

Congress of the United States
Washington, D.C. 20515

July 15, 2020

Ms. Sandra D. Bruce
Acting Inspector General
Office of Inspector General
U.S. Department of Education
550 12th Street, S.W.
Washington, D.C. 20202

Dear Ms. Bruce:

In January 2020, the first confirmed cases of the coronavirus were identified in the United States.¹ Over the following months, this pathogen would infect more than three million individuals, claim more than one hundred thousand lives, and alter nearly every aspect of American public life. In the education sector alone, colleges and universities closed campuses, school buildings and libraries physically closed, and the social and economic services that students and their families rely upon were disrupted or ceased entirely.

In response to this global pandemic and national emergency, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act, which provided vital resources to assist educational institutions “to prevent, prepare for, and respond to coronavirus.” In particular, the Act created an Education Stabilization Fund to disburse \$30.75 billion in aid to educational institutions and postsecondary students impacted by the virus. On March 27, 2020, this measure was signed into law by the President.

Article II, Section 3 of the United States Constitution states that the President, and those of the Administration, “shall take Care that the Laws be faithfully executed...”² As a result of the ongoing implementation of the CARES Act by the U.S. Department of Education (the Department), we ask that you review whether the Department has faithfully executed this law.

We ask that you pay particular attention to the Department’s implementation of key provisions of this law, including interpretations of provisions under the Act, policy decisions and decision-making processes, the guidance provided to States, educational institutions, students and families, any misconduct by the Secretary of Education or any member of her staff, the extent to which assistance is reaching institutions, school districts, and postsecondary students as intended,

¹ <https://www.nytimes.com/2020/05/15/us/coronavirus-first-case-snohomish-antibodies.html>

² <https://www.archives.gov/founding-docs/constitution-transcript#toc-section-3--2>

and whether the Department or any of its employees violated any applicable laws or regulations in the implementation of the CARES Act.

In carrying out this work, please pay particular attention to the following issues and consider all applicable processes and decisions that led to these issues and events:

1. On April 9, 2020, the Department issued a Certification and Agreement form governing the release of CARES Act funds for students under section 18004(a)(1), stating “The Secretary does not consider these individual emergency financial aid grants to constitute Federal financial aid under Title IV of the HEA.”³ However, on April 30, 2020, the Department issued guidance, stating “Only students who are or could be eligible to participate in programs under Section 484 in Title IV of the Higher Education Act of 1965, as amended (HEA), may receive emergency financial aid grants.”⁴ On May 21, 2020, the Department posted additional information on its website stating that such guidance was only “preliminary” and that the Department “continues to consider the issue of eligibility for HEERF emergency financial aid grants under the CARES Act and intends to take further action shortly.”⁵ On June 17, 2020, the Department published an interim final rule (IFR) in the Federal Register, restricting eligibility to title IV eligible students. This inconsistent and burdensome approach to interpreting the law has created confusion for institutions and students. Moreover, two federal judges recently issued preliminary injunctions preventing the Department from implementing or enforcing the IFR or the previous guidance in the State of Washington or for community colleges in the State of California.⁶
2. In an effort to stabilize higher education, the CARES Act provided funds for institutions to “prevent, prepare for, and respond to coronavirus” under section 18004(a)(1). In addition, section 18004(c) states that “an institution of higher education receiving funds under this section may use the funds received to cover any costs associated with significant changes to the delivery of instruction due to the coronavirus.” The Department, however, has interpreted these provisions in a way that would prevent institutions of higher education from using funds to make up for lost revenue. It remains unclear how the Department has arrived at this conclusion, given the lack of such a restriction in the CARES Act. Additionally, given the Department’s recent statements around the legal effect of its guidance, it is unclear whether it expects institutions of higher education to abide by this interpretation.
3. While the Department required students to abide by the same restrictions of student eligibility under Title IV of the HEA, the Department decided that certain Title IV restrictions should not apply to proprietary institutions, stating in its guidance for emergency grant aid that “Funds paid directly to institutions by the Department through

³ <https://www2.ed.gov/about/offices/list/ope/heerfstudentscertificationagreement42020.pdf>

⁴ <https://www2.ed.gov/about/offices/list/ope/heerfstudentfaqs.pdf>

⁵ <https://www2.ed.gov/about/offices/list/ope/caresact.html>

⁶ https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/031_Order_GrantingMtnPI.pdf

the HEERF will not be included as revenue for 90/10 purposes.”⁷ In addition, it is unclear whether the Department has provided sufficient guidance to proprietary institutions on how any CARES funds used toward tuition, fees, and other institutional charges should be considered for purposes of 90/10, as required by current regulations.⁸

4. The Department allocated funds under section 18004(a)(1) of the CARES Act on the basis of an institution’s six-digit OPEID,⁹ which excluded direct allocations to eligible branch campuses. While the main campus received an allocation encompassing funding based on the student enrollment of any applicable branch campuses, it is not clear if the Department provided any guidance to the main campus on how they should distribute that funding equitably to branch campuses.
5. On April 30, 2020, the Department issued information on the allocations for funding under section 18004(a)(2) for Historically Black Colleges and Universities (HBCUs), Tribally Controlled Colleges and Universities (TCUs), Minority Serving Institutions (MSIs), and other under-resourced institutions under the Strengthening Institutions Program (SIP). However, it seems that the Department initially allocated funding on the basis of the six-digit OPEID, excluding branch campuses that would have otherwise been eligible for funding. The Department stated it reserved two percent of funding within each program category to qualifying branch campuses, but it is not clear if this amount of money is sufficient to meet those institutions’ qualifying grant awards, and how the Department would allocate funds if the reserve amount is insufficient. The Department may be attempting to rectify this situation and has commenced a data collection effort to distribute funds to eligible branch campuses.
6. In addition, the Department used the formula under section 18004(a)(1) in allocating funds reserved under section 18004(a)(2), which disadvantaged certain programs and institutions, including graduate institutions that do not serve Pell recipients (one of the requirements of the formula under 18004(a)(1)). Further, in cases where an institution may have qualified for funding under one or more MSI program and the SIP program, the Department did not provide the institution the largest award for which it was eligible.
7. On April 30, 2020, the Department also provided information governing funds for section 18004(a)(3). Under the CARES Act, these funds were clearly meant for institutions that “the Secretary determines have the greatest unmet needs related to coronavirus....” The CARES Act also carried a special provision under section 18004(d)(1), granting priority consideration for an eligible institution that did not receive “at least \$500,000 and demonstrates significant unmet needs related to expenses associated with coronavirus.” Instead of requiring institutions to demonstrate their need for the funding reserved under section 18004(a)(3) through an application, the Department stated “Of the \$348.8 million available for awards under section

⁷ <https://www2.ed.gov/about/offices/list/ope/heerfstudentfaqs.pdf>

⁸ 668.28(a)(3)(i) states revenue includes funds generated from tuition, fees, and other institutional charges and 668.28(a)(5)(iv) states scholarships provided by the institution in the form of monetary aid or tuition discount must be included as revenue.

⁹ <https://www2.ed.gov/about/offices/list/ope/heerf90percentformulaallocationexplanation.pdf>

18004(a)(3), \$321.7 million is being used to raise all public and private nonprofit IHEs up to the \$500,000 level.”¹⁰ As a result of this methodology, certain institutions of higher education received more than \$450,000 in additional funding without any demonstration of need.¹¹ Moreover, this method produced a huge “windfall” for some institutions of higher education.¹² While, after criticism, the Department revised its approach, it serves as further evidence of the Department’s faulty legal interpretation and poor oversight of appropriated funds.

8. Pursuant to section 18001(a)(3), the CARES Act reserved funds for “grants to States, with the highest coronavirus burden to support activities under this heading in this Act.” However, the Department has announced competitions for States that limit the activities for this funding to a narrow selection of absolute priorities determined by the Department without any basis in the CARES Act. Section 18001(a)(3) requires the Secretary to determine coronavirus burden but does not provide authority for the Secretary to place limits on how States may use the funds.
9. As part of the funding provided for grants to States with the highest coronavirus burden under section 18001(a)(3) of the CARES Act, the Department issued a Notice Inviting Applications for a Reimagining Workforce Competition. Funds are being used to support business incubators, short-term training programs, and funds may be used to support Industry Recognized Apprenticeship Programs (IRAPs), an initiative of this Administration. None of the activities included in the NIA are mentioned in the CARES Act. Moreover, it seems the Department has diverted funding away from emergency needs for political purposes and to provide another source of funding for an Administrative initiative that has nothing to do with the Education Stabilization Fund or with the coronavirus national emergency. It is also unclear whether there is any evidence of effectiveness for small-business incubators, IRAPs, or short-term training programs in addressing the educational and economic challenges resulting from the national emergency. Moreover, Congress did consider the needs of workforce development programs and provided \$345 million for the Dislocated Worker National Reserve, which is managed by the Department of Labor.
10. Just a small fraction of the overall selection criteria for a \$180 million K-12 education competition for funding provided under section 18001(a)(3) is based on a State’s share of coronavirus cases per capita. As a result, States with the highest coronavirus caseloads could be denied funding intended to address their critical education needs.
11. On April 30, the Department released guidance interpreting section 18005(a), which states that school districts “shall provide equitable services in the same manner as provided under section 1117 of the [Elementary and Secondary Education Act of 1965] ESEA,” to require school districts to set aside an amount for equitable services based on the number of all private school students located in the school district, rather than only low-income private school students in the district as required by section 1117. If

¹⁰ <https://www2.ed.gov/about/offices/list/ope/methodologyfipse.pdf>

¹¹ <https://www2.ed.gov/about/offices/list/ope/allocationsfipse.pdf>

¹² https://www.insidehighered.com/news/2020/05/07/small-colleges-get-millions-while-other-colleges-struggle#.XrQZ_cKvTIA.twitter

followed, the guidance would cause school districts to allocate additional resources and services to wealthier private school students, thereby leaving a smaller amount of funds available to serve public school students.¹³ The Department believes the phrase “in the same manner” allows the Secretary’s interpretation to depart from section 1117 of ESEA; however, by referencing section 1117, Congress explicitly and clearly directed districts only to provide equitable services based on the number of low-income students, not all private school students, as would have been required had the CARES Act referenced section 8501 of ESEA.

12. Further, the Department recently clarified that its redefinition of the equitable services provision was designed to provide more money for equitable services than is required to be provided for such services under section 1117 of ESEA, with a spokesperson claiming that “only providing money for low-income private school students would place private school teachers and students at an unfair disadvantage.”¹⁴ Such statements raise serious doubts around whether the guidance was developed as a good faith effort to interpret the law.
13. On May 22, the Department released a letter to States announcing it would issue a rule on its interpretation of section 18005(a) “in the next few weeks and inviting public comments.”¹⁵ The letter further states “We trust that process will resolve any issues in plenty of time for next year.” Just more than one month before the school year starts in some communities, the Department finally issued its interim final rule, which goes into effect immediately and is available for public comment for 30 days. CARES funding was intended to go out quickly in order to help school districts plan for and respond to this emergency, including for assisting with technology for online learning for all students and other current needs. The school year has ended in many parts of the country and the Department’s actions in this area have prevented funds from being used for these purposes, and it is not clear how this issue will be resolved in plenty of time for the next school year.
14. As districts waited for the regulation to be final, the Department said school districts should put their CARES Act funds into an escrow account. Such actions sowed additional confusion and prevented school districts from using resources provided under the CARES Act from managing their response to this national emergency. Further, it is unclear what, if any, authority the Department has to ask grant recipients to withhold funding provided under the CARES Act while it conducts rulemaking.
15. The Notice Inviting Applications for a Rethink K-12 Education Models competition, supported by funding provided under section 18001(a)(3), includes an “equitable access” requirement resembling the Department’s interpretation of “equitable services” requirements under section 18005(a). Since section 18005(a) applies “equitable services” specifically to school districts receiving “funds under sections 18002 or

¹³ <https://edlabor.house.gov/media/press-releases/house-senate-education-leaders-call-on-devos-to-abandon-guidance-robbing-public-schools-of-covid-19-relief-funding>

¹⁴ https://www.huffpost.com/entry/betsy-devos-school-privatization_n_5eb3335ac5b6526942a16176

¹⁵ <https://blogs.edweek.org/edweek/campaign-k-12/2020/05/devos-covid-aid-private-school-students-rule.html>

18003,” it is unclear what, if any, authority the Department has to place a requirement like this on States for funds available under section 18001(a)(3).

16. Implementation of the CARES Act was centralized within a new organizational unit headed by Secretary DeVos. This comes roughly one year after the creation of a new Disaster Recovery Unit within the Department dedicated to managing the Department’s disaster response efforts. During Congressional testimony last year, Assistant Secretary Frank Brogan stated “We have learned that managing and coordinating all the Department’s efforts takes dedicated staff and resources.”¹⁶ The issues outlined above present a chaotic implementation process that is not helpful to the institutions, schools, or students we intended CARES Act funding to assist.

This is not an exhaustive list of the challenges and concerns raised by the Department’s implementation of the CARES Act, and there may be more matters that have not yet been brought to light. That is why it is essential that you review the Department’s implementation, and we ask that you coordinate with the Government Accountability Office as appropriate. Given the scope and magnitude of the national emergency we still face, it is essential that the funding and resources provided in the CARES Act be managed and distributed responsibly and in good faith. There are concerning indications that the Secretary has not done so, and we are hoping that a review by your office will help prevent mismanagement and misuse of these funds.

Sincerely,



ROSA L. DELAURO

Chair
Subcommittee on Labor, Health and Human
Services, Education, and Related Agencies
Committee on Appropriations
U. S. House of Representatives

PATTY MURRAY

Ranking Member
Committee on Health, Education, Labor
and Pensions
and
Subcommittee on Labor, Health and
Human Services, Education, and Related
Agencies
Committee on Appropriations
United States Senate

cc: The Honorable Gene L. Dodaro

¹⁶ <https://edlabor.house.gov/imo/media/doc/Frank%20Brogan%20Testimony.pdf>