POWERS
POWERS PYLES SUTTER & VERVILLE PC
ATTORNEYS AT LAW

WASHINGTON UPDATE

JANUARY 2020

Senator Elizabeth Warren Announces Bankruptcy Reform Plan to Include Discharging Student Loans

On January 7, 2020, Senator Elizabeth Warren (D-MA), who is running for the Democratic nomination for President, announced a plan to repeal the changes made in 2005 to the bankruptcy code and overhaul consumer bankruptcy rules. The proposal would make it easier for people being crushed by debt to obtain relief through bankruptcy by streamlining the bankruptcy process and reducing the costs of filing for bankruptcy. Senator Warren said: "We have a student loan debt crisis in America. And one reason is that our bankruptcy system makes it nearly impossible to get rid of that debt, even when you have nothing left."

A copy of Senator Warren's plan is found at: https://medium.com/@teamwarren/fixing-our-bankruptcy-system-to-give-people-a-second-chance-f1dd0812a65a.

House Majority Leader Hoyer and Senator Durbin Urge their Colleagues to Nullify ED's Most Recent Version of the Borrower Defense to Repayment Rule

On January 3, 2020, House Majority Leader Steny Hoyer (D-MD) circulated a Dear Colleague letter outlining the House schedule for January. The letter indicated that the House would consider House Joint Resolution 76, which states that the House would use the *Congressional Review Act (CRA)* to nullify the Department of Education's most recent version of the borrower defense to repayment rule published on September 23, 2019 and effective July 1, 2020. Representative Susie Lee (D-NV) introduced House Joint Resolution 76.

The CRA process permits Congress to invalidate a regulation issued by an executive branch agency by a simple majority vote, leaving the prior rule in place and preventing the agency from regulating again. Under the CRA process, the joint resolution must pass both the House and Senate and be signed into law by the President.

On January 13, 2020, the President issued a Statement of Administration Policy stating that if the President was presented with H.J Res. 76, "his advisors would recommend that he veto it." "This resolution would undermine the Administration's efforts to protect students and taxpayers by nullifying the Borrower Defense Institutional Accountability rule published on September 23, 2019. H.J. Res. 76 would restore the partisan regulatory regime of the previous administration, which sacrificed the interests of taxpayers, students, and schools in pursuit of narrow, ideological objectives."

A copy of the Statement of Administration Policy is found at: https://cecu.informz.net/cecu/data/images/WH%20Statement%20of%20Admin%20Policy%20on%20BDR.pdf.

Senator Dick Durbin (D-IL) urged his colleagues to support the *CRA* resolution (Senate Joint Resolution 56): "I'm asking my colleagues on both sides of the aisle: Put the party labels outside…stand up for students across America who did their best to get a college education and were deceived in the process. Stand up for students loaded up with student debt, which could destroy their lives, and give them a fighting chance for a future by saying that Secretary DeVos' borrower defense rule is unfair to veterans, unfair to students, and unfair to American families."

A copy of Majority Leader Hoyer's Dear Colleague letter is found at: https://www.majorityleader.gov/content/dear-colleague-house-vote-pfas-action-act-5g-legislation-borrower-defense-cra-protecting.

A copy of Senator Durbin's press release, which includes a copy of the Senate Joint Resolution, is found at: https://www.durbin.senate.gov/newsroom/press-releases/durbin-stand-up-for-veterans-students-and-families-by-overturning-devos-borrower-defense-rule.

Trump Signs into Law Budget Agreement for FY 2020, which Includes *Labor, Health and Human Services (HHS), Education, and Related Agencies Appropriations Act*

On December 20, 2019, President Trump signed into law a bill finalizing funding for the government for FY 2020 (P.L. 116-94). On December 17, 2019, the U.S. House of Representatives passed H.R. 1865, the *Further Consolidated Appropriations Act*, which includes the *Labor, Health and Human Services (HHS), Education, and Related Agencies Appropriations Act for FY 2020.* The vote was 297-120. On December 19, 2019, the U.S. Senate passed H.R. 1865, by a vote of 71 to 23.

Some of the major provisions of H.R. 1865 include the following:

- Provides $24.5 billion for federal student aid programs, $75 million above the 2019 enacted level. The funding supports a maximum Pell Grant of $6,345, an increase of $150 over last year; $865 million for the Federal Supplemental Educational Opportunity Grant program, an increase of $25 million above the 2019 enacted level; and $1.2 billion for Federal Work Study, an increase of $50 million above the 2019 enacted level. [We should expect the Department to publish the Pell Grant schedules no later than February 1, 2020.]

- Provides almost $1.8 billion for student aid administration, including funding for student loan servicing and implementation of FSA's Next Generation Financial Services Environment.

- Allows the Secretary to waive the cohort default rate provisions for an institution of higher education that offers an associate's degree, is a public institution, is located in an economically distressed county, and was impacted by Hurricane Matthew.

- Provides $2.3 million to conduct outreach to borrowers who may qualify for the Public Service Loan Forgiveness Program (PSLF) and includes $50 million to implement the second year of the Temporary PSLF Program for those borrowers that would qualify for the program if not for the fact that they are enrolled in graduated or extended repayment plans.

- Requires the Department to provide a report to Congress on steps taken to improve information to students who are eligible for total and permanent disability discharges of federal student loans or service obligations, and a report on the implementation of the data matching system with the U.S. Department of Veterans Affairs to facilitate the discharge of student loans for veterans with total and permanent disabilities.

- Provides in the bill report language to support the data-sharing agreement between the Department and the Internal Revenue Service included in the *Future Act*. [See article below on the *Future Act*.]

- Provides new language to protect federal student loan borrowers by directing the Department to "hold servicers accountable for high-quality outcomes, noncompliance with FSA guidelines, contract requirements (e.g., an understanding of federal and state law), and applicable laws, including misinformation provided to borrowers."

The bill also includes the following:

- Repeals the language within the *Tax Cuts and Jobs Act of 2017 (TCJA)* related to what is known as the "kiddie tax." According to the American Council on Education (ACE), the tax can "inadvertently cause harm to many low- and middle-income students who rely on scholarship aid to pay for their college education" by increasing the tax rates for those funds.

- Defines "qualified higher education expenses" to include those amounts paid as principal or interest on any "qualified education loan as defined under the Internal Revenue Code of a designated beneficiary or a sibling of a designated beneficiary not to exceed $10,000."

- Defines "qualified higher education expenses" to include expenses for fees, books, supplies, and equipment for participation of a designated beneficiary in an apprenticeship program registered and certified by the Secretary of Labor.

A summary of the bipartisan budget agreement released by the House is found at: https://appropriations.house.gov/news/press-releases/house-to-consider-domestic-priorities-and-international-assistance.

A copy of the press release released by the Senate Appropriations Committee is found at: https://www.appropriations.senate.gov/news/shelby-applauds-bipartisan-cooperation-encourages-colleagues-to-support-fy20-spending-packages-to-fully-fund-govt.

President Signs into Law the *Future Act*

On December 19, 2019, President Trump signed into law, H.R. 5363, the *Fostering Undergraduate Talent by Unlocking Resources for Education Act (Future Act)* (P.L. 116-91). H.R. 5363 passed the U.S. Senate by unanimous consent on December 10, 2019. Earlier on December 10, 2019, the U.S. House of Representatives passed H.R. 5363, by a vote of 319-96. The House-passed bill is similar to the bill passed by the Senate in the previous week, although it includes more prescriptive language added by the House Ways and Means Committee on when the Internal Revenue Service (IRS) can share taxpayer information for non-tax purposes, which Senate Health, Education, Labor and Pensions (HELP) Committee Chair Lamar Alexander (R-TN) and Ranking Member Senator Patty Murray (D-WA) helped to negotiate.

Chairman Alexander said that President Trump and Congress have delivered a Christmas present for millions of students and families after President Trump signed the bipartisan bill into law.

On December 5, 2019, the Senate passed an amendment to the *FUTURE Act*, which would permanently extend federal funding for Historically Black Colleges and Universities (HBCUs) and Minority Serving Institutions (MSIs) and allow the IRS to share taxpayer information with the Department of Education in order to simplify the Free Application for Federal Student Aid (FAFSA) and streamline income-driven repayment plans for students and their families. The amended bill was the result of a bipartisan agreement between the Senate HELP Committee Chairman Alexander and Ranking Member Murray, along with Senators Tim Scott (R-SC), Doug Jones (D-AL), Richard Burr (R-NC), and Chris Coons (D-DE). The agreement would offset the costs of the permanent HBCU-MSI funding with the passage of the *FAFSA Act.* The *FUTURE Act* passed by unanimous consent and is now on its way to the House of Representatives for consideration.

The bill was an amendment to the House-passed *FUTURE Act* on September 17, 2019, which would extend the annual funding for MSIs for just two years. The Senate version would provide a permanent funding stream to support STEM education at MSIs. Senate leaders determined that they could pay for permanent MSI funding with $2.8 billion in annual savings from improved accuracy in the federal student aid programs as a result of the direct data sharing between IRS and the Department of Education, that would lead to reduced improper payment plans and reduced risk of fraud in income-driven repayment (IDR) from self-certified income.

The *FUTURE Act* will:

- Permanently reauthorize and provide $255 million in annual mandatory funding for Historically Black Colleges and Universities and other Minority Serving Institutions;

- Be fully paid for by including the *FAFSA Act*, which passed the Senate unanimously last year, and which:

- Allows providing tax information only once—Students do not have to give their tax information to the federal government twice;
- Eliminates up to 22 questions—Students give permission to the Department of Education to request tax return data already given to the Internal Revenue Service, which reduces the 108 questions on the FAFSA by up to 22 questions;
- Eliminates the verification nightmare—For most students, the bill eliminates so-called "verification," which is a bureaucratic nightmare that 5.5 million students must go through annually to make sure the information they gave to the U.S. Department of Education is exactly the same as they gave to the IRS;
- Eliminates $6 billion in mistakes—According to the U.S. Department of Education, helps taxpayers by eliminating up to $6 billion each year in mistakes (both overpayments and underpayments) in Pell grants and student loans;
- Enables 7 million applicants who are currently unable to access their IRS data for their FAFSA to verify that they do not file taxes without requesting separate documentation from the IRS; and
- Streamlines income-driven repayment by eliminating burdensome annual paperwork for 7.7 million federal student loan borrowers on income-driven plans.

Chairman Alexander said about the bill: "First, it provides permanent funding for HBCUs and other Minority-Serving Institutions attended by over 2 million minority students. Second, it takes a big first step in simplifying the FAFSA for 20 million families, including 8 million minority students, and eliminating the bureaucratic nightmare created by requiring students to give the federal government the same information twice."

A copy of Senator Alexander's press release is found at: https://www.alexander.senate.gov/public/index.cfm/pressreleases?ID=8D71256C-C3D3-4EA4-A3D6-E017FD7AE21F.

A copy of Senator Alexander's press release on the FAFSA changes is found at: https://www.alexander.senate.gov/public/index.cfm/pressreleases?ID=B7971BF7-252A-424A-971F-30C2620F75BA.

Chairman of the House Education and Labor Committee Bobby Scott (D-VA) said on the House Floor and in a press release:

> "Unfortunately, despite their outsized role in serving our nation's most underserved students, these schools have historically been under-resourced compared to other institutions of higher education.
>
> "Now, after careful negotiation and compromise, the bill we are voting on today does not just guarantee more than $250 million per year for HBCUs and MSIs, it simplifies the Free Application for Student Aid, or FAFSA, and makes it easier for students to access student aid

> and repay their loans. I would like to give special thanks to Chairman Neal for his dedication and hard work in negotiating to bring this legislation to the floor."

A copy of Congressman Scott's press release is found at: https://bobbyscott.house.gov/media-center/press-releases/scott-praises-passage-of-future-act.

In a December 11, 2019 press release, Senate HELP Chairman Alexander said:

> "First, this legislation provides permanent funding, fully paid for, for Historically Black Colleges and Universities and other Minority Serving Institutions attended by over 2 million minority students. Second, after five years of bipartisan effort, this simplification of the FAFSA removes a huge roadblock for the millions of Americans who apply for federal grants and loans to attend college."

A copy of Senator Alexander's press release is found at:
https://www.alexander.senate.gov/public/index.cfm/pressreleases?ID=BA15A331-D8D3-4A58-84F4-0E9F7D2FE6C0.

Secretary of Education Betsy DeVos released a statement praising the enactment of the *Future Act.* Secretary DeVos said: "From eliminating up to 22 questions on the FAFSA form to reducing burdensome verification paperwork, applying for and receiving student aid will now be easier, faster and more secure than ever. Importantly, this law ensures students will not have to provide the government the same information twice, which also protects taxpayers from improper payments.

A copy of the Secretary's press release is found at: https://www.ed.gov/news/press-releases/secretary-devos-praises-higher-education-reforms-signed-law-simplify-fafsa-provide-consistent-funding-hbcus.

Durban and Takana and Seven Other Colleagues send Letter to Secretary of Veteran Affairs Urging the VA to Protect Veterans

On December 20, 2019, Senator Dick Durbin (D-IL) and Congressman Mark Takano (D-CA), along with Senators Jack Reed (D-RI), Sherrod Brown (D-OH), Richard Blumenthal (D-CT), and Elizabeth Warren (D-MA) and Representatives Susan Davis (D-CA), Mike Levin (D-CA), and Katie Porter (D-CA), sent a letter to Secretary of Veteran Affairs Robert Wilkie urging the Department of Veteran Affairs to protect veteran students in light of the recent Federal Trade Commission (FTC) settlements with two for-profit institutions for unfair, deceptive, and abusive practices.

A copy of the press release, including the text of the letter, is found at:
https://www.durbin.senate.gov/newsroom/press-releases/durbin-takano-va-must-protect-veteran-students-in-wake-of-ftc-settlements-with-for-profit-colleges.

Senator Mike Enzi Introduces Bill to Expand 90/10 Rule to All Colleges and Universities

On December 20, 2019, Senator Mike Enzi (R-WY) announced that he had introduced legislation, S. 3114, during the week that would ensure that "colleges and universities are evaluated using the same standards and regulations." Senator Enzi's bill would apply the 90/10 rule to all institutions of higher education. Currently the 90/10 rule requires for-profit institutions to receive no more than 90 percent of their revenue from federally-funded student aid. If the colleges are not in compliance, they could become ineligible to receive federal student aid.

A copy of Senator Enzi's press release is found at: https://www.enzi.senate.gov/public/index.cfm/news-releases?ID=F5C91A5E-572D-4123-8D26-F80121833FDF.

House Education Committee Holds Hearing on Borrower Defense to Repayment

On December 12, 2019, the House Education and Labor Committee held a hearing titled, "Examining the Education Department's Implementation of Borrower Defense," with Department of Education Secretary Betsy DeVos as the sole witness. Newspaper reports of the hearing indicated that the exchanges between the Secretary and the Democrats were "testy," with the Secretary testifying that the Department was working to address many of the borrower defense to repayment claims and the Democrats alleging that the methodology for calculating the amount of debt relief was flawed.

Chairman of the House Education Committee Bobby Scott (D-VA) said: "While the Department has been searching for a legal method of shortchanging defrauded borrowers, those defrauded borrowers have been left with mountains of debt, worthless degrees, and none of the job opportunities they were promised." Ranking Member Virginia Foxx (R-NC) said that "Secretary DeVos and the Education Department are committed to providing relief to students who have been harmed by fraudulent practices and are reforming the borrower defense to repayment rule to both clarify standards and make the process more accessible."

A copy of House Chairman Bobby Scott's opening statement is found at: https://edlabor.house.gov/imo/media/doc/RCBS%20OS%201212191.pdf.

A copy of Ranking Member Foxx's opening statement is found at: https://republicans-edlabor.house.gov/news/documentsingle.aspx?DocumentID=406792.

ED Releases Updated Quarterly Reports on its FSA Data Center

On January 3, 2020, the Department of Education released a series of updates to the quarterly application, disbursement, and portfolio reports on its FSA Data Center to include data through September 30, 2019. Some of the key findings include the following:

- About 16.1 million applications for the FAFSA were submitted for the 2019-2020 cycle;
- The outstanding federal student loan portfolio currently is $1.51 trillion and the Direct Loan portfolio represents 82 percent of the total;
- Enrollment in income-driven repayment (IDR) plans continues to increase with about 7.8 million Direct Loan borrowers in IDR plans, an 8 percent increase from the prior year;
- During the last quarter, FSA received approximately 15,000 new borrower defense to repayment applications, bringing the total to 288,000 applications. Almost 48,000 applications have been approved resulting in nearly $535 million in discharges; and
- About 110,000 borrowers have submitted more than 136,000 applications for discharge under the Public Service Loan Forgiveness (PSLF). Of the 125,000 applications processed, more than 74 percent were ineligible due to not meeting the program requirements and 24 percent were ineligible due to missing or incomplete information. As of September 30, 2019, 1,561 PSLF applications have been approved.

A copy of the electronic announcement is found at: https://ifap.ed.gov/eannouncements/010320FSAPostsNewReportstoFSADataCenter.html.

ED Announces Meeting of the Higher Education Triad

On December 23, 2019, emails were sent on behalf of Secretary of Education Betsy DeVos to members of the triad announcing a meeting of the higher education regulatory triad to be held on January 29, 2019. The goal of the meeting is to discuss potential solutions to concerns shared about institutions and students. The discussion will include a review of recent changes in the Department's rules on accreditation and state authorization. Also included are discussions on ways to better identify and monitor financially fragile institutions, to support innovation in higher education, and to navigate school closures in ways that best meet the needs of affected students.

Department Announces Launch of Federal Student Aid Information Hub for Students and Borrowers

On December 23, 2019, Secretary of Education Betsy DeVos announced the debut of a new, centralized hub for customers to access student aid information. The new StudentAid.gov is now the singular place where students, parents, and borrowers can learn about types of student aid, find the right repayment plan, complete loan counseling, and complete the FAFSA form. Borrowers can now access all the loan servicer contact centers through one phone number: 1-800-4-FED-AID. Secretary DeVos also announced that *Aidan,* FSA's new digital assistant, is also making its debut. Aidan, a new chatbot, can already answer more than 800 questions about federal student aid and is learning more from feedback submitted by users during a pilot program.

Secretary DeVos said: "By centralizing the information they need on one website, providing one singular phone number to call, and continually improving our mobile app, we can better serve students and cut down on the confusion of navigating the federal student aid process."

A copy of the press release is found at: https://www.ed.gov/news/press-releases/secretary-devos-delivers-promise-launch-centralized-federal-student-aid-information-hub-students-borrowers.

On December 20, 2019, the Department of Education issued an announcement regarding the availability of Federal Student Aid's online training module that provides an overview of Next Gen FSA's enhanced StudentAid.gov.

A copy of the announcement is found at: https://ifap.ed.gov/dpcletters/ANN1907.html.

Department Announces Recovery Assistance for Students and Schools Impacted by Natural Disasters

On December 19, 2019, Secretary of Education Betsy DeVos announced new federal assistance for students and schools in 13 states and the Commonwealth of the Northern Mariana Islands impacted by Hurricanes Florence and Michael, Typhoon Mangkhut, Super Typhoon Yutu and other natural disasters in 2018 and 2019. The $155 million in grant funds will be used to aid a variety of education-related disaster recovery efforts.

A copy of the press release is found at: https://www.ed.gov/news/press-releases/department-education-announces-recovery-assistance-students-schools-impacted-natural-disasters.

Department Earns A+ for Technology Modernization

On December 16, 2019, Secretary of Education Betsy DeVos issued a press release announcing that the Department of Education has earned an A+ from the House Committee on Oversight and Reform for its work to modernize and secure its information technology systems. The high grade was earned on the December 2019 Federal Information Technology Acquisition Reform Act (FITARA) scorecard. The Department received high marks in five of the seven categories, including transparency and risk management, software licensing, agency CIO authority enhancements, portfolio review, and data center optimization initiative. Just four years ago, the Department scored an F. The FITARA scorecard, issued biannually, uses data from the Government Accountability Office (GAO) to make its determinations.

A copy of the press release is found at: https://www.ed.gov/news/press-releases/department-education-earns-technology-modernization.

ED Releases NPRM for TEACH Grants and Faith-Based Entities

On December 10, 2019, the Department of Education released a Notice of Proposed Rulemaking (NPRM) for the Teacher Education Assistance for College and Higher Education (TEACH Grant Program) and faith-based entities, which resulted from the 2018-2019 negotiated rulemaking. Consensus was reach by the negotiators on all of the topics, and therefore, ED adhered to the consensus regulations. Secretary DeVos said regarding the proposed TEACH Grants: "This proposed rule ensures educators who received TEACH Grants and who are meeting their service requirements do not have grants converted to loans improperly or as a result of confusing bureaucrat paperwork." In addition, the proposed rules "ensure that individuals and institutions are not forced to choose between upholding their deeply-held faith or participating in federal funding programs." Comments are due by January 10, 2020 and the Department expects to finalize the rule by November 1, 2020, meaning that the provisions would become effective July 1, 2021 unless the Secretary exercises her authority to permit early implementation.

A copy of the Secretary's press release is found at: https://www.ed.gov/news/press-releases/secretary-devos-proposes-expanded-access-teach-grants-religious-liberty-protections-faith-based-institutions.

A copy of the NPRM is found at: https://ifap.ed.gov/fregisters/attachments/FR121119.pdf.

Secretary Approves New Methodology for Providing Student Loan Relief Assessing BDR Claims

On December 10, 2019, the Secretary of Education announced the Department has implemented a new methodology for assessing borrower defense to repayment (BDR) claims. Under the new methodology, the Department would calculate the amount of debt relief based on a student's estimated earnings utilizing earnings from the publicly available 2017 Gainful Employment earnings data, Social Security Administration earnings, College Scorecard data, and Internal Revenue Service information. A comparison of the median earnings of graduates who have made BDR claims to the median earnings of graduates from comparable programs will determine the amount of student loan relief that students will receive.

According to the announcement, hundreds of claims adjudicated utilizing the new methodology, mostly Corinthian and ITT borrowers, will be released. FSA will also notify borrowers that their loans are ineligible for relief under the 2016 BDR regulation.

House and Senate Democrats were critical of the methodology where borrowers would not obtain full relief. Chairman of the House Education and Labor Committee Bobby Scott (D-VA) said that the Department should provide full relief to defrauded borrowers rather than "inventing another scheme to provide students less relief than the law allows." Ranking Member of the Senate Health, Education, Labor and Pensions (HELP) Committee Patty Murray (D-WA) agreed and said that "If a student has been cheated or defrauded by their college, they should get their money back, plain and simple…"

A copy of the Secretary's press release is found at: https://www.ed.gov/news/press-releases/secretary-devos-approves-new-methodology-providing-student-loan-relief-borrower-defense-applicants.

A copy of Chairman Scott's press release is found at: https://edlabor.house.gov/media/press-releases/scott-statement-on-department-of-educations-new-formula-for-denying-defrauded-borrowers-full-debt-relief.

A copy of Ranking Member Murray's press release is found at: https://www.help.senate.gov/ranking/newsroom/press/senator-murray-statement-on-betsy-devos-newly-announced-borrower-defense-relief-methodology_-.

ED's OIG Releases FY 2020 Annual Plan

In December 2019, the Office of Inspector General released its FY 2020 Annual Plan, which includes a summary of its major plans for next year. The OIG plans to conduct audits and investigations of the following areas:

- FSA's transition to the NextGen Financial Services Environment;
- FSA's implementation of the NextGen Payment Vehicle Account Program Pilot;
- FSA's alignment of goals and performance measures as a performance-based organization and FSA's processes relating to establishing performance objectives;
- Schools' compliance with the requirements for using professional judgement to adjust students' financial information; and
- Audits, inspections, and investigations of selected program participants based on referrals and Hotline allegations of fraud, waste, or abuse of Federal funds.

A copy of the FY 2020 Annual Plan is found at: https://www2.ed.gov/about/offices/list/oig/misc/wp2020.pdf.

Democratic Presidential Candidate Bloomberg Supports Expanding Pell Grants

On January 8, 2020, former New York City Mayor and Democratic Presidential Candidate Mike Bloomberg released his "All-In Economy" agenda, which states that he would make education and training a priority should he become President. The proposal calls for "invest[ing] in states, community and technical colleges, and others to build career-training systems and programs providing skills and credentials employers identify as priorities for hiring for good jobs – and the supports that learners need to participate and get ahead." The plan also proposes investing in community college partnerships and apprenticeships that connect people with identifiable jobs and career paths.

A copy of Mike Bloomberg's agenda is found at: https://www.bbhub.io/mike/sites/27/2020/01/Jobs-Rollout-Press-Release-Fact-Sheet.pdf.

Sharon H. Bob, Ph.D.
Higher Education Specialist
Powers Pyles Sutter and Verville PC
1501 M Street, NW, Suite 700
Washington, DC 20005
T: 202-872-6772
F: 202-785-1756
January 15, 2020