

# The Federal Update for June 24, 2022

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Re: Federal Update

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## Legislation and Guidance

### Administration Releases Draft Title IX Rule

On Thursday, the Biden administration released its draft version of a regulation that would define the concept of “sex” to include gender identity and sexual orientation, as well as extend protection against discrimination on the basis of sex stereotypes, sex characteristics, and pregnancy or related conditions. The regulation would overturn previous rules published by former Secretary of Education Betsy DeVos which focus on how schools respond to allegations of sexual harassment and assault and will codify some safeguards for students, especially transgender students. The preamble to the rule notes that because “sex” is not defined in statute, its understanding has evolved through judicial interpretation, including the recent Supreme Court decision in *Bostock v. Clayton County*, which suggested that the concepts of sex and gender identity are so interlinked that discrimination on the basis of gender identity cannot be considered without consideration of sex discrimination. Pregnant students would be offered information on modifications available to help them attend school and must be allowed to take a voluntary leave of absence for medical reasons and be reinstated upon their return.

In the proposed rule, the U.S. Department of Education (ED) changes a number of other definitions for both K-12 schools and institutions of higher education as well as for vocational education institutions. It defines sex-based harassment in a similar way as the existing rule, as “unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.” However, it also extends the definition to include dating violence, stalking, and other activities.

ED says in the proposed rule that Title IX requires entities to respond to discrimination even if it occurs off campus so long as it is within the educational program or activity – including if the conduct at question occurs in a building owned or controlled by an officially recognized student organization (for example a fraternity or sorority), during school-based online interactions, or on a school field trip. The rule also suggests that Title IX obligates a recipient to address a hostile environment occurring within the recipient’s education program or activity, even if the underlying sex-based harassment contributing to the hostile environment does not occur in the recipient’s education program or activity or occurs outside the United States.

There is also a new proposed notification requirement, which would require certain employees to notify an entity’s Title IX coordinator when they have information about conduct that may constitute sex discrimination, and to provide any individual who shares information about such conduct with the contact information for the Title IX coordinator. The obligation for supportive measures would also be expanded to require institutions to “restore or preserve” a complainant’s access to the educational program or activity. Adjudicatory procedures must take place within a “reasonably prompt” time frame and take efforts to protect the privacy of parties. In evaluating the parties’ evidence, a school must use the preponderance-of-the-evidence standard of proof unless the school uses the clear-and-convincing-evidence standard in all other comparable proceedings.

ED says that it will engage in a separate rulemaking on athletics. This may also protect the regulation from legal challenges, as a number of State legislatures have passed laws that would prohibit transgender students from participating in sports that align with their gender identity. Federal lawmakers have also introduced legislation that would define “sex” narrowly for the purposes of athletics. If that regulation were struck down or rescinded, it would not impact this proposed rule. For the same reason, ED strategically placed a “severability” clause at several places in the rule, allowing those provisions to remain standing if other portions are rescinded or struck down by a court.

The proposed regulation’s release comes on the 50th anniversary of Title IX, as part of a celebration of the law which has ensured opportunities for women, particularly in sports. But Congressional Republicans and others say that this proposed rule will “erase” women by allowing transgender athletes to participate in women’s sports. In a statement anticipating the proposed rule’s release, Representative Virginia Foxx (R-NC) said that “the Biden administration is attempting to use this legislation to further a progressive social agenda” and suggested that allowing students to use the restrooms and locker rooms that align with their gender identity could endanger women.

The proposed rule also came out the same day as a House Committee on Education and Labor hearing where the Committee heard from the U.S. Department of Agriculture’s Food and Nutrition Services and asked pointed questions about a memo from the agency which prohibits meal providers from discriminating against meal recipients based on gender identity or sexual orientation. Lawmakers called the memorandum an unauthorized rule and suggested that it would cause private providers to lose the ability to participate in meal programs, leaving children hungry.

The rule has a 60-day comment period once published. The [draft regulation is available here](https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf). It will be published in the *Federal Register* soon.

Author: JCM

### House Appropriations Subcommittee Approves FY 2023 Legislation

The House Appropriations Subcommittee on Labor, Health and Human Services, and Education approved legislation this week for fiscal year (FY) 2023 funding levels for the U.S. Department of Education (ED) and other agencies. The bill would provide about a 13 percent, or $10.3 billion, increase overall for ED. It now goes to the full Committee for passage before it heads to the House floor.

Title I, Part A under the Elementary and Secondary Education Act (ESEA) would be boosted by $3 billion compared to FY 2022. ESEA Title II, Part A would be increased by $100 million, Title III by $169 million, Title IV, Part A by $75 million, and 21st Century Community Learning Centers by $120 million. The bill increases funding for career and technical education grants and adult education as well, by $45 million and $29 million, respectively. The legislation also includes $1 billion within a school safety fund specifically to increase mental health professionals in schools.

The bill also includes some policy provisions that garnered Republican opposition in the markup on Thursday, including a reduction of the amount of revenue that for-profit institutions can receive from federal student aid to 85 percent from the current 90 percent and an expansion of federal student aid eligibility to certain undocumented students.

The House Subcommittee approved the bill Thursday evening. The full House Appropriations Committee will mark up the bill on June 30th. The House is making progress on 12 appropriations bills, with several subcommittees holding markups this week. The House generally aims to pass most or all of its appropriations bill ahead of the summer Congressional recess, which will start at the beginning of August.

Resources:

Michael Stratford, “House Democrats seek 13 percent boost in education funding,” *Politico*, June 22, 2022.

Author: KSC

### Bipartisan Lawmakers Craft Compromise on School Meal Waivers

A group of bipartisan lawmakers in the House and Senate have reached a deal on legislation that would extend certain school meal waivers set to expire on June 30th. The waivers were originally authorized in 2020 in response to school meal challenges associated with the COVID-19 pandemic. As schools suffer from supply chain disruptions and staffing shortages, among other challenges, stakeholders and some lawmakers have been urging Congress to extend the waiver authority for another year.

The bill, the Keep Kids Fed Act of 2022, would allow current flexibility to continue through the summer, including grab-and-go availability for students. In addition, the bill would address supply chain issues by allowing schools to serve alternative meals or ingredients if those aligned to the school nutrition standards are not available. Finally, the bill will continue to provide higher reimbursement rates compared to pre-COVID rates for school breakfast and lunch through school year 2022-2023, although the rates will be lower than what is currently offered. Despite the extension of some flexibilities, the legislation will not allow schools to continue serving free meals to all students regardless of eligibility, meaning that schools must resume collecting school meal applications for school year 2022-2023. In addition, in a last-minute change to the bill Thursday evening by the Senate, reduced-price lunch eligibility will restart for the upcoming school year. As originally written, the bill would only bring back free or paid lunch options, leaving out reduced-price lunch for students who may be eligible.

The deal is a bipartisan compromise that would only cost approximately $3 billion, as opposed to the estimated $11 billion it would cost to extend all current waivers for another year. The higher price tag is the key reason many Republicans have been opposed to an extension of the waivers. In addition to the lower cost, the legislation would be “budget neutral” by using funds allocated to the U.S. Departments of Agriculture and Education to cover the cost – although lawmakers have not made clear precisely where those funds will come from within those agencies.

The House and Senate both passed the bill the Thursday, but with the addition of the reduced-price lunch option by the Senate, the legislation went back to the House Friday for approval of the modified version, where it passed by unanimous consent. It now heads to the President for signature.

Resources:

Meredith Lee, “GOP senator considering blocking school meal funding deal over transgender policy fight,” *Politico*, June 22, 2022.

Ximena Bustillo, “Senate sends the school meal waivers bill back to the House with time running out,” *NPR*, June 23, 2022.

Author: KSC

### New Rule on Gainful Employment Pushed to Spring

According to the Spring 2022 regulatory agenda, the U.S. Department of Education (ED) will not pursue new rulemaking on gainful employment until April 2023, representing a delay from the Biden administration to begin formal rulemaking to address the Devos administration’s 2019 repeal of the rule. Initially, the Biden administration said revamping the rule on gainful employment was a top priority and planned to begin the rulemaking process this summer by providing notice of its proposal. The delay means that a final rule on gainful employment will not go into effect before July 2024.

The Obama administration first implemented a rule on gainful employment in 2014. The rule was designed to limit career colleges’ receipt of federal funds that graduated students with large amounts of debt relative to their earnings. According to draft proposals, the Biden administration planned to keep much of the Obama-era rule in place but also sought to punish college programs that had a large share of graduates who earned less than the median of high school graduates, among other revisions. A negotiated rulemaking committee that met earlier this year considered gainful employment, among other higher education topics, but ultimately did not reach consensus on language for a new gainful employment rule, allowing ED to move forward with its own proposal.

A spokesperson for ED said, “The Gainful Employment rule is a cornerstone of our ambitious regulatory agenda…[and] we look forward to publishing a notice of proposed rulemaking in Spring 2023 to produce the best, most durable rule possible to protect students and borrowers.”

Resources:

Michael Stratford, “Biden administration pushed new ‘gainful employment’ rule into spring,” *Politico Pro*, June 21, 2022.

Author: ASB

### Gun Control Bill Offers Money for Title IV, School-Based Mental Health

A bipartisan gun control bill introduced and passed by Congress this week attempts to address some of the potential causes of the shooting in Uvalde, Texas through a combination of restrictions on gun purchases and funding for school and community-based mental health supports.

Among the provisions in the bill are measures which restrict access to firearms are additional background check requirements for individuals under the age of 21 and restrictions on purchases for individuals convicted of domestic violence – even if they are not married to or living with the alleged victim.

There are a number of provisions designed to examine barriers to accessing school-based Medicaid services – including mental health services – and providing technical assistance to States to expand their use under Medicaid and the Children’s Health Insurance Program (CHIP). It also provides $31 million per year for pediatric mental health grants through the U.S. Department of Health and Human Services for five years, until 2027.

The legislation would codify the requirement for a federal clearinghouse for evidence-based school safety practices within the U.S. Department of Homeland Security (DHS). The clearinghouse would be built in conjunction with the U.S. Departments of Health and Human Services and Education, and would be designed to offer recommendations on how to improve school safety to State and local educational agencies, institutions of higher education, State and local law enforcement, and health care professionals. DHS is also instructed to review and identify any federal grant programs that could be used to implement the practices recommended by the clearinghouse.

Funds would also be added to the Elementary and Secondary Education Act (ESEA). This includes $1 billion for Title IV, Part A to be available through 2025 for activities under that title that support “Safe and Healthy Students,” including trauma-informed instruction and community violence intervention, among other initiatives. Those funds will be awarded on a competitive basis to districts by State educational agencies. Another $50 million would go out through the 21st Century Community Learning Centers program this year. And another $1 billion would go to the Safe Schools and Citizenship Program in Title IV, Part F at a rate of $200 million per year over five years for School Based Mental Health Services Grants and Mental Health Services Professional Demonstration Grants.

Finally, the legislation would amend Section 8526 of ESEA to prohibit funds under any ESEA program from being used for the purchase of weapons or weapons training. Whether or not this is an allowable use of funds has been an open question since 2018, when then-Secretary of Education Betsy DeVos suggested that schools would not be prohibited from using federal funding under Title IV to purchase firearms.

The Senate passed the legislation Thursday evening, with the House approving it on Friday, sending the measure to President Biden for his signature.

Author: JCM

## News

### SCOTUS Strikes Down Restrictions on Funding for Religious Schools

In a decision issued Tuesday, the U.S. Supreme Court said that a Maine law prohibiting religious schools from receiving public education subsidies was unconstitutional. The decision in *Carson v. Makin*, which was split 6-3 along ideological lines, said that the State’s interest in avoiding Establishment Clause concerns was outweighed by parents’ right to freely exercise their religion – which the Court said included, in this case, sending their children to religious schools.

A number of rural or small districts in Maine lack the population to support middle or high schools. For students in those areas, the State funds “tuitioning” vouchers that allow them to attend existing public or private secondary schools. However, the Maine program prohibits those vouchers from going to support students at schools that are religious in nature. In this case, parents sued when they said they wished to send their children to religious schools and were not considered eligible for the vouchers.

The Supreme Court sided with the parents, saying that where a State chooses to offer a voucher for attendance at school, it may not differentiate between religious and secular schools. It also suggested that the schools which voucher students attended were not tasked by the State with providing a public education or equivalent.

In a dissenting opinion, Justice Sonia Sotomayor expressed concern about what she characterized as a series of decisions that bring the government closer to directly funding religious practice. Justice Breyer, in another dissent, asked what precedent this would set for the court. “What happens once ‘may’ becomes ‘must’? Does that transformation mean that a school district that pays for public schools must pay equivalent funds to parents who wish to send their children to religious schools? Does it mean that school districts that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education?”

Advocates say they expect further litigation on similar State programs – including those which require religious schools to follow specific nondiscrimination policies as a condition of receiving public funds. Some groups – including the Education Law Center and the Southern Poverty Law Center – say they will urge Maine to repeal the program.

The [Court’s opinion can be found here.](https://www.supremecourt.gov/opinions/21pdf/20-1088_dbfi.pdf)

Author: JCM

## Reports

### More Data Confirms Educator Burnout

According to a recently published survey from the RAND corporation, teachers and principals reported higher rates of job-related stress, burnout, and depression than other working adults. The survey asked a nationally representative sample of 2,360 teachers and 1,540 principals various questions about well-being, working conditions, and respondents’ intentions to leave their current job. The survey asked the same questions to participants from the general working adult population. Survey results indicated that teachers and principals fared worse off than members of the general working adult population for each of the five indicators measured in the survey.

Among the key findings identified in the survey were that “teachers and principals reported worse well-being than other working adults”; “well-being was especially poor among Hispanic/Latinx teachers, mid-career teachers, and female teachers and principals”; and “poor well-being and adverse working conditions were associated with teachers’ and principals’ intentions to leave their jobs, while supportive school environments were linked to better well-being and a decreased likelihood of intentions to leave.”

[Additional information and a copy of the survey can be found here.](https://www.rand.org/pubs/research_reports/RRA1108-4.html)

Resources:

Madeline Will, “Stress, Burnout, Depression: Teachers and Principals are Not Doing Well, New Data Confirm,” *Education Week*, June 15, 2022.

Author: ASB

*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* [*www.bruman.com/virtualtrainings/*](http://www.bruman.com/virtualtrainings/)*.*

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