

# Congress of the United States

Washington, DC 20510

July 13, 2020

The Honorable Betsy DeVos  
Secretary  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202

Re: Docket ID ED-2020-OPE-0078

Dear Secretary DeVos:

We write to express our strong objection to the U.S. Department of Education’s (“Department”) interim final rule (IFR) that excludes students from emergency funds provided under the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act).<sup>1</sup> While the Department has taken the position that emergency financial aid grants to students are limited to those eligible to participate in title IV programs under section 484 of the *Higher Education Act of 1965* (HEA), the legal basis and rationale put forth in support of this position are fatally flawed.<sup>2</sup> The CARES Act does not impose any eligibility restrictions on students. Further, limiting eligibility to title IV eligible students denies aid to students in need who are facing significant financial challenges as a result of the COVID-19 pandemic. The Department should immediately rescind both its unauthorized guidance and this IFR and allow institutions of higher education (“institutions”) maximum flexibility in distributing emergency aid as intended by Congress.

## **The Department’s interpretation of the CARES Act is wrong and unauthorized.**

Section 18004(c) of the CARES Act states that emergency financial aid grants are to be given to students enrolled at institutions.<sup>3</sup> The Department has taken the position that, because the terms “students” and “emergency financial aid grants” are undefined, the Department is required to exercise a “narrow interpretative authority.”<sup>4</sup> The Department further asserts that, because subsections 18004(a)(2) and (a)(3) reference title IV, “the most congruent definition of ‘student’

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<sup>1</sup> Eligibility of Students at Institutions of Higher Education for Funds Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 85 Fed. Reg. 36,494 (June 17, 2020) (to be codified at 34 C.F.R. pt. 668). <https://www.federalregister.gov/documents/2020/06/17/2020-12965/eligibility-of-students-at-institutions-of-higher-education-for-funds-under-the-coronavirus-aid>.

<sup>2</sup> See *Washington v. DeVos*, No. 2:20-CV-0182-TOR (E.D.Wash. June 12, 2020) and *Oakley v. DeVos*, (N.D.CA. June 17, 2020)

<sup>3</sup> Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 18004, 134 Stat. 281, (2020) (“[A]n institution of higher education receiving funds under this section...shall use no less than 50 percent of such funds to provide emergency financial aid grants to students for expenses related to the disruption of campus operations due to coronavirus...”).

<sup>4</sup> Eligibility of Students at Institutions of Higher Education for Funds Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 85 Fed. Reg. 36,494 (June 17, 2020) (to be codified at 34 C.F.R. pt. 668). <https://www.federalregister.gov/documents/2020/06/17/2020-12965/eligibility-of-students-at-institutions-of-higher-education-for-funds-under-the-coronavirus-aid>.

for purposes of ‘emergency financial aid grants to students’ in section 18004 is a person who is or would be eligible under section 484 of the HEA for title IV aid.”<sup>5</sup>

The Department’s position is patently contrary to Congress’ intent. A plain reading of the CARES Act and HEA makes clear that the Department is misinterpreting the statute in opposition to Congressional intent by limiting emergency aid to title IV eligible students. The CARES Act does not place any eligibility restrictions on students and no other statute requires students to also qualify for title IV to receive emergency financial aid.<sup>6</sup> If Congress had wanted to put such a restriction in place, Congress would have explicitly done so.<sup>7</sup> Section 484 of the HEA is very clear that title IV requirements apply to “grants, loans, or work assistance under this subchapter.”<sup>8</sup> Accordingly, emergency financial aid grants provided under section 18004 of the CARES Act, which are not codified under the same subchapter as title IV of HEA, are not subject to the same eligibility requirements. Further, the Department’s argument ignores elements of the funding distribution formula in section 18004 that accounts for non-title IV students, which the Department counted in allocating CARES Act funds to institutions and which would further suggest there was no intent to limit emergency aid solely to title IV eligible students.<sup>9</sup>

This is not merely our opinion. The Congressional Research Service (CRS) has described the Department’s interpretation as “not a particularly persuasive reading of the statute” and opined that “neither the CARES Act nor Title IV explicitly prohibits non-Title IV-eligible students from receiving emergency financial aid grants...Nor does the CARES Act expressly authorize the

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<sup>5</sup> Id. Students who would not be eligible under the Department’s interpretation include: (a) Dreamers with or without Deferred Action for Childhood Arrival status; (b) other students with undocumented status; (c) students with pending asylum applications; (d) students with Temporary Protected Status or Deferred Enforced Departure status; and (e) students with U-visas. Also excluded from eligibility are citizens and non-citizens who: (a) do not have a high school diploma, General Education Development certificate or equivalent, or recognized exception to these requirements; (b) are enrolled only in non-credit courses; (c) have not registered with Selective Service (males 18-25); (d) are also enrolled in high school; (e) have not maintained a “C” average or above by the end of their second year; or (f) are in default on a federal student loan or owe any refund amount on a federal student grant. See 20 U.S.C. § 1091(a)(1)-(3), (c), (d); 34 C.F.R. § 668.32.

<sup>6</sup> Specifically, under section 18004(c) institutions must use no “less than 50 percent of such funds to provide emergency financial aid grants to students for expenses related to the disruption of campus operations due to coronavirus.” Section 18006 also imposes the additional restriction that institutions, “must to the greatest extent practicable, continue to pay employees and contractors during the period of any disruptions or closures related to the coronavirus.” Sections 18004(a)(1) and (b) contain provisions regarding how these funds will be distributed to institutions but they do not imply anything about how institutions will distribute these funds to students. The Department has also asserted that Personal Responsibility and Work Opportunity Act’s (8 U.S.C. section 1611) ban on non-citizens receiving federal public benefits applies independently of whether title IV’s eligibility criteria applies. In *Oakley* the court rejected this argument, ruling that that HEER funding does not meet the definition of a “Federal public benefit” and that the “one-time emergency disbursement of HEERF Assistance in the CARES Act is not subject to the more general prohibition in the earlier statute.”

<sup>7</sup> *United States v. Montoya-Vasquez*, No 4:08CR3174, 2009 WL 103596 at \*5 (D. Neb. Jan 13, 2009) (“If Congress wanted to bar aliens with immigration detainers from eligibility for release, it could readily have said so, but it did not.”).

<sup>8</sup> 20 U.S.C Section 1091(a).

<sup>9</sup> For example, section 18004(a)(1)(b) requires the distribution of 22.5 percent of HEER funds based on the number of students who are not Pell grant recipients.

Department to create or impose grant eligibility requirements that Congress did not codify in the statute itself.”<sup>10</sup>

Two separate federal courts have agreed and issued preliminary injunctions preventing the Department from enforcing this IFR in Washington State and for California community colleges.<sup>11</sup> In *Oakley vs. DeVos*, the court indicated that it believed “Congress has demonstrated consistently that it knows how to impose conditions on funding and delegate to the Secretary the authority to impose such conditions when intended.”<sup>12</sup> The court further noted that the “entirety of Section 18004 contains a single explicit reference to title IV” which referenced “using the ‘same systems’ as the Secretary uses to distribute funding under title IV.”<sup>13</sup> This “system” merely refers to the technological system used to authenticate, originate, and disburse grants to institutions.

The Department’s imposition of eligibility restrictions is outside of its authority. While other sections of the CARES Act provide express authorization to establish eligibility requirements, Congress did not authorize or instruct the Department to “create or impose” student eligibility restrictions for funds under section 18004.<sup>14</sup> Congress did not intend the Department to exclude students from emergency financial aid.<sup>15</sup> In *Washington v. DeVos*, the court stated that, “nothing in the CARES Act grants Defendants authority to use their general rulemaking power under the HEA to impose conditions on the general allocations made in the CARES Act,” and that the Department’s “claim of general rulemaking authority is inconsistent with the language of the statute.”<sup>16</sup> The court further found that “there is no ambiguity for which the Defendants can interpret the CARES Act to be limited only to those individuals eligible for title IV assistance under the HEA.”<sup>17</sup>

### **Limiting eligibility does nothing to reduce the potential for waste, fraud, and abuse.**

In the IFR, the Department states it is concerned about waste, fraud, and abuse because institutions can use Higher Education Emergency Relief (HEER) funds to make quick “cash awards to students.”<sup>18</sup> Specifically, the Department cites concerns that using a broader definition

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<sup>10</sup> Memorandum Congressional Research Service, Eligibility Requirements for Emergency Financial Aid Grants to Students Under Section 18004 of the CARES Act. <https://go.usa.gov/xwtSE>. May 20, 2020.

<sup>11</sup> See *Washington v. DeVos* and *Oakley v. DeVos*.

<sup>12</sup> *Oakley* at 14.

<sup>13</sup> *Id.* at 13.

<sup>14</sup> Under Section 2210, for instance, the Department of Labor is permitted to determine eligibility requirements for short-time compensation program grants.

<sup>15</sup> *Washington* at 24 (“Contrary to Defendants’ argument, Congress’ limited incorporation of certain Title IV provisions raises the inference that the failure to similarly incorporate all of Title IV’s eligibility restrictions into the CARES Act was intentional. This is not a statutory ambiguity that would justify Defendants’ claim of rulemaking authority.”) (citations omitted).

<sup>16</sup> *Id.* at 25. The *Oakley* court agreed and found, “the absence of any explicit reference to title IV eligibility requirements or related grant of authority to the Secretary in Section 18004 as intentional.”

<sup>17</sup> *Washington* at 30.

<sup>18</sup> Eligibility of Students at Institutions of Higher Education for Funds Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 85 Fed. Reg. 36,494 (June 17, 2020) (to be codified at 34 C.F.R. pt. 668). <https://www.federalregister.gov/documents/2020/06/17/2020-12965/eligibility-of-students-at-institutions-of-higher-education-for-funds-under-the-coronavirus-aid>.

of “student” to determine eligibility would incentivize fraudulent institutions to “create cheap classes and programming that provides little or no educational value and then use the HEER funding to incentivize individuals not qualified under title IV to enroll as paying students in those classes and programs.”<sup>19</sup>

However, given the urgency and deadline to spend down this emergency aid, it is not feasible that institutions would be able to create new non-title IV eligible programs to recruit students in such a short time frame. Further, the types of students who might be induced to enroll based on the promise of limited awards of emergency aid are highly unlikely to have the financial means necessary to cover the cost of tuition without also having access to title IV federal grants and loans. Therefore, the Department’s rationale in using this eligibility restriction to prevent waste, fraud, and abuse is fundamentally flawed.

If the Department was truly concerned about waste, it would have avoided repeatedly shifting its interpretations of the law. The Government Accountability Office noted that the Department’s “evolving communications may have delayed schools’ distribution of funds to students.”<sup>20</sup> This unnecessary, unauthorized, and fundamentally preventable delay wasted taxpayer funds intended to meet emergency needs.

### **Limiting eligibility makes it harder to disburse emergency aid.**

While the Department has asserted that applying title IV eligibility restrictions will get CARES Act funds to “institutions and individuals as quickly and efficiently as possible,”<sup>21</sup> in reality, these restrictions make it significantly harder for institutions to efficiently disburse emergency aid. The Department’s choice to pursue this limitation, and the resulting iterative rollout discussed below, delayed institutional disbursement of funds.<sup>22</sup> Even with the IFR in place, the requirement that institutions verify a student’s eligibility for title IV aid in order to provide emergency grants hinders the ability of institutions to quickly disburse funds. Subsections 18004(a)(1) and (b) anticipated these concerns and contain provisions requiring the Department to distribute funds using existing systems in order to maximize expediency. Congress intended to ensure the funds reach institutions quickly and to provide the necessary institutional flexibility to provide these funds to the students in most need.

The Department suggests that, in the interest of efficiency, “institutions could encourage students who do not currently receive title IV aid to submit the Free Application for Federal Student Aid

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<sup>19</sup> Id.

<sup>20</sup> U.S. Government Accountability Office (June 2020). *Opportunities to Improve Federal Response and Recovery Efforts* (Publication No. GAO-20-62). Retrieved from <https://www.gao.gov/assets/710/707839.pdf> at page 181.

<sup>21</sup> Id.

<sup>22</sup> As a result of this process, two months after Congress passed the CARES Act, 42 percent of institutions indicated that they were waiting on additional guidance from the Department before distributing any emergency financial aid to students. National Association of Student Financial Aid Administrators, NASFAA Membership Survey: CARES Act Distribution, (May 2020); available at [https://www.nasfaa.org/uploads/documents/NASFAA\\_Membership\\_CARESAct\\_Survey.pdf](https://www.nasfaa.org/uploads/documents/NASFAA_Membership_CARESAct_Survey.pdf).

(FAFSA) in order to determine title IV eligibility.”<sup>23</sup> However, the fact students may be required to take this additional unneeded step is an example of the kind of unnecessary roadblock these eligibility requirements have created that will only delay needed aid from reaching students. Many students with financial need never file the FAFSA or enroll in title IV eligible programs.

### **The Department has failed to establish a consistent justification for the IFR.**

The Department’s guidance and regulatory implementation have changed over time, seemingly in reaction to lawsuits. On April 9, the Secretary wrote in a letter to institutional presidents that:

“The CARES Act provides institutions with significant discretion on how to award this emergency assistance to students. This means that each institution may develop its own system and process for determining how to allocate these funds, which may include distributing the funds to all students or only to students who demonstrate significant need. The only statutory requirement is that the funds be used to cover expenses related to the disruption of campus operations due to coronavirus (including eligible expenses under a student’s cost of attendance, such as food, housing, course materials, technology, health care, and childcare).”<sup>24</sup>

Its initial certification and agreement form stated that it did not “consider individual emergency financial aid grants” under section 18004(a)(1) “to constitute Federal financial aid under title IV.”<sup>25</sup> The Department cannot and should not impose title IV requirements on funds it does not consider to be title IV aid.

While the certification form did list a number of conditions to receive HEER funds, these conditions did not include any prohibitions restricting non-title IV students from receiving emergency financial aid.<sup>26</sup> Not until April 21, when the Department posted a Frequently Asked Questions document<sup>27</sup> on their website, was there any mention of these funds being restricted to title IV eligible students.<sup>28</sup> After the initiation of litigation, the Department then posted a statement on their website stating that “guidance documents lack the force and effect of law” and

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<sup>23</sup> Eligibility of Students at Institutions of Higher Education for Funds Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 85 Fed. Reg. 36,494 (June 17, 2020) (to be codified at 34 C.F.R. pt. 668). <https://www.federalregister.gov/documents/2020/06/17/2020-12965/eligibility-of-students-at-institutions-of-higher-education-for-funds-under-the-coronavirus-aid>.

<sup>24</sup> *Oakley at 4.*

<sup>25</sup> See Department of Education, Recipient’s Funding Certification and Agreement—Emergency Financial Aid Grants to Students under the Coronavirus Aid, Relief, and Economic Security (CARES) Act 1, previously available at [www2.ed.gov/about/offices/list/ope/heerfstudentscertificationagreement42020.pdf](http://www2.ed.gov/about/offices/list/ope/heerfstudentscertificationagreement42020.pdf).

<sup>26</sup> *Id.*

<sup>27</sup> See U.S. Department of Education CARES Act: Higher Education Emergency Relief Fund, last accessed June 8, 2020; available at <https://www2.ed.gov/about/offices/list/ope/caresact.html>.

<sup>28</sup> On April 27, 2020, on the news program “Full Court Press,” the Secretary DeVos stated that Dreamers “are not [eligible for such assistance], because they are not eligible for [t]itle IV funds, and so that’s kind of the distinction that Congress was explicit about in the law[.]” *Oakley at 7.*

that the Department would “not initiate any enforcement action based solely on these statements.”<sup>29</sup>

In addition to the certification form, the Department also used—and continues to use—non-title IV students in its methodology for allocating funds to institutions and students provided under section 18004. As stated in the Department’s own documents, this methodology includes a “simple headcount of students enrolled in classes” – regardless of the type of financial aid for which these students qualified.<sup>30</sup> The Department’s allocation methodology was consistent with Congressional intent to include non-title IV students in emergency aid, but this IFR takes the opposite—and inconsistent approach—in violation of the statute.

These shifting statements and positions only served to create greater confusion for institutions whose students were in immediate need of emergency grants. On June 11, 2020 – a full 11 weeks after the passage of the CARES Act – the Department posted on its website an unofficial copy of the IFR.<sup>31</sup> Despite widespread opposition, including from institutions, the Department decided to codify this policy without a comment period. The Department’s changing positions and haphazard implementation has created an atmosphere of confusion that has made it more difficult for institutions to efficiently distribute needed emergency funding and calls into question the entire rulemaking process as “arbitrary, capricious, [and] an abuse of discretion” under 5 U.S.C. § 706(2)(A).<sup>32</sup>

The Department has repeatedly changed its guidance in a fashion that is inconsistent with the underlying statute, while also telling institutions that the guidance did not have the force of law. After telling institutions that it would not be enforcing the guidance, the Department proceeded to issue an IFR that would be binding on all institutions, creating even more confusion. Congress worked swiftly to pass the CARES Act to respond to the urgent needs faced in the country in the wake of the COVID-19 pandemic. Recognizing the size and scope of the need facing students Congress further intended the funding for emergency aid to students to flow quickly to institutions and, in turn, to their students. Unfortunately, the Department has failed to recognize this emergency for what it is and has engaged in a process that resulted in significant disbursement delays of aid and the cruel and unnecessary denial of support to millions of students who are in dire need of assistance. As such, we urge the Department to immediately rescind both the guidance and the IFR and grant institutions the maximum flexibility to distribute this critically needed emergency aid funding as intended by Congress.

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<sup>29</sup> Kery Murakami, *Continued Confusion Over CARES Act Money*, Inside Higher ED (May 27, 2020), <https://www.insidehighered.com/news/2020/05/27/confusion-continues-over-education-departments-take-emergency-aid-distribution>.

<sup>30</sup> U.S. Department of Education, Methodology for Calculating Allocations per Section 18004(a)(1) of the CARES Act, last accessed July 8, 2020: available at <https://www2.ed.gov/about/offices/list/ope/heerf90percentformulaallocationexplanation.pdf>.

<sup>31</sup> *Oakley* at 7.

<sup>32</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) and *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009)

Sincerely,



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ROBERT C. "BOBBY" SCOTT  
Chairman, Committee on Education and  
Labor, U.S. House of Representatives



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ROSA L. DELAURO  
Chair, Subcommittee on Labor, Health and  
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