

# EMPOWER OVERSIGHT

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Whistleblowers & Research



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 Timothy Mattson, 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 Mr. Mattson 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 Mr. Mattson 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.).<sup>1</sup> 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, Mr. Mattson had a call with his supervisor, Region VII Director Bradley Burke. Director Burke 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 Burke advised Mr. Mattson 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.

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<sup>1</sup> 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.

Mr. Mattson was concerned by the information relayed to him by Director Burke and drafted notes documenting the conversation the same day. Mr. Mattson and Director Burke 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 Mr. Mattson 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 [REDACTED], Georgia, opening a case for investigation. According to the notification letters, the complainant alleged the following:

[T]he District prohibited the Student from using bathrooms consistent with his gender identity while he attended [the] Middle School during the 2022-2023 school year and [the] High School beginning in the 2023-2024 school year, and the District denied your request to change the Student’s educational records to reflect his male name and pronouns. You also allege that, as a result of your advocacy on behalf of the Student, the District retaliated against the Student by disciplining him for using the boys’ restroom. Finally, you allege that prohibiting the Student from using the boy’s restroom unnecessarily “outs” the Student to others, violating the Student’s right to privacy.

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

1. Whether the District discriminated against the Student on the basis of sex, in violation of Title IX, when it denied him access to the boy’s restroom and declined to change his educational records to reflect his male name and pronouns.
2. Whether the District discriminated against the Student on the basis of disability, in violation of Section 504 and Title II, when it denied him access to the boy’s restroom and declined to change his educational records to reflect his male name and pronouns.
3. Whether the District retaliated against the Student based on disability, in violation of Section 504 and Title II, and based on sex, in violation of Title IX, when it disciplined the Student for using the boy’s restroom following Complainant raising concerns regarding discrimination.

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:

- [REDACTED]
- [REDACTED]
- Insight Academy of Arizona (08-23-1050);
- Ivy Tech Community College (05-23-2037);
- [REDACTED]
- 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. [REDACTED]

The [REDACTED] Student] was not going to be housed with boys during his upcoming choir trip because on [the Student’s] birth certificate it shows [the Student] was assigned female at birth. [The Student’s] name had been legally



changed prior to this. [The Student's] gender marker on [the Student's] Arkansas driver's license was marked as male prior to this.

[REDACTED]

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.

[REDACTED]

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

On March 8, 2024, Enforcement Director Morey-Chandra was on a virtual meeting with Mr. Mattson, Director Burke, and the Program Manager. Ms. Morey-Chandra 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 Burke asked permission to discuss the matter with Deputy Assistant Secretary for Enforcement Randolph Wills. Enforcement Director Morey-Chandra explained that Deputy Assistant Secretary Wills disagreed and had already asked her to move the case into mediation. Enforcement Director Morey-Chandra stated that she would forward the case herself for mediation in the Denver Office.

### **Owasso Public Schools (05-24-1363)**

On February 22, 2024, Mr. Mattson received an email from Enforcement Director Meena Morey-Chandra forwarding a complaint from the Human Rights Campaign. The

complaint involved the death of a student at Owasso High School in Owasso, Oklahoma. Enforcement Director Morey-Chandra's email originated with Deputy Assistant Secretary Wills, 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. Mattson drafted notification letters for the case on February 27 and forwarded them to Deputy Assistant Secretary Wills, copying Enforcement Director Morey-Chandra.

In the notification letters Mr. Mattson 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 student as "non-binary," the student's grandmother and guardian consistently referred to the student as "she" and "her" during an interview with law enforcement in the hospital the day before the student's death. Additionally, the student informed law enforcement that classmates were making fun of how the student and the student's friends dressed and laughed. The available information, therefore, was consistent with investigating the case as sex discrimination, predicated on sex stereotypes.

On Thursday, February 29, 2024, Mr. Mattson received an email from Enforcement Director Morey-Chandra 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 Mr. Mattson received the aforementioned email from Enforcement Director Morey-Chandra, the Kansas City Office had a virtual meeting scheduled with Assistant Secretary for Enforcement Catherine Lhamon. The meeting was positive, productive, and generally uneventful. Assistant Secretary Lhamon provided useful feedback to the office on moving cases forward, and Mr. Mattson 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 Mr. Mattson and Region VII Director Bradley Burke had scheduled with the Assistant Secretary, Enforcement Director Morey-Chandra called to tell Mr. Mattson that Region VII needed to issue the notification letters. Mr. Mattson advised Ms. Morey-Chandra 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 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, Ms. Morey-Chandra acknowledged receiving the email, stated she would follow up with Mr. Mattson, and quickly ended the call.

#### **IV. Prohibited Personnel Practices**

A short time later on the afternoon of Thursday, February 29, Mr. Mattson joined Regional Director Burke for a final virtual meeting with Assistant Secretary Lhamon. Mr. Mattson had been warned by senior staff that Assistant Secretary Lhamon had previously fired a Regional Director and had a reputation for retaliation. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



Mr. Mattson's 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 Morey-Chandra called Mr. Mattson and asked whether he would sign the letters if the phrase “gender identity” was removed from the letters. Mr. Mattson 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. Ms. Morey-Chandra was very polite and ended the call without saying more.

On Sunday, March 3, 2024—the weekend following the events outlined above—Mr. Mattson 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.<sup>2</sup> Mr. Mattson 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 Mr. Mattson and Director Burke of Mr. Mattson's 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 Mr. Mattson 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).<sup>3</sup>

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

<sup>3</sup> 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, Mr. Mattson 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 Mr. Mattson’s 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 Mr. Mattson 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 Mr. Mattson and Director Burke 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 Mr. Mattson and Director Burke 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.”

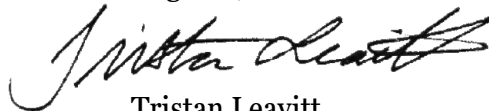
By threatening that Mr. Mattson might need to leave OCR if he was not willing to issue the notification letters – despite him clearly expressing that he viewed the letters as illegal – Assistant Secretary Lhamon committed a prohibited personnel practice. Ms. Lhamon has clear authority to take personnel actions, and threatened a personnel action because of Mr. Mattson 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 Mr. Mattson and Director Burke 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 Mr. Mattson’s 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,

A handwritten signature in black ink, appearing to read "Tristan Leavitt", with a stylized, cursive script.

Tristan Leavitt  
President  
Empower Oversight