

Fall Forum 2023
Bracing For Significant Regulatory Changes




LEGISLATIVE UPDATE

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- Appropriations and other Congressional action
- New Guidance
- What's coming from the administration
- Court cases of note



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President's Budget Proposal

Program	FY 2023 President's Proposal	FY 2023 Final	FY 2024 President's proposal	Percent change v. FY 2022
Title I-A	\$37,281	\$19,088	\$20,536	11.69%
Title I-C	\$376	\$376	\$376	--
Title II	\$2,149	\$2,190	\$2,190	--
Title III	\$1,075	\$890	\$1,195	34.3%
21st Century	\$1,310	\$1,330	\$1,330	--
Title IV-A/V/SAE	\$1,220	\$1,380	\$1,405	1.81%
IDEA Part B	\$16,259	\$14,194	\$16,259	14.55%
CTE State Grants	\$1,355	\$1,430	\$1,473	3.04%
AEFLA	\$739	\$729	\$759	4.11%
CCDBG	\$7,562	\$8,021	\$9,000	12.2%

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DEBT CEILING DEAL

- Debt ceiling legislation passed in June 2023:
 - Caps FY 2024 spending at FY 2023 levels
 - Allows 1% increase for 2025
- If Congress does not pass all 12 appropriations bills by January 1, 2024, all funding receives a 1% cut
- Raises debt ceiling until January 2025

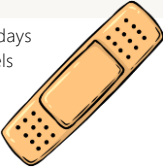
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CONTINUING RESOLUTION

- Continues government funding for 45 days (through November 17) at FY 2023 levels
- No "anomalies" for ED
- No military aid to Ukraine
- No Farm Bill extension
- Does include some FEMA disaster assistance spending
- Met with anger by conservative Republicans who feel leadership gave too much away without insisting on cuts



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SPEAKER OUSTER

- Representative Matt Gaetz (R-FL) filed Motion to Vacate the Chair
 - Per House rules adopted this year, only one member has to bring the motion. A simple majority is needed to remove the Speaker
- Representative Patrick McHenry (R-NC) installed as acting speaker pro tempore
 - This is a position created in post-9/11 rewriting of House rules – no precedent for what powers they have
 - Can only stay in office three "legislative" days (i.e. days when Congress is in session)
 - Not clear House can pass legislation without a speaker
- GOP Caucus picks Steve Scalise (R-LA) but some still unhappy, Scalise withdraws
- Jim Jordan (R-OH) fails to get enough votes in multiple rounds

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NEW HOUSE RULES ADD TO DIFFICULTY

- Rules package adopted in 2023 makes it more complicated to pass legislation – especially appropriations
- Vowed to consider appropriations bills individually
 - 12 separate bills, including Labor-HHS-Education
- Rules allow for more amendments on appropriations, slowing process
- Rules require 72 hours to read legislation before votes in House (adding to existing 72-hour rule in Senate)
- House conservatives want additional cuts, using threat of Speaker ouster as leverage
 - White House says it will veto cuts as proposed in House
 - Senate has issues with cuts saying they are trying to renegotiate terms of debt ceiling agreement

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House Spending Proposal

Program	FY 2023 Pres. Proposal	FY 2023 Final	FY 2024 Pres. proposal	House Bill	House bill vs. 2023 Final
Title I-A	\$37,281	\$19,088	\$20,536	\$3,682*	-80%
Title I-C	\$376	\$376	\$376	\$376	--
Title II	\$2,149	\$2,190	\$2,190	\$0	-100%
Title III	\$1,075	\$890	\$1,195	\$0	-100%
21st Century	\$1,310	\$1,330	\$1,330	\$1,330	--
Title IV-A/SSAE	\$1,220	\$1,380	\$1,405	\$1,380	--
IDEA Part B	\$16,259	\$14,194	\$16,259	\$14,194	--
CTE State Grants	\$1,355	\$1,430	\$1,473	\$1,430	--
AEFLA	\$739	\$729	\$759	\$729	--
CCDBG	\$7,562	\$8,021	\$9,000	\$8,021	--

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HOUSE SPENDING PROPOSAL

- "Approximately \$31 billion provided during the pandemic remains unspent and further investments will not be provided until these funds are used responsibly"
- Recissions to ESEA funding from prior year!
- Policy riders
 - Prohibit use of funds for carrying out Title IX rule
 - Prohibit use of funds for implementing new "borrower defense" rule
 - Limits ability to waive federal student loans
 - Instruction to ED to "obtain annually updated local educational agency-level census poverty data"
 - Holman Rule limitations for agency head salaries


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A "LADDERED" CR

- House passed a new funding bill with two deadlines:
 - January 19 for some agencies
 - February 2 for others (including ED)
- No solution for Farm Bill
- Brings debate back in new year but bypasses holiday shutdown threat




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OUTLOOK FOR APPROPRIATIONS



- Instability in House makes it hard to pass legislation!
- Potential for shutdown in November is still high
- Increases to spending extremely unlikely
- Plan for some cuts
 - Inflation may impact value of appropriations

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THE BSCA FIX

- Bipartisan Safer Communities Act (BSCA) amended Section 8526 of ESEA to prohibit the use of any ESEA funds for weapons purchases and training
- H.R.5110 - Protecting Hunting Heritage and Education Act (September 2023) amends language to say:
 - "except that this paragraph shall not apply to the use of funds under this Act for activities carried out under programs authorized by this Act that are otherwise permissible under such programs and that provide students with educational instruction or educational enrichment activities, such as archery, hunting, other shooting sports, or culinary arts"

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THE BSCA FIX

- Updated ED guidance for 21st CCLC, BSCA:
 - "On October 6, 2023, President Biden signed into law a bill amending section 8526 of the ESEA and clarifying that the prohibition does not apply to the use of ESEA funds for activities that are carried out under ESEA programs and that are otherwise permissible, and that "provide students with educational instruction or educational enrichment activities, such as archery, hunting, other shooting sports, or culinary arts."

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COMING UP IN CONGRESS

- Farm Bill
 - Expired in September 2023
 - Requires return to underlying 1910 bill
 - Programs based on crop year require less immediate action, price supports could have short-term impact
- Short-term Pell grants
 - Bipartisan, still working out details
 - Part of legislative package?
 - WIOA reauthorization?
- CRA resolutions

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COMING UP IN CONGRESS

- CRA Resolutions
 - The Congressional Review Act (CRA)
 - Sets requirements for agencies to share information with Congress
 - Among other things, allows Congress to pass a resolution of disapproval to strike federal rules
 - Must be passed within 60 legislative days of rule's publication
 - Requires signature by President to take effect
 - Prohibits agency from ever issuing "substantially similar" regulations on same legislative text

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CRA RESOLUTIONS

- CRA Resolutions
 - What is "substantially similar?"
 - We don't know yet!
 - Rules have either been withdrawn before CRA (e.g. 2016 Title I SNS rule), or agency has not tried to reregulate (e.g. DOL ergonomics rule)

Sour fight ends with FDA ruling soy and nut milks can still be called "milk"

FDA found that Americans are generally not confused about what's actually milk.

NEWS WIRE | 10/10/23, 10:07 AM




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COMING UP IN CONGRESS


- CRA Resolutions
 - Two wide-scale impacts
 - Creeping expansion of CRA to apply to "regulatory actions" in addition to written rules
 - Assertion of further Congressional power
 - Rush to get final rules out before they would be subject to overturning under CRA
 - 60 legislative days → July 2024ish



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THE ADMINISTRATION

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NEWLY FINALIZED TITLE I EQUITABLE SERVICES GUIDANCE

- Published May 2023: <https://oese.ed.gov/files/2023/05/Title-I-ES-guidance-revised-5-2023.pdf>
- Adds more explanation surrounding calculation of proportionate share
- Maintains ED position on “representative sample” for survey data through extended consultation
 - Presume representative sample
 - Should allow challenges during consultation – then LEA must engage in further review and share conclusions with private schools
 - If not representative, then “supplement” with other data sources
 - What is “representative?”
 - “consider the degree to which respondents are similar to non-respondents such as by using neighborhood or Title I public school attendance area characteristics”

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NEWLY FINALIZED **TITLE VIII** EQUITABLE SERVICES GUIDANCE

- <https://oese.ed.gov/files/2022/03/Draft-Title-VIII-Equitable-Services-Guidance.pdf>
- Programs that are:
 - (1) subject to equitable services AND
 - (2) not Title I,A

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NEWLY FINALIZED TITLE VIII EQUITABLE SERVICES GUIDANCE

- Major changes:
 - Lots of new information on 21st Century program, Project SERV
 - including how to calculate proportionate share
 - Will be aligned with BSCA fund guidance
 - District is not required to (but may) use the same entrance and exit procedures for English learners in private schools as it does in public schools, unless required by State law
 - Maintains guidance that conferences and travel are participant support costs
 - Need prior written approval above \$5k per person per event

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NEW PROPOSED RULE: TITLE IX ATHLETICS

- For purposes of all athletics programs run by recipients of federal financial aid
- If a recipient "adopts or applies" a "sex-related criteria" for participation on any sports team consistent with a student's gender identity, criteria must:
 - Be "substantially related to achievement of an important educational objective"
 - relevant to grade level, sport, level of competition
 - AND
 - "minimize harms to students" who would be limited or denied participation

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THE ATHLETICS RULE

- More than 142,000 public comments
- Primary objections:
 - Doesn't go far enough (from LGBTQ advocates)
 - "No meaningful guidelines" - Lack of clarity/clearly defined rules that leave compliance up to individual determinations (school officials AND conservative lawmakers)
 - Sets open sports as default with burden of proving unfairness on objectors (conservative groups)
 - Conflict with State laws – likely to be the subject of litigation

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EDUCATIONAL PROGRAMS AND ACTIVITIES RULE

- New definitions
 - "Sex" as more inclusive
 - Refers to gender identity and sexual orientation as part of protections
 - Refines definition of educational program and activity
 - Keeps requirements for training

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COURT CASES: THREE TO KNOW

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(1) TITLE IX LITIGATION



- Two potential vehicles:
 - Notice of Interpretation (NOI) lawsuit filed by States, currently in federal court
 - New Title IX Final Rule(s)

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(2) CHARTER SCHOOLS CASE

- North Carolina charter school requires different uniforms for male and female students because of belief that girls are “fragile vessels” and need to be shown courtesy/chivalry
- Argues the Equal protection clause does not apply because it is a private entity, not a “state actor”
 - Expand on Maine voucher case argument that private recipients of federal aid are not State actors
- Supreme Court DENIED CERT → will not take up the case, 4th Circuit decision stands

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(2) CHARTER SCHOOLS CASE 2.0?


- Oklahoma Governor approved opening of a virtual Catholic charter school, St. Isidore of Seville
- Group of parents sued State of Oklahoma saying it:
 - Violated charter laws by approving a school that wouldn’t attest to nondiscrimination,
 - Violated a state constitutional provision that public schools be operated “free from sectarian control,” and
 - Violated a state statute requiring that charter schools be “nonsectarian.”
- Secondary lawsuit from OK AG saying school violates establishment clause

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(2) CHARTER SCHOOLS CASE 2.0?




- Oklahoma case asks which 1st Amendment right is more important:
 - Parents’ right to freely express religion
 - Constitutional prohibition on public entities endorsing religion (establishment clause)
 - Following on Maine case (2022)
- Implications for federal funding/recognition of charter schools
- Won’t be in Supreme Court this year, but maybe fall 2024!

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(3) STUDENT LOAN FORGIVENESS



- Two main questions of law:
 - Did student loan forgiveness have to go through APA notice and comment process?
 - Does 2003 HEROES Act give President authority to wipe student loan debt?
- The decision:
 - Whether or not procedurally appropriate, action is overly broad
 - HEROES Act ability to "waive or modify" does not provide this authority
 - These are big decisions where administration needs "clear Congressional authorization"

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STUDENT LOANS AND THE "MAJOR QUESTIONS" DOCTRINE

- The concept that Congress must speak particularly clearly when it authorizes the executive branch to take on "matters of political or economic significance."
 - How much action can President take without Congress being explicit?
 - What is "significant?" How is that measured?
- Majority opinion: "given the 'history and the breadth of the authority' asserted by the Executive and the 'economic and political significance' of that assertion, the Court has 'reason to hesitate before concluding that Congress' meant to confer such authority'."

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POWER STRUGGLE BETWEEN BRANCHES OF GOV'T

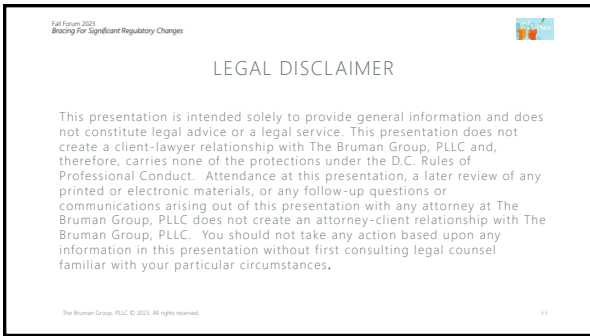


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