Overview

For additional guidance, please refer to Steptoe’s COVID-19 Resource Center.

Last week, the Department of Education (Department) released details and guidance regarding its distribution of funds appropriated to Institutions of Higher Education (IHE) under the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act).

Section 18004(c) of the CARES Act dictates the permissible uses of the $12.56 billion that are allocated to the Higher Education Emergency Relief Fund and that will be distributed to eligible IHEs and their students. Specifically, it provides that an IHE must use at least 50% of the funds received "for the sole and exclusive purpose" of providing emergency financial aid grants to students for their 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 (i.e., the so-called "direct-to-student allocation").

The remaining funds (i.e., at most 50% of the funds received) may be used by IHEs to cover the so-called "institutional allocation," including "any costs associated with significant changes to the delivery of instruction due to coronavirus," subject to certain exceptions.

The guidance issued to date primarily concerns the permissible uses for such funds and applicable restrictions on such uses. We have provided a brief overview below.

The Direct-to-Student Allocation

In its guidance, the Department has made clear that the 50% allocation must be used for the sole and exclusive purpose of assisting students. The recent guidance issued further clarifies that IHEs may not use these funds to:

- Reimburse themselves for the provision of refunds to students for room and board, tuition, and other fees (such as activities fees);
- Reimburse themselves for the provision of information technology hardware (e.g., laptops, hotspot internet devices, etc.) and other related equipment to students;
- Reimburse themselves for institutionally-funded emergency grants to students as a result of COVID-19, unless the grants are (1) for authorized expenses related to the disruption of campus operations, (2) made to students eligible to receive emergency financial aid grants, and (3) made on or after March 27, 2020;
- Reimburse themselves for continued payments to student workers for campus jobs; or
- Pay outstanding or overdue student bills to institutions.

These restrictions on the permissible uses for the direct-to-student allocation stem from a desire by the Department to have IHEs "devote the maximum amount of funds possible to emergency financial aid grants to students." This includes a suggestion by the Department that IHEs—particularly those with significant endowments or other resources available—use some or all of the funds earmarked for the institutional allocation to provide direct assistance to students.

The Institutional Allocation
Once IHEs have submitted an agreement to the Department for the direct-to-student allocation, they may then proceed to apply for the institutional allocation. In general, the Department anticipates that IHEs will have significantly greater flexibility with respect to distributing these funds, provided they have a "reasoned basis" for concluding that the specific costs have a "clear nexus to significant changes to the delivery of instruction due to the coronavirus." For instance, IHEs may use the institutional allocation to:

- Reimburse themselves for refunds provided to students for room and board, tuition, and other fees (such as activities fees) as a result of significant changes to the delivery of instruction, including interruptions in instruction, due to the coronavirus;
- Purchase equipment or software (e.g., laptops, hotspots, or other information technology equipment), pay for online licensing fees, or pay for internet service to enable students to transition to distance learning;
- Reimburse themselves for computers or other equipment purchased for and distributed to students;
- Expand remote learning programs, build IT capacity to support such programs, and train faculty and staff to operate effectively in a remote learning environment;
- Provide additional emergency financial aid grants to students; and
- Pay a per-student fee to a third-party service provider, including an Online Program Management provider, for each additional student using a distance learning platform, learning management system, online resources, or other support services.

There are, however, some restrictions applicable to the institutional allocation. For instance, as provided in the CARES Act, IHEs are prohibited from using their institutional allocation for 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.

Likewise, the recent guidance seems to indicate some additional restrictions. For one, the Certification and Agreement for the institutional allocation prohibits the use of such funds for costs incurred before March 13, 2020. Moreover, the Frequently Asked Questions showcase limits to using the funds for scholarships or to provide payment for future academic terms. It highlights that while there are certain circumstances in which an IHE may award scholarships or otherwise provide payment for future academic terms, such payments must be associated with significant changes to the delivery of instruction due to the coronavirus (or, if provided via direct-to-student allocated funds, are for expenses related to the disruption of campus operations). The guidance does not clarify how such a determination may be made or what factors IHEs should consider in rendering this determination.

We anticipate that these guidance documents and resources will continue to be updated as questions continue to arise. Up next, the Department is preparing to publish a notice in the Federal Register to provide instructions to IHEs on the data that they will need to report to the Department after the disbursement of funds is received. For more information on the recent guidance and additional resources issued by the Department, click here.

Practices
Government Affairs & Public Policy

© 2021 STEPTOE & JOHNSON LLP. ALL RIGHTS RESERVED. ATTORNEY ADVERTISING.