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EducationCounsel Alert for September 3, 2026

Resources Feedback Survey: To help us continuously improve, we are seeking feedback from everyone who reads or shares our Alerts and Deep Dives about federal developments affecting education.

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This EducationCounsel Alert shares updates about various recent actions by the federal government relevant to education, including:

1. **USED Proposes Major Revisions to its Grantmaking and Management Regulations (EDGAR)**
2. **Treasury Proposes Rule to Strip Tax-Exempt Status from Private Schools on the Basis of Engaging in Racial Discrimination**
3. **USED Releases Guidance on Responsible Use of Education Technology in Classrooms**
4. **DOJ Releases Guidance with New Legal Interpretations Regarding Parental Consent for Surveys**
5. **USED and DOJ Take Enforcement Actions Regarding Parents' Rights Related to Transgender Student Supports**
6. **Congress Passes Temporary Funding Extension and Blocks OMB's Proposed Federal Funds Rule**
7. **Court Blocks New Executive Order Restricting Birthright Citizenship**
8. **USED Recommends Ending the American Bar Association's Accreditation Recognition**
9. **Other Significant Updates**

All of our summaries and analysis of the Administration's executive actions are available in one place by clicking here. Please note that these developments are sometimes changing rapidly, and *this Alert and all our materials are meant to provide general guidance and do not constitute specific legal advice*.

1. USED Proposes Major Revisions to its Grantmaking and Management Regulations (EDGAR)

On 8/24/26, the U.S. Department of Education (USED) issued a Notice of Proposed Rulemaking (NPRM) that proposes several significant changes to the Education Department General Administrative Regulations (EDGAR), which govern USED's competitive and formula grant programs. The NPRM proposes to revise those regulations in several ways that advance the Administration's policies and preferences, including greater control over grants and opposition to efforts to advance diversity, equity, and inclusion in education. Public comments on the NPRM can be submitted here through 9/23/26. (USED's proposal substantively overlaps with, but is procedurally distinct from, the U.S. Office of Management and Budget's government-wide proposal to overhaul how funding agencies like USED make and manage grants and other forms of federal financial assistance.)

Because these changes could have major implications for federal funding across many USED programs, EducationCounsel has created an ***EDGAR Overview & FAQ*** that provides detailed summaries of key provisions and issues in USED's EDGAR proposal, each of which warrants careful consideration by anyone considering submitting comments before USED finalizes its revisions. These include:

1. Making it Easier for USED to Terminate Grants it Disfavors: The NPRM provides USED with more discretion to suspend or terminate grants "for convenience" regardless of how the grantee is performing. Among other changes, the NPRM replaces language holding USED's grantees responsible for their performance as grantees with an approach to qualifying for continued funding that would turn on remaining in good standing with USED's and the Administration's political and policy preferences. Given that policy and political preferences change within and across Administrations, this would inject new risk of grants being unexpectedly canceled mid-implementation. This additional instability and uncertainty would affect all grantees, but it could particularly disadvantage recipients that rely on federal funding for key purposes, including rural school districts, small non-profit organizations, and new federal grantees.

2. Requiring All Grantees to Comply with the President's Executive Orders: The NPRM seeks to require formula-funded grantees, such as state departments of education and public school districts, to comply with all of the President's executive orders, just as EDGAR currently does of competitive grant awardees. But EOs do not have the force of law and, as federal courts have repeatedly held, they sometimes violate federal laws or the U.S. Constitution. Requiring all of USED's grantees to comply with EOs thus introduces a level of legal uncertainty and risk that undermines the ability of states, school districts, and other recipients of federal education funding to responsibly plan and manage their grants.

3. Requiring Grantees' Employment and Admissions Decisions to be Based on "Merit": The NPRM adds requirements for all USED grantees to base any employment and admissions decisions under their grants solely on "merit," without defining that term or explaining whether and how the new EDGAR language is consistent with or goes beyond existing federal antidiscrimination laws. An accompanying provision prohibits compelling "statement of belief in support or opposition to any political views" but does not explain what constitutes a "political view." Given the vague language in these proposed provisions and the Administration's track record of misrepresenting the current state of federal antidiscrimination law,[1] these EDGAR revisions could be used to push all USED grantees to align their employment and admissions practices to an unknown legal standard subject to the Administration's interpretation or risk losing their federal funding.

4. Prioritizing Grant Applicants that Lower their Indirect Cost Rates: The NPRM creates a new competitive grant priority that can be incorporated into any USED grant competition to provide bonus points to applicants that agree to lower their negotiated indirect cost rate in their grant proposal. In competitions that USED deploys this new priority, IHEs and other entities—especially research institutions that often have higher negotiated rates given their need for costly specialized facilities and equipment—may be forced to choose between the negotiated rates to which they are legally entitled or increasing their chance of winning a grant competition.

5. Advancing the Administration's Priorities through Competitive Grant Scoring Criteria: The NPRM makes numerous changes to the menu of criteria that USED can choose from when designing the scoring rubrics for new grant competitions, with the overall effect of shifting the criteria—and thus the incentives for what the field proposes in their applications—toward the Administration's policy

[1] For examples, see EducationCounsel's Deep Dives, *Overreaching and Misleading*: Analysis of the U.S. Department of Education's February 14, 2025, "Dear Colleague" Letter on Diversity, Equity and Inclusion Policies and Programs and *Mis*guidance: An Analysis of the U.S. Department of Justice's July 29, 2025 Civil Rights Guidance.

preferences. Many of the revisions align with the Administration's opposition to efforts to advance diversity, equity, and inclusion. Removing or revising scoring factors that currently incentivize these efforts could lead to a significant shift in who benefits from USED's discretionary funds in the future.

- Supplementing the *EDGAR Overview & FAQ*'s discussion of this topic is an **Appendix** that provides our redlined and annotated version of USED's proposed revisions to EDGAR's menu of scoring criteria for competitive grant programs.

6. Other Proposed Revisions of Note: The NPRM includes other revisions as well, including changes to how USED posts information about new grant competitions, the role of the What Works Clearinghouse in defining "strong," "moderate," and "promising" levels of evidence, and the ways that USED manages any frontloading of funds for multiyear grants.

2. Treasury Proposes Rule to Strip Tax-Exempt Status from Private Schools on the Basis of Engaging in Racial Discrimination

On 9/3/26, the U.S. Department of the Treasury and the Internal Revenue Service (IRS) announced a proposed new rule that would end federal tax-exempt status for any private schools that engage in racial discrimination. Schools would lose their 501(c)(3) status if they do not satisfy the following "nondiscrimination requirement" created by the NPRM:

> A private school is not operated exclusively for exempt purposes if it adopts, maintains, or enforces any policy or practice that discriminates on the basis of race, color, or national or ethnic origin in the administration of any educational policy, admissions policy, scholarship or loan program, athletic program, or other school-administered or school-supported program. For purposes of this section, discrimination on the basis of race, color, or national or ethnic origin includes any discrimination on the basis of race, color, or national or ethnic origin **for any purpose**. (Emphasis added.)

The rule would apply to private primary and secondary schools and institutions of higher education (IHE)[2] and would take effect "with respect to the taxable year of any private school beginning after May 31, 2027."

The introduction to the NPRM appears to assert that the Administration will apply the nondiscrimination requirement quoted above on the basis of the Administration's policy preferences rather on legal grounds. Following a lengthy recounting of how federal law regarding discrimination in education has developed over time, the NPRM begins its "Explanation of Provisions" discussion by stating:

> These proposed regulations would provide that all forms of racial discrimination in education, ***regardless of*** **the intent behind or** ***the legality of*** **such discrimination** (for example, where such discrimination is defended as serving remedial or diversity-related objectives), are against a fundamental public policy of the United States and thus preclude a school's exemption from Federal income tax under section 501(c)(3). In so doing, the proposed regulations would make clear that discriminating based on race, color, or national or ethnic origin for any purpose by a private school is contrary to a fundamental public policy of the United States. (Emphases added.)

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[2] According to the press release, "The proposed regulations would apply to tax-exempt private primary and secondary schools, colleges, universities, professional schools, and trade schools. Treasury and the IRS estimate that the proposal may affect as many as 18,000 private educational institutions."

It also lists the following as the sources for identifying the "fundamental public policy of the United States":

> This public policy is evidenced by antidiscrimination law such as the Equal Protection Clause of the Fourteenth Amendment, the Civil Rights Act of 1964, Supreme Court case law such as *Brown* to *Runyon* to *Bob Jones* to *Students for Fair Admissions*, **and the actions taken by the Executive Branch to ensure racial nondiscrimination is instituted throughout the United States**.

As examples of the "actions taken by the Executive Branch," the NPRM refers to executive orders (EOs) including two of President Trump's EOs that arguably go beyond the current state of antidiscrimination law. In other words, tax-exempt status under this proposed rule would be at least in part contingent on aligning with Presidential policies that do not otherwise carry the force of law.[3]

Additionally, although the text of the proposed nondiscrimination requirement (quoted at the beginning of this summary) appears to mostly restate existing federal civil rights laws, there is an important exception. By including "for any purpose" at the end, the proposed rule does not appear to account for lawful race-*conscious* actions that institutions might take for a purpose that is a "compelling interest" under the legal strict scrutiny test applicable to racial classifications, such as remedying specific instances of racial discrimination. The 14th Amendment to the U.S. Constitution, as well as Titles VI and VII of the Civil Rights Act of 1964, sometimes require such actions.

In sum, the NPRM appears to suggest that private schools can lose their tax-exempt status even if they are fully complying with federal law and relevant federal court decisions. If they take actions that the Administration disfavors, the schools may lose their status because the Administration considers them to be engaging in discrimination for purposes of this new rule. The NPRM also does not address the process the Administration will follow in making such determinations.

The rule has not yet been officially posted to the Federal Register, but the unofficial version indicates that the agencies will accept public comment for 60 days after its publication, which should take place tomorrow. There would likely be legal challenges to the rule if it is finalized in its current form.

3. USED Releases Guidance on Responsible Use of Education Technology in Classrooms

On 8/20/26, USED released a Dear Colleague Letter (DCL) providing non-binding guidance to states, schools, teachers, families, and education technology companies on the responsible use of technology in classrooms. The guidance encourages decisionmakers to focus on "instructional value over recreational engagement" and to evaluate technology based on its impact on student outcomes rather than the amount of time students spend on screens. The DCL emphasizes that technology used in schools should have a clear educational purpose that is supported by evidence of effectiveness, with regular evaluation. The guidance asserts that states, districts, educators, and vendors share responsibility for ensuring that technology is

[3] Regarding the use of race-*neutral* criteria, the press release and the introduction to the proposed rule affirm that private schools can, as the press release says, "continue expanding educational opportunity to assist disadvantaged students using race-neutral criteria."# Private schools may reasonably worry, however, that the Administration has a very narrow view of when such criteria can be used. The proposed rule may upend otherwise lawful race-neutral practices if USED's recent guidance about student discipline is indicative of how the Administration will approach its civil rights enforcement function. In that guidance, the Trump Administration adopted the legal position that otherwise lawful race-neutral actions constitute racial discrimination if they are at all motivated by concerns about racial disparities. (See our 8/20/26 Alert for more information.)

implemented safely and in ways that advance meaningful learning outcomes. The DCL comes shortly after the Federal Communications Commission's [publication] of an E-Rate rule that raises several related questions, including about the value of technology in schools and its impact on student outcomes.

4. DOJ Releases Guidance with New Legal Interpretations Regarding Parental Consent for Surveys

On 8/26/26, the U.S. Department of Justice's DOJ's Student Privacy Policy Office (SPPO) issued a new Dear Colleague Letter (DCL) that provides the annual reminder to all districts of their obligations under the Family Educational Rights and Privacy Act (FERPA) and the Protection of Pupil Rights Act (PPRA). Under PPRA, schools are required to obtain parents' written consent before their minor student participates in any required survey, evaluation, or analysis that concerns one or more of the following eight protected areas:

1. "Political affiliations or beliefs of the student or the student's parent;
2. Mental or psychological problems of the student or the student's family;
3. Sex behavior or attitudes;
4. Illegal, anti-social, self-incriminating, or demeaning behavior;
5. Critical appraisals of other individuals with whom respondents have close family relationships;
6. Legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
7. Religious practices, affiliations, or beliefs of the student or student's parent; or,
8. Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program)."

In line with the Administration's focus on parents' access to information about their children—especially information related to children's gender identity—the DCL includes new interpretations of federal law and places a greater emphasis on a number of key areas:

- Most significantly, SPPO interprets *any* survey, evaluation, or analysis administered by a district employee to a student that touches on the eight protected topics above to be "required" and therefore subject to PPRA's advance parental notification and written parental consent requirements. The DCL bases this "required" designation on the pressures a student may feel from an authority figure or peers to participate, whether or not they are actually required to do so by the district.

- The DCL asserts that mental health screening tools that include "questions about [a student's] emotional wellbeing, internalized distress, social interactions, and other indicators of psychological or mental states or conditions" also trigger PPRA's advance notice and consent requirements.

- Even though the requirements under PPRA have typically been interpreted to attach to USED-funded activities only, the DCL does not distinguish between surveys administered with federal funds and those that are not. Instead, SPPO is interpreting PPRA requirements to apply "whether or not a specific survey is exclusively or directly administered with Department funds."

- The DCL places a greater emphasis on ensuring that parents receive notice of their rights than in past years, including sample methods that schools may use to disseminate this information. In particular, SPPO emphasizes the right of parents under PPRA to review curricula and other instructional materials upon request. The letter also raised concerns that "many LEAs may be denying parents the opportunity."

5. USED and DOJ Take Enforcement Actions Regarding Parents' Rights Related to Transgender Student Supports

Following a flurry of new investigations initiated in July, USED announced on 8/26/26 that SPPO reached a first-of-its-kind resolution agreement with Topeka Public Schools regarding allegations that the district withheld information from parents of transgender and gender non-conforming students in violation of FERPA. Under the terms of the agreement, the district will direct staff to stop creating support plans for transgender students (regardless of parental support or opposition) and allow parents to review any plans currently in place, among other changes.

DOJ will likely test some of the legal interpretations in the DCL described in #4 above in federal court through a new lawsuit it filed on 9/1/26 against Kansas City, Kansas Public Schools. In its complaint, DOJ asserts that the district's policies and procedures around supporting transgender students violate both FERPA and PPRA by unlawfully denying parents the right to consent to their child's participation in any assessment related to their gender identity, access their school records, and insert their own written explanations into their child's "Gender Plan."

6. Congress Passes Temporary Funding Extension and Blocks OMB's Proposed Federal Funds Rule

On 9/2/26, President Trump signed into law a bipartisan Continuing Resolution (CR) that maintains federal funding through 12/11/26. The bill passed the Senate 90–6 and the House 370–48. The CR provides Congress with more time to enact appropriations laws for FY27. If they cannot do so before the CR expires, Congress could enact another CR or the federal government would shut down.

Among other things, the CR prohibits the U.S. Office for Management and Budget (OMB) from issuing any final version of its proposal to overhaul the rules governing federal financial assistance until the CR expires on 12/11/26. OMB's proposed rule, summarized in this *OMB Overview & FAQ*, garnered almost half a million public comments and is currently pending with OMB, which must still issue a final rule responding to the comments and setting a date in order for the rule to go into effect.

7. Court Blocks New Executive Order Restricting Birthright Citizenship

On 9/2/26, the judge in the case that successfully challenged President Trump's initial executive order (EO) attempting to end birthright citizenship issued a new preliminary injunction blocking the President's second EO on this topic. As described in our 8/20/26 Alert, plaintiffs had asked the court to clarify that the Supreme Court's recent ruling in *Trump v. Barbara* also invalidates this new attempt to exempt certain categories of children from the Constitution's guarantee of birthright citizenship. In issuing the new injunction, the judge wrote: "The Supreme Court has spoken: Children in the certified class are 'citizens at birth.' *Barbara* is the law of the land. The President must follow it."

8. USED Recommends Ending the American Bar Association's Accreditation Recognition

On 8/22/26, USED released a staff report recommending that the agency deny the American Bar Association's (ABA) application to renew the accreditation recognition for its Council of the Section of Legal Education and Admissions to the Bar. The report points to several areas of noncompliance, particularly those related to keeping the ABA's accreditation function independent from its trade association function. The report also takes issue with the ABA's timeliness in suspending an accreditation standard related to diversity and inclusion in the wake of the Supreme Court's 2023 decision in *SFFA v. Harvard,* noting that the ABA did not suspend the standard until February 2025. USED's staff-level recommendation represents the first formal step in a process that could ultimately result in the ABA losing its status as a federally recognized accreditor. The next step is for the National Advisory Committee on Institutional Quality and Integrity (NACIQI) to review and make a recommendation on federal recognition, after which USED will make a final determination.

Loss of USED recognition carries the consequence that ABA accreditation of a law school would no longer grant eligibility to disburse federal student aid funds like student loans. However, fewer than 10 law schools rely exclusively on ABA accreditation for such eligibility. All other ABA-accredited law schools are eligible to disburse student loans because of their institutional accreditation, which is not at issue here. In addition, ABA accreditation carries other benefits, because many legal jobs explicitly require graduation from an ABA-accredited law school and nearly all states currently require graduation from an ABA-accredited law school to sit for the bar exam.

9. Other Significant Updates

All recent updates will appear in the Executive Actions Chart, but some of note include:

USED Approves 3 More Ed-Flex Applications, Bringing Total to 25 States: On 8/21/26, USED announced that it has approved Ed-Flex waivers for Arizona, Nevada, and South Carolina, which brings the total number of approved Ed-Flex states to 25. Ed-Flex authority allows state educational agencies (SEAs) to waive certain federal statutory and regulatory requirements for districts and schools without first seeking approval from USED. The full list of eligible (and ineligible) federal requirements that can be waived via Ed-Flex is available here.

DOJ Continues to Challenge State Laws Providing In-State Tuition for Undocumented Students: On 8/27/26, DOJ announced it has sued Arizona, New Mexico, Oregon, and Washington for providing in-state tuition and state financial aid to eligible undocumented students. This brings the total number of states whose laws are being challenged to 21.

USED Settles Lawsuit by Chicago Public Schools Over Termination of Magnet Funds: On 8/26/26, the Chicago Board of Education (CPS) settled its lawsuit against USED challenging the termination of the district's funds under the Magnet School Assistance Program (MSAP). USED's Office for Civil Rights (OCR) notified CPS of the pending termination in a 9/16/25 letter that focused on the district's Black Student Success Plan (which OCR asserted violates Title VI) and gender-affirming policies (which OCR alleged violate Title IX). See our 9/30/25 Alert for more information.) CPS sued in response, arguing that USED did not follow procedures required under federal civil rights law, demanded district policy changes within three days, and denied adequate reconsideration procedures despite CPS's ongoing cooperation with OCR. The settlement does not outline the total funds CPS will receive back as a result of the agreement—only that the funds will be made available by 8/28/26.

Treasury Proposes a Rule to Restrict Refundable Tax Credits for Undocumented Persons: On 8/20/26, the Treasury Department announced it was issuing a proposed rule that would treat the refunded portions of the Earned Income Tax Credit (EITC), the child tax credit, the adoption tax credit, and the American Opportunity Tax credit as "federal public benefits" for purposes of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), the federal law that generally restricts noncitizens who are not "qualified aliens" from receiving federal public benefits. (See our Deep Dive, *Who Benefits?*, for more information on the Administration's PRWORA actions.) As a result, non-citizens who do not meet the definition of a qualified alien—including persons with Temporary Protected Status (TPS), Deferred Action for Childhood Arrivals (DACA), and asylum applicants with employment authorization—would be ineligible to receive refunds under these tax credits. The Treasury Department estimates that for tax year 2026, the rule would affect between 200,000–700,000 taxpayers.

A tax credit is refundable if, when the amount of the credit exceeds a taxpayer's tax liability, the excess amount may be paid to the taxpayer as a refund. For example, if a taxpayer qualifies for a $3000 tax credit, but only owes $2000 in taxes, the federal government would refund the remaining $1000. Under Treasury's proposed rule, an affected taxpayer could still use the tax credit to reduce tax liability, if eligible, but would be ineligible to receive a refund for the portion of the credit that exceeds tax liability.

Public comments on the rule can be submitted here through 10/5/26. There will likely be legal challenges to the rule if it is finalized in its current form.

DISCLAIMER: Consistent with our mission, EducationCounsel is working to update and support the field as federal actions consequential to education are unfolding. The information provided above does not serve as legal counsel and, given the pace of action, could be outdated quickly. Nonetheless we hope this information is helpful. If you have any suggestions or feedback please send it to info@educationcounsel.com. Updates in this Alert are current as of September 3, 2026 at 2:00 pm ET.