

ED Issues Interim Final Rule on Student Eligibility for HEERF Funding While Courts Grant Preliminary Injunctions

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After weeks of confusion over the US Department of Education's guidance following its quick rollout of the Higher Education Emergency Relief Fund (HEERF), ED released an [interim final rule \(IFR\)](#) affirming that only students eligible for federal student aid can receive emergency student grants under the CARES Act. The IFR codifies ED's April guidance on student eligibility for HEERF funding, which ED has simultaneously argued in both federal court and on its website that it will not enforce. The IFR, however, converts that guidance into an enforceable regulation.

Also in the last week, federal judges in both California and Washington issued preliminary injunctions barring ED from enforcing either its guidance on student eligibility or its IFR, but only with respect to students at California community colleges or institutions located in Washington state, respectively.

[As we previously covered](#), ED issued guidance on April 21 – after many institutions had already drawn down and disbursed their HEERF funding – stating that only students eligible for federal student aid could receive HEERF grants. The practical effect of that restriction is to exclude many students, particularly non-citizens, such as international or undocumented students, from receiving HEERF grants. Following two lawsuits over that restriction, ED released a statement that its own guidance lacked the force and effect of law and would not be enforced, and then asked the judges in both cases to deny the plaintiffs' requests for preliminary injunctions on that basis, arguing in large part that the cases were not ripe because the guidance was not enforceable. But before either judge could rule, ED doubled down on the restriction, planning an IFR repeating its guidance and therefore giving it the force and effect of law.

ED's basis for the restriction, as it outlined in the preamble to the IFR, is the language of the CARES Act itself: ED argues that the term "student," as used in the CARES Act, is undefined and ambiguous, and therefore ED has the discretion to define it. Based on several other provisions in the CARES Act that reference provisions of the Higher Education Act, ED further concludes that it is reasonable to conclude that "student" is limited to Title IV-eligible students only. This rationale is at the heart of the challenge in both federal lawsuits, and neither court found it persuasive at the preliminary injunction stage.

Because the IFR has legal effect, it resolves ED's confusing statements that its prior guidance is not enforceable. But there are still several areas of ambiguity:

- **Effective date:** The IFR took effect immediately upon publication in the Federal Register on June 17, and ED will take comments for 30 days. IFRs typically do not have retroactive effect, and ED has noted in its court pleadings that it does not plan to enforce it retroactively. At the same time, ED has suggested in its public statements and guidance documents over the past few months that it believes that the student eligibility restriction is statutory and required by the CARES Act itself, which raises the possibility that it would have taken effect on March 27 (i.e., the date of the CARES Act enactment). And ED has publicly described this position several times since April, which could be construed to have put institutions on notice. It is not clear if ED believes the IFR supersedes that position.
- **Verifying student eligibility:** Assuming the IFR withstands judicial review, institutions will be expected to verify that recipients are Title IV-eligible. That is easy for students who filed a FAFSA. But for students who may be eligible, but have not filed a FAFSA, institutions need to consider other options for verifying Title IV eligibility. The safest option is requiring those students to file a FAFSA as a condition of receiving a grant, but that may not be feasible for institutions seeking to get funding to students quickly. The IFR encourages, but stops short of requiring, institutions to secure a FAFSA on file for every student to whom it distributes grants. Other options include verifying key eligibility points without a FAFSA, or obtaining a self-certification from the student for any missing eligibility criteria, or some combination of those options.
- **Using the HEERF institutional share for additional student grants:** While ED has been clear that student emergency grants can only be made to Title IV-eligible students, ED has argued in both federal court cases that institutions can and should redirect funding from the institutional share of HEERF funding to make additional grants to non-Title IV students. This seems internally inconsistent with ED's argument that the CARES Act provisions limit eligibility to Title IV students – both the institutional share and student share come from the same provisions of the CARES Act – and does not align with ED's April guidance at [Institutional Funding FAQ #5](#), which

stated that while institutions may redirect funds from the institutional share for additional grants, those grants can still only be made to Title IV-eligible students. Until these contradictions are resolved, it's not clear if this is a viable option for institutions seeking to fund additional grants to non-Title IV students.

ED has now doubled down on its view that HEERF student grants must be limited to Title IV-eligible students. The impact of the two preliminary injunctions, which only apply narrowly to students at California community colleges or institutions located in Washington state, on ED's overall strategy and enforcement remains to be seen. Institutions still evaluating how to distribute HEERF funding, particularly to non-Title IV students or students who are eligible but have not filed a FAFSA, need to assess their plans in light of the IFR. We expect more to come.

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