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General Counsel

June 17, 2020

To: [California Community College Chief Business Officers](#)

**07: 07: 07: Eligibility for CARES Act Emergency Aid**

This morning, the United States District Court for the District of Columbia issued a preliminary injunction in the case entitled *Oakley v. DeVos*, [Northern District of California Case No. 4:20](#)

1611, an earlier statute that denied “federal public benefits” to certain “non-qualified” individuals based on immigration status. The district court ruled that Congress did not intend these student eligibility restrictions to apply to HEERF.

Among the students who have been precluded from CARES Act eligibility by the U.S. Department of Education are various groups under the following:

- students who are not U.S. citizens or permanent lawful permanent residents;
- other students with undocumented status;
- students with pending asylum applications;
- students with Temporary Protected Status or Deferred Enforced Departure status;
- students with U-visas;
- students who do not have a high school diploma or GED or equivalent;
- students enrolled only in non-degree certificate programs;
- students who are 25 years of age or older (with certain exceptions for students 25-29);
- students are also enrolled in high school;
- students who are not currently enrolled in a degree or certificate program;
- and
- students who are in default on federal student loans.

See 20 U.S.C. § 1091(a)(1)-(4). Notably, the last six categories of students are not unique to non-citizens alike. The Chancellor's Office calculated that these eligibility requirements precluded approximately 899,000 of the 1.5 million California community college students from receiving HEERF assistance. Of these students, we estimated that 275,000 would be eligible under Title IV, but were precluded from receiving HEERF Student Assistance because they applied for federal financial aid, and so would have no practical means to establish their eligibility.

California community colleges may now consider students who fall within any of the above restrictions to be eligible to receive HEERF Assistance.



It is important that community colleges conform to the intent of the CARES Act by making Student Assistance grants to address costs incurred as a result of campus disruption related to the coronavirus. In addition, colleges should:

ensure that HEERF funds are not to be used to replace regular income;  
make awards based on costs incurred due to campus disruption related to the coronavirus, rather than based on student income or wealth; and  
make clear that HEERF is time limited and only provided as a result of the public health emergency.

Colleges can provide the following information to students:

HEERF grants provide financial assistance for expenses that is intended to defray costs related to the current public health emergency and is not “income maintenance,” and therefore should not be considered a “public benefit” for public charge purposes;  
Students who have lost income due to campus jobs being suspended should seek relief for lost earnings through federal or state-funded COVID-19-related unemployment benefits rather than CARES Act emergency financial aid grants because unemployment benefits are excluded from public charge determinations;  
and  
Non-citizen students concerned about potential public charge consequences should consult with an immigration attorney. Legal resources for undocumented students are identified on the Chancellor’s [Undocumented Students](#) ([http://www.cccco.edu/Students/Support\\_Services/Special-population/Undocumented-Students](http://www.cccco.edu/Students/Support_Services/Special-population/Undocumented-Students)).

Additional information is available at [www.cccco.edu](#).

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I. BACKGROUND<sup>1</sup>

A. California Community Colleges and the COVID-19 Pandemic

The California Community College system represents the largest secondary system in the United States, with more than 2.1 million students attending over 114 college campuses annually, and 1.5 million students enrolled in the Spring 2020 semester. The community college mission includes offering academic and vocational instruction at a lower division level to a diverse student population to enhance economic growth and global competitiveness. Cal. Educ. Code § 66010.4(a)

In response to the COVID-19 pandemic and the related statewide shelter-in-place order issued March 19, 2020, plaintiffs closed their campuses and transitioned to majority remote learning. The transition required these institutions to mobilize their entire infrastructure, including by training faculty on remote instruction; procuring laptop devices and access to broadband internet connections for students; and creating virtual communities to provide core student services, such as instructional support, guidance counseling, and peer support. Plaintiffs also marshalled resources to help address students' support,

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million in enrollment fees due to disruptions caused by the COVID pandemic. For most of these colleges, 70 to 90 percent of their funding depends upon enrollment. Thus, disenrollment adversely affects the types of courses, educational programs, services, and instruction offered.

S O D L Q W L I I V ¶ L Q V W L W X W L R Q V

B. The CARES Act

On March 27, 2020, in response to the extraordinary public health and economic crisis caused by the COVID-19 pandemic, the CARES Act was signed into law. Among its many

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Northern District of California

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down their emergency assistance funds.  
The Certification expressly required compliance with its terms and conditions, as well as  
to comply with such conditions, may subject an IHE to liability under enumerated statutes and  
regulations, including regulations governing suspension and debarment, including federal  
funding. 2 C.F.R. §§ 180.700, 180.800. Further, the Certification encourages IHEs to exclude  
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FLWLJHQ RU SHURDSQ109Q(5)see also 34 C.F.R. § 668.33(a) (same). Title IV  
also requires that eligible students possess a valid social security number. 20 U.S.C. §  
1091(a)(4)(B);see also 34 C.F.R. § 668.32(i)Consequently,the following categories of students,  
among others, are not eligible for title IV assistance:(a) Dreamers with or without Deferred  
Action for Childhood Arrival status; (b) other students with undocumented status; (c) students  
with pending asylum applications; (d) students with Temporary Protected Status or Deferred  
Enforced Departure status; and (e) students with visas. Among citizens and noncitizens alike,  
title IV also excludes from eligibility students who: (a) do not have a high school diploma,  
General Education Development certificate, or equivalent Tm 0 g 0 G [(00000912 [(e)4( l)13(V)] T





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start slashing essential programs or continue to spend millions of dollars and risk a financial crisis  
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Clinton v. City of New York, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring).

Here, the parties dispute the appropriateness of § V L P S R V L W n s o t h e I F R Q G  
distribution of the emergency fund. Plaintiffs argue the CARES Act does not incorporate  
IV § V HOLJLELOLW\ UHTXLUH F u n d s, w h o d o e s i t d e l e g a t e a u t h o r i t y t o D O E + (  
to apply such restrictions. Rather, the CARES Act requires the Secretary to allocate funds to  
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(A) 75 percent according to the relative share of full-time equivalent enrollment of Federal Pell Grant recipients who are not exclusively enrolled in distance education courses prior to the coronavirus emergency; and

(B) 25 percent according to the relative share of full-time equivalent enrollment of students who were not Federal Pell Grant recipients who are not exclusively enrolled in distance education courses prior to the coronavirus emergency.

\* \* \* \* \*

(b) DISTRIBUTION.<sup>2</sup> The funds made available to each institution under subsection (a)(1) shall be distributed by the Secretary using the same systems as the Secretary otherwise distributes funding to each institution under title IV of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.).

(c) USES OF FUNDS.<sup>3</sup> Except as otherwise specified in subsection (a), 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, so long as such costs do not include payment to contractors for the provision of enrollment recruitment activities; endowments; or capital outlays associated with activities related to athletics, sectarian instruction or religious worship. Institutions of higher education shall use no less than 50 percent of such funds to provide emergency financial aid grants to students for expenses related to the disruption of campus operations due to coronavirus (including eligible direct costs of attendance, such as food, housing, course materials, technology, health care, and child care).

Id. § 18004, at 5678.

The entirety of Section 18004 contains a single explicit reference to title IV. Namely, Section 18004(b)(1) contains the only statutory provision cited in the CARES Act which describes the systems only refer to operational systems used for administration of funds eligibility requirements. See 20 U.S.C. §

18004(b)(1)(C) (“The Secretary shall use the systems used to administer the Federal student financial assistance programs authorized under title IV of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.) to distribute the funds made available to each institution under subsection (a)(1)”).

(c)(3) (similar). The Ninth Circuit has held that, here, the provision of funds would not be used to

1 statute to extend beyond the portion cited. *Navajo Nation v HHS*, 325 F.3d 133, 113940 (9th  
2 Cir. 2003)(by “[c]hoos[ing] to invoke only the fiscal provisions of the ISDEA, Congress  
3 incorporated it “with surgical precision “and did not intend to incorporate other provisions in the  
4 same statute) Here, the only express reference to title IV contained in Section 18004 is unrelated  
5 to eligibility requirements.

6 Congress has demonstrated consistently that it knows how to impose conditions on funding  
7 and delegate to the Secretary the authority to impose such conditions when intended. Indeed,  
8 Congress specified eligibility criteria in other provisions of the CARES Act.<sup>10</sup> Moreover, outside  
9 of the CARES Act, Congress has been explicit when previously imposing conditions on federal  
10 funds to IHEs in the Higher Education Act.<sup>11</sup> Congress has not equivocated when it intends to  
11 extend authority to the Secretary using terms such as “prescribe” or “may add conditions.”  
12 Congress has been explicit when it intended to provide the Secretary with authority to establish  
13 eligibility criteria or impose conditions for other higher education programs, grants, or loans  
14 again, using such terms as “may add conditions” or “may impose special conditions.”  
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16 Here, no such language exists in section 18004. While Congress has the power to extend  
17 authority to the Secretary, it is not required to express proactively that such authority does exist

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20 <sup>10</sup> See, e.g., § 6428(d), 134 Stat. at 335 (excluding “receiving recovery rebates”).

21 <sup>11</sup> See, e.g., 20 U.S.C. §§ 1011, 1011a, 1011i, 1011j (limiting use of federal funding by  
22 IHEs for discriminatory purposes, on the basis of participation in protected speech or activity, and  
in the absence of drug and alcohol abuse prevention programs).

23 <sup>12</sup> See, e.g., 20 U.S.C. § 1078 (Secretary may “add conditions” to higher education law);  
24 1087c(b)(2) (Secretary may “add conditions” to higher education law); 1087c(b)(1)(B) (Secretary  
25 1072(a)(3), (c)(7) (Secretary may “add conditions” to higher education law); 1072(a)(3), (c)(7) (Secretary  
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27 QHFHVVDU\ WR DFKLHYH iWSK1416X(U)S Secretary may impose special conditions for high risk grantees).

28 <sup>13</sup> See, e.g., 20 U.S.C. § 1002(a)(2)(B)(IV) (Secretary to issue “eligibility criteria for the eligible institutions”).

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inclusion of FTE students who were not Federal Pell Grant recipients, students who would be ineligible for title IV aid. ' H I H Q G h a Q i M o m f a t i o n and made allocations based on the plain meaning of the term in the legislation. Nothing more was needed.

Instead, defendants have manufactured ambiguity where none exists by imposing their own restrictions on the definition of student, thereby rendering the meaning of the term inconsistent within HEERF itself. Under defendants' interpretation

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actions violate the APA. First, similar to their constitutional arguments, plaintiffs contend that the  
Secretary's Order violates the APA as a matter of constitutional law. Plaintiffs argue that the Secretary's  
Order is arbitrary and capricious because it fails to provide a reasoned explanation for the Secretary's  
decision. Plaintiffs also argue that the Secretary's Order is an abuse of discretion because it is  
unreasonable. The Court finds that plaintiffs have demonstrated a likelihood of success on the merits of their  
claim that defendants exceed their limited authority under the CARES Act by imposing arbitrary  
restrictions and therefore violate the APA as well. See also *Los Angeles v. Barr*, 941 F.3d at 942  
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- x public health assistance for immunization, testing, and treatment of communicable diseases;
- x treatment under Medicare for emergency medical conditions, and
- x <sup>3</sup> > V @KR, UACash, in-kind emergency disaster relief

See 8 U.S.C. §§ 1611(b)(1)(A)(C), (E).<sup>25</sup>

In addition to these exceptions, other federally funded programs, services, and assistance may be exempted by the Attorney General under those programs.

(i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety[.]

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on wheels, and other such community nutritional services for persons requiring special assistance;  
(e) Medical and public health services (including treatment and prevention of diseases and injuries) and mental health, disability, or substance abuse assistance necessary to protect life or safety;

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precedent hold that a later, more specific statement may take priority over an earlier, broader  
statutory provision even if it is. See *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (relying on long  
standing canon of construction that a specific provision is construed as an exception to  
general one). See *Oregon Nat. Res. Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996) (citing  
<sup>3</sup> *Q R W Z L W K V W D H G D O J D E O D X W H W R U H O H Y D Q W e F d e H J R U I*  
repeatedly held that the phrase notwithstanding any other laws is not always construed literally.



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With respect to the students, the harm is significant.<sup>31</sup> Congress intended for HEERF Student Assistance to be used for basic necessities, such as food, housing, health care, and childcare, as well as essential tools for learning, such as course materials and technology. An interpretation of the CARES Act would exclude hundreds of thousands of students<sup>2</sup> including those in low-income communities and communities of color, which have been affected disproportionately by COVID-19<sup>2</sup> from receiving HEERF Student Assistance. R (¶ V LQWHUSUHWDWLRQ DOVR H[FOXGHV V[WXOHYDWHZKHUH DUH frontlines of the pandemic.



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Court finds this case warrants an order granting the relief ~~step~~<sup>35</sup>

IV. CONCLUSION

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