

# The Federal Update for March 4, 2022

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Re: Federal Update

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## Legislation and Guidance

### Appropriations Stalled by Foreign Aid Debate

With a temporary appropriations measure set to expire on March 11th, lawmakers say they are still working to get a full-year, omnibus appropriations bill completed. House Appropriations Committee Chair Rosa DeLauro (D-CT) told reporters that she was optimistic about getting the bill completed in time.

Still causing conflict is the potential inclusion of several supplemental appropriations packages, including money for the “test to treat” COVID-19 initiative proposed by President Biden along with other pandemic treatments, as well as both defense and humanitarian aid for Ukraine. The latter request has increased sharply in recent days, going from a request of $6.4 billion last week to at least $10 billion this week. While members of Congress have agreed in principle on the need for Ukraine aid, there is debate over whether it should be included in the defense or non-defense portion of spending, and whether there should be “parity” between those two sides of the appropriations package. Lawmakers are also divided over the need for additional pandemic aid.

The House will need to bring a spending package to the floor by March 8th to provide adequate time for debate and passage in the Senate.

Author: JCM

### ED Updates Q&A on Parentally Placed Private School Students

The U.S. Department of Education (ED) recently updated its question and answers (Q&A) on the Individuals with Disabilities Education Act (IDEA) requirements applicable to children with disabilities placed by their parents in private schools, who are not enrolled in the local educational agency (LEA), for whom the provision of a free and appropriate public education (FAPE) is not at issue, and the parent is not seeking financial reimbursement for the private school placement. The last guidance was published on April 2011 and the updated guidance includes answers to new topics such as: (i) equitable services providers, (ii) preschool children with disabilities, (iii) children who reside out-of-State or whose parents live in other countries, (iv) State-funded school voucher and scholarship programs, and (v) extended public school closures.

Regarding extended public-school closures, the guidance states that an LEA is required to provide equitable services to private school children with disabilities if the LEA is providing virtual instruction, or other forms of remote learning, to the general student population. However, if an LEA closes its physical building and doesn’t provide instruction to the general population, an LEA is not required to provide equitable services to children with disabilities enrolled in the private schools located inside the LEA. For these instances, ED suggests LEAs consult with private schools to establish communication methods that ensure that key stakeholders share vital information during these times.

Regarding equitable services providers, the guidance clarifies that private school teachers who provide equitable services to parentally-placed children do not need to meet the special education teacher qualification requirements under IDEA. However, the State can exceed IDEA standards and require these teachers to hold certain credentials or certifications. For preschool children with disabilities, the guidance indicates that LEAs must use Section 619 funds to provide equitable services to parentally-placed preschool children with disabilities. These children are those enrolled in facilities that meet the definition of “elementary schools,” which can include private non-profit institutions that provide elementary education, as determined under State law. Lastly, on State-funded school voucher and scholarship programs, the guidance states that children with disabilities attending private schools through a State voucher or scholarship program are considered privately-placed children. Moreover, it clarifies that if a parentally-placed child with a disability reenrolls in a public school, the LEA must make FAPE available to them because they continue to be considered a child with a disability.

As noted, ED’s guidance clarifies some of the questions that LEAs and stakeholders have presented throughout the years, including COVID-19-related inquiries.

[The updated guidance is available here.](https://sites.ed.gov/idea/idea-files/questions-and-answers-on-serving-children-with-disabilities-placed-by-their-parents-in-private-schools/)

Author: MPM

## News

### In State of the Union, Biden Calls for Mental Health Resources

In his annual address to the nation, President Joe Biden mentioned several educational initiatives, but the address focused mostly on the emergent issues of the day – the Russian incursion into Ukraine and the shift in masking recommendations from the Centers for Disease Control.

Among the proposals for schools mentioned in the speech was a call to respond to a national mental health crisis, especially in children and teens. The President said he will propose $1 billion in new federal spending for school psychologists and counselors and ease administrative requirements for school-based Medicaid services. “Let’s take on mental health, especially among our children, whose lives and education have been turned upside down,” the President said.

While the President made a point that the vast majority of schools are open, he urged parents to advocate for in-person learning, even as new variants of COVID-19 emerge, and to encourage schools to use stimulus money to hire teachers and make up for lost instructional time. In a fact sheet accompanying the speech, the White House said it would encourage schools to spend relief funds on individualized and small-group instruction, teachers and instructional aides, tutoring, and after-school and summer learning programs.

During a portion of his speech which focused on elements of the stalled Build Back Better plan, the President called for free pre-K for “every 3- and 4-year-old” and efforts to reduce the cost of childcare overall. For college students, the President urged an increase of the maximum Pell grant by $2,000, but did not call for the same free community college program that was part of the earlier proposal.

Resources:
Evie Blad, “7 Takeaways for Educators from Biden’s State of the Union,” *Education Week: Politics K-12*, March 2, 2022.
Author: JCM

### President Nominates Ketanji Brown Jackson for SCOTUS

President Biden nominated Ketanji Brown Jackson late last week to serve on the U.S. Supreme Court, filling the role to be vacated by the retiring Justice Steven Breyer. Jackson is the first Black woman in U.S. history nominated for the Supreme Court and currently serves on the D.C. Circuit Court of Appeals.

Jackson has ties to the education world both through family – both of Jackson’s parents are educators – and her experience with education-related cases throughout her career, including during her time clerking for Justice Breyer. Jackson has served as a federal judge since 2013, when she was nominated by President Obama for a federal district court role. Jackson has experience ruling on cases related to special education, including whether schools provided a free and appropriate public education under the Individuals with Disabilities Education Act, and ruled in a case regarding the Trump administration’s delay in implementing a gainful employment rule crafted by the prior administration, determining that the States bringing the case lacked standing. Jackson has not, however, publicly signaled how she might rule on high profile federal education issues such as affirmative action or school choice – two topics the Court has previously ruled on and is likely to again.

The Court is slated to take up two affirmative action cases next term, one in which Harvard is accused of using unfair admissions practices for Asian American students. Jackson, who attended Harvard University for both undergraduate and law school, is a member of the Harvard Board of Overseer’s, raising questions as to whether she will recuse herself from the Harvard affirmative action case next term, if confirmed. With the Court’s conservative majority at six out of the nine justices, a recusal could make it even more likely that the Court will rule against the legality of affirmative action policies.

Jackson is awaiting Senate confirmation. She has begun meeting with lawmakers on Capitol Hill and will be required to participate in public hearings in which senators will have the opportunity to question her legal views. Those hearings are set to begin later this month on March 21st. Jackson’s confirmation process is expected to be the main focus on Capitol Hill over the coming weeks, in addition to finalizing fiscal year 2022 appropriations.

Resources:

Mark Walsh, “Ketanji Brown Jackson, a Daughter of Educators, Is Biden’s Nominee for U.S. Supreme Court,” *Politico*, February 25, 2022.

Author: KSC

## Reports

### GAO Report Finds ED Should Help States with Virtual Schools

A Government Accountability Office (GAO) report published in January found that the U.S. Department of Education (ED) should “help [S]tates address student testing issues and financial risks associated with virtual schools, particularly virtual charter schools.”

According to the report, virtual charter schools have lower proficiency and participation rates than other public schools on federally required State tests and may gather inconsistent enrollment and attendance data which can affect State and federal funding allocations. Due to low proficiency rates, fewer virtual charter school students meet their State’s grade level achievement standards. The report also found that almost half of the virtual charter schools reviewed had contracts with for-profit management organizations which can pose heightened financial and programmatic risks to federal funds. While GAO acknowledges the challenges virtual schools face are generally the responsibility of State and local officials, GAO finds that the report highlights how ED may need to help virtual schools address these challenge areas. To do so, the report concludes by offering three recommendations to the Secretary of Education. First, identify the challenges contributing to lower State standardized testing participation and achievement from students at virtual schools. Second, help States ensure that they report comparable attendance data across their virtual and brick-and-mortar schools for federal reporting purposes. Finally, the Secretary should take steps to help States report accurate data on charter management contracts to help hold them accountable.

In response to the report, ED indicated that it reached State and local officials to provide them with information on virtual charter schools and agreed with each of GAO’s recommendations. ED also indicated that it funded a technical assistance center – the Student Engagement and Attendance Center (SEAC) – to help States and districts track attendance and address chronic absenteeism.

[A full copy of the report can be found here.](https://www.gao.gov/assets/gao-22-104444.pdf)

Author: ASB

*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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