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# The Federal Update for March 3, 2023

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

Re: Federal Update

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[Legislation and Guidance 1](#_Toc128741568)

[ED Delays Recent Third-Party Servicer Guidance 1](#_Toc128741569)

[FSA Issues Guidance Expanding Liability of Private School College Leaders 2](#_Toc128741570)

[House Republicans Reintroduce Parents’ Bill of Rights Legislation 3](#_Toc128741571)

[Foxx, McClain Reintroduce College Transparency and Student Protection Act 4](#_Toc128741572)

[News 4](#_Toc128741573)

[Supreme Court Hears Argument in Student Loan Case 4](#_Toc128741574)

[President Biden Nominates Julie Su for Labor Secretary 5](#_Toc128741575)

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## Legislation and Guidance

### ED Delays Recent Third-Party Servicer Guidance

On Tuesday the U.S. Department of Education (ED) revised the new guidance it released last month regarding third-party servicers for institutions of higher education (IHEs) to delay the effective date and reporting deadlines associated with the guidance.

The guidance significantly expanded the definition of “third-party servicer” for IHEs, with IHEs initially required to report any arrangements with third-party servicers to ED by May 1, 2023. ED’s revisions this week delay the effective date of the new guidance until September 1, 2023, with IHEs being required to report their arrangements with third-party servicers to ED by that date as well. Entities meeting the definition of a third-party servicer will also be required to submit the “Third-Party Servicer Data Form” to ED by September 1, 2023.

The revisions follow significant pushback from the higher education community, including a letter submitted to ED signed by dozens of higher education organizations, opposing the expanded definition.

ED has extended the public comment period in light of this week’s revisions to the guidance. Stakeholders may now submit comments on the guidance to ED on or before March 30, 2023.

[The revised guidance is available here](https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-02-15/requirements-and-responsibilities-third-party-servicers-and-institutions-updated-feb-28-2023). [Public comments may be submitted via this link](https://www.regulations.gov/docket/ED-2022-OPE-0103).

Author: KSC

### FSA Issues Guidance Expanding Liability of Private School College Leaders

The U.S. Department of Education’s (ED) Office of Federal Student Aid (FSA) issued guidance this week to require some private college leaders to take on personal liability for financial losses to the federal government, such as borrower defense claims. The guidance stems from authority provided to ED in the Higher Education Act (HEA), but ED did not previously have a formalized process for implementing that authority.

The new guidance would require additional signatures on the Program Participation Agreement from private school leaders at the riskiest institutions – as determined by ED – that certify that those individuals would assume personal liability for financial losses incurred by the federal government. The individuals required to provide the additional signatures would be limited to those that “own or exercise substantial control” over the college, which is defined in the Higher Education Act and can include individuals who directly or indirectly control a substantial ownership in the college or are members of the board of directors or executive officers who hold substantial ownership interest in the institution, among other circumstances.

In determining whether to require assumption of personal liability, ED will consider a number of factors including how much Title IV funding the college receives, whether ED has approved a significant number of borrower defense claims for the college, whether the college has a history of noncompliance with the HEA, the withdrawal and retention rates at the college, and systemic or significant audit or program review findings at the college, among other factors. Should ED determine leaders at a college must assume personal liability due to risk factors, the additional signatures on the Program Participation Agreement will be a condition of Title IV participation. ED will make the determinations on a case-by-case basis and may consider imposing other financial protections instead of requiring personal liability.

The guidance comes in the wake of ED’s action last year to require DeVry University to pay back tens of millions of dollars in approved borrower defense claims, which allow students’ debt to be waived if they were defrauded by their institution. DeVry has since filed a lawsuit against ED, arguing that it is lacking authority to require such payback. The guidance released this week formalizes that process to hold colleges accountable and will have a significant impact moving forward on colleges’ responsibility for these types of financial losses.

[The guidance on personal liability is available here](https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2023-03-01/establishing-personal-liability-requirements-financial-losses-related-title-iv-programs).

Author: KSC

### House Republicans Reintroduce Parents’ Bill of Rights Legislation

On Wednesday, House Republicans introduced an updated version of legislation dubbed the “Parents Bill of Rights.” This legislation, first introduced in the last Congress, would amend the Elementary and Secondary Education Act (ESEA) to require that States and districts abide by certain requirements regarding the provision of information to parents or face fiscal penalties.

The bill’s provisions fall under several larger categories. First, they would require disclosure of materials including curriculum, updates of State academic standards, school district budgets, family engagement plans, and lists of library books. Schools would also have to offer meetings with teachers twice a year, report on incidents of violence, and allow testimony at school board meetings. Schools would have to make all instructional materials, including videos and original sources, available for parent inspection.

The legislation would also prohibit schools from sharing student data with technology companies without parental permission and would prohibit schools from selling student data for commercial purposes. Schools would not be able to share student information with third-party providers unless for a “legitimate educational purpose.”

Parents would have to consent to medical or other screenings, except in the case of emergency, but schools would be required to have notification procedures in place for these situations.

Opponents of the bill have pointed out that many of these requirements – including mandating teacher meetings and confidentiality of student information – are things that schools either do as a matter of practice or because they are required under other federal laws (for example the Family Educational Rights and Privacy Act, known as FERPA). Other requirements of the bill could be expensive and administratively burdensome for school districts. “[I]nstead of working with Democrats to address the real issues in schools, Republican lawmakers are proposing legislation that would further politicize our children’s education,” said Education and the Workforce Committee Ranking Member Bobby Scott (D-VA) in a statement. Secretary of Education Miguel Cardona accused the legislation of promoting “culture wars.”

House Speaker Kevin McCarthy (R-CA) told families at a press event Wednesday that the majority was promoting this legislation because “we want the parents to be empowered… that you have a say in your kids' education, not government, and not telling you what to do.”

Author: JCM

### Foxx, McClain Reintroduce College Transparency and Student Protection Act

Chairwoman of the House Committee on Education and Workforce Virginia Foxx (R-NC) and Representative Lisa McClain (R-MI) reintroduced H.R. 1311, the College Cost Transparency and Student Protection Act, this week. The bill would require institutions of higher education (IHEs) to provide clear and comprehensive information in financial aid offers. Foxx and McClain contend that IHEs are purposefully hiding the true cost of attending college and misleading students and families. This legislation would hold IHEs accountable for providing certain information in financial aid offers.

The reintroduction of the bill comes after a 2022 Government Accountability Office (GAO) report that found that prospective students and families did not receive accurate information on expected college costs from IHEs. About half of the IHEs sampled provided financial aid offers to students that did not represent the full cost of attendance, according to the GAO report. None of the IHEs that were sampled followed all of the best practices provided by U.S. Department of Education (ED) guidance. The report found that most IHEs did not itemize direct and indirect costs nor provide a comprehensive cost of attendance. Some even understated the cost of attendance or did not include it at all.

Foxx and McClain say that the legislation would help students and families compare the actual cost of attendance and make informed decisions about college.

[The full text of the bill can be found here.](https://edworkforce.house.gov/uploadedfiles/mcclai_bill_text.pdf)

Author: BNT

## News

### Supreme Court Hears Argument in Student Loan Case

The U.S. Supreme Court heard oral arguments Tuesday from the U.S. Solicitor General and plaintiffs who are challenging the administration’s student loan forgiveness plan. The Court heard arguments in two cases on the same issue, which implicate the same questions of law. In one case, the State of Missouri and five other States sued the administration, alleging that they would lose out on revenue if the student loan forgiveness was approved for various reasons. Missouri, the lead plaintiff in this case, expressed concern that its quasi-governmental lending authority, MOHELA, would not be able to use revenue generated from servicing those loans and the accumulated interest to originate new loans. In the other, plaintiffs who stand to receive either no loan forgiveness or less forgiveness than other borrowers argue that had the plan been subject to notice and comment under the federal rulemaking process, they arguably could have convinced the administration to broaden the plan to include their debt.

Justices asked several pointed questions over the hours of oral argument, focusing on whether Congress could have intended such a broad program of loan forgiveness when it passed the 2003 Health and Economic Recovery Omnibus Emergency Solutions, or HEROES Act, which the administration argues allows it to forgive loans. While some Justices seemed to agree with the argument that emergency powers conveyed to the executive branch under the HEROES Act were quite broad, others expressed concern about allowing that breadth to stand. “Some of the biggest mistakes in the Court’s history were deferring to assertions of executive or emergency power,” suggested Justice Kavanaugh. “Some of the finest moments in the Court’s history were pushing back against presidential assertions of emergency power.”

Attorneys for the plaintiffs in the case also suggested that the provision in the HEROES Act which negates any obligation for negotiated rulemaking could not apply to student loans because the Higher Education Act (HEA) explicitly requires such rulemaking for any changes to regulations or programs having to do with Title IV Student Aid.

The Justices also brought up the concept of fairness, asking why it was fair that borrowers who took on student loan debt could receive forgiveness under this plan while entrepreneurs who took out loans to start businesses received no such forgiveness. “Nobody's telling the person who was trying to set up the lawn service business that he doesn't have to pay his loan,” Chief Justice Roberts said. “He still does, even though his tax dollars are going to support the forgiveness of a loan for the college graduate who's now going to make a lot more than him over the course of his lifetime.”

The U.S. Department of Education released a statement in response to the oral arguments Tuesday, saying that “[i]n addition to this one-time debt relief plan focused on the effects of the pandemic, we will continue to put the needs of students and borrowers ahead of special interests, hold colleges accountable for runaway costs and unaffordable debts, and pursue historic changes to student loan repayment that will cut costs and reduce the crushing burden of student debt for millions of working families.”

A decision from the Court is expected no later than the end of June.

Author: JCM

### President Biden Nominates Julie Su for Labor Secretary

On Wednesday, President Biden nominated Julie Su, current Deputy Labor Secretary, to the role of Secretary of Labor. Her nomination comes after current Secretary Marty Walsh announced that he was leaving the post to serve as Executive Director of the National Hockey League Players Association. If confirmed, Su will be the first Asian American Secretary in Biden’s cabinet. Su’s nomination would further Biden’s goal of having the most diverse cabinet in history.

Before accepting her position at the U.S. Department of Labor, Su worked for a non-profit civil rights organization and California’s Labor and Workforce Development Agency.

Biden’s announcement was praised by the Congressional Asian Pacific American Caucus (CAPAC) and Congressional Black Caucus (CBC). The CAPAC sent a letter to Biden last month urging him to nominate Su for the Secretary position. However, some California Republicans expressed opposition to Su’s nomination. Those criticisms are focused on Su’s role in the implementation of California’s controversial Labor Law AB5. The law classified certain gig workers as employees and limited employers from hiring some freelancers, opponents say.

Su’s nomination hearing will likely be scheduled for this month. The Senate confirmed Su in 2021 to her current Deputy role, and she is expected to be confirmed for the Secretary position.

Resources:

Noah Minnie, “What to Know About Biden's Labor Secretary Nominee Julie Su,” *ABC News,* March 1, 2023.

Author: BNT

***The Federal Update has been prepared to inform The Bruman Group, PLLC’s legislative clients of recent events in federal education legislation and/or administrative law. It is not intended as legal advice, should not serve as the basis for decision-making in specific situations, and does not create an attorney-client relationship between The Bruman Group, PLLC and the reader.***

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