

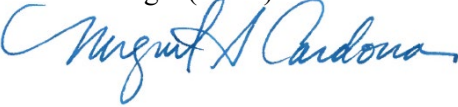


THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

September 29, 2023

MEMORANDUM

TO: Office of Management and Budget (OMB)

FROM: Miguel A. Cardona 

SUBJECT: U.S. Department of Education Contingency Plan for Lapse
in Fiscal Year (FY) 2024 Appropriations

The contingency plan for the U.S. Department of Education (the Department) was developed pursuant to applicable legal requirements governing a lapse in Federal appropriations. In the event of an interruption or absence of an appropriation (lapse) or continuing resolution, the Department will perform work that is “exempt” from furlough because it is funded by unexpired budget authority that does not require further congressional action pursuant to an annual appropriations Act. Such budget authority for “**exempt**” activities may include: appropriations provided in permanent law; advance appropriations provided in prior-year appropriations Acts; and balances from multi-year or no-year appropriations. The Department may also continue certain unfunded activities during a lapse in annual appropriations if such activities fall under an “exception” to the Antideficiency Act. These exceptions permit the following “**excepted**” activities to continue during a lapse in appropriations:

- (1) Activities that discharge of the President’s constitutional duties and powers;
- (2) Activities expressly authorized by law to continue in the absence of appropriations;
- (3) Activities necessary to protect life or property; and
- (4) Activities necessarily implied by law, including those required to continue otherwise funded or authorized activities.

As set forth in this plan, the Department would furlough more than 89 percent of its total staff for the first week of such a lapse in funding. During this first week, we would maintain only those staff needed to perform exempt or excepted functions.

If the lapse lasts longer than a week, the Director of Budget Service, within the Office of Planning, Evaluation and Policy Development, would be responsible for adjusting the plan to respond to the length of the lapse in appropriations and changes in external circumstances. The Assistant Secretary for Finance and Operations would be responsible for implementing the adjusted plan. The Department would phase in employees only as necessary under one of the exceptions to the AntiDeficiency Act, including to support and prevent significant damage to the underlying exempt or excepted activity. Some employees would be called in on a partial or rotating basis; the combined number of excepted employees working at any given time would not exceed approximately 10.7 percent (446 FTEs) of the Department’s total full-time equivalents (FTEs). As of the beginning of September 2023, the Department employed 4,166 full- and part-time employees.

This contingency plan for the Department, like the 1996, 2011, 2013, 2016, 2017, 2018, 2019, 2020, 2021 and 2022 plans, would authorize certain categories of employees (“excepted employees”) to work in the absence of a specific appropriation.

1. Necessary to Ensure an Orderly Shutdown

Immediately upon receiving notification of a lapse in appropriations, the Department would direct employees to be entirely devoted to “closing down” their individual and group work functions. The Department would ensure that employees’ orderly shutdown activities would be completed within a relatively short period (no more than 4 hours for most employees). The non-excepted employees would then be released on furlough. Examples of shutdown activities include:

- Performing payroll functions and processing travel vouchers for the period just prior to the appropriations lapse;
- Completing inventories of property;
- Securing Federal property;
- Performing personnel functions to process furlough notices;
- Setting up consistent voicemail and email out-of-office messages;
- Notifying grantees of any impact on the disbursement of funds; and
- Notifying contractors as to whether they will be required to stop work.

2. Authorized by Law

Each of the Department’s confirmed Presidential appointees subject to Senate confirmation (PAS) would not be subject to the furlough. One FTE for each PAS would be excepted from the furlough in order to perform – and support the PAS in carrying out – excepted or exempt activities at the PAS’s direction that arise during the shutdown. These FTEs would only perform excepted or exempt activities where suspension of the related activity during the funding lapse would prevent or significantly damage the execution of the funded function. The total number of FTEs excepted for this purpose is shown in the chart, “Lapse Plan Summary Overview,” at the end of this document. Individuals who are delegated the authority to perform the functions and duties of a PAS employee are excluded.

3. Necessary to Protect Life or Property

The Department engages in certain regular, ongoing functions, the suspension of which would pose a threat to property. These activities are coordinated by applicable offices, including the Office of Finance and Operations, the Office of the Chief Information Officer, the Office of the Secretary, and Office of Federal Student Aid and involve 89 excepted employees. The Office of Inspector General (OIG) would also except personnel to engage in law enforcement functions, the suspension of which would pose a threat to the protection of property and resources, affect ongoing criminal investigations, and impede the execution of search warrants and arrests. Fifteen OIG employees in this category are excepted and would report to duty on an as-needed basis and only to meet critical needs as approved by OIG. The total number of FTEs excepted for this purpose is shown in the chart, “Lapse Plan Summary Overview.”

4. Funded from an Alternative Source

Programs using mandatory or advance appropriations, or unobligated multi-year or no-year funds from a prior year (carryover) would continue to operate through a government shutdown. For these programs, staff may be brought in on an excepted basis, as necessarily implied by law, to execute the following exempt or excepted activities:

A. Grant and Loan Programs

Programs with mandatory funding can make obligations and payments during a shutdown. In addition, approximately 17 non-mandatory programs have advance funds appropriated in FY 2023 that will become available in FY 2024 and/or have authority to carry over and use remaining unexpired, unobligated balances from FY 2023 multi-year or no-year discretionary appropriations. Obligations and payments from these programs may continue, depending on the length of the lapse and availability of funds. Only those grant activities that, if not continued, would prevent or significantly damage the execution of funded functions (the “significant damage” standard) will continue on a limited basis after a lapse of one week and continue through a short-term shutdown. Examples of significant damage could be disruption of local educational agency operations or inability of students to obtain necessary higher education financing.

For exempt and excepted programs such as these, employees performing work that satisfies one of the exceptions to the Anti-Deficiency Act may be brought in to work as “excepted employees” to provide payments and fulfill obligations to grantees and other recipients. The number of excepted staff necessarily implied by law will vary depending on the length of the shutdown and amount of money and number of recipients involved. These numbers include employees in the program and support areas. In each case, only the minimum number of employees needed would be brought in to work. The chart at the end of this document specifies the number of excepted FTEs necessary in week one and the maximum number needed for weeks two through four for these activities. It is assumed that the G5 system for making payments to grantees – either grants awarded in prior years or those made with mandatory or carryover appropriations – would continue to operate at least for the first week. For a lapse of more than a week, Department staff would be needed as excepted employees to resolve any issues necessary to prevent significant damage to the underlying exempt or excepted activity.

Non-mandatory programs that do not have available unobligated balances from FY 2023 may not incur new obligations while under a government shutdown caused by a lapse in appropriations unless otherwise allowable under an exception.

B. Direct Loans and Pell Grants

A lapse in appropriations could fall at a critical point in the administration of the large student aid programs. Program funds for Pell Grants and Direct Student Loans are provided through mandatory and carryover appropriations. More than 9.8 million students receive student aid, in the form of grants and loans, at approximately 5,500 schools through these programs. As available, permanent and multi-year appropriations may be used to continue some key operations (such as processing Free Applications for Federal Student Aid, FAFSA[®]; disbursing Pell Grants and Federal Direct Student Loans; and servicing Federal student loans) for a limited time; these operations could also experience some level of disruption due to a lapse.

The Office of Federal Student Aid’s (FSA’s) Chief Operating Officer and other management officials across the Department responsible for Pell Grants and Direct Student Loans will designate the contracts and minimum number of employees and contractors necessary to keep these programs operational. These could include contracts and employees needed to obligate and process payments, maintain systems necessary to disburse Pell Grants and student loan payments, service loans, and provide legal counsel to FSA and other offices. FSA employees working in areas not directly related to Pell Grants or Direct Student Loans, administrative functions not related to providing student aid to schools and students or servicing loans, would not be excepted.

C. Bipartisan Safer Communities Act and Administration

Programs and activities authorized and funded through the Bipartisan Safer Communities Supplemental Appropriations Act, 2022 (Division B of P.L. 117-159) have authority to continue obligations and payments in FY 2024, including for program administration related to the mental health programs funded under the Safe Schools and Citizenship Education account.

Effect of Shutdown Caused by a Lapse in Appropriations

A protracted delay in Department obligations and payments beyond one week would severely curtail the cash flow to school districts, colleges and universities, vocational rehabilitation agencies, and other entities that depend on the Department's discretionary funds to support their services. For example, roughly 1 in 10 school districts receive more than 15 percent of their funds from Federally funded programs. Colleges rely on Department funds to pay ongoing expenses of staff running programs for disadvantaged students seeking to enter and stay in college. Vocational rehabilitation agencies receive more than 70 percent of the cost of providing services to adults and youth with disabilities from the Department's program.

Under a shutdown, the potential disruption to Department grant programs would be a delay in activities necessary to make competitive and formula grant awards later in the fiscal year. For the most part, the employees who do this work will be furloughed. In addition, grantees and the public seeking specific information regarding the impact of a shutdown will have limited access to information.

Some contractors could continue to work under a lapse in appropriations for some short period of time. However, during an interruption, no new contracts would be awarded unless they were significantly related to excepted activities. Contractors receiving recently awarded contracts may be ordered to stop work during the furlough, if doing so would not cause significant damage to that activity. Department staff who are furloughed may be unfurloughed as necessarily implied by law to the extent the staff are needed to provide initial direction to these contractors. Those contractors allowed to continue their work would not immediately receive payment for their services, but the Department would be obligated to make payment, along with any Prompt Payment Act interest to compensate for the delay, once funds were available.

The chart below is illustrative and is based on our current thinking of what would happen if an interruption were to occur on October 1, 2023. Staffing levels reflect the first week of a lapse in appropriations.

The Department will phase in employees as necessary when one of the exceptions to the Anti-Deficiency Act is met for such employees' activity or function.

If the lapse lasts more than one week, the total number of employees working at some point during the shutdown would be approximately 446 FTE; approximately 3,720 employees would be furloughed. The FTE and employee numbers in this plan reflect levels at the beginning of September 2023.

Actions Necessary to Resume Orderly Operations

When directing employees to "close down" their individual and group work functions, the Department will provide information to employees to monitor the status of appropriations. This information will include links to OMB websites that will provide updates on the status of agency appropriations. Employees will also be informed that they will be expected to return to work the workday following resolution of conditions that led to the shutdown. After resumption of orderly operations, supervisors will

be informed of their ability to offer leave flexibility to employees who may not have returned to work as scheduled due to extenuating circumstances.

Lapse Plan Summary Overview		
	Department of Education	Office of Federal Student Aid only
Estimated time (to nearest half day) needed to complete shutdown activities:	0.5 days	0.5 days
Total number of agency employees expected to be on board before implementation of the plan:	4,166	1,401
Total number of employees to be retained under the plan for each of the following categories:		
Compensation is financed by a resource other than annual appropriations:	6	0
Necessary to perform activities expressly authorized by law:	14	0
Necessary to perform activities necessarily implied by law:	322	173
Necessary to the discharge of the President’s constitutional duties and powers:	0	0
Necessary to protect life and property:	104	59
Brief summary of significant agency activities that will continue during a lapse:		
<p>Programs with mandatory funding can make obligations and payments during a shutdown. Examples of such programs include Pell Grants and Federal Direct Student Loans. Approximately 17 non-mandatory programs have advance funds appropriated in FY 2023 that will become available in FY 2024 and/or remaining unexpired, unobligated balances from FY 2023 multi-year or no-year discretionary appropriations. Obligations and payments from these programs may continue, depending on the length of the lapse and availability of funds. Only those grant activities that, if not continued, would prevent or significantly damage the execution of funded functions (the “necessary implication” standard) will continue on a limited basis after a lapse of one week and continue through a short-term shutdown.</p>		
Brief summary of significant agency activities that will cease during a lapse:		
<p>During a lapse, the Department would pause most of its grantmaking activities, including the development of grant announcements, review of grant applications, and awarding of grant funds. The Office for Civil Rights would also pause its review and investigations of civil rights complaints. The Department’s development and implementation of guidance, technical assistance, and regulatory actions would also pause during a lapse, unless required for otherwise funded activities.</p>		