DAILY BRIEFING

Thursday, June 30, 2022

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NCHER Offices Closed for Independence Day, *Daily Briefing* Resumes on Tuesday

The NCHER offices will be closed on Monday, July 4th in observance of Independence

Day. The offices will reopen and the *NCHER Daily Briefing* will resume its publication on Tuesday, July 5, 2022. Have a safe weekend!

NCHER Summer Legal Meeting: Register Today!

The next NCHER Legal Meeting will be held in just four weeks, on Thursday, July 28, 2022 at the law offices of Norton Rose Fulbright in downtown Washington, DC (799 9th Street NW, Suite 1000). This one-day meeting should benefit lawyers and non-lawyers alike. The registration fee is $400 for members and $500 for nonmembers. There are a number of hotels within walking distance of the law firm, which are posted on the event website. So **register** for the meeting today!
The **meeting agenda** was recently released and includes many topical sessions, including an update on the activities of the Consumer Financial Protection Bureau, developments in financing federal and private student loans, legal issues with federal student loan forgiveness and Operation Fresh Start, a discussion of state laws affecting student loan servicing and private student loan lending, and a primer on federal contracting, as well as a Washington update. If you have any questions, please do not hesitate to contact Shelly Repp at **srepp@ncher.org**.

House Appropriations Committee Approves Labor, HHS, Education Appropriations Act, Defeats Hinson Amendment on Student Loan Forgiveness

Today, the House Appropriations Committee met in executive session and passed the **Fiscal Year (FY) 2023 Labor, Health and Human Services, Education, and Related Agencies Appropriations Act**, by a vote of 32-24. The bill now heads to the U.S. House of Representatives for additional consideration, though it is doubtful that Congress will approve a final version before the start of the federal fiscal year on October 1, 2022.

During her **opening statement**, Committee Chairwoman Rosa DeLauro (D-CT) noted that the committee received more than 16,000 requests for funding items, demonstrating the importance of the bill to both Democrats and Republicans. She said that she was proud of the bill, which builds on investments made in 2022. “We know that Americans are looking for a lifeline – that pay is not keeping up with inflation, hardworking Americans live paycheck to paycheck, women are having trouble reentering the workforce because they struggle to find good childcare, and good employment and education opportunities for people, they often feel unattainable for so many,” Chairwoman DeLauro said. “And this bill

gives them the lifeline they are looking for." On higher education, the Chairwoman said that the legislation includes $1.1 billion for programs serving Historically Black Colleges and Universities, Minority Serving Institutions (MSIs) and other under resourced institutions of higher education and a $500 increase for the maximum Pell Grant. In his opening statement, Subcommittee Ranking Member Tom Cole (R-OK) thanked the committee for its work on the bill. He stated that, although the spending package considered today funds a lot of important programs, the funding level is too high and there's needs to be additional work to reach a bipartisan agreement.

During the markup session, Rep. Ashley Hinson (R-IA) offered an amendment to prohibit the U.S. Department of Education and other federal agencies from using the funds appropriated in the bill to cancel, forgive, or defer payments on federal student loan debt. The amendment provides an exception for existing loan forgiveness programs, as of March 12, 2020. The amendment failed by a vote of 24-32. There were no other higher education finance-related amendments offered during the session.

As previously reported, the legislation would provide $242.1 billion in discretionary funding for the U.S. Department of Labor, U.S. Department of Health and Human Services, and U.S. Department of Education, an increase of $28.5 billion or 13 percent over the FY 2022 enacted appropriations bill. A summary of the legislation released by the committee can be found **here**.

Key education provisions of interest to the NCHER membership include the following:

- The bill provides $86.7 billion in discretionary funding for the Department of Education, which is $10.3 billion above last year's level. The legislation provides $24.6 billion for federal student aid programs, an increase of $59 million above the FY 2022 enacted level.
- The legislation sets the maximum Pell Grant award at $7,395 an increase of $500 over the 2022 enacted level, funded by a combination of discretionary and mandatory funds.
- The bill provides $920 million for the Federal Supplemental Educational Opportunity Grant program, an increase of $25 million above the 2022 enacted level, and $1.2 billion for Federal Work Study, an increase of $34 million above the 2022 enacted level.
- The legislation provides $1.3 billion for TRIO Programs and $408 million for GEAR UP, which help first-generation college students prepare for, enter, and complete

college. TRIO programs are increased by $161 million and GEAR UP programs will see an increase of $30 million.

- The bill extends the authority for account maintenance fees paid to guaranty agencies for an additional year.
- The legislation provides $2.58 billion for federal student aid administrative expenses. It includes legislative language requiring that federal student loan servicers be evaluated on their ability to meet contractual requirements (including an understanding on federal and state law), future performance on the contracts, and history of compliance with consumer protection laws. It also requires that federal servicers are held accountable for meeting the requirements of their contract, the performance and expectations of subcontractors, and that contractors have the capacity to meet and are held accountable for performance on service levels, held accountable for and have a history of compliance with consumer protection laws, and have relevant experience and demonstrated effectiveness.

  The bill does not retain long-standing language requiring the Secretary of Education to allocate new borrower accounts to student loan servicers on the basis of their past performance, utilizing established common metrics, nor language allowing borrowers who are consolidating federal student loans to select from any student loan servicer to service their new consolidated student loan.
- The legislation modifies the 90/10 rule to increase the percentage of non-federal funds that proprietary colleges must receive to 15 percent (making it a 85/15 rule).
- The bill amends the Higher Education Act to expand eligibility for federal student aid to included Deferred Action for Childhood Arrivals or DACA participants and those who have received temporary protected status under the Immigration and Nationality Act.

For more coverage, including an archived webcast of the markup session, visit the committee website.

House Appropriations Committee Releases Report on Labor, HHS, Education Appropriations Act

Yesterday, the House Appropriations Committee released the report accompanying the Labor, Health and Human Services, Education, and Related Agencies Appropriations Act. The following report language may be of interest to the NCHER membership:

- State and Nonprofit Subcontracting.—The Committee encourages the Department to evaluate opportunities for qualified State and nonprofit organizations to contribute in the new servicing environment.
- Transparency in College Costs.—The Committee looks forward to the briefing it requested in House Report 117–96 on the Department's efforts to work with institutions of higher education to improve college cost transparency.
- Online Program Management (OPM) Companies.—The Committee is deeply concerned by the proliferation of for-profit OPMs in higher education. Specifically, the Committee is troubled by how tuition-sharing agreements between universities and for-profit OPM companies can create perverse incentives that drive up costs, waste taxpayer dollars, and rip off students. In addition, the Committee is concerned by the role OPMs play in saddling graduate students with unsustainable student debt by taking advantage of the Grad Plus program, which lets students borrow as much as colleges charge. Though the practice has proven to be a valuable revenue stream for OPMs and universities, the Committee is not persuaded that these relationships are in the best interests of students.

  A November 2021 Wall Street Journal investigation revealed how for-profit OPM 2U and the University of Southern California (USC) recruited thousands of students to an expensive online graduate program which left student borrowers with median debt of $112,000 and median earnings of $52,000 two years later. 2U, which received 60 percent of the program's total revenue, helped USC use demographic profiles to target low-income and minority students to maximize profits. The Committee believes this behavior is straight from the playbook of the predatory for-profit colleges. Further, the Committee believes a status quo that allows for the continuation and proliferation of wasteful, abusive relationships between OPMs and universities is untenable.

  The Committee is disappointed by the inappropriately loose regulatory environment and sparse enforcement that has allowed OPMs to gain their foothold across the higher education landscape. The Committee is aware of GAO's recent report (GAO–22– 104463) and agrees with recommendations for the Department to improve its audit and review process regarding OPM arrangements, including via revisions to the Compliance Supplement; however, given the severity of OPM-driven waste and abuse, the Committee supports stronger, more urgent measures. Specifically, the Committee supports the complete rescission of March 2011 sub-regulatory guidance that established a loophole to the statutory incentive

compensation ban. Under the HEA, individuals and entities cannot provide commissions, bonuses, or incentive payments based on securing enrollments or the awarding of Federal student aid. However, the misguided 2011 guidance establishes a loophole if recruiting is part of a ''bundle of services'' provided by an ''unaffiliated third party'' contractor, such as an OPM.

The Committee strongly urges the Department to immediately rescind the 2011 bundled services guidance and to establish a process to wind down institutions' inappropriate reliance on wasteful, abusive OPM tactics. In the interim, the Committee strongly urges the Department to immediately enforce commonsense aspects of the otherwise flawed guidance. Specifically, the Committee urges the Department to ensure any contractors are independent entities, unaffiliated with the institution, and uninvolved in decision making. The Committee believes several common practices by OPMs clearly overstep the existing guidance, including, the establishment of steering committees or other governing bodies that give the OPM an official and regular role in decision making; higher shares of revenue paid to the OPM as enrollment increases; and OPM control over marketing and recruiting, in the name of school.

The Committee urges the Department to employ meaningful consequences and penalties to deter predatory behavior. Finally, the Committee urges the Department to develop adequate guidance to institutions that indicates when marketing could be considered a covered activity under the ban on incentive compensation payments. In addition, the Committee urges the Department to revise audit and program review guides to meet oversight goals of the incentive compensation ban. Moving forward, the Committee is committed to vigorous oversight of relationships between universities and for-profit OPMs and urges the Department to crack down on OPM waste and abuse to protect students and the overall integrity of taxpayer-funded Federal student aid programs.

- Graduate Student Debt.—According to the fiscal year 2023 budget request, excluding consolidations, graduate student loans are expected to make up over 47 percent of new Federal student loan originations in fiscal year 2023. This proportion is significantly up from the 34 percent of new loan originations graduate student debt represented in fiscal year 2014. While OPMs play a concerning role in this trend, the Committee is also concerned about the broader landscape of graduate student debt. In response, the Committee urges the Department to analyze the disproportionate share of new student loan originations represented by

graduate student programs and to determine whether graduate student programs leave students with reasonable debt levels. In addition, the Committee strongly urges the Department to take actions to ensure that graduate program outcomes are commensurate with the debt levels of their students.

- Borrower Defense Recoupment and OPMs.—The Committee is strongly supportive of the Department's most recent proposal for an automatic, formalized process for recouping funds from institutions that commit wrongdoings against student borrowers. Under the proposal, schools that commit wrongdoings are fully liable for any amounts discharged through the Borrower Defense process except under certain reasonable circumstances. The Committee notes that institutions in partnerships with predatory for-profit OPMs will incur liabilities for discharges resulting from predatory behavior.

  To build on these strong protections, the Committee urges the Department to clarify that OPMs function as third party servicers. Further, the Committee urges the Department to develop methods for determining when Borrower Defense liabilities should be shared jointly between the institution and OP. Under such circumstances, the Committee urges the Department to recoup funds from both entities. The Committee notes that investors and shareholders have contributed to the growth of the OPM industry under an expectation of loose regulation or non-existent oversight. Accordingly, the Committee's recommendations regarding OPMs are intended to indicate that such assumptions are outdated, and that unscrupulous behavior will yield straightforward, substantial financial consequences.

- Appropriate Conditions for High-risk Schools.—The Committee recognizes that use of Federal student aid by institutions of higher education is contingent on their eligibility to be certified to do so under the Title IV of the HEA. To ensure that institutions are responsible stewards of Federal student aid, the Committee encourages the Department to place appropriate conditions on high-risk schools and to clarify procedures for when a high-risk institution may be eligible for a provisional program participation agreement.

- Spousal Consolidation Loans.—The Committee is aware that hundreds of borrowers remain in the spousal consolidation loan program which stopped originating new loans in 2006. The Committee is concerned that these loans cannot be separated and leave both borrowers liable for the entire debt, even after a divorce. The Committee believes it is deeply unwise for a Federal program to link the financial fates of two borrowers when their personal relationships may have

deteriorated or perhaps become abusive. In response, the Committee urges the Department to assist struggling spousal consolidation loan borrowers and directs the Department to describe such efforts in the fiscal year 2024 Congressional Budget Justification.

Republican Senators Introduce Bill to Require Biden Administration from Obtaining Funds from Congress Before Providing Federal Student Loan Cancellation

On Tuesday, Sens. Rick Scott (R-FL), Cynthia Lummis (R-WY), Mike Braun (R-IN), and John Barrasso (R-WY) introduced the Debt Cancellation Accountability Act, which would require the U.S. Department of Education to obtain an express appropriation from Congress to pay for any federal student loan forgiveness. The bill would apply in cases where the Department proposes to waive, discharge, or otherwise reduce student loan debt whenever granted to two or more borrowers in an amount greater than $1 million.

In a statement on the proposed legislation, the lawmakers said that the Biden Administration is considering a blanket federal student loan forgiveness plan that would place an undue burden on taxpayers and increase inflation on working families. "The reality is, a blanket forgiveness of student loans only benefits a small percentage of the population at the expense of millions of other hardworking Americans," Sen. Scott said. "Those who have saved to pay for the education they chose to get, or have no debt at all because they chose a valuable career that doesn't require a college degree, shouldn't be on the hook to bail out folks that voluntarily took on debt and now want someone else to pay for it." The senators also argued that student loan forgiveness will disproportionately benefit higher-income borrowers. "This blatant wealth redistribution will only make inflation worse at a time when millions of Americans are already feeling the burden of record-high inflation," said Sen. Braun.

FSA Releases Final Memo Setting Variable Interest Rates for FFELP

On Wednesday, the U.S. Department of Education's Office of Federal Student Aid (FSA) released a final memorandum setting interest rates for the Federal Family Education Loan Program for the period July 1, 2022 – June 30, 2023. The interest rates for variable-rate loans are as follows:

- Stafford Loans: The interest rate based on the 13-week Treasury Bill auction is 1.14 percent.
- PLUS/SLS Loans: The interest rate based on the 13-week Treasury Bill auction is 1.14 percent. The weekly average of the one-year constant maturity Treasury yield for the last calendar week ending on or before June 26 is 2.83 percent.
- Consolidation Loans: The interest rate based on the 13-week Treasury Bill auction is 1.14 percent. For the Health Education Assistance Loan portion of consolidation loans received on or after 11/13/1997, the rate is based on the average of the 13-week T-Bills auctioned for the quarter ending June 30 or 1.14 percent.

In its electronic announcement, FSA noted that these variable rates do not affect Federal Stafford or Federal PLUS loans made on or before July 1, 2006, as those loans have a fixed rate.

CFPB Releases Interpretative Rule Limiting Scope of Fair Credit Reporting Act's Preemption Provision

Earlier this week, the Consumer Financial Protection Bureau (CFPB) announced the issuance of an interpretative rule clarifying the role that states can play in the regulation of consumer reporting. "Given the intrusive surveillance that Americans face every day, it is critical that states can protect their citizens from abuse and misuse of data," said CFPB Director Rohit Chopra. While the Fair Credit Reporting Act (FCRA) expressly preempts certain categories of state laws, the interpretive rule states that these express preemptive provisions have a narrow and targeted scope, and that "States therefore retain substantial flexibility to pass laws involving consumer reporting to reflect emerging problems affecting their local economies and citizens." As long as not specifically preempted, the rule says that states can regulate consumer reporting agencies as well as furnishers of consumer reports (e.g. lenders and servicers). As background for the issuance of the interpretive rule, the CFPB states that the preemptive scope of the FCRA has been the subject of recent challenges to state law.

TICAS Publishes Brief on Access and Completion of Pell Grant Recipients, Focus on Community College Students

The Institute for College Access and Success (TICAS) recently published the first brief in a three-part series on access and completion of Pell Grant recipients, with this installment focused on community college students. According to the report, one in four

community college students, approximately 2 million recipients, receive aid from Pell Grants in order to attend postsecondary education.

The report found that, during the height of the Great Recession, nearly 40 percent of community college students received Pell Grant aid, though that percentage has steadily decreased to reach approximately 25 percent of students for the 2020–2021 school year. TICAS notes that the sharp decline in Pell Grant recipients in 2020–2021 can be attributed to the COVID-19 pandemic rather than changes to federal policy. The report cited that completion rates for Pell Grant recipients have increased over the same time period; in fact, in the most recent year data was available, the median three-year completion rate for Pell recipients was 25 percent. TICAS notes that there is not a strong relationship between access and three-year completion rates among community colleges and added that researchers and policymakers could use this report to inform through which mechanisms community colleges could improve access or completion rates.

National Student Clearinghouse Report Finds Persistence Rates Increased for Students Starting College in Fall 2020

The National Student Clearinghouse Research Center recently published a report with updated data to reflect the persistence and retention rates of students that began their postsecondary education in the fall of 2020. According to the report, 75 percent of students returned to school for their second year, which represents a 1.1 percent increase in persistence when compared to last year. Despite this increase, the persistence rate is still below the pre-pandemic persistence rate of 75.9 percent. The Center attributed this increase in persistence to first-time students transferring out in their first year more than those remaining at their starting institution, which is a reversal of a trend observed last year. The report also found that community colleges and private for-profit colleges experienced increases in retention and persistence rates, while other four-year institutions experienced small decreases.

The Clearinghouse noted that persistence rates increased for all races and ethnicities except for Native American students, who experienced a 2.8 percent decrease in persistence. On the recent data, the Center's Director of Research Publications Mikyung Ryu said, "Changes year over year in student persistence rates have much to do with the makeup of the entering student cohort." She added that "lucky student populations that have resources, who have willingness and ability to enroll in college in the midst of the variety of pandemic-related disruptions" are less likely to defer enrollment relative to

low-income students.

U.S. Department of Education News

For today's *Federal Register*, click here.
The following announcements were posted to the Federal Student Aid's Knowledge Center Website:

- (APP-22-10) 2023–2024 EDE Technical Reference (Final)
- (GENERAL-22-39) Volume 1 – Student Eligibility [2022-2023 Federal Student Aid Handbook]
- (GENERAL-22-38) FBI ALERT about Login Credentials from US Education Institutions Found Compromised on Dark Web
- (GENERAL-22-37) myStudentAid Mobile App to be Retired June 30, 2022
- (DL-22-06) Additional 2020–21 Direct Loan Program Year Closeout Information

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General News

The Consumer Financial Protection Bureau released a blog post stating that it is currently accepting applications from individuals who want to serve on its advisory committees, including the Consumer Advisory Board.

Higher Ed Dive reports that, this month, several leaders of online universities, community colleges, and higher education systems urged congressional leaders to include online-only programs in a bill that would expand Pell Grant eligibility to programs as short as eight weeks.

insideARM reports that a credit card issuer recently won a big ruling involving the definition of an automatic telephone dialer system under the Telephone Consumer Protection Act arising out of debt collection calls.

Inside Higher Ed reports that the long-awaited proposals for new Title IX regulations under the Biden Administration were released last week to mixed reactions. The proposals include changes to the way colleges and universities investigate sexual assault, which has sparked concern and condemnation from civil liberties advocates. Critics of the

regulations also fear that the administration is stripping away due process.

Saving for College reviews the 10 rules for "superfunding" a 529 plan. "Superfunding" is a term sometimes used to describe large 529 plan contributions using 5-year gift tax averaging, and it can be a great way to jumpstart a child's or grandchild's college savings account.

Forbes reports that the Biden Administration has canceled $400 billion in federal student loans, but House Education and Labor Committee Ranking Member Virginia Foxx (R-NC) says no more student loan forgiveness.

Fox Business reports Sen. Sheldon Whitehouse (D-RI) recently introduced new legislation that, if passed, would allow Americans to refinance their federal student loans at a 0 percent interest rate.

MarketWatch reviews the latest interest rates for student and parents interested in refinancing their student loans.

PlanSponsor reports that Vanguard has partnered with Candidly to offer retirement plan sponsors a student loan debt repayment program option for eligible employees.

Benefits PRO reports that, as the Great Resignation enters its second year and employers race to overhaul their recruitment and retention strategies, voluntary benefits are having a moment. With federal student loan repayment set to resume, the time is now to offer a benefits program that can help offset the impact of student debt.

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