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# The Federal Update for April 14, 2023

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

Re: Federal Update

Date: April 14, 2023

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## Legislation and Guidance

### ED Will Revise and Delay Third-Party Servicer Guidance

U.S. Department of Education (ED) Under Secretary James Kvaal posted to ED’s blog this week, informing readers that they will make changes and clarifications to the third-party servicer guidance that was released earlier this year. Kvaal wrote that the changes were being made due to the over 1,000 public comments that they have received.

Many of the comments were directed at the broad regulatory definition of third-party servicer that is included in the guidance. As originally worded, the definition appeared to include many different servicers and operations that institutions often contract for and that are separate from Title IV aid administration. In the post, Kvaal clarified that ED does not consider certain relationships to be included in the third-party servicer guidance. Those include:

* “Study abroad programs.
* Recruitment of foreign students not eligible for Title IV aid.
* Clinical or externship opportunities that meet requirements under existing regulations because they are closely monitored by qualified personnel at an institution.
* Course-sharing consortia and arrangements between Title IV-eligible institutions to share employees to teach courses or process financial aid.
* Dual or concurrent enrollment programs provided through agreements with high schools and local educational agencies, which are exempt because they do not involve students receiving Title IV aid.
* Local police departments helping to compile and analyze crime statistics, unless they write or file a report on behalf of an institution for compliance purposes.”

Kvaal noted that they will update this list to include other relationships that do not fall under the third-party servicer guidance as they continue to review public comments. Additionally, ED will consider clarifying and further narrowing the definition, especially in the areas of instructional content, software and computer services, and student retention. Kvaal also noted that while the department reviews the comments received, previous Dear Colleague Letters GEN 12-08, GEN 15-01, and GEN 16-15 (as amended by the March 8, 2017 announcement) remain effective.

ED also delayed the original September 1, 2023 effective date of the guidance. The new effective date will be at least six months after ED publishes its revised final guidance letter. The additional time will give institutions and third parties, who have already begun to review contracts, time to comply with the guidance and understand the implications of the changes.

[ED’s blog post update can be viewed here.](https://blog.ed.gov/2023/04/update-on-the-department-of-educations-third-party-servicer-guidance/)

Author: BNT

### Updated BSCA Guidance Published

The U.S. Department of Education (ED) provided additional information Wednesday in updated guidance on the Bipartisan Safer Communities Act (BSCA). The updated guidance provided some “clarifications” on certain questions and encourages more information-sharing with families and stakeholders, including through publishing BSCA plans and Emergency Operations plans on the State and district websites.

Added to the lists of allowable uses of funds are training in dating violence prevention and crisis management. ED offers further concerns about the use of such funds for school resource officers (SROs), noting the potential negative impact on school climate and student mental health in some circumstances.

There is one new question and answer in the document, which states that charter schools that are classified as local educational agencies (LEAs) are eligible for BSCA grants, and charters that are within an LEA are eligible to receive funds from their school district.

The [updated guidance is available here](https://oese.ed.gov/files/2023/04/23-0083.BSCA-FAQs.pdf).

Author: JCM

### ED Issues New Guidance on FERPA and Student Health Records

The U.S. Department of Education’s (ED’s) Student Privacy Policy Office released two new guidance documents this week addressing schools’ responsibilities under the Federal Education Rights and Privacy Act (FERPA) with regard to student health records. The guidance includes a frequently asked question document for school officials on student health records, and an overview document for parents and students on FERPA rights with regard to health records.

The guidance does not establish any new requirements related to FERPA and student health records but serves to clarify existing requirements. The guidance notes that it does “not have the force and effect of law” and was released to “provide clarity.” The guidance reviews the FERPA definition of “education record,” stating that it may include students’ health records that are maintained by schools. It also clarifies that health records for students who are 18 years or older or attending a postsecondary institution that qualify as “treatment records,” including records that are maintained by physicians or mental health professionals or are maintained only in connection with providing treatment to the student, among other scenarios, are excluded from FERPA protections. Student health records for students 18 years or older that are not considered “treatment records” are afforded protection under FERPA as “education records” and would need student consent for disclosure.

The guidance also discusses whether school officials’ personal observations of a student are considered “education records,” stating that generally they are not unless the school official uses the knowledge in a way that establishes an education record, such as a school official seeing a student commit a disciplinary violation and taking action based on the observation that results in a disciplinary record. The guidance also discusses the situations in which a school can disclose students’ education records to the students’ parents or third parties, including with the prior written consent of a student that is 18 years or older or attending a postsecondary institution or the prior written consent of the students’ parents for those under 18, and when a permissive exception to the general consent requirement under FERPA applies.

Finally, the guidance states that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule applies to health records only for nonstudents, such as for postsecondary institutions that operate public clinics. The health records of students are covered by FERPA, while the nonstudent records would be subject to HIPAA requirements.

[The guidance for school officials is here](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/The%20Family%20Educational%20Rights%20and%20Privacy%20Act%20Guidance%20for%20School%20Officials%20on%20Student%20Health%20Records.pdf); [the FAQs for students and parents is available here](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Know%20Your%20Rights%20-%20FERPA%20Protections%20for%20Student%20Health%20Records.pdf).

Author: KSC

### Title IX Proposed Rule Published in *Federal Register*

On Thursday, the U.S. Department of Education (ED) published the proposed Title IX regulations in the *Federal Register*. The regulations would prevent institutions that receive federal funding, including institutions of higher education and K-12 schools, from banning transgender students from participation in male or female athletics solely based on their gender identity.

However, the proposed regulations also allow for a number of exceptions. Under the regulations, institutions may impose or retain sex-based restrictions if, among other requirements, the restrictions are “substantially related to the achievement of an important educational objective.” Educational objectives may include fairness in competition and sports-related injuries.

Many States currently have laws on student athletics and gender identity that directly contradict these proposed regulations. If the regulations are finalized in their current form, those States and interested parties will likely bring lawsuits on the final rules.

Comments on the proposed regulations must be submitted by May 15, 2023.

[Comments may be submitted through the *Federal Register* here.](https://www.federalregister.gov/public-inspection/2023-07601/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal)

Author: BNT

## News

### OCTAE Announces New Perkins Plans Due Next Spring

Assistant Secretary for Career, Technical, and Adult Education Amy Loyd announced at a meeting this week that new four-year State plans under the Strengthening Career and Technical Education for the 21st Century Act (Perkins V) will be due next spring.

States are currently in the process of submitting their fiscal year 2023 revisions to their current four-year Perkins State plans, which are due in May. Following this final year of revisions, OCTAE will require new plans to be submitted in 2024 for the following four fiscal years. OCTAE has not released details yet on the specific timeline or process for submitting the new State plans next year, but Assistant Secretary Loyd indicated that additional information is forthcoming in June of this year.

Author: KSC

### Loan Settlement Contested by Colleges, States

A lawsuit filed by a group of colleges says that the U.S. Department of Education (ED) is improperly using its authority under the Higher Education Act (HEA) to forgive student loans of borrowers. The colleges – Everglades College Inc., Lincoln Educational Services Corporation, and American National University – say that they are being unfairly maligned by a settlement which allows for forgiveness of loans for former students. A federal judge in California approved the settlement with borrowers, and the 9th Circuit Court of Appeals said it would allow the settlement to proceed while the case is heard. Last week the colleges filed an emergency request for the U.S. Supreme Court to intervene, which it declined today.

In this case, the Biden administration has argued that the HEA gives the Secretary “broad” discretion to compromise and settle student debt owed to the federal government. In this case, the settlement came after a class action by students who say they were defrauded by their colleges. ED has previously use this “compromise” authority to discharge more than $11.6 billion of student debt.

Now, however, States have filed an amicus brief seeking to limit the settlement authority, expressing concern that if the Court strikes down the administration’s use of the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act for broad student loan forgiveness, the administration is likely to turn to the compromise authority as a backup plan. “The executive branch does not have unlimited policymaking power, nor an unlimited bank account to forgive student loan debt,” Ohio Attorney General Dave Yost, who led the coalition of 20 Republican State attorneys general in filing the amicus brief, said in a statement. “The executive branch cannot extend its authority as it sees fit.”

In a brief filed Wednesday, the administration discouraged the Supreme Court from hearing the case, saying it would effectively halt forgiveness of more than $6 billion in loans for borrowers who were defrauded by their colleges. Solicitor General Elizabeth Pregolar said the issue is “entirely distinct” from the broader student loan forgiveness plan. The settlement “does not reflect any ‘en masse’ cancellation of outstanding debt, nor an assertion by the Secretary of the power to discharge the Department’s entire $1.6 trillion loan portfolio,” she wrote.

The Court announced today that it would not hear the case at this point, leaving the decision with the 9th Circuit.

Resources:  
Michael Stratford, “Biden administration urges SCOTUS to reject another student loan forgiveness case,” *Politico*, April 12, 2023.  
Author: JCM

### ED Announces New Director for Adult Education Programs

The U.S. Department of Education’s Office of Career, Technical, and Adult Education (OCTAE) announced a new Director for the Division of Adult Education and Literacy this week, LaToya Newson.

Newson previously worked at the Tennessregaree Department of Labor and Workforce Development for many years, beginning as the Director of Performance and Compliance and eventually serving as the Assistant Administrator in the Adult Education Division. Newson also has experience as an educator, including for adult education courses.

Newson will be primarily responsible for administering programs under the Adult Education and Family Literacy Act. The Division of Adult Education and Literacy is housed under OCTAE and Assistant Secretary for Career, Technical, and Adult Education Amy Loyd. Newson’s new role does not require confirmation by the Senate as some ED leadership positions.

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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