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**The Federal Update for June 23, 2023**

From: Michael Brustein, Julia Martin, Steven Spillan, Kelly Christiansen

Re: Federal Update

Date: June 23, 2023

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## Legislation and Guidance

### Federal Agencies Publish Spring 2023 Regulatory Agendas

The U.S. Department of Education (ED) published its 2023 spring regulatory agenda last week, which details the regulatory actions ED has planned for the next several months. The agenda includes some new planned regulatory action, as well as updated timelines for when previously-planned proposed and final rules will be released.

ED estimates that it will release the pending Title IX rules on sexual violence in education programs and athletics in October of this year – a delay of several months from the original plan to finalize the rules in May. With the delay in finalizing the Title IX rules, it is unclear when they may go into effect once released. ED may implement them mid-year, which could pose administrative challenges to institutions of higher education and K-12 schools, or ED may wait to implement the rules until the beginning of the 2024-2025 school year.

ED is also planning to update nondiscrimination regulations under Section 504 of the Rehabilitation Act of 1973 to make it “consistent with the priorities of the Biden-Harris administration,” including updating outdated language and aligning the regulations with updates to related laws like the Americans with Disabilities Act. ED will also issue a proposed regulation under Title VI of the Civil Rights Act to help combat antisemitism in schools, in alignment with recent executive action from the Biden administration.

In addition to planned updates to nondiscrimination regulations, ED intends to convene a negotiated rulemaking committee in the coming months to draft regulations on a number of higher education issues, including TRIO programs, accreditation, State authorization, return to Title IV, cash management, third-party servicers, improving use of deferments and forbearances, and distance education. A notice of intent to convene a negotiated rulemaking committee is planned for July.

ED will also issue a proposed rule to update the Education Department General Administrative Regulations (EDGAR) to align with current law, as well as clarify evidence-related provisions, how ED makes continuation awards under competitive grants, and provisions related to subgranting authority. ED plans to update its agency-specific regulations under the Uniform Grant Guidance to make technical corrections as well. Although officials from the Office of Management and Budget (OMB) have indicated that significant revisions to the Uniform Grant Guidance are planned for later this year, OMB’s spring regulatory agenda does not provide specifics.

Finally, rules proposed by the U.S. Department of Agriculture’s Food and Nutrition Service to align school meal nutrition requirements with the most recent Dietary Guidelines for Americans and to lower the poverty threshold for Community Eligibility Provision participation are planned to be finalized in April of 2024.

While federal agencies include planned timelines for proposed and final rules in their spring and fall regulatory agendas, those timelines are often shifted and delayed and serve as an estimation of when the planned regulatory action will be completed.

Author: KSC

### ED Issues Fact Sheet on EL Participation in Advanced Coursework

The U.S. Department of Education’s Office for Civil Rights issued a fact sheet this week reminding schools to ensure that English learners (ELs) have full opportunity to participate in course offerings, including advanced coursework like Advanced Placement and International Baccalaureate options.

The fact sheet states that schools must ensure any testing procedures or evaluations for advanced coursework do not exclude ELs based on that status unless a program requires English proficiency for “meaningful participation.” ED provides examples of actions that exclude ELs and could violate federal discrimination laws, such as only offering an advanced course during the EL instruction class time, having different selection criteria for ELs, or not providing information about advanced coursework to ELs, among others.

The fact sheet references schools’ obligations to ensure meaningful and equal participation of ELs under Title VI of the Civil Rights Act, as well as the Supreme Court case *Lau v. Nichols*, which says that schools must take “affirmative steps to ensure that students who are [ELs] can meaningfully participate in their educational programs and services” in order to be in compliance with federal civil rights law.

[The fact sheet on EL participation in advanced coursework is available here](https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-ap-participation-el.pdf).

Author: KSC

## News

### State of Texas Files Lawsuit on Title IX Guidance

The Attorney General of Texas has filed a lawsuit against the U.S. Department of Education (ED) over its interpretation of the sex discrimination prohibitions in Title IX of the Education Amendments of 1972. The lawsuit complains that a “Notice of Interpretation” and proposed regulations issued by ED, which expand the category of “sex” to include gender identity and sexual orientation, threaten to take federal education funding from schools and universities that fail to follow the proposed Title IX regulations. The lawsuit also cites a “Dear Colleague” letter and fact sheet issued by ED.

The Notice of Interpretation and subsequent documents issued by ED are based on a 2020 Supreme Court case called *Bostock v. Clayton County.* In that case, a majority of the Court found that setting different standards of dress for employees depending on whether those standards aligned with their sex at birth was discrimination on the basis of sex, and that because gender identity is inextricably linked to its alignment or conflict with an individual’s sex assigned at birth, discrimination on the basis of gender identity constitutes discrimination on the basis of sex.

The Texas lawsuit claims that ED’s interpretation is “not in accordance with law” and is “in excess of statutory authority.” It also asserts that this new interpretation was adopted without notice and comment rulemaking (new proposed rules on Title IX within educational programs and, separately, athletic programs, are expected to be finalized in October). It asks the Court to set aside ED’s guidance and prohibit ED from interpreting or enforcing Title IX as prohibiting discrimination based on sexual orientation or gender identity.

In July of 2022, a group of 20 States asked another federal judge to halt the application of the notice of interpretation against them. A group of State governors has asked ED to halt rulemaking efforts until the Supreme Court can determine whether ED’s interpretation of Title IX is within the scope of its authority.

The [Texas lawsuit is available here](https://www.texasattorneygeneral.gov/sites/default/files/images/press/2023/docs/filed%20Title%20IX%20complaint.pdf).

Author: JCM

### Federal Government to Launch New G6 System

In a notice posted to the federal G5 grants system, the U.S. Department of Education (ED) said that it was working to build a new modernized grants management system, dubbed G6. G5 (and the expected updated system) is the system that allows federal education grantees to draw down grant funds from the U.S. Treasury. The interface is scheduled to launch August 7th, when ED will switch to a new URL, www.g6.ed.gov, and a new G6 landing page. Later in the year, the system will transition to a higher standard of authentication for login, and new pre-award functionality and training resources will roll out in fall 2023 and winter 2024. Grant awardees will need to create a new Login.gov account if they do not already have one.

The [post on the transition to G6 is available here](https://www.g5.gov/g5/home/!ut/p/z1/hU7LCoJAFP0WFy7zXsxHtZNK8EVqmDobUZhGQR1RU-jrG2jRpujszotzgEAGpC-XhpVzw_uyFTwnRqHiERG9a2LGZxMd3dbc0EtUzUZI_wWIsPEHLAQXCGt59Z6y-mq7Y0BGeqcjHZXHKOR6nofpIKOM67oqTFcYX2Rkuow17-i3Ws2nGbJPGnJx0iwiTTfji-MZt2B_QicKQz-wDXFDhaHLnj5NN5ElSS-qrc79/dz/d5/L2dJQSEvUUt3QS80TmxFL1o2X1FKR1ZJQTkwMDhBQzUwMkQwS1FSS0owMDAw/#newsSectionHeader1390).

Author: JCM

## Reports

### ED Releases Annual Report on Civil Rights

The U.S. Department of Education’s Office for Civil Rights (ED OCR) submitted its annual report to Congress this week. The report covers ED OCR’s activities in fiscal year 2022 related to its enforcement of laws prohibiting race, color, national origin, sex, age, and disability discrimination.

ED OCR reported that it received the highest volume of complaints ever in fiscal year 2022, with 18,804 complaints. This exceeded the previous record high in fiscal year 2016 by 12 percent. Overall, ED OCR resolved 16,515 cases. However, the report noted that one single individual filed 7,339 complaints raising sex discrimination allegations.

The report also indicated that along with the unprecedented surge, the complaints filed have increased in complexity, with many complaints touching on multiple areas. Complaints of race, color, or national origin discrimination comprised 17 percent of the complaints filed in fiscal year 2022. Allegations of sex discrimination comprised almost 50 percent of the complaints (48 percent or 9,498 complaints). Complaints surrounding disability discrimination are the most voluminous, comprising 32 percent of all complaints filed.

ED OCR highlighted and reflected the scope of its work to safeguard civil rights in schools. They reported multiple examples of enforcement actions related to Title VI, including multiple cases on racial harassment and retaliation and Title IX cases involving athletics.

ED OCR was also operating with fewer investigative staff and only 546 full-time employees throughout the fiscal year. Nonetheless, ED OCR issued multiple resources for schools and students related to discrimination and completed an unprecedented number of investigations.

[The report can be found here.](https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2022.pdf)

Author: BNT

*To stay up-to-date on new regulations and guidance from the U.S. Department of Education, register for one of The Bruman Group, PLLC’s virtual trainings. Topics cover a range of issues, grants management, COVID-19 relief programs, the Elementary and Secondary Education Act, and more. To view all upcoming virtual training topics and to register, visit* [www.bruman.com/training-and-recordings/](http://www.bruman.com/training-and-recordings/)*.*

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