



May 21, 2019

VIA FACSIMILE AND CERTIFIED MAIL

The Honorable Sandra Bruce
Acting Inspector General
Office of Inspector General Hotline
U.S. Department of Education
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Washington, D.C. 20202
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Dear Ms. Bruce,

On behalf of Democracy Forward Foundation, the American Federation of Teachers, Giffords Law Center to Prevent Gun Violence, and the Southern Poverty Law Center,¹ we write to respectfully request that your office investigate the decision-making process that resulted in Secretary DeVos's repeated assertions that the Department of Education (the "Department" or "ED") lacks authority to make any determination on the acceptable use of Student Support and Academic Enrichment ("SSAE")² grant funds, and would "not take *any action*" to prevent the use of SSAE grant funds to train and arm educators with firearms.³ Secretary DeVos's repeated assertions—which open the door for states to use these federal funds to put more guns in schools, thereby wasting SSAE program resources on costs that by no means serve the goals of the statute—are based on a legally erroneous understanding of the limits of the Department's authority and violate the Administrative Procedure Act ("APA").

I. Background

In the wake of school shootings in Parkland, Florida and Santa Fe, Texas, and seemingly under public pressure from the National Rifle Association, members of the Trump Administration—

¹ The requesting organizations are non-partisan, non-profit organizations with an interest in education policy, gun violence prevention policy, the operation of the Department of Education, and the intersection of those topics.

² SSAE is a block grant program first authorized by Congress in December 2015 as part of the Every Student Succeeds Act ("ESSA"). *See generally* 20 U.S.C. §§ 7111 *et seq.*

³ *See* Letter from Betsy DeVos, U.S. Sec'y of Educ., to Rep. Bobby Scott, Ranking Member, H.R. Comm. on Educ. & the Workforce at 1 (Aug. 31, 2018) [hereinafter "DeVos Letter"], *available at* <https://twitter.com/EDPressSec/status/1035632557126287360> (emphasis added).

including Secretary DeVos—publicly considered arming educators with firearms.⁴ The Administration and the Department also received numerous private requests from states, including Oklahoma and Texas, seeking authorization to use SSAE grant funds to arm and train educators.⁵

The idea received swift and immediate public rebukes from concerned families, advocates, and members of Congress, including then-Ranking Member Bobby Scott of the House Committee on Education and the Workforce.⁶ On August 31, 2018, Secretary DeVos wrote to Representative Scott to state that she had “no intention of taking any action concerning the purchase of firearms or firearms training for school staff under the [ESSA].”⁷ This statement represents a decision, one that, through the absence of action, opens the door for states to use SSAE grant funds to train and arm educators. Secretary DeVos claimed that her conclusion was compelled because “Congress did not authorize me or the Department to make those decisions.”⁸ In making this claim, Secretary DeVos represented that her hands are tied on this matter because issuing a decision on the permissibility of using SSAE grant money to train and arm educators is outside the scope of her authority.⁹

Secretary DeVos recently doubled down on that claim. Before the House Education and Labor Committee on April 10, 2019, she testified that she lacked authority to make decisions regarding whether firearms and training are allowable expenses for SSAE grants:¹⁰

Representative Jahana Hayes: So your position is that Title IV funds—it is not up to you to decide how they can be used?

Secretary DeVos: We have not advocated for nor against.

Rep. Hayes: Do you feel like you can though?

Sec. DeVos: No.

A preexisting legal analysis from the Office of Elementary and Secondary Education however, tells a very different story, one that squarely contradicts the Secretary’s position.¹¹ The analysis—

⁴ See Caitlin Emma & Michael Stratford, *DeVos Revives Bitter Debate Over Arming Teachers*, Politico, Aug. 23, 2018, <https://www.politico.com/story/2018/08/23/betsy-devos-guns-in-schools-750219>.

⁵ See, e.g., Att. A (Internal communications reference to request from the Council of Chief State School Officers (“CCSSO”) on behalf of Oklahoma Commissioner of Education (Aug. 23, 2018); Letter from Charles McMahan, Superintendent, Porter, Oklahoma, to President Donald Trump (May 21, 2018); Internal communications discussing inquiries from Texas and Oklahoma (June 8, 2018)); Att. B (Discussion between ED and the Texas Education Agency (“TEA”) (June 13, 2018); Response to Spring Branch School District (Aug. 2, 2018); Response to Plano School District (July 9, 2018); Response to Region 20 Education Service Center (“ESC”) (June 14, 2018); Inquiry from Region 7 ESC (June 21, 2018)); Att. C (Email between ED and Jeremy Marks, Director of Federal Programs, Ohio Department of Education regarding Ohio ED’s inquiry into whether it “is allowable to use Title IV, Part A to purchase guns and/or for gun safety training” (October 30, 2017)).

⁶ See Emma & Stratford, *supra* note 4; see also DeVos Letter at 1-2.

⁷ DeVos Letter at 1.

⁸ *Id.*

⁹ See *id.*

¹⁰ See C-SPAN, *Educ. Policy Hearing With Secretary DeVos* at 4:13:15 (Apr. 10, 2019), <https://www.c-span.org/video/?459644-1/education-policy-hearing-secretary-devos&start=15088>.

¹¹ See Press Release, Office of Rep. Jahana Hayes, Pressed by Hayes, DeVos Fails to Commit to Prohibiting Federal Funds From Arming Teachers, (Apr. 10, 2019), <https://hayes.house.gov/media/press-releases/pressed-hayes-devos->

revealed by Representative Hayes at the April 10, 2019 hearing—is dated July 2018, more than a month *before* Secretary DeVos announced in August 2018 that she lacked authority to act, and notes:

The Department’s Office of the General Counsel has advised that the Secretary has discretion to interpret the broad language of the statute as to its permissiveness regarding the purchase of firearms and training on the use of firearms. ... *It is therefore reasonable for the Secretary to disallow this particular use of the funds absent specific Congressional authorization*, and it is unlikely that this interpretation would be subject to a successful legal challenge.”¹²

This revelation of the Department’s legal analysis—coupled with the Secretary’s previous statements and representations to members of Congress that contradict the Office of General Counsel’s conclusions—has prompted our inquiry. As explained below, the Secretary refused to exercise the Department’s clear authority to make a decision on SSAE funding use, due to an erroneously held view that the Department lacked the authority to do so. This refusal likely opens the door to the concerning policy outcome that grantees will be allowed to use SSAE funds to train and arm educators. Because her assertion that she lacked authority to act contravened the Department’s settled understanding of the Secretary’s authority, Secretary DeVos violated federal law.¹³

II. Secretary DeVos’s Refusal to Issue A Decision Was Unlawful

Secretary DeVos’s conclusion that a decision over the use of SSAE funds to arm and train educators was outside the scope of the Department’s authority is based on a legally erroneous understanding of the limits of the Department’s authority. ED’s own memorandum, containing the considered advice of its Office of General Counsel, confirms this.¹⁴

Separate and apart from the clear reasoning set forth in the memorandum, the statutory and regulatory regime that governs the SSAE program illustrates the nature of Secretary DeVos’s error. Relying on the broad general rulemaking authority accorded to it by Congress,¹⁵ the Department has promulgated two sets of regulations—general grantmaking regulations and also regulations specific to state block grant programs—that address in detail what expenses may, and may not, be paid for by Department grants.¹⁶ ED has also issued SSAE guidance, and both that guidance and the aforementioned decision memo make clear that these regulations apply to SSAE grants.¹⁷

fails-commit-prohibiting-federal-funds-arming-teachers; *see also* Memorandum from Jason Botel, Principal Deputy Assistant Sec’y, Office of Elementary and Secondary Educ., to Kent Talbert, Senior Advisor, Office of the Deputy Sec’y (July 16, 2018) [hereinafter “Botel Memo”], <https://edlabor.house.gov/imo/media/doc/Title%20IV-A%20Guns%20Memo.pdf>.

¹² Botel Memo at 4, 7 (emphasis added).

¹³ *See, e.g., Regents of the Univ. of Cali. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 510 (9th Cir. 2018).

¹⁴ *See* Botel Memo at 4, 7.

¹⁵ *See* 20 U.S.C. § 1221e-3; *id.* at § 3474.

¹⁶ *See* 2 CFR pt. 200; 34 C.F.R. § 76.

¹⁷ *See* U.S. Dep’t of Educ., Non-Regulatory Guidance: Student Support and Academic Enrichment Grants at 10 (Oct. 2016), <https://www2.ed.gov/policy/elsec/leg/essa/essassaagrntguid10212016.pdf>; *see also* Botel Memo at 3 (citing 2 CFR Part 200 and noting that “the cost of an activity is allowable under the SSAE program if it is reasonable and necessary for performance of the grant”).

Clearly, the Department both can exercise its authority to determine allowable grant expenses, generally, and specifically for SSAE grants.

An agency decision that is based on an erroneous legal premise is deemed arbitrary and capricious agency action, and is therefore unlawful under the APA.¹⁸ Numerous courts have invalidated agency actions based on faulty legal premises.¹⁹ Most recently, courts have articulated this in opinions holding that DHS’s decision to end the Deferred Action for Childhood Arrivals (“DACA”) program was arbitrary and capricious, finding when the government “acted based on erroneous view of what the law required—the rescission was arbitrary and capricious under settled law.”²⁰

As set forth above, and contrary to Secretary DeVos’s statements, ED plainly has authority to interpret what is, and is not, an allowable use of SSAE grant funds. Accordingly, Secretary DeVos acted based on an erroneous view about her legal authority, and so any resulting actions taken by the Department are infirm and must be reconsidered.

III. Request for Investigation

Given the Secretary’s continued erroneous denial of her authority, the ways in which the Secretary’s view runs contrary to the considered judgment of the Department’s lawyers, the impact such a decision will have on our schools, and the potential this policy has to waste funds better spent on true support and educational enrichment programming, we respectfully request that an investigation include an examination of the following:

- The process by which Secretary DeVos came to the decision not to take “any action” because of her erroneous view that such a decision was outside the scope of the Department’s authority.
- Efforts by the Department to counsel states and localities over the use of SSAE funds, including over any determinations about the application of ED grantmaking regulations. This review is particularly important as state legislatures continue to fiercely debate any changes that would permit putting more guns in schools—including states, like Oklahoma and Ohio, with which we have reason to believe the Department has corresponded on this matter.²¹

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¹⁸ See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (“But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.”); *Sea-Land Serv., Inc. v. U.S. Dep’t of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998) (“An agency action, however permissible as an exercise of discretion, cannot be sustained ‘where it is based not on the agency’s own judgment but on an erroneous view of the law.’” (quoting *Prill v. Nat’l Labor Relations Bd.*, 755 F.2d 941, 947 (D.C. Cir.1985)).

¹⁹ *Id.*

²⁰ *Regents of the Univ. of Cali.*, 908 F.3d at 510 (holding that “where the Executive *did not* make a discretionary choice to [rescind a program]—but rather acted based on an erroneous view of what the law required—the rescission was arbitrary and capricious under settled law”); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 420-21 (E.D.N.Y. 2018) (same, and citing *Yale–New Haven Hosp. v. Leavitt*, 470 F.3d 71, 86-87 (2d Cir. 2006), *Transitional Hosps. Corp. of La., Inc. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000), and *Planned Parenthood Fed. of Am., Inc. v. Heckler*, 712 F.2d 650, 666 (D.C. Cir. 1983), among other authorities).

²¹ Records obtained by the requesting organizations through open record laws suggest that Oklahoma, Texas, and Ohio may be interested in using SSAE funds to arm and train educators.

Please do not hesitate to contact us if we may provide additional information. Thank you for your time and consideration.

Sincerely,

/s/ Benjamin Seel

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