



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

TO: Miguel A. Cardona
Secretary of Education

FROM: Lisa Brown
General Counsel

DATE: August 23, 2022

SUBJECT: The Secretary's Legal Authority for Debt Cancellation

Introduction

For the past year and a half, the Office of General Counsel (“OGC”), in consultation with our colleagues at the Department of Justice Office of Legal Counsel, has conducted a review of the Secretary’s legal authority to cancel student debt on a categorical basis. This review has included assessing the analysis outlined in a publicly disseminated January 2021 memorandum signed by a former Principal Deputy General Counsel. As detailed below, we have determined that the Higher Education Relief Opportunities for Students (“HEROES”) Act of 2003 grants the Secretary authority that could be used to effectuate a program of targeted loan cancellation directed at addressing the financial harms of the COVID-19 pandemic. We have thus determined that the January 2021 memorandum was substantively incorrect in its conclusions.

Given the significant public interest in this issue, and the potential for public confusion caused by the public availability of the January 2021 memorandum, I recommend making this memorandum publicly available and publishing it in the *Federal Register*, so as to provide the general public with notice of the Department’s interpretation of the HEROES Act, consistent with statutory requirements. *See* 5 U.S.C. § 552(a).¹

I. The Secretary’s HEROES Act Authority

The HEROES Act, first enacted in the wake of the September 11 attacks, provides the Secretary broad authority to grant relief from student loan requirements during specific periods (a war, other military operation, or national emergency, such as the present COVID-19 pandemic) and for specific purposes (including to address the financial harms of such a war, other military operation, or emergency). The Secretary of Education has used this authority, under both this and

¹ The Office of Legal Counsel has made its own analysis of the Secretary’s authority, which will be published in tandem with this memorandum’s recommended publication.

every prior administration since the Act’s passage, to provide relief to borrowers in connection with a war, other military operation, or national emergency, including the ongoing moratorium on student loan payments and interest.²

Specifically, the HEROES Act authorizes the Secretary to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs” if the Secretary “deems” such waivers or modifications “necessary to ensure” at least one of several enumerated purposes, including that borrowers are “not placed in a worse position financially” because of a national emergency. 20 U.S.C. § 1098bb(a)(1), (2)(A).

Several provisions of the HEROES Act indicate that Congress intended the Act to confer broad authority under the circumstances, and for the purposes, specified by the Act. First, the Act grants authority “[n]otwithstanding any other provision of law, unless enacted with specific reference to this section.” *Id.* § 1098bb(a)(1). Second, the Act authorizes the Secretary to waive or modify “any” statutory or regulatory provision applicable to the student financial assistance programs. *Id.* § 1098bb(a)(1), (a)(2). Third, the Act expressly authorizes the Secretary to issue such waivers and modifications as he “deems necessary in connection with a war or other military operation or national emergency.” *Id.* § 1098bb(a)(1). The Supreme Court has recognized that, in empowering a federal official to act as that official “deems necessary” in circumstances specified by a statute, Congress has granted the official broad discretion to take such action.³ This authority is not, however, boundless: it is limited, *inter alia*, to periods of a war, other military operation, or national emergency (*id.* § 1098bb(a)(1)), to certain categories of eligible individuals or institutions (*id.* § 1098ee(2)), and to a defined set of purposes (*id.* § 1098bb(a)(2)(A)–(E)).

In present circumstances, this authority could be used to effectuate a program of categorical debt cancellation directed at addressing the financial harms caused by the COVID-19 pandemic. The Secretary could waive or modify statutory and regulatory provisions to effectuate a certain amount of cancellation for borrowers who have been financially harmed because of the COVID-19 pandemic. The Secretary’s determinations regarding the amount of relief, and the categories of borrowers for whom relief is necessary, should be informed by evidence regarding the financial harms that borrowers have experienced, or will likely experience, because of the

² See Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, William D. Ford Federal Direct Loan Program, and Federal-Work Study Programs), 85 Fed. Reg. 79,856, 79,856 (Dec. 11, 2020) (“Secretary [DeVos] is issuing these waivers and modifications under the authority of the HEROES Act[.]”); Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and the Federal Direct Loan Program), 77 Fed. Reg. 59,311, 59,312 (Sept. 27, 2012) (“In accordance with the HEROES Act, . . . Secretary [Duncan] is providing the waivers and modifications of statutory and regulatory provisions applicable to the student financial assistance programs[.]”); Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Direct Loan Program, Federal Family Education Loan Program and the Federal Pell Grant Program), 68 Fed. Reg. 69,312, 69,312 (Dec. 12, 2003) (“Secretary [Paige] is issuing these waivers and modifications under the authority of section 2(a) of the Higher Education Relief Opportunities for Students (HEROES) Act of 2003[.]”).

³ *Webster v. Doe*, 486 U.S. 592, 600 (1988) (statute authorizing action when an agency head “shall deem such [action] necessary or advisable” “fairly exudes deference” to agency head and “strongly suggests that its implementation was ‘committed to agency discretion by law’” (second emphasis added) (some quotation marks omitted)).

COVID-19 pandemic. But the Secretary’s authority can be exercised categorically to address the situation at hand; it does not need to be exercised “on a case-by-case basis.” *Id.* § 1098bb(b)(3). That is, he is not required to determine or show that any individual borrower is entitled to a specific amount of relief, and he instead may provide relief on a categorical basis as necessary to address the financial harms of the pandemic.

II. The January 2021 Memorandum

On January 7, 2021, Secretary DeVos resigned from her position as Secretary of Education, effective January 8, 2021. On January 13, a news outlet published a memorandum signed January 12 by the then-Principal Deputy General Counsel, addressed to “Betsy DeVos[,] Secretary of Education.”⁴ Two substantively identical versions of that memorandum were posted to the website of the Office of Postsecondary Education, dated January 12 and January 18 (collectively, the “January 2021 memorandum”). Having reviewed the memorandum in consultation with the Office of Legal Counsel, we have determined that although it accurately describes the core features of the HEROES Act, its ultimate conclusions are unsupported and incorrect.⁵ As such, it should be rescinded.

As an initial matter, the bulk of the January 2021 memorandum’s discussion of HEROES Act authority describes and quotes the key provisions of the HEROES Act. The memorandum explains that the HEROES Act provides the Secretary “authority to provide specified^[6] waivers or modifications to Title IV federal financial student aid program statutory and regulatory requirements because of the declared National Emergency,” identifies that declared emergency as the COVID-19 national emergency declared on March 18, 2020, and characterizes this authority as “narrowly cabined” to achieving five enumerated purposes, including “ensur[ing] that . . . recipients of student financial assistance under title IV of the Act who are affected

⁴ Michael Stratford, Trump Administration Tries to Hamstring Biden on Student Loan Forgiveness, Politico (Jan. 13, 2021).

⁵ In addition to determining that the conclusions contained in the January 2021 memorandum were substantively incorrect, we have determined that the memorandum was issued in contravention of then-effective Department processes for issuing significant guidance. An Interim Final Rule issued by the Department on October 5, 2020, pursuant to Executive Order 13,891, established additional procedures for the issuance of guidance documents. *See* Rulemaking and Guidance Procedures, 85 Fed. Reg. 62,597 (Oct. 5, 2020); *see also* Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 9, 2019). That rule established new requirements for the issuance of guidance and “significant guidance,” defining the latter term to include guidance documents that “[r]aise novel, legal, or policy issues arising out of legal mandates [or] the President’s priorities.” 85 Fed. Reg. at 62,608. The public dissemination of the January 2021 memorandum violated a number of provisions of this rule, including that guidance must be “accessible through the Department’s guidance portal,” and that, barring compelling cause, all significant guidance may be published only after a 30-day public comment period and review by the Office of Management and Budget under Executive Order 12,866 of September 30, 1993. *Id.* That rule was rescinded in September 2021, 86 Fed. Reg. 53,863 (Sept. 29, 2021), but it was in effect at the time of the January 2021 memorandum’s publication. Thus, OGC has determined that the January 2021 memorandum was not properly promulgated.

⁶ We read the term “specified” as acknowledging statutory limits on HEROES Act authority, including the enumerated purposes of 20 U.S.C. § 1098bb(b)(1), and not as suggesting any atextual limitations on the Act’s clear grant of authority to waive or modify “any” statutory or regulatory provision applicable to student aid programs, provided other HEROES Act requirements are met.

individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals.” Jan. 2021 Mem. at 5–6.

The memorandum goes on to read in purported limitations on the scope of relief that may be afforded that are contrary to the clear text of the Act. The memorandum advances three primary arguments in support of a conclusion that “Congress never intended the HEROES Act as authority for mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or to materially modify repayment amounts or terms.” Jan. 2021 Mem. at 6.

First, the memorandum recites certain statutory limits on the Secretary’s authority, including the HEROES Act’s statutory definition of individuals eligible for relief, 20 U.S.C. § 1098ee(2), and the enumerated purposes for which waivers or modifications may be issued, *id.* § 1098bb(a)(2). The memorandum is correct that such statutory provisions exist but provides no support for the suggestion that these provisions impose limitations beyond their clear terms. *See* Jan. 2021 Mem. at 6.

Second, the memorandum points to the HEROES Act’s references to avoiding “defaults” and a “cross-cite” to a separate provision of the Higher Education Act relating to the “return” of student loan funds, concluding that these provisions “provide a strong textual basis for concluding Congress intended loans to be repaid.” *Id.* But these provisions—which identify as allowable purposes issuing waivers or modifications to avoid defaults and granting relief from certain requirements that borrowers return certain payments—in no way impose a requirement that any exercise of HEROES Act authority must ensure that every borrower is left with a remaining balance on their loan. The reference to “defaults” authorizes the Secretary to “avoid” defaults; it does not require that he preserve their possibility. And the Higher Education Act provisions regarding the “return” of overpayments relate only to specific processes and calculations under which students are required to return grant and loan assistance if they withdraw from their school, *see* 20 U.S.C. § 1091b; there is no conceivable reading of this provision that reflects a congressional intent that all borrowers, including those not covered by the section 1091b overpayment provisions, are required to repay their loans in full.

Third, the memorandum concludes that the authority to “waive or modify any statutory or regulatory provision” is limited to the definition of “modify” that was adopted for an unrelated telecommunications statute, and “does not authorize major changes.” Jan. 2021 Mem. at 6. The memorandum draws its definition of modify from *MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994). In that case, the statutory provisions under review applied no clear limiting principle to a grant of modification authority to the FCC; the statute allowed modifications “in [the FCC’s] discretion and for good cause shown.” *Id.* at 224 (quoting 47 U.S.C. § 203 (1988 ed. and Supp. IV)). Here, the HEROES Act itself clearly speaks to the scope of modification authority: the Secretary may make those modifications as may be “necessary to ensure” specific enumerated purposes. 20 U.S.C. § 1098bb. The Secretary may not make modifications going beyond that limit, but nor is he restricted to a degree of modifications that would fall short of “ensur[ing]” the enumerated purposes are achieved. Moreover, the HEROES Act broadly authorizes the Secretary to act as he “deems necessary” to “waive or modify” any statutory or regulatory provision applicable to the student aid program. The January 2021 memorandum’s interpretation of “modify” would read the Act to authorize the Secretary to waive entirely or to make non-major changes in the relevant statutory or regulatory provisions,

but not authorize the Secretary to do anything in between. That interpretation is illogical, and nothing in the HEROES Act's broad grant of authority supports such a reading.

We have discussed these and other aspects of the January 2021 memorandum with the Office of Legal Counsel, and we further find persuasive the discussion of the January 2021 memorandum offered in the Office of Legal Counsel's memorandum, which will be published in tandem with this memorandum's recommended publication.

Conclusion

For the reasons detailed above, I recommend that you (1) determine that the January 2021 memorandum is formally rescinded as substantively incorrect and (2) authorize publication in the *Federal Register* and public posting of this memorandum as the Department's interpretation of the HEROES Act.