

Higher Education Emergency Relief Fund

Signed into law with lightning speed, the Coronavirus Aid, Relief and Economic Act (CARES Act) is Congress' attempt to rush federal funds into the hands of industries, individual taxpayers, small businesses, and, yes, educational institutions. Remaining available until September 30, 2021, the CARES Act allocates \$30.75 billion to the Education Stabilization Fund (ESF), of which approximately \$13.86 billion is allocated to the Higher Education Emergency Relief Fund (HEERF). The HEERF funds break down as follows:

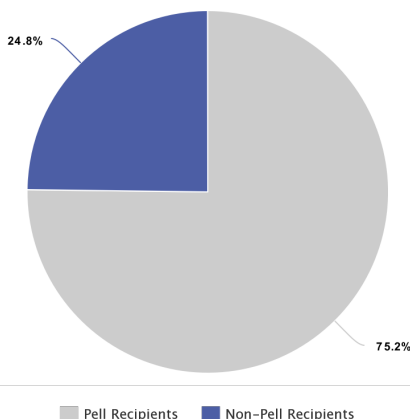
- **90%** (approximately \$12.5 billion) to each "institution of higher education" to "prevent, prepare for, and respond to coronavirus¹. See Section 18004(a)(1) (emphasis added). The U.S. Department of Education (ED) has established a dedicated [webpage](#) to HEERF.
- **7.5%** (approximately \$1.04 billion) of the Fund is dedicated to Historically Black Colleges and Universities (HBCUs), tribally controlled colleges and universities, Hispanic-Serving Institutions.
- **2.5%** of the HEERF funds (approximately \$347 million) are designated for institutions that the Secretary determines have the greatest unmet needs related to coronavirus.

For What is the Ninety Percent Portion of the HEERF Intended?

Congress allocated the overwhelming majority of the HEERF funds to "institutions of higher education" that participate in the programs authorized under the Higher Education Act of 1965 (HEA). The allocated formula for the \$12.5 billion of HEERF funds is as follows:

- **75%** of the \$12.5 billion (approximately \$9.4 billion) allocated based on the relative share of FTE enrollment of Pell recipients who "are not exclusively enrolled in distance education course prior to the coronavirus emergency."²
- **25%** of the \$12.5 billion (approximately \$3.1 billion) allocated based on the relative share of FTE enrollment of non-Pell recipients who "are not exclusively enrolled in distance education course prior to the coronavirus emergency."³

Clearly the bulk of the HEERF funds target the population of needy students who were primarily bricks and mortar students before the disruption related to COVID-19. Half of these \$12.5 billion funds are dedicated for institutions to distribute as grants to students. The other half is to assist institutions with cost associated with changing their method of delivering education.



Student Portion of HEERF Funds: Grants for Expenses Related to COVID-19 Disruption

How Should an Institution Distribute the Student Portion of the HEERF Funds?

As mentioned, **at least 50%** of this allocated amount of HEERF funds an institution receives under this provision must be used 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, healthcare, and child care).⁴” The statute does not further describe which specific expenses would be deemed to be “related to the disruption of campus operations due to the coronavirus.”

ED, however, issued pre-CARES Act [guidance](#) to assist institutions dealing with COVID-19-related disruptions. In this guidance, ED provides examples of student activities “impacted by Coronavirus.” They include the following examples. I think that expenses related to these listed circumstances, of which I provide examples, would be reasonably considered in awarding these grants to students:

- A student was enrolled or was supposed to begin a travel-abroad experience and either the student has been called back to the U.S. or was never able to begin the travel abroad experience (**examples: unreimbursed airfare to return to the U.S., reasonable lodging and meal costs associated with the return to the U.S.**);
- A student was enrolled in a program and met the requirements for full-time enrollment; however, due to the COVID-19, one or more classes – such as an internship, a clinical rotation, student teaching or fieldwork – have been canceled and now the student has fallen below the 12 credit hour minimum and is no longer considered to be

- a full-time student (**example: childcare**);
- A student is quarantined and misses class or a student is incapacitated due to COVID-19 illness (**examples: medical costs not covered by insurance, childcare, personal computer or laptop to attend online courses**);
- A campus temporarily stops offering ground-based classes in order to prevent the spread of COVID-19 (**examples: personal computer or laptop to attend online courses**);
- A foreign school that serves U.S. students who participate in title IV programs temporarily suspends operations due to COVID-19 (**examples: unreimbursed airfare to return to the U.S., reasonable lodging and meal costs associated with the return to the U.S., personal computer or laptop to attend online courses**).

Given the fact that the statute states that institutions “shall use” “no less than” their student allotment of HEERF to provide emergency financial aid grants, there appears to be an expectation that institutions will award all of their student HEERF funds to their students. Moreover, the statute contains no provision for the return of excess funds by institutions. While the Secretary has suggested that institutions with students with little need, share their HEERF funds with other institutions with greater need, there is no requirement to do so. Consequently, while institutions must allocate these student grants on the basis of factors related to COVID-19-related campus disruption, ED has acknowledged that institutions have substantial discretion to develop their own unique methodology for distributing these funds to their students. While some have advised schools to hold a portion of their HEERF funds in reserve, schools should be cautioned that ED is requiring institutions to attempt to expend all funds within [one year](#) of its certification for the funds and the purpose of HEERF itself is to distribute all funds



as quickly as possible to students.

Note that these funds **are not Title IV funds**. Unlike other provisions of the CARES Act, which expressly amend existing laws, the section of the Act that creates the HEERF does not amend the HEA or any other existing law⁵. Consequently, subject to any future guidance from ED, the limitations that normally attach to the use of professional judgment of financial aid professionals, would not be warranted here⁶. Specifically, 20 U.S.C. § 1087tt(a) permits the exercise of professional judgment to make adjustments to cost of attendance “on a case-by-case basis” “on the basis of adequate documentation.” Because the limitations of § 1097tt do not apply, it seems reasonable for an institution to make determinations of the amount of grants to which each student is due based on blanket factors, such as EFC together with factors related to COVID-19 campus operations disruption⁷. In fact, the use of EFC as a factor is consistent with Secretary DeVos’s [April 9, 2020 letter](#) to College and University Presidents to “prioritize your students with the greatest need.” She also urged schools to consider establishing “a maximum funding threshold” for each student, such as the current maximum Pell amount (\$6195) to ensure that the funds are spread as widely as possible among the student population.

In addition, because these are not Title IV funds, it is also my view that these funds could be disbursed to students who are not Title IV-eligible, such as international students. In fact, ED states expressly in the [certification](#) institutions are required to sign to receive the funds that the “Secretary does not consider these individual emergency financial aid grants to constitute Federal financial aid under Title IV of the HEA.”

What Strings are Attached to the Student HEERF Funds?

ED has made it clear that institutional recipients of these funds “retain[] discretion to determine the amount of each individual emergency financial aid grant consistent with all applicable laws including non-discrimination laws.” Nonetheless, schools should not take lightly the commitments they made when they signed the certification to receive HEERF funds. If your institution already submitted this certification it has already agreed to the following:

- 1. Limited Use:** An institution may not use the student portion of the HEERF funds to reimburse itself for any costs or expenses, including but not limited to, any refunds or benefits the institution has previously extended to students. In this sense, the HEERF funds are designed to supplement not supplant pre-existing student benefits. In addition, ED has made it clear that institutions may not use these funds for its own costs associated with significant changes to the delivery of instruction due to the coronavirus. As explained below, the second 50% allocation of HEERF funds is designated for those costs.
- 2. Fiduciary Responsibility:** The institution must hold the HEERF funds in trust for students and, therefore, has a fiduciary obligation with respect to these funds.
- 3. Reporting⁸:** Institutions must report to ED within 30 days of the Certification and then every 45 days (presumably until 45 days after the last distribution):
 - a. How grants were distributed to students;
 - b. The amount of each grant awarded to each student;
 - c. The calculation methodology for each grant;
 - d. Any direction or instruction institutions provided to students receiving HEERF grants;



- e. To the greatest extent possible, documentation that the institution has continued to pay all of its employees and contractors during the period of any disruptions or closures. In this regard, ED is requiring that the institution provide a detailed explanation of actions and decisions related to the retention of employees and contractors.
4. **One-Year Distribution Period:** HEERF grants must be distributed to students within one year of the Certification to the greatest extent possible and document the effort to do so.
 5. **Record Maintenance:** Institutions must make their records regarding HEERF fund distributions available to ED, the Office of Inspector General, and other authorized governmental entities.
 6. **Enforcement Mechanisms:** By receiving these funds, schools acknowledge that failure to comply with the Certification requirements could result in liability under the False Claims Act, debarment or suspension, and other appropriate actions pursuant to other applicable law.
 7. **Compliance with Other Federal Provisions:** Institutions accepting these funds agree to comply with Hatch Act provisions; labor standards; Single Audit Act; and all applicable Federal laws, executive orders and regulations.
 8. **Lobbying Prohibitions:** HEERF funds may not be used to influence or to attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress.

Institutional Portion of HEERF Funds

How May My Institution Spend the Institutional Portion of the HEERF Fund?

The other 50% of the HEERF funds designated for institutions has not yet been disbursed by ED and [ED has referred to an application process](#). These funds may be used only “to cover any costs associated with significant changes to the delivery of instruction due to the coronavirus.” See Section 18004(c). However, these funds may not be used for the following costs:

- Payments to contractors for pre-enrollment recruitment activities (presumably marketing, advertising, etc.);
- Capital outlay associated with facilities related to athletics; or
- Sectarian instruction or religious worship.

See *id.* at § 18004(c). For many institutions, the most relevant prohibition is the one preventing the funds from being expended on contractors’ pre-enrollment activities. The activity Congress most likely was targeting here is payment to third-party recruiters and marketers. In cases where contractors are involved in both recruitment and other activities related to the delivery of online instruction, it is unclear whether ED will consider payments to such contractors as allowable costs. Hopefully, ED will be providing guidance on a method institutions may use to prorate these costs to provide some ability to use the HEERF institutional funds for these expenditures.

In considering which expenditures are reimbursable with these HEERF funds, institutions are reminded that the funds are for costs associated with “significant changes” to their delivery of instruction. Many institutions already have robust distance education programs. Thus,



institutions should now be tracking its additional expenditures for delivery instruction. These extra costs may include additional software licenses, hardware, training, equipment, etc. It will be important to document pre-COVID-19 expenditures for delivery instruction to contrast them with those being expended post-COVID-19.

Will My Institution's Acceptance of HEERF Funds Jeopardize Its 90/10 Compliance?

Because HEERF funds were not authorized under the HEA, it appears that proprietary institutions are not required to account for these funds as Title IV funds for purposes of calculating its 90/10 ratio under 34 C.F.R. § 668.28(a). In other words, proprietary schools likely should not be burdened with concern that the acceptance of this funding could increase the chance that it will harm its 90-10 ratio⁹. However, whether an institution may count the HEERF funds for any particular student as non-Title IV "revenue" will depend upon whether they are applied to tuition, fees, other institutional charges, and other charges appropriately classified as being "generated from programs and activities" under 34 C.F.R. § 668.28(a)(3). The extent to which HEERF funds can be classified as "revenue" for purposes of the 90/10 rule will have to be made on a student-by-student basis. This is because, in general, section 668.28(a)(4) requires institutions to attribute Title IV funds first to a student's tuition, fees, and other institutional charges. Only in cases where Title IV funds do not cover all of such charges, could an institution be in a position to classify the HEERF funds as non-Title IV "revenue."

What is the Remaining Ten Percent of Fund Intended For?

Seven and one half percent (7.5%) (approximately \$1.04 billion) of the HEERF funds are dedicated to Historically Black Colleges and Universities (HBCUs), tribally controlled colleges and universities, Hispanic-Serving Institutions.

And, finally, 2.5% of the funds (approximately \$347 million) for institutions that the Secretary determines have the greatest unmet needs related to coronavirus. Institutions selected by the Secretary for funding may use to defray expenses (including lost revenue, reimbursement for expenses already incurred, technology costs associated with a transition to distance education, faculty and staff trainings, payroll) incurred by institutions of higher education and for grants to students for any component of the student's cost of attendance including food, housing, course materials, technology, health care, and child care. Perhaps APC is lobbying for those funds to be directed to institutions in New York, which has been the epicenter of the COVID-19 crisis.

This FAQ is not intended to constitute legal advice. Please use it as starting point that may prompt more questions. Let me know if you require additional guidance.



Endnotes

1. Section 18007(2) of the Act assigns the definition of “institution of higher education” as set forth in “title I of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.).” In an April 7, 2020 letter to Secretary of Education, Betsy DeVos, Senators Warren, Durbin, Brown, and Blumenthal urged the Secretary not to allocate any of the HEERF funds to proprietary institutions. See <https://www.warren.senate.gov/imo/media/doc/2020.04.07%20Letter%20to%20ED%20re%20for-profit%20colleges%20in%20CARES.pdf>. They maintained that proprietary institutions are not included within the definition of IHEs in 20 U.S.C. § 1001. See *id.* While this is true, the CARES Act refers not just to 20 U.S.C. § 1001, but to 20 U.S.C. §§ 1001 **“et seq.”** See Section 18007(2) of the Act (bold added). “*Et seq.*” is Latin for “and what follows.” Section 20 U.S.C. § 1002(a), which follows 20 U.S.C. § 1001, includes proprietary institutions within the definition of an IHE.
2. Section 18004(a)(1)(A).
3. Section 18004(a)(1)(B).
4. *Id.* at § 18004(c).
5. As explained in note 1, the HEERF section of the Act applies to “institutions of higher education” (IHE) defined in 20 U.S.C. §§ 1001 *et seq.* of the Higher Education Act (HEA). However, the fact that Congress borrowed a definition from the HEA does not make the fund authorized under the HEA. In fact, as stated in the preamble to Division B of the Act, these funds “are appropriated, out of any money in the Treasury not otherwise appropriated.” As such, they are not Title IV, HEA funds.
6. I am aware that in its March 5, 2020 pre-CARES Act guidance, ED reminded institutions of its professional judgment authority given the coronavirus crisis. See <https://ifap.ed.gov/electronic-announcements/030520Guidance4interruptionsrelated2CoronavirusCOVID19>. In this announcement, ED reiterated its policy regarding the need to make these judgments on a case-by-case basis:

Financial aid administrators (FAA) have statutory authority to use professional judgement to make adjustments on a case-by-case basis to the cost of attendance or to the data elements used in calculating the EFC to reflect a student’s special circumstances. The use of professional judgement where students and/or their families have been affected by COVID-19 is permitted, such as in the case where an employer closes for a period of time as a result of COVID-19. In making professional judgement determinations, FAAs must obtain documentation and retain it in each student’s file. This documentation must substantiate the reason for any adjustment. Institutions are reminded that, regardless of how broadly an event may affect its student population, professional judgement determinations must be made and documented on a case-by-case basis.

See *id.* (emphasis added). However, this guidance relates to the award of Title IV funds, not CARES Act funding under the Higher Education Emergency Relief Fund.
7. While the requirement to make case-by-case professional judgments does not apply to the allocation methodology applied to the HEERF funds, it does still apply with regard to how those HEERF funds are considered when awarding Title IV financial aid. Nevertheless, with regard to this determination, the Secretary has urged institutions to use this professional judgment on a case-by-case basis to exclude HEERF student awards from their EFC calculations. See <https://www2.ed.gov/about/offices/list/ope/caresheerfcertificationandagreementfinalombap-provedforissuance.pdf>. In other words, the Secretary would like institutions to consider not penalizing students with less Title IV funds because of their receipt of HEERF funds.
8. With regard to the reporting requirement, it is important to point out that the records an institution reports to ED may be subject to disclosure under the Freedom of Information Act.
9. As referenced in note 1, four Democratic U.S. senators have written to Secretary DeVos urging that the HEERF funds not be allocated to proprietary institutions. See <https://www.warren.senate.gov/imo/media/doc/2020.04.07%20Letter%20to%20ED%20re%20for-profit%20colleges%20in%20CARES.pdf>. Nonetheless, in anticipation of the funds being allocated to such institutions, these senators also recommended to the Secretary that these HEERF funds be counted as “federal [Title IV] revenues for the purpose of enforcing compliance with the 90/10 rule.” See *id.* Because the HEERF funds are not authorized under Title IV of the HEA, I do not think that the senators’ position is legally supportable.

