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## U.S. Department of Education Releases Updated Information Regarding Higher Education Emergency Relief Fund of the CARES Act

April 13, 2020

Late on Friday, April 10, 2020, the U.S. Department of Education (“Department”) released [additional instructions](#) for institutions planning to apply for funds authorized by Section 18004 of the [CARES Act](#) as the Higher Education Emergency Relief Fund (“HEERF”). This new guidance updated and supplemented information the Department released a day earlier announcing the availability of the first half of the funding authorized by the HEERF that is designated exclusively for emergency grants to students. The Department’s April 9 announcement included a [letter](#) from the Secretary of Education to college and university presidents, the [allocation of funds by institution](#) and the [methodology](#) used by the Department to make the determination, and the [Recipient’s Funding Certification and Agreement](#) (“Funding Certification”) that each institution will have to execute to receive the funds.

The HEERF funding is accessed through the [Applicants tab](#) at grants.gov under Funding Opportunity Number ED-GRANTS-041020-003. Institutions that are unfamiliar with the grants.gov site or the process for applying for federal grants will benefit from reviewing the Department’s [Grants.gov Submission Procedures and Tips for Applicants](#). The Department also published [Instructions for Submitting the Recipient’s Funding Certification and Agreement and Application Forms](#).

### *Use of HEERF Funds Designated for Students*

Section 18004(c) of the CARES Act specifically designates that the funds allocated for emergency grants to students **must** be used exclusively “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).” This mandate is reiterated in the Funding Certification, which also provides that “Recipient shall not use the advanced funds to reimburse itself for any costs or expenses, including but not limited to any costs associated with significant changes to the delivery of instruction due to the coronavirus and/or any refunds or other benefits that Recipient previously issued to students.”

It is vitally important that institutions understand and abide by their obligations regarding the use of HEERF funds designated for students (as well as for the second half of HEERF funds that will

be distributed for institutional use, about which additional information will be forthcoming from the Department soon). By signing the Funding Certification, institutions agree to distribute the funds as mandated, to provide reports to the Department (more about this below), and to comply with all applicable federal requirements. The Funding Certification explicitly notes that any failure to comply subjects an institution to liability under a number of different statutes and provisions, including the False Claims Act.

### ***Allocation and Distribution Considerations***

The CARES Act does not specify a method for institutions to decide which students are to receive the emergency grants or how to allocate the funds among the recipients. The Secretary's [letter](#) notes that an institution has broad discretion to make these determinations. However, she "encourage[s] the leadership of each institution to prioritize your students with the greatest need, but at the same time consider establishing a maximum funding threshold for each student to ensure that these funds are distributed as widely as possible." The Secretary suggests that the 2019-2020 maximum Pell Grant award of \$6,195 could serve as such a threshold, and this suggestion is reiterated in the Funding Certification. With this level of persuasion, institutions should give serious consideration to following the Secretary's recommendation or be prepared to thoroughly explain and document the reasoning for any significant deviation.

In order to determine how best to distribute the funds while complying with the CARES Act, each institution needs to make some decisions, supported by detailed policies and procedures that the institution follows diligently. Among the considerations an institution should take into account are the following:

- How will you communicate the availability of these emergency grants to students, and how will you instruct them that the funds are available only to cover their expenses related to the interruption of your campus operations? Institutions should consider developing a written notice to students describing the funds available for distribution and inviting students to respond with an indication that they have expenses for which these funds can be used and a signed certification that they will use any funds distributed to them as intended.
- Will you direct funds to students with the greatest need, or will you instead allocate funds to all students?
- How will you determine need? Reasonable proxies might include Expected Family Contribution and the level of Pell Grant eligibility.
- Will you distribute the entire allocation at once, or will you instead distribute funds in tranches? Note that the Funding Certification requires an institution to "promptly and to the greatest extent practicable distribute all the advanced funds in the form of emergency financial aid grants to students by one year from the date" the Funding Certification is signed.
- What systems and procedures will you establish to track communications with students, the allocation of funds among students, and the receipt of funds by students? The institution ultimately must be able to demonstrate that it distributed 100% of these funds to students and that no funds were deviated for institutional or other impermissible purposes.

## *Reporting Obligations*

As institutions consider how to address these and other relevant issues, they must keep in mind that they will be obligated to provide frequent reports to the Department regarding their handling of these emergency funds. The Funding Certification describes the following reporting requirements:

1. Report to the Secretary within 30 days after signing the Funding Certification and every 45 days thereafter “how grants were distributed to students, the amount of each grant awarded to each student, how the amount of the grant was calculated, and any instructions or directions given to students about the grants.” This reporting is subject to the record retention requirements outlined in [2 CFR § 200.333](#) through [2 CFR § 200.337](#).
2. Document that the institution “has continued to pay all of its employees and contractors during the period of any disruptions or closures to the greatest extent practicable, explaining in detail all specific actions and decisions related thereto, in compliance with Section 18006 of the CARES Act.”
3. Document the institution’s efforts to distribute emergency funds to students within one year after the date of the Funding Certification.
4. Cooperate with any review of records and documents by the Department or any other authorized entity of the federal government related to the use of HEERF funds.

## *Conclusion*

The CARES Act provides critical funding for institutions and their students forced to manage disruptions caused by the COVID-19 national emergency. Access to these funds, however, comes with significant compliance and reporting obligations for institutions that will be expected to demonstrate that funds were used only for the intended purposes. Failure to comply with these funding mandates will subject an institution to significant liabilities. Moreover, institutions should assume that their handling of these funds will receive ongoing scrutiny by other regulators, the media, and students.

Maynard Cooper lawyers are ready to assist institutions as they make the decisions and set up the reporting mechanisms required by the HEERF. Let us know if we can help in any way with HEERF or any other COVID-19 issues. And, we invite institutions to review other [resources](#) that our lawyers have prepared regarding the COVID-19 national emergency.

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[Maynard Cooper](#) is a full-service firm with attorneys experienced in all regulatory and operational aspects of higher education, including federal and state oversight, accreditation, employee and benefits issues, and real estate concerns. We are ready to help institutions of higher education deal with the challenges created by the COVID-19 emergency.

[Roger Swartzwelder](#) advises regionally and nationally accredited institutions of higher education regarding legal, administrative, regulatory and accreditation matters.

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