

# The Federal Update for April 7, 2023

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Re: Federal Update

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## Legislation and Guidance

### ED Issues Proposed Regulations on Title IX and Athletics

On Thursday, the U.S. Department of Education (ED) released its proposed regulations governing Title IX’s applicability to athletics eligibility. The proposed regulations prohibit educational entities receiving federal funding, including K-12 schools and institutions of higher education, from categorically prohibiting transgender athletes from participating on sports teams based on their gender identity.

While prohibiting sweeping bans, the proposed regulations do allow for some flexibility at a local level. The proposal would allow for schools to establish eligibility criteria that serve to fulfill “important educational objectives.” Examples provided by ED as objectives that have been previously raised by stakeholders include fairness in competition, as well as preventing injuries. However, the proposed rule states that criteria restrictive to transgender students would not be acceptable if the justification is disapproval of the student’s gender identity. Schools must “demonstrate that any sex-based classification they seek to impose is substantially related to the achievement of an important governmental objective,” as affirmed in case law related to the Equal Protection Clause. Schools must consider factors such as grade level, competition level, and type of sport when establishing criteria that could lead to the exclusion of transgender students from the team aligning with their gender identity.

If a school establishes criteria that does restrict transgender students, the school must work to minimize harm to the students. If in establishing criteria, a school has the ability to impose criteria that poses less harm than other options, the school would be required to select the least harmful criteria. The proposed regulations provide examples of potential harm, such as disclosure of confidential information, which may include the exposure of a student’s transgender identity, invasion of privacy, or difficulty of obtaining documentation.

The proposed regulations and related fact sheet make clear that no changes are made to the Title IX regulations in terms of their longstanding requirements of providing equal athletics participation for women and girls.

When finalized, many State laws on transgender student participation in athletics will run counter to the regulations. Significant litigation of the final regulations is likely to occur.

The proposed regulations will be published in the *Federal Register* in the coming days and will be open for public comments for 30 days after publication. [An unofficial version of the proposed regulations is available here](https://www2.ed.gov/about/offices/list/ocr/docs/t9-ath-nprm.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=).

Author: KSC

## News

### SCOTUS Sides with Transgender Athlete While Case Proceeds

The U.S. Supreme Court on Thursday denied an emergency injunction from West Virginia, allowing a transgender athlete in the State to continue participating on a girl’s cross-country team while her case challenging a West Virginia law proceeds.

West Virginia passed a law in 2021 requiring students’ participation on athletics teams to be based on their biological sex at birth, effectively prohibiting transgender athletes from participating on teams that correspond to their gender identity. A West Virginia student sued the State and after a district court ruled to allow the law to stand, the student appealed the decision to the Fourth Circuit Court of Appeals. The Fourth Circuit issued an order allowing the student to continue participating on a cross country team based on her gender identity while the appeal is in process. West Virginia appealed the Fourth Circuit Court of Appeals order to the Supreme Court asking for an emergency injunction to allow the State law to go into effect while the case proceeds through the legal system.

Justices Samuel Alito and Clarence Thomas dissented, writing that the Court should have allowed West Virginia to implement the State law while the case is considered.

The Court’s denial of the injunction does not necessarily indicate how it might rule should a Title IX athletics case be appealed for the Court to consider in the future, as it is mostly a procedural decision.

The Fourth Circuit’s consideration of the West Virginia law could now be complicated by the issuance of proposed regulations from the U.S. Department of Education on Title IX’s applicability to transgender student participation in athletics. However, those rules are unlikely to be finalized in the near future.

Resources:

Adam Liptak, “Supreme Court Rules for Transgender Girl in School Sports Dispute,” *New York Times*, April 6, 2023.

Author: KSC

### House Committees Request Documents on ESSER from ED

Following through on plans to increase oversight of COVID-19 relief spending, House Committee on Oversight and Accountability Chair James Comer (RKY), House Committee on Education and the Workforce Chair Virginia Foxx (R-NC), and Select Subcommittee on the Coronavirus Crisis Chair Brad Wenstrup (R-OH) sent a request to Secretary of Education Miguel Cardona this week to provide documentation related to the administration and use of Elementary and Secondary School Emergency Relief (ESSER) funds.

The letter expresses concern over how some States and local educational agencies (LEAs) have used ESSER funds and whether they were used appropriately in response to a pandemic-related need, including addressing learning loss from school closures. “Rather than use ESSER funds to help students recover from learning losses, some [S]tates and school districts that kept schools closed appear to have spent ESSER funds to push favored social agendas,” the lawmakers write in their letter. The letter cites specific examples from some States where the lawmakers believe ESSER funds may have been misused.

The lawmakers request all documentation related to ED’s administration of ESSER funds and the use of ESSER funds by States and LEAs, including guidance, memoranda, legal opinions, and ED’s approval processes for ESSER plans and distribution of funds, among other items. The lawmakers also request documents and communication related to the approval of certain ESSER State plans and documentation including any analysis of how ESSER funds had a measurable impact on schools’ ability to return to in-person instruction.

The letter comes amidst a renewed focus on oversight in the House under the new Republican majority.

[The full oversight request is available here](https://oversight.house.gov/wp-content/uploads/2023/04/Letter-to-Education-on-COVID-Oversight.pdf).

Author: KSC

### OPM Firm Sues ED over Third-Party Servicer Guidance

The online program management firm 2U and one of its affiliates sued the U.S. Department of Education and Secretary of Education Miguel Cardona this week over its February guidance that expands the definition of “third-party servicer” for institutions of higher education.

The guidance immediately received pushback from the higher education community after being released in mid-February. ED took steps to modify the guidance later that month, delaying the original effective date to September of this year. The complaint filed by 2U claims that ED is lacking authority to impose the additional requirements that are linked with the expansion of the “third-party servicer” definition. “The Department lacks unilateral authority to rewrite the HEA’s definition of a third-party servicer,” the complaint says. “Nor can it impose legal obligations on regulated entities without following the procedural rulemaking requirements of the [Higher Education Act] and [Administrative Procedures Act].” The complaint argues that ED is required to engage in negotiated rulemaking in accordance with Higher Education Act requirements to impose the changes included in the February guidance.

[The full complaint is available here](https://www.insidehighered.com/sites/default/server_files/media/2U%20Complaint%20and%20Exhibits.pdf).

Author: KSC

### Appeals Court Strikes Down Head Start Vaccine Mandate

Late last week the U.S. District Court for the Northern District of Texas struck down the U.S. Department of Health and Human Services’ (HHS’) vaccine mandate for the Head Start program. The vaccine requirement was issued by HHS in the fall of 2021 in the form of an interim final rule. Since its issuance, the rule has faced pushback and litigation from stakeholders, including national organizations.

The 2021 rule initially included a mask mandate for the Head Start program as well. HHS reversed that requirement last fall but left the vaccine mandate in place. The vaccine mandate was affirmed by HHS in January of this year through the issuance of a final rule. The decision issued by the district court last week vacates the rule, stating that HHS did not follow proper rulemaking procedures under the Administrative Procedure Act, including gathering public feedback, prior to issuing the interim final rule. The decision also states that Congress would be required to take action in order to impose a vaccine mandate in the Head Start program.

A second legal challenge to the rule led by the State of Louisiana, with 23 other States joining, resulted in a preliminary injunction of the vaccine mandate, applicable to only those States, in September of last year. The Texas district court determined that its decision last week is applicable nationwide, as opposed to only the case’s plaintiffs – the State of Texas and a Texas school district – effectively removing the mandate for all States and territories in the United States. HHS has not issued a formal statement on the ruling.

Resources:

Kara Arundel, “Court ends Head Start COVID vaccine mandate nationwide,” *K12 Dive*, April 5, 2023.

Author: KSC

### Colleges Ask SCOTUS to Overturn $6 Billion Class Action Settlement

Last year, the Biden administration, as part of a settlement of a class-action lawsuit brought by borrowers who allege they were defrauded by their colleges, agreed to discharge the federal student loan debt of around 200,000 borrowers. The agreement, which could lead to six billion dollars in debt being cancelled, is being challenged by a group of three colleges: Everglades College Inc., Lincoln Educational Services Corporation, and American National University. These colleges are among 153 institutions that the U.S. Department of Education (ED) determined had engaged in “substantial misconduct,” and whose former students who apply for debt relief would be entitled to loan forgiveness.

On Wednesday, the three colleges submitted an emergency application to the U.S. Supreme Court to review the case and prevent the Biden administration from discharging the loans. The petition comes after the Ninth Circuit Court of Appeals determined last week that the colleges did not provide sufficient evidence to show that they would suffer irreparable harm if the settlement was not halted. The colleges allege that the agreement would damage their reputations and that ED does not have the authority to grant widespread debt cancellation.

While the Higher Education Act (HEA) allows for debt cancellation in certain circumstances, the colleges argue that ED has exceeded its authority with the settlement. This claim is also being made in the separate pending cases at the Supreme Court surrounding the administration’s student loan relief program. The HEA provision that ED relied on for the settlement is also the same provision that some have suggested ED will use to continue the relief program, if is struck down by the Supreme Court based on lack of authority under the Health and Economic Recovery Omnibus Emergency Solutions Act.

In their court filing, the colleges state that the Court should decide to hear their case on this provision of the HEA, as their decision in other cases could be powerless, if ED is able to use the HEA authority to continue the program. The colleges wrote that ED should not be able to use “unprecedented and breathtaking claims of executive authority” before the Supreme Court has the opportunity to review the legality of reliance.

The settlement challenge may have important implications for the other federal student loan relief cases being heard by the Supreme Court. Justice Elena Kagan reviews all emergency applications from the Ninth Circuit. Even if Justice Kagan denies the colleges’ application, the HEA argument could be heard in subsequent cases that challenge future ED actions.

Resources:

Michael Stratford, “Colleges Ask SCOTUS to Stop Class-action Settlement Over Student Loan Forgiveness,” *Politico*, April 5, 2023.

Author: BNT

### Senate HELP Committee Seeks Input on ESRA Reauthorization

The Senate Committee on Health, Education, Labor, and Pensions (HELP) sent a letter to members of the education community on Wednesday requesting input on reauthorizing the Education Sciences Reform Act (ESRA), which includes the Educational Technical Assistance Act and the National Assessment of Education Progress Authorization Act.

The ESRA was passed in 2002 and expired in 2008, and prior attempts at reauthorization have been unsuccessful. The legislation created the Institute for Education Sciences (IES) at the U.S. Department of Education, which is the non-partisan research arm of the agency. The IES also includes the National Center for Education Statistics and operates the State Longitudinal Data Systems program.

The HELP Committee is seeking input on what changes are needed to ESRA to improve the effectiveness of federal education research and technical assistance centers, any policies or practices from other federal agencies that could improve ED research functions, how better coordination could be developed for education research outside of IES, and how IES could better support field-initiated research, among other items.

The lawmakers direct any public feedback on ESRA reauthorization to be submitted via email to the HELP Committee at ESRA2023@help.senate.gov no later than Wednesday, April 19th.

[The full letter on ESRA reauthorization is available here](https://www.help.senate.gov/imo/media/doc/esra_rfi_letter.pdf).

Author: KSC

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