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EDUCATION AND LABOR  
U.S. HOUSE OF REPRESENTATIVES  
2176 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6100

June 12, 2020

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

Dear Secretary DeVos:

I write regarding the U.S. Department of Education’s (Department) issuance of iterative and unauthorized guidance to institutions of higher education (institutions) directing their use of Higher Education Emergency Relief (HEER) Funds. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) established the HEER Fund to provide more than \$14 billion in emergency aid to institutions and students impacted by the novel coronavirus (COVID-19) pandemic. Congress recognized that COVID-19 would disproportionately impact students currently enrolled at institutions and required institutions to use at least 50 percent of allocated HEER funds “to provide emergency financial aid grants to students.”<sup>1</sup> Congress intended these funds to expediently flow to students, but the Department’s implementation of the CARES Act has frustrated this goal.

Congress passed the CARES Act on March 27<sup>th</sup>, but in the intervening two months the Department repeatedly changed guidance regarding institutions’ responsibilities distributing these funds. Additionally, this iterative guidance has been inconsistent with the law, confusing institutions and leading to delayed emergency relief aid. Exacerbating this confusion, the Department has issued an interim final rule to codify unauthorized eligibility requirements for these funds. As a result, almost half of financial aid administrators have decided to delay all aid to students until the Department finalizes its process.

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

**The Department has issued unauthorized guidance to restrict CARES Act aid from flowing to millions of students across the country.**

Two weeks after Congress passed the CARES Act, the Department, on April 9<sup>th</sup>, released the HEER certification of agreement form, which establishes the conditions institutions would accept to receive HEER funds.<sup>2</sup> Many institutions immediately applied for this emergency aid by signing and transmitting these forms.<sup>3</sup> After an initial wave of applications, the Department released a guidance document on April 21<sup>st</sup> interpreting the CARES Act to include several restrictions on institutions' HEER funds not present in the CARES Act. Among these provisions, the Department claimed that the CARES Act prohibited institutions from providing HEER funds to students ineligible for Title IV student aid, such as federal direct loans.<sup>4</sup>

The text of the CARES Act does not expressly or implicitly restrict funds to students eligible for Title IV. Nevertheless, the Department claims that "Congress had the Title IV framework in mind" in designing the HEER program.<sup>5</sup> Had Congress intended such an important limitation it would have included it in the text of the CARES Act. To that point, the Congressional Research Service recently issued a memorandum finding that "neither the CARES Act nor Title IV explicitly prohibits non-Title IV-eligible students from receiving emergency financial aid grants."<sup>6</sup> In its analysis, expert non-partisan researchers detail the reasons that the Department's interpretation is "not a particularly persuasive reading of the statute."<sup>7</sup> As a result of the Department's interpretation, the California Community Colleges estimates it would exclude more than half of its students.<sup>8</sup>

This is not the only instance of the Department's incorrect interpretation the CARES Act. Just last month the Department diverted the Elementary and Secondary School Emergency Relief (ESSER) Fund intended for low-income students towards all students at private and religious schools. The Department explained "[t]he CARES Act is a special, pandemic-related appropriation to benefit *all* American students, teachers, and families... The virus affects everyone."<sup>9</sup> That interpretation is in direct contravention of provisions in the CARES Act which require funds to be "distributed in the same manner as provided under section 1117 of the ESEA of 1965."<sup>10</sup>

In looking at the Department's interpretation of the HEER and ESSER funds, where the CARES Act explicitly directed funds to a specific set of students, the Department interpreted the law to apply to all students. Conversely, when the CARES Act provides no restriction on funds to students, the Department created unnecessary barriers to all students receiving the aid. Without impugning motive, it is impossible

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<sup>2</sup> 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>3</sup> Compl at 4, *Oakley v. DeVos*, No. 4:20-cv-03215-YGR (Dist. Ct. N.D.Cal.) (May 11, 2020).

<sup>4</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>5</sup> Mem. in Opp'n to Pl.'s Mot. For Prelim. Inj., *Oakley v. DeVos*, No. 4:20-cv-03215-YGR (Dist. Ct. N.D.Cal.) (May 25, 2020).

<sup>6</sup> Congressional Research Service, *Eligibility Requirements for Emergency Financial Aid Grants to Students Under Section 18004 of the CARES Act* (May 20, 2020).

<sup>7</sup> *Id.*

<sup>8</sup> Compl at 4, *Oakley v. DeVos*, No. 4:20-cv-03215-YGR (Dist. Ct. N.D.Cal.) (May 11, 2020).

<sup>9</sup> Secretary Betsy De Vos, Letter to Council of Chief State School Officers, re: Equitable Services (May 22, 2020).

<sup>10</sup> See The Coronavirus Aid, Relief, and Economic Security Act, § 18005(a); see also Chairman Robert C. "Bobby" Scott, Letter to Secretary Betsy DeVos, re: Equitable Services (May 20, 2020).

to ignore the fact that these interpretations are consistent with the publicly espoused political positions of the Department.

**The Department's incremental roll out of guidance has created confusion, delaying institutions from releasing emergency funds.**

The CARES Act text sufficiently informs institutions of their responsibilities when distributing HEER funds. However, the Department's iterative "interpreting" the CARES Act has impeded institutions' ability to rapidly distribute emergency relief aid, thereby limiting the participation of certain students.

The National Association of Student Financial Aid Administrators (NASFAA) recently surveyed its membership to better understand institutions' ability to distribute CARES Act funding.<sup>11</sup> The results raise serious questions regarding the Department's ability to facilitate rapid distribution of emergency aid. Nearly all respondents (92 percent) indicated that the Department's release of multiple versions of guidance delayed institutions' ability to disburse emergency grants to students.<sup>12</sup> Seventy-two percent of surveyed financial aid administrators indicated that the Department's guidance had not "provided enough direction... to disburse emergency grants to students in a timely manner." Perhaps most concerning, 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.<sup>13</sup>

While these institutions and their students have immediate need for this emergency funding, their reluctance to distribute funds is rational, when taken in the broader context of the Department's iterative release of eligibility restrictions. The Department has released multiple stages of guidance and in response to a lawsuit has publicly stated that it will not enforce unauthorized portions, without actually identifying those portions. And now, more than two months after Congress passed the CARES Act, the Department has initiated a rulemaking which it *will* enforce against institutions. The Department has created an atmosphere of confusion, which has paralyzed institutions.

This is not the Department's first delay of CARES Act funding. Regarding ESSER funds, referenced above, the Department recommended states place emergency funds in escrow while the Department promulgated rules. Further, the Department has not distributed a dollar of the hundreds-of-millions Congress appropriated to defray expenses at institutions of higher education with the greatest unmet needs related to coronavirus, nor has it even settled on a distribution methodology. I urge the Department to stop imposing onerous and unauthorized requirements on emergency relief funds and facilitate institutions' distribution of aid.

Accordingly, I request the Department respond to the following questions no later than June 26, 2020.

- 1) When will the Department make publicly available all final guidance related to the HEER fund?
- 2) What remaining subject matters will future guidance cover?
- 3) Provide copies of all communications between the Department and institutions of higher education related to the Department's interpretation of the CARES Act excluding non-Title IV eligible students from funding.

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<sup>11</sup> 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).

<sup>12</sup> *Id.*

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

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- 4) Provide estimates, and the Department's underlying methodology, of the number of students the Department believes are eligible for emergency financial aid grants to students under HEER, but who have not previously filed the Free Application for Federal Student Aid (FAFSA).
- 5) Does the Department's exclusion apply to students in non-Title IV programs if those students would otherwise be eligible for Title IV (e.g. students in non-credit programs)?
- 6) Has the Department calculated institutions' increased distribution burden associated with the Department's imposition of Title IV eligibility as a requirement for receipt of HEER funds? If so, please provide documentation sufficient to show how the Department calculated this burden.
- 7) In describing Title IV eligibility as a requirement for recipients, the Department states "the criteria to participate in programs under Section 484 of the HEA include... a high school diploma, GED, or completion of high school in an approved homeschool setting."<sup>14</sup> Is the Department restricting aid to Title IV eligible students who qualify under "ability to benefit" (ATB) and are enrolled in an eligible career pathway program?
- 8) The Department's guidance states that HEER funds will not be included as revenue for 90/10 purposes. Please clarify:
  - a. Does the Department intend to exclude HEERF from counting as revenue for the purposes of calculating the denominator, numerator, or both in the calculation of the 90/10 ratio?
  - b. Does this exclusion only apply to the portion of HEERF funds that go out to students as emergency grant aid or does it also apply to the institutional portion of HEERF funds?
  - c. If the Department determines there is a difference in when HEERF funds may count as revenue for 90/10 purposes, can the Department explain the instances where HEERF funds would count as revenue? Will the Department issue additional clarifying guidance to explain those circumstances?

Please send all official correspondence and information relating to this request to the Committee's Chief Clerk at [Tylease.Fitzgerald@mail.house.gov](mailto:Tylease.Fitzgerald@mail.house.gov). Thank you for your attention to this matter, and I look forward to your response.

Sincerely,



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**ROBERT C. "BOBBY" SCOTT**  
Chairman

Cc: The Honorable Virginia Foxx, Ranking Member

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<sup>14</sup> 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).