

February 5, 2025

Via email to Thomas.Wheeler@ed.gov; Candice.Jackson@ed.gov

Thomas Wheeler
Acting General Counsel
U.S. Department of Education
Washington, DC 20202

Candice Jackson
Deputy General Counsel
U.S. Department of Education
Washington, DC 20202

Re: Department of Education's retaliation against employees in violation of Title VII

Dear Mr. Wheeler and Ms. Jackson:

Our firm represents multiple employees of the U.S. Department of Education Office for Civil Rights (OCR) who were recently targeted with unexplained administrative-leave notices (example attached), beginning on the evening of January 31, 2025. All have stellar employment records in service to our nation. At least one is a veteran of the armed services who served on, and in the months after, 9/11.

The common thread that most of the recipients share is that aside from their day-to-day responsibilities enforcing federal civil-rights law in education, they either participated on committees—formed under the political leadership of the first Trump administration—or attended in-house seminars broadly about diversity, equity, and inclusion. As the Code of Federal Regulations commands, these committees “promote[d] equal opportunity” with the goal of “identify[ing] and eliminat[ing] discriminatory practices and policies”¹ within the agency, including in hiring. Indeed, as the enclosed email chain from Trump political appointees Kimberly Richey and Kenneth Marcus to committee appointees states, the goal was to create “a workplace in which barriers to diversity and equal opportunity are removed.”

No employee engaged in any such activity after President Trump's broad, vague executive order seemingly banning “DEIA” (diversity, equity, inclusion, and accessibility) activities. In fact, the committees were disbanded after the order. We set aside for the moment the question of why anyone would oppose diversity, equity, inclusion, and accessibility, venerating instead uniformity, inequity, exclusion, and inaccessibility.

While the letter placing our clients on administrative leave claimed it was not a disciplinary action, that seems dubious. The failure to even explain why the action was taken violates their due-process rights and any semblance of fundamental fairness.

¹ 29 C.F.R. § 1614.102(b)(4).

Whoever decided it was a good idea to target employees with sniper fire for these employees' anti-discrimination activity—at Trump political appointees' direction—is instigating the government to violate, at a minimum, the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964.²

As you know, Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin. To accomplish that mandate, it also prohibits retaliation against employees who engage in opposition to discrimination in the workplace. Opposition is construed broadly where the manner of opposition is reasonable, including conduct contending with, confronting, resisting, or antagonizing workplace discrimination.³ Opposition activity extends to advocacy, including advocacy against discrimination in working conditions and the hiring process.⁴

For more than 50 years, Title VII has mandated a prohibition on discriminatory workplace practices and policies. Federal agencies have used diversity, equity, and inclusion programs as part of their effort to comply with that mandate.⁵ Indeed, the first Trump administration's political leadership was the impetus for the committees at OCR.

And rightly so. Courts have consistently recognized the value of diversity and anti-discrimination-training programs as remedial injunctive measures to address a wide range of discriminatory practices, policies, and behaviors—thus furthering Title VII goals.⁶

Consistent with the Department of Education's compliance with Title VII, engagement in the Department's diversity, equity, and inclusion programs is activity fundamentally in opposition to discrimination. Diversity, equity, and inclusion activities constitute advocacy

² See, e.g., 42 U.S.C. § 2000e-3(a). We also have due-process concerns.

³ See, e.g., *Crawford v. Metro. Gov't of Nashville & Davidson City, Tenn.*, 555 U.S. 271, 276 (2009); *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014) (opposition includes “less formal” forms of protest); *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1035 (5th Cir. 1980) (formal notice or written complaints are not required to establish opposition); *Gerry W., Complainant*, EEOC DOC 0120171168, 2018 WL 5386075, at *12 (Oct. 11, 2018); *Edwardo v., Complainant*, EEOC DOC 2021003546, 2025 WL 368961, at *18 (Jan. 14, 2025).

⁴ *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 577 (6th Cir. 2000).

⁵ 29 C.F.R. § 1614.102(b)(4) (“Each agency shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies.”).

⁶ See, e.g., *Erickson v. Wisconsin. Dep't. of Corrs.*, 469 F.3d 600, 605–06 (7th Cir. 2006) (noting that employers should try to prevent harassment with “proactive steps such as ... training employees.”); *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 817 (1990) (upholding injunctive relief ordering employer to, among other things, develop anti-discrimination policies and training).

against the discrimination Title VII requires the Department to eliminate. Retaliating against employees who participate in these efforts is prohibited by law.

For example, in *Johnson v. Univ. of Cincinnati*, a fired university vice-president alleged retaliation for his efforts to advocate for minority and woman hiring. The district court granted summary judgment against him. But on appeal the Sixth Circuit reversed, holding that his advocacy on women and minorities' behalf is protected activity. The court noted that to find otherwise would be to “turn[] back the hands of time on the issue of civil rights and equality in employment.”⁷ *Johnson*, 215 F.3d at 577–78. Advocacy, including through diversity, equity, and inclusion programs, must be protected to accomplish Title VII's aims.

Retaliation against federal employees for participation in diversity, equity, and inclusion activities does not square with the protections Title VII guarantees.

We urge you, as responsible lawyers under all jurisdictions' counterpart of D.C. Bar Prof. Cond. R. 1.13(b) (Organization as Client), to guide the Department and the Office of Personnel Management to stop violating and stop risking violating Title VII. Clients' discriminatory or retaliatory animus does not excuse lawyers from fulfilling their responsibility to ensure legal compliance.

The path the Department is on is a cruel and precarious one. While some may insist that placing an employee on administrative leave isn't (yet) an adverse employment action, that isn't always true.⁸ Here, the administrative leave has a stigmatizing effect on the employees, creating the false impression that they have engaged in improper activity when both Title VII and the Code of Federal Regulations authorize their activity. At the very least, we expect the Department will end the administrative leave within 10 calendar days.⁹ OPM's insistence that leaves can extend beyond that is legally baseless.¹⁰ The leave must end no later than **February 10**—although it never should have occurred at all.

⁷ *Johnson*, 215 F.3d at 577–78.

⁸ *Muldrow v. City of St. Louis, Missouri*, 601 U.S. 346, 359 (2024) (employee needs only show “some injury respecting her employment terms or conditions”); *Stewart v. Mississippi Transp. Com'n*, 586 F.3d 321, 332 (5th Cir. 2009) (paid administrative leave may constitute adverse employment action “depending on the circumstances,” including causing stigma and significant emotional distress); *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 (9th Cir. 2013) (employee being placed on administrative leave was an adverse employment action for purposes of First Amendment–retaliation claim); *Michael v. Caterpillar Financial Services Corp.*, 496 F.3d 584, 596 (6th Cir. 2007) (placing employee on paid administrative leave was adverse employment action for retaliation purposes).

⁹ 5 U.S.C. § 6329a.

¹⁰ See, e.g., Nick Bednar, *Breaking Down OPM's 'Fork in the Road' Email to Federal Workers*, <https://www.lawfaremedia.org/article/breaking-down-opm-s--fork-in-the-road--email-to-federal-workers> (Jan. 30, 2025).

Please return my clients and those similarly situated to their important law-enforcement responsibilities on behalf of the public. And please ensure that the victims of this targeting face no further retaliation.

We look forward to your favorable response. Enclosed is a litigation-preservation demand. Because OPM, "DOGE," and Elon Musk seem to be calling the shots, these demands extend to them and their assistants.

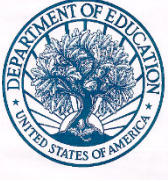
Sincerely,



Subodh Chandra

Enclosure: litigation-preservation demand

Cc: Charles Ezell, Acting Director, White House Office of Personnel Management (via hr@opm.gov)
Jacqueline Clay, Chief Human Capital Officer, U.S. Department of Education (via Jaqueline.Clay@ed.gov)



UNITED STATES DEPARTMENT OF EDUCATION

January 31, 2025

MEMORANDUM

TO: [REDACTED]
SUPERVISORY GENERAL ATTORNEY (CR)
OFFICE FOR CIVIL RIGHTS

FROM: JACQUELINE [REDACTED]
CHIEF HUMAN CAPITAL OFFICER
OFFICE OF HUMAN RESOURCES
OFFICE OF FINANCE AND OPERATIONS

SUBJECT: ADMINISTRATIVE LEAVE NOTICE

This email provides important information regarding your employment status. Effective January 31, 2025, you will be placed on administrative leave with full pay and benefits pursuant to the President's executive order on DEIA and further guidance from OPM. This administrative leave is not being done for any disciplinary purpose.

Please note the following:

- **Pay and Benefits:** You will continue to receive your full salary and benefits during the entirety of this administrative leave period.
- **Work Responsibilities:** You are not required or expected to perform any work-related tasks during this period of administrative leave.
- **Office Attendance:** You are not required or expected to come to the office during this time.
- **Email Access:** Your email access will be suspended. Please make sure that your address of record and contact information are current with your agency.

We will provide you with updates as soon as they are available. We appreciate your patience and cooperation.

If you have any concerns or questions, please contact Adriane Riase at Adriane.Riase@ed.gov.

400 MARYLAND AVE., S.W., WASHINGTON, DC 20202
www.ed.gov

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Our work—both on EEDIC and in OCR—is critically important. As the Secretary mentioned in her message from earlier today: “Racism and bigotry have no place in our nation or our world, and racial injustices must come to an end. As a nation, we can and must do better, especially for our children. We must model the behaviors we want them to emulate as we teach them to love and respect one another. It also connects directly to our work. Each day, we strive to ensure all students have equal access to a safe, nurturing, quality learning environment, free from discrimination. We fight to create opportunity for those children and families who are invisible to or forgotten by too many. The diverse perspectives each of you bring to that work is critical to our success.”

I am appreciative of the opportunity to work with you to fulfill the mission of EEDIC and to work on behalf of all OCR employees.

Thanks – and looking forward to seeing you soon!

Kim

Kimberly M. Richey

Principal Deputy Assistant Secretary

Office for Civil Rights

U.S. Department of Education

202-453-7800 (o)

202-368-8932 (c)

From: Marcus, Kenneth <Kenneth.Marcus@ed.gov>

Sent: Wednesday, February 5, 2020 2:00 PM

To: OCR All Users <OCR_All_Users@ed.gov>

Subject: Employee Engagement, Diversity & Inclusion Council (EEDIC)

OCR Team,

As Assistant Secretary for Civil Rights, I am committed to fostering a culture of diversity, inclusion and respect within our workforce, as I believe the diversity of our workforce allows us to better serve our nation's students and families. A diverse and inclusive environment, in which employees are treated with respect and dignity, not only makes OCR the best place to work, it also maximizes OCR's performance in accomplishing its mission. We must view it as our personal responsibility to work together to eliminate any discrimination and barriers to equal employment opportunity in the workplace and to maintain a dedicated, skilled, and diverse workforce.

In that vein, I have recently approved the formation of a new committee within OCR that will be charged with developing and recommending strategies that foster diversity, ensure inclusion, and increase employee engagement, involvement, and satisfaction throughout OCR. This new committee will be known as the Employee Engagement, Diversity & Inclusion Council (EEDIC). Moving forward, the EEDIC will merge the mission and purpose of the previous EEAC and D&I Committees. I believe this step will better ensure that OCR integrates a strategic and comprehensive approach to supporting OCR's diversity, equity, and inclusion initiatives with a particular focus on employee engagement.

EEDIC membership will be open to all employees – and I hope that each of you will consider participating. EEDIC will consist of two OCR employees from each of the twelve regional offices and two members from each office within Headquarters. The Principal Deputy Assistant Secretary will serve as the Chair of EEDIC. The head of each office (Regional Directors for regional offices, and the head of each office within Headquarters) will nominate interested employees and notify the Chair, in writing, of the nominations by February 28, 2020. Participation by all members of the EEDIC will be with the approval of each member's supervisor, Regional Director/Head of office, and the Chair. The Chair will select members after receiving the nominees submitted by each office.

I would like to take this opportunity to thank everyone who served on either EEAC or D&I. As we move forward, I expect that EEDIC will promote an environment where all employees are fully included, engaged, connected, respected, safe, satisfied, and fulfilled as well as a workplace in which barriers to diversity and equal opportunity are removed. OCR will continue to strive to be a model federal employer by effectively capitalizing on and leveraging the differences as well as the similarities that unite us.

I look forward to working closely with EEDIC to foster diversity and inclusion and directly improve employee engagement in OCR.