



July 17, 2020

Gaby Watts
U.S. Department of Education
400 Maryland Ave. SW
Room 258-02
Washington, DC 20202

Docket ID ED-2020-OPE-0078

Dear Ms. Watts,

Thank you for this opportunity to comment on the interim final rule (IFR) for Docket ID ED-2020-OPE-0078, "Eligibility of Students at Institutions of Higher Education for Funds Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act." These comments are also endorsed by the American Association of Community Colleges, which represents the nation's 1,050 community colleges; and by the Association of Community College Trustees. NASFAA appreciates the Department of Education's (ED) early recognition of the need for prompt release of regulatory flexibilities to account for COVID-19 related disruptions to postsecondary students and institutions across the country. The Department's initial response in March and early April to the COVID-19 outbreak was both flexible and expedient, which allowed colleges and universities to quickly transition to online coursework and maintain operational continuity for students.

Congress' passage of the Coronavirus Aid, Relief, and Economic Security (CARES) Act on March 27 provided much-needed emergency financial assistance to students whose studies were impacted by the pandemic by creating the Higher Education Emergency Relief Fund (HEERF). Within two weeks, Secretary DeVos announced in a letter to institutions the process by which they could receive their HEERF allocations, where she urged institutions to "develop [their] own system and process for determining how to allocate these funds, which may include distributing the funds to all students..." and that, "[t]he only statutory requirement is that the funds be used to cover expenses related to the disruption of campus operations due to coronavirus..."¹

¹ <https://www2.ed.gov/about/offices/list/ope/caresactgrantfundingcoverletterfinal.pdf>

Follow-up Conflicting Guidance

Creating significant confusion, the Department then narrowed those flexibilities in an April 9 Frequently Asked Questions document² by requiring that emergency grants only be awarded to students who could meet, or are currently meeting, the student eligibility requirements for Title IV federal student aid. Narrowly defining eligible students nearly two weeks after institutions of higher education signed up for the program—and, according to the Government Accountability Office³, when half of eligible institutions had already applied for funding—was a major setback in getting these funds to students quickly. Many colleges had already developed models to disburse those funds based on broad legislative language and the Department’s initial certification agreement, which did not mention these narrowly defined student eligibility criteria.

Institutions signed the Certification and Agreement form—essentially a contract—acknowledging that it could be subject to legal liability for failure to comply with the terms and conditions outlined there, based on the Secretary’s statement in her cover letter to that form that, “[t]he only statutory requirement is that the funds be used to cover expenses related to the disruption of campus operations due to coronavirus...” While ED went on to state in their response to the California and Washington filings for preliminary injunction that their initial guidance was only “preliminary”, there was, in fact, no indication in the April 9 cover letter or Certification and Agreement form that any further conditions would be applied for student eligibility for HEER funds. It is unreasonable to expect an institution’s agreement to set forth one set of terms and conditions, and then to produce an entirely different set of terms and conditions *ex post facto*.

Wreaking Havoc on Institutions, Creating Delays for Students

The Department’s timing and backtracking created havoc for institutions already strained due to COVID-19, and kept emergency funds out of students’ hands when they needed those funds the most. The Department claims in this IFR that they have, “placed a high priority on getting assistance to institutions and individuals as quickly and efficiently as possible in light of the national emergency and the immediate needs resulting therefrom...,” but the Department’s position shift on Title IV eligibility did exactly the opposite.

In fact, on May 6, two weeks after ED restricted HEERF eligibility to Title IV eligible students, 72% of institutions of higher education responding to a NASFAA survey indicated that they had not yet spent any HEER funds and, of those, 42% indicated they were waiting to do so until the Department issued further guidance. In other words, given conflicting guidance, schools became increasingly cautious about releasing funds without explicit ED answers to a multitude of questions.

² <https://www2.ed.gov/about/offices/list/ope/heerfstudentfaqs.pdf>

³ <https://www.gao.gov/reports/GAO-20-625/>

Separate from the delays and confusion arising out of ED's multiple interpretations of student eligibility for HEER funding is the matter of whether ED's interpretation of Congressional intent is correct at all. We believe ED is mistaken in its conclusion that Congress intended for these funds to be restricted to students who meet Title IV eligibility requirements. NASFAA's position is supported by the Chairman of the House Committee on Education and Labor Bobby Scott; the independent Congressional Research Service; and federal judges in California and Washington, who granted preliminary injunctions in response to lawsuits filed in both states.

What others are saying

United States House of Representatives Education and Labor Chairman Bobby Scott wrote to Secretary DeVos on June 12⁴ that the Department's interpretation was, "inconsistent with the law" and that, "[t]he text of the CARES Act does not expressly or implicitly restrict funds to students eligible for Title IV" and, further, that, "[h]ad Congress intended such an important limitation it would have included it in the text of the CARES Act."

The Congressional Research Service, in a May 20 memo, said the Department's interpretation of the CARES Act to limit emergency grant eligibility to Title IV aid eligible individuals was, "not a particularly persuasive reading of the statute," and went so far as to question the Department's authority "to create or impose grant eligibility requirements that Congress did not codify in the statute itself."

U.S. District Court Judge of the United States District Court for the Northern District of California Yvonne Gonzalez Rogers noted in her order⁵ granting a preliminary injunction to the California community college system that, "[n]owhere does [the CARES Act] mention or otherwise incorporate restrictions on the types of students eligible for aid," and, further, that the Department "manufactured ambiguity where none exists by imposing their own restrictions on the definition of 'student,'" from which ED then presumed the Title IV eligibility requirements.

Similarly, Chief United States District Judge of the United States District Court for the Eastern District of Washington Thomas O. Rice, in his order⁶, argues against ED's assumption that Title IV eligibility is implied in the CARES Act because of limited tangential references to Title IV

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<https://edlabor.house.gov/imo/media/doc/2020.05.19%20RCS%20Ltr%20to%20ED%20Re%20illegal%20wage%20garnishment.pdf>

⁵ https://www.nasfaa.org/uploads/documents/CCC_CARES_Decision.pdf

⁶ https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/031_Order_GranteeingMtnPI.pdf

provisions, stating that, “[c]ontrary to Defendants’ argument, Congress’ limited incorporation of certain Title IV provisions raises the inference that the failure to similarly incorporate all of Title IV’s eligibility restrictions into the CARES Act was intentional.”

Unnecessary Burden on Institution and Students

Further, as it relates to unnecessary burden, Executive Order 13563, Improving Regulation and Regulatory Review, requires the selection of approaches that maximize net benefits, including equity. Yet, the imposition of Title IV eligibility on CARES emergency grants imposes a burden that minimizes net benefits, by requiring students to prove they meet the Title IV requirements. While the Department permits a student self-attestation, the most practicable way to establish Title IV eligibility is by completing the FAFSA. The Department acknowledges in the IFR the barriers to FAFSA completion which disproportionately impact low income, minority, and first generation students. Requiring students to meet the Title IV eligibility requirements, which is most easily achieved by completing the FAFSA, makes the emergency grant process as inequitable as the existing process for applying for federal student aid.

Separate from the administrative ease of using the FAFSA instead of creating a new one, institutions are likely to choose the FAFSA over a self-attestation in order to minimize the risk of conflicting information. If a student self-attests to meeting Satisfactory Academic Progress but the institution’s records indicate otherwise, they are obligated to resolve the conflict. The same is true if the student self-attests to any of the other Title IV eligibility requirements and subsequently files a FAFSA that contradicts the self-attestation. Institutions will be unlikely to place their students in a position that might allow them to unknowingly commit perjury.

The Department’s burden estimates are also too low. On institutional burden to create and implement a student self-attestation in lieu of the FAFSA, the Department estimates institutions will require five hours. NASFAA conducted a limited, nonrepresentative poll of member institutions for their own estimates of this burden; only two of seven agreed that five hours was adequate. The majority of responses indicated an estimated burden in the 7-9 hour range.

The IFR estimates it will take students 20 minutes to request HEERF emergency grants, but the Department hasn’t provided any sound methodology for creating such an estimate. In practice, institutions will almost certainly take advantage of the FAFSA instead of creating an entirely separate process by which students can document that they meet Title IV eligibility requirements. The [2020-21 FAFSA Federal Register](#) notice estimates just under 1.5 hours for a dependent student to complete the online FAFSA, requiring families to provide answers to dozens of unnecessary income and asset questions to document only that they meet basic student eligibility requirements.

Ultimately, debating whether the application takes 20 minutes or 1.5 hours for students to

complete is a distraction from the fact that an application proving eligibility for Title IV funds is unnecessary in the first place because Title IV eligibility is not a statutory requirement for HEERF student emergency grants. Requiring institutions to develop a form, and students to complete it or the FAFSA, all adds complexity, confusion, and effort to a process that was intended to be quick and simple.

The HEERF student grants were authorized by Congress to address emergencies. Institutions with existing emergency aid programs prioritize simplicity and expediency in the application process, in recognition of the fact that students facing emergencies do not have time to waste on a lengthy and complex application process. Absent the Title IV eligibility restrictions imposed by the Department, institutions could have implemented agile and responsive processes for students to apply for HEERF grants and get funding into their hands as quickly as possible. The Department's eligibility restrictions greatly hinder any such efforts.

New Eligible Program Requirements

The IFR imposes, for the first time, a new requirement for CARES Act emergency grant funding: that students be enrolled in a Title IV eligible program to receive these funds. This excludes yet another broad swath of students—including non-degree seeking students and students enrolled in short-term certificate programs that prepare them to pursue careers such as emergency medical technicians, nursing assistants, auto mechanics, and cosmetologists—who experienced COVID-19 related financial hardship from receiving emergency grant funding. Worse, it does so more than two months after ED first issued CARES Act guidance. The CARES Act does not require such a limitation on eligibility; nor does ED argue that it does. Such a late change to eligibility requirements in the context of the many iterations of guidance to date only leaves institutions more unsure of how to award these funds correctly.

Justification of Combating Fraud is Inconsistent

Finally, the Department claims in the IFR, as part of its justification for imposing the Title IV eligibility and the eligible program requirements, that it is in the interest of preventing fraud and abuse. This is inconsistent with all of ED's prior communications, dating back to its first guidance on the CARES Act on April 9, when ED encouraged schools to promptly disburse those funds. Subsequently, when ED announced the Title IV eligibility restriction on April 21, and until the publication of this IFR, ED never cited concerns about fraud and abuse as justification.

Surely ED cannot have only now considered the potential for fraud and abuse, and if they did consider that possibility earlier, then measures for combating fraud and abuse should have been taken prior to making funds available to institutions, or in one of the many subsequent iterations of guidance that followed. A NASFAA survey⁷ shows that as of June 12, 94% of institutions reported they had spent CARES Act emergency grants and more than three-fourths

⁷ https://www.nasfaa.org/uploads/documents/CARES_survey_results.pdf

of those schools had spent more than half of their allocations by that date. If ED is interested in preventing fraudulent CARES Act emergency grant spending by imposing new limitations on how those funds can be spent, the impact of those efforts will be negligible at this point. Fortunately, Congress already provided for institutional reporting requirements for the emergency grant funds in the CARES Act to hold institutions accountable for how they spend these funds and to prevent fraud and abuse; the imposition of new eligibility requirements is unnecessary.

In conclusion, it is widely accepted that the Department has overstepped in its interpretation of student eligibility for CARES Act emergency grant funding. In doing so, it is at best unfairly burdening students and at worst denying students who need emergency funds to help them navigate the vast and varied impacts of the COVID-19 pandemic. We urge the Department to drop any and all requirements that students meet Title IV eligibility standards and instead allow institutions to broadly define students who are enrolled at their institutions.

Thank you for your consideration of these comments. Please feel free to reach out to me directly (draegerj@nasfaa.org) or Jill Desjean (desjeanj@nasfaa.org) with any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Draeger", is positioned above the typed name.

Justin Draeger, President & CEO