

# EMPOWER OVERSIGHT

*Whistleblowers & Research*



January 21, 2025

## 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).<sup>1</sup> 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.

<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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).<sup>4</sup> 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.

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

<sup>3</sup> 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.

<sup>4</sup> 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 Nex was subjected.” 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: Student A’s mother told OCR that Student A was assigned the female sex and given a female name at birth. In approximately the eighth grade, Student A began expressing a different **gender identity**.

Page 10: Student A’s mother told OCR that she identified Student A as **non-binary and transgender** during their conversation . . . Counselor A confirmed to OCR 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: Counselor A told OCR that, at this time, she “assumed but did not know” Student A’s **gender identity**, and she used “they/them” pronouns for Student A. . . . Assistant Principal A told OCR that although no one told her specifically, she assumed based on Student A’s preferred name and pronoun use that Student A was **transgender**.

Page 10: Student A’s mother told OCR that during the 2023–2024 school year, Student A used “he/him” pronouns and no longer used his female birth name, instead using a **gender-neutral name**. Student A’s mother told OCR that Student A was **transgender and non-binary**, had a mostly LGBTQ+ friend group at school, and expressed his **gender identity** “through the way he dressed, his hairstyle, the pronouns and name that he used, and his mannerisms.”

Page 11: According to Student B’s parent, Student A, Student B, and Student C were **gender nonconforming**. Student A’s mother told OCR that Student A, Student B and Student C were harassed by three students (Students 1, 2, and 3), who were also [redacted content] at that time.

Pages 12–13: She said she told them that Student A had been attacked because of his **gender** and asked for the police to be called. 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 called him **gay**, asked him whether he was **transgender**, and asked him about his pronouns. 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, and C “faggot” and “queer,” threw paper at them, and laughed at how 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.<sup>5</sup> 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).

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<sup>5</sup> 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.”<sup>6</sup>

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).<sup>7</sup> 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

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<sup>6</sup> 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.

<sup>7</sup> 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)

<i>Allegation:</i>	District did not allow a transgender student to room with students consistent with their gender identity, but the opposite sex, on an overnight field trip.
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*Opened/Mediated:* Mediated by Denver Regional Office on May 17, 2024.<sup>8</sup>

*Current Status:* Dismissed on October 15, 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 September 19, 2023.

*Current Status:* Dismissed on September 19, 2024.

## **3. Bellbrook-Sugarcreek (OH)**

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

*Opened/Mediated:* Opened for investigation May 11, 2022.

*Current Status:* Dismissed on September 30, 2024.

## **4. Fairborn City Schools (OH)**

*Allegation:* With respect to Title IX, the District did not allow transgender student to use the gender-neutral staff bathroom. Complaint also included disability related allegations.

*Opened/Mediated:* Opened for investigation by OCR on September 8, 2023.

*Current Status:* Title IX allegation dismissed on October 3, 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 January 29, 2024.

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<sup>8</sup> 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 December 6, 2022.

*Current Status:* Dismissal letter drafted by Chicago Regional Office on January 7, 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 December 12, 2022, while a previous, related case was opened on May 9, 2022.

*Current Status:* Dismissal letter proposed by Metro Regional Office sent to OCR headquarters on December 17, 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.**

[REDACTED]

[REDACTED]

[REDACTED]

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

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

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. . ."<sup>9</sup> 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

<sup>9</sup> 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 . . . .”<sup>10</sup> 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.’”<sup>11</sup>

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).

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

<sup>11</sup> 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.<sup>12</sup>

## **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.

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<sup>12</sup> 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