



Biden loan forgiveness alternatives face new challenge

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Less than six weeks after the U.S. Supreme Court held that President Biden lacked authority to advance his signature effort to forgive upwards of \$430 billion in federal student loans, a new challenge has been filed to other major elements of his higher-education agenda. On August 4, 2023, the Cato Institute and Mackinac Center for Public Policy filed suit in the Eastern District of Michigan, alleging that the U.S. Department of Education lacks authority to forgive an additional \$39 billion in federal student loans in connection with payment-counting revisions for the Public Service Loan Forgiveness (PSLF) and Income-Driven Repayment (IDR) programs that were announced, and some of which became effective immediately, on April 19, 2022. Plaintiffs are pursuing claims under the Appropriations Clause of the U.S. Constitution and the Administrative Procedure Act.

The new suit is founded on the observation that under the statutory framework for PSLF, which was enacted in 2007, borrowers seeking loan forgiveness based on public service must have “made 120 monthly payments,” and have been “employed in a public service job during the period in which the borrower made each of the 120 payments.” 20 U.S.C. § 1087e(m). By regulation, the monthly payments must be made “within 15 days of the scheduled due date for the full scheduled installment amount.” 34 C.F.R. § 685.219(c)(1)(iii). Similar regulatory requirements exist for borrowers seeking loan forgiveness pursuant to various income-driven repayment plans such as Income-Contingent Repayment, Income-Based Repayment, Pay As You Earn, and Revised Pay As You Earn.

The Department’s initiative, by contrast, awarded a one-time credit to borrowers in both PSLF and IDR programs for periods of long-term forbearance—i.e., stretches during which borrowers received a “temporary cessation of payments” under 34 C.F.R. §§ 682.211(a)(1), 685.205(a)—during which no payments were made. Citing findings “suggested” by unspecified reviews by the Office of Federal Student Aid and “concerns raised by” the CFPB and state attorneys general, the Department’s April 2022 announcement stated that the credit

was intended to correct instances in which federal student loan servicers (under the Department’s supervision) allegedly “steered” borrowers into forbearance when they would have benefited from other repayment options. The Department also cited the need to “support student loan borrowers through the pandemic.” The Department’s announcement resulted in “immediate debt cancellation for at least 40,000 borrowers” under the PSLF program as of April 2022.

The new lawsuit now attempts to enjoin the award of similar credit for periods of forbearance to borrowers on IDR plans, which, according to a July 2023 Department announcement, will result in forgiveness of an additional \$39 billion for approximately 804,000 borrowers beginning on August 13, 2023, and eventually as much as \$175 billion. The Department has not engaged in rulemaking for the adjustment or otherwise disclosed the legal authority for its plan. Whether the Department intends to again rely on the HEROES Act or instead argue that the adjustment is permitted by the plain text of the Higher Education Act itself is unclear.

As with challenges to the Biden administration’s broader loan forgiveness initiative, a major question relating to the new action will be whether the plaintiffs have standing to bring their suit. According to the complaint, the Department’s “one-time adjustment” would be good for public servants with federal student loans—but bad for their public service employers such as the plaintiffs, Cato Institute and Mackinac Center for Public Policy. According to plaintiffs, PSLF operates as an employer subsidy by incentivizing borrowers to complete 10 years of public service that they might otherwise be unable to afford. The unlawful forgiveness of student loan debt, however, “reduces the amount of a borrower’s PSLF-cancellable debt and thus reduces the amount by which PSLF benefits qualified employment.”

Stated differently, the plaintiffs’ theory of standing is that a substantial reduction in borrowers’ length of repayment to obtain PSLF-related loan forgiveness—such as by counting periods of long-term forbearance—decreases the amount of time during which the borrower would be required to remain in public service to obtain the statutory benefit. The plaintiffs contend that the changes to IDR payment calculations, too, harm them insofar as the marginal value of PSLF over IDR is decreased for borrowers who are not public servants, and their incentive to seek PSLF forgiveness by working for a public service employer is reduced or eliminated entirely.

Plaintiffs filed an *ex parte* motion for a temporary restraining order on August 7, which the court may rule on imminently in light of the Department's intent to proceed with implementation of the IDR-related forgiveness plan by August 13. The case is No. 1:23-cv-11906 in the U.S. District Court for the Eastern District of Michigan, pending before Judge Thomas L. Luddington (appointed by President George W. Bush).