

WASHINGTON UPDATE

JULY 2017

President Trump Signs Executive Order Expanding Apprenticeships

On January 12, 2017, Secretary of Labor Alexander Acosta addressed the issue of workforce development at President Trump's first meeting with a fully confirmed Cabinet. Secretary Acosta delivered a presentation on the importance of expanding apprenticeships and the need for all federal agencies to support the Administration's apprenticeship initiative. He distributed a memorandum to each member of the Cabinet.

The memorandum is found at:

<https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/workforce-development-memorandum.pdf>.

A press statement was issued on June 12, 2017 and is found at: <https://www.whitehouse.gov/the-press-office/2017/06/12/statement-press-secretary-workforce-development-week>.

On June 15, 2017, President Trump signed an Executive Order to expand apprenticeships in America. Implementing the Executive Order will cost \$200 million to be funded out of existing Department of Labor money and will be used to fund many of the six million jobs that are currently open. The Executive Order directs the Secretary of Labor to work with the Secretaries of Education and Commerce to consider proposing regulations that promote the development of apprenticeship programs by third parties. The third parties may include trade and industry groups, companies, non-profit organizations, unions, and joint labor-management organizations. The regulations should include an assessment of whether to determine how qualified third parties may provide recognition to high quality apprenticeship programs; establish guidelines that qualified third parties should follow to ensure that apprenticeship programs they recognize meet quality standards; provide that any industry-recognized apprenticeship program may be considered for expedited and streamlined registration under the registered apprenticeship program the Department of Labor administers; and establish review processes for considering whether to deny the expedited and streamlined registration or to terminate the registration of an apprenticeship program.

A copy of the executive order is found at: <https://www.whitehouse.gov/the-press-office/2017/06/15/presidential-executive-order-expanding-apprenticeships-america>

A copy of the White House Fact Sheet is found at: <https://www.whitehouse.gov/the-press-office/2017/06/15/president-trump-leads-workforce-development>.

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House and Senate Democrats Question the Legality of Delaying the Borrower Defense to Repayment Rule

On June 29, 2017, 48 House and Senate Democrats sent a letter to Secretary of Education Betsy DeVos expressing opposition to the Department of Education's recent decision to delay the borrower defense to repayment rule. They questioned the ability of the Department to invoke the Administrative Procedure Act (APA) to delay the effective date of the rule. "The Department has never before used a justification under 5 U.S.C. Section 705 to delay the implementation of a pending regulation due to litigation. To do so now in order to delay consumer protections for student borrowers and safeguards for taxpayers is both highly unusual and legally suspect." The letter also questions the Department's notice delaying the effective date for institutions to modify their contracts to ban arbitration and noted that institutions have had eight months to prepare for implementation and many "responsible institutions would have already done the work to come into compliance with this provision, as it was set to go into effect less than a month before the delay was announced." Finally, the letter questioned the Department's assertion that the delay of the borrower defense to repayment rule will avoid significant costs to the federal government and taxpayers.

A copy of the letter is found at:

<https://www.help.senate.gov/imo/media/doc/062917%20DeVos%20BD%20Delay%20Letter.pdf>.

House Democrats Urge ED to Reconsider the Delay of the GE and BDR Rules

On June 22, 2017, Mark Takano (D-CA), Raúl M. Grijalva (D-AZ), Suzanne Bonamici (D-OR), Jared Polis (C-CO), and Carol Shea-Porter (D-NH) from the House Education and the Workforce Committee wrote to Secretary of Education Betsy DeVos urging her to reconsider the delay of the gainful employment and the borrower defense to repayment rules. The decision to delay and revisit the rules suggests that the rules may be weakened or repealed. "A delay or attack on these two safeguards could leave taxpayers and students on the hook when schools commit abuses or suddenly shut their doors; impede justice for defrauded students; and make more opaque career education programs that impose long-term financial hardships for graduates."

ED Holds Public Hearing to Receive Feedback on its Proposed Neg Reg Process to Review the GE and BDR Rules

On July 10, 2017, the Department of Education held the first of two public hearings to receive feedback on its proposed negotiated rulemaking process to revise the final rules for gainful employment (GE) and borrower defense to repayment (BDR). Acting Assistant Secretary for Postsecondary Education Kathleen Smith said that Secretary of Education Betsy DeVos' first priority when regulating higher education is to protect students and ensure that the nation's colleges are "serving their students well." She said that the Obama Administration had "missed an opportunity to get it right" with the regulations, and instead, they put in place "a muddled and

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unfair process where taxpayers are on the hook.” Ms. Smith said that it was time to take a step back and develop “clear, fair, and balanced rules.” Ms. Smith also said that the negotiated rulemaking committee on BDR rules would begin in November 2017 and the negotiated rulemaking committee on GE rules would begin in December 2017.

The Department heard from about 45 witnesses. Each of the 10 consumer groups criticized the Department for delaying the gainful employment and borrower defense to repayment rules and opposed any attempt to rewrite or weaken the rules including once again allowing arbitration agreements. The Department heard from seven school-based groups and each of them stated that the Department plays an important role in combating waste, fraud, and abuse but also criticized several aspects of the final rules. For instance, the United Negro College Fund (UNCF) said that the borrower defense to repayment rule does not provide due process for institutions that is equitable and transparent. The American Association of Community Colleges (AACC) said that the reporting requirements for gainful employment were burdensome and complicated. Three organizations for veterans made similar comments to those made by the consumer groups. About nine representatives from cosmetology schools described the impact on their schools. Betsy Mayotte with American Student Assistance expressed disappointment with the delay in the BDR rule and noted that the rule does not target high-quality, transparent schools, and protects taxpayers where recouped funding could support Pell, Grants and college access and success programs. Finally, ED heard from 15 presenters representing different categories, including the National Association of Student Financial Aid Administrators (NASFAA), the National Association of Independent Colleges and Universities (NAICU), and the National Association of College and University Business Officers (NACUBO) who criticized the financial responsibility requirements of the BDR rules.

The second public hearing will be at Southern Methodist University in Dallas, TX later this year.

Secretary of Education Issues Statement on Regulatory Reform Task Force Progress Report

On June 22, 2017, Secretary of Education Betsy DeVos announced the release of the Department’s first Progress Report developed by the Regulatory Reform Task Force as required by President Trump’s Executive Order 13777. The Regulatory Reform Task Force is made up of political appointees and career civil servants and the public can read its progress report on the Department’s website. Secretary DeVos said: “The Regulatory Reform Task Force has been hard at work over the last few months cataloging over 150 regulations and more than 1,700 pieces of policy guidance on the books at the Department of Education.” The Task Force has been tasked with making recommendations as to which regulations should be repealed, modified or kept in an effort to protect students.

The Report states that the Office of Postsecondary Education (OPE) plans to convene meetings with higher education associations as well as conduct hearings on regulatory relief to gather ideas. In reviewing and analyzing the rules, the Report notes that OPE has already identified GE and

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BDR for review and plan on commencing negotiated rulemaking proceedings for both sets of rules.

The press release is found at: <https://www.ed.gov/news/press-releases/secretary-devos-issues-statement-regulatory-reform-task-force-progress-report>.

The progress report is found at: <https://www2.ed.gov/documents/press-releases/regulatory-reform-task-force-progress-report.pdf>.

Secretary Delays Certain Provisions of the Gainful Employment Provisions

On June 30, 2017, Secretary of Education Betsy DeVos announced that institutions will have additional time to comply with certain provisions in the gainful employment rules. A *Federal Register* Notice of June 30, 2017, announced that the Department will delay until July 1, 2018, the requirements to implement 34 C.F.R. § 668.412(d) and (e), which would require institutions to include the GE disclosure template or the link on their GE program promotional materials and to directly distribute the GE disclosure template to prospective students. The Department believes it should evaluate the utility of the disclosure provisions to students prior to requiring institutions to include the disclosure template or the link on their GE program promotional materials and to directly distribute them to prospective students. On the same day, Electronic Announcement #106 was issued explaining that certain provisions in the GE rules would be delayed until July 1, 2018.

Institutions must implement 34 C.F.R. § 668.412(c), by July 1, 2017, which is providing the updated GE disclosure template on its GE program web pages.

In addition, the Department of Education will extend the deadline for all programs to file alternate earnings appeals in response to the June 28, 2017 Court Order in *American Association of Cosmetology Schools v. DeVos*, Civil Action No. 17-0263. On June 28, 2017, U.S. District Judge Rudolph Contreras blocked the gainful employment rules relating to how for-profit cosmetology schools appeal their graduates' earnings. Judge Contreras ordered the Department to give for-profit cosmetology programs more flexibility to appeal their earnings data of their graduates, ruling that the gainful employment rule arbitrarily and capriciously restricted the appeals process for those schools because it did not take into account the issue of unreported income even though the agency "openly acknowledged that underreporting is an issue, even identifying cosmetology schools by name."

A copy of the *Federal Register* Notice is found at: <https://www.gpo.gov/fdsys/pkg/FR-2017-07-05/pdf/2017-14186.pdf>.

A copy of the Secretary's press release is found at: <https://www.ed.gov/news/press-releases/devos-presses-pause-burdensome-gainful-employment-regulations>

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A copy of Electronic Announcement #106 is found at:

<https://ifap.ed.gov/eannouncements/063017GEEA106ExtensionComplDateEnhancDisclosures.html>.

A copy of the ruling is found at: <https://www.republicreport.org/wp-content/uploads/2017/02/AACS-v-Devos-complaint.pdf>.

Department Publishes Notice Seeking Input on Regulations that May be Appropriate for Repeal, Replacement, or Modification

On June 22, 2017, the Department of Education published a notice in the *Federal Register* seeking input on regulations that may be appropriate for repeal, replacement, or modification. This notice is issued in accordance with Executive Order 13777, Enforcing the Regulatory Reform Agenda, issued by President Trump on February 24, 2017, which directed federal agencies to establish task forces “to alleviate unnecessary regulatory burdens.” Last month, Acting Under Secretary James Manning wrote to a number of Senators who inquired about the President’s regulatory task force that the Executive Order would be “carried out through a collaborative effort by both political and career staff.” The request is part of that directive. Comments are due no later than August 21, 2017.

A copy of the notice is found at: <https://www.gpo.gov/fdsys/pkg/FR-2017-06-22/pdf/2017-13157.pdf>.

A copy of Acting Under Secretary’s letter of May 31, 2017 is found at:

<https://bloximages.newyork1.vip.townnews.com/newsadvance.com/content/tncms/assets/v3/editorial/3/b5/3b5c2874-4d45-11e7-9ab1-bfada1844eb3/593aef5c5280d.pdf.pdf>.

Secretary of Education Announces Plans to Appoint Wayne Johnson as the Next COO of FSA

On June 20, 2017, Secretary of Education Betsy DeVos announced plans to appoint Wayne Johnson as the next Chief Operating Officer (COO) of Federal Student Aid (FSA). Mr. Johnson is the current Chief Executive Officer and President of Reunion Financial Services and would replace James Runcie, who resigned last month following a dispute over whether he would testify before the House Oversight and Government Reform Committee, regarding improper loan payments.

Secretary DeVos said: “Wayne is the right person to modernize FSA for the 21st Century. He actually wrote the book on student loan debt and will bring a unique combination of CEO-level operating skills and an in-depth understanding of the needs and issues associated with student loan borrowers and their families. He will be a tremendous asset to the Department as we move forward with a focus on how best to serve students and protect taxpayers.” Mr. Johnson held senior positions at VISA and Deloitte and began his own company, which captures credit card transactions in real time and alerts card holders to better manage their accounts. He wrote his doctoral dissertation on private student loan indebtedness.

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A copy of the Secretary's announcement is found at: <https://www.ed.gov/news/press-releases/secretary-education-betsy-devos-announces-intent-appoint-dr-wayne-johnson-chief-operating-officer-federal-student-aid>.

On June 21, 2017, Chairman of the House Education and the Workforce Committee Virginia Foxx (R-NC) issued a statement of support for Wayne Johnson stating that the Committee hopes that "Dr. Johnson can work with Secretary DeVos to bring accountability and leadership to the office."

A copy of Chairman Foxx's statement is found at:
<https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=401778>.

Department Releases Guidance on Implementing Year-Round Pell Grants

On June 19, 2017, the Department of Education released guidance as to how institutions should implement year-round Pell Grants, the provision included in the *Consolidated Appropriations Act, FY 2017*, signed into law by President Trump on May 5, 2017. P.L. 115-31 authorized the expansion of the Pell Grant program that will allow an eligible student to receive up to 150 percent of his/her scheduled Pell Grant award beginning with the 2017-2018 award year.

Secretary DeVos said in her press release: "This decision is about empowering students and giving them the flexibility and support needed to achieve their goals. Expanding access to the Pell program, so that students who need additional resources can graduate more quickly and with less debt, is the right thing to do."

A copy of the Secretary's press release is found at: <https://www.ed.gov/news/press-releases/secretary-education-betsy-devos-delivers-promise-year-round-pell-and-increased-flexibility-students>.

A copy of Dear Colleague letter GEN-17-06 providing guidance on the implementation of year-round Pell Grants is found at: <https://ifap.ed.gov/dpcletters/GEN1706.html>.

Department Delays Borrower Defense to Repayment and Announces Intent to Establish Neg Reg Committees for Borrower Defense to Repayment and Gainful Employment Rules

On June 14, 2017, Secretary of Education Betsy DeVos announced her intention to establish rulemaking committees on borrower defense to repayment (BDR) and gainful employment (GE) regulations. In addition, due to pending litigation challenging borrower defense to repayment regulations, the Department will be delaying the effective date of the BDR rule pursuant to Section 705 of the *Administrative Procedures Act*.

On June 16, 2017, the Department of Education published a notice in the *Federal Register* announcing that it will delay the borrower defense to repayment (BDR) rule, which was to go into

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effect on July 1, 2017. The delay is attributed to the May 24, 2017 filing of a complaint challenging the rule by the California Association of Private Postsecondary Schools (CAPPS). The Department stated that due to the pending litigation, justice requires the postponement of the BDR regulations. The Department announced that it would continue to process borrower defense claims under existing regulations.

Separately, the Department announced in another notice in the June 16, 2017 *Federal Register* its plan to establish negotiated rulemaking committees to review and revise the gainful employment regulations and the borrower defense to repayment regulations. Two public hearings will be held in on July 10, 2017 and July 12, 2017. The Department anticipates beginning negotiated rulemaking for up to three sessions beginning in November or December 2017. If GE and BDR rules are finalized by November 1, 2018, they would go into effect on July 1, 2019.

The Secretary said: “My first priority is to protect students. Fraud, especially fraud committed by a school, is simply unacceptable. Unfortunately, last year’s rulemaking effort missed an opportunity to get it right. The result is a muddled process that’s unfair to students and schools, and puts taxpayers on the hook for significant costs. It’s time to take a step back and make sure these rules achieve their purpose: helping harmed students. It’s time for regulatory reset.”

A copy of the Notice to delay BDR is found at: <https://www.gpo.gov/fdsys/pkg/FR-2017-06-16/pdf/2017-12562.pdf>.

A copy of the Notice announcing intent to establish neg reg is found at: <https://www.gpo.gov/fdsys/pkg/FR-2017-06-16/pdf/2017-12555.pdf>.

A copy of the Secretary’s announcement that she would be establishing negotiated rulemaking committees for BDR and GE is found at: <https://www.ed.gov/news/press-releases/secretary-devos-announces-regulatory-reset-protect-students-taxpayers-higher-ed-institutions>.

ED Dismisses the Attorneys General Lawsuit as “Ideologically Driven”

On July 6, 2017, the Department of Education’s spokeswoman Liz Hill was reported to have responded to the lawsuit filed by the 18 state Attorneys General over the Department’s delay of the borrower defense to repayment (BDR) regulations by saying that it was “ideologically driven.” She said that the rules were drafted through a “heavily politicized process” that “failed to account for the interests of all stakeholders.” Ms. Hill defended the Department’s decision to delay the BDR rules based on a legal challenge filed by the California Association of Private Postsecondary Schools (CAPPS). She also said that the rules have “substantive and procedural flaws” that ED will consider when it rewrites the regulations.

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ED Files Documents Asking a Federal Judge to Deny Effort by Nine State Attorneys General to Intervene in the CAPPS Lawsuit

On July 10, 2017, the U.S. Department of Justice filed documents asking a federal judge to deny an effort by nine state attorneys general to intervene in a lawsuit filed by the California Association of Private Postsecondary Schools (CAPPS) against the Department. The attorneys general from Massachusetts, California, the District of Columbia, Illinois, Iowa, Maryland, New York, Oregon, and Pennsylvania should not be permitted to weigh-in on the lawsuit. The Department of Justice stated that the state attorneys general do not have standing because the rule does not directly impact their states. The attorneys general argued that ensuring the federal rule is enforced is related to their role of protecting students from predatory practices.

18 States and DC Attorneys General File Lawsuit Against the Secretary of Education Over the Delay in the BDR Rules

On July 6, 2017, eighteen states and the District of Columbia attorneys general filed a lawsuit against Secretary of Education Betsy DeVos over her delay of the borrower defense to repayment (BDR) regulations that were meant to provide protections for federal student loan borrowers. The lawsuit led by Massachusetts and 18 other attorneys general accuse the Secretary of illegally delaying the regulations, which were to go into effect on July 1, 2017. The rules would have made it easier for federal student loan borrowers to have their loans forgiven if they were defrauded by an institution. The rules also prohibited colleges from requiring students to use arbitration to resolve their complaints.

A copy of the lawsuit is found at: <http://www.mass.gov/ago/docs/press/2017/filed-complaint-massachusetts-et-al-v-devos.pdf>.

FSA Releases Updated Reports to its FSA Data Center

On July 10, 2017, the Office of Federal Student Aid (FSA) posted updated reports to its FSA Data Center. Key items include:

- **Outstanding Loan Portfolio Overview:** The outstanding federal student loan portfolio is \$1.33 trillion.
- **Application Volume and Aid Disbursements:** The 2017-2018 FAFSA was launched on October 1, 2016, three months earlier than in previous award years. As of March 31, 2017, 10.4 million applications were submitted for the 2017-2018 school year. This represents a 27 percent increase in applications submitted in the previous cycle through March 31, 2017.
- **Increased Enrollment in Income-Driven Repayment Plans:** Enrollment in income-driven repayment (IDR) plans continue to increase. As of March 2017, more than 6.2 million

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Direct Loan borrowers were enrolled in IDR plans, representing a 33 percent increase from March 2016.

- **Tracking Toward Public Service Loan Forgiveness:** The Public Service Loan Forgiveness (PSLF) Program, which was established under the *College Cost Reduction and Access Act of 2007*, permits Direct Loan borrowers who make 120 qualifying monthly payments under a qualifying repayment plan, while working full-time for a qualifying employer, to have the remainder of their balance forgiven. Through March 2017, about 1.5 million Employment Certification Forms have been submitted and about two-thirds have been approved.
- **New Direct Loan Defaults and Delinquency Rates Fall:** For the fifth consecutive quarter, new Direct Loan defaults have decreased as a percentage of recipients in repayment the previous quarter. Direct Loan delinquency rates are also down compared to the same time period last year.

A copy of the electronic announcement is found at:

<https://ifap.ed.gov/eannouncements/071017FSAPostsUpdatedReportstoFSADataCenter.html>.

Borrower Advocates Ask to Intervene in *CAPPS v. Betsy DeVos* Case

On June 15, 2017, Public Citizen and the Project on Predatory Student Lending at Harvard Law School asked a federal judge for permission to intervene in the case, *California Association of Private Postsecondary Schools (CAPPS) v. Betsy DeVos*. The motion was filed on behalf of two students who claimed to be defrauded by the New England Institute of Art. The students had wanted to sue the school but were unable to do so because of the arbitration clause in their enrollment agreement.

On May 25, 2017, CAPPS filed a complaint against the Department of Education in an attempt to block the implementation of the borrower defense to repayment rules that were to go into effect on July 1, 2017.

A copy of the motion to intervene is found at: <http://www.legalservicescenter.org/wp-content/uploads/2012/10/Doc-22-Borrower-Motion-to-Intervene.pdf>.

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