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MEMORANDUM May 20, 2020

To: U.S. Senate Committee on Health, Education, Labor, and Pensions
Attention: Bryce McKibben

From: Kevin M. Lewis, Legislative Attorney, kmlewis@crs.loc.gov, 7-9973

Subject: **Eligibility Requirements for Emergency Financial Aid Grants to Students Under Section 18004 of the CARES Act**

This memorandum, prepared at your request,[1] analyzes whether institutions of higher education (IHEs)[2] may award emergency financial aid grants under Section 18004(a)(1)[3] of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)[4] to students who do not satisfy the eligibility criteria in Section 484[5] of Title IV of the Higher Education Act of 1965 (HEA).[6] The Department of Education (ED) has interpreted federal law to impose such an eligibility requirement[7] and the U.S. Code generally authorizes the Secretary of Education (Secretary) to promulgate rules and regulations to implement the programs she

[1] Information in this memorandum is drawn from publicly available sources and may be of general interest to Congress. CRS may therefore provide all or part of this information in memoranda or reports for general distribution to Congress. If so, CRS will preserve your confidentiality as a requester.

[2] For the statutory definition of IHE, see 20 U.S.C. §§ 1001-1002.

[3] The Frequently Asked Questions document in which ED announced that non-Title IV-eligible students are ineligible for emergency financial aid grants only purports to govern grants under Section 18004(a)(1) of the CARES Act; it does not purport to apply Title IV's eligibility requirements to grants under Section 18004(a)(2) or (3). *See* Department of Education, *Frequently Asked Questions about the Emergency Financial Aid Grants to Students under Section 18004 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act* 1, 4, *available at* www2.ed.gov/about/offices/list/ope/heerfstudentfaqs.pdf [hereinafter *FAQ*] ("*These FAQ address only those funds provided by the Secretary to an institution for emergency financial aid grants under Sections 18004(a)(1) and 18004(c) of the CARES Act* . . . . Only students who are or could be eligible to participate in programs under Section 484 in Title IV . . . may receive emergency financial aid grants.") (emphasis added). For that reason, this memorandum only analyzes eligibility requirements for Section 18004(a)(1) grants, not Section 18004(a)(2) or (3) grants. Nor does this memorandum analyze whether Section 484's eligibility requirements apply to students receiving emergency financial aid grants under Section 3504 of the CARES Act. *See* Pub. L. No. 116-136 § 3504 (2020) (codified at 20 U.S.C. § 1001 note). CRS can analyze either of those issues upon request.

[4] Pub. L. No. 116-136 § 18004 (2020) (codified at 20 U.S.C. § 3401 note). Besides making funds available for emergency financial aid grants to students, Section 18004 of the CARES Act also allocates funds to IHEs to cover certain COVID-19-related costs. *See id*. This memorandum only analyzes the provisions of Section 18004 governing grants to students.

[5] 20 U.S.C. § 1091.

[6] *Id*. §§ 1070-1099d. This memorandum does not analyze whether federal laws other than the HEA, such as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, would render certain categories of students ineligible for Section 18004 grants. *See, e.g.*, 8 U.S.C. § 1611(a). CRS can analyze that issue upon request.

[7] *See infra* "The Secretary Has Interpreted Applicable Federal Law to Prohibit IHEs from Awarding Section 18004(a)(1) Grants to Non-Title IV-Eligible Students."

administers.[8] However, neither the CARES Act nor Title IV explicitly prohibits non-Title IV-eligible[9] students from receiving emergency financial aid grants under Section 18004(a)(1).[10] Nor does the CARES Act expressly authorize ED to create or impose grant eligibility requirements that Congress did not codify in the statute itself.[11] In these circumstances, a court might invalidate the Secretary's determination that Section 18004(a)(1) grants are unavailable for non-Title IV-eligible students because:

- the Secretary did not announce that interpretation through notice-and-comment rulemaking or some other formalized process;[12] and
- the Secretary's interpretation is not a particularly persuasive reading of the statute.[13]

For several reasons described below, however, it is also possible—albeit less likely—that a court would uphold ED's interpretation.[14]

Statutory Background

Title IV Eligibility Requirements

Title IV establishes various federal programs to assist students attending IHEs, including grant programs,[15] student loan programs,[16] and work-study programs.[17] Section 484 of Title IV imposes various eligibility requirements that a student must satisfy "[i]n order to receive any grant, loan, or work assistance under" Title IV.[18] Among other requirements, the student must

- be either
  - a U.S. citizen or national;
  - a permanent resident of the United States; or
  - "in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident";[19] and
- either
  - hold a certificate of graduation from a secondary school (or a recognized equivalent);
  - have completed a secondary school education in a home school setting; or

[8] *See infra* "The U.S. Code Contains General Provisions Authorizing the Secretary to Promulgate Necessary Rules and Regulations."

[9] This memorandum uses the phrase "non-Title IV-eligible" to refer to students who do not satisfy one or more of the eligibility requirements in Section 484. *See infra* "Title IV Eligibility Requirements."

[10] *See infra* "The CARES Act Does Not Explicitly Prohibit IHEs from Awarding Section 18004(a)(1) Grants to Non-Title IV-Eligible Students"; "Title IV Does Not Explicitly Prohibit IHEs from Awarding Section 18004(a)(1) Grants to Non-Title IV-Eligible Students."

[11] *See infra* "The CARES Act Does Not Expressly Authorize ED to Establish Restrictions on the Use of HEERF Funds Other Than Those Specified in Section 18004."

[12] *See infra* "*Chevron* Step Zero." For background on notice-and-comment rulemaking, see CRS Report R44356, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, by Jared P. Cole, at 1-2.

[13] *See infra* "The *Skidmore* Doctrine."

[14] *See infra* "*Chevron* Step Zero"; *Chevron* Step One"; "*Chevron* Step Two."

[15] *See* 20 U.S.C. §§ 1070—1070h.

[16] *See id.* §§ 1071—1087-4, 1087a—1087j, 1087aa—1087ii.

[17] *See id.* §§ 1087-51—1087-58.

[18] *See id.* § 1091(a).

[19] *See id.* § 1091(a)(5).

    - be enrolled in an "eligible career pathway program" that satisfies certain statutory criteria;[20] and
- be "maintaining satisfactory progress" in his or her course of study;[21] and
- submit a certification containing various assurances and information to the Secretary, including the student's social security number;[22] and
- not be in default on a Title IV loan or owe a refund on a Title IV grant.[23]

Subject to certain exceptions, Section 484 also renders students convicted of drug offenses temporarily or permanently ineligible for Title IV assistance.[24] Section 484 also establishes modified eligibility requirements for students with intellectual disabilities.[25]

Section 18004 of the CARES Act

Section 18004 of the CARES Act established the Higher Education Emergency Relief Fund (HEERF) to assist students and IHEs adversely affected by COVID-19.[26] The CARES Act requires the Secretary to allocate and distribute money from the HEERF to IHEs according to complex statutory formulae, which IHEs may then use for specified purposes.[27]

As relevant here, Section 18004(a)(1) requires the Secretary to distribute 90% of the HEERF funds "to each [IHE] to prevent, prepare for, and respond to coronavirus."[28] Section 18004(a)(1)(A) directs the Secretary to apportion 75% of that 90%—that is, 67.5% of the money in the HEERF—to IHEs based on the number of students enrolled at that IHE who have received Federal Pell Grants under Title IV.[29] Section 18004(a)(1)(B) then obliges the Secretary to apportion the remaining fraction of that 90%—*i.e.*, 22.5% of the money in the HEERF—to IHEs based on the number of students who have *not* received Federal Pell Grants.[30] Section 18004(b) specifies that the Secretary will distribute the HEERF funds

[20] *See id.* § 1091(d)(1). *See also id.* § 1091(d)(2) (defining "eligible career pathway program"). This eligibility requirement does not apply to certain grant programs codified in Part A of Title IV. *See id.* § 1091(d)(1) (providing that a student must satisfy this eligibility requirement "to be eligible for any assistance *under subparts 1, 3, and 4 of part A* and parts B, C, D, and E" of Title IV) (emphasis added).

[21] *See id.* § 1091(a)(2). *See also id.* § 1091(c) (defining "satisfactory progress").

[22] *See id.* § 1091(a)(4) (requiring students to "file with the Secretary, as part of the original financial aid application process, a certification, . . . which shall include—(A) a statement of educational purpose stating that the money attributable to such grant, loan, or loan guarantee will be used solely for expenses related to attendance or continued attendance at such institution; and (B) such student's social security number").

[23] *See id.* § 1091(a)(3) (providing that the student must "not owe a refund on grants previously received at any institution under [Title IV], or be in default on any [loan under the Federal Perkins Loan program], or a loan made, insured, or guaranteed by the Secretary under [Title IV] for attendance at any institution").

[24] *See id.* § 1091(r).

[25] *See id.* § 1091(s).

[26] Pub. L. No. 116-136 § 18004 (2020) (codified at 20 U.S.C. § 3401 note).

[27] *See id.*

[28] *Id.* § 18004(a)(1).

[29] *See id.* § 18004(a)(1)(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 . . . ."). For background on Federal Pell Grants, see CRS Report R45418, *Federal Pell Grant Program of the Higher Education Act: Primer*, by Cassandria Dortch.

[30] *See* Pub. L. No. 116-136 § 18004(a)(1)(B) (2020) (codified at 20 U.S.C. § 3401 note) ("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.").

allocated by Section 18004(a)(1) "using the same systems as the Secretary otherwise distributes funding to each [IHE] under [T]itle IV."[31]

Section 18004(c) restricts how IHEs may use the money they receive under Section 18004(a)(1).[32] As especially relevant here, IHEs must "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)."[33] Section 18004(c) also forbids IHEs from using money allocated under Section 18004(a)(1) for "payment[s] to contractors for the provision of pre-enrollment recruitment activities; endowments; or capital outlays associated with facilities related to athletics, sectarian instruction, or religious worship."[34] Section 18004(c) does not, however, explicitly prohibit IHEs from providing emergency financial aid grants to non-Title IV-eligible students.[35] Indeed, Section 18004 does not expressly impose any eligibility requirements on student grant recipients at all;[36] the restrictions in Section 18004(c) only govern how *IHEs* may *use* HEERF funds, not *which* students can *receive* such funds.[37]

Section 18006 of the CARES Act also imposes an additional condition on HEERF funds: any IHE that receives such funds must, "to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus."[38] Here too, though, nothing in that provision pertains to students' eligibility for Section 18004 grants.[39]

Significantly, Congress did not codify Section 18004 in Title IV.[40] Perhaps for that reason, ED has stated that it "does not consider . . . individual emergency financial aid grants" under Section 18004(a)(1) "to constitute Federal financial aid under Title IV."[41]

The Funding Certification and Agreement Form

ED requires IHEs to submit a Funding Certification and Agreement form before they can receive funds for emergency financial aid grants under Section 18004(a)(1).[42] Among other things, that form requires IHEs to certify that they will (1) only use such funds for direct grants to students; (2) comply with certain statutory and regulatory reporting requirements; and (3) promptly distribute such grants to students.[43] As particularly relevant here, the form also requires IHEs to certify that they will comply with selected provisions of the Education Department General Administrative Regulations (EDGAR),[44] which, as

[31] *See id.* § 18004(b).

[32] *See id.* § 18004(c).

[33] *Id.*

[34] *Id.*

[35] *See id.*

[36] *See generally id.* § 18004.

[37] *See id.* § 18004(c).

[38] *See id.* § 18006.

[39] *See id.*

[40] *See* 20 U.S.C. § 3401 note.

[41] *See* Department of Education, *Recipient's Funding Certification and Agreement—Emergency Financial Aid Grants to Students under the Coronavirus Aid, Relief, and Economic Security (CARES) Act* 1, *available at* www2.ed.gov/about/offices/list/ope/heerfstudentscertificationagreement42020.pdf [hereinafter *Certification and Agreement Form*].

[42] *See id.* at 1-3.

[43] *See id.* at 2.

[44] *See id.* at 3 ("The Recipient assures and certifies the following: . . . . Recipient will comply with . . . the following provisions of Education Department General Administrative Regulations (EDGAR) 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99

discussed below, render specified individuals ineligible to receive certain ED-funded grants.[45] The form does not, however, explicitly require IHEs to certify that they will only distribute Section 18004(a)(1) grants to students who satisfy Title IV's eligibility requirements.[46]

The Secretary Has Interpreted Applicable Federal Law to Prohibit IHEs from Awarding Section 18004(a)(1) Grants to Non-Title IV-Eligible Students

The Secretary has construed the CARES Act to prohibit IHEs from awarding Section 18004(a)(1) grants to non-Title IV-eligible students.[47] ED announced that interpretation in a Frequently Asked Questions (FAQ) document that states that "[o]nly students who are or could be eligible to participate in programs under Section 484 in Title IV . . . may receive emergency financial aid grants" under Section 18004(a)(1).[48] As far as CRS's research reveals, ED has not codified that interpretation in a proposed or final regulation published in the Federal Register or the Code of Federal Regulations.

Although the FAQ does not state the legal basis for ED's interpretation,[49] an ED spokesperson has elaborated ED's legal reasoning in response to questions from reporters.[50] According to that spokesperson, two provisions in the CARES Act *implicitly* bar IHEs from awarding Section 18004(a)(1) grants to non-Title IV-eligible students, namely:[51]

- Section 18004(a)(1)(A)—which, as discussed above, requires the Secretary to allocate 67.5% of the HEERF funds to IHEs based on the number of students at those institutions who have received Federal Pell Grants under Title IV;[52] and
- Section 18004(b)—which, as mentioned previously, requires the Secretary to distribute 90% of the HEERF funds to IHEs "using the same systems as the Secretary otherwise distributes funding to each institution under Title IV."[53]

This spokesperson asserts that "Congress, by making those references to financial aid" under Title IV, *implied* that "it only wanted those who qualify for regular aid programs" under Title IV "to get the emergency grants" under Section 18004(a)(1).[54]

. . . .").

[45] *See infra* "The Funding Certification and Agreement Does Not Expressly Prohibit IHEs from Awarding Section 18004 Grants to Non-Title IV-Eligible Students."

[46] *See Certification and Agreement Form*, *supra* note 41, at 1-3.

[47] *See FAQ*, *supra* note 3, at 4.

[48] *See id.*

[49] *See id.*

[50] *See* Kery Murakami, *Does the Stimulus Package Really Exclude DACA Students?*, INSIDE HIGHER ED, May 4, 2020, *available at* insidehighered.com/news/2020/05/04/devos-right-does-cares-act-exclude-daca-students-aid.

[51] *See id.*

[52] *See* Pub. L. No. 116-136 § 18004(a) (2020) (codified at 20 U.S.C. § 3401 note) ("The Secretary shall allocate funding under this section as follows: (1) 90 percent to each institution of higher education to prevent, prepare for, and respond to coronavirus, by apportioning it—(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 . . . .").

[53] *Id.* § 18004(b).

[54] Murakami, *supra* note 50.

At Least One Group of Plaintiffs Has Challenged ED's Interpretation in Court

The Chancellor and the Board of Governors of California Community Colleges, along with several California community college districts (collectively the "California Plaintiffs"), have filed a lawsuit challenging ED's interpretation of Section 18004.[55] The California Plaintiffs claim that it is "unlawful and unconstitutional" for ED to apply Title IV's eligibility requirements to Section 18004(a)(1) grants.[56] The California Plaintiffs have therefore asked the U.S. District Court for the Northern District of California to enjoin ED "from imposing and enforcing the eligibility requirements identified in the" FAQ "or otherwise restricting eligibility for HEERF [a]ssistance to only those who are eligible under Title IV."[57] As of the date of this memorandum, that lawsuit remains pending.

The CARES Act Does Not Explicitly Prohibit IHEs from Awarding Section 18004(a)(1) Grants to Non-Title IV-Eligible Students

For several reasons, ED's interpretation of Section 18004 is not the most natural reading of the statute. As noted above, the CARES Act does not explicitly bar IHEs from awarding Section 18004(a)(1) grants to non-Title IV-eligible students.[58] To the contrary, Section 18004(c) states that IHEs "shall use no less than 50 percent of [HEERF] funds to provide emergency financial aid grants *to students*," without expressly restricting such grants to students who are eligible for Title IV assistance.[59] Although, as discussed earlier, Section 18004 forbids IHEs from using HEERF funds for certain purposes,[60] awarding emergency financial aid grants to non-Title IV-eligible students is not one of them.[61] That Section 18004 does not expressly forbid IHEs from providing emergency financial aid grants to non-Title IV-eligible students may imply that Congress did not intend to prevent those students from obtaining Section 18004(a)(1) grants.[62]

Moreover, the ED spokesperson's structural argument in support of ED's interpretation overlooks other subsections of Section 18004 that require the Secretary to distribute HEERF funds to IHEs without regard to whether students at those institutions have received or qualify for Title IV aid.[63] Section 18004(a)(1)(B), for instance, requires the Secretary to distribute 22.5% of available HEERF funds to IHEs based on the number of students attending those institutions "who were *not* Federal Pell Grant recipients."[64] Congress therefore apparently contemplated that the Secretary would allocate a significant

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[55] *See* Complaint for Declaratory, Injunctive, and Mandamus Relief, Oakley v. DeVos, 3:20-cv-03215 (N.D. Cal. May 11, 2020).

[56] *Id*. at 4.

[57] *Id*. at 33.

[58] *See supra* "Section 18004 of the CARES Act."

[59] *See* Pub. L. No. 116-136 § 18004(c) (2020) (codified at 20 U.S.C. § 3401 note) (emphasis added).

[60] *See supra* "Section 18004 of the CARES Act."

[61] *See* Pub. L. No. 116-136 § 18004(c) (2020) (codified at 20 U.S.C. § 3401 note).

[62] *Cf.* United States v. Montoya-Vasquez, No. 4:08CR3174, 2009 WL 103596, at *5 (D. Neb. Jan. 13, 2009) ("If Congress wanted to bar aliens with immigration detainers from eligibility for release, it could readily have said so, but did not.").

[63] *See supra* "The Secretary Has Interpreted Applicable Federal Law to Prohibit IHEs from Awarding Section 18004(a)(1) Grants to Non-Title IV-Eligible Students."

[64] *See* Pub. L. No. 116-136 § 18004(a) (2020) (codified at 20 U.S.C. § 3401 note) ("The Secretary shall allocate funding under this section as follows: (1) 90 percent to each institution of higher education to prevent, prepare for, and respond to coronavirus, by apportioning it . . . . (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.") (emphasis added).

percentage of the HEERF funds to IHEs based on factors unrelated to Title IV eligibility.[65] Thus, Section 18004(a)(1)(A)'s references to Federal Pell Grants do not necessarily imply that Congress intended to prohibit IHEs from awarding Section 18004(a)(1) grants to non-Title IV-eligible students.

In any event, the fact that Section 18004(a)(1) and (b) contain provisions specifying how the *Secretary* will distribute HEERF funds to *IHEs* does not necessarily imply anything about how *IHEs* may then distribute those funds to *students*.[66] Section 18004(a)(1) only establishes that the amount of HEERF funds that an IHE receives will depend in part on how many of its students received Federal Pell Grants; Section 18004(a)(1) does not say that those funds are exclusively available to Federal Pell Grant recipients or students who are otherwise eligible for Title IV assistance.[67] Similarly, the fact that Section 18004(b) requires the Secretary to *distribute* funds to IHEs "using the same systems as the Secretary otherwise distributes funding to each institution under Title IV" does not necessarily imply anything about how the IHEs may *use* those funds once they receive them.[68]

If Congress wanted to prohibit non-Title IV-eligible students from obtaining emergency financial aid grants, it could have said so in Section 18004(c), which, as noted above, is the provision of the CARES Act that limits how IHEs may use and distribute HEERF funds.[69] That Section 18004(c) does not explicitly incorporate Title IV's eligibility requirements by reference could imply that Congress did not intend to apply those restrictions to Section 18004 grants.[70]

Title IV Does Not Explicitly Prohibit IHEs from Awarding Section 18004(a)(1) Grants to Non-Title IV-Eligible Students

Title IV does not expressly apply Section 484's eligibility criteria to emergency financial aid grants under Section 18004 of the CARES Act either.[71] Section 484 states that its eligibility requirements apply to "grant[s], loan[s], or work assistance *under this subchapter*"—that is, under Title IV.[72] Section 18004(a)(1) grants do not qualify as grants "under" Title IV because, as noted above, Congress did not codify Section 18004 in Title IV.[73] The fact that "[t]he Secretary does not consider . . . individual emergency financial aid grants" under Section 18004(a)(1) "to constitute Federal financial aid under Title IV" further undercuts ED's argument that Title IV's eligibility requirements apply to Section 18004(a)(1) grants.[74]

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[65] *See id.* § 18004(a)(1)(B).

[66] *See id.* § 18004(a)(1) ("The *Secretary* shall allocate funding . . . . to each *institution of higher education* . . . .") (emphasis added); *id.* § 18004(b) ("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 . . . .") (emphasis added).

[67] *See id.* § 18004(a)(1).

[68] *See id.* § 18004(b).

[69] *See id.* § 18004(c) (2020) (specifying that IHEs may not use HEERF funds for "payment[s] to contractors for the provision of pre-enrollment recruitment activities; endowments; or capital outlays associated with facilities related to athletics, sectarian instruction, or religious worship").

[70] *Cf.* United States v. Montoya-Vasquez, No. 4:08CR3174, 2009 WL 103596, at *5 (D. Neb. Jan. 13, 2009) ("If Congress wanted to bar aliens with immigration detainers from eligibility for release, it could readily have said so, but did not.").

[71] *See* 20 U.S.C. § 1091.

[72] *See id.* § 1091(a) (emphasis added).

[73] *See* Pub. L. No. 116-136 § 18004 (2020) (codified at 20 U.S.C. § 3401 note).

[74] *See Certification and Agreement Form*, *supra* note 41, at 1.

The Funding Certification and Agreement Does Not Expressly Prohibit IHEs from Awarding Section 18004 Grants to Non-Title IV-Eligible Students

Nor does the Funding Certification and Agreement form that IHEs must complete as a prerequisite for obtaining Section 18004(a)(1) grant funds expressly bar IHEs from awarding emergency financial aid grants to non-Title IV-eligible students.[75] Although that form requires IHEs to agree to various conditions to receive HEERF funds, those conditions do not include a prohibition against distributing Section 18004(a)(1) grants to non-Title IV-eligible students.[76]

It is true, as noted above,[77] that the Funding Certification and Agreement form requires IHEs to follow the EDGAR rules codified in 34 C.F.R. §§ 75.60-75.62.[78] Those regulations render individuals who are not current on certain educational and government debts ineligible for ED-funded discretionary grants.[79] While those regulatory eligibility criteria overlap to a limited extent with the eligibility requirements codified in Section 484,[80] they are not coextensive.[81] Thus, there is nothing in the Funding Certification and Agreement form that explicitly bars IHEs from awarding Section 18004(a)(1) grants to non-Title IV-eligible students, so long as they are current on their debts under 34 C.F.R. §§ 75.60-75.62.[82]

The CARES Act Does Not Expressly Authorize ED to Establish Restrictions on the Use of HEERF Funds Other Than Those Specified in Section 18004

Neither Section 18004 nor its neighboring provisions expressly delegate authority to the Secretary to promulgate restrictions on the permissible uses of HEERF funds other than those set forth in the statutory text.[83] Section 18004 therefore differs from other provisions in the CARES Act that expressly authorize administrative agencies to establish eligibility requirements for other CARES Act assistance. For example, Section 2210 authorizes the Secretary of Labor to "determine eligibility criteria for" short-time compensation program grants.[84] The fact that some CARES Act provisions authorize agencies to establish new eligibility requirements, but Section 18004 does not, may imply that Congress did not anticipate that

[75] *See id.* at 1-3. *See generally supra* "The Funding Certification and Agreement Form."

[76] *See Certification and Agreement Form*, *supra* note 41, at 1-3.

[77] *See supra* "The Funding Certification and Agreement Form."

[78] *See Certification and Agreement Form*, *supra* note 41, at 3 ("Recipient will comply with . . . 34 CFR part[] 75 . . . .").

[79] *See* 34 C.F.R. § 75.60(a) ("An individual is ineligible to receive a . . . discretionary grant funded by [ED] if the individual—(1) is not current in repaying a debt or is in default . . . on a debt—(i) Under a program listed in paragraph (b) of this section; or (ii) To the Federal Government under a nonprocurement transaction; and (2) Has not made satisfactory arrangements to pay the debt."); *id.* § 75.60(b) (listing types of educational debts that trigger 34 C.F.R. § 75.60(a)'s ineligibility provision); *id.* § 75.62(b) ("An entity . . . may not award a . . . discretionary grant to an individual if . . . The Secretary informs the entity that the individual is ineligible under § 75.60.").

[80] *See* 20 U.S.C. § 1091(a) ("In order to receive any grant, loan, or work assistance under this subchapter, a student must . . . . (3) not owe a refund on grants previously received at any institution under this subchapter, or be in default on any loan from a student loan fund at any institution provided for in part E, or a loan made, insured, or guaranteed by the Secretary under this subchapter for attendance at any institution . . . .").

[81] *See id.* § 1091. *See also supra* "Title IV Eligibility Requirements."

[82] *See Certification and Agreement Form*, *supra* note 41, at 1-3.

[83] *See* Pub. L. No. 116-136 §§ 18001-18008 (2020) (codified at 20 U.S.C. § 3401 note).

[84] *See id.* § 2110(a)(3) (codified at 15 U.S.C. § 9028) (requiring the Secretary of Labor to "determine eligibility criteria for" short-time compensation program grants under the CARES Act).

the Secretary would apply restrictions on the uses of HEERF funds other than those expressly codified in the statute.[85]

The U.S. Code Contains General Provisions Authorizing the Secretary to Promulgate Necessary Rules and Regulations

The U.S. Code contains at least two general provisions that authorize the Secretary to issue rules and regulations necessary to implement the programs that ED administers. The first, 20 U.S.C. § 3474, authorizes the Secretary "to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or [ED]."[86] The second, 20 U.S.C. § 1221e-3. states that "in order to carry out functions otherwise vested in the Secretary," the Secretary may "make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by," ED.[87] The question, then, is whether the Secretary's interpretation of Section 18004 constitutes a permissible exercise of these general rulemaking authorities.

A Court Would Probably Not Defer to ED's Interpretation of Title IV and the CARES Act

Courts perform a multi-part analysis derived from the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*. when evaluating whether an agency has permissibly construed a statute that the agency implements.[88] First, the court conducts an inquiry that administrative law specialists call "*Chevron* Step Zero."[89] At *Chevron* Step Zero, the court assesses (1) whether "Congress delegated authority to the agency generally to make rules carrying the force of law," and (2) whether the agency promulgated the interpretation in question "in the exercise of that authority."[90] If the answer to either of those two questions is no, then the court will not afford the agency's interpretation any special deference,[91] but it may still uphold the agency's interpretation if the court finds it persuasive.[92]

If, by contrast, the answer to both questions is yes, the court then applies an analytical framework known as the *Chevron* doctrine.[93] Under *Chevron*, a court will defer to an agency's interpretation of a statute it administers if (1) the statute is ambiguous or silent about the issue in question, and (2) the agency's

[85] *Cf., e.g.*, United States v. Sampson, 486 F.3d 13, 31 (1st Cir. 2007) ("[T]he inclusion of a term in one part of a statute is persuasive evidence that its omission elsewhere is deliberate . . . .").

[86] 20 U.S.C. § 3474.

[87] *Id*. § 1221e-3.

[88] 467 U.S. 837 (1984).

[89] *See, e.g.*, Or. Rest. & Lodging Ass'n v. Perez, 816 F.3d 1080, 1086 n.3 (9th Cir. 2016). *See generally* CRS Report R44954, Chevron *Deference: A Primer*, by Valerie C. Brannon & Jared P. Cole, at 4-13.

[90] United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

[91] *See, e.g.*, Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) ("Here, . . . we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

[92] *See, e.g.*, *Mead*, 533 U.S. at 234-35.

[93] *See, e.g.*, *id.* at 229. *See generally* Brannon & Cole, *supra* note 89.

interpretation is reasonable.[94] Courts refer to these inquiries as *Chevron* Step One and *Chevron* Step Two, respectively.[95]

Because several litigants have challenged ED's construction of Section 18004 in court,[96] the judiciary will likely have to decide whether *Chevron* applies to that interpretation, and, if so, whether ED's interpretation merits deference. As explained below, the fact that ED did not announce its interpretation through notice-and-comment rulemaking makes it unlikely that a court would defer to that interpretation under *Chevron*.[97] Still, CRS cannot guarantee that ED's failure to invoke the notice-and-comment rulemaking procedure would render ED's interpretation categorically ineligible for *Chevron* deference.[98] In the unlikely event that the court did end up evaluating ED's interpretation under the *Chevron* framework, the court would probably uphold that interpretation because (1) the statute is silent about eligibility requirements for Section 18004(a)(1) grants, and (2) courts applying the *Chevron* doctrine often interpret statutory silence as an implicit delegation to the agency to fill the gap.[99] Moreover, even if the court determined that ED's failure to announce its interpretation through notice-and-comment rulemaking rendered the *Chevron* doctrine inapplicable, there is still a chance—albeit a relatively small one—that the court might uphold the interpretation under a less deferential standard known as the *Skidmore* doctrine.[100]

Chevron Step Zero

When an agency announces an interpretation of a statute it administers in an informal guidance document, courts are much less willing to defer to that interpretation than when the agency promulgates its interpretation through a more formalized process, such as notice-and-comment rulemaking.[101] As noted above,[102] ED announced its interpretation that non-Title IV-eligible students are ineligible for Section 18004(a)(1) grants in an informal FAQ document, not a regulation published in the Code of Federal Regulations or the Federal Register.[103] Thus, even though 20 U.S.C. §§ 3474 and 1221e-3 delegate

[94] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). *See generally* Brannon & Cole, *supra* note 89, at 13-21.

[95] *See generally* Brannon & Cole, *supra* note 89, at 13-21.

[96] *See supra* "At Least One Group of Plaintiffs Has Challenged ED's Interpretation in Court."

[97] *See infra* "*Chevron* Step Zero."

[98] *See infra id*.

[99] *See infra* "*Chevron* Step One;" "Chevron Step Two."

[100] *See infra* "The *Skidmore* Doctrine."

[101] *Compare, e.g.*, Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) ("Here, . . . we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."), *with, e.g.*, Sierra Club v. U.S. Army Corps of Eng'rs, 909 F.3d 635, 644 (4th Cir. 2018) ("When an agency's interpretation 'derives from notice-and-comment rulemaking,' it will 'almost inevitably receive *Chevron* deference.'") (quoting Knox Creek Coal Corp. v. Sec'y of Labor, Mine Safety & Health Admin., 811 F.3d 148, 159 (4th Cir. 2016)).

[102] *See supra* "The Secretary Has Interpreted Applicable Federal Law to Prohibit IHEs from Awarding Section 18004(a)(1) Grants to Non-Title IV-Eligible Students."

[103] *See FAQ*, *supra* note 3, at 4. This memorandum does not address whether, if ED had counterfactually announced its interpretation in a regulation rather than an informal guidance document, federal law would have authorized ED to promulgate that regulation without complying with the usual notice-and-comment procedures. *See* 5 U.S.C. § 553(a)(2) (providing that the

authority to the Secretary to "make rules carrying the force of law,"[104] the Secretary did not announce her interpretation of Section 18004 "in the exercise of that authority."[105] The court will therefore probably not apply the *Chevron* framework to ED's interpretation.[106] As explained below, if the court does not apply the *Chevron* standard, it will be more likely to invalidate ED's interpretation.[107]

That said, an agency's failure to conduct notice-and-comment rulemaking does not always render that agency ineligible for *Chevron* deference.[108] Courts sometimes apply the *Chevron* framework to interpretations announced through less formal methods depending on

- whether the interpretation at issue involves an "interstitial" legal question;
- the agency's expertise in the area;
- the question's importance to the statute's administration;
- the complexity of the issue and the statutory scheme; and
- whether the agency has carefully considered the legal question over a long period.[109]

Depending on how the court applies those factors, it might hold that ED's failure to engage in notice-and-comment rulemaking does not deprive ED's interpretation of *Chevron* deference. As explained below, if the court reached that conclusion, it would be more likely to uphold ED's interpretation.[110]

Chevron Step One

If the court determined that the *Chevron* framework applies even though ED did not conduct notice-and-comment rulemaking, it would first assess whether the text of the CARES Act or Title IV unambiguously

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Administrative Procedure Act (APA)'s notice-and-comment procedures do not apply to any "matter relating to . . . grants"); City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 613 (E.D. Pa. 2017) (holding that "grant conditions . . . are not subject to the . . . requirements that the agency publish general notice of proposed rulemaking in the Federal Register . . . and provide interested persons an opportunity to participate in rulemaking through submission of written data or arguments"); 5 U.S.C. § 553(b)(B) (providing that the APA's notice-and-comment procedures do not apply "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest"); Cole, *supra* note 12, at 5-7 (explaining that courts generally find good cause for an agency to bypass the notice-and-comment rulemaking during time-sensitive emergency situations).

[104] *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). *See generally supra* "The U.S. Code Contains General Provisions Authorizing the Secretary to Promulgate Necessary Rules and Regulations."

[105] *Mead*, 533 U.S. at 226-27.

[106] *Cf. Christensen*, 529 U.S. at 587 ("Here, . . . we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

[107] *See infra* "The *Skidmore* Doctrine."

[108] *See, e.g.*, *Mead*, 533 U.S. at 230-31 ("[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded. The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*.") (internal citations omitted); Barnhart v. Walton, 535 U.S. 212, 221 (2002) ("[T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due.") (internal citations omitted).

[109] *See Barnhart*, 535 U.S. at 222 ("In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.").

[110] *See infra* "*Chevron* Step One"; "*Chevron* Step Two."

forecloses ED from applying Title IV's eligibility requirements to Section 18004(a)(1) grants.[111] Although, as discussed above, neither the CARES Act nor Title IV explicitly apply Section 484's eligibility requirements to Section 18004,[112] neither of those laws expressly forbid ED from applying or imposing those eligibility requirements either.[113] Rather, the applicable statutes are silent about whether non-Title IV-eligible students are eligible for Section 18004(a)(1) grants.[114] Because courts applying the *Chevron* doctrine generally construe statutory silence as an implicit congressional delegation of authority to the agency to fill a statutory gap, a court might find that Section 18004's text does not unambiguously preclude ED's interpretation under *Chevron* Step One.[115] If the court did so, it would proceed to *Chevron* Step Two to evaluate whether ED's interpretation is reasonable.[116]

The U.S. Court of Federal Claims' decision in *Meyers v. United States* shows how a court might analyze the relevant statutes at *Chevron* Step One.[117] In that case, the Natural Resources Conservation Service (NRCS) promulgated regulations to implement the Conservation Security Program (CSP), which provided federal financial assistance to certain agricultural producers.[118] The NRCS regulations, however, established eligibility requirements for CSP assistance that the CSP statute did not explicitly impose.[119] Although the CSP statute authorized the NRCS to promulgate regulations to implement the CSP,[120] it did not expressly empower the NRCS to create eligibility criteria more restrictive than those in the governing statute.[121] Several cattle ranchers who did not satisfy the additional eligibility requirements in the NRCS regulation therefore challenged the added requirements in court.[122] The court, applying the *Chevron* Step One framework, determined that the CSP statute did not unambiguously foreclose the NRCS's interpretation.[123] The court emphasized that the statute was "silent with respect to whether the NRCS ha[d] the discretion to adopt eligibility criteria not contained in the statute."[124] The court therefore

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[111] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[112] *See supra* "The CARES Act Does Not Explicitly Prohibit IHEs from Awarding Section 18004(a)(1) Grants to Non-Title IV-Eligible Students"; "Title IV Does Not Explicitly Prohibit IHEs from Awarding Section 18004(a)(1) Grants to Non-Title IV-Eligible Students."

[113] *See, e.g.*, 20 U.S.C. § 1091; Pub. L. No. 116-136 § 18004 (2020) (codified at 20 U.S.C. § 3401 note).

[114] *See, e.g.*, 20 U.S.C. § 1091; Pub. L. No. 116-136 § 18004 (2020) (codified at 20 U.S.C. § 3401 note).

[115] *See, e.g.*, Van Hollen v. FEC, 811 F.3d 486, 495 (D.C. Cir. 2016) ("Congressional silence . . . is, in *Chevron* terms, 'an implicit delegation from Congress to the agency to fill in the statutory gaps.'") (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)) (emphasis omitted).

[116] *See, e.g.*, Nat'l City Bank of Ind. v. Turnbaugh, 463 F.3d 325, 332 (4th Cir. 2006) ("[I]n cases of statutory silence, we 'must defer, under *Chevron*, to [an agency's interpretation of its governing statute], so long as that interpretation is permissible in light of the statutory text and reasonable.'") (quoting Ohio Valley Envtl. Coal. v. Bulen, 429 F.3d 493, 498 (4th Cir. 2005)).

[117] *See* 96 Fed. Cl. 34, 54 (2010).

[118] *See id.* at 37 ("Under the CSP, [the United States] provides financial and technical assistance to eligible producers who adopt specified conservation practices on eligible land.").

[119] *See id.* at 51 ("[T]he CSP regulations contain eligibility requirements that were not contained in the CSP statute.").

[120] *See id.* at 53 ("[T]he CSP statute contained an express delegation of rulemaking authority specifically empowering the agency to adopt regulations to implement the CSP statute.").

[121] *See id.* at 46 ("[T]he CSP statute is silent with respect to whether the NRCS may impose restrictive eligibility requirements in addition to those expressly set forth in the statute.").

[122] *See id.* at 36, 51 ("In this case, the owners and operators of two cattle ranches seek damages . . . for payments they would have received from the government if they had been allowed to participate in an agricultural conservation program authorized by Congress . . . . Plaintiffs were excluded from participation in the CSP based upon their failure to meet an eligibility requirement that was set forth in the CSP regulations, but which was not expressed in the CSP statute.").

[123] *See id.* at 54 ("[T]he CSP statute does not address the precise question at issue . . . .").

[124] *Id.*

proceeded to *Chevron* Step Two to assess whether it was reasonable for the NRCS to impose the additional eligibility requirements.[125] This memorandum discusses the *Meyers* court's *Chevron* Step Two holding below.[126]

It is true that some courts have applied *Chevron* Step One to invalidate agencies' attempts to impose eligibility requirements for CARES Act programs that Congress did not codify in the CARES Act itself.[127] In *DV Diamond Club of Flint, LLC v. U.S. Small Business Administration*, for instance, a group of adult-oriented businesses challenged a Small Business Administration (SBA) rule prohibiting those businesses from obtaining loans under the CARES Act's Paycheck Protection Program (PPP).[128] The relevant provision of the CARES Act, however, does not explicitly render adult-oriented businesses ineligible for PPP loans.[129] To the contrary, the applicable provision states that *any* business concern of a particular size is eligible to receive a PPP loan during a specified period.[130] The U.S. District Court for the Eastern District of Michigan therefore concluded that the CARES Act unambiguously foreclosed the SBA from creating a new eligibility requirement forbidding adult-oriented businesses from participating in the PPP.[131]

Critically, however, Section 18004 differs from the PPP provision in a potentially dispositive respect. Unlike Section 18004, which is silent about which students may receive emergency financial aid grants,[132] the PPP provision expressly states that *any* business that meets certain statutory criteria is eligible to receive a PPP loan.[133] The *DV Diamond Club* court therefore held that "Congress's express listing of [those] eligibility criteria indicate[d] that Congress did not intend there to be any other criteria for loan guarantee eligibility."[134] Thus, the court explained, the SBA contravened the statute's unambiguous text by imposing additional eligibility limitations.[135] Section 18004, by contrast, does not *entitle* any particular student to an emergency financial aid grant; the provision merely requires IHEs to grant at least 50% of the HEERF funds they receive to students.[136] For that reason, establishing a new eligibility requirement that categorically denies emergency financial aid grants to non-Title IV-eligible students might not

[125] *See id.* ("[T]he court must proceed to the second step of the *Chevron* analysis to determine whether the agency's interpretation of the statute, as embodied in the CSP regulations, is based upon a permissible construction of the statute.").

[126] *See infra* "*Chevron* Step Two."

[127] For similar cases outside the CARES Act context, see Sunrise Coop., Inc. v. USDA, 891 F.3d 652, 654-59 (6th Cir. 2018); Torres v. OPM, 124 F.3d 1287, 1288-91 (Fed. Cir. 1997).

[128] No. 20-cv-10899, 2020 WL 2315880, at *1-2 (E.D. Mich. May 11, 2020).

[129] *See* 15 U.S.C. § 636(a)(36)(D).

[130] *See DV Diamond Club*, 2020 WL 2315880, at *10 ("[T]he text of the PPP makes clear that every business concern meeting the statutory criteria is eligible for a PPP loan during the covered period. Congress identified in the PPP only two criteria that a business concern must satisfy in order to qualify for loan guarantee eligibility: (1) during the covered period (2) it must have less than 500 employees or less than the size standard in number of employees established by the [SBA] for the industry in which the business operates.") (analyzing 15 U.S.C. § 636(a)(36)(D)(i)).

[131] *See id.* at *12 ("[T]he plain language of the PPP makes clear that any business concern is eligible for a PPP loan if it employed the requisite number of Americans during the covered period. Thus, the Defendants may not exclude Plaintiffs from participating in the PPP on the ground that they present entertainment or sell products of a 'prurient sexual nature.'").

[132] *See* Pub. L. No. 116-136 § 18004 (2020) (codified at 20 U.S.C. § 3401 note).

[133] *See* 15 U.S.C. § 636(a)(36)(D)(i) (stating that "*any* business concern . . . shall be eligible to receive a covered loan" if it meets the statute's size criteria) (emphasis added).

[134] 2020 WL 2315880, at *10. *Cf.* Sunrise Coop., Inc. v. USDA, 891 F.3d 652, 654-59 (6th Cir. 2018); Torres v. OPM, 124 F.3d 1287, 1288-91 (Fed. Cir. 1997).

[135] *See* 2020 WL 2315880, at *10.

[136] *See* Pub. L. No. 116-136 § 18004(c) (2020) (codified at 20 U.S.C. § 3401 note) ("[IHEs] shall use no less than 50 percent of such funds to provide emergency financial aid grants to students . . . .").

irreconcilably conflict with the Section 18004's text under *Chevron* Step One, even if that interpretation is not the most natural one.[137]

Chevron Step Two

If a court applying the *Chevron* doctrine determined that the CARES Act's language did not unambiguously foreclose ED's interpretation of Section 18004 at *Chevron* Step One, it would then analyze whether the interpretation was reasonable at *Chevron* Step Two. "Judicial review at step two of *Chevron* is 'highly deferential,' and the court must 'accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.'"[138] Thus, if ED successfully reached *Chevron* Step Two, the court would probably defer to the agency's construction of Section 18004—even though, for the reasons discussed above, ED's interpretation may not be the best reading of the statute.[139]

Meyers, discussed above,[140] shows how a court might evaluate ED's interpretation at *Chevron* Step Two. After the *Meyers* court determined at *Chevron* Step One that the CSP statute did not unambiguously foreclose the NRCS's interpretation, it held that the NRCS reasonably construed that statute to impose additional eligibility requirements.[141] The court first noted that although the CSP statute did not expressly authorize the NRCS to create new eligibility requirements, it did not explicitly forbid NRCS from doing so either.[142] The court also observed that nothing in the CSP statute's legislative history suggested that NRCS lacked authority to promulgate additional eligibility criteria.[143] Finally, the court reasoned that "the CSP statute contain[ed] far too many gaps to be administered in the absence of implementing regulations."[144] Because Congress directed the NRCS to "establish" the CSP but only provided a skeletal outline of the program's elements, the court held that the CSP statute implicitly delegated authority to the NRCS to develop nonstatutory eligibility criteria.[145] The court therefore rejected the ranchers' challenge to the agency's regulations.[146]

Meyers could therefore support an argument that ED permissibly interpreted Section 18004 under *Chevron* Step Two by imposing eligibility requirements on emergency financial aid grants that aren't expressly codified in the CARES Act. That said, it might remain open for a party to distinguish *Meyers* by

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[137] *See, e.g.*, Nat'l City Bank of Ind. v. Turnbaugh, 463 F.3d 325, 332 (4th Cir. 2006) ("[I]n cases of statutory silence, we 'must defer, under *Chevron*, to [an agency's interpretation of its governing statute], so long as that interpretation is permissible in light of the statutory text and reasonable.'") (quoting Ohio Valley Envtl. Coal. v. Bulen, 429 F.3d 493, 498 (4th Cir. 2005)); Van Hollen v. FEC, 811 F.3d 486, 495 (D.C. Cir. 2016) ("Congressional silence . . . is, in *Chevron* terms, 'an implicit delegation from Congress to the agency to fill in the statutory gaps.'") (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)) (emphasis omitted).

[138] *E.g.*, Cigar Ass'n of Am. v. FDA, 315 F. Supp. 3d 143, 159 (D.D.C. 2018) (quoting Vill. of Barrington v. Surface Transp. Bd., 636 F.3d 650, 667 (D.C. Cir. 2011); Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005)).

[139] *See id.*

[140] *See supra* "*Chevron* Step One."

[141] *See* 96 Fed. Cl. 34, 54-55 (2010) ("The court holds that the interpretation of the CSP statute advanced by NRCS is reasonable, and that the CSP regulations were authorized and consistent with the statute . . . . The interpretation of the CSP statute proposed by NRCS—*i.e.*, that the agency has the discretion to limit eligibility in the program—is not unreasonable.").

[142] *See id.* at 54 ("First, the express language of the CSP statute does not proscribe the adoption of additional eligibility requirements by the NRCS.").

[143] *See id.* at 55 ("[T]he legislative history of the statute is consistent with an interpretation that authorizes the agency to limit participation in the program.").

[144] *Id.* at 54-55.

[145] *See id.* ("[I]t is apparent that the CSP statute contains far too many gaps to be administered in the absence of implementing regulations. The statute provides a general framework for the CSP, but directs the NRCS to 'establish' the program.").

[146] *See id.* at 36.

arguing that, unlike the CSP statute, Section 18004 does not "contain[] far too many gaps to be administered in the absence of" eligibility requirements devised by ED.[147]

The *Skidmore* Doctrine

As previously stated, the court would only apply this deferential standard if it determined at *Chevron* Step Zero that ED's decision to promulgate its interpretation without conducting notice-and-comment rulemaking did not disqualify it from *Chevron* deference.[148] As explained above, however, the fact that ED announced its interpretation in an informal FAQ rather than in a regulation makes it unlikely the court would apply the *Chevron* doctrine.[149] As this section of the memorandum explains, it is more likely that the court would instead apply a less deferential standard or grant ED's interpretation no deference at all.

When a court determines that an agency's failure to promulgate an interpretation through notice-and-comment rulemaking disentitles that interpretation to *Chevron* deference, courts instead afford such informal interpretations "respect proportional to [their] 'power to persuade.'"[150] This principle is known as the *Skidmore* doctrine.[151] Thus, if the court determined that ED's failure to announce its interpretation of Section 18004 through the notice-and-comment rulemaking process rendered *Chevron* inapplicable, it would assess "the merit of [the interpretation's] thoughtfulness, logic, and expertness, its fit with prior interpretations, and any other sources of weight."[152]

For several reasons, the court might find ED's interpretation of Section 18004 unpersuasive under the *Skidmore* standard. First, ED's current interpretation does not "fit" particularly well "with [its] prior interpretations" of Section 18004.[153] For one, ED's determination that Title IV's eligibility requirements apply to Section 18004(a)(1) grants is difficult to reconcile with its position that Section 18004(a)(1) grants do not "constitute Federal financial aid under Title IV."[154] ED's interpretation is also inconsistent with the position the Secretary took in an April 9, 2020 letter to IHEs that stated that (1) IHEs enjoy "significant discretion on how to award" HEERF assistance to students; (2) each IHE "may develop its own system and process for determining how to allocate [HEERF] funds which may include distributing the funds to *all* students"; and (3) "[t]he *only* statutory requirement" governing the use of emergency financial aid grants "is that the funds be used to cover expenses related to the disruption of campus operations due to coronavirus."[155] Second, the FAQ does not include any legal analysis explaining the basis for ED's interpretation.[156] In particular, the FAQ does not explain why Section 18004 incorporates Section 484 by reference even though Section 484 explicitly applies only to Title IV assistance[157] and

[147] *See id.* at 54-55.

[148] *See supra* "*Chevron* Step Zero."

[149] *See supra id*.

[150] United States v. Mead Corp., 533 U.S. 218, 2235 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[151] *See Skidmore*, 323 U.S. at 140.

[152] *Mead*, 533 U.S. at 235.

[153] *See id.*

[154] *See Certification and Agreement Form*, *supra* note 41, at 1.

[155] *See* Letter from Secretary Betsy DeVos to College and University Presidents (Apr. 9, 2020), *available at* www2.ed.gov/about/offices/list/ope/caresactgrantfundingcoverletterfinal.pdf (emphasis added).

[156] *See FAQ*, *supra* note 3, at 4.

[157] *See* 20 U.S.C. § 1091(a) (stating that Section 484's eligibility requirements apply to "grant[s], loan[s], or work assistance *under this subchapter*"—that is, under Title IV) (emphasis added).

Section 18004 is not codified in Title IV.[158] Third, the ED spokesperson's structural inferences based on Sections 18004(a)(1)(A) and (b) are not persuasive for the reasons discussed above.[159]

Still, it remains possible that a court could uphold ED's interpretation of Section 18004 under the *Skidmore* standard even if the court determined that ED did not deserve *Chevron* deference.

Considerations for Congress

Congress could potentially resolve any debate over whether the Secretary may apply Title IV's eligibility requirements to Section 18004(a)(1) grants by amending the CARES Act to specify explicitly whether non-Title IV-eligible students are eligible for emergency financial aid grants or whether the Secretary may impose eligibility requirements on Section 18004 grants that Congress did not expressly codify in the statutory text. For instance, Section 150110(a)(1) of the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act), which the House passed on May 15, 2020, would amend the CARES Act to state that "the Secretary is prohibited from imposing any restriction on, or defining, the populations of students who may receive [HEERF] funds other than a restriction based solely on the student's enrollment at the" IHE.[160]

[158] *See id.* § 3401 note.

[159] *See supra* "The CARES Act Does Not Explicitly Prohibit IHEs from Awarding Section 18004(a)(1) Grants to Non-Title IV-Eligible Students."

[160] H.R. 6800 § 150110(a)(1) (116th Cong. 2020).