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# The Federal Update for May 19, 2023

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

Re: Federal Update

Date: May 19, 2023

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## Legislation and Guidance

### OMB Publishes 2023 Compliance Supplement

The Office of Management and Budget (OMB) published its 2023 Compliance Supplement this morning. The supplement is the key tool that auditors use when reviewing a grantee’s or subgrantee’s administration of a federal program.

Each year, federal agencies determine six (or, in some cases, seven) of out twelve compliance areas for auditors to focus on for each program the agencies administer. The twelve possible compliance areas include: activities allowed or unallowed; allowable costs/cost principles; cash management; eligibility; equipment and real property management; matching, level of effort, earmarking; period of performance; procurement and suspension and debarment; program income; reporting; subrecipient monitoring; and special tests and provisions. The 2023 Compliance Supplement for the U.S. Department of Education includes all annually-funded and administered programs, such as programs under the Elementary and Secondary Education Act and the Higher Education Act, among others, in addition to temporary COVID-19 relief programs, such as the Elementary and Secondary School Emergency Relief Fund. While ED has selected the same six or seven compliance areas for some programs, it is not uniform across the agency. Grantees and subgrantees should refer to the Compliance Supplement for information regarding specific federal education programs.

Although ED is required to choose specific compliance areas for each program as a focus for auditors for the next year, grantees and subgrantees are still responsible for ensuring compliance with all twelve areas for each federal program they administer, as well as statutory program requirements and the Uniform Grants Guidance rules.

[The full compliance supplement is available here](https://www.whitehouse.gov/wp-content/uploads/2023/05/2023-Compliance-Supplement-%E2%80%93-2-CFR-Part-200-Appendix-XI.pdf). [The ED section of the supplement is here](https://www.whitehouse.gov/wp-content/uploads/2023/05/Part-4-Department-of-Education.pdf). The Bruman Group, PLLC will include a more detailed analysis of the 2023 Compliance Supplement in the next issue of the Federal Update.

Author: KSC

### Updated School Prayer Guidance Incorporates Recent Court Rulings

The U.S. Department of Education (ED) has released new guidance on constitutional protections surrounding prayer in schools and how to navigate different requests to support or accommodate religious exercise. The guidance comes following the U.S. Supreme Court’s decision in *Kennedy v. Bremerton School District*, in which prayer by a football coach immediately following a game was considered to be private speech, and said that the school had not offered a sufficient justification to restrict it.

The new guidance says “[t]eachers, school administrators, and other school employees may not encourage or discourage private prayer or other religious activity.” The guidance also notes that there are constitutional protections for school employees that engage in protected religious expression during the school day at times when it would be permissible to engage in other private conduct, like checking email or reading a book. However, the guidance emphasizes that it is never permissible for school employees to pressure students to join in that religious expression (the question of whether football players were pressured to join the coach’s prayers was part of the *Bremerton* case as well, but the Justices said they found insufficient evidence of such pressures).

At events like graduation ceremonies, schools “may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer,” but if individual speakers choose to offer a prayer, then school officials “may choose to make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's speech.”

Finally, the guidance distinguishes between the teaching and promotion of religious exercise, which would be impermissible in public schools, from teaching about religions “as a subject of inquiry or influence,” which would be allowable in a history, art, or philosophy class, for example.

The guidance also notes the requirement in the Elementary and Secondary Education Act that school districts certify to the State that they have no policy against permissible exercise of religion, and that States record and report such complaints to ED.

The [guidance is available here](https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html).

Author: JCM

### New ‘Gainful Employment’ Rule Posted

The U.S. Department of Education (ED) revealed a new “gainful employment” rule on Wednesday which would set new metrics for career training programs to meet in order to maintain access to federal student loans and Pell grants. The regulations would apply to all for-profit institutions and non-degree granting programs in any sector.

The proposed rule preserves the metric instituted by the Obama administration, which would penalize institutions where graduates’ student loan obligations exceed eight percent of their annual income or two percent of their discretionary income. It would also add a new metric which looks at whether program graduates can expect a wage higher than that of the typical high school graduate. Programs would fail the test if the typical graduate earns less than about $25,000 per year (exact amounts vary by State cost of living).

If an entity fails either metric just once, programs would have to warn students. If it fails that same metric two out of three consecutive years, ED would cut off access to Pell grants.

In a statement, ED said that about 1,800 of the roughly 32,000 programs would fail those metrics if they were in place today, and that about 58 percent of for-profit colleges have at least one program that fails one or both metrics. ED says that it plans to publish final regulations in October and make them effective by July of 2024.

Some conservative lawmakers pushed back, with House Committee on Education and the Workforce Chair Virginia Foxx issuing a statement saying “[i]f the Biden administration was concerned about solving the student loan disaster it would recognize that less than one in 10 students are enrolled at a career college and work with Congress to ensure that all colleges and universities are held financially accountable for offering degrees with little to no financial value.”

Resources:   
Katherine Knott, “New, Stronger Gainful Employment Regs Released,” *Inside Higher Education*, May 18, 2023.  
Author: JCM

### ED Seeking to Simplify Access to Medicaid for Special Ed Services

The U.S. Department of Education (ED) issued a proposed rule Thursday that seeks to provide schools more flexibility in accessing Medicaid and Children’s Health Insurance Program (CHIP) funding to help pay for special education services. Specifically, the proposed rule would amend regulations under Part B of the Individuals with Disabilities Education Act (IDEA) to remove requirements that a school obtain parental consent prior to accessing a student’s CHIP or Medicaid benefits to provide or pay for required special education services.

ED says that the rule seeks to ensure equal treatment of students with disabilities and students without disabilities, as there is currently no consent requirement for students without disabilities to access these public benefits. The proposed rule does not impact other parental consent requirements under IDEA, such as for evaluations and initial provision of special education services, nor does it alter other federal consent requirements related to providing personally identifiable information (PII) that are found under the Family Educational Rights and Privacy Act (FERPA). In addition, current IDEA requirements surrounding parental consent for provision of a student’s PII would still apply when schools seek to access public benefits for special education services.

In conjunction with the proposed rule released this week, the U.S. Department of Health and Human Services (HHS) also released a comprehensive guide on Medicaid services in school settings which discusses delivery of services as well as billing and claiming for school-based services, among other topics. ED also approved IDEA State plan amendments for two States to allow for Medicaid to pay for health care services schools deliver to Medicaid-enrolled students in those States.

[The proposed rule on parental consent in accessing public benefits for special education services is available here](https://www.federalregister.gov/documents/2023/05/18/2023-10542/assistance-to-states-for-the-education-of-children-with-disabilities) and will be open for public comment until August 1, 2023. [The HHS guide on school based services and Medicaid is available here](https://www.medicaid.gov/medicaid/financial-management/downloads/sbs-guide-medicaid-services-administrative-claiming.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=).

Author: KSC

### Lawmakers Introduce Universal School Meals Bill

A group of Democratic lawmakers in both chambers of Congress have introduced the Universal School Meals Program Act – legislation that would expand the current programs to provide free meals to all students.

Citing the end of short-term pandemic relief and the associated rise in student meal debt—as well as a “burdensome” application process—the proposal would provide free breakfast, lunch, and dinner to every student. It would also increase the reimbursement rates for meals to $2.80 for each breakfast and $4.63 for lunch and dinner, with an additional incentive of $0.30 per meal for schools that procure at least 25 percent of their food from sources within 250 miles.

The proposal would reimburse schools for all their delinquent debt up to the date of implementation, and provide summer meals and $60 per child in summer electronic benefit transfer (EBT) to all children.

Despite recognizing the administrative burden of meal applications, the bill does not create any new systems for gathering eligibility data. Instead, it encourages school systems to rely on the use of Direct Certification and survey data for allocations and targeting of services.

Though the legislation has a number of cosponsors, it has drawn criticism from Congressional Republicans as too expensive and a giveaway for affluent students. Senators drafting the 2023 Farm Bill, which would provide a vehicle for agricultural policy changes, have said they are not considering changes to nutrition programs that would expand the jurisdiction of the bill’s consideration (school meal programs are under the jurisdiction of the Committee on Education and the Workforce in the House, which would mean seeking Committee approval from another group of lawmakers), so the future of this bill is uncertain.

[The text of the bill is here](https://www.sanders.senate.gov/wp-content/uploads/Universal-School-Meals-Program-Act-of-2023.pdf).

Author: JCM

## News

### Senators Request Information on ED Oversight of ESSER

Earlier this month, members of the Senate Committee on Health, Education, Labor, and Pensions (HELP) sent a letter to Secretary of Education Miguel Cardona requesting information on ED’s oversight of Elementary and Secondary School Emergency Relief (ESSER) program funds.

The letter was signed by Ranking Member Bill Cassidy (R-LA) and Senators Lisa Murkowski (R-AK), Mike Braun (R-IN), Roger Marshall (R-KS), Mitt Romney (R-UT), Tommy Tuberville (R-AL), and Markwayne Mullin (R-OK). The HELP Committee Senators stated that they wanted to ensure ED had appropriate procedures to prevent fraud, waste, and abuse in the ESSER program. The letter cites recent reports that local educational agencies (LEAs) are spending ESSER funds almost twice as fast as last year as the deadline for obligating American Rescue Plan ESSER program funds approaches. As of January 2023, LEAs were spending more than $5 billion per month. “Given the size, scale, and pace of this unprecedented spending, it is critical to ensure that effective oversight mechanisms are in place to prevent waste, fraud, abuse, and mismanagement of taxpayer dollars,” the letter said.

In the letter, the Senators state that they are concerned with how ED is conducting oversight of the program and want to do an extensive review of the ESSER program. The Senators note that there have been reports that ED has modified its reporting process multiple times, which may make it difficult for States to accurately comply with monitoring. Additionally, the letter says that it is unclear how States are selected for monitoring on the basis of risk assessments, and even notes that ED’s website includes monitoring protocols for ESSER I, but not for ESSER II or ESSER III funds.

The Senators also note their concern that ED only posts summaries of monitoring reports but omits any certain questions and supporting documentation. Further, the Senators question whether identified problems are being properly addressed. They indicate that when ED has given States a low rating and asked them to provide documentation to show compliance, such documentation and updates are not provided to the public.

The letter requests that the Secretary respond to and provide specific records, protocols, and communications by May 18, 2023. The information will allow the HELP Committee to “assess the effectiveness of the processes ED is using to conduct oversight of ESSER funding,” the letter said.

[The letter can be viewed here.](https://www.help.senate.gov/imo/media/doc/esser_letter.pdf)

Author: BNT

## Reports

### GAO Report Recommends More Guidance on Equitable Services

The Government Accountability Office (GAO) released a report this week that analyzed implementation of the requirement under the Elementary and Secondary Education Act (ESEA) that every State designate an equitable services ombudsman – a provision that was added in the 2015 ESEA reauthorization. GAO also reviewed States’ and the U.S. Department of Education’s (ED’s) handling of disputes related to equitable services under ESEA and challenges that public and private schools face in implementing and participating in equitable services.

GAO found that many ombudsmen feel underprepared for their responsibilities in that role, with 40 percent reporting a lack of training and guidance as their greatest challenge. Ombudsmen identified the equitable services legal requirements and monitoring and enforcement requirements as the top issues on which additional guidance would be useful, while also identifying equitable services complaint decisions, facilitating district and private school interactions, and the consultation process as other topics on which guidance or training would be beneficial. In addition, some stakeholders raised concerns about impartiality and independence of State ombudsmen, as in most States the designated ombudsman was already an employee at the State educational agency before undertaking the additional role.

In reviewing the dispute process for equitable services complaints, GAO found that of all complaints appealed to ED since 2015, ED has never issued a decision within the 90-day timeframe set out in ESEA. It took ED a median of 258 days to investigate and issue a decision in equitable services appeals.

Finally, private school officials identified administrative burden as the top reason for not participating in a district’s equitable services program, and participating private schools reported issues with the amount and quality of services received. School district and private school officials also described challenges with identifying and counting eligible children.

GAO recommends ED issue guidance to help ensure ombudsmen have the capacity to fulfill the role, as well as guidance on impartiality while serving as ombudsman. GAO also recommends that ED provide additional training to ombudsmen on identified topic areas and develop resources, including guidance, templates, or checklists, to use in the equitable services complaints and appeals process to support ED in meeting the statutory timeline for decisions. GAO also recommends ED make equitable services appeals a higher priority to help in meeting the 90-day decision timeline.

[The full GAO report on equitable services is available here](https://www.gao.gov/products/gao-23-105469).

Author: KSC

***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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