

# The Federal Update for August 5, 2022

From: Michael Brustein, Julia Martin, Steven Spillan, Kelly Christiansen

Re: Federal Update

Date: August 5, 2022

[News 1](#_Toc110593519)

[School Advocacy Groups Push for Blanket ESSER Extension 1](#_Toc110593520)

[Affirmative Action SCOTUS Arguments Scheduled for October 2](#_Toc110593521)

[ED Releases Higher Ed Semi-Annual Regulatory Agenda 3](#_Toc110593522)

[Lawmakers Introduce Bill to Limit Student Loan Forgiveness 3](#_Toc110593523)

[Reports 4](#_Toc110593524)

[GAO Report Finds Direct Loan Program Increased Cost for Government 4](#_Toc110593525)

[Report Says School Devices Inappropriately Tracking Students 5](#_Toc110593526)

## News

### School Advocacy Groups Push for Blanket ESSER Extension

A number of K-12 advocacy organizations sent a letter to U.S. Secretary of Education Miguel Cardona late last month asking for wide-scale extensions of the spending deadlines for stimulus funds in the Elementary and Secondary School Emergency Relief Fund (ESSER) program. The organizations, including AASA and the Council of Chief State School Officers, asked the U.S. Department of Education (ED) for more guidance as school districts approach the start of a new school year.

In May, ED wrote that it would consider individual requests from school districts for an 18-month extension of ESSER funding through a process known as “late liquidation.” However, the process outlined would be burdensome for States and districts, the groups argue. It would require States to apply for an extension on a case-by-case basis for specific projects, leading to what the letter calls an “extraordinary burden.” Instead, the letter asks ED to approve a blanket spending extension for all districts in a State, which the State can then pass along as needed.

In addition, the groups ask to apply the extension – which ED notes in its letter applies specifically to ESSER III – to ESSER I and ESSER II as well. They also request a further extension of the late liquidation deadline, from March of 2026 to December of that year, to provide more time for districts to spend their funds and to mirror the liquidation deadline imposed by the U.S. Department of Treasury for Coronavirus State and Local Fiscal Relief Funds. Finally, the groups ask for clear guidance on the timing for obligation and expenditure to ensure that auditors are aware of and clear on what flexibility the late liquidation process provides.

“Districts and states may be hesitant to make these investments with ESSER funds if they do not have confidence that a valid and timely obligated expense will be deemed eligible for a liquidation extension well in advance of the need for the extension,” the letter states. “The sooner districts and states know whether a liquidation extension can be granted, the better able they will be to plan for the most effective and efficient use of ESSER funds.”

The letter is available [here](https://aasa.org/uploadedFiles/ESSER_Late_Liquidation_Request_Submitted_to_USED_07.22.2022.pdf).

Author: JCM

### Affirmative Action SCOTUS Arguments Scheduled for October

This week, the U.S. Supreme Court scheduled oral arguments for two high-profile cases that will be heard during the upcoming term. The cases, *Students for Fair Admissions (SFFA) v. Harvard* and *Students for Fair Admissions v. University of North Carolina*, will task the Court with determining whether to uphold affirmative action admissions policies as constitutional.

The Justices will determine whether to overturn the precedent set in *Grutter v. Bollinger* (2003), which held that the University of Michigan’s Law School race-conscious admissions policy did not violate the Equal Protection Clause of the Fourteenth Amendment because the consideration of race was narrowly tailored and the university conducted an individualized review of each applicant when making admission decisions. The cases currently before the Court seek to overturn the use of race conscious admissions programs. The two cases were initially set to be heard together but the Court decided last month to separate them into two individual cases. However, the Court will hear arguments for both cases on the same day – October 31st.

With the separation of the cases, Justice Ketanji Brown Jackson will now be able to participate in the case against the University of North Carolina. (Jackson recused herself from the Harvard case due to a conflict of interest as a member of the Board of Overseers, as well as other university involvement).

Even given Jackson’s participation in one case, the Court is most likely to overturn the use of race conscious admissions policies due to current the conservative majority, but the scope of the decision could be wide-ranging or more limited.

Resources:

Bianca Quilantan, “Supreme Court to hear Harvard, UNC affirmative action challenges in October,” *Politico*, August 3, 2022.

Author: KSC

### ED Releases Higher Ed Semi-Annual Regulatory Agenda

In a document to be published in the *Federal Register* Monday, the U.S. Department of Education (ED) laid out its plans for higher education regulations in the coming year.

Among the rules that are coming in the proposed rule stage are regulations on Borrower Defense to Repayment, calculating federal financial assistance for the purpose of the 90/10 rule, and Gainful Employment.  ED has engaged in Negotiated Rulemaking on many of these topics and intends to release proposed regulations this summer or next spring (in the case of Gainful Employment). Many of these proposed rules have been drafted but are undergoing a final agency review to determine the potential economic impact.

[The notice is available here](https://public-inspection.federalregister.gov/2022-14601.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=pi+subscription+mailing+list).

Author: JCM

### Lawmakers Introduce Bill to Limit Student Loan Forgiveness

Republican members of the House of Representatives introduced legislation on Thursday that would limit the administration’s ability to forgive federal student loans by prohibiting the Secretary of Education from promulgating rules that are economically significant and would result in an increased “subsidy cost.”  The bill – titled the Responsible Education Assistance Through Student Loan Reforms Act – would also eliminate the Public Service Loan Forgiveness program, replace the current income-driven repayment options with a single program that sets payments at 15 percent of a borrower’s discretionary interest (the current program limits payments to 10 percent), and eliminate the option for income-based forgiveness after 20 or 25 years of payment. Additionally, the legislation would create a new mandatory minimum monthly payment of $25.

The bill would eliminate interest capitalization on federal student loans – a provision where there is bipartisan agreement – and impose a $25,000 annual cap on the amount of money students can borrow for graduate school.  Additionally, the bill would allow students to use Pell grants for short-term job training programs.

The legislation has little chance of passage in the Democratically-controlled House, but it represents the first major alternative policy proposal to the student loan forgiveness discussion.

Author: JCM

## Reports

### GAO Report Finds Direct Loan Program Cost More than Anticipated

The Government Accountability Office (GAO) published a report last week that examines how the U.S. Department of Education’s (ED’s) Direct Loan program cost estimates have changed over time. Previously, it was assumed that the student loan program made money for ED; however, GAO’s recent report calls this prediction into question and finds that the student loan program may have cost the federal government an estimated $197 billion in the past 25 years. The report found that recent programmatic changes that help students pay over time and based on income, and the pandemic relief that suspended borrower payment and interest accrual have all contributed most to the recent increase in cost.

The $197 billion cost estimate is based on the aggregate cost of ED providing approximately $1.8 trillion in loans disbursed from fiscal year 1997 to 2021. Original estimates predicted these loans would generate $114 billion in income for the government. The difference represents a $311 billion increase in the cost of the Direct Loan program based on new estimates from the report. Cost estimates are based on assumptions about loan performance, which is affected by borrower repayment behavior. GAO acknowledges that actual loan performance is difficult to predict because changes to the Direct Loan program have allowed for new repayment plans and forgiveness options. The report also notes that the size of the Direct Loan program has grown substantially over the last decade, and about half of the loan volume is now being paid through income driven repayment plans.

Reactions to the report from leaders of the House Committee on Education and Labor were divided among party lines. Rep. Virginia Foxx (R-NC) stated, “the GAO report is only the latest evidence that, at best, Biden’s Department of Education doesn’t have a clue about the real harm of its policies; at worst, the political appointees there simply don’t care and are unwilling to disclose the true costs to the American public.” Committee Chairman Rep. Bobby Scott (D-VA) urged policymakers to focus on solutions. He said, “the solution to this problem is not to eliminate the student loan program, but — rather — we should work together to address the rising cost of college, restore the value of the Pell Grant, and make meaningful reforms to the student loan program.” ED Under Secretary James Kvaal highlighted the uncertainty of cost estimates based on changes in interest rates and underscored the need for borrowers to have access to “fair and affordable” repayment plans.

[A copy of the report can be found here.](https://www.gao.gov/assets/gao-22-105365.pdf)

Resources:

Danielle Douglas-Gabriel, “GAO: Federal government is losing, not making money off student loans”, *The Washington Post*, July 29, 2022.

Author: ASB

### Report Says School Devices Inappropriately Tracking Students

A technology group called the Center for Democracy and Technology issued a report this week which concluded that school digital monitoring software is endangering students’ civil rights and creating a hostile environment for many student populations.

While many of these monitoring tools are billed as student safety protections – for example, flagging for administrators when students search for terms related to violence or self-harm – the report concludes that this software is more often used for disciplinary purposes, and in some cases is not limited to school hours or even school-issued devices. The report also says that teachers have been given considerable responsibility for monitoring student activity but are not adequately trained.

In addition, the report says that schools send data to law enforcement, who use it to contact students, rather than to internal staff who can offer mental health supports or services. The authors express concern that LGBTQ+ students are disproportionately targeted for action, and that monitoring sometimes results in the nonconsensual disclosure of a student’s sexual orientation or gender identity to teachers or parents. Additionally, disciplinary measures resulting from tracking software seem to be disproportionately applied to students of color and students with disabilities.

The organization – along with several others – also sent a letter to the U.S. Department of Education’s Assistant Secretary for Civil Rights, Catherine Lhamon, expressing concern about the scope of monitoring and how it is used to discipline, rather than protect, students. They urge ED to develop a “policy statement” to help mitigate these potential harms. “Student activity monitoring is subjecting protected classes of students to increased discipline and interactions with law enforcement, invading their privacy, and creating hostile environments for students to express their true thoughts and authentic identities,” they write. “At minimum, this environment causes disparate impact and — to the extent that monitoring software is expressly coded to flag words related to protected classes — may constitute disparate treatment.”

The [report, titled “Hidden Harms,” is available here](https://cdt.org/wp-content/uploads/2022/08/Hidden-Harms-The-Misleading-Promise-of-Monitoring-Students-Online-Research-Report-Final-Accessible.pdf). The [letter to Lhamon is here](https://cdt.org/wp-content/uploads/2022/08/OCR-Letter-Final-August-2022.pdf).

Author: JCM

*To stay up-to-date on new regulations and guidance from the U.S. Department of Education, register for one of Brustein & Manasevit’s upcoming virtual trainings. Topics cover a range of issues, including COVID-19 related issues, grants management, the Every Student Succeeds Act, special education, and more. To view all upcoming virtual training topics and to register, visit* [*www.bruman.com/virtualtrainings/*](http://www.bruman.com/virtualtrainings/)*.*

***The Federal Update has been prepared to inform Brustein & Manasevit, PLLC’s legislative clients of recent events in federal education legislation and/or administrative law. It is not intended as legal advice, should not serve as the basis for decision-making in specific situations, and does not create an attorney-client relationship between Brustein & Manasevit, PLLC and the reader.***

© Brustein & Manasevit, PLLC 2022

Contributors: Julia Martin, Kelly Christiansen, Andy Ball

Posted by the California Department of Education, August 2022

[www.bruman.com](http://www.bruman.com/)