

# The Federal Update for July 22, 2022

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Re: Federal Update

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[Legislation and Guidance 1](#_Toc109391110)

[ED Updates Disciplinary Guidance for Students with Disabilities 1](#_Toc109391111)

[New Guidance Highlights Concerns on Accreditor Transitions 2](#_Toc109391112)

[News 3](#_Toc109391113)

[Federal Judge Blocks Preliminary Title IX Interpretation 3](#_Toc109391114)

## Legislation and Guidance

### ED Updates Disciplinary Guidance for Students with Disabilities

In a series of documents issued this week, the U.S. Department of Education (ED) called on schools to avoid disciplinary practices that target or primarily negatively impact students with disabilities. Two documents, including a questions-and-answers document (Q&A), seek to further clarify concerns about the balance between addressing student mental health concerns, school safety, and requirements and restrictions in federal law.

ED notes that federal law does not prohibit the disciplining of students with disabilities, but notes “pervasive disparities” in punishment between disabled students (and students of color) and their peers. The agency says that there is an “urgent need” to improve the implementation of the Individuals with Disabilities Education Act (IDEA) to increase equity for students by examining the causes of those disparities and preparing educators and service providers to implement responsive practices in place of exclusionary discipline.

In the accompanying Q&A document, ED notes the obligation to address behavioral issues through positive behavioral interventions and supports, as listed in the student’s individualized educational program (IEP), and the need to convene the IEP team to discuss options if such supports are on outlined. It also notes that IDEA does not define “discipline” or what tactics are to be used, but does preclude the use of certain measures where they would result in a change in placement and where the behavior is determined to be a “manifestation of the child’s disability.” While IDEA does not prohibit the use of corporal punishment or so-called “seclusion and restraint” practices, ED strongly discourages them.

Given recent school shootings, ED also notes that IDEA does not address the completion of risk or threat assessments of children with a disability, but encourages districts to ensure that personnel conducting such assessments are knowledgeable about the child and his or her IEP and are working in coordination with the IEP team. The guidance discusses in detail the procedures for evaluating whether a violation of the student code of conduct was a manifestation of a student’s disability, and under what circumstances a student may be placed in an interim alternative educational setting.

The [Dear Colleague on discipline is here](https://sites.ed.gov/idea/files/dcl-implementation-of-idea-discipline-provisions.pdf?source=email). A guidance document on [proactive, positive approaches is here](https://sites.ed.gov/idea/files/guide-positive-proactive-approaches-to-supporting-children-with-disabilities.pdf), and [the Q&A document is here](https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf).

Author: JCM

### New Guidance Highlights Concerns on Accreditor Transitions

The U.S. Department of Education (ED) published two guidance documents and a letter to accrediting agencies this week that clarify ED requirements for institutions to change or add an accrediting agency as part of its effort to maintain integrity amongst institutions. In its letter to accreditors, ED notes a Florida law requiring public institutions to seek new accrediting agencies, a change that jeopardizes the long-held practice of voluntary accreditation. While an institution may change its accrediting agency, ED reiterates that it only recognizes voluntary changes. The letter also reminds institutions of their obligation to demonstrate reasonable cause for a change to ensure that they do not change accreditors “simply to evade accountability, avoid open inquiries, or seek approval from an agency with less rigorous standard.” While ED statute and regulations address voluntary accreditation and reasonable cause, this recent guidance provides additional clarification for institutions.

Generally, institutions must seek approval from the Office of Federal Student Aid (FSA) before changing their primary accrediting agency. A dear colleague letter (DCL) dated July 19, 2022, updates the procedures for seeking approval. An institution’s request for approval must include certain documentation to assist ED in the approval process by providing FSA with documentation of its current accreditation and materials demonstrating “reasonable cause” for the change. Institutions must inform ED of its current recognition over the last 24 months, the new agency from which the institution seeks accreditation, and the reason for the change. The institution must then receive notice from FSA that it completed these steps and has ED’s approval before applying to the new accreditation agency. After securing new accreditation, the institution must then notify FSA of its new accreditation agency and update its electronic application (E-App) with the new accreditor’s information.

DCL GEN-22-11 addresses ED’s reasonable cause standard for institution’s seeking to change accreditors and provides examples of factors FSA may consider when making a reasonable cause determination. Under ED regulations, FSA will not determine an institution’s cause to be reasonable if the institution: 1) had its accreditation withdrawn, revoked, or otherwise terminated for cause during the preceding 24 months, unless such withdrawal, revocation, or termination has been rescinded by the same accrediting agency, or 2) is subject to a probation or equivalent, show cause order, or suspension order during the preceding 24 months. When determining whether an institution meets the reasonable cause standard, the guidance states that FSA may consider the following factors:

1. The institution’s stated reason for the proposed change or multiple accreditations.
2. Whether the institution is seeking to change accrediting agencies or multiple accreditations to lessen oversight or rigor, evade inquiries or sanctions, or the risk of inquiries or sanctions by its existing accrediting agency.
3. Whether the proposed change of agencies or multiple accreditations would strengthen institutional quality.
4. Whether the institution is seeking to change agencies or seeking multiple accreditations because the new agency and its standards are more closely aligned with the institution’s mission than the current accrediting agency.
5. Whether the proposed change or addition involves an accrediting agency that has been subject to ED action.
6. Whether, if ultimately approved by ED and the accrediting agency, the institution’s membership in the accrediting agency would be voluntary, as required for recognition of the accrediting agency under ED regulations.

The complete guidance documents can be viewed here: [DCL-22-11](https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-07-19/procedures-institutions-seeking-approval-request-change-or-add-accrediting-agencies), [DCL-22-10](https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-07-19/guidance-institutions-seeking-change-or-add-accrediting-agencies), and [ED’s Letter to Accreditors](https://www2.ed.gov/admins/finaid/accred/letter-to-institutional-accreditors.pdf).

Author: ASB

## News

### Federal Judge Blocks Preliminary Title IX Interpretation

A federal judge in the Eastern District of Tennessee has issued a decision blocking the U.S. Department of Education (ED) from enforcing a “Notice of Interpretation” which prohibits discrimination on the basis of gender identity and sexual orientation.

In his order, the judge said that the notice constituted non-binding guidance, but that it “directly interferes with and threatens Plaintiff States’ ability to continue enforcing their State laws” regarding participation in sports teams or use of restrooms. In doing so, the judge agreed with the plaintiffs that the agency had violated the Administrative Procedure Act. The judge also criticized the administration’s assertion that the Supreme Court decision in *Bostock v. Clayton County* applies in the educational context when the Court itself said that *Bostock* should have only limited reach.

The lawsuit was brought by a group of 20 State attorneys general, led by counsel from Tennessee. Though the interpretation has not yet been enforced by ED’s Office for Civil Rights, the States argued that they faced a “credible threat” of losing significant federal funding due to this policy.

The court’s decision may incentivize ED to finalize its draft regulation on sex-based harassment and discrimination—published in draft-form on July 12th—as quickly as possible in order to have an enforceable rule on the books. Even then, however, the rule likely faces significant scrutiny and lawsuits. In addition, it does not address athletics since ED made the decision to handle those questions separately.

Author: JCM

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