

COVID-19 Guidance for Postsecondary Institutions
UPDATE: June 22, 2020

This updated article provides links to, and briefly summarizes, legislation and federal agency guidance designed to ease the burden of the coronavirus pandemic on higher education institutions.

Powers has updated this article to incorporate new information and guidance released by the U.S. Department of Education (“ED” or “Department”) on May 15, 2020, and further modified by the Department on June 16. The Department also released an Interim Final Rule impacting student emergency grants under the CARES Act, which took effect on June 17. Sections that have been substantively revised based on these May and June updates are denoted by the phrase *New Information*.

CARES Act

The President signed a \$2 trillion federal economic relief package on Friday, March 27, that provides financial assistance and other relief to individuals and businesses impacted by the spread of COVID-19. The economic relief package is known as the Coronavirus Aid, Relief and Economic Security (“CARES”) Act and includes provisions for financial assistance and other regulatory relief to students and their postsecondary institutions. While this article addresses some provisions of the CARES Act, Powers separately provides a more complete [summary of the higher education provisions in the CARES Act](#). Please also visit the [Powers COVID-19 Resource Page](#) for additional helpful resources and information.

Higher Education Emergency Relief Fund (“HEERF”) – New Information

The CARES Act established a \$14 billion Higher Education Emergency Relief Fund (“HEERF”). On April 9, 2020, the Department [announced](#) that \$6 billion of the HEERF will be distributed immediately to colleges and universities to provide direct emergency cash grants to students whose lives and educations have been disrupted by COVID-19. However, ED has continued to issue guidance on a rolling basis regarding requirements for these grants. This includes a binding [Interim Final Rule \(“IFR”\)](#) on student eligibility for emergency financial aid grants that, subject to certain court challenges, took effect as to most institutions on June 17, 2020. The IFR requires students to meet all Title IV eligibility requirements in order to receive a grant. Institutions should check the Department’s [HEERF information page](#), and consider consulting their counsel, to ensure they are administering the grants based on the most recent requirements.

On April 21, 2020, the Department announced the release of a second tranche of HEERF funds, which may be used for additional student grants, or for “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 (including marketing and

advertising), endowment expenses, or capital expenditures associated with athletics, sectarian instruction, or religious worship.

Finally, the HEERF includes additional allocations of funds to Historically Black Colleges and Universities, Tribally Controlled Colleges and Universities, Minority Serving Institutions, and allocations under the Strengthening Institutions Program and Fund for the Improvement of Postsecondary Education. Please see the Department's [HEERF information page](#) for the most recent information about these funding allocations.

U.S. Department of Education Guidance

To assist institutions in making changes to their operations and complying with Title IV of the Higher Education Act ("Title IV of the HEA"), ED published an electronic announcement titled "[Guidance for interruptions of study related to Coronavirus \(COVID-19\)](#)" on March 5, 2020 ("3/5 Guidance"). On March 20, 2020, ED supplemented the Guidance with [additional frequently asked questions \("3/20 FAQs"\)](#).

On April 3, 2020, ED issued [guidance taking into account the CARES Act \("4/3 Updated Guidance"\)](#). In the 4/3 Updated Guidance, ED recognized that social distancing may continue for longer than was initially anticipated and extended the flexibilities provided in its three guidance documents to any payment period or term beginning between March 5, 2020, and June 1, 2020, inclusive.

On May 15, 2020, ED issued guidance that expands upon prior guidance, provides additional regulatory flexibilities, and issues answers to frequently answered questions ("[5/15 Updated Guidance](#)"). On June 16, 2020, ED issued a [further update](#) to this guidance impacting the Return of Title IV Funds (R2T4) discussion, below. Summaries that have been substantively revised based on ED guidance released in May and June 2020 are denoted below by the phrase ***New Information***.

Taken together, the CARES Act and the Department's guidance have significant implications for institutional administration of the Title IV programs in the COVID-19 era, including the following:

- *Approval to Offer Distance Education – ***New Information****: The Department provided broad approval for institutions to offer distance education on a temporary basis to students currently in attendance without going through the regular approval process. This temporary approval is effective for enrollment in payment periods that overlap March 5, 2020 or that begin on or between March 5, 2020 and December 31, 2020. The Department has clarified that distance education need not be provided via sophisticated software or online platforms unless needed to comply with accreditor standards (which accreditors may waive), although instructors must initiate substantive communications with students on a regular basis.
 - In the 5/15 Updated Guidance, the Department specifically waives the requirement that institutions offering a distance education program be accredited by accreditors that have distance education within the scope of their recognition.

- Accreditors are encouraged to waive the distance education review process and to promptly develop new policies for the rapid approval of distance education programs offered by affected institutions. Accreditors should document how their decision-making bodies waived or provided expedited review of distance education programs.
 - The 3/20 FAQs clarify that institutions may offer a clock-hour program via distance education format if they ensure each clock hour is supervised by qualified institutional personnel. Institutions must ensure clock hour programs offered via distance education comply with applicable requirements of accreditors, state agencies, and education prerequisites for state licensure.
 - This flexibility does not apply to clock-hour programs that lead to licensure if the applicable licensing agency does not accept distance learning hours or give credit for them toward hours students must complete.
 - Institutions may enter into consortium agreements and accreditors may waive requirements related to the percentage or number of credits earned in residence at the home institution.
- ***Return of Title IV Funds (R2T4) Waiver and Direct Loan Cancellation – New Information (June 16 Update)***: The CARES Act directs the Department to waive any requirements for an institution or student to return unearned Title IV funds, and to cancel any Direct Loans associated with the relevant payment period, when a student withdraws due to COVID-19.
 - The 5/15 Updated Guidance (as further updated June 16, 2020) expands the term and nonterm payment periods to which the R2T4 waiver applies. The R2T4 waiver now applies to periods that include March 13, 2020, or that begin between March 13 and the later of December 31 or the last date the national emergency is in effect (referred to as the “covered period”). By its June 16 updated guidance, ED is allowing schools to apply the R2T4 waiver to payment periods that were excluded under the initial guidance.
 - The waiver is limited to students withdrawing as a result of COVID-19.
 - Under the 5/15 Updated Guidance (as further updated June 16, 2020), any institution that moved students from ground-based instruction to distance learning, closed campus housing or other campus facilities, or experienced other interruptions in instruction during a term or payment period within the covered period may consider all withdrawals *during such term or payment period* by students enrolled in affected programs to have been due to COVID-19.
 - For other withdrawals occurring during a term or payment period within the covered period, including by distance education students, the institution must obtain a student’s written attestation (which may be in the form of email or text messages) explaining why the withdrawal was the result of the COVID-19 emergency. Allowable COVID-related circumstances include, but are not limited to, student or family illness, service as a caregiver or first responder, loss of childcare, economic hardship, lack of internet access, or an increase in

- work hours as a result of COVID-19. If the institution cannot contact the student, it may rely on information from a family member.
- For students receiving the R2T4 waiver, institutions will need to complete R2T4 calculations for withdrawn students and complete other required steps, short of actually returning funds to ED or making adjustments to COD, for any withdrawn student who is impacted by this waiver. For students entitled to post-withdrawal disbursements, the institution should “proceed with making any remaining disbursement for the payment period.”
 - The 5/15 Updated Guidance also directs institutions to reverse prior R2T4 calculations as needed. For returns already made, the institution should re-disburse Title IV funds, make adjustments in COD, credit students’ ledger accounts, and re-request funds from G5. Similarly, because resulting student grant overpayments have been waived, any grant funds returned as an overpayment should be re-requested.
 - Since the R2T4 provisions do not affect refund policies, if a student withdraws and is granted a tuition refund, any credit balance created must be provided to the student within 14 days. ED is allowing institutions to modify their refund policies temporarily; however, students may have the right under state law to remain under their current refund policy. Any modified policy must apply to all students in a given program.
 - For institutional reporting obligations regarding R2T4, see the 5/15 Updated Guidance. To be able to comply with this reporting, institutions will need to complete R2T4 calculations (but not return funds) for each withdrawn student.
 - Upon receipt of information from the institution, ED will cancel the entire amount of any disbursement of a Direct Loan borrowed by the student/parent, exclude from a student’s Subsidized Loan usage and Pell Grant lifetime eligibility used any payment period the student does not complete due to COVID-19, and cancel disbursements of TEACH Grants. ED is still developing processes to implement these steps, and cautions that this will take some time.
 - The 3/5 Guidance and 3/20 FAQs contain additional guidance with respect to withdrawals at institutions that have temporarily ceased operations or extended “scheduled break” periods, which guidance is not expressly preempted by the CARES Act. The 5/15 Updated Guidance does not address this issue.
- *Leaves of Absence – **New Information:*** Students may be granted an approved leave of absence (LOA) for COVID-19 related concerns, and several waivers to the usual LOA requirements are available.
 - An institution may approve a LOA and a student may begin such LOA even if the student requests it in writing after the LOA has begun, which is not typically permitted. If an institution does not have a policy in place allowing for approved LOAs, it may adopt one on a temporary basis.
 - The CARES Act waives the requirement that a student returning from an approved LOA be able to resume at the same point in their academic program, which allows term-based schools with traditional academic calendars to permit LOAs.

- While the CARES Act requires that students return within the same semester (payment period) in which the leave began, the 5/15 Updated Guidance contemplates students returning in a “subsequent term or award year.”
 - For a student completing post-leave coursework in a subsequent term or award year, the student’s cost of attendance may not include tuition and fee costs for the coursework being completed. However, the 5/15 Updated Guidance states that living costs may be included, and credits associated with the coursework being completed may count toward the student’s enrollment status.
 - The 3/20 FAQs provided that if coursework in a program, including clinicals or internships/externships, is suspended due to COVID-19, an institution is allowed to place students on an approved LOA “until the institution can resume coursework or can find another placement for the student.” However, we see no indication that ED is waiving the usual limitation that an approved LOA may not exceed 180 days in a twelve-month period.
 - Typically, students must originate LOA requests. However, for all leaves related to COVID-19 circumstances, the 5/15 Updated Guidance allows an institution to first “plac[e] all students on approved LOAs,” and to obtain LOA requests from the impacted students later. While the school must “solicit LOA requests,” the guidance does not state what happens where a student does not respond to the solicitation.
- *Satisfactory Academic Progress (SAP)* – **New Information:** The CARES Act allows institutions to exclude from the quantitative component of SAP credits a student was unable to complete as a result of COVID-19. The 5/15 Updated Guidance states that a student need not file a SAP appeal because of COVID-19, although the institution must make a reasonable determination that the student’s failure to complete those credits is the result of COVID-19. ED provides examples of allowable circumstances that include illness of the student or family member, need to become a caregiver or first responder, economic hardship, added work hours, loss of childcare, inability to continue with classes via distance education, inability to access wi-fi due to closed facilities. Further, if the institution temporarily ceases operations during a period of enrollment, attempted credits for all affected students may be excluded.
 - The 5/15 Updated Guidance clarifies that institutions may permit students to take some or all classes on a pass/fail basis and courses taken on a pass/fail basis count as attempts for SAP purposes. Institutions have flexibility to modify their policies regarding the number of courses students may take pass/fail due to COVID-19 or temporarily adopt a policy allowing pass/fail grades. ED acknowledges that institutions need not count the pass/fail grade in the GPA.
- *Change of Ownership* – **New Information:** The 5/15 Updated Guidance expands the timeframe for post-consummation filings to the Department by an institution that has undergone a change of ownership. To extend the Temporary Program Participation Agreement issued to an institution by the Department following a change of ownership, an institution typically must submit additional information to the Department (including an

audited same day balance sheet and evidence of accreditor and state authorizing agency approval of the change of ownership) by the end of the month following the month in which the change of ownership occurred. The 5/15 Updated Guidance extends the timeframe for institutions to submit this additional information by an additional six months.

- *Students Who Did Not Begin Attendance:* Institutions need not return Title IV loan funds disbursed as a credit balance as long as the institution was not aware a student would not attend prior to disbursement. Institutions should not notify the loan servicer of a student who did not begin attendance.
- *Enrollment Status Changes:* The Department cannot waive the requirement to disburse Title IV funds based on a student's actual enrollment status (e.g., half-time, full-time). However, the Department's guidance reminds institutions that they need only consider students' enrollment status in limited circumstances (i.e., at time of disbursement for Direct Loans, and based on institutional census date(s) for Pell grants). Institutions might also consider temporarily modifying any internal policies and procedures for recalculating aid eligibility that are more stringent than what ED requires.
- *Academic Year:* If an institution closes for a period or otherwise shortens a term due to COVID-19 disruptions, it can contact its School Participation Division to request a temporary reduction in academic year length. (See 4/3 Updated Guidance for instructions for making this request.) A reduced academic year must still contain at least 26 weeks of instructional time under ED's regulations.
- *Academic Calendars; Scheduling Flexibility:* The Department is providing scheduling flexibility when planned instructional time is lost to COVID-19 disruptions (e.g., temporary closure; loss of travel abroad or experiential learning credit). Institutions may extend their terms and offer courses on a schedule that would otherwise trigger non-term or non-standard term treatment, while continuing to disburse Title IV aid based on a standard term calendar. For example, the 3/20 FAQs confirm that standard term treatment would continue to apply even where a Spring term is extended due to COVID-19 and overlaps with the Summer term (such overlap would normally make the program a non-term program).
- *Verification Status Code "W":* ED is cancelling the warning and "deobligation" process for student records with a verification status of "W" that had been scheduled for April 2020. This is typically the process under which schools are warned that certain Pell Grant disbursements will be regarded as "overawards" and will be reduced to a zero-dollar amount. The Department is re-evaluating the processes scheduled for July and October and will likely issue additional guidance.
- *Verification Groups V4 and V5 – **New Information:*** For the Custom Verification Group (V4) and the Aggregate Verification Group (V5), institutions ordinarily must complete verification

in-person or via a notary. The 4/3 Updated Guidance provides flexibilities if the institution is unable to receive the required documents in-person or by mail, and/or if the applicant or student is unable to provide the required documents in person or cannot provide notarized documents by mail. Specifically, ED suspended the in-person and notary requirements and allows an applicant to submit copies of the required verification documents electronically. Institutions also are permitted to accept an expired document if it expired after March 1, 2020. ED is waiving the parent signature requirements for a dependent student, provided that the institution documents why neither of the student's parents was available to provide a signed statement. Finally, the 5/15 Updated Guidance acknowledges that students may find it difficult to obtain official documentation of high school completion during the national emergency, and thus permits institutions to accept student attestations of high school completion. While the 4/3 Updated Guidance is limited to payment periods between March 5, 2020 and June 1, 2020 through June 30, 2020 (unless there is a crossover payment period attached to 2019-2020), the 5/15 Updated Guidance applies until December 31, 2020 (for both the 2019-2020 and 2020-2021 award years).

- *Need Analysis:* Any aid students may receive from a federal or state entity as a result of the COVID-19 emergency, including grants or low-interest loans, should not be included as income when calculating a family's Expected Family Contribution or as estimated financial assistance for packaging purposes.
- *Professional Judgement:* Financial aid administrators may use professional judgement to adjust cost of attendance where students have been affected by COVID-19, and the 4/3 Updated Guidance "encourages FAAs to use professional judgment to reflect more accurately the financial need of students and families affected by the COVID-19 pandemic." As usual, professional judgment must be exercised on a case-by-case basis and documentation must be retained in the student file. (Note: The ED Office of Inspector General will be focusing on professional judgment compliance in [fiscal year 2020](#).)
- *Waivers of Institutional Charges:* Institutions that waive all or a portion of tuition, fees, or other institutional charges of a current payment period need not re-evaluate cost of attendance or make changes to Title IV awards on the basis of such changes.
- *Cash Management:* If an institution is unable to comply with the cash management regulations—including borrower requests for loan cancellations, excess cash requirements, and notice and authorization requirements—due to COVID-19 disruptions, it must document the reason(s) and retain the documentation in its records.
- *Common Origination and Disbursement (COD) Loan Periods:* Institutions that extend terms that begin on or before June 1, 2020 as a result of COVID-19 need not change loan period end dates in COD if the loan period was scheduled to end on the term end date.

- *Written Arrangements Between Domestic Institutions:* If an institution located in the United States or its territories is unable to continue providing an eligible program because of COVID-19, it may enter into a written agreement with another institution to enable students to continue their academic program while receiving Title IV assistance. (See also *Foreign Schools; Written Arrangements.*)
- *Institutional Participation:* A temporary cessation of educational instruction due to the COVID-19 pandemic will not cause a loss of institutional eligibility or participation.
- *Clery Act:* The 4/3 Updated Guidance clarifies the Clery Act’s “emergency notification” requirement as it applies to the COVID-19 pandemic.
 - Postsecondary institutions are not required to provide regular, on-going updates on COVID-19 or to proactively identify positive COVID-19 cases within the campus community to comply with the Clery Act’s emergency notification requirement.
 - Institutions are not required to provide emergency notifications regarding positive COVID-19 cases among individuals who are not attending classes, working, or residing on campus or to provide notifications to such individuals.
 - An institution may satisfy the emergency notification requirements by either (1) providing students and employees a single notification through the regular means of communicating emergency notifications or (2) creating a banner at the top of the institution’s homepage. This communication should provide information about COVID-19 and necessary health and safety precautions, as well as encourage the campus community to obtain information from health care providers, state health authorities, and the CDC’s COVID-19 website. Many institutions have already provided this type of information on their websites and we do not read this to require an additional notification.
 - The Department also indicated it will likely provide additional guidance to institutions about how to comply with campus security reporting and equity in athletics disclosures.
- *Reporting Deadlines:* Institutions having trouble meeting reporting deadlines for (1) Federal Pell Grant, Iraq and Afghanistan Service Grant, or TEACH Grant disbursement, adjustment, or cancellation records, (2) final Federal Pell Grant payments, or (3) Direct Loan payment data, should contact their School Participation Division or use the Common Origination and Disbursement (COD) website, as applicable, to discuss their concerns or inquire about a possible extension. See the 4/3 Updated Guidance for details and instructions.
- *Campus-Based Aid Waivers – **New Information:*** The CARES Act eliminates the 25% institutional matching contribution requirement for federal SEOG and FWS funds. Institutions also may transfer up to 100% of their unexpended FWS allotment to their SEOG allotment. Per the 5/15 Updated Guidance, an institution may reimburse itself from the FWS and FSEOG

allocation for the nonfederal portion of wages paid to students or disbursements of FSEOG made to students on or after March 13, 2020.

- *Supplemental Educational Opportunity Grants (SEOG) – **New Information:*** The CARES Act allows an institution to use part of its SEOG allotment for emergency financial aid grants of up to the applicable maximum Pell Grant amount (\$6,195 for award year 2019-2020) to assist undergraduate and graduate students with unexpected expenses and unmet need as a result of COVID-19. Institutions may receive assistance from a scholarship-granting organization to aid in the application and disbursing process. The 5/15 Updated Guidance states that eligibility for FSEOG Emergency Aid Grants is determined by the institution within the parameters established in the CARES Act. Further, the 5/15 Updated Guidance states that FSEOG awarding rules, i.e., exceptional need, are waived for the purpose of making FSEOG Emergency Aid Grants.
- *Federal Work Study (FWS) – **New Information:*** The CARES Act codifies the Department’s 3/5 Guidance on FWS. An institution can continue to pay FWS to enrolled students if the campus or student employer closes or moves classes online (provided the change occurred after the beginning of the term), the institution continues to pay essential faculty and/or staff (i.e., an institution need not continue to pay all employees), and the institution meets institutional wage share requirements. Pursuant to ED’s 4/3 Updated Guidance, payments may be made in an amount equal to or less than the amount of FWS wages those students would have been paid had they been able to complete the FWS obligation. The flexibility applies to students who began their FWS job prior to COVID-19. Further, if an institution cannot comply with the 7% FWS community service requirement, including one project for tutoring children or family literacy, it must request a waiver explaining the reason for its inability to comply by contacting the Campus-Based Call Center.
 - *Note Regarding the Paycheck Protection Program (PPP) and FWS:* The Small Business Administration has confirmed that, unlike other student employees, FWS students should not be counted as employees for determining an institution’s employee headcount for the PPP, and payroll costs for FWS students should be excluded from the calculation of payroll costs used to determine the PPP loan amount. Institutions that filed loan applications prior to the SBA’s issuance of this guidance on May 8, 2020 are not bound by this interpretation but may rely on it.
- *Foreign Schools; Distance Education – **New Information:*** While Title IV of the HEA does not permit foreign schools to provide distance learning to U.S. students for the purposes of the Direct Loan program, the CARES Act allows an otherwise eligible program at a foreign institution to be offered via distance education if the applicable governmental authorities in the country in which the foreign institution is located have declared an emergency related to COVID-19. Foreign institutions that transition to distance education must submit reports to ED, as explained in a [May 12, 2020 ED guidance document](#). Specifically, a foreign institution

must provide its name, OPEID, country, and the number of students receiving Direct Loans whose program was offered in whole or in part by distance education. The first reporting deadline is June 30, 2020; subsequent reports are due 30 days after the end of a payment period.

- *Foreign Schools; Written Arrangements – **New Information***: While the Department’s regulations state that programs offered in the U.S. by a foreign institution are not Title IV eligible, the CARES Act provides an exception allowing foreign institutions to enter into written arrangements with U.S. institutions during the COVID-19 crisis. This exception is limited because a public or nonprofit foreign institution may not enter into a written arrangement with a proprietary institution. However, a foreign for-profit graduate medical school, nursing school, or a veterinary school may enter into a written arrangement with a proprietary, public or nonprofit institution. A foreign institution that executes (or is planning to execute) a written agreement must submit a [report](#) to ED that includes the name and OPEID of the U.S. partner institution, as well as the number of students who received Direct Loans and who took courses at the U.S. institution under the written arrangement during the 2019-2020 award year. The first reporting deadline is June 30, 2020; subsequent reports are due 30 days after the end of a payment period.
- *Foreign Schools; MCATs – **New Information***: Due to the unavailability of the MCAT, the 5/15 Updated Guidance waives the requirement foreign graduate medical schools require students accepted for admission to have taken the MCAT. This waiver applies to students admitted to a foreign graduate medical school during an admissions year in which the MCAT was unavailable for some period of time due to COVID-19.
- *TEACH Grants – **New Information***: The 5/15 Updated Guidance expands the list of circumstances under which a TEACH grant recipient who is unable to fulfill all or a portion of their teaching service obligation is excused from fulfilling that portion. A TEACH grant recipient whose qualifying service was interrupted by COVID-19 will receive credit for a full year of service.
- *Selective Service – **New Information***: The 5/15 Updated Guidance acknowledges that requests for Status Information Letters from the Selective Service System are not being processed. The Department recommends an applicant, or a financial aid administrator, register or verify registration via [sss.gov](#). If the online process does not confirm an applicant’s registration, the financial aid administrator has the authority to determine whether the applicant knowingly and willfully failed to register, and may consider special circumstances that may have prevented registration.

Audits

*Proprietary Institutions – **New Information***

The 5/15 Updated Guidance “extend[s] the financial statement and compliance audit deadlines by six months” based on discretion granted to the Department by Congress. While this brief statement leaves room for questions, it would appear, at a minimum, to cover audit deadlines for institutions relating to fiscal years ended between December 31, 2019 and June 30, 2020.

Despite this federal extension, institutions should be mindful of any other parties (state licensing bodies, creditors, etc.) to which they may need to submit audited financial statements and/or compliance reports. Institutions should also stay in touch with their auditors to ensure they will be able to obtain an audit under the extended deadlines.

Also, on March 10, 2020, the Department’s Office of the Inspector General issued [Dear CPA Letter, CPA-20-01](#), which provides an exemption from the Department’s site visit requirement for audits conducted using the [Guide for Audits of Proprietary Schools and for Compliance Attestation Engagements of Third-Party Servicers Administering Title IV Programs \(September 2016\)](#). The exemption applies to proprietary school audits of fiscal years ending between September 30, 2019 and December 31, 2019. For such audits, auditors must document how the alternative procedures achieved the intent of the site visit requirement.

Public and Non-Profit Institutions

On March 19, 2020, the [Office of Management and Budget \(“OMB”\) issued a memorandum](#) recommending that federal agencies provide an extension of six months beyond the normal due date for audits under the Single Audit Act. ED’s 4/3 Updated Guidance confirms the extension and indicates ED will provide additional guidance on the particulars of the extension for audits submitted by public and nonprofit institutions.

*Recordkeeping and Data Security – **New Information***

In the 5/15 Updated Guidance, the Department notes it “cannot exempt an institution from record retention or data security requirements.” However, institutions have flexibility regarding “how they can collect documents during the national emergency,” and an example of this flexibility is described above (see *Verification Groups V4 and V5*).

Institutions must still maintain all required documents. Under the 5/15 Updated Guidance, proper preservation may include “preserving text messages”—and presumably other types of informal documentation—“for the formal record or requiring students to provide hard copies, notarized copies

or official copies of documents through the institution’s normal process when normal campus operations resume.”

Institutions must use secure methods to exchange information with students, and the 5/15 Updated Guidance directs institutions to “use [their] judgment” to determine whether email or other electronic methods in use are sufficiently secure. Institutions newly transitioning to email and other forms of electronic communication due to the pandemic should consider whether adequate security measures are in place.

Student Privacy

On March 12, 2020, the Department’s Student Privacy Policy Office (“SPPO”) [released guidance](#) to assist school officials working with public health officials during COVID-19 while also protecting the privacy of students’ education records. SPPO’s guidance document discusses the applicability of the Family Educational Rights and Privacy Act (“FERPA”) to situations schools may face during the COVID-19 outbreak. Under FERPA’s health or safety exception, if an institution determines that (1) there is an articulable and significant threat to the health or safety of the student or another individual and (2) certain parties need the personally identifiable information from education records to protect the health or safety of the student or another individual, then the institution may disclose that information to appropriate parties without first obtaining consent. The guidance document reiterates SPPO’s longstanding position that the media are not “appropriate parties” because they generally do not have a role in protecting individual students or other individuals at the institution.

As in other areas discussed in this article, institutions must ensure they document compliance with FERPA. Specifically, if an institution uses the health or safety exception to make a disclosure, the institution must record in the student’s education records the articulable and significant threat that formed the basis for the disclosure and the parties to whom information was disclosed.

On March 20, 2020, the SPPO released [FERPA and Virtual Learning Related Resources](#). This guidance provides links to relevant sections of the Department’s [Security Best Practices Portal](#), including the [FSA Cyber Security Page](#), and previous guidance documents including “[Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices](#)” and “[Protecting Student Privacy While Using Online Educational Services: Model Terms of Service](#)”.

On March 30, 2020, the Acting Director of the SPPO conducted a [webinar addressing commonly asked questions](#) related to the challenges of complying with student privacy laws during COVID-19 and presenting ten scenarios highlighting privacy best practices and considerations when adopting distance learning approaches. For instance, SPPO confirmed that, per FERPA’s school official exception, schools may use video conferencing or other virtual learning software to hold classes virtually.

Civil Rights – New Information

On March 17, 2020, the Department’s Office for Civil Rights (“OCR”) released a [webinar](#) for schools utilizing online learning during the COVID-19 outbreak regarding accessibility for students with disabilities. OCR reminds institutions that, under Section 504 of the Rehabilitation Act (“Section 504”) and Title II of the Americans with Disabilities Act (“ADA”), a person with a disability must be afforded the opportunity to acquire the same information, engage in the same interactions, and enjoy the same programs and activities as a person without a disability in an equally effective and equally integrated manner, with substantially equivalent ease of use. As institutions move programs to a distance modality, OCR recommends that institutions assess whether their online learning systems are sufficiently accessible by employing both automated checkers and manual testing.

In addition, OCR published a [Fact Sheet](#) for education leaders on how to protect students’ civil rights as school leaders take steps to keep students safe and secure. OCR confirms that school officials have discretion to make educational decisions based on local health needs and concerns. As school leaders respond to evolving conditions related to COVID-19, OCR instructs them to be mindful of the requirements of Section 504, Title II of the ADA, and Title VI of the Civil Rights Act, to ensure that all students are able to study and learn in an environment that is safe and free from discrimination.

ED’s 4/3 Updated Guidance acknowledges the difficulties institutions are encountering in moving to an online modality, and appears to provide flexibility to such institutions:

Institutions should not decline to provide distance instruction, at the expense of most students, to address matters pertaining to accommodations for students with disabilities. Rather, institutions must make decisions that take into consideration the health, safety, and well-being of all their students and staff. Additionally, the Department understands that, during this national emergency, postsecondary institutions may not be able to provide services in the same manner as they typically would for the rest of the academic year.

On May 12, 2020, OCR issued “Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency” ([“May 2020 OCR Q&A”](#)), which further addresses accessibility requirements under Section 504 and the ADA. OCR reminds postsecondary institutions that students with disabilities must receive academic adjustments, auxiliary aids and services, and reasonable modifications in policies, practices, and procedures, where doing so would not impose an undue burden nor cause a fundamental alteration to the service, program, or activity. If an institution can establish that providing a particular aid or service would result in a fundamental alteration or undue burden, the institution is required to take other steps which would ensure that, to the maximum extent possible, the individual with a disability can participate in, and receive the benefits or services provided by, the institution’s education program or activity. OCR urges institutions to think creatively about alternative methods and to develop innovative solutions. The May 2020 OCR Q&A also confirms that institutions may use captioning for distance learning rather than sign language

interpreters for students who are deaf and hard of hearing, if an institution can establish that captioning provides communication that is as effective as sign language interpretation and affords the student an equal opportunity to participate in and benefit from its service, program, or activity.

Per the May 2020 OCR Q&A, postsecondary institutions—including ones that have suspended instruction or are only offering distance learning—must continue accepting and investigating complaints of harassment and discrimination made under Title IX of the Educational Amendments of 1972 (“Title IX”), Title VI of the Civil Rights Act of 1964, and other civil rights statutes. OCR acknowledged that investigations may take more time or be conducted in a different manner given the current circumstances so long as schools are still resolving complaints promptly and equitably. Parties should be notified of any delays caused by the pandemic and students and employees should be notified of any changes to the institution’s method for receiving complaints. Institutions should also continue to enforce no-contact and no-communication agreements or orders and modify such orders as necessary given the changed circumstances.

Finally, in May 2020 the Department published new Title IX [regulations](#) that go into effect on August 14, 2020 and will likely require substantial revisions to most institutions’ policies and procedures. To assist institutions with implementing these new regulations, Powers delivered a [webinar](#) titled “Are You Ready to Implement the New Title IX Rules?” as part of the [CECU 2020 Virtual Convention](#) (free registration through June 30, 2020).

Relief to Individual Student Loan Borrowers

The CARES Act extended the President’s announced suspension of payments and interest on federally-held student loans until September 30, 2020, and the 4/3 Updated Guidance further details the relief and support available to individual Title IV borrowers. Holders of non-federally held Title IV loans (i.e., Perkins loans and privately held FFEL loans) may voluntarily provide similar relief. The Department also has provided a [resource page](#) for individual borrowers.

Additionally, the Department suspended collection on defaulted, federally-held loans, including wage garnishments and offsets, and will not penalize borrowers in repayment arrangements or rehabilitation programs for missed payments through September. Collection agencies are also instructed to cease collection activities on defaulted, federally-held loans through September 30, 2020.

The 4/3 Update Guidance authorizes institutions to grant limited forbearances for Perkins Loan borrowers and permits similar accommodations for payment and collection as apply to Direct Loans.

Guidance for Students Receiving Grant Funds – *New Information*

On May 15, 2020, the Department, in collaboration with the Internal Revenue Service, published [guidance](#) confirming that funds received as emergency grants under the CARES Act are not included

in calculations of the student's 2020 gross income. Additionally, the Department clarified that students do not have to repay any funds received as emergency student grants under the CARES Act.

The IRS [further clarified](#) that student-recipients cannot claim a tuition and fees deduction for their personal costs covered by CARES Act grant funds.

GI Bill Benefits Extended for Student Veterans

On March 21, 2020, President Trump signed into law a [bill authorizing the Secretary of Veterans Affairs to allow veterans' GI Bill benefits to continue](#) when previously authorized in-person education programs are converted to distance education because of an emergency, namely COVID-19. The law gives the Department of Veterans Affairs ("VA") temporary authority to continue GI Bill benefits for converted programs, including monthly housing allowances and education benefits payments, until in-person classes resume after the pandemic.

Subsequently, the VA [has published guidance](#) confirming that an institution that converts an approved residence training course to an online training modality need not make submissions to the relevant agencies when the modality conversion is the only change. However, for students who become ill due to COVID-19, the current law does not allow the VA to continue payments beyond the last day of attendance. The guidance outlines various program modifications and enrollment changes that require reporting to the VA.

The VA maintains a website with guidance for GI Bill students affected by COVID-19 [here](#).

Institutions Should Keep Accreditors Informed – *New Information*

As institutions transition online or make changes to their academic calendar, accreditors may require the filing of a notification or an application. Although many of these processes have been waived or relaxed, it is critical that institutions review the relevant accrediting agency guidance and communicate with their accreditor regarding institutional and programmatic changes made to address COVID-19, including changes to method of instruction or academic calendar. The Department's rules requiring institutions to notify and potentially seek approval from their institutional accreditor for such changes have been relaxed but not eliminated.

The [5/15 Updated Guidance](#) permits accrediting agencies to conduct virtual site visits through December 31, 2020. However, accreditors must perform an on-site visit following the virtual visit when reasonably practicable. Many accrediting agencies have already begun this process and will continue scheduling virtual site visits with institutions.

For up-to-date information from institutional accreditors, follow the links below:

- [Accrediting Bureau of Health Education Schools \(ABHES\)](#)

- [Accrediting Commission for Community and Junior Colleges Western Association of Schools and Colleges \(ACCJC WASC\)](#)
- [Accrediting Commission of Career Schools and Colleges \(ACCSC\)](#)
- [Accrediting Council for Continuing Education & Training \(ACCET\)](#)
- [Accrediting Council for Independent Colleges and Schools \(ACICS\)](#)
- [Council on Occupational Education \(COE\)](#)
- [Distance Education Accrediting Commission \(DEAC\)](#)
- [Higher Learning Commission \(HLC\)](#)
- [Middle States Commission on Higher Education \(MSCHE\)](#)
- [New England Commission of Higher Education \(NECHE\)](#)
- [Northwest Commission on Colleges and Universities \(NWCCU\)](#)
- [Southern Association of Colleges and Schools Commission on Colleges \(SACSCOC\)](#)
- [Western Association of Schools and Colleges Senior College and University Commission \(WSCUC\)](#)

International Students

Institutions enrolling international students (i.e., F or M visa students) should review the Department of Homeland Security, Student and Exchange Visitor Program (“SEVP”) [COVID-19 Resources Page](#), including a regularly-updated set of [Frequently Asked Questions for SEVP Stakeholders about COVID-19](#). For institutions temporarily suspending programs or transitioning to online delivery due to COVID-19, SEVP is providing several flexibilities, including to the “full course of study” requirement and the usual limitation on courses an international student may complete online. However, institutions taking advantage of these flexibilities must report to SEVP within ten days. Please see the SEVP guidance for additional important information, including an optional reporting template.

Document and Communicate

With the rapidly changing landscape brought on by COVID-19, institutions should document institutional decisions relating to student services, academic programs, and Title IV aid. In particular, the Department encourages institutions to document, as contemporaneously as possible, any actions taken as a result of COVID-19, including actions contemplated by the Department’s COVID-19 guidance documents. Institutions should then consider their obligation to communicate these decisions to the appropriate federal, state, and local agencies. Failure to document and communicate steps taken to address COVID-19 may result in unexpected liabilities or regulatory action in the future.

The Department has emphasized that it will provide flexibility where possible, and that its guidance to date does not necessarily reflect all possible approaches. Institutions may contact the Department to advocate for alternative lawful approaches other than those stated in ED’s guidance, request a modification or rescission of the terms of the guidance, or both. Instructions for submitting a request

or comment are included in the 4/3 Updated Guidance, and we advise institutions to work with their counsel in drafting any such requests or comments.

We at Powers are diligently reviewing the announcements from the Department, Congress, accreditors, and industry groups. This article is provided as a summary of these announcements and is not intended to provide legal advice. For specific questions or for assistance drafting comments to ED, please contact the Powers attorneys or professionals with whom you work (listed below):

Sherry Gray, Principal – Sherry.Gray@PowersLaw.com

Joel Rudnick, Principal – Joel.Rudnick@PowersLaw.com

Sharon Bob, Higher Education Specialist – Sharon.Bob@PowersLaw.com

Sean Beller, Principal – Sean.Beller@PowersLaw.com

Nick Michiels, Principal – Nick.Michiels@PowersLaw.com

Dan Brozovic, Principal – Dan.Brozovic@PowersLaw.com

Katherine Demedis, Associate – Katherine.Demedis@PowersLaw.com

Ryan Spraker, Associate – Ryan.Spraker@PowersLaw.com