

# The Federal Update for December 10, 2021

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Re: Federal Update

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## Legislation and Guidance

### Congress Extends FY 2022 Funding Until February

With the risk of a government shutdown approaching last week, Congress passed a second fiscal year (FY) 2022 continuing resolution (CR) last Thursday to extend federal funding at FY 2021 levels until February 18th. The federal government had previously been operating under a CR that was set to expire on December 3rd. The second funding extension comes as lawmakers in Congress have yet to pass final legislation to provide funding for FY 2022.

Lawmakers this week have turned to another pressing fiscal issue – the debt ceiling. The United States is estimated to breach the current debt ceiling around mid-December, leaving lawmakers scrambling to increase the limit and avoid a national default. The debt ceiling was first raised temporarily in October amid disagreement between Democrats and Republicans on the strategy to increase the spending limit. Republicans were pushing for Democrats to pass a debt ceiling increase through the budget reconciliation process – which would require no Republican support – but Democrats were keener on using the traditional legislative process.

A compromise was reached this week between party leaders which will allow a temporary exemption of the filibuster for legislation to increase the debt ceiling but will not require Democrats to use the strict reconciliation process. The exemption will allow the bill to be passed with only a simple majority and, therefore, will not require any Republican support in the Senate. The legislation authorizing the one-time exemption, however, was passed this week with some Republican support in the Senate, as the bill needed 60 votes to overcome a filibuster. Democrats will now move forward in the coming days with legislation to raise the debt ceiling. The compromise reached by party leaders only suspends the filibuster for debt ceiling action for one month and requires that the debt ceiling be increased by a specific number, not suspended completely. Democrats are expected to pass an increase that will ensure the U.S. does not risk breaching the ceiling again before the 2022 midterm elections.

Finally, Senate Democrats are still hoping to pass their social spending bill that includes funding for soft infrastructure needs by the end of the year. Democrats are using the reconciliation process for the legislation, which has already been passed by the House, and are continuing to take steps to bring the bill to a vote on the Senate floor this year.

Resources:

Emily Cochrane, “Senate Clears Last Hurdle to Raising Debt Ceiling,” *New York Times*, December 9, 2021.

Author: KSC

### OMB Releases ARP Compliance Supplement Addendum

The Office of Management and Budget (OMB) published an addendum to the 2021 Compliance Supplement last Friday that addresses audit requirements for education funds under the American Rescue Plan Act (ARP). The initial version of the supplement released earlier this year discussed requirements for stimulus funds provided under the first two rounds, but did not include directions related to ARP.

For all Education Stabilization Fund allocations, auditors are directed to focus on activities allowed or unallowed, allowable costs/cost principles, cash management, equipment/real property management, reporting, subrecipient monitoring, and special tests and provisions.

Regarding use of Elementary and Secondary School Emergency Relief funds (ESSER) under all three stimulus bills, the addendum clarifies that grantees can use ESSER funds “to support a very wide range of activities, including activities indirectly linked to the impact of COVID-19, as outlined in the ED Volume 2 COVID Handbook… provided such uses are consistent with statutory requirements and the Uniform Guidance in 2 CFR Part 200.” While activities paid for with ESSER funds do not have to be directly linked to the pandemic, such as COVID-19 tests or personal protective equipment, indirectly-linked costs must still be tied to the pandemic in some way. Examples of indirectly-linked costs include reengagement of students with chronic absenteeism, intensive student tutoring, and mental health services for students and staff.

The addendum also addresses the question of maintaining time and effort for employees working on stimulus-funded programs.  The addendum states that employees that are splitting time between activities that are allowable under ESSER and the Governor’s Emergency Education Relief Fund (GEER) and activities that are not allowable under those programs are required to maintain time and effort.  However, the addendum suggests that there would be limited circumstances in which an employee would be working on activities that are unallowable under ESSER or GEER since grantees can use ESSER and GEER funds for “activities that are necessary to maintain the operation of and continuity of services in [an LEA] and continuing to employ existing staff of the [LEA].”  This language continues to muddy the water on maintaining time and effort for employees working on stimulus-funded programs, failing to resolve conflicting statements in the 2020 and 2021 Compliance supplements on the necessity of time and effort records when using ESSER funds.

In addition, the addendum outlines reporting requirements and requirements for purchasing equipment or real property. The supplement addendum also includes several special tests of compliance for auditors to perform including the wage rate requirements for construction, participation of private school students under ESSER I and GEER I, and prioritizing services or assistance to non-public schools under the Coronavirus Response and Relief Supplemental Appropriations Act, Emergency Assistance for Non-Public Schools Program.

[The full compliance supplement addendum for education stimulus funds is available here](https://www.cfo.gov/assets/files/Education%20Exchange%20Stabilization%20Fund%20Compliance%20Supplement%20Addendum%201%20PDF.pdf).

Author: KSC

### ED Finalizes New Discretionary Grant Priorities

The U.S. Department of Education (ED) published updated final discretionary grant priorities in the *Federal Register* today. These grant priorities may be used by ED for any discretionary grant programs to further certain objectives and goals of ED.

There are six new supplemental priorities and definitions established, including:

* Addressing the impact of COVID-19 on students, educators, and faculty;
* Promoting equity in student access to educational resources and opportunities;
* Supporting a diverse educator workforce and professional growth to strengthen student learning;
* Meeting student social, emotional, and academic needs;
* Increasing postsecondary education access, affordability, completion, and post-enrollment success; and
* Strengthening cross-agency coordination and community engagement to advance systemic change.

In the *Federal Register* notice, ED says the purpose of these new priorities is to “further the Department’s mission, which is to ‘to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.’” All of the grant priorities will not necessarily be attached to each discretionary grant that ED offers, but now that they are final priorities, ED may include them as part of discretionary grant competitions.

[The final priorities and stakeholder comments on the proposed priorities are available here](https://public-inspection.federalregister.gov/2021-26615.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=pi+subscription+mailing+list).

Author: KSC

## News

### School Voucher Arguments Heard by Supreme Court

This week the U.S. Supreme Court heard arguments in the case of *Carson v. Makin*, which examines the limits around a “tuitioning” system created by the State of Maine. In Maine, students in areas too small to host their own schools are provided with a voucher which they can use to access a publicly-funded education at a number of private schools. The vouchers range from $9,500 at the K-8 level to $11,900 for high school students, and the vast majority of voucher recipients attend a group of less than a dozen major public high schools. However, State law allows only nonsectarian schools – or religiously affiliated schools that provide a secular education – to receive public funds through the program.

In this case, a group of parents who wish to send their children to private religious schools are suing the State, alleging that this limitation represents an unconstitutional restriction on their right to freely exercise their religion by sending their children to a school that provides a religiously-based or religion-centered education. These parents seek to expand on precedent set in *Trinity Lutheran* (2017) and *Espinoza v. Montana Department of Revenue (2020).*

Justices questioned attorneys for both parties during arguments Wednesday, offering hypotheticals about what kinds of schools would be included or excluded under the law, and whether parents in these particular areas are entitled to a State-funded religious education while parents living in districts with their own public high schools would not receive the same benefit. The Court also asks whether such schools would still be eligible for public funds if they rejected students based on their families’ religion or sexual orientation, or if they violated State law prohibiting discrimination against employees like teachers based on gender identity or sexual orientation.

The federal government argued on behalf of the State of Maine, with Deputy Solicitor General Malcolm Stewart arguing that the State government has more latitude to decline to make payments supporting religious exercise than it would if it were creating barriers to exercise and speech.

The Court may not decide the case on these merits, however, if the Justices determine that the private schools the plaintiff parents have chosen would not be able to receive funds anyway for other reasons – if, in order words, the alleged injury could not be remedied by a decision in their favor.

A decision in this case is expected by June of next year. While it will not impact federal funding for education at this point, public school advocates say they are concerned about the Court opening the door to public funding of religious education on a broad scale.

Sources:
Marissa Martinez, “Supreme Court Hears Case Challenging Maine’s Ban on Religious High School Vouchers,” *Politico*, December 8, 2021.
Author: JCM

### ED to Convene Negotiated Rulemaking Committee

The U.S. Department of Education (ED) announced last week that it will establish a negotiated rulemaking committee in January to address key higher education topics including the 90-10 rule for for-profit institutions, gainful employment, and heightened financial risk. Negotiators will meet for three sessions in January through March of 2022.

The Higher Education Act (HEA) requires that ED engage in negotiated rulemaking on certain topics as a form of community engagement, and ED has committed to seeking nominations from a diverse range of stakeholders, including those representing historically underserved and low-income communities. Once the committee has met, ED will finalize new regulations as part of a more comprehensive overhaul of higher education regulations.

Author: JCM

## Reports

### ED OIG Releases Semiannual Report to Congress

The U.S. Department of Education’s Office of Inspector General (ED OIG) recently released its semiannual report to Congress, which outlines many of the activities ED OIG has completed and worked on over the past six months.

ED OIG has begun oversight activities for the three rounds of COVID-19 stimulus funds authorized by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Coronavirus Response and Relief Supplemental Appropriations Act (CRRSAA), and the American Rescue Plan Act (ARP). Over the past six months, ED OIG has released six audit reports related to the stimulus funding and will continue auditing these funds over the next several years. ED OIG is committing significant resources to stimulus oversight, particularly as all three rounds of stimulus bills allocated money to ED OIG for oversight activities. Inspectors general across the federal government, including ED OIG, have also created a Pandemic Response Accountability Committee (PRAC), as required under the CARES Act, which is “tasked with conducting, coordinating, and supporting inspectors general in the oversight of the trillions of dollars in emergency [f]ederal spending to address the economic impacts of the COVID-19 pandemic.”

Much of ED OIG’s K-12 work over the past six months has focused on charter schools and charter management organizations. These activities have included fraud investigations of charter school officials, as well as audits of charter schools’ grant administration under the Elementary and Secondary Education Act. ED OIG also conducted a review of the administration of the Student Support and Academic Enrichment Grant by ED’s Office of Safe and Supportive Schools’ (OSSS) which found that OSSS provided inadequate oversight of grantee performance and funds.

ED OIG also conducted significant work around disaster recovery funds, including funds provided to States and territories impacted by hurricanes and other natural disasters. These activities included audits of States’ and territories’ use of Emergency Impact Aid for Displaced Students funding and higher education disaster relief funding.

ED OIG also worked with ED staff to develop a directive called the “Overview of the Office of Inspector General” which outlines the role and independence of the OIG and provides information on ED OIG’s operations and statutory requirements. This directive is intended to be a resource for ED staff to provide a better understanding of ED OIG’s role and how to handle referrals made from OIG.

Finally, ED OIG has instituted a new quality control process for audits, establishing a process for conducting desk reviews of a sample of audit reporting packages. These desk reviews provide a grade of pass, pass with deficiencies, or fail for the reporting package or audit documentation. Should a reporting package or audit documentation be provided a pass with deficiencies, the auditor is notified for correction in future audits, while if a failing grade is determined, the auditor must resolve the deficiencies or the report will be rejected for unreliability by ED OIG.

Many of the updates provided in ED OIG’s semiannual report were reported on by Keith Cummins of ED OIG at Brustein & Manasevit’s Fall Forum in Clark County, Nevada last week.

[ED OIG’s semiannual report to Congress is available here](https://oig.ed.gov/reports/semiannual-report/ed-oig-83rd-semiannual-report-congress).

Author: KSC

### GAO Report Finds Increased Rates of Bullying, Hate Speech

A report issued by the U.S. Government Accountability Office (GAO) last month found that reports of bullying, hate speech, hate crimes, and other victimization based on student characteristics increased from 2014-15 to the 2018-19 school year. According to the report, “[a]bout one in four of all students aged 12 to 18 saw hate words or symbols written in their schools, such as homophobic slurs and references to lynching.” GAO says further that about seven percent of students were directly subjected to hate speech related to their race, religion, ethnic background/national origin, disability, gender, or sexual orientation, with race being the most common topic of such speech. The report examined cyberbullying via computers or smartphones as well as incidents that occurred in school buildings, reviewing school crime and safety data as well as federal databases.

While incidents increased, enforcement was somewhat patchwork. An additional 2,000 schools used school resource officers with the ability to arrest students over that time period. Use of other prevention mechanisms also increased.

Federal civil rights investigations tended to move more quickly over the last few years, with the average number of days a complaint spent pending resolution falling from a high of 447 in the 2015-16 school year to an average of 74 days in 2019-20. But civil rights experts told GAO that they no longer relied on the U.S. Department of Education’s Office for Civil Rights (OCR) because of the increased rates of complaint dismissals. In the 2019-20 school year, OCR both received fewer complaints and dismissed more of them. Of those dismissals, 81 percent were because the complainant did not consent to being identified to the individual or entity about which they were complaining. Current OCR officials also noted that a number of dismissals were due to the rescission of an opinion letter that protected transgender students against discrimination; ED has since restored the interpretation of federal law which considers gender identity and sexual orientation to be protected elements of sex.

[The report is available here](https://www.gao.gov/assets/gao-22-104341.pdf).

Author: JCM

*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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