

# The Federal Update for October 28, 2022

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Re: Federal Update

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[Legislation and Guidance 1](#_Toc117864012)

[ED Finalizes Group of Higher Ed Regulations 1](#_Toc117864013)

[News 2](#_Toc117864014)

[Department of Energy to Release School Infrastructure Funding 2](#_Toc117864015)

[NAEP Scores Dropped Nationwide in 2022 3](#_Toc117864016)

[Analysis of ESSER Spending Shows Limited Spending 3](#_Toc117864017)

[Reports 4](#_Toc117864018)

[GAO Finds Discrimination in Dress Codes, Enforcement 4](#_Toc117864019)

[ED Can Improve Cybersecurity Vigilance, According to GAO Report 5](#_Toc117864020)

## Legislation and Guidance

### ED Finalizes Group of Higher Ed Regulations

The U.S. Department of Education (ED) published final regulations today in the *Federal Register* that make changes to a number of higher education issues, including the 90-10 rule, change in ownership of an institution of higher education, and prison education programs.

The portion of the regulations pertaining to the 90-10 rule, which prohibits for-profit colleges from receiving more than 90 percent of their revenue from federal sources, implements a change to the rule that was passed in the American Rescue Plan Act last year. That change modified the definition of what is considered a federal source for the purposes of the 90-10 rule, now requiring that federal financial aid for veterans, including G.I. Bill funding, be included toward the 90 percent maximum on federal dollars. The change was intended to protect veterans from aggressive marketing by for-profit colleges by prohibiting federal education benefits for veterans from being counted toward the non-federal 10 percent portion of the 90-10 rule.

The regulations also add new requirements for when an institution of higher education is changing ownership, or converting from a for-profit institution to a non-profit institution, including required notification of ED and the institution’s students 90 days prior to the ownership change, potential financial conditions for risk mitigation regarding the change, and an updated definition of nonprofit institution, among other updates.

Finally, the rule implements another statutory higher education change – lifting the prohibition on offering Pell Grants to incarcerated students. Congress lifted the ban in 2020 to take effect in 2023.

All of these changes will take effect in 2023, with the 90-10 rule changes applying to institutional fiscal years beginning after January 1, 2023, and the other portions of the regulations taking effect July 1, 2023.

Resources:

Michael Stratford, “Cardona finalizes tighter rules for for-profit colleges, expansion of aid to incarcerated students,” *Politico*, October 27, 2022.

U.S. Department of Education Press Release, “Education Department Unveils Final Rules to Protect Veterans and Service Members, Improve College Access for Incarcerated Individuals and Improve Oversight When Colleges Change Owners,” October 27, 2022.

Author: KSC

## News

### Department of Energy to Release School Infrastructure Funding

The U.S. Department of Energy (DOE) published a notice this week announcing the upcoming availability of $80 million for energy improvements in public K-12 schools. The funding was appropriated under the Infrastructure Investment and Jobs Act that Congress passed in November of last year and is referred to as the “Renewing America’s Schools” grant program. Vice President Kamala Harris also provided an update this week on the administration’s “Plan for Building Better School Infrastructure,” touting the upcoming DOE funding, along with other school infrastructure initiatives.

DOE will seek applications with projects falling into two “topic areas,” including high-impact energy efficiency and health improvements and innovative energy technology packages. Eligible applicants will be consortia including one local educational agency (LEA) along with one or more schools, certain non-profit and for-profit organizations, or community partners. The first application period will open next month and close in January 2023. Examples of how the funding may be used include HVAC upgrades for better air quality and installation of renewable energy technology to improve the sustainability of school buildings. DOE will release a “Funding Opportunity Announcement” in the coming weeks, which will include detailed information on how LEAs can apply for the first round of the Renewing America’s Schools grant program.

DOE is also providing $4.5 million under the Energy Champions Leading the Advancement of Sustainable Schools Prize (Energy CLASS Prize) to allow up to 25 LEAs to train staff as “energy managers.” Applications for that funding will also open next month.

As noted by the Vice President this week, additional funding for schools under the Infrastructure Investment and Jobs Act is coming from the Environmental Protection Agency as well – $5 billion to implement the Clean School Bus Program – however, that funding has not yet been released. The administration also provided updates on other initiatives to improve school infrastructure and energy efficiency, including the use of education stimulus funds to improve air quality, and announced some planned actions, including additional guidance under the State and Local Fiscal Recovery Fund on partnering with LEAs for school infrastructure upgrades, a toolkit for schools on infrastructure upgrades, and a proposed Office of Infrastructure and Sustainability at the U.S. Department of Education.

Resources:

Mackenzie Wilkes, “Schools to get $80 million from new Energy Department program,” *Politico*, October 26, 2022.

Author: KSC

### NAEP Scores Dropped Nationwide in 2022

American primary and secondary students saw significant drops in test scores across almost all demographic groups and in both math and reading according to test scores released Monday. The results of the National Assessment of Educational Progress provide a snapshot of achievement in spring 2022, the first such assessment since 2019.

In the latest results, math scores for eighth graders were down in nearly every state, with only 26 percent of eighth graders showing proficiency, down from 34 percent in 2019. Reading scores also declined in more than half of States, with only 33 percent of 4th graders and 31 percent of eighth graders demonstrating proficiency on the test.

While there was some correlation between extended school closures and lowered test scores, that correlation was not consistent across subjects, grades, or type of district (rural, suburban, or urban), leading researchers to caution against drawing conclusions based on the length of school closures. Family and economic circumstances likely played a role too – in a survey included in the test, students who were lower-performing tended to have less access to internet-enabled devices and quiet places to work or study.

Author: JCM

### Analysis of ESSER Spending Shows Limited Spending

An analysis of State and school district spending of American Rescue Plan Elementary and Secondary School Emergency Relief (ARP ESSER) funds conducted by the *Washington Post* and a Georgetown University finance group, Edunomics, recently found that districts spent less than 15 percent of those funds during the last school year.

The analysis also found that some districts facing the greatest losses in math and reading achievement have spent ARP ESSER funds at the slowest rate. The data used for the analysis, however, does not fully capture districts’ use of education stimulus funding. The data only accounts for funds that have been liquidated by a district, leaving out funding that has been obligated to certain initiatives but not yet paid out, as some education officials interviewed by the *Washington Post* note. In addition, districts have been working on spending the prior rounds of ESSER funding before dipping into the ARP ESSER bucket of funding. The period of availability for ESSER I only ended a month ago, on September 30, while ESSER II funds are available for districts to spend until September 30, 2023. ARP ESSER funds may be spent for another year after that, expiring on September 30, 2024, making it likely that more of those funds will be drawn down in the coming two years as prior rounds of ESSER expire.

With the drop in National Educational Assessment of Progress scores this year, there is likely to be public and political pressure for districts to spend down ARP ESSER funding more quickly in the coming year, as a portion of those funds is required to be spent to address learning loss, which may have been a factor in the lower scores.

Resources:

Lauren Lumpkin, “Schools got $122 billion to reopen last year. Most has not been used,” *Washington Post*, October 24, 2022.

Author: KSC

## Reports

### GAO Finds Discrimination in Dress Codes, Enforcement

A new report from the Government Accountability Office (GAO) has found that public school dress codes are more likely to restrict items worn by girls, students of color, and LGBTQ+ students – and therefore disproportionately enforced against those groups.

GAO reviewed policies from a sampling of 236 public school districts. Overall, schools which had more restrictive dress codes had more in-school and out-of-school suspension than those that did not, resulting in students being removed more often from the classroom. Significantly more of the restricted items covered by dress codes are those traditionally worn by girls, including skirts, leggings, and midriff-baring tops. GAO also found that almost 60 percent of dress codes had rules regarding hair, hairstyles, and hair coverings that could disproportionately impact Black students. Many also had subjective language regarding hair looking “natural,” “clean,” and “well-groomed” which could be applied inequitably to students of different ethnic backgrounds. Likewise, subjective phrases banning “revealing” or “immodest” clothing could be enforced disproportionately based on gender and body type.

The report notes that in an attempt to be objective, many dress codes use measurements (for example, requiring that skirts be two inches above the knee). However, officials noted that these measurements could be embarrassing to students, especially if done in front of peers.

GAO has recommended that ED create resources to support best practices for drafting and enforcing dress codes, noting that in reality even facially neutral school rules are often disproportionately applied to minority students, girls, and students with disabilities.

The [full report is available here](https://www.gao.gov/assets/gao-23-105348.pdf).

Resources:  
Mackenzie Wilkes, “GAO report finds unequal school dress code enforcement for girls and students of color,” *Politico*, October 25, 2022.   
Author: JCM

### ED Can Improve Cybersecurity Vigilance, According to GAO Report

A Government Accountability Office (GAO) report published this month found that the U.S. Department of Education (ED) can do more to prevent and respond to cybersecurity threats to schools. Cyber incidents against schools, like those that affect district’s information technology system and jeopardize sensitive information, have been on the rise, but ED has not effectively responded to these incidents, according to the report. While ED provides information to schools on cybersecurity and cyberattacks, GAO found that ED should make a better effort coordinating with schools and other public agencies to better understand the nature of these incidents to help schools better address their cybersecurity needs. GAO suggests that stakeholder cooperation through a government coordinating council comprised of federal, State, local, tribal, and territorial government entities is required to better protect schools. Federal guidelines require ED to create such a coordinating council but ED has failed to do so. GAO also suggests that ED should measure the effectiveness of the cybersecurity information it provides to schools. While ED officials are aware that a more coordinated effort may help, they note that a lack of authority to oversee participation of various education entities limits the formation of a formal coordinating mechanism. Education officials say their authority is limited to privacy matters. In response to the report, ED promised to explore what kinds of metrics would be best for measuring the effectiveness of its cybersecurity resources.

[A full copy of the report is available here.](https://www.edweek.org/technology/education-dept-slow-to-recognize-seriousness-of-cyberattacks-gao-watchdog-report-finds/2022/10)

Resources:

Alyson Klein, “Education Dept. Slow to Recognize Seriousness of Cyberattacks, GAO Watchdog Report Finds,” *Education Week*, October 25, 2022.

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

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