

# The Federal Update for March 25, 2022

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

Re: Federal Update

Date: March 25, 2022

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## Legislation and Guidance

### Updates to Organizational Structure at ED Fall Into Place

Over a year into the Biden administration, nominees have been confirmed for only eight of the 15 Senate-confirmable leadership positions at the U.S. Department of Education (ED). Four more individuals have been nominated and are awaiting confirmation, and three positions have not yet received nominees. The chart below outlines the status of each leadership position at ED.

| **Position** | **Nominee** | **Status** |
| --- | --- | --- |
| Secretary of Education | Miguel Cardona | Confirmed |
| Deputy Secretary of Education | Cindy Marten | Confirmed |
| Under Secretary of Education | James Kvaal | Confirmed |
| General Counsel | Lisa Brown | Confirmed |
| Assistant Secretary for Civil Rights | Catherine Lhamon | Confirmed  |
| Assistant Secretary for Communications and Outreach | LaWanda Toney | Nominated |
| Assistant Secretary for Legislation and Congressional Affairs | Gwen Graham | Confirmed |
| Assistant Secretary for Planning, Evaluation, and Policy Development | Roberto Rodriguez | Confirmed |
| Inspector General of Education | Sandra Bruce | Confirmed |
| Chief Financial Officer | TBA | N/A |
| Assistant Secretary for Elementary and Secondary Education | TBA | N/A |
| Assistant Secretary for Special Education and Rehabilitative Services | Glenna Gallo | Nominated |
| Commissioner of Rehabilitation Services Administration | TBA | N/A |
| Assistant Secretary for Career, Technical, and Adult Education | Amy Loyd | Nominated |
| Assistant Secretary for Postsecondary Education | Nasser Paydar | Nominated |

Author: KSC

### New Charter School Program Regulations Restrict For-Profit Management

In new competitive grant priorities issued by the U.S. Department of Education (ED) last week, the agency implemented new restrictions for schools that receive funds under the federal Charter School Grant Program (CSGP).

Potential grantees must now list descriptions of community support and unmet demand, their plans to maintain diverse student and staff populations, family and community engagement plans, how a charter will accommodate families from various backgrounds and promote access through transportation, and a description of steps taken to ensure that the charter would not impede any active desegregation orders or requirements. Additionally, schools would have to provide assurances that it “has not and will not” contract with for-profit management companies or management companies under a for-profit entity under which the management organization exercises “full or substantial control” over the charter school.

ED’s introductory language ties this requirement to an assurance that the charter school itself – rather than a management company – maintain control over all program funds “because, among other things, a grantee or subgrantee receiving CSP funds must establish and maintain proper internal controls and directly administer or supervise the administration of the project.”

While the regulations do not define “substantial control,” they suggest that “impermissible delegations of administrative control” would include “situations in which the [Educational Management Organization (EMO)] controls all or a substantial portion of grant or subgrant funds and expenditures, including making programmatic decisions (also referred to as “sweeps contracts”); the EMO employs the school principal and a large proportion of the teachers; or the EMO makes decisions about curricula and instructional practices.”

Charter advocates object to this change, asserting that ED will only “limit charter school opportunities” by restricting the number of schools eligible for the grant, and others have suggested that while for-profit arrangements can be problematic, these restrictions may be overbroad. Still, these regulations seem to be a watered-down version of a restriction the House of Representatives passed in a draft of the fiscal year 2022 appropriations bill, which would have prohibited any federal funds from being awarded “to a charter school that contracts with a for-profit entity to operate, oversee or manage the activities of the school.”

Comments on the proposed rule are due by April 13; the [Charter School Grant Program rule is available here](https://www.federalregister.gov/documents/2022/03/14/2022-05463/proposed-priorities-requirements-definitions-and-selection-criteria-expanding-opportunity-through).

Resources: Laura Meckler, “Biden administration proposes tougher rules for charter school grants,” *The Washington Post*, March 21, 2022.
Author: JCM

### ED Aims to Hold Private College Owners Financially Liable

The U.S. Department of Education (ED) unveiled a new policy this week that will impact private non-profit and for-profit colleges. The policy seeks to hold private companies that have substantial control over a college – which ED has determined to be a 50 percent ownership stake or more – financially liable if the college closes or is found to have otherwise engaged in fraudulent or misleading behavior.

The new policy would require these private companies with substantial control to sign on to the program participation agreement (PPA) that is required for colleges to participate in Title IV financial aid programs. Under the current practice, only the college is required to engage in that agreement. The secondary signature from the college’s owner will only be required in certain situations, however, including if there has been a change in ownership, if the college is on provisional status, and if ED has approved a significant number of borrower defense claims for the institution, among others. ED makes clear that the individuals at the private companies will not be held personally liable – only the company itself.

The new requirements will apply to PPAs issued on or after July 1, 2022, PPAs issued prior to the announcement of the new policy for which ED has communicated a signature requirement, and all other applicable PPAs, including those issued for changes in ownership, initial certifications, and reinstatements issued on or after the date the new policy was announced.

[The notice of the new policy is available here](https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-03-23/updated-program-participation-agreement-signature-requirements-entities-exercising-substantial-control-over-non-public-institutions-higher-education).

Author: KSC

### OSERS Releases Letter on COVID-19 and Students with Disabilities

The U.S. Department of Education’s (ED) Office of Special Education and Rehabilitative Services published a letter this week that discusses the recently updated Centers for Disease Control (CDC) guidance on COVID-19 and masking in the context of accommodating students with disabilities.

The recently updated CDC guidance changes the metric for establishing the level of transmission in a community, focusing on the severity of disease and impact on the healthcare system. In addition, the CDC guidance no longer recommends masking indoors in communities with low and medium transmission, which describes a significant portion of communities across the country. ED’s letter reminds schools of their responsibilities under the Individuals with Disabilities Education Act (IDEA) to students with disabilities, including providing a free appropriate public education (FAPE) in the least restrictive environment (LRE). In some cases, students with disabilities may be at higher risk for severe COVID-19 disease – a concern to some parents and stakeholders as school mask mandates are lifted across the country.

In its letter, ED says that schools may still want to consider a masking requirement in certain circumstances. In addition, ED states that schools must make appropriate modifications “to ensure equal access for their students with disabilities, absent a showing that the modifications would constitute a fundamental alteration or undue administrative burden on the program.” ED also says that schools may determine that “some degree of masking of students and staff is necessary as a reasonable modification” to provide students with disabilities equal access to in-person learning. The use of COVID-19 prevention measures should also be included in a child’s Individualized Education Plan or Section 504 plan if the prevention measures “constitute special education, related services, supplementary aids and services under IDEA, related aids and services under Section 504, or program modifications and support for school personnel.”

The guidance is consistent with statements from ED last year that it would investigate States that prohibited mask requirements as potentially violating the access of students with disabilities and medically vulnerable students to FAPE. The outcome of those investigations – which focused on several States that had mask mandate prohibitions – has not yet been announced. The issue of requiring masking for vulnerable students at schools has cropped up in recent legal battles as well, including a recent case out of Virginia in which a judge ruled that the schools which 12 children who are at risk of severe COVID-19 disease attend may mandate masking, despite the Virginia General Assembly’s recently passed law that makes masks optional in schools across the State.

[The full letter from ED is available here](https://www2.ed.gov/documents/coronavirus/letter-to-educators-and-parents-regarding-new-cdc-recommendations-03-24-2022.pdf).

Author: KSC

## News

### Biden Nominates Leader for Office of Postsecondary Education

President Biden announced his nominee for assistant secretary for postsecondary education late Friday, Nasser Paydar. Paydar has extensive experience in the higher education field, serving in various positions at Indiana University for more than 35 years. Paydar is currently the chancellor emeritus of Indiana University-Purdue University Indianapolis and executive vice president of Indiana University.

In a press release following the nomination, Secretary of Education Miguel Cardona said: “I could not be more pleased with President Biden’s decision to nominate Dr. Nasser Paydar as assistant secretary for postsecondary education. Throughout his more than 35 years of experience as a higher education leader, Dr. Paydar has championed equitable and affordable access to postsecondary education.”

Paydar will now face Senate confirmation before officially taking his post, along with other nominees who have not yet been approved by the Senate.

Resources:

U.S. Department of Education Press Release, “Statement by U.S. Secretary of Education Miguel Cardona on President Biden’s Nomination of Nasser Paydar,” March 18, 2022.

Author: KSC

### Jackson Says She Would Recuse Herself from Admissions Case

In her confirmation hearing on Wednesday, Supreme Court Justice nominee, Ketanji Brown Jackson, said she would recuse herself from *Students for Fair Admissions v. Harvard*, a prominent Supreme Court case on the use of race in college admissions, if confirmed by the Senate.

*Students for Fair Admissions v. Harvard* asks the Supreme Court to overturn its ruling in Grutter v. Bollinger and find it unlawful for schools to consider race in admissions decisions. The lawsuit also alleges that Harvard intentionally discriminates against Asian American applicants in its admissions process. Under the landmark affirmative action case, Grutter v. Bollinger, which was decided in 2003, schools may consider race as one of many factors when reviewing applicants for admission. In January, the Supreme Court agreed to hear the case featuring the anti-affirmative action group during its next term which would be during Jackson’s Supreme Court tenure, if confirmed by the Senate.

Jackson attended Harvard for both undergraduate and law school and is a member of Harvard’s Board of Overseers, potentially creating a conflict of interest for the nominee should she hear the case. Jackson is also a member of the Harvard Black Alumni Society, which submitted an amicus brief, along with other alumni groups, in support of Harvard’s current admissions policy that takes race into consideration.

With Jackson recusing herself from the case, and the Supreme Court’s current conservative majority, it is more likely that the Court will rule that affirmative action policies are unlawful.

Resources:

Bianca Quilantan, “Ketanji Brown Jackson plans to recuse herself from Harvard affirmative action case,” *Politico*, March 23, 2022.

Author: ASB

## Reports

### GAO Report Says Many Students Never Showed Up to School

In a report issued this week by the Government Accountability Office (GAO), researchers say that many students failed to show up to school at all in the 2020-21 school year. GAO estimates that nearly half of public elementary and secondary school teachers had at least one student who was registered but never showed up for class. Of these teachers, 72 percent said this was more than in a typical year. Based on this data, GAO estimates that there were 1.1 million students unaccounted for in the past school year.

Those teachers in virtual instruction were more likely to report absences, with high schools having the most absent students. Teachers reported a number of obstacles to attendance, like a lack of adult assistance or support, need to care for a family member, work commitments, or limited access to devices.

The [GAO report is available here](https://www.gao.gov/assets/gao-22-104581.pdf?source=email).

Author: JCM

*To stay up-to-date on new regulations and guidance from the U.S. Department of Education, register for one of Brustein & Manasevit’s upcoming virtual trainings. Topics cover a range of issues, including COVID-19 related issues, grants management, the Every Student Succeeds Act, special education, and more. To view all upcoming virtual training topics and to register, visit* <https://bruman.com/training-and-recordings/>.

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Posted by the California Department of Education, March 2022

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