

WASHINGTON UPDATE

JUNE 2023

President Biden Vetoes H.R. Res. 45 to Repeal President Biden’s Student Debt Relief

On June 7, 2023, President Joe Biden swiftly vetoed the Republican-led resolution, H.R. Res. 45, which would have repealed the President’s debt relief plan that would cancel up to \$20,000 of student debt for tens of millions of borrowers. Previously, on June 1, 2023, the Senate passed H.J. Res. 45, a *Congressional Review Act* resolution, by a vote of 52-46, that would have repealed the debt relief plan. In the Senate, Senators Joe Manchin (D-WV), Jon Tester (D-MT), and Krysten Sinema (I-AZ) voted in favor of H.J. Res. 45. On May 24, 2023, the House passed H.R. Res. 45, by a vote of 218-203. Representatives Jared Golden (ME) and Marie Gluesenkamp Pérez (WA) voted in favor of the Republican resolution.

Senator Manchin released a statement saying that the Department’s plan “forces hard-working taxpayers who already paid off their loans or did not go to college to shoulder the cost.”

Senator Manchin’s statement is found at: <https://www.manchin.senate.gov/newsroom/press-releases/manchin-statement-on-support-for-overturning-reckless-student-loan-plan>.

During House floor debate, Chairwoman of the House Education and the Workforce Committee Virginia Foxx (R-NC) said: “Coupled with the permanent repayment pause, expansive new regulations, and a radical new income-driven repayment plan, the Biden Administration’s student loan scam could end up costing taxpayers \$1 trillion.”

A copy of Chairwoman Foxx’s statement is found at: <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409208>.

Ranking Member of the House Education and the Workplace Committee Bobby Scott (D-VA) said during floor debate: “The reality is that H.R. Res. 45 would trigger a wave of delinquencies and defaults for our most vulnerable borrowers. Intentionally or not, this resolution would create chaos for borrowers and their families as well as the loan servicers. And the Congressional Research Service has confirmed that “this chaos would be triggered by the retroactive application of this rule.”

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A copy of Ranking Member Scott’s statement is found at:

<https://democrats-edworkforce.house.gov/media/press-releases/extreme-maga-republicans-vote-to-deny-debt-relief-for-more-than-206-million-of-their-own-constituents>.

Separately, the Supreme Court is weighing whether to allow the Biden Administration’s plan for student loan debt cancellation to move forward. The justices are expected to issue a ruling by the end of June or early July.

Senate Republicans Send Letter to Secretary Cardona Asking him to Prepare Borrowers and Student Loan Servicers for Repayment Restart

On June 7, 2023, Senate Minority Whip John Thune (R-SD), Senate Health, Education, Labor, and Pensions Committee Ranking Member Bill Cassidy (R-LA), and Senate Appropriations Subcommittee on Labor, Health, Education, and Related Agencies Ranking Member Shelly Moore Capito (R-WV) recently sent a letter to Secretary of Education Miguel Cardona urging the Department of Education to begin to prepare borrowers and federal student loan servicers for a return to federal student loan repayment without delay. In the letter, the Senators specifically ask the Department to “abandon all loan forgiveness activities that were not explicitly directed by Congress, which are an impediment to the smooth resumption of repayment.”

A copy of the press release, which includes the text of the letter is found at:

<https://www.thune.senate.gov/public/index.cfm/press-releases?ID=91454971-46F1-4B9E-B2F3-DA83BF5EE74C>.

Biden Signs *Fiscal Responsibility Act* Requiring the Biden Administration to Begin Collecting Student Loans and Charging Interest in 60 Days

On June 3, 2023, President Joe Biden signed the *Fiscal Responsibility Act of 2023* into law, which ended the threat of a default on the nation’s debt. The compromise deal reached between President Biden and Speaker of the House Kevin McCarthy (D-CA) codifies into law the Biden Administration’s plan to end the ongoing pause on monthly student loan payments and interest at the end of the summer. The Department of Education had previously been preparing to restart payments 60 days following either a court decision or June 30, 2023, whichever came first.

The Republicans had been trying to use the debt ceiling plan to force the White House to repeal the Biden Administration’s student debt cancellation plan, but the agreement does not

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affect the plan. The debt cancellation plan remains in limbo while the Supreme Court is expected to rule on whether it can proceed in the coming weeks.

House Subcommittee on Higher Education and Workforce Development Holds Hearing on Biden Administration’s Higher Education Initiatives

On May 25, 2023, House Subcommittee on Higher Education and Workforce Development Chairman Burgess Owens (R-UT) held a hearing titled, “Breaking the System Part II: Examining the Implications of Biden’s Student Loan Policies for Students and Taxpayers” with Under Secretary of Education James Kvaal and Federal Student Aid (FSA) Chief Operating Officer (COO) Richard Cordray testifying before the Subcommittee. In his opening statement, Chairman Owens focused on the extension of the student loan repayment moratorium occurring six times; blanket student loan cancellation; and proposed revisions to the Income-Driven Repayment regulations.

Under Secretary Kvaal said that the Biden/Harris Administration is tackling student debt by offering relief from the continuing effects of the pandemic and making loans more affordable to repay than they have ever been before. They hope to make college more affordable “by investing in Pell Grants, free community college, and scholarships at inclusive institutions – and by holding colleges accountable for college costs.”

COO Cordray provided testimony highlighting the efforts of the Department of Education in making a number of changes to the student loan system, detailing the major changes required under the *FAFSA Simplification Act*, and describing the efforts to enhance and improve the FSA system.

Some of the exchanges were heated. For instance, Chairman Owens asked about the Department’s laser focus on for-profit institutions to which COO Cordray said FSA was building an enforcement office to address issues by schools that harm students. Representative Pramila Jayapal (D-WA) added that while states have direct governance authority over public institutions and private, nonprofit institutions are operated by trustees, who are legally committed to the public interest, only in the for-profit sector can leaders benefit personally from the operations of their institutions. In response to a question from Chairman Owens about the proposed rule on gainful employment, Under Secretary Kvaal said the statutory authority for ED to issue the gainful employment rule is grounded in Section 102 of the *Higher Education Act*, and Congress has distinguished between for-profit career programs and traditional higher education programs. Under Secretary Kvaal agreed that gainful employment programs are offered by public and nonprofit institutions, but no program should routinely be leaving students with debts they cannot afford. Mr. Kvaal

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agreed that career programs at all types of colleges and universities should be addressed but “different tools are appropriate in different contexts.”

Ranking Member of the House Education and the Workforce Committee Bobby Scott (D-VA) said that the gainful employment rule is a concern because it measures the socioeconomic demographics of the student body as much as it does the quality of the program. Under Secretary Kvaal responded that the goal of the gainful employment rule is to create better choices for students, especially for low-income students, first-generation students, and students of color who are disproportionately likely to be left with debts they cannot afford. He concluded that the gainful employment rule will improve the value of programs.

In response to Representative Jayapal’s question as to whether the gainful employment rule will prevent the abuse of taxpayer dollars, Under Secretary Kvaal said the rule sets standards for earnings and for debt affordability at career programs and for-profit colleges. Ranking Member Scott asked what the Department was doing to make sure that for-profit executives and owners who are personally responsible for fraud and who personally profited from fraud are personally responsible for the borrower defense claims that the government has to end up paying. COO Cordray responded that ED has imposed clarity around entity liability and for personal liability.

Other areas of discussion included student choice, student loan debt cancellation and income verification, and student loan defaults. Chairman Owens ended the hearing by saying that the discussion was a “step in the right direction.”

House Hearing Covers ED’s Budget Request for FY 2024 and Committee Oversight Efforts

On May 16, 2023, Secretary of Education Miguel Cardona testified at the House Committee on Education and the Workforce to justify the Department of Education’s budget request for FY 2024 as well as the Department’s track record. Concerns were raised regarding the transition of borrowers back into repayment following the repayment and interest pause. Chairwoman Foxx called on the Department to be more prompt in responding to the Committee’s no less than 11 oversight letters since ED seems to be minimally responsive to the Committee.

Chairwoman Foxx said: “Mr. Secretary, I wish this hearing was an endorsement of your department’s cooperation with our requests, so we could then proceed in good faith to the FY 2024 budget request. Instead, your department has engaged in disingenuous and misleading actions while being minimally responsive to congressional oversight.”

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Ranking Member Bobby Scott (D-VA) and other Democrats used their time to show support for student loan forgiveness and other policies as well as to detail how the budget cuts proposed in the House debt-ceiling bill would affect the department and students.

The Committee released a summary of the hearing on May 17, 2023. See: <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409173>.

House Republicans Send Letter to Secretary of Education Questioning Change in Self-Certification for IDR Plans

On May 12, 2023, House Education and the Workforce Chairwoman Virginia Foxx (R-NC), House Oversight and Accountability Committee Chairman James Comer (R-KY), and House Government Operations and the Federal Workforce Subcommittee Chairman Pete Sessions (R-TX) sent a letter to Secretary of Education Miguel Cardona questioning the Department's decision to waive income verification requirements for borrowers who enroll in income-driven repayment plans. Instead, ED will rely on self-certification. The letter expressed their concern that "individuals may fraudulently misrepresent their income to reduce their loan payments and ultimately have their student loans transferred to taxpayers."

The letter requests a staff-level briefing no later than May 19, 2023, covering the following topics: (1) the Department's specific legal authority to waive income verification requirements; (2) a detailed explanation of when and why the decision to relax income verification was made; and (3) the Department's internal controls and procedures used to prevent fraud in student loan repayments.

A copy of the letter is found at:

<https://oversight.house.gov/wp-content/uploads/2023/05/Comer-Foxx-Sessions-letter-to-Cardona-IDR.pdf>.

ED Announces a Timing Update on Title IX Rulemaking

On May 26, 2023, the Department of Education announced in a blog post a timing update on Title IX rulemaking. The Title IX proposed regulations were released on July 12, 2022, and the Department received more than 240,000 public comments, which is why the Department is now expected to delay the publication of the final rules on Title IX until October 2023.

A copy of the NPRM can be found at: <https://www.govinfo.gov/content/pkg/FR-2022-07-12/pdf/2022-13734.pdf>.

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A copy of the blog post is found at: <https://blog.ed.gov/2023/05/a-timing-update-on-title-ix-rulemaking/>.

ED Releases DCL on Accreditation and Eligibility Requirements for Distance Education

On May 18, 2023, the Department of Education released a Dear Colleague Letter (DCL) (GEN-23-09) to clarify the Department’s guidance on accreditation and Title IV eligibility requirements for distance education. In an electronic announcement of January 19, 2021, the Department provided guidance with respect to institutional eligibility for distance education and expectations of nationally recognized institutional accrediting agencies where certain requirements were waived until October 7, 2023.

Since the national pandemic has expired, an institutional accrediting agency must have distance education included in its scope of recognition if it accredits an institution that offers any portion of a program via distance education and must have a process in place to review institutions offering any distance education for effective delivery of distance education. The Department also reminds institutional accrediting agencies that their policies must require approval of a substantive change whenever an accredited institution increases distance education to meet or exceed the 50 percent threshold.

The DCL outlines the requirements for institutions that offer any portion of a Title IV program via distance education and the requirements for institutional accrediting agencies that accredit an institution that offers any portion of a Title IV program via distance education.

A copy of the DCL is found at: <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-05-18/accreditation-and-eligibility-requirements-distance-education>.

ED Releases Proposed Rules on Gainful Employment, Financial Responsibility, Administrative Capability, Certification Procedures and Ability to Benefit Provisions

On May 17, 2023, the Department of Education released proposed regulations, which were published in the *Federal Register* on May 19, 2023, to “establish the strongest set of safeguards ever to protect students from unaffordable debt or insufficient earnings from career training programs.” In addition, the Department stated that the proposed rules would provide increased transparency to the true costs and financial outcomes of almost all programs. According to the press release, Secretary of Education Miguel Cardona said: “The rules proposed today are about helping ensure that when students invest in a

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postsecondary education, they get a solid return on investment and a greater shot at the American dream.”

The rules also propose changes to other regulatory areas that would “strengthen the Department’s ability to engage in targeted and proactive accountability to protect students, borrowers, and taxpayers.”

The NPRM includes the following provisions:

- **Gainful Employment (GE):** The proposed rules would implement both a debt-to-earnings ratio test and a high school earnings test on all certificate and degree programs offered at for-profit colleges and certificate programs at all other institutions of higher education. The debt-to-earnings test would require institutions to demonstrate that their graduates’ student loan debt is less than 8 percent of their annual income or no more than 20 percent of their discretionary income defined as income above 150 percent of the poverty line. The high school earnings test would require institutions to demonstrate that at least half of their graduates have higher earnings than a typical high school graduate in their state’s labor force who never pursued a postsecondary education. Institutions whose programs fail to meet either of these metrics would be required to notify students and would lose their Title IV eligibility after failing two out of three consecutive years. For a period of several years, institutions would be prohibited from introducing new GE programs that resemble failed programs.
- **Transparency on Financial Value:** The proposed rules would require all institutions of higher education to provide overall and programmatic information on their costs (including tuition and fees, books, and supplies), non-federal grant aid, typical borrowing amounts (both federal and private loans), earnings, any applicable occupational and licensing requirements, and licensure exam passage rates. This information should be made publicly available on a Department of Education website, and students would need to acknowledge viewing these disclosures before receiving loans to attend programs that fail the provisions of the gainful employment rules. In addition, ED said that it will create a separate watch list of the least financially valuable postsecondary education programs through separate agency actions.
- **Financial Responsibility:** The Department says the proposed rules would simplify the system that the Department uses to secure upfront financial protection when colleges exhibit signs of financial struggle, such as significant debts or liabilities from a lawsuit or is at risk of losing access to Title IV programs.

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- **Administrative Capability:** The proposed rules would increase requirements for colleges to establish initial and ongoing administrative capability. These requirements would involve enhanced disclosure or certification obligations, including additional student disclosures relating to cost of attendance, available financial assistance, and award deadlines. The proposed rules would add a new requirement that institutions must have “adequate career services” in order to be administratively capable.
- **Certification Procedures:** The proposed rules would grant the Department more discretion to deny initial certification or recertification, to place institutions on provisional approval, or to impose requirements on institutions as a condition of participation (i.e., growth restrictions).
- **Ability to Benefit:** The proposed rule mirrors the Department’s negotiated rulemaking proposal, which outlines the requirements for demonstrating that programs are “eligible career pathway programs.”

A copy of the Secretary’s announcement, which includes a fact sheet on the GE and transparency parts of the rules and a fact sheet on the other provisions in the regulatory package, along with the unofficial copy of the proposed rules, is found at:

<https://www.ed.gov/news/press-releases/department-education-releases-proposed-rules-accountability-certificate-and-profit-programs-and-transparency-unaffordable-student-debt>.

A copy of the NPRM from the *Federal Register* is found at:

<https://fsapartners.ed.gov/knowledge-center/library/federal-registers/2023-05-19/nprm-financial-value-transparency-and-gainful-employment-ge-financial-responsibility-administrative-capability-certification-procedures-and-ability-benefit-atb>. Comments are due on or before June 20, 2023. The Department expects to finalize the rules by November 1, 2023, which will go into effect on July 1, 2024.

ED Updates Third-Party Servicer Guidance

On May 16, 2023, the Department of Education issued Dear Colleague Letter (DCL) GEN-23-08 removing the effective date of third-party servicer guidance included in Dear Colleague Letter GEN-23-03, and stating that the guidance will not go into effect until six months after a revised final DCL is issued. DCL GEN-23-03 was intended to ensure oversight of additional entities that have been performing aspects of institutions’ participation in the Title IV programs, including recruiting, retention, and the provision of educational content and instruction, but after receiving more than 1,000 comments, ED realized institutions needed additional time to be in compliance. The DCL also removed the

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prohibition on contracts between institutions and foreign-owned or operated third-party servicers.

A copy of the DCL is found at: <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-05-16/update-third-party-servicer-guidance-gen-23-03#>.

University of Phoenix Intends to Affiliate with University of Idaho

On May 17, 2023, the University of Idaho announced that “the University of Idaho and the University of Phoenix intend, with the appropriate approvals, to affiliate with the goal of increasing access to all learners, improving capacity for supporting all learners and helping all learners achieve their higher education goals.” According to several newsletters, the University of Idaho would create a new nonprofit corporation that would issue bonds to pay \$550 million to buy Phoenix’s assets, which include about 85,000 students, significant technology, and about 3,000 full-time and adjunct faculty. The arrangement will require approvals from the Higher Learning Commission, the University of Phoenix’s accreditor, and the Northwest Commission on Colleges and Universities, the University of Idaho’s accreditor.

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