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July 17, 2020

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

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

**Re: Docket ID ED-2020-OPE-0078, Comments 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:

On behalf of San José State University (SJSU), I submit this comment letter in response to the U.S. Department of Education's (Department) 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.<sup>1</sup> **We write to express our opposition to the exclusion of those who do not qualify for Title IV assistance from receiving emergency financial aid under the Coronavirus Aid, Relief, and Economic Security (CARES) Act.** We particularly oppose the rule's exclusion of Deferred Action for Childhood Arrivals (DACA) and undocumented students enrolled in institutions of higher education.

SJSU is located in San José, CA, enrolls approximately 36,000 students, employs over 4,300 faculty and staff, and has an annual budget of \$404 million. SJSU is committed to supporting our undocumented campus community, including students, staff, and faculty and providing them with the resources they need to succeed and thrive. Under the rule, hundreds of our undocumented students would be unfairly excluded from CARES Act aid during a time of great financial difficulty.

**I. THE INTERIM FINAL RULE HAS SUBSTANTIAL NEGATIVE EFFECTS ON STUDENTS AT OUR INSTITUTION WHO ARE INELIGIBLE FOR TITLE IV ASSISTANCE**

The Department estimates that its Title-IV-eligibility requirement would "exclu[de]" more than 1.12 million noncitizens from receiving emergency financial aid, to say nothing of the many other students who are ineligible for

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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), <https://www.federalregister.gov/documents/2020/06/17/2020-12965/eligibility-of-students-at-institutions-of-higher-education-for-funds-under-the-coronavirus-aid>.

Title IV assistance on different grounds.<sup>2</sup> Separately, the Department has acknowledged the “urgent economic challenges facing many students as a result of the crisis.”<sup>3</sup> Many students who are not eligible for Title IV benefits are experiencing those challenges particularly acutely. But the Department does not consider the economic and non-economic costs of excluding more than 1.12 million students from access to emergency financial aid during this national emergency.

As noted above, SJSU is home to hundreds of undocumented students, many of whom have been devastated financially by the COVID-19 pandemic. The proposed eligibility criteria have prevented them from receiving CARES Act funds that their peers have already been able to take advantage of to help mitigate the financial challenges they are facing as a result of the pandemic.

All students are facing unprecedented economic and non-economic challenges as a result of COVID-19. The United States has had millions of cases of COVID-19.<sup>4</sup> Meanwhile, unemployment has skyrocketed, leaving many students in dire economic circumstances.<sup>5</sup> Many students face unique economic challenges: Many students lost their on-campus jobs due to COVID-19, lost their summer internships or jobs, or were ineligible for a Recovery Rebate check under the CARES Act.<sup>6</sup>

The Department previously “encourage[d]” institutions of higher education to prioritize “students with the greatest need” in awarding emergency financial aid.<sup>7</sup> We agree. And we note that many students who are not eligible for Title IV assistance are among those with the “greatest need.”

Many immigrant students ineligible for Title IV assistance face unique challenges. For one, many ineligible students (and their families) do not have

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<sup>2</sup> 85 Fed. Reg. at 36,499-50. The Department declines to estimate, as it must, how many students overall are ineligible for Title IV assistance. *See id.* at 36,497 n.2; *id.* at 35,499-50; Exec. Order 13,563.

<sup>3</sup> 85 Fed. Reg. at 36,498.

<sup>4</sup> *Coronavirus Disease 2019, Cases in the US*, Ctrs. for Disease Control & Prevention (last updated July 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

<sup>5</sup> *Labor Force Statistics*, U.S. Bureau of Labor Statistics (last visited July 1, 2020), <https://data.bls.gov/timeseries/LNS14000000>.

<sup>6</sup> *E.g.*, David Yaffe-Bellany, *Another Casualty of the Coronavirus: Summer Internships*, N.Y. Times (May 27, 2020), <https://www.nytimes.com/2020/05/22/business/coronavirus-summer-internships.html>; Sara Goldrick-Rab et al., *New Evidence on Basic Needs Insecurity and Student Well-Being*, Hope Ctr., 2 (June 2020), [https://hope4college.com/wp-content/uploads/2020/06/Hopecenter\\_RealCollegeDuringthePandemic.pdf](https://hope4college.com/wp-content/uploads/2020/06/Hopecenter_RealCollegeDuringthePandemic.pdf); Hao Liu, *Most College Students Won't Get Stimulus Checks—But They Should*, Fortune (May 5, 2020), <https://fortune.com/2020/05/05/stimulus-checks-college-students-debt/>.

<sup>7</sup> Letter from Betsy DeVos to College and University Presidents (Apr. 9, 2020), <https://www2.ed.gov/about/offices/list/ope/caresactgrantfundingcoverletterfinal.pdf>.

health insurance.<sup>8</sup> Those same populations of students are suffering disproportionate health effects as a result of this pandemic.<sup>9</sup>

Moreover, many ineligible students are struggling in the face of record levels of unemployment and resulting difficulties in meeting their most basic needs.<sup>10</sup> The Department's interim final rule fails to consider its most apparent cost: its cost to students ineligible for Title IV assistance in the midst of these dire circumstances. As the Secretary put it, "there are millions of students, [Title-IV-ineligible] students included, that are struggling."<sup>11</sup> The overwhelming majority—over 80 percent—of undocumented students attend two- and four-year public colleges and universities, and many attend community colleges.<sup>12</sup> While studies show undocumented students at both two- and four-year institutions concerned about financing their education, undocumented students at community colleges are even more likely to face extremely high levels of financial stress, compared to their peers at four-year colleges.<sup>13</sup>

It is unsound policy to prevent those ineligible students at both two- and four-year institutions from accessing emergency financial aid to meet their most fundamental needs.

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<sup>8</sup> *Health Coverage of Immigrants*, Kaiser Family Found. (Mar. 18, 2020), <https://www.kff.org/disparities-policy/fact-sheet/health-coverage-of-immigrants/>; NYS Health Found., *Connecting Undocumented New Yorkers to Coverage 2* (2018), [https://nyshealthfoundation.org/wp-content/uploads/2018/08/Connecting-Undocumented-New-Yorkers-to-Coverage\\_final.pdf](https://nyshealthfoundation.org/wp-content/uploads/2018/08/Connecting-Undocumented-New-Yorkers-to-Coverage_final.pdf); *Key Facts on Individuals Eligible for the Deferred Action for Childhood Arrivals (DACA) Program*, Kaiser Family Found. (Feb. 1, 2018), <https://www.kff.org/disparities-policy/fact-sheet/key-facts-on-individuals-eligible-for-the-deferred-action-for-childhood-arrivals-daca-program/>.

<sup>9</sup> See, e.g., Ctrs. for Disease Control & Prevention, *supra* note XX; *QuickFacts*, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/US/RHI725219> (last visited July 1, 2020); see also *COVID-19 in Racial and Ethnic Minority Groups*, Ctrs. for Disease Control & Prevention (updated June 25, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>; Maria Godoy & Daniel Woods, *What Do Coronavirus Racial Disparities Look Like State by State?*, NPR (May 30, 2020), <https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state>.

<sup>10</sup> See, e.g., *The Unemployment Situation—May 2020*, U.S. Bureau of Labor Statistics (June 2020), <https://www.bls.gov/news.release/pdf/empsit.pdf> (Summary Table A); *In Their Own Words: The Impact of Covid19 on DREAMers*, TheDream.US, 3-4 (Mar. 26, 2020), <https://www.thedream.us/wp-content/uploads/2020/04/TheDream.US-In-Their-Own-Words-Impact-of-Covid-19-on-DREAMers.pdf>.

<sup>11</sup> *Education Secretary Betsy DeVos Says CARES Act Funding Will Go To Students*, Full Court Press (Apr. 27, 2020), <https://www.fullcourtgreta.com/video/2020/04/27/education-secretary-betsy-devos-says-cares-act-funding-will-go-students/> (5:26 to 5:39).

<sup>12</sup> Miriam Feldblum et al., *New Am. Econ. & Presidents' Alliance on Higher Educ. & Immigration, Undocumented Students in Higher Education: How Many Students Are in U.S. Colleges and Universities, and Who Are They?* (Apr. 2020), <https://www.presidentsimmigrationalliance.org/wp-content/uploads/2020/04/2020-04-16-NAE-PA-Report-Undocumented-Students-in-Higher-Education.pdf>.

<sup>13</sup> Olivia Osei-Twumasi & Guadalupe Lopez Hernandez, *Resilience in the Face of Adversity: Undocumented at Students Community Colleges*, in *Immigrant-Origin Students in Community College: Navigating Risk and Reward in Higher Education* (Carola Suarez-Orozco & Olivia Osei-Twumasi, eds., 2019) (citing Carola Suarez-Orozco et al., *Undocumented Undergraduates on College Campuses: Understanding Their Challenges and Assets and What It Takes to Make an Undocufriendly Campus*, 81 Harv. Educ. Rev. 427, 438-73 (2015)).

We see the harmful effects of the exclusion at our institution. Our undocumented students, many of whom are training to be frontline medical workers, are experiencing financial hardships similar to their peers across campus; however, because they are ineligible for automatic federal aid, they must pursue other, harder-to-find sources. The challenges of living during a pandemic and adjusting to distance learning, while also trying to navigate and apply for alternative forms of financial support, create an extremely stressful situation for our undocumented students.

Nor does the Department consider that ineligible students facing these dire economic circumstances may well be constrained to postpone or forego their higher education.<sup>14</sup> Many students, including those within our undocumented community, have expressed concerns about their academic future due to the financial uncertainties they face. That would deprive those students of the numerous benefits that higher education brings, as well as expose them to substantial costs.<sup>15</sup> What is more, society at large will be deprived of numerous external benefits if ineligible students are forced to postpone or forego their higher education.<sup>16</sup>

In summary, the Department's interim final rule overlooks its most obvious and substantial cost. The Department can hardly issue this rule on a "reasoned determination that its benefits would justify its costs" after ignoring the rule's effects on students ineligible for Title IV assistance.<sup>17</sup>

## **II. THE INTERIM FINAL RULE HAS SUBSTANTIAL NEGATIVE EFFECTS ON STUDENTS AT OUR INSTITUTION WHO ARE ELIGIBLE FOR TITLE IV ASSISTANCE**

The Department also declines to consider the interim final rule's effects on students who are eligible for Title IV assistance, but who have not yet confirmed their Title IV eligibility. Millions of students do not have documentation in place that establishes their eligibility.<sup>18</sup> As the Department recognizes, many such

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<sup>14</sup> See, e.g., *Br. of Amici Curiae 25 Ctys., Cities, and Municipalities* (Dkt. 27-1) at 2-5, *Oakley v. DeVos*, No. 4:20-cv-03215-YGR (N.D. Cal. June 1, 2020).

<sup>15</sup> *College Affordability and Completion: Ensuring a Pathway to Opportunity*, U.S. Dep't of Educ. (last visited July 1, 2020), <https://www.ed.gov/college>.

<sup>16</sup> Jennifer Ma et al., Coll. Bd., *Trends in Higher Education Series: Education Pays 2019* 4-5 (2019), <https://research.collegeboard.org/pdf/education-pays-2019-full-report.pdf>; David E. Bloom et al., *Beyond Private Gain: The Public Benefits of Higher Education*, 18 *Int'l Handbook of Higher Educ.* 135 tbl. 2 (2004) (citing Inst. for Higher Educ. Policy, *Reaping the Benefits: Defining the Public and Private Value of Going to College* (1998)).

<sup>17</sup> 85 Fed. Reg. at 36,499.

<sup>18</sup> *FAFSA Volume Reports*, U.S. Dep't of Educ., Office of Fed. Student Aid (last visited July 1, 2020), <https://studentaid.gov/data-center/student/application-volume/fafsa-school-state/> ("FAFSA Data by Demographic Characteristics"; Department finding that 10.72 million Pell-eligible students filed the FAFSA in the most recent available application year); 85 Fed. Reg. at 36,499-50 & tbl. 1 (Department estimating that 19.75 students are eligible to receive emergency financial aid); see Laura Owen & Erik Westlund, *Increasing College Opportunity: School Counselors and FAFSA*

students “lack the necessary information or familiarity with the financial aid process to have information in place already.”<sup>19</sup> The Department acknowledges that this is due to the FAFSA’s “complexity” and the “lack of counseling” options available to students.<sup>20</sup>

To combat these enormous costs of its interim final rule, the Department offers two solutions. First, the Department says, such students can complete the FAFSA.<sup>21</sup> The first solution is no solution at all. As the Department recognizes, many students will be unable to complete the FAFSA due to its “complexity” and their “lack of counseling.” Second, the Department alternatively suggests that such students could complete an institution-provided application “in which the student attests under the penalty of perjury to meeting the requirements of section 484 of the HEA.”<sup>22</sup> But, for many students, that option is even more “complex.” Under penalty of perjury, many students will struggle to confidently state whether they are an “eligible noncitizen,” whether they are maintaining satisfactory academic progress (as defined by their institution), whether they have complied with complex eligibility requirements (*e.g.*, filing a “statement of educational purpose” as “part of the original financial aid application process”), and more.<sup>23</sup>

It is a foreseeable result that many students who are eligible for Title IV assistance but have not been able to confirm their eligibility will continue to be unable to confirm their eligibility. The Department fails to consider this effect, too, of the interim final rule. That is especially untenable in view of the Department’s recognition that these burdens will fall most squarely on “low-income, minority, and first-generation [college] students”<sup>24</sup>—many of the students most in need of emergency financial aid. We see evidence of these struggles among students at our institution.

Those students who do elect to undergo the “complex” process of confirming their eligibility will bear substantial costs in so doing. Again, the Department ignores those costs altogether.

Those costs would likely be extensive: To demonstrate their eligibility, hundreds of thousands of undergraduate and graduate students around the United States would need to complete a FAFSA or a substantial institution-provided application, which would likely amount to hundreds of thousands or millions of hours’ worth of direct costs to students.<sup>25</sup> Students at our institution are bearing those unrecognized costs.

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*Completion*, 2 J. of Coll. Access 12 tbl. 1 (2016) (cited at 85 Fed. Reg. at 36,500; showing that 55 percent of studied students did not complete the FAFSA); Steven Bahr et al., U.S. Dep’t of Educ., NCES 2018–061, *Why Didn’t Students Complete a Free Application for Federal Student Aid (FAFSA)? A Detailed Look* 20 app. A (2018), <https://nces.ed.gov/pubs2018/2018061.pdf>.

<sup>19</sup> 85 Fed. Reg. at 36,500.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 36,497.

<sup>22</sup> *Id.* at 36,500.

<sup>23</sup> *Id.* at 36,499 n.7; 20 U.S.C. § 1091.

<sup>24</sup> 85 Fed. Reg. at 36,500.

<sup>25</sup> See, *e.g.*, Farran Powell & Emma Kerr, *Completing the FAFSA: Everything You Should Know*, U.S. News (Oct. 1, 2019), <https://www.usnews.com/education/best-colleges/paying-for->

At bottom, the Department failed to consider the interim final rule's enormous effects on a large population of students who will be unable to navigate the process of confirming their Title IV eligibility, and thus unable to access emergency financial aid. Likewise, the Department failed to consider the rule's effects on all other eligible students who will be forced to undergo the time-intensive process of confirming their eligibility. The Department could not have issued this rule on a "reasoned determination that its benefits would justify its costs" after ignoring the rule's most apparent and significant costs.<sup>26</sup>

### III. THE INTERIM FINAL RULE IMPOSES SIGNIFICANT COSTS ON OUR INSTITUTION

The Department suggests that this rule will impose only five hours of costs on institutions like ours. That sole cost, the Department suggests, will be to "set up a new form for students to complete and establish review and recordkeeping procedures to be able to comply with the separate reporting requirements."<sup>27</sup> That five-hour estimate is an *enormous* underestimate of the costs that colleges and universities will bear as a result of the interim final rule.

The Department ignores the most important and substantial costs of its interim final rule, which will impose enormous direct and indirect costs on colleges and universities that the Department failed to consider or analyze.

**Direct Costs:** The Department ignores this rule's obvious direct costs, which far exceed the sole cost considered.

**First**, setting up the eligibility-confirming application alone will likely take much more than five hours. Institutions have to thoroughly review the interim final rule before creating this application—a cost that the Department ignores.<sup>28</sup> Section 1091 and its eligibility requirements raise numerous difficult questions and leave others open to an institution's discretion.<sup>29</sup> Institutions have to thoroughly research these statutory requirements to ensure that they are accurately advising their students. And they will have to clearly spell out their own policies that determine, for instance, whether students are in good academic standing. Thus, it is likely that creating the application alone will take much longer than five hours.

**Second**, institutions will have to follow up with students about questions that arise as students fill out their applications. Students may ask, for instance, questions about the statutory requirements or university's policies (*e.g.*, "I

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[college/articles/completing-the-fafsa](#) ("According to the Department of Education, during the 2019-2020 FAFSA cycle, from Oct. 1, 2018, to Aug. 31, 2019, it took dependent students 47 to 58 minutes on average to complete a new form.").

<sup>26</sup> 85 Fed. Reg. at 36,499.

<sup>27</sup> *Id.* at 36,503.

<sup>28</sup> *See, e.g., Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114, 51,229 (Oct. 10, 2018) (public charge rule considering familiarization costs).

<sup>29</sup> 20 U.S.C. § 1091.

received poor grades last semester due to a death in my family. Under Section 1091(c)(1), will the university waive the good-academic-standing requirement?”). This back and forth will consume substantial time, which the Department fails to acknowledge.

**Third**, institutions will have to carefully review each eligibility-establishing application they receive. Otherwise, they will now run afoul of their contractual obligation to comply with “all relevant provisions and requirements of the CARES Act,” exposing themselves to legal penalties.<sup>30</sup>

**Fourth**, beyond “*establish[ing]*” recordkeeping procedures, institutions will actually have to *maintain* records of each and every Title IV eligibility-establishing document that they receive.

And **fifth**, university officials may need to instruct many students seeking to establish their Title IV eligibility on how to complete the FAFSA.

**Indirect Costs:** The Department does not consider the rule’s indirect costs to institutions. As a result of the rule, many students will postpone or abandon their higher education, as we explained above. The Department observes in its rule that colleges and universities are “rightfully concerned about declining enrollments and the loss of ancillary revenue.”<sup>31</sup> It is hard to see, then, how the Department does not consider the obvious effect of its rule: that it will make those “rightful” enrollment concerns even worse.

Beyond the substantial economic effects of this interim final rule, the rule will have the non-economic cost of depriving institutions of valuable members of their diverse communities. More than 450,000 students are enrolled in higher education are undocumented immigrants.<sup>32</sup> That amounts to two percent of all students in higher education in the United States.<sup>33</sup> Approximately 216,000 enrolled students are DACA-eligible.<sup>34</sup> At SJSU, we have approximately 550 undocumented students.

The benefits of diversity to American colleges and universities are well understood. “[S]tudent body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.”<sup>35</sup> “[I]t is not too much to say that the nation’s future depends upon leaders trained through

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<sup>30</sup> *Recipient’s Funding Certification and Agreement for the Institutional Portion of the Higher Education Emergency Relief Fund Formula Grants Authorized by Section 18004(a)(1) of the Coronavirus Aid, Relief, and Economic Security (CARES) Act* § 4(i), U.S. Dep’t of Educ. (last visited July 1, 2020), <https://www2.ed.gov/about/offices/list/ope/beer/institutionalcertificationagreement42020v2.pdf>.

<sup>31</sup> 85 Fed. Reg. at 36,497.

<sup>32</sup> Miriam Feldblum et al., *supra* note XX..

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>36</sup> This list of benefits goes on at length.<sup>37</sup>

In line with all of the available data, it is unsurprising that institutions like ours broadly recognize the important role that students who are not eligible for Title IV assistance play on campuses across the United States.<sup>38</sup> In short, “any actions taken to reduce the numbers of students of color on college and university campuses will have a powerfully negative effect on the opportunity that students have to learn from one another.”<sup>39</sup> IHEs have a critical responsibility to diverse students to remove obstacles, both in terms of access to higher education and the ability to succeed once such students enroll. This interim final rule will make the playing field more uneven, making it that much more difficult for IHEs to meet their educational and moral obligations to students of color, low-income students, undocumented students, and otherwise-marginalized students.

As Silicon Valley’s public university, SJSU has both unique opportunities and challenges that can affect the long-term economic prosperity of our state and our region. We need to continue to enroll students from a wide variety of backgrounds, including undocumented students; make essential investments for our campus to improve the learning environment; support student well-being; and ensure a well-educated workforce vital for our future.

At SJSU, we transform the lives of our students and open the doors of social mobility. Nearly a third of our students are the first in their families to attend college and about half are eligible for Pell grants. More than 40 percent of incoming freshmen and 35 percent of incoming transfer students identify as an underrepresented minority. We are proud of our designation as both a Hispanic-Serving Institution and an Asian American and Native American Pacific Islander-Serving Institution. Similarly, we are proud of our undocumented student population and remain committed to supporting them in whatever ways that we can.

This rule prevents us from effectively serving our undocumented students.

#### **IV. THE INTERIM FINAL RULE IS UNLAWFUL UNDER THE ADMINISTRATIVE PROCEDURE ACT**

We have established at length that the interim final rule is bad policy. It is also unlawful under the Administrative Procedure Act: It is arbitrary and capricious,

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<sup>36</sup> Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312-13 (1978) (quotation marks omitted).

<sup>37</sup> See generally *Amici Curiae* Br. of 21 Colorful Crimson et al. (Dkt. 504) at 26-28, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), No. 14-cv-14176 (D. Mass. Aug. 30, 2018) (surveying academic literature, court opinions, expert testimony, and other materials, and highlighting the benefits of diverse student bodies).

<sup>38</sup> *E.g.*, Br. for *Amici Curiae* Insts. of Higher Educ. at 2, 11-13 & n.22, Dep’t of Homeland Sec. v. Regents of Univ. of Cal., Nos. 18-587, 18-588, 18-589 (U.S. Oct. 4, 2019), [https://www.supremecourt.gov/DocketPDF/18/18-587/118076/20191004111332453\\_18-587%2018-588%2018-589%20Obsac%20Institutions%20of%20Higher%20Education.pdf](https://www.supremecourt.gov/DocketPDF/18/18-587/118076/20191004111332453_18-587%2018-588%2018-589%20Obsac%20Institutions%20of%20Higher%20Education.pdf).

<sup>39</sup> Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors* ch. 5 p. 9 (2003), [https://web.stanford.edu/~hakuta/www/policy/racial\\_dynamics/Chapter5.pdf](https://web.stanford.edu/~hakuta/www/policy/racial_dynamics/Chapter5.pdf).

and the Department violated procedure required by law by waiving notice and comment and making the rule effective immediately.

The rule is “arbitrary” and “capricious” and therefore must be “set aside.”<sup>40</sup> That is so primarily for two reasons. First, the interim final rule has “unexplained inconsistency” after unexplained consistency, yet the Department displays no “awareness that it is changing position,” let alone “show[s] that there are good reasons for the new policy.”<sup>41</sup> The Department’s reversals are numerous and obvious:

- Initially, the Department asserted that the “only statutory requirement” was Section 18004(c)’s sole explicit textual requirement.<sup>42</sup> Now, it asserts that there is a separate statutory eligibility requirement in Section 18004(c).
- The Department initially represented that it “does not consider these individual emergency financial aid grants to constitute Federal financial aid under Title IV.”<sup>43</sup> The Department eventually took down the original certification form and replaced it with a certification whose URL ended “v2,” for version two, which removed that language.<sup>44</sup>
- The Department initially did not mention, let alone impose, a Title-IV-eligibility requirement. It then reversed course, saying that Congress was “explicit” about such a requirement.<sup>45</sup> Now, it reverses course again, saying that Congress left in the statute a “critical ambiguity.”<sup>46</sup>
- The Department initially did not mention, let alone suggest that it would enforce, Section 1611. Months later, it reversed course, stating that Section 1611 is applicable.<sup>47</sup>
- The Department originally allocated funds by including students ineligible for Title IV assistance.<sup>48</sup> Now, it bars those same students from receiving funds. The Department’s acknowledgement of this reversal is no explanation. The Department’s suggestion that it did not want to “stop” the allocation process is far from persuasive: At a minimum, it could have subtracted out the 1.2 million “[n]onresident alien” students that it incorporated in its allocations who are clearly ineligible for Title IV assistance.<sup>49</sup> Subtracting out that single number would have taken a few moments.

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<sup>40</sup> 5 U.S.C. § 706(2)(A).

<sup>41</sup> *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

<sup>42</sup> Letter from Betsy DeVos, *supra* note XX.

<sup>43</sup> *See, e.g., Danielle Douglas-Gabriel, More than a Million College Students will be Shut Out of Emergency Grant Program*, Wash. Post (Apr. 21, 2020).

<sup>44</sup> *Recipient’s Funding Certification*, *supra* note XX.

<sup>45</sup> *Education Secretary Betsy DeVos Says CARES Act Funding Will Go To Students*, *supra* note XX, at 4:27 to 4:52.

<sup>46</sup> 85 Fed. Reg. at 36,495.

<sup>47</sup> *Id.* at 36,496.

<sup>48</sup> *Id.* at 36,497 n.2.

<sup>49</sup> *Id.*; *Methodology for Calculating Allocations per Section 18004(a)(1) of the CARES Act*, U.S. Dep’t of Educ. (last visited July 1, 2020),

<https://www2.ed.gov/about/offices/list/ope/peerf90percentformulaallocationexplanation.pdf>; *IPEDS Data Explorer: 2017-18*, U.S. Dep’t of Educ. (last visited July 1, 2020),

Second, the rule is also arbitrary and capricious because the Department did not “examine the relevant data” or “articulate a satisfactory explanation for its action[,] including a ‘rational connection between the facts found and the choice made.’”<sup>50</sup> As we explained above, the Department did not examine the bulk of the relevant data: It ignored its rule’s most obvious and significant costs. Nor did the Department articulate a “satisfactory explanation” or make a “rational connection” between the few costs it did find and the choice it made.

In support of the rule’s most important “benefit” of reducing waste, fraud, and abuse, the Department offers as evidence only an unrelated, footnote-consigned *New York Times* article.<sup>51</sup> The Department’s hypothetical concerns are easily dispelled of and are ungrounded in evidence. IHEs take great care to avoid such outcomes.

In sum, the Department offers only its unadorned say-so that the rule’s benefits justify its costs.<sup>52</sup> That is plainly insufficient under the Administrative Procedure Act, and the rule is arbitrary and capricious on that basis, too.

Separately, the Department violates “procedure required by law” by waiving notice-and-comment participation and by making the rule effective immediately without good cause.<sup>53</sup> Good-cause exceptions “are desperate measures,” which must be “narrowly construed and reluctantly countenanced.”<sup>54</sup> The Department’s bases for good cause are (1) “the importance of institutions properly distributing the HEERF allocations” and (2) “the current national emergency.”<sup>55</sup>

The first basis fails. The Department could make that argument with respect to any funding it administers. “A mere recitation that good cause exists, coupled with a desire to provide immediate guidance, does not amount to good cause.”<sup>56</sup> That is especially so here, where the Department waited almost three months after the CARES Act was enacted to issue this interim final rule. The second basis fails, too. Again, the Department issued this interim final rule almost *twelve weeks* after the CARES Act was signed, and more than *eight weeks* after the Department first mentioned any Title IV eligibility restriction. Any exigency now is of the Department’s own making. The Department cannot “simply wait” to promulgate a rule and then claim that circumstances are too “imminen[t]” to

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[https://nces.ed.gov/ipeds/Search?query=&query2=&resultType=all&page=1&sortBy=date\\_desc&overlayTableId=25211](https://nces.ed.gov/ipeds/Search?query=&query2=&resultType=all&page=1&sortBy=date_desc&overlayTableId=25211) (including 1.2 million “[n]onresident alien” students”).

<sup>50</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

<sup>51</sup> 85 Fed. Reg. at 36,497 n.3.

<sup>52</sup> *Id.* at 36,499.

<sup>53</sup> 5 U.S.C. § 706(2)(D); *id.* § 706(2)(A).

<sup>54</sup> *Commonwealth of N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 14 (D.D.C. 2009) (quoting *Petry v. Block*, 737 F.2d 1193, 1200 (D.C. Cir. 1984)).

<sup>55</sup> 85 Fed. Reg. at 36,498.

<sup>56</sup> *Zhang v. Slattery*, 55 F.3d 723, 746 (2d Cir. 1995).

comply with the Administrative Procedure Act.<sup>57</sup> Put differently, “an emergency of [the Department’s] own making” cannot constitute good cause.<sup>58</sup> The Department cannot forego the notice-and-comment procedures at the heart of the Administrative Procedure Act<sup>59</sup> because it thinks it has a “proper” interpretation of a statute that it now wants to administer after months of waiting.

Because the rule is arbitrary and capricious, and because the Department lacked good cause to forego notice and comment and make the rule effective immediately, the rule is unlawful under the Administrative Procedure Act.

## **V. THE STATUTORY TEXT IS UNAMBIGUOUS**

The Department claims that Section 18004(c) of the CARES Act contains a “critical ambiguity” because the word “students” is not defined.<sup>60</sup> The statutory text, however, is unambiguous. “A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”<sup>61</sup> “When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”<sup>62</sup> These elementary principles “foreclose [the Department’s] reading.”<sup>63</sup> The Department of Education strains to define the term “students” in a manner plainly contrary to the “ordinary understanding” of that word.<sup>64</sup> No dictionary defines “students” with a Title IV eligibility requirement.<sup>65</sup> The common usage of the word is not restricted to those eligible for Title IV assistance. In line with the common understanding of the word, the Department itself repeatedly refers to ineligible students as “students” *in its interim final rule*.<sup>66</sup>

Because the text is unambiguous, the Department’s attempt to add a Title-IV-eligibility requirement is unlawful.

## **VI. THE DEPARTMENT’S SECTION 1611 ARGUMENT IS LEGALLY UNSOUND AND IRRELEVANT, AND IT INJECTS SUBSTANTIAL UNCERTAINTY INTO THE ADMINISTRATION OF FUNDS**

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<sup>57</sup> See, e.g., *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981).

<sup>58</sup> *NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004).

<sup>59</sup> The “notice-and-comment procedures of the Administrative Procedure Act [were] designed to assure due deliberation.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). “Congress made a judgment that notions of fairness and informed administrative decision making require that agency decisions be made only after affording interested persons notice and an opportunity to comment.” *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996).

<sup>60</sup> 85 Fed. Reg. at 36,495.

<sup>61</sup> *Perrin v. United States*, 444 U.S. 37, 42 (1979).

<sup>62</sup> *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

<sup>63</sup> *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

<sup>64</sup> *Babbitt v. Sweet Home Chapter, Cmty. for a Great Or.*, 515 U.S. 687, 697 (1995).

<sup>65</sup> See *id.* (relying on dictionary definition).

<sup>66</sup> See, e.g., 85 Fed. Reg. at 36,498 (“students [who] cannot maintain Satisfactory Academic Progress”); *id.* (“students who . . . do not intend to receive a degree or certificate”).

The Department additionally argues that Section 1611 “clearly” applies to emergency financial aid funds, thus barring many noncitizens from accessing the funds.<sup>67</sup> Both courts to consider the issue disagree with that assessment.<sup>68</sup> For the reasons that each of those courts discussed and cited, we disagree that Section 1611 applies to Section 18004(c) funds.<sup>69</sup>

Separately, we note that the Department’s assertion that Section 1611 is applicable is irrelevant to the survival of this interim final rule. In any event, as we have explained, the rule is bad policy, unlawful under the Administrative Procedure Act, and contrary to the statutory text.

Last, the Department did not assert that Section 1611 applied to the awarding of CARES Act funds until May 21, almost two months after the CARES Act was enacted and in the midst of pending litigation. On May 21, the Department asserted for the first time that “the restriction in 8 U.S.C. § 1611 on eligibility for Federal public benefits including [emergency financial aid] grants” is “legally binding” on IHEs.<sup>70</sup> The Department presses the same argument in this interim final rule. The Department’s reversal of course almost *two months* after the CARES Act was enacted is confounding; the Department did not mention Section 1611, let alone assert that it was applicable, in its letter to IHE presidents, its certification form (either in version one or version two of that form), or any other document until May 21. In fact, the Department stated outright that the “only statutory requirement” was Section 18004(c)’s sole explicit textual requirement.<sup>71</sup>

The Department’s about-face is especially concerning given that the certification form that many IHEs signed prior to May 21 states that IHEs may be liable for failure to comply with “any applicable law,”<sup>72</sup> which the Department only recently suggested includes Section 1611. Even after one court enjoined the Department’s *post hoc* addition of Section 1611 to the universe of “applicable law,” the Department responded: “The Department will . . . enforce the IFR and other applicable law to the extent not enjoined. The Department is considering its options in responding to these preliminary injunctions.”<sup>73</sup>

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<sup>67</sup> *Id.* at 36,496.

<sup>68</sup> See Order Granting Pls.’ Mot. for Prelim. Inj. (Dkt. 44) at 24, *Oakley v. DeVos*, No. 4:20-cv-03215-YGR (N.D. Cal. June 17, 2020) (“[T]he Court is not persuaded . . . that HEERF funds would constitute ‘Federal public benefits’ from which most non-citizens are excluded, nor that the Secretary’s election to apply 1611(a)’s restrictions to these funds as an eligibility condition would be lawful.”) [hereinafter “Cal. PI Order”]; Order Granting Pl.’s Mot. for Prelim. Inj. (Dkt. 31) at 21, *Washington v. DeVos*, No. 2:20-cv-00182 (E.D. Wash. June 12, 2020) (reserving the question after noting the plaintiff’s “reasonable and compelling arguments” against application of Section 1611 to HEERF funds) [hereinafter “Wash. PI Order”].

<sup>69</sup> Cal. PI Order at 19-24, *supra* note XX; Wash. PI Order at 18-21, *supra* note XX.

<sup>70</sup> CARES Act: Higher Education Emergency Relief Fund, U.S. Dep’t of Educ. (last visited July 1, 2020), <https://www2.ed.gov/about/offices/list/ope/caresact.html>.

<sup>71</sup> Letter from Betsy DeVos, *supra* note XX.

<sup>72</sup> *Recipient’s Funding Certification*, *supra* note XX.

<sup>73</sup> CARES Act: Higher Education Emergency Relief Fund, *supra* note XX.

Because the Department waited for months to assert that Section 1611 applies to emergency financial aid, some institutions likely now have great uncertainty as to whether they previously administered funds in a manner inconsistent with what the Department now, after months of silence, deems “applicable law.” The Department states in a footnote that it will not “enforce the title IV eligibility interpretation announced in this rule against distribution of HEERF funds that occurred prior to the publication of this rule.”<sup>74</sup> But the interim final rule is conspicuously silent about whether the Department will enforce Section 1611 retroactively, despite that provision’s unsettled applicability. Additionally, many institutions will be forced to hold on to their remaining funds until it is settled whether Section 1611 is applicable. That, in turn, will prevent students from accessing the funds that they need now.

Section 1611 is inapplicable as a matter of law and irrelevant to the survival of this interim final rule. What is more, the Department’s moving goalposts with respect to Section 1611 have produced enormous uncertainty for IHEs in a time when IHEs are already experiencing unprecedented uncertainty.

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For the reasons provided above, the Department should promptly withdraw this interim final rule. The Department’s extratextual eligibility requirement is unsound policy and would do great harm to students across the board, and especially to undocumented and DACA students. Moreover, the rule is unlawful as a matter of both substance and procedure. At a minimum, the Department must reissue this rule, allowing for notice and comment, and delaying the effective date.

If I can answer any questions, provide additional context, or be of assistance in any way, please feel free to reach out to me directly.

Sincerely and with appreciation,



Mary A. Papazian, Ph.D.  
President  
San José State University

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<sup>74</sup> 85 Fed. Reg. at 36,498 n.6.