



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

Shari Brewster
Assistant General Counsel for Appropriations Law
U.S. Government Accounting Office
441 G St. N.W.
Washington, DC 20548

February 22, 2023

Dear Ms. Brewster:

This letter responds to your letter of October 17, 2022, seeking factual information and legal views on the applicability of the Congressional Review Act (“CRA”) to actions taken by the Department of Education pursuant to the Higher Education Relief Opportunities for Students Act of 2003 (“HEROES Act”). Your letter referenced a document entitled *Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program)*, published in the *Federal Register* on October 12, 2022, 87 Fed. Reg. 61,512 (“the Notice”), and the student loan action outlined on the *One-Time Federal Student Loan Debt Relief* website, <https://studentaid.gov/debt-relief-announcement/one-time-cancellation> (“the Student Loan Relief posting”).

We appreciate the opportunity to provide information and our conclusion. Consistent with settled practice across the twenty years and four presidential administrations since the HEROES Act’s passage, we believe that the Department’s actions pursuant to that Act are not subject to the CRA. The HEROES Act provides a comprehensive framework for the Secretary of Education to quickly and effectively protect borrowers from economic harm due to the effects of national emergencies. The statute’s text, structure, and purposes make clear that HEROES Act waivers and modifications are not subject to the CRA’s additional procedural requirements.

Background

The Notice and the Student Loan Relief posting reflect actions taken by the Secretary of Education under the authority of the HEROES Act, Pub. L. No. 108-76, § 2, 117 Stat. 904. The Act provides:

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The Department of Education’s mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

(a) Waivers and modifications

(1) In general

Notwithstanding any other provision of law, unless enacted with specific reference to this section, the Secretary of Education . . . may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Higher Education Act of 1965, as amended (HEA),] as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2).

(2) Actions authorized

The Secretary is authorized to waive or modify any provision described in paragraph (1) as may be necessary to ensure that [among other things]—

- (A) recipients of student financial assistance under title IV of the [HEA] who are affected individuals are not placed in a worse position financially in relation to their financial assistance because of their status as affected individuals; [and]
- (B) administrative requirements placed on affected individuals who are recipients of student financial assistance are minimized, to the extent possible without impairing the integrity of the student financial assistance programs, to ease the burden on such students and avoid inadvertent, technical violations or defaults;

20 U.S.C. § 1098bb(a)(1)–(2).¹

When the Secretary exercises this authority, the HEROES Act provides that: “Notwithstanding section 1232 of [title 20] and section 553 of title 5, the Secretary shall, by notice in the Federal Register, publish the waivers or modifications of statutory and regulatory provisions.” *Id.* § 1098bb(b)(1). The Act also contains a section, entitled “No delay in waivers and modifications,” that exempts HEROES Act waivers and modifications from certain time-consuming requirements of the Higher Education Act. *Id.* § 1098bb(d). Finally, the HEROES Act includes a specific congressional reporting provision for the Secretary that—unlike the

¹ Affected individuals include, among others, any individual who “resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency” or any individual who “suffered direct economic hardship as a direct result of a . . . national emergency, as determined by the Secretary.” 20 U.S.C. § 1098ee(2)(C), (D).

CRA’s ex ante reporting provisions, *see* 5 U.S.C. § 801(a)—does not affect the effective date of his emergency action. *See* 20 U.S.C. § 1098bb(c).

In March 2020, President Trump declared a national emergency in response to the COVID-19 pandemic. *See* Proclamation 9994, 3 C.F.R. 56 (2020 Comp.). That declaration remains in effect, and the Federal Government has declared all 50 States, the District of Columbia, and the Territories to be disaster areas. *See* FEMA, COVID-19 Disaster Declarations, <https://perma.cc/B7KA-W4KD>. In response to the pandemic, then-Secretary of Education DeVos and current Secretary Cardona have provided vital relief to borrowers with Department-held loans through use of the Secretary’s HEROES Act authority. *See, e.g.*, 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020).

In compliance with the HEROES Act requirement to publish waivers or modifications in the *Federal Register*, the Notice informed the public that the Secretary had exercised his authority under the HEROES Act to: (1) extend through December 31, 2022, the waivers and modifications specified in the December 11, 2020, *Federal Register* document (85 Fed. Reg. 79,856), that were previously granted by both the current and prior administrations and that relate to the payment and collection of, and accumulation of interest on, Federal student loans;² and (2) waive or modify provisions of the Direct Loan Program to discharge specified amounts of eligible loans for borrowers who met delineated income requirements and either applied by the deadline established by the Secretary or for whom the Department already had the relevant income information. Details about the Student Loan Relief and its implementation are posted on the *One-Time Federal Student Debt Relief* website, including how to apply and how affected individuals can obtain support, such as help on the application process.

Discussion

The Notice and the Student Loan Relief posting reflect exercises of HEROES Act authority that are not subject to the CRA. In fact, HEROES Act waivers and modifications have never been treated as CRA rules during the twenty-year history of the HEROES Act—a statute that has been deployed quickly and successfully across four presidential administrations. Concluding that the CRA suddenly bars that well-established practice, and thereby diminishes the Secretary’s authority at this late date, would conflict with the comprehensive text, carefully designed structure, and urgent purposes of the HEROES Act.

To start, the CRA itself does not require that counterintuitive result. The CRA applies only to a subset of “rule[s]” under the Administrative Procedure Act (APA). *See* 5 U.S.C. §§ 801(a)(1)(A), 804(3). A straightforward reading of the CRA indicates that HEROES Act waivers and modifications are not rules under the CRA at all, as they are at root orders that deliver relief from statutory and regulatory requirements to help a defined set of borrowers during times of national emergency, rather than changing law or policy going forward. *See id.* § 501(6), (11), (13) (defining “order” and “relief” separately from rule); *id.* § 501(4) (defining

² The Department further extended the corresponding pause for FFEL loans held by guaranty agencies, as discussed in Dear Colleague Letter GEN-21-03, through December 31, 2022.

“rule” to require future effect). In this instance and as reflected in the Notice and Student Loan Relief posting, the Secretary determined that extending the repayment pause and discharging a limited amount of debt were necessary to ensure that a subset of borrowers were not placed in a worse position financially with regard to their student loans due to the devastating effects of the pandemic. The Secretary’s decision was not a rulemaking, but a one-time, fact-bound application of existing and statutorily prescribed waiver and modification authority to alleviate a defined set of existing loan obligations. *See Goodman v. FCC*, 182 F.3d 987, 993–94 (D.C. Cir. 1999) (holding that a time-limited waiver of deadlines for an existing class of licensees was a retrospective non-rulemaking order for jurisdictional purposes). As such, the Secretary’s actions are not subject to the CRA.³

In any event, the CRA cannot be read in isolation in this case. The text, structure, and purposes of the HEROES Act, along with twenty years of consistent practice, make clear that the statute was specifically written to protect its relief from additional procedural impediments. Only the carefully designed demands of the HEROES Act, and not the additional procedures of the CRA, govern here.

1. The HEROES Act authorizes emergency action and prescribes a comprehensive set of expedited procedures that preclude coverage by the CRA.

The HEROES Act provides a comprehensive and streamlined plan for emergency relief that does not allow for the additional procedural demands of the CRA. Congress enacted the HEROES Act to enable the Secretary to respond expeditiously to national emergencies and avoid harm to student borrowers. The statute thus gives the Secretary broad discretion to act free from restrictions imposed by other laws that do not expressly reference the HEROES Act, as expressly stated in the opening language of the statute:

Notwithstanding any other provision of law, unless enacted with specific reference to this section, the Secretary of Education . . . may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [HEA, 20 U.S.C. § 1070 et seq.] as the Secretary deems necessary in connection with a war or other military operation or national emergency.

20 U.S.C. § 1098bb(a)(1) (emphasis added).

Accordingly, the Secretary’s authority to waive or modify the specified provisions cannot be limited by any other law that does not specifically reference the HEROES Act. The CRA

³ This is consistent with how the Department has treated a range of statutory authorities that allow for waivers or modifications of existing requirements, which have never been considered subject to the CRA either. *See, e.g.*, 20 U.S.C. §§ 7221b(d)(5), 7861 (addressing waivers of charter school program requirements, and waivers of statutory and regulatory requirements of the Elementary and Secondary Education Act as amended); *id.* § 1068a(c) (addressing waivers and modifications for institutions affected by the Gulf hurricane disaster).

contains no such reference.⁴ And the HEROES Act’s declaration that other laws do not apply is consistent with the broader statutory structure and purpose of the statute—to authorize emergency action by the Secretary within a clearly defined range of circumstances and without hurdles imposed from outside the Act.

The Secretary’s authority to deliver relief under the HEROES Act is part of an interlocking structure of provisions that define and guide the exercise of that authority. Indeed, all of the provisions of the HEROES Act reinforce the inapplicability of the CRA. Consistent with the goal of enabling expeditious and effective action, section 1098bb(b)(1) of the statute exempts the Secretary’s waivers and modifications from any demands that might arguably arise from the APA’s procedural requirements for “Rule making.” In particular, the HEROES Act provides that “[n]otwithstanding” the requirements for rules in 20 U.S.C. § 1232 and 5 U.S.C. § 553, all that is required is that “the Secretary . . . , by notice in the Federal Register, publish the waivers or modifications of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of [the HEROES Act].” 20 U.S.C. § 1098bb(b)(1).⁵ Likewise, a subsequent provision of the HEROES Act relaxes certain time-consuming procedural demands under the Higher Education Act. In a subsection entitled “*No delay* in waivers and modifications,” *id.* § 1098bb(d) (emphasis added), the HEROES Act exempts waivers and

⁴ While the CRA includes a generally worded “notwithstanding” clause in 5 U.S.C. § 806(a), it does not override the HEROES Act’s “notwithstanding” clause in 20 U.S.C. § 1098bb(a)(1). The notwithstanding clause in the HEROES Act was enacted later and it declares a *specific* limitation on the application of other statutes unless they reference the HEROES Act. Indeed, the HEROES Act’s combination of “notwithstanding” and “specific reference” language is nearly unique in the U.S. Code. That specific instruction must be followed here, consistent with standard practice in statutory interpretation. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434–35 & n.3, 437–38 (1989) (relying on Congress’s comprehensive treatment of jurisdiction over foreign states in a later enactment to bar resort to an earlier enactment on jurisdiction, which remained effective for other matters); *see also Arellano v. McDonough*, 143 S. Ct. 543, 551 (2023) (“But the clause says more than ‘unless’—it says that the default applies ‘[u]nless specifically provided otherwise.’” § 5110(a)(1) (emphasis added). That is an instruction to attend to specifically enacted language to the exclusion of general, unenacted carveouts.”). Finally, continuing to deliver HEROES Act relief without adding the CRA’s demands presents no conflict with the CRA. The CRA has never been interpreted so broadly as to interfere with the HEROES Act, and the CRA will continue to apply to many other agency actions, as it always has. *See Argentine Republic*, 488 U.S. at 438.

⁵ The fact that the CRA itself reduces some (though not all) of its demands if agencies make and publish certain “good cause” findings in their rules does not mean that the CRA applies to actions under the HEROES Act. *See* 5 U.S.C. § 808(2) (regarding effective dates); *see also id.* § 801(c) (regarding written determinations by the President); B-333501, 2021 WL 5986759 (Dec. 14, 2021) (Comp. Gen.) (treating a mask requirement as a rule, and suggesting that agencies make good-cause findings during emergencies). The APA, too, has an exception for “good cause” findings, *see* 5 U.S.C. § 553(b)(B), but section 1098bb(b)(1) of the HEROES Act specifically exempts the Secretary from the APA’s rulemaking requirements, and thus the requirement to make just such good-cause findings. It would be inconsistent with that congressional judgment to conclude that good-cause findings under the CRA will adequately protect emergency action under the HEROES Act, when Congress specifically exempted the Secretary from just such findings under the APA. Neither GAO opinion B-330811 (discussed below in note 6) nor GAO opinion B-333501 addresses whether emergency statutes that include a comprehensive, expedited scheme like the HEROES Act are subject to the CRA, which is the principal issue that we raise in this letter.

modifications from master calendar and negotiated rulemaking requirements that otherwise might be imposed by sections 482(c) and 492 of the HEA (20 U.S.C. §§ 1089(c), 1098a).⁶

Moreover, the HEROES Act itself speaks specifically to the role of Congress vis-à-vis waivers and modifications, and that statutorily defined role is fundamentally different from that set forth in the CRA. The HEROES Act sets out its own mechanism of congressional reporting that is triggered only *after* the Secretary acts. After the Secretary “exercis[es] any authority to issue a waiver or modification,” the HEROES Act calls on the Secretary to report to specified congressional committees within 15 months on “the impact of any waivers or modifications issued,” “the basis for such determination,” and “the Secretary’s recommendations for changes to [relevant] statutory or regulatory provisions.” 20 U.S.C. § 1098bb(c). In this provision, Congress specifically addressed the proper relationship between itself and the Secretary’s exercises of authority under the HEROES Act. Congress opted for a narrow reporting mechanism that arises only after relief is provided, rather than any sort of legislative preclearance procedure that might impede the delivery of relief. More-general enactments on congressional-agency relations, such as the CRA, cannot supersede Congress’s specific choice of after-action reporting for the HEROES Act, absent a clear statement—of which there is none.⁷

Fairly interpreted, the text, structure, and purposes of the HEROES Act leave no room for additional procedural hurdles and delay. By creating a standalone, comprehensive framework for issuing waivers and modifications and reporting to Congress after relief is provided, and by freeing the Secretary from the ordinary procedural constraints that might apply under the APA or HEA, Congress made clear that it wanted to enable the Secretary to act quickly and without delay, to ensure that student borrowers are not negatively affected by national emergencies. *Accord* 149 Cong. Rec. H2525 (Apr. 1, 2003) (Rep. McKeon) (stating that the Act would allow the Secretary “to act quickly should a situation arise that has not been considered”); *see also Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (“[T]he use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section

⁶ An earlier GAO opinion concluded that the CRA applied to certain agency guidance that revised agency policy on waivers for States under the Patient Protection and Affordable Care Act (“PPACA”). *See* B-330811, 2008 WL 11505721 (July 15, 2019) (Comp. Gen.). Here, as we have explained and as reflected in the Notice and posting, the Secretary’s decision on HEROES Act relief was a one-time, fact-bound application of existing and statutorily prescribed waiver and modification authority. In any event and importantly, that GAO opinion neither raised nor addressed the issue of whether emergency statutes that include a comprehensive, expedited scheme like the HEROES Act are subject to the CRA, which is the principal issue addressed in this letter. Furthermore, the HEROES Act is obviously not like the PPACA regarding emergencies and streamlined procedures. In stark contrast to the procedure-laden, multi-agency demands of the PPACA, *see, e.g.*, 42 U.S.C. § 18052(a)(4)(B), the HEROES Act is an emergency statute that consistently, explicitly, and comprehensively excludes procedures that would impede the Secretary’s efforts to swiftly deliver relief in times of war, natural disaster, national emergencies, and other extraordinary circumstances.

⁷ “[I]t is a commonplace of statutory construction that the specific governs the general.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). It is equally accepted practice to rely on the overall structure of a statute to understand its exclusive force. *See, e.g., Guam v. United States*, 141 S. Ct. 1608, 1613, 1615 (2021) (relying on the “interlocking language and structure of the relevant text” to limit contribution claims for environmental liability, and refusing to isolate one provision from “the larger Act”); *Argentine Republic*, 488 U.S. at 434–35 & n.3, 437–38 (addressing the preclusive effect of a comprehensive and later-enacted statute on an earlier enactment).

override conflicting provisions of any other section.”); *United States v. Reece*, 956 F. Supp. 2d 736, 737 (W.D. La. 2013) (concluding that the CRA did not apply to agency action where the Controlled Substances Act prescribed a specific and expedited procedure for that action). The HEROES Act specifies the required procedures—publishing a Notice in the *Federal Register* and reporting to Congress pursuant to 20 U.S.C. § 1098bb(c); the Secretary is “not required to further comply with the general notice requirements of Title 5 U.S.C. § 801” of the CRA. *Reece*, 956 F. Supp. 2d at 737.

Requiring the Secretary to go through the CRA process would impose exactly the type of complication and delay that Congress sought to avoid with the HEROES Act.⁸ It would interject uncertainty into the implementation of a HEROES Act waiver or modification and, at worst, would significantly delay implementation of these emergency measures. That result would be contrary to the Act’s text, inconsistent with its carefully designed structure, and irreconcilable with the purpose of enabling the Secretary to quickly provide relief to affected individuals during war and other emergencies. It also would be unprecedented.

2. *Subjecting HEROES Act waivers and modifications to the CRA’s strictures would conflict with twenty years of settled practice across four presidential administrations.*

Since the enactment of the HEROES Act in its current form in 2003, the Secretary of Education has repeatedly invoked the Act to provide categorical relief to borrowers affected by emergencies. Time after time the Act has been used, across four different presidential administrations, and not once has the CRA applied. There is no reason to override that well-established practice at this late date.

Prior to the COVID-19 emergency, exercises of HEROES Act authority protected student borrowers who were on active military duty, who were performing qualifying National Guard duty, or who lived or worked in disaster areas. *See, e.g.*, 68 Fed. Reg. 69,312, 69,312 (Dec. 12, 2003). The relief included waiving the requirement that borrowers return overpayments of certain grant funds; waiving the requirement that service be uninterrupted to qualify for loan cancellation on the basis of employment in certain occupations; extending the maximum period of forbearance for Perkins loans and eligibility for deferment of Family Education Loans; and requiring the Department to pay the interest that accrues during extended deferments. *See id.* at 69,312–69,318; Office of Legal Counsel, U.S. Dep’t of Justice, *Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans*, 2022 WL 3975075, at *4 (Aug. 23, 2022). In response to the COVID-19 emergency, both Secretary DeVos and Secretary Cardona exercised their HEROES Act authority to suspend payment of interest and principal on student loans held by the Department and to count each month of non-payment toward any loan forgiveness

⁸ The CRA includes a number of requirements that could substantially delay relief, including ex ante reporting requirements, *see* 5 U.S.C. § 801(a)(1)(A) (stating that, “[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing” various items); *id.* § 801(a)(1)(B) (requiring additional submissions to the Comptroller General), and specific delayed effective dates for major rules, *see id.* § 801(a)(3)(A)–(C). As we have maintained in this letter, adding those kinds of delays is not compatible with the HEROES Act or practice thereunder.

program for which the borrower would have otherwise qualified and was seeking. *See, e.g.*, 85 Fed. Reg. 79,856–79,863 (Dec. 11, 2020).

None of these waivers and modifications was considered a rule subject to the CRA. This was true from the first exercise of HEROES Act authority in the year of its enactment, and across actions by Secretaries in administrations both before and during the pandemic. Indeed, after Secretary DeVos initially invoked the HEROES Act authority to pause payments of loan principal and interest, without submitting the relief to Congress under the CRA, Congress itself extended that relief without objecting to Secretary DeVos’ prior action. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3513, 134 Stat. 281, 404 (2020).⁹

Changing course now and triggering the CRA would, therefore, have major implications for emergency relief to students and educational institutions. Fast and effective relief would be at risk not only with respect to pandemics like COVID-19, but also other forms of disaster such as hurricanes as well as wartime operations and other military service. It would impede efforts of the Secretary to protect borrowers in times of national emergency under a statute that explicitly authorizes him to take such action quickly and without the delay of ordinarily applicable procedural requirements.

On the other side of the ledger, allowing the Secretary of Education to continue to exercise HEROES Act authority according to the terms of that statute bears little implication for the CRA. The CRA’s reach would remain as broad as it ever was, with a relatively small range of emergency relief actions continuing to proceed as they always have. Few statutes match the HEROES Act in its exclusive language and comprehensive treatment of procedure.¹⁰ At the same time, extending the CRA to the HEROES Act could undercut not only that statute but an uncertain set of additional statutes that Congress specifically enacted to enable agencies to take emergency action. Any such novel understanding of the HEROES Act and the CRA is, we believe, unwarranted.

Conclusion

For the reasons above, we believe that HEROES Act waivers and modifications—including those reflected in the Notice and the Student Loan Relief posting—are not subject to the requirements of the CRA. The text, structure, and purposes of the HEROES Act do not allow for such additional requirements, and settled practice under the Act confirms that conclusion.

⁹ In March 2020, then-Secretary DeVos invoked the HEROES Act to pause repayment obligations and suspend interest accrual and capitalization on all such loans. *See* 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020). Congress directed the Secretary to extend those policies through September 2020. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3513, 134 Stat. 281, 404 (2020). Both the Trump and Biden Administrations then further extended these protections under the HEROES Act. *See, e.g.*, 85 Fed. Reg. at 79,857; 87 Fed. Reg. 61,512 (Oct. 12, 2022).

¹⁰ One of the few arguably similar statutes likewise involves education and emergency relief. *See* 20 U.S.C. § 1068a(c) (regarding waivers and modifications for institutions affected by the Gulf hurricane disaster).

We appreciate the opportunity to respond to your question. Please let me know if you have any other questions or need further information on this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lisa B", with a long horizontal flourish extending to the right.

Lisa Brown
General Counsel