September 30, 2024

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 Regarding the 2024 Waiver Scheme
(DFI FOIA No. 100-11-24)

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. 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.

I. Background of the Department's Student Loan Cancellation Schemes

Despite the fact that it has no authority to engage in the cancellation of student loan debt outside narrowly drawn circumstances enacted by Congress, the Biden Administration has demonstrated that it will stop at nothing to reimagine its authority under multiple statutes to allow it to cancel any student debt it wishes. Despite these efforts by the U.S. Department of Education (the "Department" or "ED"), the courts have refused to oblige and have blocked the Department's best-laid plans to use taxpayer funds to pay for hundreds of billions of dollars in canceled debt without authorization from Congress. Specifically, in 2023, the Supreme Court scuttled the Department's attempt to unilaterally cancel approximately $430 billion in student loan debt under a little-known provision of the HEROES Act in *Biden v. Nebraska*.[1] Multiple courts halted aspects of the Department's Saving on a Valuable Education ("SAVE") mass debt cancellation scheme before the U.S. Court of Appeals for the Eighth Circuit issued a nationwide preliminary injunction blocking the $475-billion plan in its entirety.[2]

[1] *Biden v. Nebraska*, 600 U.S. 477 (2023).
[2] *Missouri v. Biden*, 112 F.4th 531 (8th Cir. 2024).

In the wake of these court losses, the Biden Administration is once again trying to cancel student loan debt on a mass scale, and it is once again doing so by wildly misinterpreting its statutory authority—this time through administrative rulemaking claiming that its authority to "waive" certain rights under the Higher Education Act ("HEA") gives it limitless power to cancel all student loan debt. In recognition of this abuse of authority, seven states have filed suit against the Department and have obtained from a federal court a temporary restraining order ("TRO") halting the administration's new plan to unilaterally cancel debt, particularly in light of evidence presented by the states that the administration planned to engage in the cancellation of at least $150 billion in student loan debt prior to the publication of the final rule.

II. The Department's Claimed Waiver Authority

Section 432(a)(6) of the HEA authorizes the Secretary of Education (the "Secretary") to "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption."[3] Citing this authority, which applies only to the now-defunct Federal Family Education Loan ("FFEL") program, the Department has proposed regulations claiming both that this authority extends to Direct Loans held by the federal government and that it allows the Department to engage in the mass cancellation of at least $150 billion in student loan debt. As DFI explained in our public comment on the proposed regulations,[4] it is not correct in either case, as the only sensible reading of Section 432(a)(6) is a provision of authority to the Secretary to engage in case-by-case decision-making regarding enforcement of rights and obligations the Department holds with regard to the FFEL program.

III. States' Lawsuit Blocking the Debt Waiver Scheme

Led by the State of Missouri, on September 3, 2024, seven states sued the Department to block the implementation of its latest student loan debt cancellation scheme, citing correspondence between the Department and student loan servicers indicating the Department's plans to implement its "waiver" of student loan debt prior to the publication of its final rule, thus circumventing judicial review of the administrative action and violating federal law requiring that "major rules" only become effective 60 days or more after their publication. The correspondence cited by the states' lawsuit included an "opt-in/opt-out" email sent on August 1, 2024, sending instructions to student loan servicers to begin cancelling loan balances as early as

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[3] 20 U.S.C. § 1082(a)(6)

[4] Defense of Freedom Institute, Comment on the Department's Notice of Proposed Rulemaking: Student Debt Relief for the William D. Ford Federal Direct Loan Program (Direct Loans), the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program (May 16, 2024) https://dfipolicy.org/wp-content/uploads/2024/05/DFI-Comment-HEA-Waiver-NPRM-05.16.2024.pdf.

September 3, and documents indicating that plans for this unlawful implementation of the rule prior to its publication began as early as May 31.[5]

On September 5, the U.S. District Court for the Southern District of Georgia granted the states' request for a TRO. It noted that the states have shown a substantial likelihood of success on the merits due to the plan's lack of statutory authority and the Secretary's refusal to abide by federal law.[6]

IV. Harms of Federal Action before the Release of the Final Rule

The states' lawsuit and the TRO raise grave concerns regarding how the Biden Administration plans to implement its latest mass debt cancellation scheme. The states have presented evidence, accepted by the district court, that the Department has sought to short-circuit judicial review of its administrative rulemaking and defy the rule of law by implementing it prior to publication of the final rule. Additionally, the states' evidence points to plans by the Department make the rule effective less than 60 days after its publication, violating federal legal requirements for such "major rules."[7]

In light of the evidence against the Department and its acceptance by a federal district court as the basis for the issuance of a TRO against the Department blocking any cancellation of debt under the authority claimed in its proposed rule, DFI urgently seeks communications, records, and information related to the new mass student loan debt cancellation plan since April 1, 2024.

Requested Records

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

1. The key search terms are as follows:
    a. Waiver
    b. Mass Cancellation
    c. Forgiveness Files
    d. Debt Relief
    e. Loan Balance
    f. Debt Discharge

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[5] Complaint, *Missouri v. Biden*, Case 2:24-cv-00103-JRH-BKE (SDGA Cir. Ct. Sep. 3, 2024), https://ago.mo.gov/wp-content/uploads/1-Complaint-Student-Loans.pdf.
[6] Order, *Missouri v. Biden*, Case 2:24-cv-00103-JRH-BKE (SDGA Cir. Ct. Sep. 5, 2024).
[7] *See* 5 U.S.C. § 801(a)(3).

2. All communications and correspondence, including but not limited to electronic mail ("email"), email attachments, texts, letters, memoranda, and other documentation, regarding the Department's implementation of the NPRM codified at 20 U.S.C. § 1082(a)(6) or referencing any key terms from Item 1 between ED officials (see Custodians, *infra*) and entities responsible for servicing federal loans or student-loan focused entities/organizations that the Department has communicated with regarding this issue from April 1, 2024 through the date the search is conducted.

3. All communications and correspondence, including but not limited to electronic mail ("email"), email attachments, texts, letters, memoranda, and other documentation, that resemble or are themselves memoranda or final decision memoranda signifying a decision to move forward with the implementation of the NPRM codified at 20 U.S.C. § 1082(a)(6) either in an internal communication or an external communication from April 1, 2024 through the date the search is conducted.

Custodians

The search for records described in Item 2 should be limited to "ED officials" within the Office of the Secretary, Office of the General Counsel, and Federal Student Aid 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. "SES" (Career Senior Executive Service)
e. "SC" (Schedule C Confidential or Policymaking Positions)
f. Chief Operating Officer, Federal Student Aid
g. Acting Chief Operating Officer, Federal Student Aid
h. g. Deputy Chief Operating Officer, Federal Student Aid
i. h. Chief Financial Officer, Federal Student Aid
j. i. Executive Assistant to the Chief Operating Officer, Federal Student Aid
k. j. Chief of Staff, Federal Student Aid
l. k. Senior Advisor for Management, Federal Student Aid
m. l. Senior Advisor, Federal Student Aid
n. m. Ombudsman, Federal Student Aid
o. n. 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 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."[8] Upon request, ED must "promptly" make the requested records available to the requester.[9] Notably, covered agency records include materials provided to ED by both private and governmental organizations.[10] 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,[11] ED must conduct a search calculated to find responsive records in ED's control at the time of the request.[12] 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."[13]

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.[14]

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

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[8] *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).
[9] 5 U.S.C. § 552(a)(3)(A).
[10] *Id*. at 144.
[11] 5 U.S.C. § 552(a)(3)(A)(i).
[12] *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).
[13] 5 U.S.C. § 552(a)(3)(B).
[14] 5 U.S.C. § 552(a)(6)(A)(i).

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 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 X which was formerly known as 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"[15] and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the nondisclosure relies.

- Please provide responsive records in electronic format by email, native format by mail, or PDF or TIH 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.

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 Title IX Final Rule and Athletics NPRM 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 X, which was formerly known as 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

[15] *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

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."[16] 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 may 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 X formerly known as Twitter. 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

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 recent attempts to cancel student loans on a mass basis, which is of tremendous interest to students, families, and taxpayers.

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[16] *See Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).

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 martha.astor@dfipolicy.org or (321) 390-2707.

Sincerely,

Martha A. Astor
Counsel, Litigation
Defense of Freedom Institute for Policy Studies