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August 3, 2020

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

RE: Docket ID ED-2020-SCC-0088

Dear Secretary DeVos:

We write to express concern with the U.S. Department of Education's (Department's) information collection request (ICR) titled "Eligibility of Students at Institutions of Higher Education for Funds under the CARES Act." The *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act) established the Higher Education Emergency Relief (HEER) fund to provide more than \$14 billion in emergency aid to institutions of higher education (institutions) and required institutions to use at least 50 percent of allocated HEER funds "to provide emergency financial aid grants to students."¹ Congress intended these funds to expediently flow to students, but the Department has established student eligibility restrictions that are in contravention of congressional intent, run counter to the best interest of students, and place unnecessary administrative burden on institutions. The Department is using this ICR to facilitate the implementation of its unauthorized restrictions on the use of HEER funds by institutions.

The restrictions established in the interim final rule² and reflected in the ICR deny support to students who are likely to have the most significant financial need as a result of COVID-19 including undocumented and international students, students in non-title IV-eligible workforce training programs, students with a defaulted federal student loan, students without a high school diploma, and students who have been impacted by the criminal justice system. The restrictions will cause disproportionate harm to populations of students less likely to have completed the Free Application for Federal Student Aid (FAFSA) including student veterans, students who

¹ The Coronavirus Aid, Relief, and Economic Security Act, § 18004(c).

² 85 FR 36494.

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attend low-cost institutions like community colleges, and students who self-finance their education through full- or part-time work. Failing to provide adequate support will result in financial turmoil, personal struggle, and, in many cases, a delayed or entirely derailed college education. As such, we urge you to immediately withdraw the ICR, rescind the interim final rule,³ and repeal the elements of the April 21 guidance document⁴ that first introduced the student eligibility restrictions.

Our key concerns with the ICR are detailed below.

The ICR exists solely to support the Department’s unauthorized, unnecessary, and ill-advised policy of restricting student eligibility for CARES-funded emergency aid.

The information collection burdens created by the Department’s emergency aid eligibility restrictions are a product of the Department’s own making. The Department could have avoided placing additional burden on institutions and students, both already overburdened as a result of COVID-19, by simply following Congressional intent and allowing institutions broad discretion in distributing emergency aid to all students. Instead, the Department has gone to great lengths to establish, enforce, and attempt to defend its harmful policies that restrict access to emergency aid, including through this ICR. In doing so, the Department has denied relief to students in need and created significant administrative burden for institutions in the midst of a global pandemic.

Contrary to the Department’s press statements,⁵ the CARES Act does not implicitly or explicitly apply eligibility criteria for programs under title IV of the *Higher Education Act of 1965* (HEA) to CARES-funded emergency aid. Two separate district court judges have concluded that the Department likely exceeded its authority in imposing these restrictions, and as a result have granted preliminary injunctions blocking the Department from imposing title IV eligibility requirements with respect to the plaintiffs who filed suit.⁶ If the Department did not insist on its unauthorized and unnecessary eligibility restrictions for emergency aid, there would be no need for institutions to collect the additional information outlined in this ICR.

Eligibility for emergency aid should not be predicated on meeting title IV criteria or FAFSA completion.

³ See Chairman Robert C. “Bobby” Scott, Chairwoman Rosa L. DeLauro, and Ranking Member Patty Murray, Letter to Betsy DeVos, re: Docket ID ED-2020-OPE-0078 (July 13, 2020).

⁴ U.S. Department of Education, *Frequently Asked Questions about the Emergency Financial Aid Grants to Students under Section 18004 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act* (April 21, 2020).

⁵ See for example Jeremy Bauer-Wolf, Higher Ed Leaders Push Back as Ed Dept Bars Undocumented Students from Aid, Education Dive, April 23, 2020, <https://www.educationdive.com/news/higher-ed-leaders-push-back-as-ed-dept-bars-undocumented-students-from-aid/576677/> and Education Secretary Betsy DeVos Says Cares Act Funding Will Go To Students, Full Court Press, April 27, 2020, <https://www.fullcourtgreta.com/video/2020/04/27/education-secretary-betsy-devos-says-cares-act-funding-will-go-students/>.

⁶ Order Granting Pl.’s Mot. For Prelim. Inj., *State of Washington v DeVos*, No. 2:20-CV-0182-TOR (Dist. Ct. E.D. Wash.)(June 12, 2020) at 30; and Order Granting Pl.’s Mot. For Prelim. Inj.; Motions for Leave to File Amicus Briefs, *Oakley v. DeVos*, No. 4:20-cv-03215-YGR (Dist. Ct. N.D. Cal.) (June 17, 2020) at 19.

While many of the title IV eligibility requirements included in section 484 of the HEA protect the integrity and efficacy of title IV aid programs, applying these restrictions to COVID-19 emergency financial aid does not advance the goals of the CARES Act. The pandemic we face today does not discriminate based on whether a student is maintaining satisfactory progress, enrolled in a degree-granting program, or the recipient of a high school diploma. The goal of section 18004(c) of the CARES Act is to provide immediate relief to students who are struggling due to the pandemic, not to systematically increase the affordability of a college education in order to increase degree attainment. As a result, the requirements of section 484 of the HEA that the Department seeks to apply are wholly inappropriate in this context.

The FAFSA is poorly suited for the purposes of distributing emergency aid. The FAFSA requires extensive asset and income information, as federal grants and loans are awarded based on established formulas that provide a comprehensive picture of applicants' financial need. However, this information is unnecessary for disbursing aid that is temporary in nature, aimed specifically at addressing the needs and disruptions resulting from COVID-19, and most often disbursed at the discretion of financial aid administrators. Further, the information reported on the FAFSA is based on tax data that is already two years old at the time the FAFSA is submitted. Widespread job and wage loss resulting from COVID-19 means that FAFSA data is significantly less likely to reflect students' current financial circumstances than it might have otherwise been.

When crafting the CARES Act, lawmakers agreed on the need for expediency in distributing emergency aid and recognized that the financial circumstances of students and their families were rapidly changing as a result of the pandemic. Congress therefore gave the responsibility of determining which students are most in need of immediate support to institutional administrators – the individuals working on the ground – not the Department. The Department's actions in the ICR, interim final rule, and April 21 guidance violate Congressional intent by limiting the ability of institutional administrators to exercise the judgment necessary to disburse emergency aid effectively, equitably, and efficiently.

Requiring institutions to verify title IV eligibility before awarding emergency grants needlessly slows down the disbursement process and limits access to aid.

The Department acknowledges that some institutions will likely require students to file the FAFSA in order to receive the emergency aid.⁷ The Department could not have picked a worse time to enact a policy that requires students to complete notoriously complicated paperwork.

⁷ Supporting Statement for Paperwork Reduction Act Submission 1840-NEW – Eligibility of Students at Institutions of Higher Education for Funds under the CARES Act (June 11, 2020); available at <https://www.regulations.gov/document?D=ED-2020-SCC-0088-0004>. In the Supporting Statement dated June 4, 2020, the Department stated that “We believe that most institutions will expand their current financial aid appeals process and utilize that framework to receive requests for COVID-19 assistance from eligible students.” In subsequent versions of the Supporting Statement dated June 8 and June 11, 2020, the Department removed that statement and instead stated “We believe that some institutions will require students to submit the FAFSA to receive COVID-19 assistance.”

Given the disruptions caused by COVID-19, we are deeply concerned that FAFSA completion will present an insurmountable barrier for many students, including those most in need of emergency aid. Completing the FAFSA requires substantial time and access to information, resources, and supports that are particularly hard to secure in the midst of the pandemic.⁸

Recognizing that not all title IV-eligible students will have filed or be able to file a FAFSA,⁹ the ICR and the interim final rule rely in part on the creation of a new patchwork of vaguely conceived institutional processes. Standing up new, largely duplicative systems to verify title IV eligibility would be burdensome and labor intensive under normal circumstances—asking institutions to do so in the midst of a pandemic is beyond impractical. This ICR and the interim final rule come at a time when institutions and financial aid offices are under tremendous strain as a result of COVID-19, leaving them especially ill equipped to establish separate procedures for newly federally mandated eligibility determinations. Establishing a separate eligibility process would additionally limit the capacity of financial aid administrators to focus on other important tasks like adjusting non-emergency aid determinations to reflect recent job loss among students and their families. The Department’s approach further undermines the benefit the FAFSA provides in standardizing aid eligibility determinations across higher education and increases the likelihood that institutions will simply limit emergency aid to those students who have already filled out the FAFSA, leaving out far too many students in need of support.

The Department has not engaged in a deliberative process and, as a result, failed to take steps that would have minimized the burden of disbursing CARES-funded emergency aid.

⁸ Barriers to FAFSA completion include lack of information about how to complete the FAFSA, challenges accessing parental income information among dependent students, inability to use the IRS Data Retrieval Tool for certain filers (e.g. filers from households who filed taxes as Married Filing Separately or Head of Household), lack of reliable access to the internet, and lack of an email address among students and parents. See generally Lamar Alexander, Op-Ed., *FAFSA so complex that it stops students who most need aid from getting it*, LEAF CHRON., Oct. 25, 2019, <https://www.theleafchronicle.com/story/opinion/columnists/2019/10/25/fafsa-reform-simplification-needed-lamar-alexander-says/2454738001/> (“The complicated 108-question FAFSA is one of the biggest challenges low-income students who want to go to college face.”).

⁹ According to the most recent data available from the National Postsecondary Student Aid Survey, nearly 30 percent of undergraduate students did not apply for federal student aid. Students enrolled at community colleges were particularly unlikely to have completed the FAFSA (40 percent). U.S. Department of Education, National Center for Education Statistics, 2015-16 National Postsecondary Student Aid Study (NPSAS:16).

As has been extensively detailed in Congressional letters¹⁰ and media coverage,¹¹ the Department's rollout of the eligibility restrictions has been piecemeal, irregular, and confusing.¹² The Department has rushed through major changes without consulting stakeholders, engaging in deliberative consideration, or soliciting public comment.¹³

Continuing this trend, the Department made major substantive changes to the Supporting Statement for this ICR over the course of just four days, including changing the cited cause of the added burden associated with the ICR from "due to new statute" to "due to agency discretion."¹⁴ This change was presumably made in recognition of the fact that, as explained above, the ICR is not needed to implement the CARES Act with fidelity. Instead, the ICR is only necessary for implementing the Department's inherently flawed interpretation of the CARES Act. Additionally, the Department posted, withdrew, and subsequently reposted this

¹⁰ See for example Chairman Robert C. "Bobby" Scott, Letter to Secretary Betsy DeVos, re: HEER Guidance (June 12, 2020); Ranking Member Patty Murray and Chairwoman Rosa L. DeLauro, Letter to Betsy DeVos, re: Guidance on Emergency Aid Provided Under the CARES Act (May 1, 2020); Representative Eric Swalwell et. al., Letter to Secretary Betsy DeVos, re: Disbursement of Emergency Financial Aid Grants to Students (April 27, 2020); and Senate Democratic Leader Chuck Schumer et. al., Letter to Secretary Betsy DeVos, re: the Department's Decision to Prohibit Institutions from Granting Emergency Aid to Undocumented Students (April 27, 2020).

¹¹ See for example Danielle Douglas-Gabriel, Emergency Grant Program for College Students is off to a Slow Start, The Washington Post, April 17, 2020, <https://www.washingtonpost.com/education/2020/04/17/emergency-grant-program-college-students-is-off-slow-start/>; Erica L. Green, DeVos Excludes 'Dreamers' From Coronavirus College Relief, The New York Times, April 22, 2020, <https://www.nytimes.com/2020/04/22/us/politics/coronavirus-funds-colleges-dreamers.html>; and 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>

¹² The CARES Act was signed into law on March 27, 2020. Eleven days later (April 9), the Department released the Certification and Agreement, letter to institutions, and allocation formula for the HEER fund student aid portion, none of which made any mention of student eligibility restrictions. Twelve days after that (April 21), the Department released the FAQ for the HEER fund student aid portion (in conjunction with various institutional portion documents), which introduced the student eligibility restrictions for the first time. At this point many institutions had already submitted the Certification and Agreement for the HEER student aid portion. A full month later (May 21), the Department updated their HEER guidance webpage to emphasize the non-binding nature of the Department's HEER guidance, including the student eligibility restrictions included in the April 21 FAQ. Three weeks after that (June 11), the Department posted a copy of an interim final rule codifying the student eligibility restrictions on the HEER website. However, the interim final rule did not become legally binding until the following week (June 17) when it was officially published in the Federal Register.

¹³ The Department did not seek public comment prior to releasing the April 21 FAQs, the interim final rule, or the ICR. This is despite the fact that institutions, lawmakers, and other stakeholders expressed strong opposition to the student eligibility restrictions as included in the April 21 FAQs. Some of the choices made by the Department appear to be driven in response to pending litigation. For example, the Department made changes to the HEER webpage emphasizing the non-binding nature of the HEER guidance only after the California Community Colleges and State of Washington had filed lawsuits seeking preliminary injunctions. The Department subsequently argued in court that the eligibility restrictions were not ripe for judicial review because they were only included in non-binding guidance and were subject to an ongoing rulemaking process. Prior to the filing of the lawsuits, the Department had made no indication that they did not intend to take enforcement actions related to the student eligibility restrictions or that the eligibility restrictions were subject to ongoing consideration.

¹⁴ Compare Supporting Statement for Paperwork Reduction Act Submission 1840-NEW – Eligibility of Students at Institutions of Higher Education for Funds under the CARES Act (June 4, 2020) with Supporting Statement for Paperwork Reduction Act Submission 1840-NEW – Eligibility of Students at Institutions of Higher Education for Funds under the CARES Act (June 8, 2020)

ICR notice and revised versions of the supporting documents without explanation over the course of two weeks. These errors, changes, and resubmissions are indicative of the haphazard process the Department has engaged in on this issue.

The ICR understates institutional and student burden.

The Department estimates that it will take just five hours per institution “to set up any new institutional application or other process, to review students requests, and establish review and recordkeeping procedures to be able to comply with the separate reporting requirements in the Certification and Agreement between the institutions and the Secretary.” However, institutions and stakeholders have indicated to House Education and Labor Committee staff that complying with the ICR and the interim final rule will take between seven and nine and a half hours per institution, well above the Department’s estimate.

The Department further estimates that it will take students 20 minutes to apply for CARES Act-funded emergency aid. The validity of this estimate is questionable given the likely inevitable variation in institutional forms and the many unanswered questions about how institutions will determine and verify title IV eligibility for students who have not previously completed a FAFSA. Even more concerning, the student burden estimates in the ICR assume that only 15 percent of title IV aid recipients will apply for emergency aid. This estimate, which is not supported by any data sources or rationale in the ICR, seems to ignore the very students who will face the greatest challenge in accessing emergency aid under the interim final rule, namely, those who have not previously established title IV eligibility. It is unclear whether this is reflective of a presumption that institutions will not actually establish new processes to evaluate the eligibility of students who don’t already have a FAFSA on file or whether the Department simply did not bother to calculate the burden that will be experienced by such students. Further, even if the Department did have cause for assuming that institutions will limit emergency aid to students with a FAFSA on file, 15 percent is woefully low given that 58 percent of students at both two- and four-year institutions reported experiencing basic needs insecurity in the midst of the pandemic.¹⁵

Institutions across the country have spent far too much time attempting to understand and comply with the Department’s unauthorized and inconsistent guidance on student eligibility for CARES Act funding. Their time would have been far better spent assisting students who are struggling with the impact of COVID-19 and ensuring that safe and enriching postsecondary opportunities are available. The Department’s continued insistence on enforcing these restrictions will further harm vulnerable students and make it harder for institutions to provide effective support. We urge you to immediately cease your efforts to enforce student eligibility restrictions for CARES Act-funded emergency aid.

¹⁵ Sara Goldrick-Rab et. al., The Hope Center, *#RealCollege During the Pandemic: New Evidence on Basic Needs Insecurity and Student Well-Being*; available at https://hope4college.com/wp-content/uploads/2020/06/HopeCenter_RealCollegeDuringthePandemic.pdf

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Sincerely,



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