

July 17, 2020

*Via Federal eRulemaking Portal*

The Hon. Betsy DeVos  
Secretary of Education  
Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202

RE: Comment Regarding Interim Final Rule, *Eligibility of Students at Institutions of Higher Education for Funds under the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, 85 Fed. Reg. 36,494 (June 17, 2020), RIN 1840-ZA04.

Dear Secretary Devos:

We, the Attorneys General for the State of New York, Colorado, Connecticut, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Pennsylvania, Vermont, Virginia, Washington, Wisconsin, and the District of Columbia, write to urge the U.S. Department of Education to withdraw the eligibility restrictions imposed on the Higher Education Emergency Relief Fund (“HEERF”) student grants by the Interim Final Rule, *Eligibility of Students at Institutions of Higher Education for Funds under the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, 85 Fed. Reg. 36,494 (June 17, 2020) (“IFR” or the “Rule”). The eligibility restrictions violate the Spending Clause of the U.S. Constitution, break with the text and purpose of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), and harm states, schools, and students facing severe disruptions due to the ongoing coronavirus pandemic.

Public institutions of higher learning and their students are already facing unprecedented financial, logistical, and educational challenges. The IFR exacerbates these challenges, creating inconsistencies in the Department’s guidance, leaving schools scrambling to fill the funding gap left by the Rule, and triggering greater disenrollment—and, therefore, revenue losses—across the United States. By excluding vulnerable students, the IFR also harms the very population that Congress designed HEERF to benefit. Instead of supporting students in crisis, HEERF money is left sitting in institutional coffers rather than helping students pay for basic necessities or school costs. This is not what Congress intended. We urge the Department to withdraw the Rule.

**I. Background**

On January 30, 2020, the World Health Organization designated the 2019 outbreak of a new coronavirus disease (“COVID-19”) as a Public Health Emergency of International Concern. On March 11, the WHO upgraded COVID-19 to a global pandemic—the world’s first-ever

pandemic caused by a coronavirus.<sup>1</sup> At the time, cases outside of China had grown 13-fold in only two weeks, resulting in 118,000 cases in 114 countries and over 4,000 deaths.<sup>2</sup> Two days later, on March 13, President Donald J. Trump issued a proclamation designating the COVID-19 outbreak as a national emergency.<sup>3</sup>

By March 27, 2020, countries around the world had recorded 500,000 cases and 20,000 deaths.<sup>4</sup> That day, Congress enacted the CARES Act to address the social and economic impact of COVID-19 on workers, families, schools, and students. *See generally* CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020). As relevant here, the CARES Act appropriated \$30.75 billion to the Department of Education “to prevent, prepare for, and respond to coronavirus, domestically or internationally.” 134 Stat. at 564.

Section 18004 of the Act designates a portion of the appropriation for the creation of the Higher Education Emergency Relief Fund (“HEERF”). Section 18004(a) requires 90 percent of HEERF money to go to institutions of higher education (“IHEs”), pursuant to a specific formula that calculates the number of students with need at each institution. *Id.* at 567 (§ 18004(a)). Section 18004(b) directs that HEERF funds “shall be distributed by the Secretary using the same systems as the Secretary otherwise distributes funding to each institution under title IV of the Higher Education Act of 1965.” *Id.* at 568 (§ 18004(b)).

Most critical to the IFR is Section 18004(c), which grants IHEs wide discretion in how they use HEERF money—with one major exception. At least 50 percent of the HEERF money an institution receives must fund emergency 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).” *Id.* (§ 18004(c)). Otherwise, institutions may use HEERF “to cover any costs associated with significant changes to the delivery of instruction due to the coronavirus, so long as such costs do not include payment to contractors for the provision of pre-enrollment recruitment activities; endowments; or capital outlays associated with facilities related to athletics, sectarian instruction, or religious worship.” *Id.* The CARES Act includes no other limitations on the use of HEERF funds, only a requirement that IHEs report how they ultimately

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<sup>1</sup> *See WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19*, World Health Org. (Mar. 27, 2020), available at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>2</sup> *Id.*

<sup>3</sup> *See Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, White House (Mar. 13, 2020), available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak>.

<sup>4</sup> *See WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19*, World Health Org. (Mar. 27, 2020), available at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--27-march-2020>.

use the funds to the Secretary. *Id.* (§ 18004(e)).

On April 9, 2020, the Department announced it was allocating \$12.56 billion in HEERF money to IHEs. That same day, IHEs across the country received a letter from the Department informing them of their HEERF allotments and requiring them to sign a certification form that they would comply with the Department’s terms and conditions.<sup>5</sup> The letter recognized that

The CARES Act provides institutions with significant discretion on how to award this emergency assistance to students. This means that each institution may develop its own system and process for determining how to allocate these funds, which may include distributing the funds to all students or only to students who demonstrate significant need. The only statutory requirement is that the funds be used to cover 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).<sup>6</sup>

Meanwhile, the attached certification form stated that the signing IHE “retains discretion to determine the amount of each individual emergency financial aid grant consistent with all applicable laws including non-discrimination laws. . . . The Secretary does not consider these individual emergency financial aid grants to constitute Federal financial aid under Title IV of the [Higher Education Act of 1965].”<sup>7</sup> The certification form required IHEs to agree to its terms and to “all relevant provisions and requirements of the CARES Act or any other applicable law.”<sup>8</sup> Failure to comply could subject IHEs to legal and regulatory liability, including the loss of federal funding.<sup>9</sup>

On April 21, 2020, however, the Department conducted a conference call with many IHEs to announce eligibility restrictions on the HEERF emergency grants to students. On the same day, the Department posted an FAQ on its website stating that only students “who are or could be eligible to participate in programs under Section 484 in title IV of the Higher Education Act of 1965” (“HEA”) could receive HEERF grants.<sup>10</sup> The FAQ highlighted that the “criteria to

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<sup>5</sup> Letter from Betsy DeVos, Sec’y of Educ., to Coll. and Univ. Presidents (Apr. 9, 2020), available at <https://www2.ed.gov/about/offices/list/ope/caresactgrantfundingcoverletterfinal.pdf> (“DeVos Letter”).

<sup>6</sup> *Id.*

<sup>7</sup> *Recipient’s Funding Certification and Agreement Emergency Financial Aid Grants to Students under the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, Dep’t of Educ., available at <https://www2.ed.gov/about/offices/list/ope/heerfstudentscertificationagreement42020.pdf> (visited July 7, 2020) (“Certification Form”).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Higher Education Emergency Relief Fund: Frequently Asked Questions about the Emergency Financial Aid Grants to Students under Section 18004 of the Coronavirus Aid, Relief, and*

participate in programs under Section 484 of the HEA include but are not limited to the following: U.S. citizenship or [permanent resident]; a valid Social Security number; registration with Selective Service (if the student is male); and a high school diploma, GED, or completion of high school in an approved homeschool setting.”<sup>11</sup>

Title IV also requires that students be enrolled in for-credit courses, have a “C” average or greater by the end of their second year, and not be in default on any federal student loan or owe any amount on a federal student grant. *See* 20 U.S.C. § 1091. Additionally, although the Department concluded “that a FAFSA is not required for a student to be eligible for CARES Act funds, having a FAFSA on file is the primary practicable means for an institution to determine whether a student is eligible to participate in student aid programs and meets all applicable eligibility guidelines.” *Washington v. DeVos*, No. 20 Civ. 182, 2020 WL 3125916, at \*3 (E.D. Wash. June 12, 2020). As a result, students without FAFSAs are effectively barred as well.

On June 17, 2020, the Department published the IFR formalizing its FAQ guidance in the Federal Register with immediate effect. *See generally* 85 Fed. Reg. 36,494. As previously stated in the non-binding FAQ,<sup>12</sup> the IFR restricts eligibility for HEERF student grants to students who meet the eligibility requirements of Title IV. In the IFR, the Department states that the CARES Act did not define the terms “students,” “grants to students,” or “emergency financial aid grants to students.” *Id.* at 36,495. The Department concludes that who constitutes a “student” is therefore “at a minimum ambiguous.” *Id.* It further maintains that it has permissibly interpreted the term “to be limited to those individuals eligible for title IV assistance” on two grounds.

First, the Department points to the Act’s references to Title IV in certain provisions, including within Section 18004. *Id.* at 36,495–97. Second, with respect to the eligibility of noncitizens in particular, the Department argues that HEERF assistance “would be significantly curtailed at the outset by existing law independent of title IV.” *Id.* at 36,496. Specifically, the Department determines that the prohibition against providing “Federal public benefit[s]” to noncitizens in 8 U.S.C. § 1611 applies to HEERF. On these bases, the Department concludes that “a person who is or would be eligible under section 484 of the HEA for title IV aid” is the “best” and “most congruent” definition of “student.” *Id.* at 36,497.

At the same time, however, the Department already rejected this “best” and “most congruent” definition of student when calculating the amount of HEERF funding for each institution per the formula at Section 18004(a). In April, the Department distributed HEERF

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*Economic Security (CARES) Act*, at 4, Dep’t of Educ. (Apr. 21, 2020), available at <https://www2.ed.gov/about/offices/list/ope/heerfstudentfaqs.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> On May 21, 2020, the Department posted a statement on its website acknowledging that the FAQ was guidance that “lack[ed] the force and effect of law.” *See* Office of Postsecondary Education, *CARES Act: Higher Education Emergency Relief Fund*, Dep’t of Educ. (May 21, 2020), available at <https://www2.ed.gov/about/offices/list/ope/caresact.html>.

allotments based on IHEs' *full* number of students, without consideration of students' eligibility under Title IV. The IFR recognizes that its Section 18004(a) definition "differs from the approach taken" in Section 18004(c), but maintains that it "did not have data available on the number of individuals enrolled at each institution who are or could be eligible for title IV aid, so the Department had to use a different measure based on available data." 85 Fed. Reg. at 36,497 n.2.

As explained below, the law and the facts demonstrate that the IFR is fatally flawed. We urge the Department to reconsider and withdraw the IFR in order to comply with the U.S. Constitution, implement the CARES Act as Congress intended, and prevent further harm to schools and students across the country.

## **II. The IFR violates the Constitution.**

As the only court to consider the question has held, the IFR's restrictions on student eligibility for HEERF emergency grants violate the Spending Clause. *See Oakley v. Devos*, No. 20 Civ. 3215, 2020 WL 3268661, at \*7 (N.D. Cal. June 17, 2020).<sup>13</sup> Under that clause, federal funding to states may only carry conditions that Congress has explicitly imposed. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17–18 (1981). As the CARES Act neither imposed Title IV eligibility restrictions on HEERF grants nor delegated authority to do so to the Department of Education, the IFR is unconstitutional.

"Congress has broad power to set the terms on which it disburses federal money to the States." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). But where "Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. This is because "legislation enacted pursuant to the spending power is much in the nature of a contract." *Id.* As such, "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.*

Here, the contract is literal—IHEs were required to sign the Department's certification in order to receive HEERF money. But "there can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* To that end, the Supreme Court "insist[s] that Congress speak with a clear voice," *id.*, and provide "clear notice" of any conditions, *Arlington*, 548 U.S. at 296. Congress never gave such notice.

In the CARES Act, Congress did not impose Title IV's eligibility restrictions on HEERF student grants or delegate such authority to the Department—much less do so "unambiguously." *Pennhurst*, 451 U.S. at 17. As the *Oakley* court explained, "[t]he entirety of Section 18004 contains a single explicit reference to title IV." *Oakley*, 2020 WL 3268661, at \*8. And that sole explicit reference is not found in Section 18004(c), which sets conditions on the HEERF student grants. *See* 134 Stat. at 568 (§ 18004(c)) (directing IHEs to provide emergency student grants for "expenses related to the disruption of campus operations due to coronavirus (including

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<sup>13</sup> The only other court to consider the Department's eligibility restrictions declined to reach constitutional questions. *See Washington*, 2020 WL 3125916, at \*11.

eligible expenses under a student’s cost of attendance, such as food, housing, course materials, technology, health care, and child care”).

Rather, Section 18004(b) states that HEERF money “shall be distributed by the Secretary using the same systems as the Secretary otherwise distributes funding to each institution under title IV of the Higher Education Act of 1965.” *Id.* (§ 18004(b)). As “those ‘systems’ only refers to operational systems used for administration of funds, not eligibility requirements,” *Oakley*, 2020 WL 3268661, at \*8, the invocation of Title IV does not support interpreting “student” to mean only students eligible for Title IV programs. To the contrary, the isolated invocation of Title IV in Section 18004(b) suggests that its singular use “was not accidental, but instead . . . created with surgical precision.” *United States v. Hoskins*, 902 F.3d 69, 84 (2d Cir. 2018). Congress clearly knew how to invoke Title IV, but deliberately chose not to do so when imposing conditions on the HEERF student grants. *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (“Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”).<sup>14</sup>

The IFR fails to even address the “clear notice” requirement for exercises of the spending power, much less apply the aforementioned principles of statutory construction that counsel against reading any Title IV restrictions into “student.” *See generally* 85 Fed. Reg. at 36,495–97. Properly applied, however, it is clear that the IFR’s eligibility requirements violate the Spending Clause.

### **III. The IFR violates the CARES Act.**

For similar reasons, the IFR violates the CARES Act. As discussed above, no provision of the CARES Act—or any other statute—either imposes eligibility restrictions on the HEERF student grants or delegates authority to the Department to do so. *See generally* 134 Stat. 281. As such, the IFR not only violates the Spending Clause, but also exceeds the authority the agency has been granted by Congress. *See Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018) (“*NRDC*”) (“It is well settled that an agency may only act within the authority granted to it by statute.”); *see also Washington*, 2020 WL 3125916, at \*8–9.

Further, the IFR effectively creates multiple definitions of “student” within the CARES Act by first defining it broadly when calculating funding amounts for each IHE, *see* 134 Stat. at 567 (§ 18004(a)), and then defining it narrowly for which “students” are ultimately eligible to

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<sup>14</sup> The IFR maintains that other provisions of the CARES Act and Section 18004 implicitly invoke Title IV by referencing certain Title IV programs or other related parts of the HEA. *See* 85 Fed. Reg. at 36,496–97. As discussed above, however, veiled or ambiguous references do not give States the requisite “clear notice” of funding conditions. *Arlington*, 548 U.S. at 296. And even if they were explicit, none of these references are found in Section 18004(c). *Oakley*, 2020 WL 3268661, at \*11 (“Nowhere does Section 18004(c) mention or otherwise incorporate restrictions on the types of students eligible for aid.”). The invocation of Title IV elsewhere in the statute only confirms that Congress did not intend to limit student eligibility for emergency grants in Section 18004(c). *MacLean*, 135 S. Ct. at 919.

receive HEERF grants, *see id.* at 568 (§ 18004(c)). Inconsistent interpretation of a term appearing in the same statute—indeed, within two subsections of each other—does not constitute reasonable interpretation, *see Washington*, 2020 WL 3125916, at \*10–11, contrary to the IFR’s conclusions, 85 Fed. Reg. at 36,495.

“A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.” *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); *see also United States v. Kleiner*, 765 F.3d 155, 159 (2d Cir. 2014) (The “normal rule . . . [is] that identical words used in different parts of the same act are intended to have the same meaning.” (quoting *Dep’t of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994))); *Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 49 (2d Cir. 2012) (noting presumption that identical terms used in the same statute “are intended to have the same meaning”) (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 43 (1932)).

Notably, the Department already calculated the amount of HEERF funding for each institution based on the institution’s full number of students, without any consideration of their eligibility under Title IV or their citizenship status. *See Washington*, 2020 WL 3125916, at \*7; *Oakley*, 2020 WL 3268661, at \*11. “There is no reason to believe that the . . . language in the former provision, unlike the . . . language simultaneously inserted two subsections later,” *Powerex*, 551 U.S. at 232, should be read differently. Rather, the definition of “student” in Section 18004(c) ought to align with the meaning, clearly understood and already utilized by the Department, in Section 18004(a).

The IFR seeks to justify this incongruence by suggesting that data and time limitations required the use of a broader definition of student in Section 18004(a)—despite maintaining that the “Department intends to interpret the term ‘student’ in the same way throughout section 18004.” 85 Fed. Reg. at 36,497 n.2. But this only serves to highlight that not only does its interpretation violate the rule that identical terms have identical meanings, *Powerex*, 551 U.S. at 232, but also that it is impractical and clearly not the interpretation called for by Congress.

“What we have here, in reality, is a fundamental revision of the statute.” *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994); *see also, e.g., Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014) (holding it is a “core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate”); *NRDC*, 894 F.3d at 108–13 (vacating the agency’s decision for failure to comply with unambiguous statutory text). The CARES Act itself dictates that the Secretary “shall allocate HEERF funds according to a specific formula that counts *all* of an IHE’s students,” rendering the Department’s argument that it could have allocated funds based on a narrow definition of student had there been no date or time limitations entirely fanciful. *Oakley*, 2020 WL 3268661, at \*15.

In an attempt to avoid the Act’s dictates, the IFR then suggests that interpreting “student” to mean all of an IHE’s non-distance learning students, regardless of their citizenship status, would “be significantly curtailed at the outset by existing law independent of title IV with regard to certain immigration statuses.” 85 Fed. Reg. at 36,496. The IFR points to 8 U.S.C. § 1611,

which “prohibits [non-citizens] from receiving any ‘Federal public benefit’ and applies ‘notwithstanding any other provision of law.’” *Id.* Although the Rule states the prohibition “clearly applies to the HEERF funds,” this is incorrect. *See Oakley*, 2020 WL 3268661, at \*13-16. Section 1611 is inapplicable.

The canon of statutory construction that specific instructions from Congress override more general ones dictates that the CARES Act overrides Section 1611. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (“[I]t is a commonplace of statutory construction that the specific governs the general.”) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)). In the CARES Act, Congress specifically provided for funding to IHEs based on a precise formula accounting for all non-distance learning students. 134 Stat. at 567 (§ 18004(a)). And nothing in the CARES Act suggests that Congress intended Section 1611’s general provisions to apply to the “narrow, precise, and specific subject” of COVID-19 emergency relief. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *see id.* (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” (quoting *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974))).

The purpose of the CARES Act is also highly specific, responding to a once-in-a-century pandemic with a one-time infusion of cash. By contrast, Section 1611 is part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”)—a general statute written in general terms that is geared towards decreased long-term dependency on welfare benefits. *See* Pub. L. No. 104–193, 110 Stat. 2105 (1996); *see also* H.R. Rep. No. 104–651, at 3 (1996) (PRWORA intended to “limit[] lifetime welfare benefits”). That general goal would not be served by emergency legislation providing for one-off emergency assistance, nor does it supersede the CARE Act’s detailed commands.

For the same reasons, Section 1611’s “notwithstanding any other laws” clause does not dictate a different conclusion. The CARES Act’s specific, comprehensive statutory scheme controls over a general “notwithstanding” of an earlier enacted law. The CARES Act “must govern because it is the most recent indication of Congress’s intent,” even though “the earlier statute contained a ‘notwithstanding’ clause and the more recently enacted statute did not.” *See GP-UHAB Hous. Dev. Fund Corp. v. Jackson*, No. 05 Civ. 4830, 2006 WL 297704, at \*9 (E.D.N.Y. Feb. 7, 2006) (citing *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 991 (2d Cir.1990) (“[W]hen two statutes are in irreconcilable conflict, we must give effect to the most recently enacted statute since it is the most recent indication of congressional intent.”)).

Finally, Congress demonstrated that they knew how to specifically exclude noncitizens from CARES Act funding by prohibiting noncitizens from receiving the \$1,200 stimulus payments that were authorized by Section 2201. *See Washington*, 2020 WL 3125916, at \*7 (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)). Accordingly, it is far from “clear[]” that Section 1611’s prohibitions would apply to HEERF funds. To the contrary, proper construction of the law dictates



otherwise.

#### **IV. The IFR Harms the IHEs and Students that Congress Sought to Assist through HEERF.**

Beyond violating the CARES Act's terms, the IFR does the exact opposite of what Congress intended. As the United States faced massive upheaval from COVID-19, Congress enacted the CARES Act to support struggling institutions and vulnerable populations. Specifically, as relevant here, Congress created HEERF to "provide financial relief to colleges and universities and also support grants to displaced students." 166 Cong. Rec. H1823 (2020) (statement of Rep. Robert Scott).

As Sen. Susan Collins explained in debates on the Act, "direct aid to colleges and universities is needed to help these institutions offset these sudden revenue losses and unexpected costs." *Id.* at S2057. That is why, as Sen. Lamar Alexander noted, the bill included "money for block grants . . . for higher education." *Id.* at S1895. Rep. Lauren Underwood highlighted how these grants provide "much-needed temporary relief" to "support[] college students whose semesters were disrupted due to COVID-19." *Id.* at H1856. The Act's support, Rep. Mike Thompson explained, "will ensure America's learners are still able to operate remotely and can continue to develop to their full potential, regardless of their learning location." *Id.* at H1860.

The IFR frustrates Congress's efforts to limit COVID-19's impact on IHEs and "America's learners." Rather than implement HEERF as Congress intended, the Rule creates contradictory guidelines, exacerbates economic harms, denies emergency assistance to needy students, and holds up funds that could already have been deployed. Combined, these effects amount to staggering economic harm as well as repercussions for students' health, security, and education. We urge the Department to withdraw the IFR.

##### **A. The IFR Conflicts with the Department's Initial Guidance and Certification Form, Sowing Confusion Among IHEs.**

As discussed above, the Department calculated IHEs' HEERF allotments based on their full number of students. *See supra* Part 1, at 4–5. The letter and certification form the Department sent to IHEs on April 9, 2020 was consistent with that calculation; it did not impose eligibility restrictions on HEERF student grants.<sup>15</sup> To the contrary, the letter highlighted the "significant discretion" afforded to IHEs under the CARES Act, explaining that the "only statutory requirement" was "that the funds be used to cover expenses related to the disruption of campus operations due to coronavirus."<sup>16</sup>

Across the United States, the majority of the colleges and universities of the States represented here only became aware of any possible eligibility restrictions on the Department's April 21, 2020 conference call with IHEs or after reviewing the FAQs posted on the

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<sup>15</sup> DeVos Letter, *supra* n.5.

<sup>16</sup> Certification Form, *supra* n.7.

Department’s website that day. By then, many IHEs had already signed the certification form on the understanding that they had “significant discretion” to distribute HEERF student grants. Indeed, many schools had begun planning how to distribute the grants or had already assigned allotments—processes that the new guidance interrupted. A May 2020 survey of over 500 member institutions of the National Association of Student Financial Aid Administrators found that over 80 percent of institutions had to “greatly” or “somewhat” delay distribution of HEERF grants due to the Department’s evolving guidance.<sup>17</sup> Nearly 85 percent also reported that the April 21 guidance “greatly” or “somewhat” forced them to alter their initial plans for distributing the funds.<sup>18</sup>

In Colorado, the Metropolitan State University of Denver had to “abruptly change tack” following the publication of the FAQs.<sup>19</sup> In Illinois, some schools likewise had to adjust their original plans for disbursement once the guidelines were published. In Wisconsin, Milwaukee Area Technical College convened district leaders to discuss how CARES Act funds would be administered as early as April 13. By April 21, Madison College had already identified a population of students to receive HEERF student grants. The *ex post facto* introduction of the eligibility restrictions created “additional complexity” in administering its HEERF student grant allotment.

For many of the States’ IHEs, the contradictions between the April 9 letter and certification form, the non-binding FAQ guidance, and the binding IFR have sowed confusion in administering HEERF student grants. In New Jersey, IHE administrators have had to engage in “continued conversations” with state officials to ensure that their institutions are compliant with all operative regulations. Still, the difficulty in navigating the competing directions from the Department has remained a “constant source of frustration” for many IHEs. And, at a minimum, has required IHEs to expend extra staff time and effort to keep up. For example, in Nevada, Western Nevada College “continues to adjust to the constant updates and changes provided by the U.S. Department of Education.”

Contrary to the Department’s claims that the Rule requires only “five hours to set up any new form for students to complete and establish review and recordkeeping procedures,” 85 Fed. Reg. at 36,503, weaving through the Department’s inconsistent commands has constituted a significant burden on IHEs. The Department’s five-hour estimate is a gross underestimation of the Rule’s compliance costs. In actuality, compliance requires serious outlays of time and effort to stay on top of changing requirements, filter out ineligible students, and handle the downstream

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<sup>17</sup> *NASFAA Membership Survey: CARES Act Distribution*, at 2, Nat’l Ass’n of Student Fin. Aid, (May 2020), available at [https://www.nasfaa.org/uploads/documents/NASFAA\\_Membership\\_CARESAct\\_Survey.pdf](https://www.nasfaa.org/uploads/documents/NASFAA_Membership_CARESAct_Survey.pdf).

<sup>18</sup> *Id.* at 3.

<sup>19</sup> Sam Tabachnik, *Colorado universities coming to aid of undocumented students, others not eligible for federal coronavirus stimulus*, Denver Post (May 13, 2020), available at <https://www.denverpost.com/2020/05/13/coronavirus-colorado-colleges-daca-dreamers-financial-aid>.

effects on revenue, enrollment, housing, and scheduling when needy students are denied aid. And these costs come at exactly the time that IHEs need to move quickly and efficiently in administering their finances to account for dramatic economic losses, as discussed below.

**B. The IFR Exacerbates Economic Harms That IHEs Are Facing Due to COVID-19, Frustrating the CARES Act’s Purpose.**

The CARES Act appropriated funds to support IHEs given the billions of dollars in decreased revenue and increased expenses prompted by the COVID-19 pandemic. *See* 166 Cong. Rec. S2057 (statement of Sen. Susan Collins) (explaining need to “help these institutions offset these sudden revenue losses and unexpected costs”). By restricting HEERF grants to only Title IV-eligible students, however, the Rule forces IHEs to come up with extra funds to provide for excluded students at a time when their cash flow is evaporating and state budget cuts increase costs. At the same time, the Rule triggers greater student disenrollment—and, therefore, more revenue losses—as students unable to get financial assistance forgo finishing their degrees due to emergency expenses. In short, the Rule dramatically exacerbates the very economic harms that Congress enacted the CARES Act to help struggling IHEs address.

**1. The States’ IHEs Face Unprecedented Losses and Expenses, with More Anticipated.**

The COVID-19 pandemic has plunged higher education into economic crisis, with no signs of recovery coming soon. Experts estimate that IHEs will need an additional \$46 billion to weather the pandemic’s impact, beyond the funds already distributed under the CARES Act.<sup>20</sup> Indeed, the States’ IHEs face unprecedented losses due to student reimbursements for tuition, housing, dining, and other fees; decreased enrollments; greater personnel costs; significant and ongoing technology costs to ensure successful remote instruction; as well as continued outlays for public health and sanitation. For these public IHEs, the economic crisis is likely to continue for years as state budgets face an estimated \$765 billion in cuts over the next three years.<sup>21</sup>

In New York, the University at Buffalo has returned over \$20 million to students for unused fees for housing, dining, parking and transportation, athletics, and more.<sup>22</sup> The SUNY College of Environmental Science and Forestry refunded \$1 million in dorm fees for the spring

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<sup>20</sup> Victoria Yuen, *Mounting Peril for Public Higher Education During the Coronavirus Pandemic*, at 2, Ctr. for Am. Progress (June 11, 2020), available at <https://cdn.americanprogress.org/content/uploads/2020/06/08095038/Mounting-Peril-for-Public-Higher-Ed41.pdf>.

<sup>21</sup> Michael Leachman, *Projected State Shortfalls Grow as Economic Forecasts Worsen*, Ctr. on Budget & Policy Priorities (May 20, 2020), available at <https://www.cbpp.org/blog/projected-state-shortfalls-grow-as-economic-forecasts-worsen>.

<sup>22</sup> Kate McKenna, *UB announces CARES Act funding*, UBNOW (June 11, 2020), available at <http://www.buffalo.edu/ubnow/stories/2020/06/cares-act-funding.html>.

semester alone.<sup>23</sup> The City University of New York refunded students' housing fees for the remainder of the spring semester, after CUNY went fully online on March 12, and returned between 25 and 50 percent of student activity fees as well.<sup>24</sup> Onondaga Community College lost \$1.7 million over the spring semester, a significant part of its small budget.<sup>25</sup>

In Colorado, Colorado Mesa University lost \$3 million alone after shutting down residence halls for the spring semester. CMU also had to refund \$358,000 to students and fundraise \$350,000 to assist students with balances so they could return to complete their degrees. Western Colorado University refunded or credited approximately \$1.5 million in room, board, and mandatory fee revenue in the spring. WCU expects to spend at least \$2 million to cover additional COVID-related adaptations for the next school year—ranging from infrastructure mitigations to testing and tracing services to continued online delivery development. The state has already reduced WCU's appropriations by \$8.8 million. The state legislature cut all IHE appropriations by 58 percent, or \$493 million, this year—albeit with CARES Act institutional funds replacing most of the money.<sup>26</sup> Still, IHEs will see a 5 percent cut next year, for a loss of \$43 million.<sup>27</sup>

In Connecticut, the University of Connecticut anticipates a \$130 million loss over the next school year. Canceled procedures and other COVID-related disruptions at UConn Health has also led to \$188 million loss in revenue, with no rebound expected before at least sometime in 2021.<sup>28</sup> UConn has also already spent \$1.5 million on additional telehealth equipment and software, special cleaning agents, sanitizers, masks, and scrubs.

Illinois's public universities anticipate paying \$200 million in refunds and coronavirus-related costs by December 2020. Costs reported include unanticipated overtime, additional cleaning labor, salaries and wages of employees sent home, lack of work, hardware and software for online classes, study abroad, cleaning supplies, medical supplies, building retrofits and signage, canceled contracts, additional advertising, student outreach, enrollment management staffing, specialized labor and extra help, as well as student transitional support.

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<sup>23</sup> Mark Weiner, *Coronavirus in CNY: Colleges, universities refund money, feel financial pain*, The Post-Standard (Apr. 12, 2020) available at <https://www.syracuse.com/coronavirus/2020/04/coronavirus-in-cny-colleges-universities-refund-money-feel-financial-pain.html>.

<sup>24</sup> Victoria Merlino, *CUNY refunds booted dorm students, waives activity fees in light of COVID-19*, Queens Daily Eagle (March 31, 2020), available at <https://queenseagle.com/all/cuny-refunds-booted-dorm-students-waives-activity-fees-in-light-of-covid-19>.

<sup>25</sup> Weiner, *supra* n.23.

<sup>26</sup> Yuen, *supra* n.20, at 5.

<sup>27</sup> *Id.*

<sup>28</sup> Board of Trustees, *UConn & UConn Health FY21 Spending Plans*, Univ. of Conn. (June 24, 2020), available at <https://boardoftrustees.uconn.edu/wp-content/uploads/sites/2924/2020/06/Att.-18-FY-21-Spending-Plan-Presentation.pdf>.

By far, however, the largest impact is on revenue. Illinois community colleges estimate that they have already lost over \$50 million. Public universities project they will eventually lose \$172.7 million in revenue, not including any impact of lost tuition and fees. They anticipate substantial losses in ancillary services, as well as dining and housing. Universities with clinical services have already lost significant revenues and they anticipate more losses.

All told, New Jersey's public institutions project nearly \$343 million in losses for fiscal year 2020. Rutgers University's budget alone has taken a \$183 million hit. That loss includes \$50 million in refunds for unused student services, \$60 million in canceled procedures at its medical centers, and \$73 million due to state budget cuts.<sup>29</sup> In Wisconsin, the University of Wisconsin system lost \$78 million in revenue for the spring 2020 semester. The system's 13 campuses expect an additional \$90 million in losses for summer 2020 for canceled summer camps, catering services, and athletics.<sup>30</sup>

A special session of the New Mexico legislature cut state appropriations to the state's public IHEs by 4 to 6 percent. The cuts were designed to be filled by CARES Act funding, in what was termed a "stimulus swap." But now half that money is tied up due to the Rule's restrictions, which have had a serious impact on school efforts to help students. For example, New Mexico State University has been "coordinating the logistics" to identify additional funding for ineligible students.<sup>31</sup>

Wisconsin's technical colleges have also lost millions of dollars. Milwaukee Area Technical College had over \$2 million in coronavirus-related costs for the spring semester and anticipates \$2 million more for the fall. Wisconsin Indianhead Technical College lost nearly half a million dollars due to tuition reimbursements as well as increased technology and personnel costs. Southwest Wisconsin Technical College lost over \$320,000. Western Technical College reimbursed over \$200,000 of room rent and meal plan costs to students when the pandemic began. For the fall, WTC anticipates losing over \$2.3 million in tuition, housing, and meal plan revenue, on top of over \$140,000 in increased IT costs to set up students for a successful semester, among other costs. Madison College spent over half a million on technology to support distance learning alone.

## **2. The States' IHEs Have Had to Divert Funding or Identify Additional Funding Sources to Account for the IFR's Restrictions, but Still Face Disenrollment Increases.**

At a time when IHEs are already facing high COVID-19 expenses, the IFR has prompted many institutions to divert funds from their budgets or related entities to fill the funding gap left

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<sup>29</sup> Yuen, *supra* n.20, at 1.

<sup>30</sup> *Id.* at 3–4.

<sup>31</sup> Aimee Ryan, *NMSU receives emergency funding from CARES Act due to COVID-19*, The Round Up (May 11, 2020), available at <https://nmsuroundup.com/15771/coronavirusnmsu/nmsu-receives-emergency-funding-from-cares-act-due-to-covid-19>.

by the IFR. In New York, the City University of New York raised \$3.5 million from donors to establish its own emergency relief fund for hard-hit students—including undocumented and international students barred by the Rule. As the need is great, students have to apply for assistance from CUNY’s emergency relief fund via lottery.

In Colorado, the University of Colorado has set up a student relief fund at each of its campuses, giving preference to students barred from receiving HEERF. In May, the University of Northern Colorado was still investigating how to assist ineligible students—likely turning to private philanthropy, if possible, to make up the shortfall. Metro State University had to redirect \$400,000 of money initially reserved for scholarships to a fund for ineligible students.

Many other IHEs across the United States have had to spend considerable time, effort, and resources to do the same. The University of Connecticut has had to identify new funding sources to account for ineligible students. The University of the District of Columbia recently reallocated \$550,000 to assist such students. Its foundation also raised \$65,000 for ineligible students. The University of Massachusetts’s Amherst and Boston campuses have had to use their own funds to cover costs for ineligible students. In Illinois, the Illinois Board of Higher Education and Illinois Community College Board raised \$700,000 in private contributions to help universities and community colleges support students without regard to Title IV eligibility.

The Wisconsin Technical College System awarded funds to its 16 technical colleges to assist students ineligible under the IFR. Nevertheless, foundations for Gateway Technical College, Lakeshore Technical College, Madison College, Nicolet Area Technical College, Northcentral Technical College, Waukesha County Technical College, and Wisconsin Indianhead Technical College also had to divert funds due to the IFR. Southwest Wisconsin Technical College repurposed two small grant programs to assist ineligible students.

Despite these efforts, thousands of students have not been able to access the necessary funds to account for COVID-19 disruptions to their education. In Colorado, Western Colorado University expects enrollment to be down between 3 to 4 percent for the fall due to COVID impacts, resulting in approximately \$1.2 million in revenue reduction. In Vermont, some IHEs estimate between 10 to 30 percent reduction in enrollment for the fall. In Wisconsin, Gateway Technical College estimates the current impact on fall enrollment to be \$5 million. At Chippewa Valley Technical College, fulltime enrollment is already down 6 percent.

The decrease in enrollments is tied to the Rule’s exclusion of many students with severe economic need. For example, due to the eligibility restrictions, 70 percent of CVTC’s students could not receive HEERF assistance in spring and summer 2020. Withdrawals have therefore increased while enrollment has decreased, both with a direct impact on the college’s budget. As a result, the IFR is exacerbating economic harms in middle of IHEs’ ongoing struggle to survive the impact of COVID-19.

### **C. The IFR Excludes a Huge Number of Students Facing High COVID-19 Costs, Especially Those Who Could Most Benefit from HEERF Grants.**

The IFR’s harms to IHEs is matched by the harms to their students. The IFR’s wide-

reaching restrictions bar thousands of students of all stripes from accessing desperately needed financial assistance. For example, in New York, the State University of New York system has over 18,000 international students who are barred from receiving HEERF grants. At Finger Lakes Community College, only 1,638 out of about 5,700 full- and part-time were eligible.

In Colorado, thousands of students have been found ineligible under the IFR. At Metro State University, some 8,000 students do not have a FAFSA—the most practical means of demonstrating Title IV eligibility. Approximately 1,730 of the 3,500 total students at Western Colorado University were ineligible based on the Title IV eligibility criteria. At Colorado Mesa University, 369 students were likewise ineligible. In the District of Columbia, 1,650 international students, 251 non-degree students, and 1,102 students without FAFSAs at the University of the District of Columbia could not receive HEERF grants under the IFR.

In Illinois, the over 130,000 students enrolled in adult education, dual credit, or a short-term certificate program in fiscal year 2019 were ineligible for HEERF grants.<sup>32</sup> Over 2,500 students at University of Illinois at Urbana-Champaign alone were excluded from assistance. Meanwhile, the University of Massachusetts at Amherst has already received over 700 applications for assistance from students who are ineligible due to the IFR. In New Jersey, about 1,200 students at Rutgers were excluded—including both citizens who applied and were found to be ineligible for Title IV and noncitizen students attending through the New Jersey Dreamers program.

In Nevada, nearly 10,000 students at the University of Nevada, Las Vegas were ineligible. The University of Nevada, Reno had 6,500 students with no FAFSA on file. Of those who applied for HEERF grants, 1,350 were ineligible due to either the lack of FAFSA or IFR's restrictions. Nevada State College had to deny over 200 applications due to Title IV restrictions. At Vermont Technical College, the school estimates that only 1,043 of its roughly 1,600 students are eligible for HEERF grants. And as mentioned above, in Wisconsin, some 70 percent of one technical college's students could not receive HEERF assistance in spring and summer 2020.

The need for financial assistance to support students could not be overstated. In Illinois, over 40,000 public university students have applied for HEERF grants. In Iowa, over 22,000 students applied. In New Jersey, many students at Rutgers faced housing disruption when residence halls closed in March 2020, and over 20,000 students applied for HEERF grants. In Wisconsin, Southwest Wisconsin Technical College students faced over \$550,000 in food, housing, coursework, tech, healthcare, childcare, and other costs over the course of the spring semester. At Madison College, over 900 students have identified a need for food, housing, medical, childcare, course materials, and technology totaling over \$700,000.

In response, students organizations have been forced to divert their own funds while also attempting to handle income, public health, and other COVID-related disruptions. For example, in Wisconsin, the Waukesha County Technical College Student Government Association

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<sup>32</sup> Short-term credential students may include some students in programs of 16-30 hours in length, who would be eligible for HEERF aid.

diverted funds to help HEERF ineligible students with fuel and food cards. Gateway Technical College's United Student Government also provided \$100,000 to support student technology needs and other pandemic-related expenses.

Often, the students who are excluded under the IFR are the ones most likely to benefit from emergency HEERF assistance. For example, Colorado estimates that the eligibility restrictions preclude over 1,300 undocumented students from receiving HEERF grants. At Metro State University, the Rule rendered over 700 Deferred Action for Childhood Arrivals (“DACA”), undocumented, or international students ineligible. Similarly, New Jersey had at least 1,000 DACA recipients in the past school year who were ineligible under Title IV. Rutgers alone estimates that over 700 undocumented students have been excluded. In New Mexico, all of the state's public colleges and universities are minority-serving institutions, including four tribal colleges. Almost three-quarters of their students are on financial aid, but, at the University of New Mexico alone, less than 13,000 of the school's 22,000 students were eligible for HEERF grants.<sup>33</sup>

In Wisconsin, at Western Technical College, the IFR's “largest impact” has been on students enrolled through partnerships with county jails, alternative high schools, and all adult learners in ABE classes. This population includes the nearly 1,000 incarcerated or reentering students from Project PROVEN and over 900 students in adult basic education. Students in these programs would likely see the most benefit in receiving HEERF grants not only to cover increased technology costs, but also to cover the types of basic living assistance explicitly identified in the CARES Act—including healthcare, housing, food assistance, and childcare.

Students in these programs tend not to have as many resources. Impacts to their family budgets at any level are likely to cause them to drop classes or forgo further education in the following semester. Many also do not do as well in online classrooms, preferring instead one-on-one bonds they have formed with learning specialists and faculty. Excluding these students will not only impact IHE budgets, but also IHEs with missions that have identified equity and inclusion as strategic goals.

#### **D. Many IHEs Still Have Funds to Disburse, but the IFR Prevents Students from Receiving HEERF Grants.**

If not for the IFR, the staggering level of student need could be mitigated by distributing HEERF grants to students who fall outside of Title IV's eligibility restrictions. Indeed, dozens of IHEs across the United States still have HEERF funds available to distribute. Although some IHEs are reserving HEERF grant money for future COVID-related disruptions, many would be distributing at least a portion of the remaining funds to ineligible students. Instead, the money remains hamstrung by the myriad restrictions imposed by the IFR.

In Colorado, Colorado Mesa University currently has \$2 million of HEERF student grant money remaining. The restrictions that the Department of Education has placed upon the

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<sup>33</sup> Fin. Aid Office, *Federal CARES Act Information*, Univ. of New Mexico, available at <https://finaid.unm.edu/cares-act.html>.



awarding of the funds makes it difficult to direct the funds in a manner that benefits the students for paying costs associated with finishing their degrees. Opening up aid to students that are not eligible for Title IV funding would allow at least \$250,000 of the funding to be allocated. Western Colorado University also has nearly \$50,000 available in HEERF funds for students.

As of mid-July, the University of District Columbia still had over \$586,000 in funds to distribute—more than the \$550,000 the university has had to reallocate for students ineligible under the IFR’s restrictions. In Illinois, as of the middle of June, public IHEs reported having \$25.4 million that had not been distributed. Illinois’s schools continue to reach out to students to urge them to apply for funds. If the IFR was withdrawn, many schools would likely distribute some of the funds to students who are ineligible to receive funds under the Rule.

In Wisconsin, Northeast Wisconsin Technical College still had over \$500,000 of HEERF student grant funding left to disburse as of June 30, 2020. Western Technical College had only spent 37 percent of its allotment as of June 29. Madison College had only spent 25 percent, although it anticipates that increased technology needs in the fall semester will burn through the remaining funds quickly.

As of June 29, 2020, UMass Boston had approximately \$3.5 million in HEERF funds that had not been distributed to students. The university would have already distributed a portion of these funds to Title IV ineligible students if permitted. Although it is planning to distribute this money beginning in August, the Rule will continue to prevent it from providing assistance to all students who are in need of support.

As of July 2020, UMass Dartmouth had approximately \$2.7 million in funds that had not been distributed. UMass Lowell had approximately \$1.7 million remaining. While both UMass Dartmouth and UMass Lowell plan to distribute aid to students for the fall 2020 semester, barred students will be unable to access the fund if the IFR remains in effect.

## V. Conclusion

For these reasons, the undersigned Attorneys General ask that the Department withdraw the IFR. The Rule is unconstitutional, unlawful, and blind to the serious harms it imposes on states, schools, and students.

Sincerely,



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LETITIA JAMES  
New York Attorney General



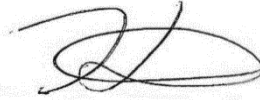
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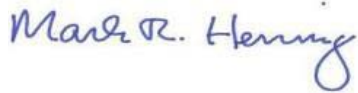
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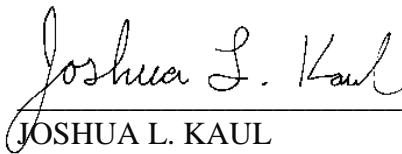
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