



Fall Forum 2021

Stimulus Funds and UGG, and You and Me, So Happy (Back) Together

# You Can't Hurry... Congress? What's Next for the Biden Administration

Kelly Christiansen & Julia Martin

[kchristiansen@bruman.com](mailto:kchristiansen@bruman.com) [jmartin@bruman.com](mailto:jmartin@bruman.com)

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

**M & BRUSTEIN**  
**MANASEVIT, PLLC**  
ATTORNEYS AT LAW



Fall Forum 2021: Stimulus Funds and UGG, and You and Me, So Happy (Back) Together

# Congress



# The Congressional Agenda

---

- Fiscal year 2022 appropriations
- Debt ceiling
- Infrastructure
- Next...??



---

# How Familiar Are You With the Federal Funding Process?

- a) I'm an expert!
  
- b) I know it pretty well but could use a refresher!
  
- c) I'm excited to learn more!



# Federal Funding Basics

---

- Education programs are forward funded
- Federal fiscal year begins October 1 each year
  - Funds go out to education grantees on following July 1

FY 2022 began on October 1, 2021, but States will receive FY 2022 funding on July 1, 2022



# Federal Funding Basics

---

- Congress holds “power of the purse”
- 12 appropriations “accounts”
  - Department of Education packaged with Departments of Labor, Agriculture  
= Labor-HHS-ED funding bill
- Sometimes bills passed in larger packages (minibus, omnibus)





# Congressional Action FY 2022

---

## House:

- Passed all 12 appropriations bills in July
- Overall increase of \$29.3 billion for ED

## Senate:

- Senate delayed on appropriations
- Draft bills released in mid-October
- Overall increase of \$25.4 billion for ED



# Proposed Funding Levels FY 2022

---

Program	House-Passed Increase	Senate-Proposed Increase
ESEA Title I	\$19.5 billion	\$16.6 billion
IDEA	\$3.1 billion	\$2.6 billion
ESEA Title II-A	\$150 million	\$50.5 million
ESEA Title III	\$203 million	\$120 million
ESEA SSAE	\$85 million	\$100 million
ESEA 21 <sup>st</sup> CCLC	\$100 million	\$50 million
Perkins CTE State grants	\$50 million	\$50 million





# Where Are We Now?

---

- Continuing resolution (CR) passed on September 30<sup>th</sup>
- Keeps government funded at FY 2021 levels through December 3<sup>rd</sup>
- On/before December 3<sup>rd</sup>, Congress must
  - *Finalize all 12 appropriations bills or*
  - *Pass another CR*
- OR government will shut down



# Debt Ceiling

---

- U.S. Treasury estimated debt ceiling breach around mid-October
- Disagreement over *how* to increase debt ceiling
  - Reconciliation
  - Regular legislative process
- Congress passed temporary fix in October to push deadline until later this year



# Fiscal Cliff??

- FY 2022 CR expires  
December 3<sup>rd</sup>

AND

- U.S. may reach debt  
ceiling limit in  
December





# Infrastructure – White House

---

- White House proposals released in spring (American Jobs Plan, American Families Plan)
  - *\$112 billion for K-12 and higher education*
    - Purposes: air quality, energy efficiency, improvement of school kitchen facilities, increased access to community college for rural areas, improved technology for higher ed
  - *\$100 billion for broadband internet*
  - *\$45 billion for safe drinking water program through EPA*
  - *Free universal pre-K for 3- and 4-year-olds*
  - *Free 2-year community college degrees*



# Infrastructure – Congress

---

- Democrats devised “two-track” plan
  - One bill passed through regular legislative process
    - With some Republican support
  - Second bill passed through reconciliation
    - With only Democrats’ support



# Infrastructure – Congress

---

- Bipartisan infrastructure bill (\$1 trillion) passed by Senate in August
- Includes funding for physical infrastructure (roads, bridges, etc.)
  - *No funding for education*
- Initial disagreement among House Democratic factions on when to bring Senate bill to a vote
- Passed by the House in early November



# What is Budget Reconciliation?

---

Legislative process that can be used for legislation that changes spending, revenues, or debt limit

Budget resolution



Budget instructions to “standing committees”



Committee recommendations to the Budget Committee



Recommendations packaged and reported to the floor



# What is Budget Reconciliation?

---

- Byrd Rule in Senate imposes additional limits
  - *Cannot include measures:*
    - With no budgetary effect;
    - That produce a budgetary effect that is merely incidental to the non-budgetary policy change;
    - That impact social security;
    - That raise deficits in any year after the period covered by the reconciliation instructions (unless offsets provided).
- Time-limited debate on reconciliation bills
- Bypasses Senate filibuster, so only simple majority needed to pass





# Infrastructure – Congress

---

- House proposal initially released in September with \$3.5 trillion total cost
  - *\$194 billion for education total, including:*
    - Increase maximum Pell Grant;
    - School construction;
    - Free community college;
    - College retention and completion grants;
    - Career, technical, and adult education;
    - HBCUs, MSIs, TCUs;
    - Teacher recruitment and retention;
    - WIOA;
    - Child-care and universal pre-k;
    - Child nutrition program modifications.



# Infrastructure – Congress

---

- Moderates in Senate take issue with high price tag → White House releases lower cost proposal in late October
- Just under \$2 trillion total
  - *\$38.3 billion total for education*
    - Removes free community college, school construction
    - Reduces funding for most other education proposals
- House passed bill on November 19
  - *Must still be passed by Senate*



# The Congressional Agenda for 2022

---

- Discussions in 2021 for reauthorization of WIOA, child nutrition programs
  - No substantive action; other items more pressing
  - Hearings held on both reauthorizations
    - Smaller, issue-specific bills related to child nutrition programs introduced
      - Could serve as groundwork for larger bill
- Likely to see lawmakers turn back to these issues after funding items, infrastructure finalized
- BUT reauthorization in 2022 is not guaranteed



# The Administration



# Shifting Context: The Delta Variant

---

- CARES, CRRSA, ARP all passed based on assumption that widely available vaccination would mean end to substantial community spread
- Vaccine hesitancy, pushback on mask use and quarantine, delays in EUA for kids under 12 have combined with delta to change timeline
- Interim Final Requirements (IFR) issued by ED in April assumed transition to “recovery”
- BUT as school year starts we still have a need for mitigation/suppression strategies, virtual instruction plans, AND recovery simultaneously

# Schools Had Plans for Federal Relief Aid. The Delta Variant Upended Them



By [Mark Lieberman](#) — August 30, 2021 ⌚ 5 min read

“Earlier this summer, as districts began to get spending plans on track, the virus outlook was sunny. More than half of American adults had been vaccinated, case numbers were dropping precipitously, and new CDC guidance allowed vaccinated people across the country to shed masks, even indoors...

...But a more transmissible strain of the virus grew dominant, vaccination rates ground to a halt, and hospitals in some parts of the country began to fill up like they did during the pandemic’s previous peaks. School communities are now embroiled in passionate debates over masks, state lawmakers have restricted many remote learning options, and covid-related costs are beginning to pile up.”



# Shifting Context: The New Administration

---



- Move from minimal guidance and instructions to strict and prescriptive interpretations
  - *Including plan review!*
- Obama-era-like level of involvement from ED
  - *Strong exercise of federal power*
- Shift has resulted in delays, some inconsistencies in responses
- Low staffing levels exacerbates delays



# Staffing Updates

---

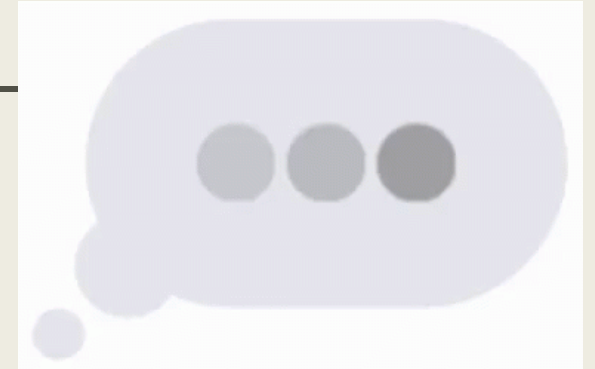
- Recently confirmed staff include:
  - *Catherine Lhamon (Assistant Secretary of the Office for Civil Rights)*
  - *Gwen Graham (Assistant Secretary for Legislative and Congressional Affairs)*
  - *Roberto Rodriguez (Assistant Secretary for Planning, Education, and Policy Development)*
  - *Elizabeth Merrill Brown (General Counsel)*
  - *James Kvaal (Undersecretary)*





# Staffing Updates

---



- Still pending...
  - *Inspector General (Sandra Bruce nominated)*
  - *Assistant Secretary for Career and Technical Education (Amy Loyd nominated)*
  - *Assistant Secretary of Elementary and Secondary Education (Ian Rosenblum Acting)*
  - *Assistant Secretary of Office of Special Education and Rehabilitative Services (Katherine Neas Acting)*
  - *Assistant Secretary of Postsecondary Education (Michelle Asha Cooper Acting)*



# New OSERS Guidance

---

- Additional conditions may be eligible for services/ accommodations under IDEA and Section 504
  - *Long COVID* ([guidance July 2021](#))
    - Both K-12 and postsecondary
    - Conduct appropriate evaluations/ child find as with other potentially debilitating medical conditions
  - *Depression and Anxiety* ([fact sheet October 2021](#))
    - Joint between ED/ DOJ
    - Suggest staff training, reasonable attendance accommodations, mental health services



# New OSERS Guidance

---

- [Return to School Roadmap](#): developing and implementing IEPs during COVID
  - *Consider impact of lost instructional time and /or lost opportunity to receive services best provided in-person*
    - Whether services offered in-person/virtual, timing, transportation offered
  - *Annual IEP goals may be revised to reflect learning and skill lost during pandemic*
  - *Consider whether to offer “compensatory services”*
    - \*even if not court-ordered\*
    - Based on current performance, previous rates of progress, frequency of services



# New OSERS Guidance

---

- *“Question D-7: Must States ensure that compensatory services are available for all IDEA-eligible children who need them because they did not receive appropriate services under Part B of IDEA due to pandemic-related closures and other service disruptions?”*
- Answer: Generally, yes. States must ensure FAPE is available to all children residing in the State between the ages of 3 and 21, 38 inclusive, including children with disabilities who have been suspended or expelled from school. 34 C.F.R. § 300.101”



# New OSERS Guidance

---

- [Return to School Roadmap](#): developing and implementing IEPs during COVID
  - *“Some children with disabilities have underlying medical conditions, such as genetic, neurologic, or metabolic conditions, or congenital heart disease, that place them at increased risk of severe illness... This is especially the case in States or local jurisdictions that have enacted State or local laws, rules, regulations, or policies that are inconsistent with CDC’s COVID-19 prevention and risk reduction strategies.”*



# New OSERS Guidance

---

- [Return to School Roadmap](#): developing and implementing IEPs during COVID
  - *Recommend consideration of “preventative and risk-reducing strategies” in IEP, including:*
    - Masks and other PPE
    - Regular cleaning
    - Avoiding “shared use of personal and educational items”
  - *“State or local laws, rules, regulations, or policies that have the effect of improperly limiting the ability of the IEP Team to address the school-related health needs of a child with a disability...would be a violation of IDEA”*



# OCR Mask Investigations

---

- August 2021: ED announces investigations into 5 States with prohibitions on mask mandates “exploring whether statewide prohibitions on universal indoor masking discriminate against students with disabilities who are at heightened risk for severe illness”
  - *Question: do prohibitions violate students’ right to FAPE in LRE?*
  - *Investigation under Section 504, Title II of ADA*
  - *No specific parent/student allegations*
  - *Only in States enforcing bans*







# OCR Mask Investigations

---

- Impact of investigations still TBD
  - *“OCR is a neutral factfinder, collecting and analyzing relevant evidence from state education agencies and other sources as appropriate prior to reaching determinations in these matters”*
  - *Significant time/ staff investment in reviewing documents, policies, health recommendations, etc.*
  - *Will decision be timely given progress of vaccination authorizations?*
- Really a smaller battle in fight over Federal/State power
  - *What does local control mean?*





# The NSBA Files

---



- NSBA sends letter in October 2021 asking DOJ for help in reining in threats/violence against school board officials
  - *Later rescinded (not cleared by org President)*
  - *DOJ: want to work with local law enforcement*
  - *Pushback from lawmakers:*
    - FBI “snitch line”
    - Impinging on free speech/ chilling effect



# The NSBA Files

---

- House Education and Labor Committee Republicans sent letter asking GAO to investigate compliance with parent engagement provisions of ESEA
  - *Sec. 1116*
  - *Are requirements being followed? Are funds being spent appropriately?*
  - *Review representative sample of school districts*
  - *Examine State oversight, enforcement, and monitoring*



# The Federalism Question

---

- ***10<sup>th</sup> Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”***
- Ongoing question: what should be federal power and what should be a State prerogative?
- What is “enough” authority to regulate?
  - *Interstate commerce clause?*
  - *Conditional federal grants with “buy-in”?*





Fall Forum 2021: Stimulus Funds and UGG, and You and Me, So Happy (Back) Together

# The Courts



# School Financing: Carson v. Makin

---

- Maine “tuitioning” case before SCOTUS this fall
- Following on heels of *Trinity Lutheran* (2017) and *Montana v. Espinoza* (2020)
- First amendment free exercise clause v. establishment clause
- Will not directly impact federal grants, but implications for reauthorization, State grants, further lawsuits
  - *Michigan Blaine amendment case lined up*



# Legal Disclaimer

---

This presentation is intended solely to provide general information and does not constitute legal advice or a legal service. This presentation does not create a client-lawyer relationship with Brustein & Manasevit, PLLC and, therefore, carries none of the protections under the D.C. Rules of Professional Conduct. Attendance at this presentation, a later review of any printed or electronic materials, or any follow-up questions or communications arising out of this presentation with any attorney at Brustein & Manasevit, PLLC does not create an attorney-client relationship with Brustein & Manasevit, PLLC. You should not take any action based upon any information in this presentation without first consulting legal counsel familiar with your particular circumstances.