

March 20, 2023

**VIA ELECTRONIC MAIL**

U.S. Department of Education  
Office of the Executive Secretariat  
FOIA Service Center  
400 Maryland Ave. SW, LBJ 7W106A  
Washington, D.C. 20202-4536  
EDFOIAManager@ed.gov  
ATTN: FOIA Public Liaison

**Re: FOIA REQUEST: Records of the Department’s Communications with Congress  
Regarding its Income-Driven Repayment Policies  
(DFI FOIA No. 100-6-23)**

Dear FOIA Public Liaison:

The Defense of Freedom Institute for Policy Studies, Inc. (“DFI”) is a 501(c)(3) nonprofit, nonpartisan organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting civil and constitutional rights at schools and in the workplace. DFI includes former U.S. Department of Education (“Department” or “ED”) and other federal agency officials who are experts in education law and policy and the operation of the Department. For the benefit of the public, DFI’s mission includes obtaining records related to the consideration and implementation of policies imposed by the federal government and its officials on the American people.

**The Department’s Income-Driven Repayment Notice of Proposed Rulemaking**

On Jan. 11, 2023, the U.S. Department of Education published a Notice of Proposed Rulemaking (“NPRM”) entitled “Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program” (“IDR NPRM”).<sup>1</sup> The NPRM proposed “to amend the regulations governing income-contingent repayment plans by amending the Revised Pay as You earn (REPAYE) repayment plan, and to restructure and rename the repayment plan regulations under the William D. Ford Federal Direct Loan (Direct Loan) Program . . . .”<sup>2</sup>

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<sup>1</sup> 88 Fed. Reg. 1894 (Jan. 11, 2023) (“NPRM”).

<sup>2</sup> *Id.*



The reach and complexity of the Department’s proposed rulemaking is immense and, remarkably, compares in size to President Biden’s massive student loan debt cancellation plan.<sup>3</sup> In its IDR NPRM announcement, the Department boasted that its proposal would “cut monthly payments for undergraduate borrowers in half and create faster pathways to forgiveness [so that borrowers can] focus on building brighter futures for themselves and their families.”<sup>4</sup>

The IDR NPRM proposes to fundamentally revise the repayment options available to student loan borrowers under the Department’s authority to create an income-driven repayment (“IDR”) plan, which would result in significant, enduring implications for taxpayers, current and future borrowers, and the Department. The IDR NPRM would completely reformulate the Department’s current IDR offerings, with far-reaching proposals to transform its regulations on discretionary income; payment amounts as a percentage of adjusted gross income; interest waivers; the impacts of deferments and forbearances on the timeline for the cancellation of remaining loan balances; treatment of spouses’ income for married borrowers; the timeline for loan cancellation; automatic enrollment in an income-contingent repayment plan; treatment of defaulted loans; application and annual recertification procedures; the consequences of failing to recertify one’s income and other information; and consolidation loans.

### **Impact of the Proposed Income-Driven Repayment NPRM**

Indicative of the tremendous impact of the proposed rulemaking on the American people should it be enacted, DFI believes the IDR NPRM would:

- Transform student loans issued under Title IV into a *de facto* grant program in violation of the clear terms prescribed by Congress in the Higher Education Act of 1965,<sup>5</sup> as amended (“HEA”);
- Exceed the Department’s statutory authority by effectively canceling student loan debt on a massive scale<sup>6</sup> by reading into the clear terms Congress used to define federal student loan programs in the HEA an ambiguity that does not exist;

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<sup>3</sup> Katie Lobosco, “Biden’s other student loan forgiveness plan could be more generous in the long run,” CNN (Feb. 18, 2023), <https://www.cnn.com/2023/02/18/politics/biden-student-loan-forgiveness-income-driven-repayment/index.html>.

<sup>4</sup> See <https://www.ed.gov/news/press-releases/new-proposed-regulations-would-transform-income-driven-repayment-cutting-undergraduate-loan-payments-half-and-preventing-unpaid-interest-accumulation>.

<sup>5</sup> Pub. L. 890329, Nov. 8, 1965, 79 Stat. 1219 (20 U.S.C. § 1001 et seq.).

<sup>6</sup> Beth Akers, “Biden’s Changes to Student Loans Means the Vast Majority of Borrowers Will Never Repay Their Debt,” AMERICAN ENTERPRISE INSTITUTE (Feb. 7, 2023), <https://www.aei.org/education/bidens-changes-to-student-loans-means-the-vast-majority-of-borrowers-will-never-repay-their-debt/>.



- Violate the Department’s statutory obligation to collect all U.S. monetary claims and to charge interest on Title IV student loan debt;<sup>7</sup>
- Create the false illusion that “payments” that count toward student loan forgiveness can include circumstances in which the borrower has actually paid nothing to the Department.<sup>8</sup>
- Disingenuously create pretextual reasons to justify the need for a massive, taxpayer-funded subsidy to student borrowers and postsecondary institutions that would mislead the public (in violation of the statutory requirement that the Department offer genuine justifications for its rulemaking decisions);
- Grossly underestimate the IDR NPRM’s immense cost to the American people;<sup>9</sup>
- Fail to appropriately weigh the resulting inflationary increases in tuition<sup>10</sup> and living costs at postsecondary institutions against the claimed benefits of the NPRM;
- Senselessly contribute to a proliferation of low-quality academic programs;
- Negatively and unfairly impact affordable community colleges and trade schools;
- Imprudently encourage millions of students to incur additional college debt with little intention of fully repaying that debt.

### **Costs of the Proposed Income-Driven Repayment NPRM**

The Department described the IDR NPRM’s costs as having “a net budget impact of \$137.9 billion across all loan cohorts [sets] through 2032.”<sup>11</sup> The Department’s estimated costs, however, have not been supported by nonpartisan analyses. On Mar. 13, 2023, the Congressional Budget Office (“CBO”) released a starkly different estimate of the IDR NPRM’s net costs over the 2023-2033 period at “about \$230 billion”<sup>12</sup> while a reliable independent study of the IDR NPRM estimated

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<sup>7</sup> 31 U.S.C. § 3711(a)(1)-(2) and 31 CFR 901.1(a).

<sup>8</sup> NPRM at 1925.

<sup>9</sup> Adam Looney, “The Department of Education doesn’t know what its new income-driven plan for student loans will cost or who will benefit,” THE BROOKINGS INSTITUTION (Mar. 6, 2023), <https://www.brookings.edu/opinions/the-department-of-education-doesnt-know-what-its-new-income-driven-plan-for-student-loans-will-cost-or-who-will-benefit/>.

<sup>10</sup> Lindsey M. Burke and Preston Cooper, “A New Twist to Biden’s Student Loan Handout Plan Could Cost Taxpayers Billions,” THE HERITAGE FOUNDATION (Feb. 9, 2023), <https://www.heritage.org/debt/commentary/new-twist-bidens-student-loan-handout-plan-could-cost-taxpayers-billions>.

<sup>11</sup> NPRM at 1895.

<sup>12</sup> See <https://www.cbo.gov/system/files/2023-03/58983-IDR.pdf>.



its net cost to be between \$331 and \$361 billion, but cautioning that “budgetary costs could increase to \$471 billion with even higher take-up rates.”<sup>13</sup> If the Supreme Court strikes down the Department’s Student Loan Debt Cancellation Program, one comprehensive review of the revised IDR program estimates the potential costs to be over \$1 trillion.<sup>14</sup> Clearly, the IDR NPRM creates an alternative back door student loan debt cancellation through other means.

Congressional leaders have expressed strong objections to this unprecedented proposed rulemaking. U.S. Representative Virginia Foxx, Chairwoman of the U.S. House Education and the Workforce Committee, joined U.S. Senator Bill Cassidy, ranking member of the U.S. Senate Health, Education, Labor and Pensions Committee and 67 other Members of Congress in describing the IDR NPRM as a regulation that “would turn a safety-net for low-income federal student loan borrowers into an unsustainable transfer of wealth from hardworking taxpayers to college-educated individuals” that transforms the Direct Loan program into an “untargeted grant.”<sup>15</sup> Indeed, the Department’s IDR NPRM appears to impermissibly transform a statutorily-authorized loan repayment program into an unauthorized massive grant program.

DFI believes the American people have a deep interest in better understanding the Department’s decision-making related to its publication of its proposed revamping of the Department’s Income-Driven Repayment program, including communications the Department had regarding its IDR policies with Members of Congress and congressional staff.

Therefore, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of ED, 34 C.F.R. Part 5 (“Availability of Information to the Public”), DFI makes the following requests for the provision of records within your possession and/or control:

### **Requested Records**

DFI requests that ED produce the following records within **twenty (20) business days** as required by statute:

1. All communications and correspondence, including but not limited to electronic mail (“email”), email attachments, texts, letters, memoranda, and other documentation regarding the Department’s Income-Driven Repayment policies, including but not limited to the IDR NPRM (discussed and identified *supra*), between ED officials (see Custodians, *infra*) and any Member of Congress or congressional staff, to include **anyone using an email address ending in “mail.house.gov” or “senate.gov”** from

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<sup>13</sup> Junlei Chen and Kent Smetters, “Budgetary Cost of Newly Proposed Income-Driven Repayment Plan,” WHARTON SCHOOL OF THE UNIVERSITY OF PENNSYLVANIA (Jan. 30, 2023), <https://budgetmodel.wharton.upenn.edu/issues/2023/1/30/budgetary-cost-of-proposed-income-driven-repayment>.

<sup>14</sup> See <https://www.studentloanplanner.com/new-repaye-plan-ten-year-cost/>.

<sup>15</sup> See [https://www.help.senate.gov/imo/media/doc/idr\\_full\\_comment1.pdf](https://www.help.senate.gov/imo/media/doc/idr_full_comment1.pdf).



January 20, 2021, through the date the search is conducted, to include the use of any of the following terms:

- a. Income-Driven Repayment
- b. IDR
- c. IDR NPRM
- d. ED-2023-OPE-0004
- e. 2022-28605

## **Custodians**

The search for records described in Item 1 should be limited to “ED officials” within the Office of the Secretary, Office of Legislation and Congressional Affairs, and Office of the General Counsel, who are classified as any of the following or referenced with the following job titles:

- a. “PAS” (Presidential Appointments Requiring Senate Confirmation)
- b. “PA” (Presidential Appointments Not Requiring Senate Confirmation)
- c. “NC-SES” (Non-Career Senior Executive Service)
- d. “SC” (Schedule C Confidential or Policymaking Positions)
- e. Any employee of whatever classification working in the Office of Legislation and Congressional Affairs
- f. Chief Operating Officer, Federal Student Aid
- g. Deputy Chief Operating Officer, Federal Student Aid
- h. Chief Enforcement Officer, Federal Student Aid
- i. Chief Financial Officer, Federal Student Aid
- j. Executive Assistant to the Chief Operating Officer, Federal Student Aid
- k. Chief of Staff, Federal Student Aid
- l. Senior Advisor for Management, Federal Student Aid
- m. Senior Advisor, Federal Student Aid
- n. Ombudsman, Federal Student Aid
- o. Congressional Team Lead, Federal Student Aid

## **Statutory Disclosure Requirements**

FOIA imposes a burden on ED, as a covered agency under 5 U.S.C. § 551(1), to timely disclose requested agency records to the requestor<sup>16</sup> if ED (1) created or obtained the requested materials, and, (2) is “in control of the requested materials at the time the FOIA request [was] made.”<sup>17</sup> Upon request, ED must “promptly” make the requested records available to the requester.<sup>18</sup> Notably,

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<sup>16</sup> FOIA requires the disclosure of nonexempt agency records to any person, which includes an individual, partnership, corporation, association, or public or private organization other than an agency. 5 U.S.C. § 551(2).

<sup>17</sup> *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

<sup>18</sup> 5 U.S.C. § 552(a)(3)(A).



covered agency records include materials provided to ED by both private and governmental organizations.<sup>19</sup> Upon receipt of a FOIA request that “reasonably” describes the records sought and is in compliance with ED’s published rules regarding the time, place, any fees, and procedures to be followed,<sup>20</sup> ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.<sup>21</sup> In addition, the records produced by ED are required to be provided in “any form or format requested . . . if the record is readily reproducible by the agency in that form or format.”<sup>22</sup>

Upon receipt of this request, ED has **twenty business days** to “determine . . . whether to comply with [the] request” and “shall immediately notify” the requester of its determination and the reasons therefor,” the right to seek assistance from the agency’s FOIA public liaison, and the requester’s right to appeal any “adverse determination” by ED.<sup>23</sup>

Consistent with FOIA guidelines, DFI requests the following regarding the provision of the requested records:

- ED should immediately act to protect and preserve all records potentially responsive to this request, notifying any and all responsible officials of this preservation request and verifying full compliance with the preservation request. This matter may be subject to litigation, making the immediate initiation of a litigation hold on the requested materials necessary.
- ED should search all record systems that may contain responsive records, promptly consulting with its information technology (IT) officials to ensure the completeness of the records search by using the full range of ED’s IT capabilities to conduct the search. To constitute an adequate search for responsive records, ED should not rely solely on a search of a likely custodian’s files by the custodian or representations by that likely custodian, but should conduct the search with applicable IT search tools enabling a full search of relevant agency records, including archived records, without reliance on a likely custodian’s possible deletion or modification of responsive records.
- ED should search all relevant records and information retention systems (including archived recorded information systems) which may contain records regarding ED’s business operations. Responsive records include official business conducted on unofficial systems which may be stored outside of official recording systems and are subject to FOIA. ED should directly inquire, as part of its search, if likely custodians have conducted any such official business on unofficial systems and

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<sup>19</sup> *Id.* at 144.

<sup>20</sup> 5 U.S.C. § 552(a)(3)(A)(i).

<sup>21</sup> *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

<sup>22</sup> 5 U.S.C. § 552(a)(3)(B).

<sup>23</sup> 5 U.S.C. § 552(a)(6)(A)(i).



should promptly and fully acquire and preserve those records as ED's official records. Such unofficial systems include, but are not limited to, governmental business conducted by employees using personal emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voice mail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack. Failure to identify and produce records responsive to this request from such unofficial systems would constitute a knowing concealment by ED calculated to deflect its compliance with FOIA's requirements.

- ED should timely provide entire records responsive to this request, broadly construing what information may constitute a "record" and avoiding unnecessarily omitting portions of potentially responsive records as they may provide important context for the requested records (*e.g.*, if a particular email is clearly responsive to this request, the response to the request should include all other emails forming the email chain, to include any attachments accompanying the emails).
- ED should narrowly construe and precisely identify the statutory basis for any constraint which it believes may prevent disclosure.
- If ED determines that any portions of otherwise responsive records are statutorily exempt from disclosure, DFI requests that ED disclose reasonably segregable portions of the records.
- For any responsive records withheld in whole or part by ED, ED should provide a clear and precise enumeration of those records in index form presented with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA"<sup>24</sup> and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the non-disclosure relies.
- Please provide responsive records in electronic format by email, native format by mail, or PDF or TIF format on a USB drive. If it helps speed production and eases ED's administrative burden, DFI welcomes provision of the records on a rolling basis. Responsive records sent by mail should be addressed to the Defense of Freedom Institute for Policy Studies, 1455 Pennsylvania Avenue NW, Suite 400, Washington, D.C. 20004.

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<sup>24</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



## **Fee Waiver Request**

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33 and 34 C.F.R. § 5.32(b)(1)(ii), DFI requests a waiver of all fees associated with this FOIA request for agency records.

### **Disclosure of the requested records is in the public interest.**

Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and because disclosure of the information contained within the requested records is not primarily in the commercial interests of DFI.

The disclosed materials are likely to contribute significant information to the public's understanding of the Department's proposed Income-Driven Repayment policies that are highly relevant to the interests of American students, families, teachers, and taxpayers. Disclosure of the requested materials will illuminate ED's policies and planning considerations. Further, the requested information does not otherwise appear to be in the public domain (in duplicative or substantially identical form).

Provision of the requested records will not commercially benefit DFI (a nonprofit, nonpartisan organization interested in the transparency of ED operations and governance), but will benefit the general public and other groups and entities with non-commercial interests in ED's operations and governance.

DFI will review and analyze the requested records and make the records and analyses available to the general public and other interested groups through publication on DFI's website and social media platforms such as Facebook and Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021, including a detailed news story on ED policies widely distributed by one of the nation's largest news providers in February 2022, a March 2022 analysis of DOJ policies distributed by a leading news magazine, and multiple widely-published analyses and news stories involving recent ED policy announcements regarding the student loan repayment program and Title IX proposed rulemaking. DFI personnel also frequently offer commentary and analyses on radio and television news programs and in various public forums.

Federal law makes clear that when the disclosure is in the public interest and the information contained within the disclosed records is not primarily in the commercial interests of the requester (here, DFI), statutory fee waiver is appropriate.



## **DFI is a representative of the news media.**

In addition to the fee waiver request based upon the public interest, DFI also requests a fee waiver on the basis that DFI is a **representative of the news media**, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.32(b)(1)(ii).

FOIA (as amended) provides that a representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that to an audience.”<sup>25</sup> DFI provides exactly this service to the general public and other audiences with an interest in those materials and analyses. Upon receipt of the requested materials from ED, DFI will review and analyze those materials and will extract and otherwise distill particularly useful information from those materials for the benefit of the general public and other interested audiences.

DFI will provide its analyses to the general public and other interested audiences through publication on DFI’s website and social media platforms such as Facebook and Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021, including a detailed news story on ED policies widely distributed by one of the nation’s largest news providers in February 2022 and more recently, a March 2022 analysis of DOJ policies, and several more recent published and widely distributed news stories regarding DFI’s analyses of ED’s Title IX rulemaking and student loan debt cancellation program, among other news stories. DFI personnel also frequently appear as guests or panelists to offer commentary and analyses on radio and television news programs and in various other public forums.

As a qualified non-commercial public education and news media requester with demonstrated ability to review and analyze publicly-available information and to provide insight regarding that information, DFI is thus entitled to a fee waiver under FOIA as a representative of the news media.

## **Conclusion**

The subject of this request regards the Department’s proposed Income-Driven Repayment policies (including but not limited to the IDR NPRM) and the Department’s communications regarding those policies with Members of Congress and congressional staff. The proposed Income-Driven Repayment policies are highly relevant to the interests of American students, families, teachers, and taxpayers. Provision of the requested records will meaningfully inform the general public about the Department’s proposed Income-Driven Repayment policies which affect millions of American students, families, and taxpayers. The requested records concern significant Departmental policies with considerable financial implications for all Americans and are worthy of transparency in service of the public’s right to know.

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<sup>25</sup> See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



DFI appreciates ED's prompt attention to this request for records pursuant to FOIA, which will provide important information to the American people regarding the Department's proposed Income-Driven Repayment policies which are of tremendous interest to students, families, and taxpayers.

Please contact me immediately if DFI's request for a fee waiver is not granted in full.

If you have any questions or I can further clarify DFI's request, please contact me at your earliest convenience at [paul.moore@dfipolicy.org](mailto:paul.moore@dfipolicy.org).

Sincerely yours,

*/s/ Paul R. Moore*

Paul R. Moore, Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.