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Higher Ed Litigation Summary

Thompson Coburn's Higher Education Litigation Summary is your resource for legal updates on key rulings and ongoing cases shaping the higher education sector. This installment covers updates related to Gainful Employment, the Bare Minimum Rule, BDR, Student Loan Forgiveness, Title IX, False Claims Act, Nonprofit Institution Status, Federal Funding Freeze, DEI Executive Orders, and the Executive Order Directing the Closure of ED.

Gainful Employment

Overview

In October 2023, the U.S. Department of Education ("ED") published a new Gainful Employment Rule ("GE Rule"). The GE Rule sets forth complex debt and earnings metrics that ED uses to measure whether programs are preparing students for "gainful employment in a recognized profession" under the Higher Education Act of 1965, as amended ("HEA"). 20 U.S.C. §§ 1088(b)(1)(A)(i); 1002(b)(1)-(2), (c)(1)-(2). Programs failing the metrics risk losing Title IV eligibility.

Prior to its July 1, 2024 effective date, two lawsuits from the cosmetology school community challenged the GE Rule. *American Association of Cosmetology Schools v. U.S. Dep't of Ed.*, No. 23-cv-01267 (N.D. Tex.); *Ogle School Management v. U.S. Dep't of Ed.*, No. 24-cv-00259 (N.D. Tex.). Plaintiffs in both cases argued the GE Rule was unlawful because Congress's definition of "gainful employment" in the HEA did not contemplate ED using such debt and earnings metrics. They argued the GE Rule was therefore in "excess" of ED's authority and was "arbitrary and capricious," in violation of the federal Administrative Procedure Act ("APA").

The *Ogle School* plaintiffs moved for a preliminary injunction to stop the GE Rule from becoming effective, but the Northern District of Texas denied the motion in June 2024. The court held that the GE Rule likely did not clearly violate the statutory definition of "gainful employment," and further, was not arbitrary and capricious. Significantly, the court issued its opinion just days before the Supreme Court's landmark decision in *Loper Bright* overturning the *Chevron* deference doctrine. The *Ogle School* plaintiffs did not appeal the ruling denying its injunction motion. The two lawsuits were then consolidated in July 2024.

Current Status of Litigation

In September 2024, the parties filed cross motions for summary judgment. But in February 2025, after President Trump assumed office, ED asked the court for a 90-day stay of the litigation "to allow the new Administration to become familiar with and evaluate [its] position regarding the issues in this case." The court granted the motion and extended the remaining summary-judgment briefing deadlines through May 16, 2025, (or four days after the stay is terminated in the event it is modified). ED has also postponed GE reporting requirements until September 30, 2025.

If and when the stay is lifted, the court is likely to revisit its prior analysis of the GE Rule under the *Loper Bright* standard. Specifically, the court is expected to closely scrutinize the GE Rule to determine whether ED's interpretation of "gainful employment" in the HEA to permit the use of debt and earnings metrics is the "best" under the statute's plain meaning, rather than whether it "so clearly contradicts" the statutory definition.

Bare Minimum Rule

Overview

In October 2023, as part of a broader final rulemaking, ED promulgated the so-called "Bare Minimum Rule." Effective July 1, 2024, the Bare Minimum Rule restricted Title IV aid to GE programs that required the minimum

hours a state mandates for licensure in a given field. If a program's length exceeded the state's minimum hours, students are ineligible for Title IV aid for the additional hours. The Bare Minimum Rule departed from a prior "150% Rule" under which ED previously restricted Title IV aid to GE programs that did not exceed 150% of a state's minimum hours. Two lawsuits were filed challenging the Bare Minimum Rule under the APA: *360 Degrees Education, LLC v. U.S. Dep't of Ed.*, No. 24-cv-00508 (N.D. Tex.); *American Massage Therapy Association v. U.S. Dep't of Ed.*, No. 24-cv-01670 (D.D.C.).

Current Status of Litigation

In *360 Degrees Education*, the Northern District of Texas granted the plaintiffs' motion for an injunction in part on June 21, 2024. The court held that the Bare Minimum Rule was likely "arbitrary and capricious," emphasizing that it "represents a sea-change from thirty years of established practice." The next month, ED announced that it would revert to enforcing its prior program hour length requirements (under the 150% Rule) while the injunction remained in place.

Later, in December 2024, ED initiated an administrative proceeding to terminate an institutional plaintiff's Title IV eligibility. But after President Trump assumed office, ED in February 2025 filed a motion to stay the administrative proceeding for 60 days so it could review the arguments and theories it was advancing. There should be no movement in this case until mid-April 2025.

Meanwhile, in *American Massage Therapy*, plaintiff AMTA and ED filed cross motions for summary judgment in November 2024. ED, however, also requested a stay of this case in early 2025. On February 27, 2025, the court stayed all deadlines pending the resolution of the administrative proceeding against the plaintiff in *360 Degrees Education.*

Borrower Defense to Repayment

2022 BDR Rule

Overview

In November 2022, ED published a final Borrower Defense to Repayment Rule **("2022 BDR Rule").** The 2022 BDR Rule, among other things, includes provisions creating a loan forgiveness adjudication system and a prohibition on pre-dispute arbitration agreements. The 2022 BDR Rule has been the subject of litigation for almost two years.

In February 2023, Career Colleges & Schools of Texas ("CCST") sued to challenge the 2022 BDR Rule's provisions, including the loan forgiveness adjudication system and its prohibition on pre-dispute arbitration agreements. *Career Coll. & Schs. of Texas v. U.S. Dep't of Ed.*, No. 23-cv-00433 (W.D. Tex.). The district court denied CCST's motion for a preliminary injunction, but the Fifth Circuit reversed in April 2024 and enjoined the challenged provisions on a nationwide basis.

Current Status of Litigation

In October 2024, ED petitioned the Supreme Court to review the Fifth Circuit's injunction. In January 2025, the Supreme Court granted ED's petition but only to consider the scope of ED's authority to implement the 2022 BDR Rule—not the propriety of the Fifth Circuit's nationwide injunction. After the change in administration, on January 24, 2025, ED filed a motion to hold the briefing schedule in abeyance "to allow for the Department to reassess the basis for and soundness of the borrower defense regulations." The Supreme Court granted the motion to hold briefing in abeyance on February 6, 2025.

2016 BDR Rule

Overview

In a separate case related to BDR, students sued ED for failing to process borrower defense claims under the 2016 BDR Rule. *Sweet v. Cardona*, No. 16-cv-3674(N.D. Cal.). The 2016 BDR Rule, which set standards for student borrowers to assert claims based on institutional misconduct, faced delays after ED under the first Trump administration paused adjudication of claims. In June 2022, a settlement was reached between ED and a class of students, resulting in $6 billion in debt discharges for students who attended 151 schools that were identified as having likely engaged in substantial misconduct. Four schools opposed the settlement, but the court approved it, finding that ED had statutory authority to settle the students' claims under 20 U.S.C. § 1082(a).

Current Status of Litigation

Three of the four schools appealed the settlement approval order, but in November 2024, the Ninth Circuit dismissed their appeal, ruling the schools lacked prudential standing. In December 2024, one of the appealing schools, Everglades College, petitioned the Ninth Circuit for rehearing en banc**.** ED, after the change in administration, filed a consent motion to extend the deadline to file a response to the rehearing petition until April 2, 2025. The Ninth Circuit granted the consent motion.

Student Loan Forgiveness

SAVE Plan

Overview

In July 2023, ED published a final rule creating a new plan to expand federal student loan borrowers' eligibility for loan forgiveness. Effective July 1, 2024, the "SAVE Rule" would have allowed borrowers to be eligible for loan forgiveness if they made repayments for 10 years at substantially lower amounts compared to prior regulations. ED claimed that it had authority for the SAVE Rule under 20 U.S.C. § 1087e(d)(1). In early 2024, two groups of states challenged the SAVE Rule in court, arguing that its early forgiveness and lower payment provisions were not congressionally authorized, and that ED therefore violated the APA. *State of Missouri et al. v. Biden et al.*,No. 24-cv-00520 (E.D. Mo.); *State of Kansas et al. v. Biden et al.*, No. 24-cv-01057 (D. Kan.).

Current Status of Litigation

In *State of Missouri*, the Eastern District of Missouri in June 2024 issued an order preliminarily enjoining the *loan forgiveness* provision, citing the lack of clear statutory authority under 20 U.S.C. § 1087e(d)(1). But the court did not enjoin the lower payment provision. Both the states and ED appealed the order to the Eighth Circuit. On August 9, 2024, the Eighth Circuit granted the states' motion for a temporary injunction prohibiting ED from implementing the *entirety* of the SAVE Rule pending the appeals. ED then asked the Supreme Court to vacate the injunction pending the appeals. In a brief, unsigned order, the Supreme Court denied ED's request in late August 2024.

The Eighth Circuit issued an opinion on February 18, 2025, dismissing ED's appeal of the district court's preliminary injunction. It held that 20 U.S.C. § 1087e(d)(1) "does not authorize loan forgiveness." It also held that it did not authorize the lower payment provision in the SAVE Rule.

In *State of Kansas*, the district court also issued a preliminary injunction order in June 2024. ED appealed the order to the Tenth Circuit, but the Tenth Circuit stayed the appeal while awaiting the Eighth Circuit's decision, since the two cases involved the same issue. After the Eighth Circuit's ruling, on February 20, 2025, the Tenth Circuit ordered the parties "to file supplemental briefs addressing how the Eighth Circuit's opinion affects these appeals." On March 21, 2025, the Tenth Circuit continued the stay of the appeal. During the continued stay, the parties are required to file a joint status report every 45 days.

Following the Eighth Circuit's dismissal of ED's appeal of the district court's injunction, the parties in that case normally would file motions for summary judgment in the district court and seek a final ruling on the merits. Given the Trump Administration's position regarding student loan forgiveness generally, however, it is unlikely ED will attempt to defend the SAVE Rule moving forward.

Proposed Rule Litigation

Overview

In April 2024, ED published a notice of proposed rulemaking ("Proposed Rule") that, like the SAVE Rule, also would have forgiven loan balances for qualifying borrowers. Eligibility for forgiveness under this Proposed Rule mirrored the eligibility criteria under the SAVE Rule, but ED claimed authority to forgive loans under an entirely different statute–20 U.S.C. § 1082(a)(6).

Current Status of Litigation

Several states filed a lawsuit, *State of Missouri et al. v. U.S. Dep't of Ed., et al.*, No. 24-cv-00103 (S.D. Ga.), and motion for an injunction in September 2024, challenging the Proposed Rule. As with the SAVE Rule challenges, they argued the Proposed Rule lacked clear statutory authorization. Ultimately, due to procedural issues regarding venue, the case has been in two separate federal district courts: first a court in Georgia and then a court in Missouri. Both courts, like the courts in the SAVE Rule cases, enjoined the Proposed Rule, once again citing the lack of statutory authority for loan forgiveness. This time, however, ED did not appeal the injunctions.

In December 2024, ED withdrew the Proposed Rule. The litigation technically remains active today because of an unresolved challenge to whether the Missouri court was a proper venue. However, given the Proposed Rule's withdrawal by ED under the Biden Administration, and the Trump Administration's stance on loan forgiveness, the Proposed Rule, like the SAVE Rule, is unlikely to be revived.

Title IX

Overview

On April 29, 2024, ED published a new Title IX rule ("2024 Title IX Rule"), which went into effect August 1, 2024. The 2024 Title IX Rule, among other things, expanded the definition of "discrimination on the basis of sex" to include discrimination on the basis of "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."

Current Status of Litigation

Twenty-six states and private parties filed or joined lawsuits seeking to block the implementation and enforcement of the 2024 Title IX Rule. The litigation initially resulted in several preliminary injunctions issued by multiple federal courts, but none on a nationwide basis; the injunctions instead only applied to schools in the plaintiff states and to schools where a member of a plaintiff organization was a student. This resulted in a patchwork application of the 2024 Title IX Rule, with some schools following the prior 2020 Title IX Rule from the first Trump Administration and others following the 2024 Title IX Rule.

However, on January 9, 2025, the Eastern District of Kentucky vacated the 2024 Title IX Rule on a nationwide basis. This decision was the first issued on the merits, meaning it is a final (not a preliminary) decision. The court's order noted several reasons for finding the 2024 Title IX Rule invalid, including that ED exceeded its statutory authority in expanding the definition of "sex," that the 2024 Title IX Rule was arbitrary and capricious, and that the 2024 Title IX Rule violated the First Amendment.

ED did not appeal the Eastern District of Kentucky's decision. But in late March 2025, two non-profit organizations moved to intervene in the case and filed notices of appeal to the Sixth Circuit. As for the other pending cases, after President Trump took office, ED withdrew their pending appeals in *Louisiana v. U.S. Dep't of Ed.*,No. 24-cv-00563 (W.D. La.) (5th Cir. No. 24-30399), *Kansas v. U.S. Dep't of Ed.*, No. 24-cv-04041 (D. Kan.) (10th Cir. No. 24-3097), *Oklahoma v. Cardona,* No. 24-cv-00461 (W.D. Oka.) (10th Cir. No. 24-6205), and *Arkansas v. U.S. Dep't of Ed.*, No. 24-cv-00636, (E.D. Miss.) (8th Cir. No. 24-2921).

Appeals remain pending in *Texas v. United States of America*, No. 24-cv-00086 (N.D. Tex.) (5th Cir. No. 24-10832) and *Alabama v. Cardona*,No. 24-cv-00533 (N.D. Ala.) (11th Cir. 24-12444).

The effect President Trump's January 20, 2025, Executive Order 14168 will have on the pending 2024 Title IX Rule litigation is an open question. Because the Executive Order states that the current administration will define "sex" as male or female, based on biological sex assigned as birth, it seems likely that ED will have little appetite to defend the 2024 Title IX Rule, and may use the Executive Order's definition in its investigations going forward.

False Claims Act

Overview

The *qui tam*, or whistleblower, provision of the False Claims Act ("FCA") was challenged in a lawsuit, ***United States ex rel. Zafirov*** *v. Florida Medical Associates LLC*, No. 19-cv-01236 (M.D. Fla.), originally filed in 2019. In their February 2024 motion for judgment on the pleadings, the defendants challenged whether whistleblowers could represent the federal government in FCA actions without violating the Constitution's Appointments Clause.

Current Status of Litigation

In September 2024, the district court issued its decision declaring the *qui tam* provision of the FCA unconstitutional, raising significant questions about the future of whistleblower litigation. The opinion stated that in cases where the government does not intervene and private individuals proceed representing the government in FCA claims anyway, it is a violation of the Appointments Clause. The government appealed to the Eleventh Circuit.

This ruling contradicts prior appellate court decisions, but it aligns with concerns raised by Justice Thomas in a 2023 opinion. The Supreme Court may ultimately agree to hear the case given the textualist leanings of the current justices. The Eleventh Circuit's briefing is currently underway.

If the ruling stands, it could significantly impact whistleblower litigation. If the Supreme Court declares the *qui tam* provision unconstitutional, it could either foreclose FCA whistleblower claims altogether (if a more broad application), or substantially limit them to cases only where the government intervenes (a more narrow application). The ruling could have broad implications, particularly in higher education, where FCA suits are prevalent. Depending on the outcome of the litigation, Congress could seek a legislative fix due to the substantial federal revenue generated by these suits.

Nonprofit Institution Status

Overview

Grand Canyon University ("GCU") filed a lawsuit, ***Grand Canyon University*** *v. Miguel A. Cardona et al.*, No. 21-cv-00177 (D. Ariz.), over ED's denial of GCU's request to convert to a nonprofit institution under the HEA. Although GCU had received IRS recognition as a 501(c)(3) nonprofit, ED denied its request because GCU failed to meet the HEA's nonprofit ownership and operational requirements. ED's denial was based on GCU's revenue-sharing agreement with its for-profit parent company, which ED argued meant the university did not meet the HEA's standards.

Current Status of Litigation

The district court's order sided with ED in GCU's challenge. GCU thereafter appealed and the Ninth Circuit reversed. The Ninth Circuit held that ED used incorrect standards for determining nonprofit status under the HEA and should have applied a less stringent test. The Ninth Circuit instructed ED to reconsider GCU's request using the correct standards.

ED did not seek rehearing in the Ninth Circuit. ED also did not file a petition for a writ of certiorari in the Supreme Court by its deadline to do so.

Federal Funding Freeze Litigation

Overview

On January 27, 2025, the Office of Management and Budget ("OMB") issued a memorandum directing federal agencies to pause all activities related to federal financial assistance impacted by various executive orders, including funding for foreign aid, DEI programs, and the Green New Deal. This pause was set to begin on January 28, 2025.

On January 29, 2025, however, OMB issued a new memorandum (M-25-14) purportedly rescinding the original directive, though White House Press Secretary Karoline Leavitt announced from her official social media account that the new memorandum was "NOT a rescission of the federal funding freeze," and instead only rescinded M-25-13. Post by Karoline Leavitt, X (formerly Twitter) (Jan. 29, 2025).

Several nonprofit organizations filed a lawsuit, *National Council of Nonprofits, et al. v. Office of Management and Budget*, No. 25-cv-00239 (D.D.C.), against OMB, claiming the pause violated the APA and the First Amendment.

Twenty-two states and the District of Columbia filed a separate lawsuit in Rhode Island, *New York v. Trump*, No. 25-cv-00039 (D.R.I.), against the President, several executive branch agencies, and the heads of those agencies. Both lawsuits were filed before OMB rescinded its original memorandum instituting the funding freeze.

Current Status of Litigation

On February 3, 2025, the court granted National Council of Nonprofits' motion for a temporary restraining order. It subsequently entered a preliminary injunction against OMB on February 25, 2025. The preliminary injunction enjoins OMB "from implementing, giving effect to, or reinstating under a different name the unilateral, non-individualized directives in [the OMB memorandum] with respect to the disbursement of Federal funds under all open awards."

The Rhode Island court issued a TRO against the government defendants on January 31, 2025, prohibiting the freeze on funds. The court later extended the TRO on February 6, 2025, and entered a preliminary injunction against the government defendants on March 6, 2025. The government defendants appealed the court's preliminary injunction order four days later and simultaneously sought a stay of the litigation while the appeal proceeded. The appellate court denied the motion to stay on March 31, 2025.

Executive Orders and Dear Colleague Letter Litigation

DEI Executive Orders

Overview

Shortly after taking office, President Trump issued two DEI Executive Orders: "*Ending Radical and Wasteful Government DEI Programs and Preferencing*," and "*Ending Illegal Discrimination and Restoring Merit-Based Opportunity*."

On February 3, 2025, higher education officials, restaurant workers, and the City of Baltimore together filed a lawsuit challenging the DEI Executive Orders in *National Assoc. of Diversity Officers in Higher Educ. et al. v. Donald J. Trump, et al.*, No. 25-cv-00333 (D. Md.). Their complaint argues that the DEI Executive Orders violate constitutional protections, including the First and Fifth Amendments, and infringe on Congress's authority over federal funding. They seek a declaratory judgment that the DEI Executive Orders are unconstitutional and an injunction to prevent their enforcement.

Current Status of Litigation

The court granted a preliminary injunction, agreeing that plaintiffs are likely to succeed on their First and Fifth Amendment claims. The court found that provisions in the DEI Executive Orders, particularly those related to "equity-related" grants and certifications, were vague and created uncertainty for contractors and grantees about whether they could comply. The court also found these provisions could infringe on their free speech and due process rights, as they could result in retaliation or punishment for expressing certain viewpoints. As a result, the injunction blocked enforcement of these provisions but does not address the separation of powers or spending clause issues raised.

The government appealed the preliminary injunction to the Fourth Circuit and asked for a stay of the injunction pending its appeal. The Fourth Circuit agreed to stay the preliminary injunction pending the appeal. Thus, currently, **the DEI Executive Orders are in force as of now, and at least as to the Department of Education.**

A number of other cases also challenge the DEI Executive Orders, but no ruling on the merits have been made, many of the which also challenge Executive Order 14168, "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government."

In *National Urban League v. U.S. Dep't of Ed.*, No. 25-cv-471 (D.D.C.), the plaintiffs challenge the DEI Executive Orders, claiming, among other things, they violated First and Fifth Amendments protections. Their preliminary injunction motion is fully briefed. A hearing has been held, but no ruling has been made yet. The court is considering whether the judge should recuse himself due to his wife being the director of the DC Department of Transportation.

In *San Francisco Aids Foundation v. U.S. Dep't of Ed.*, No. 25-cv-01824 (N.D. Cal.), the plaintiffs are claiming, among other things, the DEI Executive Orders violated First Amendment. The motion for preliminary injunction is currently being briefed, and a hearing is scheduled for May 22, 2025.

In *Chicago Women in Trades v. U.S. Dep't of Ed.*, No. 25-cv-2005 (N.D. Ill.), the plaintiffs filed a motion for a TRO and a hearing was held. The court granted the TRO on March 27, 2025, but it is limited. For now, it only applies to the Department of Labor ("DOL"). Until there is a decision on the merits of the preliminary injunction motion, the TRO in place restrains the DOL from acting under the DEI Executive Order's "Termination Provision," which terminates "equity-related grants and contracts," and its "Certification Provision," which requires grantees/contractees to certify that they are not engaged in "illegal discrimination." Next, the court will determine the preliminary injunction motion.

Dear Colleague Letter Litigation

In response to ED's February 14, 2025 Dear Colleague Letter ("DCL") and follow-up "Frequently Asked Questions, " a large teachers union sued ED to challenge the enforceability of the DCL on DEI issues. *Am. Federation of Teachers v. U.S. Dep't of Ed., et al.*, No. 25-cv-00628 (D. Md.). Plaintiffs argue the DCL goes beyond merely reiterating Title VI's requirements and instead "upends and re-writes otherwise well-established jurisprudence," misrepresenting the state of the law under Title VI and the Constitution. The plaintiffs contend that the DCL deviates from ED's previous interpretations of the law and seek to have the court declare it unlawful and unconstitutional. The preliminary injunction motion, seeking to enjoin ED from enforcing or taking any steps to implement the DCL, has been filed but not yet fully briefed.

Executive Order 14242 Directing the Closure of ED

Overview

On March 20, 2025, President Trump issued Executive Order 14242, titled "Improving Education Outcomes by Empowering Parents, States, and Communities." The Executive Order directed the Secretary of Education "to the maximum extent appropriate and permitted by law, take all necessary steps to facilitate the closure of the Department of Education and return authority over education to the States and local communities…" Several lawsuits immediately challenged the Executive Order.

In *NAACP v. United States*, No. 25-cv-00965 (D. Md.), the NAACP, education advocacy groups, and three children sued challenging Executive Order 14242 on the basis that it violates the Constitution's take care and spending clauses, the separation of powers, and the APA. The plaintiffs are seeking a preliminary injunction to prevent enforcement. The motion is not fully briefed.

In *Somerville Public Schools et al. v. Trump et al.*, No. 25-cv-10677 (D. Mass.), the plaintiffs, including two Massachusetts school districts and five teacher unions, filed a lawsuit challenging Executive Order 14242 as unlawful. They too allege it violates the separation of powers, the Constitution's take care clause, and the APA. On April 1, 2025, plaintiffs filed a motion for a preliminary injunction.

Following a March 11, 2025 "reduction in force" at ED, on March 13, 2025, plaintiffs, including nineteen states and the District of Columbia, filed *State of New York et al. v. McMahon et al.*, No. 25-cv-10601 (D. Mass.). Plaintiffs argued that the reduction in force violated the separation of powers and the APA. After Executive Order 14242 was issued, on March 24, 2025 plaintiffs moved for a preliminary injunction arguing that the Executive Order is arbitrary and capricious under the APA and violates the separation of powers. There has been no hearing or ruling to date.

Finally, filed one week before Executive Order 14242, plaintiffs in *Carter et al. v. U.S. Dep't of Ed.*, No. 25-cv-00744 (D.D.C.) moved to enjoin ED's reduction of force and "decimation" of its Office of Civil Rights on the basis that it, among other things, violates the APA and Fifth Amendment protections. There have been no rulings on the motion for an injunction to date.

Current Status

The motions for injunctive relief are not fully briefed and there have been no rulings to date in any of the above actions.

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