

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL STUDENT LEGAL
DEFENSE NETWORK,
1701 Rhode Island Ave. N.W.
Washington, D.C. 20036

Plaintiff,

v.

U.S. DEPARTMENT OF EDUCATION,
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Defendant.

Case No. 1:24-cv-00720

COMPLAINT

INTRODUCTION

1. The right to vote is “regarded as a fundamental political right . . . preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
2. In 1993, Congress passed the National Voter Registration Act (“NVRA”) to establish procedures to increase the number of citizens eligible to vote in elections for federal office and prompt federal, state, and local governments to implement the provisions of the statute to enhance participation of eligible citizens in elections for federal office. 52 U.S.C. § 20501.
3. Section 4(b) of the NVRA applies to states that have voter registration requirements. These jurisdictions are called “covered jurisdictions.” Only six states are exempt from the requirements of the NVRA—Idaho, Minnesota, New

Hampshire, North Dakota, Wisconsin, and Wyoming—because they either have no voter registration requirements or permit same-day registration at the polling place.¹ 52 U.S.C. § 20503(b).

4. Despite the NVRA and similar laws, significant obstacles inhibit Americans from voting. Recognizing this, on March 7, 2021, President Biden issued Executive Order 14,019 (the “EO”) establishing that it is “the responsibility of the Federal Government to expand access to, and education about, voter registration and election information, and to combat misinformation, in order to enable all eligible Americans to participate in our democracy.” The EO also directed federal agencies to “consider ways to expand citizens’ opportunities to register to vote and to obtain information about, and participate in, the electoral process.”²

5. Voter access issues are particularly acute in and around college campuses. Young voters—often college students—tend to be one of the most mobile voting blocs, but numerous states have adopted measures to decrease access to the franchise.³ Restrictions on voter registration and other voter suppression efforts have a particularly acute impact on people of color.⁴

¹ 44 states and the District of Columbia are covered by the NVRA. See *The National Voter Registration Act of 1993 (NVRA)*, U.S. DEP’T OF JUST. (July 20, 2022), <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra>.

² See Exec. Order No. 14,019, “Promoting Access to Voting,” 86 Fed. Reg. 13623 (Mar. 10, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/07/executive-order-on-promoting-access-to-voting/>.

³ See, e.g., Johanna Alonso, *State Voter ID Laws in Flux, Student IDs in Question*, INSIDE HIGHER ED (July 7, 2023), <https://www.insidehighered.com/news/students/free-speech/2023/07/07/bans-student-ids-voting-proposed-five-states#>.

⁴ See *Vote Suppression*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression>; see also *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, ACLU (Aug. 18, 2021), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020>; ALL VOTING IS LOCAL, NEEDS IMPROVEMENT:

6. On February 26, 2024, in response to the EO, the U.S. Department of Education (“Department”) released a toolkit of resources (“Toolkit”) for schools to promote voting.⁵ The Toolkit set forth information helpful for colleges committed to expanding voter access and contained numerous examples of actions by universities that increased voting accessibility for students.⁶

7. Yet releasing the Toolkit and responding to the EO does not—on its own—fulfill the Department’s responsibility to promote the electoral franchise. Rather, Congress has specifically tasked the Department with ensuring that colleges and universities are meeting voter registration requirements enshrined in the law.

8. More specifically, to help address the longstanding problem with access to the polls for young voters, in 1998, Congress amended section 487 of the Higher Education Act of 1965 (“HEA”) to require institutions of higher education (“IHEs”) in States that are covered jurisdictions under section 4(b) of the NVRA—as a condition of their students receiving federal student aid funds under Title IV of the HEA—to make a “good faith effort to distribute a mail voter registration form, requested and received from the State, to each student enrolled in a degree or certificate program and physically in attendance at the institution, and to make

BARRIERS TO THE BALLOT AT OHIO’S HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (2019), <https://allvotingislocal.org/wp-content/uploads/2019/09/AVL-CSWU-Report-2019.pdf>; Adam Edelman, *HBCU Students in Georgia Face at Extra Obstacle in Voting*, NBC NEWS (Dec. 4, 2022), <https://www.nbcnews.com/politics/2022-election/hbcu-students-georgia-face-extra-obstacle-voting-rcna59442>.

⁵ U.S. DEPT OF EDUC., PROMOTION OF VOTER PARTICIPATION FOR STUDENTS (Feb. 26, 2024), <https://www2.ed.gov/documents/press-releases/student-voter-toolkit.pdf>.

⁶ *Id.* at 6, 7, 9.

such forms widely available to students at the institution.” HEA § 487(a)(23), 20 U.S.C. § 1094(a)(23).

9. HEA section 487 further requires that institutions in a covered state request voter registration forms from the state 120 days before the deadline to register to vote for general and special elections for federal office and for elections for governor or other chief executive offices in the state. If the state does not provide the institution with a “sufficient quantity of forms” sixty days before the deadline to register to vote, the institution will not be held “liable for not meeting the requirements of this section during that election year.” HEA § 487(a)(23)(B), 20 U.S.C. § 1094(a)(23)(B).

10. As the agency responsible for enforcing the HEA, the Department is the primary overseer of compliance with Title IV, including the requirements with respect to voter registration. The Department has adopted regulations largely mirroring the requirements of section 487(a)(23). *See* 34 C.F.R. § 668.14(d)(1)–(2) (together, with the statutory requirements, the “Campus Voter Registration Requirements”).

11. Unfortunately, there is no guarantee that colleges share the Administration’s stated commitment to voter access or to compliance with Title IV. And although the Toolkit provides examples and recommendations, it does not detail any consequences for institutions that fail to comply with the Campus Voter Registration Requirements. Likewise, in April 2022, the Department issued a “Dear Colleague Letter” to remind IHEs of their obligations with respect to the Campus

Voter Registration Requirements.⁷ As with the Toolkit, that DCL was silent about compliance or enforcement.

12. The Department’s failure to remind institutions of potential penalties for violating the Campus Voter Registration Requirements is particularly striking, given that the Department has informed Plaintiff National Student Legal Defense Network (“Student Defense”) that it does not it does not “specifically identify” or “maintain any specific data” regarding compliance with the Campus Voter Registration Requirements. *See infra* ¶ 22.

13. Despite its alarming statements about the lack of tracking mechanisms, the Department has also asserted that it only “rare[ly]” finds institutions noncompliant with the requirements. *See infra* ¶ 22. It is unclear how the Department knows this, given its professed lack of tracking. It is similarly unclear whether the alleged rarity is due to institutional compliance or the Department’s failure to conduct meaningful oversight.

14. In response to a Freedom of Information Act (“FOIA”) request, the Department has refused to release any documents regarding institutional compliance with the Campus Voter Registration Requirements.

15. For these reasons, Student Defense brings this action against the Department under the FOIA, 5 U.S.C. § 552, and the Declaratory Judgment Act, 28

⁷ *See* Dear Colleague Letter (GEN-22-05), “Requirements for Distribution of Voter Registration Forms,” FED. STUDENT AID (Apr. 21, 2022), <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-04-21/requirements-distribution-voter-registration-forms>.

U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

16. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

17. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

18. Because the Department has failed to comply with the applicable time-limit provisions of FOIA, Student Defense is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

19. Student Defense is a nonpartisan, non-profit organization incorporated in the District of Columbia. Student Defense's mission is to work, through a variety of means, to advance students' rights to educational opportunity and ensure that higher education provides a launching point for economic mobility. To further its mission, Student Defense gathers information—including through responses to FOIA requests submitted to government agencies—to inform the public via, *inter alia*, its website, social media, press releases and other comments to the media, and regulatory comments to government agencies.

20. The U.S. Department of Education is a department of the executive branch of the United States government headquartered in Washington, D.C. and an

agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). The Department has possession, custody, and control of the records that Student Defense seeks.

STATEMENT OF FACTS

21. On April 4, 2022, Student Defense submitted a request under FOIA (the “Request”), seeking documents regarding institutional compliance with the Campus Voter Registration Requirements. The Department subsequently assigned the Request tracking number 22-02418-F. The Request seeks the production of:

1. All communications with institutions of higher education from January 2017 to the date of this request regarding the [Campus] Voter Registration Requirements.
2. All final program review determinations or program review reports documenting findings of non-compliance with respect to the [Campus] Voter Registration Requirements.
3. All final audit reports documenting findings of non-compliance with respect to the [Campus] Voter Registration Requirements.

22. On June 15, 2022, Student Defense received an email from the Department asking for clarification on the nature of the Request. In full, the Department stated:

To better assist you, we would like to provide some information, and then request that you revisit your request and let us know the type of information you believe may best provide the responsive documents you are seeking. FSA does not maintain our records in the manner you are seeking them. There is an overarching finding code for Consumer Information issues, however, it does not specifically identify Voter Registration issues.

Moreover, with regard to element 1, please note that FSA does not maintain any specific data on ‘Voter Registration Requirements’ aside from the guidance that is provided to Institutions of Higher Education (IHE) that participate in the Title IV programs. The Voter Registration Requirements is

part of the Consumer Information that Institutions Higher Education (IHE) are required to provide to their students and employees. Such information is contained in FSA's publications at: <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2013-07-01/gen-13-17-subject-requirement-distribution-voter-registration-forms>.

Final Program Review Determinations or Final Audit Determinations do not specifically cite an IHE for this issue. Any non-compliance with this requirement, if any, would be incorporated into a finding related to **Consumer Information Requirements Not Met (CI)**. However, there is no way of determining which report has a CI finding noted non-compliance with the Voter Registration Requirements. **Such finding is very rare**, as the IHEs are aware of the requirement, and have been generally found to be in compliance. A cursory review of such program reviews or audits with a CI finding resulted in nearly 650 reports. Identifying any responsive documents, should they exist, would require the department to conduct research by reading each of the 650 reports that met the **Consumer Information Requirements Not Met (CI)** code, which is considered research and is not required by the FOIA.

Please let us know if you are still interested in this request. We can provide you with documents that meet the finding code **Consumer Information Requirements Not Met (CI)**, for you to determine if [it is] related to Voter Registration (*again, this is a very rare finding*). Your request will [be] placed on hold for seven (7) business days. If we do not hear from you by June 27, 2022, we will consider you are no longer interested in this information and this request will be administratively closed.

(emphasis in original).

23. On June 17, 2022, well within the seven-day window suggested by the Department, Student Defense provided a response to the request for clarification stating that:

For element 1, we would like to maintain our request as initially stated. If documents responsive to this request are publicly available on Federal Student Aid's website, we would accept a listing of the responsive documents and hyperlinks in lieu of the documents themselves. To the extent that there are responsive documents that are not publicly available, we ask that the Department produce them in a timely manner, as you have not identified a basis for withholding.

For elements 2 and 3, we request that the Department produce all documents related to a finding of Consumer Information Requirements Not Met (CI) that contain any of the following keywords:

- Vote
- Voted
- Voting
- Voter
- Registration
- Ballot
- Election
- NVRA

If no reports matching the CI finding contain any of these keywords, please memorialize that no responsive documents exist in your final response letter.

24. On September 27, 2022, Student Defense requested a status update.

The following day, the Department responded that the response was pending, and it was “conducting [a] search for responsive records.”

25. Student Defense has not received any further communications from the Department regarding the Request.

26. As of the date of this filing, Student Defense’s request maintains an “In Process” status on the Department’s website for tracking FOIA requests.

27. As of the date of this filing, the Department has failed to: (a) notify Student Defense of any determination regarding the Request, including the scope of any responsive records the Department intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

28. Through the Department's failure to respond to the Request within the period required by law, Student Defense has constructively exhausted its administrative remedies and seeks immediate judicial review.

29. The Department's delay stands in stark contrast to the recently stated policy of the United States that the "[t]imely disclosure of records is ... essential to the core purpose of FOIA," and that agencies should approach FOIA requests with a "presumption of openness."⁸

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Search for Responsive Records

30. Student Defense repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

31. Student Defense properly requested records within the Department's possession, custody, and control.

32. The Department is an agency subject to FOIA and must therefore make reasonable efforts to search for requested records.

33. The Department failed to promptly review agency records for the purpose of locating those records that are responsive to the Request.

34. The Department's failure to conduct adequate searches for responsive records violates FOIA.

⁸ See Memorandum from U.S. Att'y Gen. Merrick Garland to Heads of Executive Departments and Agencies on Freedom of Information Act Guidelines, at 1, 3–4 (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

35. Student Defense is therefore entitled to injunctive and declaratory relief requiring the Department to promptly make reasonable efforts to search for records responsive to the Request.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

36. Student Defense repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

37. Through the Request, Student Defense properly requested records within the Department's possession, custody, and control.

38. The Department is an agency subject to FOIA and must therefore release any non-exempt records in response to the Request and provide a lawful reason for withholding any materials.

39. By failing to produce documents responsive to the Request, the Department is wrongfully withholding non-exempt agency records.

40. The Department's failure to provide all non-exempt responsive records violates FOIA.

41. Student Defense is therefore entitled to declaratory and injunctive relief requiring the Department to promptly produce all non-exempt records responsive to the Request and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, Student Defense respectfully requests the Court to:

1. Order the Department to conduct searches reasonably calculated to uncover all records responsive to the Request;
2. Order the Department to produce, within twenty days of the Court's order, or by such other date as this Court deems appropriate, any and all non-exempt records responsive to the Request and indexes justifying the withholding of any responsive records withheld under claim of exemption;
3. Enjoin the Department from continuing to withhold any and all non-exempt records responsive to the Request;
4. Award Student Defense the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
5. Grant Student Defense such other relief as the Court deems just and proper.

Dated: March 13, 2024

Respectfully submitted,

/s/Daniel A. Zibel

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