



# Higher Education Regulatory Update

Mid-Atlantic Association of Career Schools

Seven Springs Resort, Champion, Pa.

July 15, 2025



# Thompson Coburn LLP

- Full-service law firm with over 400 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, New York, Birmingham, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



# Presenter Profile

- Practice and Experience
  - Assists institutions of higher education in navigating a wide array of challenging legal, regulatory and operational matters.
  - Provides advice regarding accreditation, state agencies, and a range of Title IV matters, among other topics.
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Roger Swartzwelder

Partner

Higher Education Practice

# Presentation Preamble

## Disclaimer

- Laws and policies are updated regularly. If you are reviewing these slides after July 2025, please keep in mind that changes may have occurred.

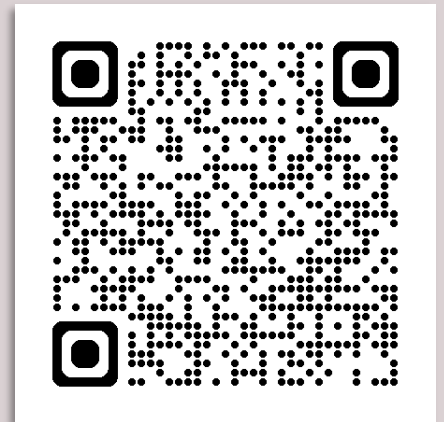
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## TC Extra Credit

- All TC resources referenced in the presentation are free and can be accessed [here](#) or by scanning the QR code to the right.

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# Syllabus

The State of ED

Recent Rule and Policy Developments

Status of Key Higher Education Litigation



# The State of ED

# Reduction in Force

- On March 11, ED initiated a reduction in force (RIF) that, according to ED's [Newsroom](#), reduced the agency from about 4,130 to about 2,180.
  - 259 employees accepted the [Deferred Resignation Program](#)
  - 313 employees accepted the Voluntary Separation Incentive Payment

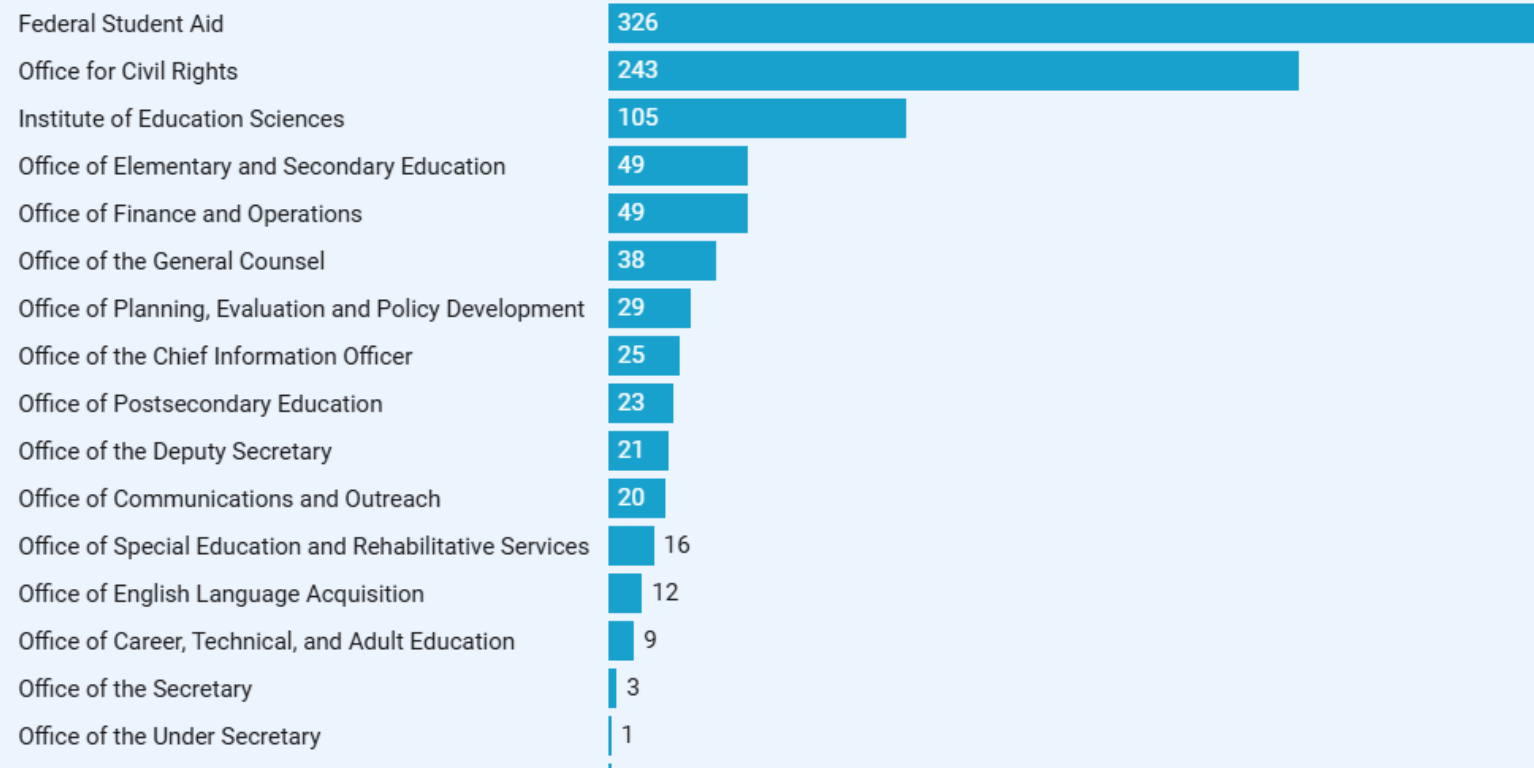


# ERN Data and Charts

- Education Reform Now (ERN), a non-partisan, nonprofit think tank, obtained a list of union employees who were part of the RIF and shared a [de-identified data set](#) including 969 employees.
- ERN analyzed the data and provided [three illustrative charts](#) demonstrating that FSA and OCR experienced the deepest cuts.

## A Snapshot of who Got Cut at ED on March 11

The number of employees who received notification they were being put on leave.



# School Eligibility and Oversight Hit Hard

- An ED organizational chart dated March 20 shows the significant cuts to the FSA case teams.
- But for Chicago and Philadelphia, all teams were eliminated entirely, including the Multi-Region and Foreign School.
- RIF also removed the Financial Services Group, the Third-Party Servicer Group, and the Critical Response Division.

## Organizational Charts

Version Date: March 20, 2025

### Office of IHE Oversight and Enforcement Continued

### School Eligibility and Oversight Service Branch Continued

#### Atlanta School Oversight Section

Cassandra L. Weems (V)  
Tana Jean Lyon (R)  
Rhonda L. Puffer (R)  
Alicia J. Scott (R)  
Vinita Simpson-Miller (R)  
Carolyn Ann Turner (R)  
Jasmine Applewhite (R)  
Mary Cook (R)  
John G. Kruszewski (R)  
Lucorin J. Mathis (R)  
Margaret A. McGinness (R)  
Eric Schmidt (R)  
Marshall Stephens (R)  
Ira G. Turner (R)  
Antonia M. White (R)  
Christopher Bennett (R)  
Michael Connors (R)  
Donita M. Harvey (R)  
Rodney D. Russell (R)  
Keith C. Zollinger (R)  
Tony Jones (R)  
Theron K. Martin (R)  
Zachary McDaniel (R)  
Lonnie L. Seal (R)  
Christopher Miller (R)  
Latonya Nesbeth (R)  
Melody Parker Venable (R)

#### Chicago/ Denver School Oversight Section

Kelli L. Goers  
Tammi S. Sawyer  
Roslyn A. Harris  
Erica N. Haynes  
Marion A. Peak  
Rosa Reth  
Sherika L. Roberts  
Ola M. Ross  
Donna J. Sobie  
Lytashia L. Davis  
Kathleen Shelton  
Devri F. Lott  
Aria Simmons  
Tanya Daniluk  
Susan Alvarez  
Leslie Orofino  
Anna M. Mendez (V)

#### Dallas School Oversight Section

Dalinda Lasater (DR)  
Carla Smith (DR)  
Jesus Moya (V)  
Yolanda D. Smith (V)  
Regina K. Krob (V)  
Cynthia Thornton (R)  
Kimberley Peeler-Cox (R)  
Sheree S. Porter (R)  
Michael K. Rhodes (R)  
Nicole R. Anderson (R)  
Michael G. Williams (R)  
Shannon Venezia (R)  
Althia Wall (R)  
Jonathan H. Hemmilla (R)  
Tynisa Adams (R)  
Alexander Velez (R)

#### Kansas City School Oversight Section

Charles Gasper (DR)  
Dyak R. Corwin (V)  
Matthew B. Couch (V)  
Angela Jo Beam (R)  
Kathy A. Feith (R)  
Edmaly Rodriguez (R)  
Leticia Chavez (R)  
Danielle E. Dillon (R)  
John B. Nading (R)  
Bridget R. Pratt (R)  
Tammy K. Allen (R)  
Virginia L. Armontrout (R)  
Donica L. Barnett (R)  
Melissa A. Bender (R)  
Matthew A. Monsees (R)  
Holly R. Walkenbach (R)  
Summer Bond (R)  
Rachel Gehri (R)  
Jennifer L. Hendrickson (R)

#### Multi-Region and Foreign School Participation Section

Maria Johnson (DR)  
Michael Frola (V)  
Carol Hayes (V)  
Michelle Alred (R)  
Mark Busskohl (R)  
Joe Peterson (R)  
Adam Quinn (R)  
Terri Benton (R)  
Sherry Blackman (R)  
Elizabeth Brunton (R)  
Chartise C. Gavin (R)  
Meghan Coyle (R)  
Glenda Despenze (R)  
Linda Devito (R)  
Shein Dossa (R)  
Jane Eldred (R)  
Elizabeth Eldridge (R)  
Robert Gelfand (R)  
Andrew Hagedorn (R)  
Shayla Hamlin (R)  
Rhonda Jackson (R)  
Brenae Johnson (R)  
Donald Lee (R)  
Jorge Matos (R)  
Shari Mecca (R)  
Lonny Meleon (R)  
Raenaida Palmer (R)  
Michael Powers (R)  
E. Scott (R)  
Sonal Shah (R)

#### New York/Boston School Participation Section

Jennifer Uhler (DR)  
Dietrich Revelle (DR)  
Sherrie Beachy (DR)  
Mark Malbeuf (DR)  
Vanessa Dillard (V)  
Jo Anne Fenwick (R)  
Jacqueline Blue (R)  
Jennifer Desmarais (R)  
Demetrias Fogle (R)  
Debra Knight Brown (R)  
Fanny Kong (R)  
Rizmanoski  
Cheryl Marotta (R)  
Melissa Matus (R)  
James Medonagh (R)  
Judith O. Velazquez (R)  
Tonya Sydney (R)  
Kaenaat Syed (R)  
Jacqueline Watford (R)  
Ebony Williams (R)

#### Philadelphia School Participation Division





Sherrie Bell  
Manuel Loera  
Bronsdon Thompson  
Carmen Austin  
Alekia Campbell  
Stephen Conger  
John Hicks  
Vickie Mouzon  
David Mumford  
Kenneth Porter  
Padreus Pratter  
Deborah Reedom  
Robert Scott  
Seri Singh  
Vecchia Della (DR)  
Jean Brennan (DR)  
Carmean (DR)  
John Gavin (V)  
Cynthia Laws (V)


#### San Francisco/ Seattle School Participation Section

Nancy Taylor (DR)  
Terri Tom (DR)  
Kimberly Wu (DR)  
Marla Green (V)  
Pilar Diaz (V)  
Erik Fosker (R)  
David Garza (R)  
Kim Meadows (R)  
Marisol Mendoza (R)  
Leslie Chin (R)  
Kia Cuffey (R)  
Adeline Espinos (R)  
Tina Harmon (R)  
Danna Harper (R)  
Lisa Huynh (R)  
Patricia Meauley (R)  
Dianne O'Riley (R)  
Kevin Roberts (R)  
Lana Walter (R)  
Hyun Jhong Yi (R)

# Dismantling ED

- On March 20, the President signed an [executive order](#) directing his administration to begin working to eliminate ED.
- The order called upon Secretary Linda McMahon “take all necessary steps to facilitate the **closure of the Department of Education**” to the “maximum extent appropriate and permitted by law.”

 PRESIDENT DONALD J. TRUMP The WHITE HOUSE   

  
PRESIDENTIAL ACTIONS

## Improving Education Outcomes by Empowering Parents, States, and Communities

Executive Orders | March 20, 2025

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to enable parents, teachers, and communities to best ensure student success, it is hereby ordered:

**Section 1. Purpose and Policy.** Our Nation's bright future relies on empowered families, engaged communities, and excellent educational opportunities for every child. Unfortunately, the experiment of controlling American education through Federal programs and dollars — and the unaccountable bureaucracy those programs and dollars support — has plainly failed our children, our teachers, and our families.

Taxpayers spent around \$200 billion at the Federal level on schools during the COVID-19 pandemic, on top of the more than \$60 billion they spend annually on Federal school funding. This money is largely distributed by one of the newest Cabinet agencies, the Department of Education, which has existed for less than one fifth of our Nation's history. The Congress created the Department of Education in 1979 at the urging of President Jimmy Carter, who received a first-ever Presidential endorsement from the country's largest teachers' union shortly after pledging to the union his support for a separate Department of Education. Since then, the Department of Education has entrenched the education bureaucracy and sought to convince America that Federal control over education is beneficial. While the Department of Education does not educate anyone, it maintains a public relations office that includes over 80 staffers at a cost of more than \$10 million per year.

Closing the Department of Education would provide children and their families the opportunity to escape a system that is failing them. Today, American reading and math scores are near historical lows. This year's National Assessment of Educational Progress showed that 70 percent of 8th graders were below proficient in reading, and 72 percent were below proficient in math. The Federal education bureaucracy is not working.

Closure of the Department of Education would drastically improve program implementation in higher education. The Department of Education currently manages a student loan debt portfolio of more than \$1.6 trillion. This means the Federal student aid program is roughly the size of one of the Nation's largest banks, Wells Fargo. But although Wells Fargo has more than 200,000 employees, the Department of Education has fewer than 1,500 in its Office of Federal Student Aid. The Department of Education is not a bank, and it must return bank functions to an entity equipped to serve America's students.

Ultimately, the Department of Education's main functions can, and should, be returned to the States.

**Sec. 2. Closing the Department of Education and Returning Authority to the States.** (a) The Secretary of Education shall, 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



# Dismantling ED

- On March 21, President Trump announced that the Small Business Administration (“SBA”) “will handle all of the student loan portfolio” adding that “it will be serviced much better than it has been in the past.” (emphasis added).
- On the same day, White House Press Secretary Karoline Levitt stated that “when it comes to student loans and Pell Grants, those will still be run out of the Department of Education.”
- Given these contrasting remarks, **it is unclear** whether Trump’s intention is to transfer servicing of the student loan portfolio to SBA or to entirely transfer administration of the federal financial aid programs to SBA.

# Dismantling ED

- RIF and Executive Orders are subject of several lawsuits.
- Federal court in Boston issued a preliminary injunction suspending the RIF, efforts to close ED and transfer of certain ED functions to other agencies.
- After federal court and First Circuit Court of Appeals refused to stay the injunction, the Administration appealed to the U.S. Supreme Court, which is expected to rule in the coming days.

# FSA Communications Centralized

- Following the RIF, Acting Under Secretary James Bergeron observed that “[a]lthough certain regional offices and staff that handle matters impacting institutions of higher education (such as program reviews, changes in ownership, and program participation agreements) were impacted by the RIF, these important functions are being transferred to other offices and experts.”
- The same day, ED notified schools that FSA is now centrally responding to all questions related to completion of the E-App and general school eligibility inquiries, which schools should direct to [CaseTeams@ed.gov](mailto:CaseTeams@ed.gov). Support also continues to be available at 1-800-848-0978.



# FSA Realignment Underway

Area of Responsibility	Contact	Email
All Matters Involving Office of Institutions of Higher Education Oversight and Enforcement	Jeremy Early Acting Branch Chief/Section Chief	Jeremy.Early@ed.gov
Eligibility Questions for IHEs in Chicago/Denver, San Francisco/Seattle, Dallas and Kansas City regions	Tammi Sawyer	Tammi.Sawyer@ed.gov
Eligibility Questions for IHEs located in the previous New York/Boston, Philadelphia, and Atlanta regions	Sherrie Bell	Sherrie.Bell@ed.gov
Audit Resolution	Bronsdon Thompson	Bronsdon.Thompson@ed.gov
Program Review	Jason Charlton Manuel Loera	Jason.Charlton@ed.gov Manuel.Loera@ed.gov
Changes in Ownership/Mergers	Kelli Goers	Kelli.Goers@ed.gov
HCM2 Submissions	Jason Charlton	Jason.Charlton@ed.gov

# Action Items for Institutions

- Ensure all institutional personnel who might receive **communications from ED** are watching for updates.
- Identify and prioritize any circumstance where feedback or approval is required from ED, or a submission is due to ED, by a **fixed deadline**.
- Where program reviews, audits, investigations, certifications and recertifications, and other such processes are underway, but no deadline or adverse consequence is looming, **remain patient**.

# Action Items for Institutions

- Assume pending **policy inquiries** with individual FSA staff may not have been successfully transitioned; identify new staff and resubmit for assistance.
- Understand and distinguish among actions that require only **notice** and actions that require **approval**.
- Consider timing strategic initiatives so that critical interactions with ED will occur in 6 to 12 months, or later.





# Recent Rule and Policy Developments

# Updates to 90/10 Calculation

- On July 2, ED announced an “[Interpretive Rule](#)” that revised the classification of revenue for 90/10 calculations.
- ED rescinded as “procedurally deficient” the Preamble language in the Final Rule published on October 28, 2022, that prohibited schools from counting revenues in non-Title IV eligible programs that are delivered by distance education.
- Rules on locations at 668.28(a)(3)(iii) (as distinct from the ban on distance education) went through formal rulemaking process, so ED’s statement that location is not relevant for 90/10 purposes probably is not correct.
- Rescission is effective immediately, and schools can revise their prior fiscal years’ 90/10 calculations accordingly.

# Negotiated Rulemaking

- On April 4, ED [announced](#) its intention to hold negotiated rulemaking.
- Even though ED solicited proposals for a wide range of negotiating topics, it ultimately decided that it would limit session to discussion of Public Service Loan Forgiveness program and the definition of qualifying employers
- ED indicated that it would address other proposed topics in later rulemaking sessions.



# Negotiated Rulemaking

- ED held two public hearings to discuss the rulemaking agenda.
- Negotiated rulemaking sessions held June 30-July 2.
- Negotiators did not reach consensus, leaving ED with discretion to propose regulations.
- ED's comments from session focus on its interest in excluding from "qualified employers" entities that engage in activities with "substantial illegal purpose," such as aiding illegal immigration or illegal discrimination.

# Resumption of Default Collections

- On April 21, ED [announced](#) that it would resume the collection of defaulted student loans for the first time since March 2020.
- The agency indicated that at the same time it will be initiating a “communication and outreach campaign” to educate borrowers regarding their options.
- ED stated that as part of this effort, it will be restarting the [Treasury Offset Program](#), which permits various forms of garnishment (e.g., wages, SS benefits, tax refunds) in the event borrowers do not make a payment, enroll in an income-driven repayment plan, or sign up for loan rehabilitation.

# Default Outreach

- In a May 5 Electronic Announcement, ED [called upon institutions](#) to contact borrowers who ceased to be enrolled at the institution since January 1, 2020, and communicate the following:
  - borrowers are obligated to repay federal student loans;
  - repayment options are available; and
  - students can check the status of their loans by logging into StudentAid.gov.
- In the same EA, the ED said it would post loan non-payment rates by institution to the Federal Student Aid Data Center.



# Process for Changing Accreditors

- A May 1, 2025, [DCL from ED](#) outlines a substantially simplified process for a school seeking to change its institutional accreditation agency.
- The updated procedure requires a school to submit a two-page [form](#), certifying the school's reasonable cause for changing accreditors.
- The DCL also specifies that, if ED does not make a reasonable cause determination within 30 days of submission, the request to change accreditors will be deemed approved by default.

# One Big Beautiful Bill Act

- Massive budget reconciliation bill signed July 4 by President Trump includes several sections impacting higher education.
- OBBB adds institutional accountability measures:
  - Risk-sharing provisions proposed by House were dropped from final bill.
  - “Do No Harm” provision eliminates loan eligibility for undergraduate programs that leave majority of completers worse off than median high school graduate in state and for graduate programs that leave majority of completers worse off than median bachelor’s degree holder in same field in same state.
  - Program loses eligibility if it fails 2 out of 3 years.

# One Big Beautiful Bill Act

- Postpones implement of Biden BDR rules for 10 years and specifies that Trump BDR rules apply in the interim.
- Adds new provisions on loan eligibility:
  - Restrictions on Parent PLUS loans and elimination of Grad PLUS loans.
  - Caps on graduate borrowing.
  - Modifies repayment, deferment, and forbearance rules.
- Adds short-term Pell eligibility beginning 7/1/26.
- ED will need to write regulations fleshing out these provisions.
- Does not eliminate 90/10 or Gainful Employment.





# Status of Key Higher Education Litigation

# New Litigation Summary Page

**REGUCATION** Last Updated: April 4, 2025 | 15 minute read | Tres Cleveland , Brandt Hill , Lorrie Hargrove , Evan Moltz , Anna S. Knouse

## 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.

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**Gainful Employment**



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**Bare Minimum Rule**



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**Borrower Defense to Repayment**



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**Student Loan Forgiveness**

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# Borrower Defense Litigation

- The Biden administration's BDR rule (2022 BDR Rule) was slated to take effect July 1, 2023. In February 2023, a career school group sued ED seeking to invalidate the 2022 BDR Rule.
  - *Career Coll. & Schs. of Texas v. U.S. Dep't of Ed.*, No. 23-cv-00433 (W.D. Tex.), No. 23-50491 (5th Cir.), No. 24-413 (U.S.).
- In April 2024, the Fifth Circuit directed the district court to enter a nationwide injunction.



# Borrower Defense Litigation

- In October 2024, ED [petitioned](#) the Supreme Court to review the Fifth Circuit's injunction. In January 2025, the Supreme Court granted the 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.
- 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.

# Borrower Defense Litigation

- **Status:** ED filed a motion on May 29 stating that it intends to defend the Biden-era borrower defense regulations.
- One Big Beautiful Bill postpones enforcement of Biden-era Borrower Defense Regulations for 10 years and restores the Trump-era Borrower Defense Regulations in the interim.
- It is not yet clear what the effect of ED's new position on the Borrower Defense Regulations and the OBBB provisions will have on pending litigation.

# Bare Minimum Rule Litigation

- Generally, the Bare Minimum Rule requires that for each GE program, an institution must limit the number of hours in the program to the required minimum number of hours if the state or any federal agency has established such a requirement.
- Two lawsuits were filed challenging the Bare Minimum Rule, one in Texas and one in DC.
  - [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.).
- In June 2024, the Texas court granted a nationwide, preliminary injunction. 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.



# Bare Minimum Rule Litigation

- Later, in December 2024, ED initiated an administrative proceeding to terminate a plaintiff's Title IV eligibility. But after President Trump assumed office, the administrative proceeding was stayed.
- In the DC case, the court stayed all deadlines through July 21, 2025, while ED "continues to consider" its position on this matter.
- **Status:** The current administration has yet to reveal its position on the litigation.

# GE Litigation in the Fifth Circuit

- On October 10, 2023, ED [published](#) its final Financial Value Transparency and Gainful Employment (GE) rule, which took effect July 1, 2024.
- Two separate lawsuits were filed in the North District of Texas challenging the 2023 GE Rule.
- In June 2024, just prior to the Supreme Court's decision in *Loper Bright*, the Northern District of Texas declined to grant a preliminary injunction to plaintiffs. The two suits were consolidated in July 2024.
- On February 10, 2025, the Court granted a 90-day stay of the briefing schedule. The motion was filed at the request of ED and with the consent of plaintiffs, to provide the Trump administration with time “to become familiar with and evaluate their position regarding the issues in this case.”

# Trump Administration's GE Shocker

- On May 16, 2025, the Trump Administration [revealed](#) that it intends to defend the Biden Administration's GE Rule, notwithstanding the fact that the first Trump administration stripped a very similar rule from the books in 2019, observing at the time that:
  - “the GE regulations rely on a debt-to-earnings (D/E) rates formula that is fundamentally flawed and inconsistent with the requirements of currently available student loan repayment programs, fails to properly account for factors other than institutional or program quality that directly influence student earnings and other outcomes, fails to provide transparency regarding program-level debt and earnings outcomes for all academic programs, and wrongfully targets some academic programs and institutions while ignoring other programs that may result in lesser outcomes and higher student debt.”



# Trump Administration's GE Shocker

- ED suggests in its May 16 filing that the **federal deficit and student loan debt** are at the heart of its new position. And both are indeed significant policy points for the current administration and part of the discussion that framed the budget reconciliation bill, i.e., the One Big Beautiful Bill Act.
- ED also points to the need for accountability, repeatedly referencing its obligation to ensure a reasonable return on investment for the taxpayer.

# Reading the GE Tea Leaves

- This administration may simply be too interested in the opportunities the FVT framework presents to let it go.
- The framework requires every institution to collect and report vast volumes of data about every Title IV program and student.
- It also creates a new federal website, where ED gets to **pass judgment** on the value of each and every program offered by the institution.



# Reading the GE Tea Leaves

- This administration has openly signaled its dissatisfaction with certain sectors of higher education and certain practices among institutions. It may view the FVT framework as a new vehicle through which it can explore, refine, and express its dissatisfaction.
- Even if the court strikes down “gainful employment,” **the FVT framework could still stand.**
- In litigation, ED was careful to note that any relief should be limited to the cosmetology sector and the accountability framework, and it observed that the FVT framework is informational and **not challenged by Plaintiffs.**
- It is not yet known how OBBB “Do No Harm” will impact ED’s thinking on GE and FVT.





# TC Extra Credit



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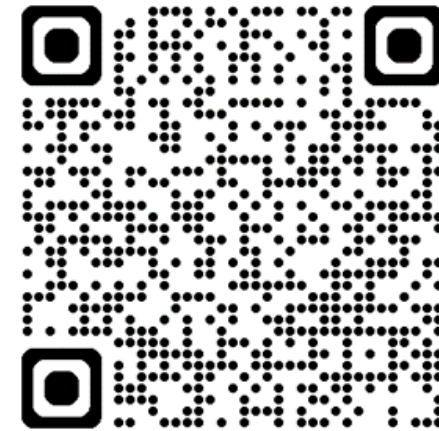
# REGucation | TC's Free Resources Platform



Home\_Higher Education Resources

## higher education resources

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EMAIL

As part of our ongoing commitment to the postsecondary community, Thompson Coburn's higher education practice routinely creates complimentary resources designed to assist institutions with navigating the complexities of the higher education regulatory and policy environment. We have collected a number of these resources on this page, including our most recent webinars, training series, desk guides, whitepapers, and blog posts. We hope you find these resources helpful, and if you have any questions, please do not hesitate to contact us!

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**Compliance Resources**



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**Webinars/Training Resources**



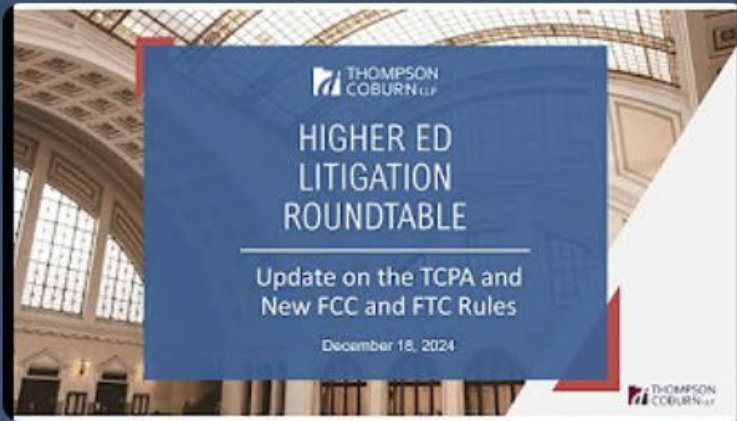
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by Thompson Coburn LLP

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### Examining Title VI Compliance for Institutions of Higher Education

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### The Latest on ED's Financial Value Transparency and Gainful Employment Rule

Thompson Coburn LLP • 1K views • 4 months ago





# REGucation | Higher Education Blog



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January 30, 2025 | 4 minute read

[One-to-One is Done: The Eleventh Circuit Scraps the FCC's New Consent Rule Under the TCPA, Inviting Future Challenges to Written Consent Altogether](#)



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January 24, 2025 | 5 minute read

[President Trump's Executive Order Banning Illegal DEI Policies: What Does It Mean for Higher Education?](#)



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January 17, 2025 | 4 minute read

[A Dogfight of a Removal Battle: A Supreme Court Decision with Higher Ed Impact](#)



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January 13, 2025 | 2 minute read

[The Merry-Go-Round Continues: Supreme Court to Review 2022 Borrower Defense to Repayment Final Rule](#)



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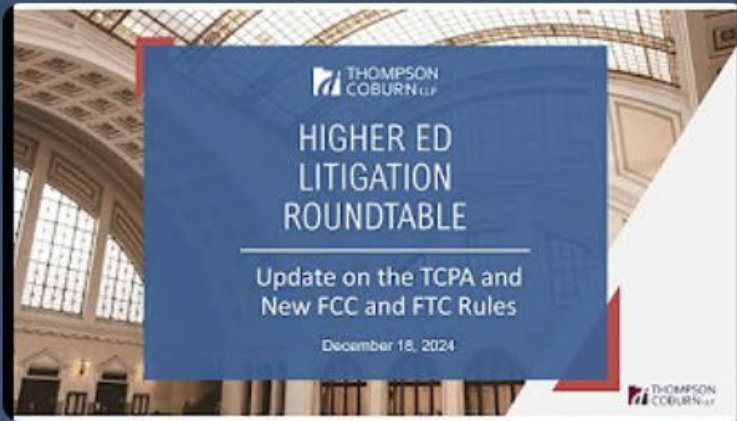


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# REGucation | Litigation Summary



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# REGucation | Compliance Materials



## Suggested Protocols for Responding to Individual Borrower Defense to Repayment Claims

Last Updated: August 2023

Under the Higher Education Act and its implementing regulations, students may file a claim with the U.S. Department of Education ("ED") to discharge their federal Direct Loans (or Direct Consolidated Loans) if, generally, their institution misled them or engaged in other misconduct related to the making of their federal loans or the provision of their educational services. This is referred to as a "borrower defense to repayment" or "BDR" claim.<sup>1</sup> On November 1, 2022, the Biden administration promulgated a revised version of the BDR rule, which took effect on July 1, 2023.<sup>2</sup> On August 7, 2023, the U.S. Court of Appeals for the Fifth Circuit issued a nationwide [injunction](#) of the new, revised BDR rule, postponing its implementation. The current BDR rule remains in effect, however, and the injunction does not prevent the processing of BDR claims under the existing framework.

With regard to BDR claims, data released by ED suggests that virtually every institution in the United States has at least a handful of claims pending against it and over 500 institutions have 30 or more.<sup>3</sup> Anecdotally, Thompson Coburn has observed a rise in outreach from ED notifying institutions of BDR claims. Given this trend, we anticipate that many institutions may want to establish protocols for responding to BDR claims. We have developed this document to aid institutions with this process. In addition to this resource, we welcome institutions to review our webinar, "Responding to Student BDR Claims," available [here](#). Please note that this document is not intended to cover every possible consideration, but, instead, to highlight key concepts we suggest should be part of any protocol for responding to individual BDR claims.<sup>4</sup>

### I. Initial Assessment of the Claim

When triaging individual BDR claims, there are several initial matters we suggest an institution consider. First, we recommend institutions quickly determine whether ED's response deadline affords sufficient time to reply, or if an extension may be necessary. Second, as institutions review individual claims, they should identify the specific misconduct the student is alleging and determine whether, on its face, it is a valid basis for a BDR claim under applicable law. Generally, a BDR claim requires a misrepresentation or a breach of a promise or contract by an institution. These allegations most commonly take the form of promises related to cost, post-graduation employment or salary, transferability of credit, or accreditation. However, we routinely see claims that do not actually assert any conduct that would support a BDR claim, even if presumed true (e.g., disciplinary matters, academic disputes, quality of education). Third, institutions should consider whether any of the student's statements or omissions are inconsistent with or otherwise undermine the asserted misconduct. Finally, we suggest institutions identify and carefully consider their response to any information requests from ED that may accompany the claim or claims, but be unrelated to any specific alleged misconduct.

<sup>1</sup> Congress introduced the BDR concept in 1993, when it directed ED to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [federal student loan]." 20 U.S.C. § 1087e(h); see also 34 C.F.R. § 685.206; 34 C.F.R. § 685.222.

<sup>2</sup> See 87 Fed. Reg. 65904 (Nov. 1, 2022).

<sup>3</sup> In response to a FOIA request filed by the Legal Defense Fund, the Department supplied a list of BDR claims pending as of July 31, 2022, organized by institution. The resulting spreadsheet is available for download [here](#).

<sup>4</sup> In some cases, ED has the authority to certify group claims, which could cover scores of borrowers. While many of the suggestions detailed in this document would still be worthwhile, we note that group claims are managed under different legal procedures and should be handled carefully and accordingly.



## Financial Responsibility Reporting Guide (2024)

Last Updated: July 1, 2024

On July 1, 2024, the U.S. Department of Education's new *Financial Responsibility, Administrative Capability, Certification Procedures, Ability To Benefit* rule takes effect (the "2024 Rule").<sup>1</sup> The 2024 Rule implements a wide range of changes relating to financial responsibility, including the significant revision and expansion of the reporting obligations at 34 C.F.R. § 668.171, which require institutions to report certain "triggering events" to the Department.<sup>2</sup> These reporting requirements are meant to alert the agency that an institution "may not be able to meet its financial responsibilities."<sup>3</sup> If an institution fails to report a triggering event within the requisite timeframe, the Department may take administrative action, to include determining that the institution is not financially responsible, or initiating a proceeding to fine, limit, suspend, or terminate the institution's participation in the federal financial aid programs (the "Title IV Programs").<sup>4</sup> If an institution reports a triggering event (or the Department otherwise becomes aware that an event has occurred), the Department may determine that the institution is not financially responsible and take various administrative actions, depending on the nature and significance of the event reported. Institutions should review the 2024 Rule carefully for additional information regarding the consequences of reporting triggering events and the opportunities to mitigate such consequences.

Below, we provide a guide to the reporting obligations under the 2024 Rule, as set forth in the regulatory text. Because the 2024 Rule, like the existing financial responsibility reporting framework, distinguishes between a Mandatory Triggering Event and a Discretionary Triggering Event, we have divided the chart to identify which triggering events fall into each category. Triggers should be reported to the Department through the Document Center, available on the Common Origination and Disbursement (COD) website, and by emailing the FSA Financial Analysis Division at [FSAFinancialAnalysisDivision@ed.gov](mailto:FSAFinancialAnalysisDivision@ed.gov). For information concerning the form and content of the submissions, please see the Department's June 27, 2024 [Electronic Announcement](#).

On May 17, 2024, the current administration posted a [Q&A website](#) that addresses certain aspects of the new reporting requirements implemented by the 2024 Rule. We strongly encourage institutions to review the Department's Q&A website and any other relevant guidance to determine, among other things, whether the agency is interpreting the regulatory text in a manner that may expand or otherwise modify the reporting obligations as described in the 2024 Rule (and detailed in the chart below).

- <sup>1</sup> The final 2024 Rule was published in the Federal Register on October 31, 2023. See 88 Fed. Reg. 74568 (Oct. 31, 2023). It revises the financial responsibility regulations at 34 C.F.R. §§ 668.23, 668.171, 668.174, 668.175, and 668.176. The 2024 Rule also revises the financial responsibility factors applicable to institutional changes in ownership, currently in § 668.15, moving them to § 668.176.
- <sup>2</sup> Triggering events, as explained by the Department, are external events or financial circumstances that may not appear in an institution's annual financial statements and are not yet reflected in the institution's calculated composite score. See 88 Fed. Reg. 74569 (Oct. 31, 2023).
- <sup>3</sup> 88 Fed. Reg. 74568 (Oct. 31, 2023).
- <sup>4</sup> 34 C.F.R. § 668.171(f)(2) (July 1, 2024).

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## Maintaining Compliance with the Evolving 90/10 Rule

Last Updated: April 2021

On March 11, 2021, President Biden signed into law the [American Rescue Plan Act of 2021](#) (the "Act"), a \$1.9 trillion stimulus package containing emergency pandemic relief and a number of provisions important to the higher education sector. Of particular significance to proprietary institutions is Section 2013 of the Act, which amends the longstanding and controversial "90/10 rule." Under the current 90/10 rule, to remain eligible to participate in the federal student aid programs, a proprietary institution must "derive at least 10 percent of its revenues for each fiscal year from sources other than Title IV, HEA program funds."<sup>1</sup> Section 2013 amends this language, requiring instead that covered institutions derive at least 10 percent of their revenue from sources other than "Federal education assistance funds." Federal education assistance funds are defined as "[f]ederal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution."

Pursuant to the Act, the earliest this revision to the 90/10 rule may take effect is for institutional fiscal years beginning on or after January 1, 2023. Congress has directed the U.S. Department of Education ("ED") to engage in a negotiated rulemaking before it implements the revision. It presently is unclear which federal funding programs will be deemed "Federal education assistance funds." However, we anticipate that during the negotiated rulemaking, the current administration will propose a broad interpretation, which will include GI Bill benefits for veterans, Military Tuition Assistance benefits for active military, and Trade Adjustment Assistance for workers, among others.

Given this imminent change to the 90/10 rule, and the challenge we expect it will create for many proprietary institutions, we determined to create this compilation of strategies we have seen used in the past for managing 90/10 rule compliance, and to include thoughts and considerations, as appropriate. We strongly emphasize that the compliance strategies detailed below should not be viewed as recommendations, and may not be appropriate for every institution. Each institution should consult its own legal advisors, accountants, and other trusted professionals to determine whether to employ any particular strategy for complying with the 90/10 rule.

<sup>1</sup> 34 C.F.R. § 668.14(a)(16); see also 20 U.S.C. § 1094(a)(24).

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