

# The Federal Update for January 14, 2022

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Re: Federal Update

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[Legislation and Guidance 1](#_Toc93050601)

[Biden Administration to Send COVID-19 Tests to Schools 1](#_Toc93050602)

[ED Updates Guidance on Missing School Lunch Data 2](#_Toc93050603)

[USDA Increases Funding for School Meals 2](#_Toc93050604)

[News 3](#_Toc93050605)

[Supreme Court Strikes Down General Vaccine Mandate 3](#_Toc93050606)

[Negotiated Rulemaking Kicks Off Next Week for Higher Ed 4](#_Toc93050607)

## Legislation and Guidance

### Biden Administration to Send COVID-19 Tests to Schools

The Biden Administration released a fact sheet on Wednesday outlining its plan to send COVID-19 tests to schools across the country as part of the administration’s push to keep schools open for in-person learning in the midst of a significant increase in COVID-19 cases due to the Omicron variant.

The administration says that it will “increase the number of COVID-19 tests available to schools by 10 million per month.” That 10 million per month will include 5 million rapid tests and increasing lab capacity to process an additional 5 million PCR tests. The PCR testing will be run through a previously established Department of Health and Human Services (HHS) program. The first tests are expected to be delivered next month by Operation Expanded Testing from the regional offices of the Centers for Disease Control (CDC). In addition, the administration will coordinate Federal Emergency Management Agency (FEMA) and HHS testing efforts with high-need school testing sites, including by locating FEMA testing sites in close proximity to schools. The U.S. Department of Education and the CDC will also work with school districts to connect them with testing providers available in their State, and the administration reminds districts that purchasing COVID-19 tests is an allowable use of Elementary and Secondary School Emergency Relief funds. Finally, the CDC is expected to issue FAQs soon expanding on the “test to stay” school guidance issued in December. That guidance encourages schools to allow exposed students to remain in their classroom, with mitigation measures, such as mask wearing, and with a COVID-19 test administered at least twice in the week following the exposure.

[The fact sheet on COVID-19 testing in schools is available here](https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/12/fact-sheet-biden-harris-administration-increases-covid-19-testing-in-schools-to-keep-students-safe-and-schools-open/).

Author: KSC

### ED Updates Guidance on Missing School Lunch Data

The U.S. Department of Education updated guidance this week regarding how districts should calculate indicators which require data on the number of low-income students in a school or district. Under normal circumstances, many districts rely on free- and reduced-price school meal data to make these determinations. However, school meal programs have operated under a waiver for the past two school years which allow schools to serve free meals to all students, obviating the need to collect individual student data.

The guidance primarily extends existing flexibilities, allowing districts to account for missing 2020-21 or 2021-22 National School Lunch Program (NSLP) data in many cases by using alternate options including:

* Poverty data from other sources, including Medicaid or TANF;
* The “best available” NSLP data, including data from the 2019-20 school year;
* Any NSLP data from a more recent school year that may be accessible, for example direct certification data;
* A combination of the best available NSLP data from 2019-20, 2020-21, and 2021-22, or
* Data from a survey conducted by the State or district which replicates NSLP data.

Some form of this alternate data can be used to determine eligibility and allocations for Title I, Title II, and the Rural, Low-Income Schools Program. It may also be used in some cases to adjust allocations for small districts, for within-district allocations, or to calculate allowances for equitable services. ED acknowledges that use implementation of this guidance “may result in using the same NSLP data several years in a row” but argues that in many federal programs, multi-year status determinations are the norm.

The [updated NSLP guidance is available here](https://oese.ed.gov/files/2022/01/ED-USDA-Fact-Sheet-Revised-1-12-2022.pdf).

Author: JCM

### USDA Increases Funding for School Meals

To address the pandemic’s continued effect on school operations, the U.S. Department of Agriculture (USDA) Secretary Tom Vilsack announced last week that the Department will increase school meal reimbursements to help schools continue to serve their students despite supply chain issues caused by the pandemic and recent inflation. According to a USDA press release, schools will receive an “additional 25 cents per lunch.”

The National School Lunch Program (NSLP) helps provide low-cost or free meals to children by reimbursing participating schools for the meals they serve to students. In the last two school years, USDA has offered a waiver allowing schools to serve free meals to all students regardless of income status. But recently, higher food costs due to inflation and supply chain issues have added pressure to schools’ operating budgets. The 25-cent increase in school lunch reimbursements will help schools serve more children and give schools more purchasing power by providing an estimated $750 million to school meal programs across the nation this year. On the adjustment, Secretary Vilsack stated, “USDA understands that balancing the pressures of the pandemic with the need to feed children continue[s] to be a priority for schools across the country…these higher meal reimbursements will help school meal programs meet their mission.” According to the press release, the upward adjustment for FY 2021 will add to the range of flexibilities USDA has provided to school meals by providing $1 billion for schools to buy food for their meal programs, awarding up to $200 million to States for purchase of domestic local foods, and ensuring schools are not penalized if they cannot meet meal standards due to supply chain issues.

[A copy of the release can be found here.](https://www.usda.gov/media/press-releases/2022/01/07/usda-announces-increased-funding-support-school-meals-and-help)

Evie Blad, “Citing Supply Chain Issues, Inflation, USDA Boosts Funding for School Meals,” *Education Week*, January 10, 2022.

Author: ASB

## News

### Supreme Court Strikes Down General Vaccine Mandate

The U.S. Supreme Court issued a decision Thursday striking down a COVID-19 vaccination rule issued by the Occupational Safety and Health Administration (OSHA). The OSHA rule set out the vaccine-or-test requirement for private employers in States where the agency has direct jurisdiction and required States with OSHA-approved enforcement plans, which cover State and local government employees in 26 States, to implement the same rule.

In a 6-3 decision, the Court struck down the generalized vaccine-or-test requirement, saying that OSHA does not have the “power to regulate public health more broadly” and that COVID-19 is a generalized hazard, not one specific to workplaces.

In a dissenting opinion, Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan argued that the decision “stymies the Federal Government's ability to counter the unparalleled threat that COVID–19 poses to our Nation's workers” and that the assertion the pandemic is not an occupational hazard is “outside of [the Court’s] competence.”

In a narrower ruling, one which applied to health care workers at entities that receive funding from Medicare and Medicaid, the justices upheld the rule by a vote of 5-4, saying that the regulation served to protect patients in a limited health care setting from being exposed to specific risks. “It would be the very opposite of efficient and effective administration,” they wrote, “for a facility that is supposed to make people well to make them sick with COVID–19.”

The Court did leave the door open for a narrower rule for some workplaces, saying that “[w]here the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible.” The Court added that OSHA could, in theory, “regulate risks associated with working in particularly crowded or cramped environments.”

This decision does not stop individual States or localities from creating their own vaccination requirements, but it does give opponents of such requirements ammunition to argue against a generalized rule.

Resources:
Nina Totenberg, “Supreme Court Blocks Biden’s Vaccine-or-Test Mandate for Large Private Companies,” *NPR*, January 13, 2022.
Kevin Breuninger and Spencer Kimball, “Supreme Court Blocks Biden Covid Vaccine Mandate for Businesses, Allows Health-Care Worker Rule,” *CNBC*, January 13, 2022.
Author: JCM

### Negotiated Rulemaking Kicks Off Next Week for Higher Ed

The U.S. Department of Education (ED)’s planned negotiated rulemaking for a number of higher education issues kicks off next week, on January 18th. ED has drafted “issue papers” ahead of those sessions that will be used as initial proposals to begin negotiations and discussions.

The negotiated rulemaking committee consists of a variety of higher education stakeholders and will meet three times over the course of the next three months. The committee is tasked with agreeing upon proposed regulatory language for seven different higher education topics that will impact programs under the Higher Education Act, including the for-profit 90/10 rule, gainful employment, financial responsibility, change of ownership and control, certification procedures, ability to benefit, and standards of administrative capability.

ED’s issue papers released this week indicate that ED hopes to more strictly define “non-federal” revenues for the purpose of the 90-10 rule, which prohibits for-profit colleges from receiving more than 90 percent of their revenue from federal financial aid. Previously, only Title IV financial aid funding counted towards the 90 percent cap, but the American Rescue Plan Act made changes to that requirement, expanding it to all “federal education assistance funds,” which would include additional funding such as military education benefits. The negotiated rulemaking committee may work to provide a clearer definition or tracking system for “federal education assistance.”

ED also proposes additional oversight with regard to institutions’ certification for Title IV, particularly for those institutions that ED considers to be engaged in high-risk activities, as well as suggestions to modify and streamline the process for changes in ownership of institutions. While ED is also seeking to reinstitute regulations that ensure colleges provide for gainful employment of their students, the issue paper on that topic merely offers questions for discussion, as opposed to proposed regulatory language.

The negotiated rulemaking committee will work to reach full consensus on regulatory language for the designated topic areas. If consensus is reached, ED will be required to move forward with the language crafted by the committee. However, should the committee fail to reach an agreement, then ED may propose its own language.

Resources:

Michael Stratford, “Biden Administration Circulates Draft Plans to Rewrite 90/10 Rule, ‘Gainful Employment,’ *Politico Pro*, January 11, 2022.

Author: KSC

*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* <https://bruman.com/training-and-recordings/>.

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