

July 2, 2020

The Honorable Betsy DeVos
Secretary of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Secretary DeVos:

On behalf of the undersigned higher education associations, we offer comments on the Interim Final Rule (IFR) for establishing student eligibility for emergency grants under the Coronavirus Aid, Relief, and Economic Security (CARES) Act published by the Department of Education (ED) on June 17, 2020 (Docket ID ED-2020-OPE-0078).

We share ED's desire to limit the potential for waste, fraud, and abuse in the campus-level administration of CARES Act emergency student grants. However, ED's approach in the IFR fails to focus on the environments where experience tells us such issues are most likely to occur. ED's rationale for further restricting eligibility for emergency grants does not reflect circumstances on our campuses or the immediate problems we believe Congress was attempting to address in the CARES Act and is not supported by the authorizing legislation. Indeed, two federal District Courts have ruled ED's approach violates the plain language of the CARES Act.

The IFR largely restates the guidance ED previously issued on April 21, but subsequently announced would not be enforced, with one major addition—a student grantee must be enrolled in a Title IV-eligible program. Thus, the IFR codifies the reversal of the Department's initial April 9 guidance, which had provided institutions with the discretion to distribute emergency grants to some or all of their students. Also on April 9, ED made available the Funding Certification and Agreement form, which institutions are required to use to request CARES Act funding, which also did not restrict student eligibility.

The new limitations rely on a strained interpretation of both the CARES Act and the Higher Education Act (HEA). In doing so, ED has effectively created a new Title IV student grant program and in the process has done little to alleviate the confusion, complexity, and delays it had previously created for campus administrators. Even more problematic, the IFR will delay and in many cases deny students the very emergency relief Congress intended to provide for them.

ED's new eligibility criterion for student emergency grants requires the student to be enrolled in a HEA Title IV-eligible program. However, the IFR Preamble discussion is silent on this topic, so there is no discerning ED's rationale.

It appears ED is using the student Title IV eligibility criteria in Section 484 of the HEA, in particular the provision that a student must "be enrolled or accepted for enrollment in a

degree, certificate, or other program ... leading to a recognized educational credential” at a Title IV-eligible institution, as the basis for this requirement.

However, ED cannot rely on this provision in this instance because Congress explicitly defined a Title IV-eligible program in Section 481 of the HEA. It is obvious, then, that a student can satisfy the Section 484 requirements yet be enrolled in an educational program that is not eligible for Title IV assistance. ED does not mention Section 481 in the IFR and has simply not explained its basis for this additional restriction on eligibility for student emergency grants.

Further, ED references several provisions in the CARES Act to rationalize its decision to require emergency grant recipients to satisfy the Title IV student aid eligibility requirements, even though nearly 8 million undergraduate, graduate, and professional students do not complete a Free Application for Federal Student Aid (FAFSA) every year. We do not agree with this rationale.

First, ED states that Congress implicitly said that emergency grants should be tied to the definition of the cost of attendance in Section 472 of the HEA. But this definition applies to all students, not just Title IV recipients. Further, the consumer information requirements in Section 485 of the HEA require campuses to disclose “the cost of attending the institution,” again without distinguishing between Title IV-aided students and non-recipients. All students have a cost of attendance, and the reference to the Section 472 definition provides no basis for restricting emergency grants to Title IV-eligible students.

Second, ED states, “...non-title IV aid can be subject to title IV eligibility requirements” and references a provision in the HEA authority for a non-Title IV program—the Fund for the Improvement of Postsecondary Education (FIPSE). However, that statutory provision explicitly states that students receiving funding from FIPSE must satisfy the student eligibility requirements in Section 484(a) of the HEA. The CARES Act has no such explicit reference. Therefore, we do not believe ED has a basis to use the FIPSE authority to restrict eligibility for CARES Act student emergency grants.

Third, ED states that one of the two components of the CARES Act formula that allocates approximately \$12.6 billion among institutions includes enrolled undergraduate students who are Pell Grant recipients. Because all Pell Grant recipients satisfy the student eligibility requirements in Section 484, ED concludes that all student emergency grant recipients must likewise satisfy Section 484 requirements.

However, the second component of the allocation formula encompasses all students, including the millions of students, particularly graduate and professional students, who do not qualify for Pell Grant support. ED’s inclusion of just one part of the institutional allocation formula as justification for its interpretation of student eligibility for emergency grants makes no sense.

Fourth, ED states it would be illogical for Congress to require Section 484 eligibility for certain CARES Act funding for students—the FIPSE-like allocation of 2.5 percent of the Higher Education Emergency Relief Fund (HEERF)—but not for all CARES Act funding for students. To the contrary, it is more logical—and likely—that this explicit reference reflects Congress’s

intention that some HEERF funding should be restricted by Section 484, but other funding should not, including the emergency grants.

Finally, it is unclear if the IFR provides an alternative for establishing a student's eligibility for emergency grants without filing a FAFSA. The text of the final rule defines a student for the purpose of the CARES Act "as an individual who is, or could be, eligible under section 484 of the HEA..." However, this text is silent regarding any manner in which an institution would legally determine that a student "could be eligible under section 484."

Instead, ED relegates its explanation of an alternative eligibility determination to a discussion that is part of an administrative requirement under Executive Order 12866 ("Costs, Benefits, and Transfers"). In particular, ED refers to campus-specific grant applications that institutions could provide for their students to self-certify section 484 eligibility under the penalty of perjury. ED goes on to say that institutions could sanction students who knowingly misrepresent their eligibility by disciplinary action or grant repayment. Both the meaning of perjury in the student self-certification context and the party responsible for initiating and then adjudicating an allegation of perjury is unclear, and because the text of the final rule is silent on this alternative, ED should further clarify this issue.

Despite ED's claim that it conducted a holistic review of the statutes in question as it developed this IFR, its interpretation remains fundamentally flawed. Moreover, either explicitly or as a practical matter, the IFR denies CARES Act emergency grants to millions of students, including many student veterans, for failing to establish Title IV eligibility or for enrolling in non-Title IV-eligible programs of study.

The Department's inconsistent and contradictory pronouncements on the plain text of the CARES Act has created unnecessary confusion and costs for institutions and delayed the disbursements of desperately needed emergency grants to distressed students. We respectfully ask ED to immediately modify the IFR to ensure consistency with statute and to permit campuses to distribute this emergency funding as quickly and broadly as possible to all students in need.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry W. Hartle".

Terry W. Hartle
Senior Vice President

On behalf of:

Achieving the Dream
ACPA - College Student Educators International
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges

American Association of State Colleges and Universities
American Council on Education
American Dental Education Association
American Indian Higher Education Consortium
APPA, "Leadership in Educational Facilities"
Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities of Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Council for Advancement and Support of Education
Council for Opportunity in Education
Council of Graduate Schools
Council of Independent Colleges
EDUCAUSE
Higher Education Loan Coalition
Hispanic Association of Colleges and Universities
NAFSA: Association of International Educators
NASPA - Student Affairs Administrators in Higher Education
National Association for College Admission Counseling
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Colleges and Employers
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
National Association of System Heads
UPCEA