



August 08, 2012

Darrin A. King, Director
Information Collection Clearance Division
Privacy, Information and Records Management Services
Office of Management
U.S. Department of Education
400 Maryland Avenue SW, LBJ
Washington, DC 20202-4537

OMB CONTROL NUMBER: 1840-0821

Dear Mr. King:

Western Michigan University GEAR UP Learning Centers (WMU) is responding to the announcement in the Federal Register (Vol. 77, No. 139) on July 19, 2012 **Notice of Submission for OMB Review; Office of Postsecondary Education; Application for Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) College Savings Account Research Demonstration Project.**

We believe that the action proposed by the U.S. Department of Education (Department) and the actions taken in April 2012 conflict with the philosophy and principles of Executive Order 12866 and that review of this new program and the Department's handling of the FY 2012 appropriations in relation to the legislation governing GEAR UP, 20 U.S.C. 1070a-21 – 1070a-28 (HEA 404A-404H) is warranted. We contend that the Department has failed to meet the legal and policy mandates of the legislation in conferring the FY 2012 grantees in the most recent competition; and that diverting funds intended for this competition to establish the new program will further disadvantage Partnership applicants of the competition. The actions taken by the Department have materially altered the budgetary impact and the rights of Partnership grantees. The detrimental budgetary impact of the Department's actions for the Partnerships and the students served by the institutions of higher education, school districts, community agencies, and State agencies that comprise or participate in these Partnerships is conservatively estimated at \$40.2 million per year or more than \$280 million in federal and matching funds over the life of the affected Partnership projects.

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On June 19, 2012, WMU submitted a public comment in response to the announcement in the Federal Register (Vol. 77, No. 106) on June 01, 2012, **Proposed Priorities: Gaining Early Awareness and Readiness for Undergraduate Programs; College Savings Account Research Demonstration Project** (attached for inclusion in the current response).

In that response, WMU stated opposition to establishing this new program or redistributing any portion of the balance of the GEAR UP FY 2012 appropriations until the matter of the FY 2012 funding for the GEAR UP competition has been reviewed and the statutory requirements of the appropriations are met in accordance with 20 U.S.C. 1070a-22. Prior to submitting this response, during April and May 2012, WMU and Congressman Upton's office had several discussions with the Department about the imbalanced distribution and the legislation.

To provide context, on Tuesday, June 14, 2011 the Department announced the GEAR UP competition in the Federal Register Notice (Vol. 76, No. 114), Applications for New Awards: Gaining Early Awareness and Readiness for Undergraduate Programs. The legislation (program authority) governing this competition is 20 U.S.C. 1070a-21 – 1070a-28 (HEA 404A-404H).

On page 31 of the application, the Department states, "Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2012 from the list of unfunded applicants from this competition." Funding for this competition was distributed in September 2011 from the FY 2011 appropriations budget, and in April 2012 from the FY 2012 appropriations budget.

This competition, as in past competitions, was structured in a manner that allowed for an unlimited number of Partnership applicants, and multiple applications from Partnerships. Because there is a fixed number of States and Territories, the number of possible State applicants was 56.

Information published on the Department's website for new awards was available for 2005, 2006, 2008 and 2009. The historical information shows that the Department followed the appropriations ratio as stated in the legislation, 20 U.S.C. 1070a-22 (attached). The historical ratio averaged 36:64, State to Partnership. State applicants received the minimum appropriation of 33%, plus 3% of the total FY appropriations (9% of the 34% discretionary limit). Partnership applicants received the minimum appropriation of 33%, plus 31% of the total FY appropriations (91% of the 34% discretionary limit).

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In addition to the concern related to geographical equity as discussed in the response dated June 19, 2012, a condition of 20 U.S.C. 1070a-22 in awarding the discretionary funds is that the Department must consider the number of applicants.

Logically because this is a nation-wide competition and the Department has no restriction on the number of Partnership applicants, and because the number of State applicants, is fixed at 56, the number of Partnership applicants will always be significantly greater than the number of State applicants. It stands to reason then, that the historical distribution of the discretionary appropriations was appropriate for the Partnership applicants.

According to information published after the conclusion of the 2011 competition, there were 296 applicants. Of this total, 89% (262) of the applicants were Partnerships, and 11% (34) were State applicants.

The first round of funding for the FY 2011 appropriations is shown in the table below. Although the ratio of the FY 2011 discretionary appropriations to Partnership applicants is lower than the historical ratio, 69% versus 91%, it complies with the legislation and is in keeping with the historical pattern of competition funding.

FY 2011 Appropriations (Competition)		177,452,449				
<i>(Actual distribution 09/30/11)</i>						
Grant Type	% Required by Statute	Statutory Minimum	Discretionary	% Discretionary	Total	% Total
State	33%	58,559,308	18,748,038	31%	77,307,346	44%
Partnership	33%	58,559,308	41,585,795	69%	100,145,103	56%
Discretionary	34%	60,333,834		0%		0%
Total	100%	177,452,450	60,333,833	100%	177,452,449	100%

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The second round of funding from the FY 2012 budget is an entirely different matter as evidenced by the distribution ratio. Not only did the Department fail to meet the minimum appropriations level of 33% for the Partnership applicants, but it failed to consider the number of applicants in appropriating discretionary funding. As shown in the table below, the discretionary funding ratio is significantly out of proportion with the applicant ratio.

FY 2012 Appropriations (Competition)		35,584,771					
(Actual distribution 04/12/12)							
Grant Type	% Required by Statute	Statutory Minimum	Distribution of Discretionary Appropriations	% Discretionary	Redistribution of Partnership Appropriations	Total	% Total
State	33%	11,742,974	12,098,822	100%	6,887,161	30,728,957	86%
Partnership	33%	11,742,974	-	0%	(6,887,161)	4,855,813	14%
Discretionary	34%	12,098,822	-	0%	-	-	0%
Total	100%	35,584,770	12,098,822	100%	-	35,584,770	100%

The ratio of State applicants to Partnerships in the competition was **11:89**. The total appropriations ratio of State applicants to Partnerships was **86:14**.

Only **19%** of the **262** Partnerships applicants were funded. **76%** of the **34** State applicants in the competition were funded. The discretionary appropriations ratio of State applicants to Partnerships was **100:0**.

The Department failed to meet the minimum statutory requirement of 33% and failed to apply the considerations of the legislation to the discretionary appropriations, eliminating all funding for Partnership applicants.

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In any competition for federal funding, participants are entitled to expect that federal agencies charged with oversight, comply with the law. Partnership applicants reasonably expected that in awarding the FY 2012 appropriations that the Department would have, at the very least, complied with the minimum levels for appropriations, and a ratio of discretionary appropriations similar to the first round of funding in September 2011 as shown in the table below.

FY 2012 Appropriations (Competition)		35,584,771					
(Expected distribution of Discretionary Appropriations based 20 U.S.C. 1070a-22 number of applicants consistent with historical distribution, 2011 distribution and performance scores)							
Grant Type	% Required by Statute	Statutory Minimum	Distribution of Discretionary Appropriations	% Discretionary	Redistribution of Partnership Appropriations	Total	% Total
State	33%	11,742,974	3,759,568	31%	-	15,502,542	44%
Partnership	33%	11,742,974	8,339,254	69%	-	20,082,228	56%
Discretionary	34%	12,098,822		0%			0%
Total	100%	35,584,770	12,098,822	100%	-	35,584,770	100%

The Department's failure to comply with the legislation in April 2012 resulted in an estimated loss of \$15.2 million per year to the Partnership applicants, a total loss of \$106.4 million over the life of affected Partnership projects.

In addition the Department withheld a significant amount of FY 2012 funding, \$8.7 million, to establish an entirely new program. This represents 20% of the total FY 2012 appropriations that should have been available for the applicants of the competition.

In February 2012 when the Department announced that \$45 million was available from the FY 2012 appropriations to the applicants of the competition, and that the Department would fund down the slate, there was no mention of changes in the statutory requirements or diverting the funds to a new program.

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As shown in the table below, the Department's reallocation of the funds from the competition to the new program, results in an additional loss of approximately \$4.9 million per year to Partnership applicants.

FY 2012 Appropriations (Competition)		44,284,771					
<i>(Inclusion of funds withheld from competition, distribution of Discretionary Appropriations based 20 U.S.C. 1070a-22 number of applicants consistent with historical distribution, 2011 distribution and performance scores)</i>							
Grant Type	% Required by Statute	Statutory Minimum	Distribution of Discretionary Appropriations	% Discretionary	Redistribution of Partnership Appropriations	Total	% Total
State	33%	14,613,974	4,678,733	31%	-	19,292,707	44%
Partnership	33%	14,613,974	10,378,089	69%	-	24,992,063	56%
Discretionary	34%	15,056,822		0%			0%
Total	100%	44,284,770	15,056,822	100%	-	44,284,770	100%

In total the Department's actions in diverting the appropriations to establish a new program and its actions in April 2012 in conferring awards in a manner contrary to the legislation have cost Partnership applicants \$20.1 million per year, or a total of \$140.7 million in federal funds and \$140.7 million in matching funds over the life of the affected Partnership applicants projects.

Furthermore, the Department did not follow the rank order rules of the competition. At least one of the State applicants received \$5.0 million with a score of 102.33. This is 1 full point below the score of 103.33 that WMU received. Because the Department will not release information related to placement scores of applicants that did not receive awards, the actual number of Partnership applicants affected by the Department's decision to change the scoring method is unknown.

On May 11, 2012, in response to an inquiry made by Congressman Upton's office about the scoring of the competition, the Department stated *"The GEAR UP Program is comprised of two types of grants: States and Partnerships. We run separate competitions for each grant program, thus the scores received by a partnership applicant do not correspond to scores received by a state applicant. Western Michigan University applied as a partnership grant applicant in the 2011 GEAR UP competition and received a score of 103.33 which was below the cutoff score for funded partnership applicants in 2011 and 2012."*

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The Department's acknowledgement that there are two types of grants and that these are separate competitions, is inconsistent with the way that the Department appropriated the funds. The Department transferred 81% of the funding that should have been available to Partnership applicants under the legislation to State applicants. This arbitrary conformity to the legislation stifled the Partnership applicants' ability to compete.

The FY 2012 cut-off score for the Partnership applicants was 103.67. It is plausible that if the Department had not diverted the appropriations designated for Partnership applicants to State applicants, WMU and an unknown number of Partnership applicants with a score of 103.33 would have been funded. Because the average Partnership award in September 2011 was \$2.1 million, upwards of 9 Partnerships may have been funded.

Transparency in government and public accountability is essential in competing for federal funds. Executive Order 13563 states: "*Sec. 2. Public Participation. (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.*" In April 2012, in modifying the existing rules the Department did not notify the public of any changes that would have affected the legislation. The Department did not seek public input even though these actions clearly have a significant economic impact. The Department did not notify the participants of the intent to change the rules of competition after the fact. In establishing the new program, the Department has failed to consider the affected stakeholders, the Participant applicants of the competition.

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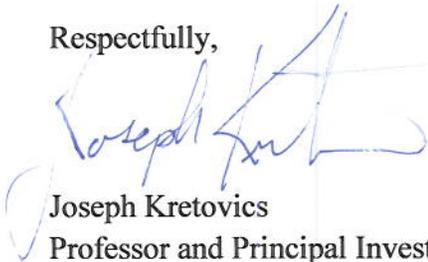
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Executive Order 12866 states *"Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people."* Clearly the Department exceeded its authority in the handling of the FY 2012 GEAR UP Program appropriations.

We request that OMB compel the Department to comply with the legislation and require that the Department immediately take corrective action to appropriate the FY 2012 funds as required by law.

Respectfully,



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Attachment: Western Michigan University; Response to Demonstration
Project 2012-13232, 06/19/12

c: Ms. Gabriella Gomez, Assistant Secretary for Legislative
and Congressional Affairs, U.S. Department of Education

Mr. Kevin Neyland, Deputy Administrator
Office of Information and Regulatory Affairs, OMB



June 19, 2012

James Davis, Director
Gaining Early Awareness and Readiness for Undergraduate Programs
U.S. Department of Education
1990 K Street, N.W.
Room 7007
Washington, DC 20006-8513

Dear Mr. Davis:

Western Michigan University GEAR UP Learning Centers (WMU) is responding to the announcement in the Federal Register (Vol. 77, No. 106) on June 01, 2012, **Proposed Priorities: Gaining Early Awareness and Readiness for Undergraduate Programs; College Savings Account Research Demonstration Project.**

In the announcement the U.S. Department of Education (Department) is proposing priorities for a closed competition for State grantees who received funding in FY 2011 or FY 2012 for which the Department intends to award approximately \$8.7 million from the GEAR UP FY 2012 budget for a college savings account research demonstration project.

As of the date of this announcement, the Department has failed to distribute the FY 2012 appropriations to the GEAR UP applicants of the FY 2011 competition, as required by the legislation, the Higher Education Act of 1965, as amended, SEC. 404B. [20 U.S.C. 1070a-22] Requirements (attached).

On Tuesday, June 14, 2011 the Department announced the GEAR UP competition in the Federal Register Notice (Vol. 76, No. 114), Applications for New Awards: Gaining Early Awareness and Readiness for Undergraduate Programs. The legislation (program authority) governing this competition is 20 U.S.C. 1070a-21 – 1070a-28 (HEA 404A-404H).

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Page 31 of the application states, "Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2012 from the list of unfunded applicants from this competition."

In September 2011, the Department distributed awards from the FY 2011 appropriations budget. The distribution of grants was within the parameters established by the legislation. State grantees received 44% and Partnership grantees received 56% of the total funding.

In February 2012, a spokesperson from the Department announced that \$45.0 million was available from the FY 2012 for applicants of the competition, and that awards would be funded down the slate based on the reviewed scores.

In April 2012, the Department distributed awards totaling \$35.6 million from the FY 2012 appropriations budget. To date, State grantees have received 86% and Partnership grantees received 14% of the total funding. This is clearly not in line with the parameters established by the legislation.

In terms of geographical distribution, 6 states received 61% of the FY 2011 appropriations relative to 39% of the GEAR UP population based on data obtained from the U.S. Census Bureau.

In FY 2012, of the 11 awards made, 8 were made to states that had already received FY 2011 funding that was nearly equal to, or exceeded, the GEAR UP population. The 8 awards were made to 7 states that received 63% of the FY 2012 appropriations relative to 19% of the total population served, based on data obtained from the U.S. Census Bureau.

49% of the combined funding for FY 2011 and FY 2012 went to 6 states. These 6 states serve 32% of the GEAR UP population based on data obtained from the U.S. Census Bureau. Clearly this is not an equitable geographical distribution of appropriations.

The legislation, 20 U.S.C. 1070a-22 requires that a minimum of 33% of the appropriations for a fiscal year is distributed to State applicants 404(c)(1) with a corresponding 33% distributed to Partnership applicants 404(c)(2). The legislation allows for the remaining 34% to be distributed to either State or Partnership applicants or a combination of both with consideration given to the

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number of applicants, the quality of the proposals, and if practicable, the geographic distribution of applicants and the type of population served, urban or rural.

In response to the inquiry made on WMU's behalf by Congressman Upton's office, the Department on May 11, 2012 acknowledged the minimum statutory requirements of the legislation. The Department did not address the FY 2012 budget appropriations. Instead, using FY 2011 as an example, the Department stated that *"This requirement is not solely applicable to new funding as WMU believes but also applies to non-competing continuation funded grants as well."*

20 U.S.C. 1070a-22 does not contain a provision that allows for the inclusion of non-competing continuation grant obligations in the calculation of the minimum statutory appropriation requirements for this competition.

The new awards made in FY 2012 are subject to the statutory appropriations provisions set forth in 20 U.S.C 1070a-22 - independent of the obligations of prior years.

We believe that the Department's inclusion of non-competing obligations from prior years violates the legislation. We also believe that changing the funding formula after the date of application, stifled Partnership applicants' ability to compete.

In response to the matter of geographical equity, the Department did not address the distribution of the appropriations. Instead, the Department stated that *"To the extent practicable, we believe the program has achieved a geographic distribution of grants. 44 states had at least one GEAR UP project and there were GEAR UP projects in American Samoa, the District of Columbia, Micronesia and Puerto Rico as well."* Based on the data posted on the Department's website, no awards were made in FY 2011 or FY 2012 to the territories listed in the response.

We believe that the Department's inequitable geographic distribution of the appropriations is contrary the intent of the legislation.

While we recognize the extreme pressure that the Department is under to serve the entire nation, we believe that funding decisions made by the Department with regard to the FY 2012 appropriations in April 2012 is contrary to the legislation. Changes to the legislation require Congressional action. We believe that Department's actions have disadvantaged the thousands

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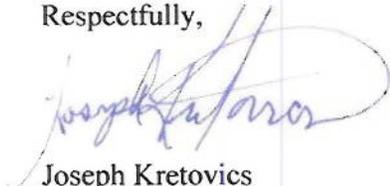
of students served by Partnership grants who would have been served if the Department had complied with the legislation.

We believe that under Executive Order 12866, a review by OMB is warranted. Section 3(f) states that regulatory action is subject to review by OMB if the action is likely to result in a rule that may (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

The Department's decision to distribute the appropriations in a manner contrary to the legislation has materially altered the budgetary impact and the rights of the Partnership grants; and raises the issue of whether the Department followed the legal and policy mandates of the legislation.

We request that the Department is restricted from establishing this new program or redistributing any portion of the balance of the GEAR UP FY 2012 appropriations until the matter of the FY 2012 funding for the GEAR UP competition has been reviewed and the statutory requirements of the appropriations are met in accordance with the legislation.

Respectfully,



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**U.S. Department of Education
Proposed Priorities, GEAR UP, Federal Register (Vol. 77, No. 106)
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Attachment**

The Higher Education Act of 1965, as amended

Subpart 2 – Federal Early Outreach and Student Services Programs

**CHAPTER 2-GAINING EARLY AWARENESS AND READINESS FOR
UNDERGRADUATE PROGRAMS**

SEC.404B. [20 U.S.C. 1070a-22] Requirements

In awarding grants from the amount appropriated under section 404H for a **fiscal year**, the Secretary shall-

make available-

- (1) to eligible entities described in section 404A(c)(1), **not less than 33 percent** of such amount
- (2) to eligible entities described in section 404A(c)(2), **not less than 33 percent** of such amount
- (3) to eligible entities described in paragraph (1) or (2) of section 404A(c), the remainder of such amount taking into consideration the **number, quality, and promise** of the applications for the grants, and to the extent practicable-
 - (A) the **geographic distribution** of such grant awards; and
 - (B) the distribution of such grant awards between **urban and rural** applicants.