

United States Senate
WASHINGTON, DC 20510

April 7, 2020

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

Dear Secretary DeVos:

We write to request that the U.S. Department of Education (“the Department”) clarify whether it will allow for-profit colleges to be eligible for the Higher Education Emergency Relief Fund authorized by Congress in the *Coronavirus Aid, Relief, and Economic Security Act (CARES Act)*.¹ The Department has the authority to target funds under the *CARES Act* to public and private, nonprofit institutions. If the Department determines that for-profit colleges are eligible for this funding, we urge the Department to include in such a determination strong accountability policies to support students and protect taxpayers, including policies to prohibit for-profit colleges from using such funding for any purposes beyond those which directly support student instruction, emergency financial aid to students, and student support services central to schools’ educational missions.

The coronavirus disease 2019 (COVID-19) pandemic has jeopardized the health, learning, and livelihoods of millions of vulnerable students and currently threatens to critically destabilize colleges and universities across the country. In response to the global public health emergency caused by COVID-19 and its devastating effect on our nation’s institutions of higher education, Congress established the Higher Education Emergency Relief Fund (“the fund”) in the *CARES Act* to aid students and stabilize colleges and universities impacted by COVID-19.

The *CARES Act* defines eligibility for institutions of higher education in accordance with Title I of the *Higher Education Act of 1965 (HEA)*, giving the Department full authority to target funds to public and private, nonprofit institutions.² Within Title I of the HEA, section 101 does not include for-profit colleges.³ Section 102 of the HEA, which includes for-profit colleges and was added in a subsequent HEA reauthorization, explicitly states that this definition is narrowly “for purposes of [Title] IV [of the HEA].”⁴ By extension, for-profit colleges are currently excluded from all other non-Title IV grant programs authorized by HEA.⁵ Additionally, the *CARES Act* provides that ten percent of the fund flows through parts of the HEA, which are only

¹ Sec. 18004 of H.R.748, the Coronavirus Aid, Relief, and Economic Security Act, Public Law No: 116-136

² *Id.*

³ 20 U.S.C. § 1001

⁴ 20 U.S.C. § 1002

⁵ *Id.*

eligible to public and nonprofit institutions.⁶ As such, we believe the most legally sound interpretation of the CARES Act would exclude for-profit colleges from the fund entirely.

The *CARES Act* requires institutions spend funds on emergency financial aid to students and “any costs associated with significant changes to the delivery of instruction due to the coronavirus...”⁷ The Act further states that “[i]nstitutions 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 expenses under a student’s cost of attendance, such as food, housing, course materials, technology, health care, and child care).”⁸ The Department’s recent Notice of Proposed Rulemaking on distance education states that the percentage of students who were enrolled exclusively in distance learning prior to COVID-19 was highest among for-profit colleges (60 percent), reflecting relatively less need for funds to compensate for changes to the mode of delivery of instruction among these students and institutions.⁹

For all of these reasons, we encourage the Department to target funds under Section 18004(a)(1) to public and nonprofit institutions. If the Department determines that for-profit colleges are eligible to receive allocations from this fund, we strongly encourage the Department to follow the clear legislative intent behind the expressed purposes of the funds under the *CARES Act* to prohibit taxpayer dollars under the fund from being used to increase profits to private companies and investors, and include the following accountability policies to support students and protect taxpayers:

1. Require for-profit colleges that receive funds made available under Section 18004(a)(1) of the *CARES Act* to use one hundred percent of the funding for student instruction, emergency financial aid to students, and student support services central to the colleges’ educational mission.
2. Prohibit for-profit colleges from using funds made available under Section 18004(a)(1) of the *CARES Act* for executive compensation and require for-profit colleges that receive such funding to freeze executive compensation for at least one year after the receipt of funds to align with other executive compensation provisions in the *CARES Act*.¹⁰
3. Prohibit publicly-traded for-profit colleges that receive funds made available under Section 18004(a)(1) of the *CARES Act* from engaging in stock or share repurchases,

⁶ Sec. 18004 of H.R.748, the Coronavirus Aid, Relief, and Economic Security Act, Public Law No: 116-136, allocates 7.5 percent of the fund to parts A and B of title III, parts A and B of title V, and subpart 4 of part A of title VII, and allocates 2.5 percent of the fund for part B of title VII of the Higher Education Act of 1965. Only public and non-profit institutions of higher education are eligible for these funds.

⁷ Sec. 18004(c) of H.R.748; Public Law No: 116-136

⁸ *Id.*

⁹ 85 FR 18674

¹⁰ Sec. 4004 of H.R.748; Public Law No: 116-136. Sec. 4004, Limitation on certain employee compensation, requires that during the term of the loan plus one year, salaries for critical businesses are limited such no officer or employee whose total compensation exceeded \$425,000 in calendar year 2019 will receive: compensation greater than what they received calendar year 2019; or a severance package twice their 2019 pay; and no officer or employee of the eligible business whose total compensation exceeded \$3 million in calendar year 2019 may receive during any 12 consecutive months of such period total compensation in excess of the sum of: \$3 million plus half of any total over \$3 million.

dividend payments or any other capital distribution to shareholders to align with other such provisions in the *CARES Act*.¹¹

4. Prohibit for-profit colleges from using funds made available under Section 18004(a)(1) of the *CARES Act* for any advertising, marketing, or recruitment purposes.
5. Prohibit for-profit colleges that receive funds made available under Section 18004(a)(1) of the *CARES Act* from seeking additional stimulus funds from other sources authorized by the *CARES Act*, but which may be difficult or impossible for most public and nonprofit institutions of higher education to access, such as grants or loans administered by the Department of Treasury, the Federal Reserve System, or the Small Business Administration.¹²
6. Consider any funds made available to for-profit colleges under the *CARES Act* as federal revenues for the purpose of enforcing compliance with the 90/10 rule.¹³ In addition, publish in the Department's annual 90/10 report to Congress the amount of funding made available under the *CARES Act*, including the specific amount of funding made available under Section 18004(a)(1), to each for-profit college, as part of the required details of the amount and percentage of federal and non-federal revenues received by each college.
7. In the required report to Congress,¹⁴ detail how for-profit colleges used funds made available under Section 18004(a)(1), both in the aggregate and per institution, including the proportion of such funding for-profit colleges spent on student instruction, emergency financial aid to students, student support services, and any other disallowed purposes.

Please provide a written response to this letter by April 21, 2020. We appreciate your attention to this request. Please contact our offices if you have any questions.

Sincerely,

Elizabeth Warren
United States Senator

Richard J. Durbin
United States Senator

Sherrod Brown
United States Senator

Richard Blumenthal
United States Senator

¹¹ Sec. 4003 of H.R.748; Public Law No: 116-136

¹² Secs. 1102 & 4003 of H.R.748; Public Law No: 116-136

¹³ 20 USC 1094(d)(4)

¹⁴ Sec. 18004(e) of H.R.748; Public Law No: 116-136