



July 17, 2020

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

Re: Docket ID (ED-2018–OPE–0027) Comment in Response to Interim Final Rule on Eligibility of Students at Institutions of Higher Education for Funds Under the Coronavirus Aid, Relief and Economic Security (CARES) Act

Dear Secretary DeVos:

The Lawyers' Committee for Civil Rights Under Law, a national racial justice organization that works to ensure all students have equal access to meaningful educational opportunities free from discrimination, including discrimination against students of color based on immigration status, submits this comment letter in response to the U.S. Department of Education's interim final rule, Eligibility of Students at Institutions of Higher Education for Funds Under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act (Docket ID ED-2020-OPE-0078), published June 17, 2020 (herein, "Interim Final Rule").¹

Through the CARES Act, Congress created the Higher Education Emergency Relief Fund ("HEERF") to help institutions of higher education ("IHE") "prevent, prepare for, and respond to coronavirus."² By unilaterally creating Title IV-eligibility restrictions for institutions of higher education through guidance and the Interim Final Rule, the Department of Education ("the Department") undermines the purpose of the HEERF, frustrates the educational missions of higher education institutions, and harms entire academic communities in contravention of the CARES Act. The express language of the CARES Act and its legislative history confirm that Congress intended to grant broad discretion and flexibility to institutions for HEERF distribution to address disruptions to their campus operations and educational communities due to the pandemic. A federal court has confirmed as much in ruling that the Department's arbitrary actions likely exceeded its authority under the CARES Act, in violation of the Spending Clause, separation of powers principles and the Administrative Procedure Act, warranting a preliminary injunction.³

¹ 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.

² 134 Stat. § 18004 (a), (c) at 567-68.

³ *Oakley v. DeVos*, No. 20-CV-03215-YGR, 2020 WL 3268661, at *19 (N.D. Cal. June 17, 2020) (*see also* *Washington v. DeVos*, No. 2:20-cv-00182-TOR, 2020 WL 3125916, at *13 (E.D. Wash. June 12, 2020)).



As discussed below, the Department's actions conflict with congressional intent and are inconsistent with the Department of Education's responsibility under the CARES Act, which was to get money in the hands of higher education communities as quickly as possible and provide them with the discretion for allocating funds to students in need, irrespective of their Title IV-eligibility status. Indeed, by levying such restrictions on IHEs, the Department is depriving large swaths of students who, otherwise, demonstrate significant need during the crisis, thereby jeopardizing not only their health, safety and education, but also the continuity of higher education communities. The students excluded include but are not limited to: students in default on a loan issued by the Department, students determined not to be making satisfactory progress, certain noncitizens and students without social security numbers, including undocumented students. *See* 20 U.S.C. § 1091.

Background on Interim Final Rule

On March 27, 2020, in response to the extraordinary public health and economic crisis caused by the COVID-19 pandemic, Congress signed the CARES Act into law. *Oakley*, 2020 WL 3268661, at *2. The CARES Act appropriates \$30.75 billion to the Department and directs that a portion of those funds be used for the creation of the HEERF program. Under HEERF, the Secretary is required to allocate funding to institutions of higher education to then be used "to cover any costs associated with significant changes to the delivery of instruction due to the coronavirus."⁴

On or about April 9, 2020, the Department wrote a letter to college and university presidents notifying them of the availability of HEERF Student Assistance, which the Department was "prioritizing... in order to get money in the hands of students in need as quickly as possible." *Oakley*, 2020 WL 3268661, at *3. The letter gave institutions significant discretion in allocating funds as long as the institutions signed and returned a Certificate of funding and Agreement. *Id.*

Despite Congress' intent to provide flexibility to universities, on April 21, 2020, the Department issued guidance restricting eligibility for emergency assistance under HEERF. The guidance declared that these funds would be available to "[o]nly students who are or could be eligible to participate in programs under Title IV of the Higher Education Act."⁵ On May 21, 2020, the Department released a statement supporting its eligibility limitations by suggesting that restrictions on access to "Federal public benefits" under 8 U.S.C. § 1611 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA's) applied to HEERF assistance to students.⁶ After lawsuits were filed in May in California and Washington

⁴ CARES Act § 18004(c), stat. at 568.

⁵ Frequently Asked Questions about the Emergency Financial Aid Grants to Students under Section 18004 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, ECF No. 6-1 at 129, Ex. G., <https://www2.ed.gov/about/offices/list/ope/heerfstudentfaqs.pdf>.

⁶ Dep't of Educ., Office of Postsecondary Education, "CARES Act: Higher Education Emergency Relief Fund" (updated statement 5/21/2020) Available at <https://www2.ed.gov/about/offices/list/ope/caresact.html> (last visited July 17, 2020).



challenging the Department's guidance (*see supra* note 3), on June 17, 2020, the Department published the Interim Final Rule redefining "student" to mean persons "who are or could be eligible" to participate in programs under Title IV.⁷

A. Neither The Law Nor The Legislative History of the CARES Act authorize the Secretary to incorporate Title IV-eligibility restrictions in the HEERF Program.

1. The text of the CARES Act intended that IHEs have broad discretion and flexibility in allocating HEERF aid to their student community.

The plain text of the CARES Act demonstrates Congress' intent to grant educational institutions broad discretion and flexibility. In Section 18004(c), Congress expressly allows educational institutions to use the HEERF assistance "to cover *any* costs associated with significant changes to the delivery of instruction due to the coronavirus" subject to only two requirements. 134 Stat. at 568 (emphasis added). First, Congress stated that funds cannot be used for "payments to contractors for the provision of pre-enrollment recruitment activities, endowments, or [certain] capital outlays. *Id.* Second, Congress stated that at least 50 percent of the HEERF funds must be used "to provide emergency financial aid grants to students for expenses related to the disruption of campus operations due to coronavirus." *Id.* Congress gave institutions discretion to determine which students are in need of emergency assistance "for 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 child care)." CARES Act § 18004(c).⁸

In a California lawsuit challenging the application of the rule, the plaintiffs argued that the Secretary's imposition of eligibility restrictions violated the APA as "in excess of statutory jurisdiction, authority or limitations." *Oakley*, 2020 WL 3268661, at *12.⁹ The Court reasoned "the language of the statute itself is the strongest evidence that Congress did not intend for title IV eligibility restrictions to apply to HEERF." *Oakley*, 2020 WL 3268661, at *9. Based on the language of the statute, the Court held that the Secretary and the Department likely exceeded their authority under the CARES Act by imposing eligibility restrictions on the distribution of HEERF student assistance, thereby violating separation of powers principles, the Spending Clause, and the APA. In conclusion, the California Court held: "we expect Congress to speak clearly if it wishes to assign to an agency decision of vast economic and political significance." *Id.*¹⁰

⁷ Dep't of Educ., Eligibility of Students at Institutions of Higher Education for Funds under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 85 Fed. Reg. 36494, 36497 (June 17, 2020).

⁸ *See also Letter from Secretary of Education, to College and University Presidents* (Apr. 9, 2020), ECF No. 6-1 at 8, Ex. B (presenting the Secretary's once-held view that "[t]he only statutory requirement is that the funds be used to cover expenses related to the disruption of campus operations due to coronavirus").

⁹ *See also* 5 U.S.C. § 706(2)(B)-(C).

¹⁰ *See Oakley*, 2020 WL 3268661, at *9 (citing *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 324 (2014)).



2. The legislative history of the CARES Act demonstrates that IHEs have broad discretion and flexibility in allocating HEERF aid to their student communities.

Beyond the unambiguous language of the statute, the legislative record behind the CARES Act confirms Congress' intent to grant broad discretion and flexibility to educational institutions.¹¹ On March 27, after describing that schools in her congressional district “need[ed] funding flexibility due to disruption in the academic year from COVID-19,” Congresswoman Lauren Underwood (D-IL) remarked that she is “pleased that the CARES Act begins to deliver.” *Id.* at H1856. Congress directed the HEERF funds to flow directly to educational institutions to enable them to fulfill their educational mission, while protecting the health and safety of their student community.¹² In a speech submitted on March 27, Congressman Peter DeFazio (D-OR) explained that emergency relief is provided to educational institutions “to help defray costs, such as lost revenue, to support social distancing and distance education, and to issue emergency grants to impacted students for food, housing, course materials, tech, and healthcare and childcare.” 166 Cong. Rec. E345. When setting up the HEERF program, Congress had in mind assisting all students whose education was disrupted by the crisis.¹³

In a Washington lawsuit challenging the rule, the court cited Congress' specificity in other areas of the CARES Act as evidence of Congress' knowledge of how to delegate to the Secretary authority to impose conditions. *See Washington v. Devos*, 2020 WL 3125916 at *25. The court found that the grants of limited powers did not justify any scope of rulemaking authority and Congress' failure to incorporate all of Title IV's eligibility restrictions into the CARES Act was intentional. The court further reasoned that the Department's strict prescriptions of the CARES Act were inconsistent with a claim of general rulemaking authority. *Id.* at 9.

B. Congress did not intend for the Department to impose PRWORA restrictions on HEERF funding and PRWORA does not preempt HEERF aid to undocumented and DACAmented students.

As stated above, the legislative record demonstrates that Congress intended to grant educational institutions wide latitude in determining how to use HEERF to assist all students whose education was disrupted by the crisis and who were in need. Nevertheless, in the Interim Final Rule, and in its previous guidance, the Department asserts as part of its rationale underlying the rule that 8 U.S.C. § 1611 prohibits the provision of HEERF aid to certain noncitizens including undocumented students.¹⁴ The Department claims that because Section 1611(c) outlaws allocating “Federal public benefits” to such people living in the U.S., IHEs cannot provide

¹¹ *See Abramski v. United States*, 573 U.S. 169, 179, (2014) (explaining that when interpreting a statute for which there are conflicting textual interpretations, the court must “interpret the relevant words not in a vacuum, but with reference to the statutory context, ‘structure, history, and purpose.’”).

¹² CARES Act § 18004(a)-(b), 134 Stat. at 567-68.

¹³ *See, e.g., id.* at H1856 (daily ed. Mar. 27, 2020) (statement of Rep. Underwood) (remarking that the grants would “support college students whose semesters were disrupted due to COVID-19”); *id.* at H1823 (daily ed. Mar. 27, 2020) (statement of Rep. Scott) (stating that the grants would go to students “displaced” by the COVID-19 crisis).

¹⁴ Interim Final Rule at 36496.



HEERF funds to those students. *Id.* However, nowhere in the Act did Congress exclude, or indicate to the Department its authority to exclude and the Department's reliance on Section 1611 as an exclusionary tool is ill-intended, misplaced and unlawful.

Congress created HEERF funding to serve as a community benefit rather than a federal public benefit, recognizing that colleges and universities would be best situated to understand and respond to the complex and localized needs of their educational communities. On March 22, as Senator Lamar Alexander (R-TN) underscored the critical need for the legislation, he explained that the bill included “money for block grants . . . for higher education . . . which will provide immediate assistance.” 166 Cong. Rec. S1895.¹⁵ Therefore, PRWORA does not apply.

In a recent analysis of PRWORA's applicability to HEERF, the Northern District of California was not persuaded that the Secretary's election to apply 1611(a)'s restrictions as an eligibility condition would be lawful. *Oakley*, 2020 WL 3268661, at *16. First, the court held that Congress' allocation of HEERF funds to IHE's based on counts of *all* respective students (except those in enrolled exclusively in distance learning courses prior to COVID-19) evidenced Congress' intent that the same students would not be excluded based on Section 1611. *Id.* at *15.

Second, the court struck down the Department's argument that Section 1611's “notwithstanding” clause preempts the provision of HEERF funds to certain noncitizens. *Id.* The Court reasoned that, based on other cases, the specific, one-time emergency disbursement of HEERF Assistance in the CARES Act is not subject to the more general prohibition in the earlier statute, Section 1611. *Id.*

Third, the Court held that Section 1611's restrictions on “Federal public benefits” do not apply to funds like the HEERF fund. *Id.* at *14-*15. The court found that HEERF was similar to other exempt funds under Section 1611 that addressed emergency assistance and that HEERF paralleled other approved discretionary block grant funding that reached undocumented families, irrespective of Section 1611's prohibition. *Id.*

The final language of Section 18004 of the CARES Act fulfills Congress' intent by not qualifying or otherwise limiting which students would be eligible. *See* 134 Stat. at 567-68. The additional restrictions will harm students and campuses profoundly, contravening Congress' goals under the CARES Act. In an amicus brief to the Eastern District of Washington, the Black Alliance for Just Immigration (“BAJI”), the National Immigration Law Center and the Lawyers' Committee amplified the voices of individual students directly impacted by the restrictions.¹⁶ Sworn declarations from BAJI and affected college students—including DACAmented students-

¹⁵ *See also Rural Alaska Cmty. Action Program v. Smith*, 847 F.2d 535, 536 (9th Cir. 1988) (“the block grant system . . . permits [federal fund grantees] to administer the programs with minimal federal involvement and few federal procedural requirements.”).

¹⁶ Brief for Black Alliance for Just Immigration, et al., as Amici Curiae Supporting Plaintiffs, *Washington v. DeVos*, No. 2:20-cv-00182-TOR, ECF No. 41-1 (E.D. Wash. July 13, 2020).



- reflect the devastating impact of the Department's restrictions on individual students and their broader education communities. *Id.* at § III. These impacts included students lacking the funds to purchase technology and materials to support their remote learning, access to funds for expenses such as food, housing and medical care. *Id.* But for the Department's arbitrary, unauthorized and mean-spirited rule, these students would be receiving assistance like their Title IV-eligible peers.

The harm caused by the Interim Final Rule, harm that Congress never intended, provides further evidence that the Department's arbitrary actions affect not only the individuals, but also the broader academic and social communities in which they live, threatening the community relationships between institutions and students. *Id.* And these effects are not small by any standard as an estimated 454,000 undocumented students attend postsecondary institutions, including 216,000 DACA-eligible students.¹⁷

Conclusion

As shown above, Congress intended to equip higher education institutions with flexibility in addressing the needs of their campus communities. Neither the express language of the CARES Act nor the legislative record shows any congressional intent authorizing the Department of Education to impose Title IV-eligibility restrictions or that PRWORA restrictions would apply to HEERF aid. Instead of supporting IHEs with the proper administration of the HEERF program, the Department's restrictions undermine the purpose of the CARES Act, directly harming IHEs and their students in desperate need of aid during the COVID-19 pandemic. Accordingly, the Lawyers' Committee urges the Department to comply with the CARES Act and withdraw its Interim Final Rule and all guidance restricting eligibility for HEERF to Title IV-eligibility under the Higher Education Act.

Sincerely yours,

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¹⁷ New American Economy and Presidents' Alliance on Higher Education and Immigration, *Undocumented Students in Higher Education*, Executive Summary (2020) <https://tinyurl.com/ycjdregt>.