



U.S. Department of Education
Office of Inspector General

U.S. Department of Education's Nondisclosure Policies, Forms, and Agreements

May 12, 2025
ED-OIG/I24DC0196

INSPECTION REPORT

NOTICE

Statements that managerial practices need improvements, as well as other conclusions and recommendations in this report, represent the opinions of the Office of Inspector General. The appropriate Department of Education officials will determine what corrective actions should be taken.

In accordance with Freedom of Information Act (Title 5, United States Code, Section 552), reports that the Office of Inspector General issues are available to members of the press and general public to the extent information they contain is not subject to exemptions in the Act.



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL

Audit Services

May 12, 2025

TO: Thomas Wheeler
Acting General Counsel
Office of the General Counsel

FROM: Sean Dawson /s/
Assistant Inspector General for Audit

SUBJECT: Final Inspection Report, "U.S. Department of Education's Nondisclosure Policies, Forms, and Agreements," Control Number ED-OIG/I24DC0196

Attached is the subject final inspection report that consolidates the results of our review of the Department's nondisclosure policies, forms, and agreements. We received the Office of the General Counsel's response to our draft report stating it generally agrees with the findings.

U.S. Department of Education policy requires that you submit a corrective action plan within 30 days of the issuance of this report. The corrective action plan should set forth the specific action items and targeted completion dates necessary to implement final corrective actions on the findings and recommendations contained in this final report. Corrective actions that your office proposes and implements will be monitored and tracked through the Department's Audit Accountability and Resolution Tracking System.

In accordance with the Inspector General Act of 1978, as amended, the Office of Inspector General is required to report to Congress twice a year on recommendations that have not been completed after 6 months from the date of issuance.

We appreciate your cooperation during this inspection. If you have any questions, please contact Michele Weaver-Dugan at (202) 360-8454 or Michele.Weaver-Dugan@ed.gov.

Attachment

Results in Brief

U.S. Department of Education's Nondisclosure Policies, Forms, and Agreements



Why the OIG Performed this Work

The Whistleblower Protection Enhancement Act of 2012 (WPEA) was signed into law on November 27, 2012 (Public Law 112-199). The law strengthens protections for Federal employees who disclose evidence of waste, fraud, or abuse. The anti-gag provision, codified in the WPEA, requires all Federal agency nondisclosure policies, forms, or agreements to include an explicit statement notifying employees of their rights to report wrongdoing and make protected disclosures to an Inspector General, Office of Special Counsel, and to Congress.

In March 2024, Senator Charles E. Grassley requested that all Inspectors General review their agencies' nondisclosure policies, forms, and agreements to ensure the anti-gag provision statement is included as required by the WPEA.

Our objective was to determine whether the U.S. Department of Education (Department) includes the anti-gag provision statement, as required by the WPEA, in nondisclosure policies, forms, or agreements.

What Did the OIG Find?

We found that the Department did not include the anti-gag provision statement, required by the WPEA, in all applicable nondisclosure agreements and forms. Specifically, we identified 6 agreements or forms developed by or currently being used by 3 of the Department's 17 principal offices that did not contain the required statement.

This occurred because the Department does not have documented policies and procedures relating to the development of nondisclosure forms or agreements and has not developed a process to ensure that the anti-gag provision statement is included, when required, in nondisclosure policies, forms, and agreements.

What Is the Impact?

Department employees subject to nondisclosure policies, forms, or agreements that do not include the anti-gag provision statement, when required, may lack awareness of their rights to report wrongdoing, which may increase the risk of them not reporting potential fraud, waste, and abuse. The lack of written policies, procedures, and guidance increases the risk that nondisclosure agreements and forms may continue to be developed and used that do not include the provision when required.

What Are the Next Steps?

We made two recommendations to the Office of the General Counsel (OGC) to improve the Department's compliance with the WPEA and address the issues identified during the inspection.

OGC provided no formal written comments in response to our draft report but stated that it generally agreed with our findings and did not state whether it agreed or disagreed with the recommendations.

Table of Contents

| | |
|--|----|
| Introduction | 1 |
| Finding. The Department’s Nondisclosure Forms and Agreements Did Not Include the Anti-Gag Provision Statement | 3 |
| Appendix A. Scope and Methodology..... | 9 |
| Appendix B. Acronyms and Abbreviations..... | 10 |

Introduction

Background

Nondisclosure agreements are agreements in which parties agree that certain information will remain confidential. As such, a nondisclosure agreement binds a person who has signed it and generally prevents them from disclosing information included in or covered by the agreement to anyone not specifically authorized in the agreement.

Whistleblower Protection Enhancement Act of 2012

Congress enacted the Whistleblower Protection Enhancement Act of 2012 (WPEA)¹ in November 2012 to strengthen protections for Federal employees who disclose fraud, waste, or abuse. The WPEA requires agencies to include specific language in any nondisclosure policies, forms, and agreements applying to Federal employees to inform them of their whistleblower protections.

Specifically, the WPEA amended Title 5 United States Code (U.S.C.) section 2302(b) to prohibit employees with authority over personnel actions from implementing or enforcing a nondisclosure agreement if it does not include the following language, also known as the “anti-gag provision”:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a 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 (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

Attempting to implement or enforce a nondisclosure agreement that does not include this language is a prohibited personnel practice. Additionally, appropriation law prohibits the use of government funds to enforce these agreements if they fail to contain the anti-gag provision.

¹ Public Law No. 112-199 (November 27, 2012).

Congressional Request

In March 2024, Senator Charles E. Grassley requested that the U.S. Department of Education's (Department) Inspector General review all nondisclosure policies, forms, agreements, and related documents specific to the Department to ensure the anti-gag provision is included as required by law.

Finding. The Department's Nondisclosure Forms and Agreements Did Not Include the Anti-Gag Provision Statement

We found that the Department did not include the anti-gag provision statement required by the WPEA in all applicable nondisclosure forms and agreements and did not have any related policies. Specifically, we identified 6 forms or agreements developed by or currently being used by 3 of the Department's 17 principal offices that did not contain the required statement. Of the remaining principal offices, 3 provided documentation that we determined would not be required to contain the anti-gag provision statement because it did not have language requiring non-disclosure or did not pertain to Federal employees; 10 indicated that they did not use any nondisclosure forms or agreements; and 1 did not respond to our request.² Additionally, we attempted to review settlement agreements to determine whether they included the required anti-gag provision statement when applicable and found that the Department does not track settlement agreements. As a result, our review in this area was limited.

Nondisclosure Forms and Agreements

Nondisclosure agreements and forms we reviewed that did not include the required statement are as follows.

Institute of Education Sciences Nondisclosure Documents

The Institute of Education Sciences (IES) identified four nondisclosure agreements currently in use: the Agreement for Principal Office Access to EDFacts Data, the Agreement for Data Steward Access to EDFacts Data, the Affidavit of Nondisclosure, and the Small Business Innovation Research (SBIR)³ Reviewer Self-Certification form. IES uses these nondisclosure agreements to ensure that data containing personally identifiable

² Multiple attempts were made to obtain a response from this principal office.

³ All Federal agencies that expend more than \$100 million to support extramural research and development are required to set aside 3.2 percent of extramural research and development funds each year to support awards authorized under the SBIR authority. IES administers the SBIR authority through contract awards and its employees review the contract proposals for funding.

information are not publicly released; EDFacts⁴ data is not disclosed without first confirming it is allowed by the data steward;⁵ and Federal employees serving as contract peer reviewers do not disclose confidential, proprietary, competition sensitive, or personal information accessed during the review process. We found that all four documents are nondisclosure agreements binding Federal employees and therefore require the inclusion of the anti-gag provision statement, but do not.

The IES provides the Agreement for Principal Office Access to EDFacts Data or the Agreement for Data Steward Access to EDFacts Data to individuals requesting access to EDFacts data, which could include Department staff, to inform them how the data should be handled. Both agreements state that to retain access to EDFacts data, the individual agrees to terms that include not providing the data and analysis of the data publicly without approval from the data steward and not contacting any external data providers about the data or data quality issues identified. Neither agreement included the anti-gag provision statement, as required.

The IES requires anyone who is given access to restricted-use data,⁶ including Department staff, to sign an Affidavit of Nondisclosure. The Affidavit of Nondisclosure states that the individual affirms they will not use or reveal any individually identifiable information for any purpose other than what is specified in the IES survey, project, or contract; make any disclosure or publication whereby an individual could be identified; or permit anyone not authorized by the Director of IES to examine the individual reports. The Affidavit of Nondisclosure does not include the anti-gag provision statement, as required.

The IES requires Department staff performing peer reviews of proposals for funding under the SBIR program to complete an SBIR Reviewer Self-Certification form online, certifying that the reviewer, among other things, will not disclose data or information with any proposal to any unauthorized person and will report any fraud, waste, abuse, or any kind of wrongdoing under any SBIR award to the OIG. Although the form includes part of the anti-gag provision statement, it does not include the entire statement as

⁴ EDFacts is a Department initiative to collect, analyze, and promote the use of high-quality, pre-Kindergarten through grade 12 data. EDFacts centralizes performance data supplied by State education agencies with other data assets, such as financial grant information, within the Department to enable better analysis and use in policy development, planning and management.

⁵ A data steward is responsible for the management and governance of data within an organization.

⁶ The IES uses the term “restricted-use” for survey and research data containing individually identifiable information, which is confidential and protected by Federal law.

required. The anti-gag statement in the form does not include the required language relating to the reporting of a violation of any law, rule, or regulation; mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety to the United States Office of Special Counsel (Office of Special Counsel).

Federal Student Aid Acquisitions Source Selection Participation Agreement

Federal Student Aid's (FSA) Acquisitions Directorate requires all Federal employees who receive procurement sensitive information and work outside of FSA Acquisitions, such as subject matter experts, to sign a Source Selection Participation Agreement; however, the agreement does not include the required anti-gag provision statement. The Contracting Officer for each solicitation determines who needs access to procurement sensitive information and obtains a signed copy of the agreement. The agreement states that the employee will not disclose any contractor bid or proposal information or source selection information pertaining to each procurement directly or indirectly. The agreement also states that it supersedes any previous nondisclosure agreements that the employee may have signed pertaining to the same procurement. As an agreement that binds disclosures made by Federal employees, the Source Selection Participation Agreement is required to include the anti-gag provision statement, but it does not.

Office of the General Counsel Confidential Information Nondisclosure Agreement

The Office of the General Counsel (OGC) provided us with a Confidential Information Nondisclosure Agreement form, dated 2019, which states that the recipient agrees to protect all confidential information from any unauthorized disclosure. While the form includes a clause that references the Whistleblower Protection Act,⁷ it does not include reference to the WPEA or include the anti-gag provision statement. OGC officials stated that the form was originally drafted in 2008, prior to the enactment of the WPEA and the required inclusion of the anti-gag provision statement, at the request of the then-Deputy General Counsel. They were not aware whether it was considered a standard form formally approved by the Department for principal offices to use or whether any principal offices in the Department use the form. While the form is not currently used within OGC, they suggested that FSA's Acquisitions Directorate or the Office of Finance and Operations' Contracts and Acquisitions Management (CAM) Division may use the form. Upon follow-up, FSA's Acquisitions Directorate stated that it does not use this

⁷ The Whistleblower Protection Act of 1989 (Public Law 101-12 (April 10, 1989)) was amended by the WPEA in 2012.

form and CAM stated that it does use the form but only for contractor employees. Contractor employees are not covered by the WPEA; therefore, we determined that, because the anti-gag provision statement does not apply to agreements binding contractor employees, no violations occurred. However, the form should include the anti-gag provision statement when it is used as an agreement between the Department and a Department employee.

Settlement Agreements

In its 2018 WPEA-related guidance, the Office of Special Counsel recognized that the WPEA requirement may apply to settlement agreements containing confidentiality clauses but noted it would not apply if the agreement restricts only the disclosure of terms and conditions of the settlement. We therefore requested to review settlement agreements from fiscal years 2023 and 2024. However, OGC's Assistant General Counsel, Division of Business and Administrative Law (DBAL), indicated that OGC could not determine the number of settlement agreements for those fiscal years or easily obtain them because they did not track settlement agreements. As a result, our review was limited to two examples of settlement agreements that OGC was able to provide. According to the OGC's Assistant General Counsel, DBAL, confidentiality provisions in all of DBAL's settlement agreements are limited to the terms and conditions of the agreements and therefore none of them would require the anti-gag provision statement. We confirmed that both settlement agreements provided contained confidentiality clauses that restricted only disclosure of the terms and conditions of the settlement and therefore did not require the anti-gag provision statement.

Policies, Procedures, and Guidance

The Department does not have documented policies and procedures relating to the development of nondisclosure forms or agreements and has not developed a process, such as a required review by OGC, to ensure that the anti-gag provision statement is included, when required, in nondisclosure policies, forms, and agreements. Having formal written policies and procedures for developing nondisclosure forms or agreements would help to ensure that the required anti-gag provision statement is included in such documents. Although OGC's Assistant General Counsel, DBAL, sent an email to OGC staff in March and September 2024 to remind them to include the anti-gag provision statement in nondisclosure agreements, there was no similar guidance provided to any other principal office.

The U.S. Government Accountability Office's *Standards for Internal Control in the Federal Government*, Principles 12.02–12.04 states that

[m]anagement documents in policies the internal control responsibilities of the organization. Management documents in policies

for each unit its responsibility for an operational process's objectives and related risks, and control activity design, implementation, and operating effectiveness.... Each unit also documents policies in the appropriate level of detail to allow management to effectively monitor the control activity.... Management communicates to personnel the policies and procedures so that personnel can implement the control activities for their assigned responsibilities.

Department employees subject to nondisclosure forms or agreements that do not include the anti-gag provision statement may lack awareness of their rights to report wrongdoing, which may increase the risk that they do not report potential fraud, waste, and abuse. Additionally, because the Department did not develop written policies and procedures or provide formal guidance, Department officials were unsure of what documents were considered a nondisclosure form or agreement and therefore subject to the provision when responding to our request for all current nondisclosure policies, forms, and agreements. The lack of written policies, procedures, and guidance increases the risk that nondisclosure agreements and forms may continue to be developed and used that do not include the anti-gag provision when required.

In written comments provided in February 2025, after the conclusion of our fieldwork, OGC officials noted that the Department has taken steps toward ensuring that the anti-gag provision statement required by the WPEA is included in all applicable Department nondisclosure agreements and forms and is committed to resolving the concerns that were noted during the OIG's review. Specifically, OGC has begun discussing the legal requirement with program office leadership and they, in turn, are working with staff to revise applicable forms and include appropriate language in agreements. The OGC aims to capture the required action in writing and disseminate it Department-wide in a timely manner.

Recommendations

We recommend that the General Counsel—

1. Ensure all nondisclosure agreements and forms currently in use by the Department and identified in this report as noncompliant with the WPEA are updated to include the anti-gag provision statement.
2. Develop and issue written policies and procedures and create a process, to include identifying those responsible for the implementation and management of the process, to ensure that all nondisclosure forms and agreements, including settlement agreements, are tracked and comply with Federal law and include the anti-gag provision statement when required.

OGC Comments

OGC provided no formal written comments in response to our draft report but stated that it generally agreed with our findings and did not state whether it agreed or disagreed with the recommendations.

OGC stated that it agreed with the findings generally except for the section of the finding regarding OGC's Confidential Information Nondisclosure Agreement form. OGC stated that because the form was legal and appropriate when it was first developed prior to the enactment of the WPEA and only used with cases involving contractors when the law was changed, there never was a violation that occurred using the OGC form. OGC suggested that this section should be clarified so that it can be understood that no violations occurred using the form.

OIG Response

While we agree that the OGC form, as used by CAM, was not in violation of the WPEA, OGC officials were uncertain as to who may have been using it; therefore, the possibility exists that other principal offices may currently be using it or will use it in the future in ways that do require the inclusion of the anti-gag provision statement. We made minor changes to the finding for clarity.

Appendix A. Scope and Methodology

To answer our objective, we reviewed all current nondisclosure policies, forms, and agreements provided by the Department’s principal offices and any guidance provided by the Department or its principal offices regarding the WPEA and nondisclosure policies, forms, and agreements. We held discussions with OGC’s Deputy General Counsel and Assistant General Counsel regarding their roles in implementing the WPEA and to determine the Department’s process for ensuring nondisclosure policies, forms, and agreements include the required anti-gag provision statement. We also reviewed other Federal agency reports related to our objective. Additionally, we reviewed and gained an understanding of the following laws, regulations, and guidance relevant to the WPEA and nondisclosure policies, forms, and agreements:

- 5 U.S.C. section 2302—Prohibited Personnel Practices;
- “Whistleblower Protection Enhancement Act of 2012” (Public Law 112-99), November 27, 2012;
- Office of Special Counsel, Memorandum for Executive Departments and Agencies, “Non-Disclosure Policies, Forms, or Agreements”, February 1, 2018; and
- Government Accountability Office *Standards for Internal Control in the Federal Government*, September 2014.

To perform our review, we relied on the Department to identify and provide all current nondisclosure policies, forms, and agreements. We also relied on the Department to identify all settlement agreements entered into during fiscal years 2023 and 2024. Because the Department does not track settlement agreements, we were unable to identify the total number issued and our review was limited to the two settlement agreements that OGC was able to provide.

We performed the work for this review from August 2024 through February 2025. We discussed the results of our review with OGC officials on February 19, 2025.

Compliance with Standards

We conducted our work in accordance with the Council of the Inspectors General on Integrity and Efficiency (CIGIE) “Quality Standards for Inspection and Evaluation.” Those standards require that we plan and perform our work to obtain sufficient and appropriate evidence to support our findings and provide a reasonable basis for our conclusions. We believe that the evidence obtained provides a reasonable basis for our conclusions.

Appendix B. Acronyms and Abbreviations

| | |
|------------------------------|--|
| CAM | Contracts and Acquisitions Management |
| DBAL | Division of Business and Administrative Law |
| Department | U.S. Department of Education |
| FSA | Federal Student Aid |
| IES | Institute of Education Sciences |
| Office of Special Counsel | United States Office of Special Counsel |
| OGC | Office of the General Counsel |
| SBIR | Small Business Innovation Research |
| U.S.C. | United States Code |
| WPEA | Whistleblower Protection Enhancement Act of 2012 |