

Administrative Student Debt Relief – Legal Q&A

The United States faces a historic student debt crisis, with [more than 40 million Americans crushed under over \\$1.5 trillion in federal student loan debt](#). This ever-growing crisis has prevented millions from being able to [start a small business, buy a home, or even finish college](#).

A crisis of this magnitude requires bold action. On day one of his administration, President-elect Biden should issue a presidential executive order to cancel federal student loan debt based on [S.Res.711](#), Leader Schumer and Senator Warren’s [resolution calling on the President of the United States](#) to take executive action to broadly cancel Federal student loan debt.. This executive order should:

- 1) Direct the Secretary of Education to administratively cancel up to \$50,000 in federal student debt, [using the modification and compromise authority legally granted by Congress](#).
- 2) Direct the IRS and Treasury to prevent debt cancellation from resulting in a tax bill for borrowers, and
- 3) Direct coordination across executive branch agencies to overcome budgetary or legal challenges.

Is administrative debt cancellation legal?

- Yes, Congress has already granted the Secretary of Education the [legal authority to broadly cancel student debt](#) under [section 432\(a\) of the Higher Education Act of 1965 \(20 U.S.C. 1082\(a\)\)](#), which grants the Secretary the authority to modify, "... compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption."
- The Harvard Law Project on Predatory Student Lending has consulted the statutory and regulatory framework governing federal student loan programs administered by the U.S. Department of Education, as well as the framework and controlling interpretations of the budgetary structure of these programs, and [has concluded in this memo](#) that broad or categorical debt cancellation or modification would be a lawful and permissible exercise of the Secretary of Education’s authority under existing law.

Is there precedent for administrative debt cancellation?

- Yes, the Trump administration has already publicly acknowledged its use of the Secretary’s modification and compromise authority in 2020.
- In March 2020, prior to the passage of the *Coronavirus Aid, Relief, and Economic Securities Act*, the Education Department [revealed to the press that](#) Secretary DeVos had “exercised her [compromise] authority under Sec. 432(a)(6) of the [*Higher Education Act*] to allow a temporary waiver of interest based on the unique and special facts presented by the COVID-19 pandemic interruption and the resulting declaration of a National Emergency by the President.” According to [reports](#), the Trump administration, when asked about the legal authorities explained, “That portion of the law gives the education secretary the authority to ‘enforce, pay, compromise, waive, or release’ debts.” In effect, Secretary DeVos canceled student debt (unpaid interest) in 2020 for the entire federal student loan portfolio pursuant to the same modification and compromise authority discussed above.
- [President Trump’s August 2020 student loan executive order](#) also includes broad student loan debt (unpaid interest) cancellation, and [the White House Press Secretary cited multiple legal authorities for this order](#), explaining “section 2A — 2, subsection A — of the Higher Education Relief Opportunities for Students Act of 2003, which is 20 U.S.C. § 1098(bb), authorizes the Secretary to waive or modify provisions of student financial assistance programs to ensure that individuals who’ve been affected by the National Emergency are not worse off financially. There’s another statute for that one — section 432 of the *Higher Education Act of 1965* — which gives broad authority to the Secretary.”
- *The Higher Education Relief Opportunities Act of 2003* paragraph (a)(2) allows the Secretary to determine that individuals “suffered direct economic hardship as a direct result of a...national emergency” declared by the President, and therefore to “waive or modify any statutory or regulatory

provision applicable to” federal student aid administrative requirements. The Secretary may use this authority to waive requirements for “higher education, eligible lenders, guaranty agencies, and other entities” during the national emergency caused by the COVID-19 pandemic.

Would administrative cancellation of student debt create an Antideficiency Act issue?

- No, for several reasons. *The Antideficiency Act* penalizes Executive Branch employees for unauthorized spending or spending in excess of Congressional appropriations. Because Congress has already appropriated the money for federal student loans—under the *Federal Credit Reporting Act*, the cost is fully realized upfront at the time of lending. The spending has already occurred, and the projected cost of the student loan program is regularly modified or re-estimated based on administrative policy changes or other factors.
- Administrative student debt cancellation is not be “unauthorized” spending because Congress authorized HEA section 432(a) authority to the Secretary of Education to use in his or her discretion.
- Although the cost of debt cancellation would need to be reflected in the student loan program’s budget through a modification, because the ever-changing cost of the federal student loan program is already within existing appropriations as part of the baseline cost of lending, student debt cancellation does not require a new budget authority or appropriation from Congress.

What are the legal risks in case of a lawsuit?

- Lawsuits challenging administrative student debt cancellation would likely fail.
- First, it would be *very* difficult for any person or entity to successfully argue they would have standing to sue the Biden-Harris administration over student debt cancellation.
- Second, even if a person or entity could successfully argue that they have standing, they were somehow wronged, and that they are owed some legal remedy—no person or entity could reasonably argue that the remedy to their lawsuit should be indefinitely keeping tens of millions of student loan borrowers in debt.
- Finally, the law does not give the Secretary of Education the power to reinstate student loans after they have been cancelled. That would take an Act of Congress.

Will borrowers be taxed for cancelled debts?

- Not if the Biden-Harris administration acts to prevent borrowers from being taxed. The Treasury Department and the IRS would need to issue a revenue procedure (rev-proc) to ensure that borrowers would not be taxed for cancelled debt.
- There is recent precedent for the IRS to issue rev-procs to shield federal student loan borrowers from tax liabilities. In 2015, [after successful advocacy by Senator Warren](#), the Obama-Biden IRS issued [Rev. Proc. 2015-57](#), which was the first in a series of rev-procs that ensured that student loans canceled by the Department of Education under borrower defense to repayment would not result in a tax liability for borrowers, which was reiterated in [2020](#).
- A student debt cancellation rev-proc could rely on multiple legal authorities available under the Internal Revenue Code, including but not limited to:
 - the [general welfare exclusion](#), which grants the IRS the clear authority to conclude “that payments to individuals by governmental units under legislatively provided social benefit programs for the promotion of the general welfare are not included in a recipient's gross income,”
 - the [insolvency exclusion](#) used for borrower defense discharges, which allows the IRS to simply determine that borrowers, who are crushed by student loan debt, should not be taxed because they are largely insolvent, meaning their liabilities exceed their assets, and/or
 - the Biden-Harris administration could deem student debt cancellation as a disaster payment relating to COVID-19 under [section 139 of the Internal Revenue Code](#), shielding it from taxes.