleading. Some of the cases, in addition to gender identity or sexual orientation, also implicate race and disability. However, the presence of additional allegations does not excuse OCR’s decision to investigate or mediate allegations enjoined by the Court.

The Department acknowledged that OCR dismissed the following four cases identified by the whistleblower:

1. Rogers Public Schools (MO)

Allegation:

District did not allow a [REDACTED] but the opposite [REDACTED]

Opened/Mediated: Mediated by Denver Regional Office on [REDACTED] 2024.⁸

Current Status: Dismissed on [REDACTED] 2024.

2. Matanuska-Susitna Borough School District (AK)

Allegation: District did not allow students to play on athletic teams or use restrooms consistent with their gender identity.

Opened/Mediated: Opened for investigation on [REDACTED] 2023.

Current Status: Dismissed on [REDACTED] 2024.

3. Bellbrook-Sugarcreek (OH)

Allegation: District did not allow students to use restrooms consistent with their gender identity.

Opened/Mediated: Opened for investigation [REDACTED] 2022.

Current Status: Dismissed on [REDACTED] 2024.

4. Fairborn City Schools (OH)

Allegation: With respect to Title IX, the District did not allow [REDACTED] Complaint also included disability related allegations.

Opened/Mediated: Opened for investigation by OCR on [REDACTED] 2023.

Current Status: Title IX allegation dismissed on [REDACTED] 2024.

The Atlanta, Chicago, and Metro Regional Offices either paused work or drafted dismissal letters in three cases subject to the 2022 Injunction:

5. Bryan County Schools (GA)

Allegation: District did not allow student to use restrooms consistent with their gender identity or alter education records to use pronouns consistent with their gender identity.

Opened/Mediated: Opened for investigation on [REDACTED] 2024.

⁸ The Department's Reply simply states: "Instructions were given to move forward with the mediation." (Reply at 17). The memorandum drafted by the Kansas City's Regional Director elaborates on what transpired. On or around February 8, 2024, the Enforcement Director stated that "she did not believe mediating the Rogers complaint would violate the Injunction and even if it did, the mediation is confidential, so the Court would not find out." (Memorandum at 16). On or around February 8, 2024, the Enforcement Director stated that the Deputy Assistant Secretary "felt 'quite strongly' that we needed to move forward on mediation . . . [as] this is an agency decision, a national direction." (Memorandum at 17). On February 26, 2024, the Enforcement Director stated that she and the Deputy Assistant Secretary "are ordering us to proceed with mediation." (Memorandum at 18). The same day, the Kansas City Regional Director asked the Enforcement Director for an email explaining "why she does not believe proceeding to mediation will violate the Injunction so we will have a written record of the instruction," to which she responded that "no such written instruction or order will be sent, and they do not want a paper trail of this." *Id.* On March 8, 2024, the Enforcement Director stated that she would personally ask someone in the Denver Regional Office to mediate the case. (Memorandum at 20).

Current Status: Team Leader in Atlanta Regional Office informed team to pause work on sexual orientation/gender identity cases on July 29, 2024.

6. Ivy Tech Community College (IN)

Allegation: Student, who is transgender, was treated differently than other students when College required a behavior contract.

Opened/Mediated: Opened for investigation on [REDACTED] 2022.

Current Status: Dismissal letter drafted by Chicago Regional Office on [REDACTED] 2025.

7. Spartanburg Community School District (SC)

Allegation: District retaliated against student by denying an out-of-district placement following complaints of harassment based on gender identity. The harassment complained of related to the use of restrooms and pronouns consistent with the Student's gender identity, as well as clothing consistent with the Student's gender identity.

Opened/Mediated: Retaliation allegation opened on [REDACTED] 2022, while a previous, related case was opened on [REDACTED] 2022.

Current Status: Dismissal letter proposed by Metro Regional Office sent to OCR headquarters on [REDACTED] 2024.

It is undeniable that the Department failed to disclose all the cases that OCR investigated or mediated in violation of the 2022 Injunction. The Department falsely claimed that several of these cases were dismissed due to injunctions of the Department's 2024 Title IX Regulations, even though these regulations were not yet issued. It is also undeniable that the Department's investigation was inadequate since it only interviewed staff in two regional offices. Finally, the Department falsely represented to OSC that it "found no evidence that OCR . . . implemented the challenged documents," even though many of the cases identified by the whistleblower involved investigations of the very same fact patterns laid out in the challenged documents.

4. The Department omitted material information from its report.

i. The Department's report omitted material information from Kansas City's Regional Director concerning OCR's compliance efforts.

With respect to OCR's compliance efforts, the Department only tells one side of the story. According to the Department, "OCR took reasonable steps to ensure its compliance with the Court's injunction." (Reply at 13). In support of this representation, the Department cites two emails from the Assistant Secretary, sent on July 20, 2022, and September 16, 2022. The Department also states, "the Assistant Secretary discussed the Court's injunction on calls with Enforcement Directors and staff in OCR regional offices." (Reply at 11). According to the Department, the Assistant Secretary "expressed disappointment with the Court's injunction" and told staff "to continue their work while complying with the Court's injunction." *Id.* This is just one side of the story. The other side comes from the Regional Director of Kansas City.

On November 22, 2022, the Department's investigative team interviewed the Regional

Director of Kansas City (hereafter Regional Director). Following the interview, the Regional Director sent a 25-page memorandum to the investigative team with his account of the events at issue in OSC's referral. In the memo, the Regional Director documented a meeting between the Assistant Secretary, the Enforcement Directors, and the Regional Directors of OCR that occurred on July 26, 2022.

The Regional Director recalled the following from the July 26, 2022, meeting:

The Assistant Secretary stated she disagrees with the guidance from OGC [Office of General Counsel] and DOJ attorneys working on the federal litigation regarding the preliminary injunction, and **she wanted to send us an email explaining what she wants us to do but she was persuaded to not make a written record of it, so she decided to have this call instead.** She wants us to continue opening and investigating Title IX SOGI [sexual orientation and gender identity] complaints including those covered by the preliminary injunction, and stated **there is a chance we may be found in violation of the injunction if we continue to move forward on these cases,** but she feels it is a risk that should only apply to her and senior staff, not field staff, but **in the event one of us is found in contempt for violating the injunction and fined, she is offering to pay for our legal representation and to pay any fines for us, either through the department or by her personally.** She said we should not be fined by the Court for doing our job, and **this is a fight worth having.**

(See Memorandum at 6–7) (emphasis added). The whistleblower was not a participant in the meeting; however, he received a call from the Regional Director the same day informing him of the information described above. The whistleblower can personally confirm the Regional Director reported the same information to him on July 26, 2022, and the whistleblower drafted contemporaneous notes documenting the conversation.

The Regional Director also documented a meeting on August 24, 2022, that included the Assistant Secretary, Enforcement Directors, and Regional Directors. The Regional Director recalled the following from the meeting:

The Assistant Secretary stated we should be moving forward with opening SOGI [sexual orientation and gender identity] investigations, even in injunction states, but before any letters opening investigations or dismissing complaints are issued, they should be sent to the Enforcement Director for approval. **The Assistant Secretary stated no one should have pencils down, people should have pencils up, in all the states.**

(Memorandum at 7). Notwithstanding these instructions from the Assistant Secretary, the whistleblower and Regional Director agreed that the Kansas City Regional Office would abide by the 2022 Injunction.

Five separate times in the Department's reply to OSC, the Department states it "found no evidence" that OCR violated the 2022 Injunction. Yet the Memorandum provided by the Regional Director is credible, firsthand evidence that OCR violated the 2022 Injunction, and that OCR did so with the knowledge and approval of senior OCR leadership. Even if the Department disagrees, it cannot honestly claim it "found no evidence" that the Court's 2022 Injunction was violated.

The Department's reply to OSC completely omitted the information provided by the Regional Director. There is no mention of the Regional Director's interview or the memorandum he sent to the investigative team. Moreover, the Department's report did not address any other witnesses' recollections of the substance of the Assistant Secretary's "calls with Enforcement

Directors and staff in OCR regional offices.” By failing to address the Assistant Secretary’s calls with OCR staff, the Department – at a minimum – omitted material information concerning OCR’s compliance efforts.

ii. **The Department failed to address the Assistant Secretary’s meeting with Kansas City’s Regional Director and Chief Attorney on February 29, 2024.**

The Deputy Assistant Secretary requested that the Kansas City Regional Office open the case for investigation on February 22, 2024. Per his request, the Kansas City Chief Attorney (the whistleblower) drafted Notification Letters and proposed to open an investigation into harassment based on “sex stereotypes” – a legal issue that was not part of the challenged documents or subject to the Court’s 2022 Injunction. On February 29, 2024, the Enforcement Director over the Kansas City Regional Office requested that the Kansas City Regional Office issue the Notification Letters but substituted “gender identity” for “sex stereotypes.”

The same day, the Kansas City Regional Office was scheduled to meet with the Assistant Secretary (via Microsoft Teams) as an office for most of the day. At the conclusion of the meeting, the Regional Director and Chief Attorney met separately with the Assistant Secretary. By this time, the Assistant Secretary was aware the whistleblower had declined to sign the Notification Letters investigating the issue of harassment based on gender identity. Rather than discussing the issue in “good faith,” as the Department claims, the Assistant Secretary demanded the whistleblower reconsider his position and future at OCR. The Assistant Secretary also criticized the whistleblower for expressing disagreement in writing and directed him not to do so in the future.

1. **The Department acted in bad faith when the Assistant Secretary threatened the whistleblower’s employment.**

When Kansas City’s Regional Director and Chief Attorney met with the Assistant Secretary on February 29, 2024, she stated the following:

Assistant Secretary: I think you should think hard about the position that you’re taking. . . So, you’re taking a position that no other lawyer is taking related to this order. And I really think you should think hard about whether that’s the position that you want to take moving forward . . . You don’t have to talk to me about it.

Assistant Secretary: Yeah. I mean . . . Um . . . Each of us has very difficult decisions that we make at different points in our job. And we have to look at our own souls about what we’re comfortable with, and, uh, make decisions about what we’re doing. And, I have had the experience where people left OCR because they did not feel comfortable with a particular path. That is a choice. I don’t think that has to be *the* choice. Uh, and so . . . Let’s figure out what the other options are, also.

2. **The Department acted in bad faith when the Assistant Secretary directed the whistleblower not to express any disagreement in writing.**

When Kansas City’s Regional Director and Chief Attorney met with the Assistant Secretary on February 29, 2024, she further stated:

Assistant Secretary: I do not appreciate the email traffic about it, so, I, you know, I think that’s not the way we roll, and you all should be able to operate the same way that I do, which is we can have a conversation, we don’t send an email

about it. . .

Assistant Secretary: I want to invite you to have a conversation with me if you need to in the future and I really want to say to you, DO NOT put in writing things, in a heavily oversight environment that is always contentious, that reflects disagreement. We can talk about that.

The Regional Director's memorandum, which was provided to the investigative team, addresses this meeting as well. (See Memorandum at 20-22).

5. The Department continues implementing the guidance from the challenged documents in violation of the Court's injunction.

i. OCR leadership requested that the Kansas City Regional Office investigate a case in violation of the 2022 Injunction, even after the whistleblower submitted his complaint to OSC.

Owasso Public Schools was not the final case that OCR instructed the Kansas City Regional Office to investigate in violation of the 2022 Injunction. After the whistleblower submitted his complaint to OSC on April 5, 2024, the Kansas City Regional Office proposed dismissing the case of Leavenworth U.S.D. 453 (hereafter the District) to OCR headquarters. The complaint alleged the District had adopted a policy of removing "LGBTQ/transgender books, characters, or themes below middle school" from the school library. In response to the proposed dismissal letter, the Enforcement Director sent an email on June 4, 2024, stating: "This case needs to open. I consulted with [the Deputy Assistant Director] and he agrees."

The directions from the Enforcement Director and the Deputy Assistant Director were troubling because the Department of Education Organization Act, at 20 U.S.C. § 3403(b), specifically states the Department is not authorized "to exercise any direction, supervision, or control over . . . the selection or content of library resources. . ."⁹ Nevertheless, the Department published guidance on June 21, 2023, stating as follows (with emphasis added in bold font):

Protecting LGBTQI+ students from book bans that create a hostile environment in violation of Federal civil rights laws . . . Book bans may violate Federal civil rights laws, depending on the facts and circumstances. OCR can investigate whether students have experienced a hostile environment at school based on sex, race or disability. OCR has a webpage with Resources for LGBTQI+ Students, which includes a wide range of legal and other resources and information about how to file a complaint with OCR for students who believe they may have experienced discrimination, including harassment, at school.

Apparently, OCR's position is that investigating "book bans" as a hostile environment would circumvent federal law governing the Department's jurisdiction. It would not. OCR's investigation of an alleged hostile environment resulting from the selection of library resources violates both federal law **and** the 2022 Injunction in states subject to the injunction.

For the reasons discussed above, opening an investigation into Leavenworth U.S.D. 453—as requested by the Enforcement Director and Deputy Assistant Secretary—would have violated federal law and the 2022 Injunction in Kansas. On September 18, 2024, the Kansas City

⁹ See also 20 U.S.C. § 1232a ("No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.")

Regional Director sent the Enforcement Director a revised dismissal letter, which she has yet to approve.

ii. **OCR violated federal law and the 2022 Injunction when it investigated and resolved a “book ban” case in Georgia in 2023.**

While investigating the Leavenworth U.S.D. 453 case, it came to the whistleblower’s attention that OCR violated both federal law and the 2022 Injunction when it investigated Forsyth County Schools in Georgia. On February 23, 2023, OCR sent a Notification Letter opening the case for investigation. The Notification Letter stated (with emphasis added in bold font):

The complaint alleged that **the District** discriminated against students based on sex, race, color, and national origin because it **removed books from its schools that were written by individuals or involved characters who are queer, non-binary or persons of color. . .**

OCR will investigate:

- 1. whether the District’s removal of books from schools created a hostile environment for students based on sex, in violation of Title IX and its implementing regulation at 34 C.F.R. Part 106; and**
- 2. whether the District’s removal of books from schools created a hostile environment for students based on race, color or national origin, in violation of Title VI and its implementing regulation at 34 C.F.R. §100.3.**

Because this case was opened in Georgia on February 23, 2023, the case was opened in violation of the 2022 Injunction, in addition to federal law.

OCR resolved the case via a Resolution Agreement on May 19, 2023, also in violation of the 2022 Injunction. OCR issued a Resolution Letter, which—like the Owasso Public Schools case—extensively addressed the issues of gender identity and sexual orientation. Consider the sections below (with emphasis added in bold font):

Page 4: Around November 2021, **a parent group reportedly asked the District to shelve LGBTQI+ books separately in school libraries** and to place tags on the books. . . On January 12, 2022, the District Media Committee **convened a meeting in response to these requests regarding sexually explicit books and LGBTQI+ books. . . The committee discussed and rejected requests that the District shelve LGBTQI+ books separately,** or put stickers on such books, concluding that those actions would be detrimental to students, might lead to increased bullying, and, again, could cause students to stop using the media center.

Page 5: During a February 15 District school board meeting, which the District’s Superintendent attended, multiple parents and students spoke about the District’s removal of books. . . **The students’ comments at the board meeting focused on the gender identity, sexual orientation,** and race or color of authors or characters in the books. Some students also raised concern about the impact of removing the books.

Pages 5–6: A third student -- who **characterized the District’s actions as singling out books by authors who are gay, supporters of the LGBTQI+ community,** women and people of color -- expressed the belief that the District

does not care about diversity.

Page 6: An online article dated June 21, 2022, attributed to a District sophomore a statement that as a brown, female person, **“this is something that affects me,”** and attributed to a District senior the statement, **“I’m openly queer, openly transgender, and so it really hits close to home when people are like, let’s not have diversity.”**

Pages 6–7: OCR also recognizes the District limited its book screening process to sexually explicit material. Nonetheless, **communications at board meetings conveyed the impression that books were being screened to exclude diverse authors and characters, including people who are LGBTQI+ and authors who are not white, leading to increased fears and possibly harassment.**

(Emphasis added). Like Owasso Public Schools, it is incontrovertible that the issues of gender identity, as well as sexual orientation, are woven throughout OCR’s Resolution Letter in the Forsyth County Schools case. Because the case involved the selection of library resources, OCR’s investigation violated both federal law—20 U.S.C. § 3403(b) and 20 U.S.C. § 1232a—which restricts OCR’s jurisdiction over library resources, **and** the 2022 Injunction, which prohibits OCR from investigating cases based on gender identity and sexual orientation.

iii. The Civil Rights Data Collection Office (CRDC) is collecting data to assist OCR in its enforcement efforts, violating the 2022 Injunction.

According to the Department, “OCR administers the CRDC and uses the data to enforce civil rights laws that prohibit discrimination based on race, color, national origin, sex, and disability.” (2021-22 Civil Rights Data Collection A First Look: Students’ Access to Educational Opportunities in U.S. Public Schools at 6). The website for the CRDC explains that “OCR relies on the CRDC data it receives from public school districts as it investigates complaints alleging discrimination, determines whether the federal civil rights laws it enforces have been violated, [and] initiates proactive compliance reviews . . .”¹⁰ OCR’s implementing regulations require recipients of federal financial assistance from the Department to “submit to OCR ‘complete and accurate compliance reports at such times, and in such form and containing such information’ as OCR ‘may determine to be necessary.’”¹¹

Despite the 2022 Injunction – and all the other injunctions cited by the Department concerning the 2024 Title IX regulations – OCR is collecting data for the purpose of including gender identity and sexual orientation in its enforcement of Title IX. Consider three examples:

1. Providing data for nonbinary students was “optional for the 2021–22 CRDC but **required** for the 2023–24 CRDC.” (2023–24 Civil Rights Data Collection: General Overview, Changes, and List of Data Elements at 3–4) (emphasis added). The term nonbinary means “not exclusively male or female. Transgender students may be reported as male, female, or nonbinary.” (Master List of CRDC Definitions at 15–16).
2. The CRDC also redefined harassment on the basis of sex to include “harmful conduct based on actual or perceived gender identity (including harassment because a student identifies as or is perceived to be transgender, cisgender, or nonbinary).” (Master List of CRDC Definitions at 13, see also chart tracking changes to CRDC definitions).

¹⁰ See <https://civilrightsdata.ed.gov/about/faqs> (last accessed January 17, 2025).

¹¹ Id.

3. Providing data for “reported allegations of harassment or bullying of K-12 students on the basis of gender identity” is **required** from every school in the 2023-2024 CRDC.” (2021-22 Civil Rights Data Collection A First Look: Students’ Access to Educational Opportunities in U.S. Public Schools at 31).

None of these changes comply with the 2022 Injunction or the later injunctions of the 2024 Title IX Regulations identified by the Department.¹²

Conclusion

As noted above, the Department’s reply is a master class in obfuscation, misdirection, gaslighting, and half-truths. Consider the following:

- **Obfuscation:**
 - Dismissing all cases that violate court orders with the same formulaic language, so it is difficult for readers to determine what cases violated the 2022 Injunction, and what cases were subject to injunctions after the 2024 Title IX Regulations were published.
 - Claiming that OCR was “engaging in enforcement actions consistent with [the enjoined] documents” but was not “implementing the challenged documents.”
- **Misdirection:**
 - Asserting that the Department should be judged by whether its actions conformed with the Notice of Compliance – not the Court’s order.
 - Admitting that OCR dismissed 4 cases identified by the whistleblower, but claiming the cases were dismissed due to injunctions of the 2024 Title IX Regulations – even though the 2024 Title IX Regulations were not published when the cases were opened and were not retroactive.
- **Gaslighting**
 - Claiming that OCR’s investigation of Owasso Public Schools did not “rely on the theory that Title IX’s prohibition on sex discrimination includes discrimination on the basis of gender identity” – even though the terms “gender identity,” “gender-neutral,” “gender,” “gender nonconformity” are used 20 times, the term “gay” appears 6 times, and the term “pronouns” is used 9 times.
 - Reporting the Department found “no evidence” that OCR violated the 2022 Injunction, while ignoring the 25-page memorandum from the Kansas City Regional Director documenting the Assistant Secretary’s verbal directions to violate the injunction.
 - Claiming the OSC referral resulted from a “good faith” disagreement, when the Assistant Secretary threatened the whistleblower’s employment with OCR and directed him not to express any disagreements in writing.
- **Half-truths:**
 - Claiming that OCR took “reasonable steps” to comply with the 2022 Injunction by citing written instructions in two emails from the Assistant Secretary but ignoring the Assistant Secretary’s verbal instructions to ignore the 2022 Injunction.

¹² See Louisiana v. U.S. Dep’t of Educ., No. 3:24-cv-00563 (W.D. La. June 13, 2024); Tennessee v. Cardona, No. 2:24-072-DCR (E.D. Ky. June 17, 2024); Kansas v. U.S. Dep’t of Educ., No. 24-4041-JWB (D. Kan. July 2, 2024); Texas v. United States, No. 2:24CV86-Z (N. D. Tex. July 11, 2024); Carroll Indep. Sch. Dist. v. Dep’t of Educ., No. 4:24-cv-00461-O (N.D. Tex. July 11, 2024); Arkansas v. U.S. Dep’t of Educ., Case No. 4:24 CV 636 RWS (E.D. Mo. July 24, 2024); and Oklahoma v. Cardona, No. CIV- 24-00461-JD (W.D. Okla. July 31, 2024).

- Reporting the Department found “no evidence” that OCR violated the 2022 injunction, when that finding resulted from the Department’s failure to interview regional staff who either drafted dismissal letters for, or paused working on, cases the whistleblower identified.

This is not a “good faith” disagreement between attorneys. The Assistant Secretary verbally directed staff to ignore the 2022 Injunction, and OCR investigated numerous cases—most notably Owasso Public Schools—in blatant violation of the Injunction. When confronted by the whistleblower, the Assistant Secretary doubled down, and senior staff at OCR went along. Now, faced with oversight from OSC, the Department conducted a half-hearted investigation and invented self-serving, threadbare excuses to justify its blatant (and ongoing) violation of the 2022 Injunction.

Cordially,

/Tristan Leavitt/
Tristan Leavitt
Empower Oversight
President