

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, CLASP 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:

We, the Center for Law and Social Policy (CLASP), write to 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 strong opposition to the exclusion of postsecondary students 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 recipients of Deferred Action for Childhood Arrivals (DACA), Temporary Protected Status (TPS), Deferred Enforced Departure (DED), and undocumented students enrolled in institutions of higher education (IHEs).

As a national, nonpartisan nonprofit organization, we work to advocate for federal and state policies that reduce poverty and increase the economic security of youth and adults with low incomes, particularly people of color, immigrants, and individuals impacted by the criminal justice system. Due to the COVID-19 pandemic, DACA, TPS, and DED recipients and undocumented students and their families have experienced illness, death, significant job losses, layoffs, and increased poverty. To make matters worse, millions of immigrant families have not received relief under the COVID-19 relief packages enacted by Congress.

We are concerned that this interim final rule will cause harm and further disrupt the postsecondary education and livelihoods of DACA, TPS, and DED recipients and undocumented students.<sup>2</sup> The rule will continue to increase the economic insecurity of these students and make it more difficult for them to access, afford, and complete college.<sup>3</sup> In our view, the Department should be working to meet the basic needs of all students during this pandemic, instead of establishing arbitrary and unauthorized restrictions that explicitly target and exclude these students from emergency grant aid. As such, CLASP joined with

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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>.

<sup>2</sup> Rosa M. Garcia, *Undocumented Students Need Covid-19 Relief Now* (May 1, 2020), <https://www.clasp.org/blog/undocumented-college-students-need-covid-19-relief-now>

<sup>3</sup> *Id.*

its advocacy partners in calling on the Department to abide by the congressional intent in the CARES Act and to allow IHEs to provide these students with the emergency grant aid they need to succeed in school. However, the Department has ignored requests from members of Congress and advocates who have urged the Department to rescind its flawed policy guidance on this matter.<sup>4</sup> The Department should recognize the will and intent of Congress and immediately rescind both the rule and its policy guidance and allow IHEs the maximum flexibility in distributing emergency aid.

The interim final rule must be withdrawn for the following reasons:

## **I. THE INTERIM FINAL RULE WILL CAUSE GREATER HARM TO STUDENTS WHO ARE INELIGIBLE FOR TITLE IV ASSISTANCE**

The Department estimates that its Title-IV-eligibility requirement would “exclude” more than 1.12 million noncitizens from receiving emergency financial aid, to say nothing of the many other students who are ineligible for Title IV assistance on different grounds.<sup>5</sup> The Department has also acknowledged the “urgent economic challenges facing many students as a result of the crisis.”<sup>6</sup> Many students who are not eligible for Title IV benefits are facing significant financial challenges. However, the Department is minimizing the harm and adverse impact of excluding more than 1.12 million students from accessing emergency financial aid during this global public health and economic crisis.

All postsecondary students, particularly students with low incomes, students of color, immigrants, students impacted by the criminal justice system, parenting students, and students who were experiencing food and housing insecurity prior to the pandemic are facing unprecedented economic and non-economic challenges as a result of COVID-19. In the United States, millions of Americans have been adversely affected by COVID-19.<sup>7</sup> During this pandemic, unemployment has skyrocketed, leaving many students in dire economic circumstances.<sup>8</sup> Many students have lost their on-campus jobs and summer internships due to COVID-19.<sup>9</sup> Others have lost jobs in their communities and were not eligible for a Recovery Rebate check under the CARES Act.<sup>10</sup>

The Department previously “encouraged” institutions of higher education to prioritize “students with the greatest need” in awarding emergency financial aid.<sup>11</sup> We want to underscore that many students who are not eligible for Title IV assistance are among those with the “greatest need.” Like many of their peers, DACA, TPS, and DED recipients and undocumented students are facing increased employment, housing, health care, food insecurity and other challenges related to COVID-19 disruptions.<sup>12</sup>

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<sup>4</sup> Letter from United We Dream to Betsy DeVos (April 29, 2020), <https://unitedwedream.org/wp-content/uploads/2020/04/Org-Sign-On-Letter-to-Sec.-Devos-for-access-to-Covid19-aid-for-undocumented-students.pdf>

<sup>5</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>6</sup> 85 Fed. Reg. at 36,498.

<sup>7</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>8</sup> *Labor Force Statistics*, U.S. Bureau of Labor Statistics (last visited July 1, 2020), <https://data.bls.gov/timeseries/LNS14000000>.

<sup>9</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>10</sup> *Id.*

<sup>11</sup> Letter from Betsy DeVos to College and University Presidents (Apr. 9, 2020), <https://www2.ed.gov/about/offices/list/ope/caresactgrantfundingcoverletterfinal.pdf>.

<sup>12</sup> *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>

The interim final rule is harmful and cruel for several reasons. These immigrant students face unique challenges. As mentioned previously, many DACA recipients and undocumented students and their families do not have health insurance.<sup>13</sup> Those same populations of students are suffering disproportionate health effects as a result of this pandemic.<sup>14</sup> Moreover, many immigrant students are struggling in the face of record levels of unemployment and resulting difficulties in meeting their most basic needs.<sup>15</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 this global pandemic.

The overwhelming majority—over 80 percent—of undocumented students attend two- and four-year public colleges and universities.<sup>16</sup> Studies show that undocumented students at both two- and four-year institutions are concerned about financing their education. Undocumented students at community colleges, however, are even more likely to face extremely high levels of financial stress.<sup>17</sup> Many DACA, TPS, and DED recipients and undocumented students who attend two- and four-year public colleges and universities are also first-generation college students. During this pandemic, some of these first-generation college students are also having to support their families financially.

Many DACA, TPS, and DED recipients are “essential workers” and continue to put their lives at risk during this COVID-19 pandemic. According to the Center for American Progress, 202,500 DACA recipients are working to protect the health and safety of Americans.<sup>18</sup> These immigrant workers are serving as doctors, nurses, home and personal care aides, and psychiatric aides. Others are teachers who are working to ensure that our children are still receiving a quality education.

As a result of the COVID-19 pandemic and these economic challenges, DACA, TPS, and DED recipients and undocumented students are facing increased anxiety and uncertainty in their lives. According to a survey conducted by the Dream.US, of the 76 percent of respondents who reported working while in school, 80 percent of those reported a loss in income, while 57 percent of working Scholars had lost their

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<sup>13</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>14</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>15</sup> See, e.g., *The Unemployment Situation—May 2020*, U.S. Bureau of Labor Statistics (June 2020), <https://www.bls.gov/news.release/pdf/empst.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>16</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>17</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)).

<sup>18</sup> Nicole Prchal Svajlenka, *A Demographic Profile of DACA Recipients on the Frontlines of the Coronavirus Response*, (April 6, 2020), <https://www.americanprogress.org/issues/immigration/news/2020/04/06/482708/demographic-profile-daca-recipients-frontlines-coronavirus-response/>.

job.<sup>19</sup> In addition, 65 percent of Scholars reported needing assistance to pay for rent and utilities, and 48 percent reported needing assistance for food and meals. In light of these findings, it is not surprising that 58 percent reported needing mental health support services, such as counseling, online resources, and support groups.<sup>20</sup>

The Department fails to consider that these students who are facing financial hardship may postpone or forego their higher education.<sup>21</sup> That would deprive those students of the numerous benefits that higher education brings, as well as expose them to substantial costs.<sup>22</sup> Society at large would also be deprived of the numerous contributions of these immigrant students and their families, if these students are forced to postpone or forego their higher education.<sup>23</sup>

In summary, the Department's interim final rule fails to recognize the harmful impact of the rule on DACA, TPS, and DED recipients and undocumented students and their families. 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>24</sup>

## II. THE INTERIM FINAL RULE HAS AN ADVERSE IMPACT ON TITLE IV ELIGIBLE STUDENTS

The Department fails to consider the interim final rule's effects on Title IV eligible students who have yet to confirm their Title IV eligibility. Millions of students do not have documentation in place that establishes their eligibility.<sup>25</sup> As the Department recognizes, many such students "lack the necessary information or familiarity with the financial aid process to have information in place already."<sup>26</sup> The Department acknowledges that this is due to the FAFSA's "complexity" and the "lack of counseling" options available to students.<sup>27</sup>

To address these issues, the Department offers two solutions. First, the Department says, such students can complete the FAFSA.<sup>28</sup> This is not a solution. As the Department recognizes, many students will be unable to complete the FAFSA due to its "complexity" and their "lack of counseling." Second, the

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<sup>19</sup> *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>; <https://www.thedream.us/news/new-survey-of-the-dream-us-scholars-details-how-covid-19-is-affecting-dreamers>

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

<sup>21</sup> *See, e.g.*, Br. of *Amici Curiae* 25 Cts., 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>22</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>23</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>24</sup> 85 Fed. Reg. at 36,499.

<sup>25</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 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>26</sup> 85 Fed. Reg. at 36,500.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 36,497.

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>29</sup> For many students, however, 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, whether they have complied with complex eligibility requirements, and more.<sup>30</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 students”<sup>31</sup>—many of the students most in need of emergency financial aid.

Those students who do elect to undergo the “complex” process of confirming their eligibility will bear substantial costs in doing so. 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>32</sup> There is also a mental health cost to students. Many students have already had their education and lives upended and might feel embarrassed or stressed about filling out a long form to prove their eligibility and their need for assistance.

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 be 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.

### **III. THE INTERIM FINAL RULE UNDERMINES RACIAL EQUITY, DIVERSITY AND INCLUSION ON COLLEGE CAMPUSES**

The interim final rule undermines efforts to foster racial equity, diversity, and inclusion on the nation’s college campuses. More than 450,000 students enrolled in higher education are undocumented immigrants.<sup>33</sup> That amounts to two percent of all students in higher education in the United States.<sup>34</sup> Approximately 216,000 enrolled students are DACA-eligible.<sup>35</sup>

The benefits that come with promoting racial equity, diversity, and inclusion on the nation’s colleges and universities are well understood. “Student body diversity promotes learning outcomes, and better prepares

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<sup>29</sup> *Id.* at 36,500.

<sup>30</sup> *Id.* at 36,499 n.7; 20 U.S.C. § 1091.

<sup>31</sup> 85 Fed. Reg. at 36,500.

<sup>32</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-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>33</sup> Miriam Feldblum et al., *supra* note XX..

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

<sup>35</sup> *Id.*

students for an increasingly diverse workforce and society.”<sup>36</sup> “The nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>37</sup> This list of benefits goes on at length.<sup>38</sup>

Furthermore, we must recognize the important role that DACA recipients and undocumented students play on campuses across the United States.<sup>39</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>40</sup> Our nation has a responsibility to promote racial equity and inclusion and to remove obstacles in postsecondary education. This includes promoting access and providing students with the critical supports they need to succeed once such students enroll. This interim final rule will make the playing field more uneven for these students. It will also make it more difficult for colleges and universities to meet their educational and moral obligations to students of color, students with low incomes, undocumented students, and otherwise-marginalized students.

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

The interim final rule is not just harmful and cruel, it’s also bad policy. The interim final rule is unlawful under the Administrative Procedure Act. It is arbitrary and capricious, and the Department violated procedure required by law by waiving notice and comment and making the rule effective immediately. First of all, the interim final rule has “unexplained inconsistency” after unexplained inconsistency, yet the Department displays no “awareness that it is changing position,” let alone “shows 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>

<sup>36</sup> *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

<sup>37</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 (1978) (quotation marks omitted).

<sup>38</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>39</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%20of%20Higher%20Education.pdf](https://www.supremecourt.gov/DocketPDF/18/18-587/118076/20191004111332453_18-587%2018-588%2018-589%20obsac%20of%20Higher%20Education.pdf).

<sup>40</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).

<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.

- The Department initially did not mention 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 has no explanation.

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>49</sup> As we explained above, the Department did not examine the bulk of the relevant data. 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.

The Department violates “procedure required by law” by waiving notice-and-comment participation and by making the rule effective immediately without good cause.<sup>50</sup> Good-cause exceptions “are desperate measures,” which must be “‘narrowly construed and reluctantly countenanced.’”<sup>51</sup> The Department’s bases for good cause are (1) “the importance of institutions properly distributing the Higher Education Emergency Relief Fund (HEERF) allocations” and (2) “the current national emergency.”<sup>52</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>53</sup> The Department waited almost three months after the CARES Act was enacted to issue this interim final rule. The second basis fails as well. 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. The Department cannot “simply wait” to promulgate a rule and then claim that circumstances are too “imminent” to comply with the Administrative Procedure Act.<sup>54</sup> Put differently, “an emergency of [the Department’s] own making” cannot constitute good cause.<sup>55</sup> The Department cannot forego the notice-and-comment procedures at the heart of the Administrative Procedure Act<sup>56</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.

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

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

<sup>49</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>50</sup> 5 U.S.C. § 706(2)(D); *id.* § 706(2)(A).

<sup>51</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>52</sup> 85 Fed. Reg. at 36,498.

<sup>53</sup> *Zhang v. Slattery*, 55 F.3d 723, 746 (2d Cir. 1995).

<sup>54</sup> *See, e.g., Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981).

<sup>55</sup> *NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004).

<sup>56</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).

## 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>57</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>58</sup> “When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”<sup>59</sup> These elementary principles “foreclose [the Department’s] reading.”<sup>60</sup> The Department strains to define the term “students” in a manner plainly contrary to the “ordinary understanding” of that word.<sup>61</sup> The common usage of the word “students” 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>62</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

The Department additionally argues that Section 1611 “clearly” applies to emergency financial aid funds, thus barring many noncitizens from accessing the funds.<sup>63</sup> Both courts which considered the issue disagree with that assessment.<sup>64</sup> For the reasons that each of those courts discussed and cited, we disagree that Section 1611 applies to Section 18004(c) funds.<sup>65</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>66</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

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<sup>57</sup> 85 Fed. Reg. at 36,495.

<sup>58</sup> *Perrin v. United States*, 444 U.S. 37, 42 (1979).

<sup>59</sup> *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

<sup>60</sup> *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

<sup>61</sup> *Babbitt v. Sweet Home Chapter, Cmty. for a Great Or.*, 515 U.S. 687, 697 (1995).

<sup>62</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”).

<sup>63</sup> *Id.* at 36,496.

<sup>64</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) (“The 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>65</sup> Cal. PI Order at 19-24, *supra* note XX; Wash. PI Order at 18-21, *supra* note XX.

<sup>66</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>.

Department stated outright that the “only statutory requirement” was Section 18004(c)’s sole explicit textual requirement.<sup>67</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>68</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>69</sup>

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 the HEERF funds that occurred prior to the publication of this rule.”<sup>70</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 they are already experiencing unprecedented uncertainty.

## VII. THE INTERIM FINAL RULE DISREGARDS CONGRESSIONAL INTENT

Finally, the interim final rule disregards the congressional intent of the CARES Act.<sup>71</sup> Under the CARES Act, Congress intended to grant institutions of higher education broad discretion to assist students enrolled at higher education institutions to cover the cost of certain expenses related to disruptions stemming from the COVID-19 pandemic. This includes expenses such as food, housing assistance, health care, course materials, technology, and child care.<sup>72</sup> In fact, on April 9, the Department circulated a letter to institutions of higher education advising colleges and universities that they would have “significant discretion on how to award this emergency aid to students.”<sup>73</sup> Secretary DeVos added that an “institution may develop its own system and process for determining how to allocate these funds, which may include distributing the funds to all students or only the students who demonstrate significant need.”<sup>74</sup>

However, in an Frequently Asked Questions (FAQ) document released on April 21, the Department changed its policy and chose to exclude students who were ineligible for Title IV aid from receiving emergency financial aid. In response to these arbitrary and unauthorized restrictions, members of

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<sup>67</sup> Letter from Betsy DeVos, *supra* note XX.

<sup>68</sup> *Recipient’s Funding Certification*, *supra* note XX.

<sup>69</sup> *CARES Act: Higher Education Emergency Relief Fund*, *supra* note XX.

<sup>70</sup> 85 Fed. Reg. at 36,498 n.6.

<sup>71</sup> Letter to Betsy DeVos led by Representatives Lou Correa, Raúl Grijalva, and Pramila Jayapal (May 1, 2020),

<https://www.clasp.org/sites/default/files/05.01.2020%20-%20DeVos%20Ltr.pdf>

<sup>72</sup> *Id.*

<sup>73</sup> Letter from Betsy DeVos to College and University Presidents (Apr. 9, 2020),

<https://www2.ed.gov/about/offices/list/ope/caresactgrantfundingcoverletterfinal.pdf>.

<sup>74</sup> *Id.*

Congress have expressed their concerns about this policy guidance and underscored the congressional intent of the CARES Act. In a letter to the Department on May 1, congressional Representatives explained that the CARES Act “did not place restrictions on access to emergency aid for undocumented students.”<sup>75</sup> They wrote: “We strongly urge the Department to revise its guidance and ensure DACA, TPS, and DED recipients and undocumented college students receive the same disaster relief as provided to other students. COVID-19 does not differentiate between students and neither should the associated relief.”<sup>76</sup> And we agree.

For these reasons, we are not surprised that two separate federal courts have issued preliminary injunctions preventing the Department from enforcing the interim final rule for the California community colleges and in Washington State.<sup>77</sup> In *Oakley v. DeVos* the court concluded that “Congress has demonstrated consistently that it knows how to impose conditions on funding and delegate to the Secretary the authority to impose such conditions when intended.”<sup>78</sup> In *Washington v. DeVos*, the court argued that, “nothing in the CARES Act grants Defendants authority to use their general rulemaking power under the HEA to impose conditions on the general allocations made in the CARES Act.”<sup>79</sup> The Department must recognize the congressional intent of the CARES Act and the broad discretion and flexibility given to colleges and universities to distribute emergency aid to all students whose education has been disrupted by COVID-19. Most of all, it must refrain from establishing arbitrary and unauthorized restrictions that explicitly target and exclude undocumented students from accessing emergency grant aid.

In closing, we urge the Department to promptly withdraw this interim final rule and rescind its policy guidance. This interim final rule is unlawful as a matter of both substance and procedure and will continue to harm DACA, TPS, and DED recipients and undocumented students by denying them the emergency aid they need to succeed in college.

If you have questions regarding these comments, please contact Rosa M. García at [rgarcia@clasp.org](mailto:rgarcia@clasp.org) or by phone at (202) 906-8058 for further information.

Sincerely,

Rosa M. García, Ed.D.  
Director, Postsecondary Education and Workforce Development Team

Asha Banerjee, Policy Analyst, Postsecondary Education and Workforce Development Team

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<sup>75</sup> Letter to Betsy DeVos led by Representatives Lou Correa, Raúl Grijalva, and Pramila Jayapal (May 1, 2020), <https://www.clasp.org/sites/default/files/05.01.2020%20-%20DeVos%20Ltr.pdf>

<sup>76</sup> *Id.*

<sup>77</sup> Letter to Betsy DeVos from Senator Patty Murray and Representatives Robert “Bobby” Scott and Rosa DeLauro (July 13, 2020), <https://edlabor.house.gov/imo/media/doc/13-July-2020%20HEERF%20Emergency%20Aid%20Comment%20Letter.pdf>

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*