

ED announces interim final rule regarding student eligibility for CARES Act grants

June 24, 2020

On June 11, 2020 the U.S. Department of Education (ED) [announced](#) an [interim final rule](#) (IFR) detailing student eligibility requirements to receive Higher Education Emergency Relief Fund (HEERF) grants under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Specifically, the IFR limits HEERF grant eligibility to students otherwise eligible for federal financial aid under Title IV of the Higher Education Act (HEA). The IFR is the only regulation that ED has promulgated in connection with the CARES Act, and it seeks to codify prior subregulatory guidance regarding HEERF grant eligibility. As explained below, although the IFR is generally consistent with prior subregulatory guidance, ED indicates that it will not enforce the interpretation reflected in the IFR with respect to distribution of HEERF funds that occurred prior to the publication of the IFR. This advisory summarizes key aspects of the IFR, which became effective June 17 and is subject to revisions based on a public comment period that ends July 17.

Prior ED guidance

CARES Act § 18004(a) establishes HEERF and authorizes ED to allocate funding to institutions in accordance with allocation formulas. Section 18004(c) instructs institutions to “use no less than 50 percent of [HEERF funds] to provide emergency financial aid grants to students for expenses related to the disruption of campus operations due to coronavirus (including eligible expenses under a student’s cost of attendance, such as food, housing, course materials, technology, health care, and child care).” We summarized aspects of ED’s earlier HEERF guidance in a [prior advisory](#).

Because the CARES Act does not define “student,” since early April ED has made several interpretive statements regarding student eligibility to receive HEERF grants, including:

- **April 9** – In a [cover letter](#) regarding HEERF grant funding, Secretary Betsy DeVos explained that “[t]he CARES Act provides institutions with significant discretion on how to award this emergency assistance to students. This means that each institution may develop its own system and process for determining how to allocate these funds, which may include distributing the funds to all students or only to students who demonstrate significant need.”

- **April 21** – ED indicated in a [HEERF FAQ](#):

What students are eligible to receive emergency financial aid grants from the HEERF?

“Only students who are or could be eligible to participate in programs under Section 484 in Title IV of the Higher Education Act of 1965, as amended (HEA), may receive emergency financial aid grants. If a student has filed a Free Application for Federal Student Aid (FAFSA), then the student has demonstrated eligibility to participate in programs under Section 484 [of] the HEA. Students who have not filed a FAFSA but who are eligible to file a FAFSA also may receive emergency financial aid grants. The criteria to participate in programs under Section 484 of the HEA include but are not limited to the following: U.S. citizenship or eligible noncitizen; a valid Social Security number; registration with Selective Service (if the student is male); and a high school diploma, GED, or completion of high school in an approved homeschool setting.”

- **May 21** – In an updated statement to its [CARES Act HEERF webpage](#), ED indicated that its statement “explaining that only students who are or could be eligible to participate in programs under Section 484 in Title IV of the Higher Education Act of 1965, as amended, may receive emergency financial aid grants...lack[s] the force and effect of law” because the statement was made in a guidance document. As such, ED indicated that it would “not initiate any enforcement action based solely on these statements” and that it “continues to consider the issue of eligibility for HEERF emergency financial aid grants under the CARES Act and intends to take further action shortly.”

The IFR, then, memorializes ED’s current position regarding HEERF grant student eligibility through a legally-binding mechanism. Prior to the IFR, the California Community College System and the State of Washington challenged in separate federal court complaints ED’s non-binding guidance regarding student eligibility restrictions. With respect to the State of Washington case, the district court issued a [preliminary injunction](#) on June 12 prohibiting ED from implementing or enforcing the April 21 guidance or the IFR against higher education institutions in the state. With respect to the California Community College System case, the district court issued a [preliminary injunction](#) on June 17 prohibiting ED from implementing or enforcing the April 21 guidance, May 21 updated statement, or the IFR against community colleges in the state.

IFR

The IFR states that for purposes of CARES Act references to HEERF “grants to students” and “emergency financial aid grants to students,” “student” is defined as “an individual who is, or could be, eligible under section 484 of the HEA, to participate in programs under title IV of the HEA.” This definition is codified at 34 C.F.R. § 668.2.

HEA § 484 requires that eligible students:

- Enroll or be accepted for enrollment in a program leading to a recognized credential at an eligible institution of higher education (and not be dually enrolled in secondary school).
- If presently enrolled, maintain satisfactory academic progress.
- Not owe a refund on a federal student grant or be in default on any federal student loan.
- Submit a Statement of Educational Purpose.
- Are a U.S. citizen, National, or eligible noncitizen.

- Not have been convicted of, or pled nolo contendere or guilty to, a crime involving fraud in obtaining federal student aid.
- Have a high school diploma or its equivalent.
- Have a valid social security number.
- Register with the Selective Service (if required).
- Not have been convicted of federal or state controlled substance offenses for conduct occurring during a period of enrollment for which federal student aid was received.

Also of note in the IFR:

- Undocumented students are ineligible to receive HEERF grants. As previously stated on the CARES Act HEERF webpage, ED reiterates in the IFR that “certain individuals” (i.e., “non-qualifying aliens”) are prohibited by statute from receiving any “Federal public benefit,” including HEERF grants. See 8 U.S.C. § 1611(a). The State of Washington preliminary injunction expressly states that it does not lift this statutory restriction. The California Community College System preliminary injunction broadly enjoins the IFR and related subregulatory guidance, including ED’s application of this statutory restriction to HEERF grants.
- Students must be enrolled in a Title IV-eligible program in order to receive HEERF grants.
- Students may verify their eligibility through the FAFSA or an institution-designed application requiring attestation under penalty of perjury that HEA § 484 eligibility requirements have been met.
- ED will not enforce the IFR with respect to distribution of HEERF funds that occurred prior to the publication date of the IFR (See IFR footnote 6).

ED stated that the IFR “is meant to balance flexibility and clarify administration for institutions so the funds can be provided to eligible students as efficiently as possible with eligibility requirements consistent with congressional intent and designed to prevent waste, fraud, and abuse.” The IFR is open for public comment for 30 days in order to provide ED with feedback as it considers whether to revise the rule; comments are due on or before July 17.

We are available to respond to questions.

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