

ED Simultaneously Backs Away from and Embraces Its Own HEERF Guidance

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Last week, the Department of Education [announced](#) it will not enforce its April guidance on the Higher Education Emergency Relief Fund, further muddling the quick rollout of student and institutional funding under the CARES Act.

While this announcement has introduced considerable confusion into how institutions should treat ED's guidance on HEERF, it is not a new concept: subregulatory guidance, such as the policy statements outlined in the CARES Act guidance from ED, can only clarify existing obligations and does not create standalone legal obligations. In 2019, the administration issued an [Executive Order](#) clarifying its position, among other things, that agency-issued guidance is nonbinding. But ED likely has primary enforcement authority over the HEERF provisions of the CARES Act, and its latest announcement may signal how ED or others will evaluate CARES Act compliance down the road.

In order to get funds into the hands of students and schools in the shortest possible time, ED implemented HEERF entirely through [guidance documents](#), including [two sets of FAQs on April 21](#) that provided specific limitations on and clarifications to the use of HEERF funding that are not apparent in the CARES Act itself, which largely deferred to institutions on how to administer HEERF funding.

While the FAQs provide clarifying guidance from ED on several points, the most controversial limitation is ED's position – [outlined at Question #9 of the Student Funding FAQ](#) – that only students eligible for federal student aid can receive emergency student aid under HEERF. That position, which is not expressed in the CARES Act itself, would exclude international and undocumented students from receiving grants, as well as students who may be ineligible for federal student aid for a number of other reasons, such as selective service registration or drug-related offenses. That student eligibility restriction is the subject of legal challenges from both the California Community Colleges and the Washington Attorney General.

Last Thursday evening, ED issued a statement that its guidance, specifically in the context of its CARES Act FAQs, lacks the force and effect of law and will not be enforced by ED. ED directed institutions instead to follow the language in the CARES Act and other statutes. The statement preceded a Tuesday filing by the Department of Education in the California Community Colleges lawsuit in which ED asked the court to deny a request for an emergency injunction because its FAQ documents only indicate ED's preliminary views on the subject and will not be enforced by ED.

ED's statement that its FAQs are not binding, only represent preliminary thoughts and will not be enforced, requires institutions to weigh several considerations:

- A majority of schools have already accepted and disbursed HEERF funding following ED's April 21 guidance. Many institutions relied on ED's guidance because it is common practice for ED to provide important clarifications via guidance. ED has consistently provided other COVID-19 adjustments and updates via guidance, which – until ED articulated its latest position – have been relied upon as authoritative.
- Institutions that followed ED's original April guidance in distributing their HEERF student grants only to Title IV-eligible students would have excluded students who would have otherwise received this funding. Many institutions have already disbursed their share of HEERF student grant funding, and it's unlikely already-disbursed grants can be adjusted or rescinded. But institutions *can* reallocate some of the institutional share of HEERF funding, intended to cover institutional costs, to make additional student grants if they choose, although ED has also stated (in guidance) that the eligibility requirements for student grants made in this way must follow the same rules as the student grant share.
- This leaves institutions with a difficult choice: should they continue to rely on the ED's guidance and prohibit non-Title IV eligible students from receiving HEERF grants? Or should they disregard ED's guidance and provide leftover HEERF funding from the institutional share to these previously excluded students?
- The CARES Act appears to largely defer to *institutions* – not ED – to decide how to distribute funding to students, and an institution following the ED nonbinding guidance may therefore be out of compliance with the CARES Act in denying grants to students in the way ED outlines. While there is ED precedent allowing a safe harbor for institutions that follow ED guidance, it is not clear how that would apply if the guidance itself is outside the scope of the agency's authority at the outset.

- ED may still issue formal regulations on the student eligibility restriction. While ED says its guidance lacks the force and effect of law and will not be enforced, it does not say its guidance represents an incorrect interpretation. In fact, its statement specifically reiterates its view on limited student eligibility. If ED were to subsequently promulgate regulations including the restriction, while the regulation itself would not have retroactive effect, ED could argue it was only codifying the clear intent of the statute.
- Of course, ED is not the only mechanism for enforcement. The pending California Community Colleges lawsuit may result in a judicial interpretation of the law, and Inspectors General have been known to have their own interpretations of the meaning of statutory provisions.
- It also must be assumed that CARES Act compliance will be audited by institutions' independent auditors, as is the case with all other federal programs, and now ED has introduced considerable uncertainty into what requirements will be applied. It is common in the federal student aid context for requirements that are not always or even commonly enforced by ED to be flagged by auditors as part of the annual compliance or single audit, and that same scenario could play out here.

ED's statement does indicate it is still reviewing its positions and expects to weigh in on student eligibility again, but it's not clear if that means more guidance or a formal rulemaking. Not surprisingly, given the short time since enactment, ED has declined so far to issue emergency regulations to implement HEERF, and ED may be signaling that an interim final rule on student eligibility is forthcoming.

Nancy Anderson focuses on regulatory issues affecting higher education institutions, including compliance with federal, state and accrediting agency requirements.

Mike Goldstein has been a pioneer in the development of new and more effective and efficient approaches to education in general and eLearning in particular through the creation of innovative approaches to combining the resources and interests of the various sectors of the education, technology, financial and governmental communities.

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