



DEPARTMENT OF EDUCATION

34 CFR Part 677

RIN 1840-AD63

Calculation of the Endowment Factor for Allocations to
Historically Black Colleges and Universities under Section
314(a)(2)(A) of the Coronavirus Response and Relief Supplemental
Appropriations Act, 2021

AGENCY: Office of Postsecondary Education, Department of
Education.

ACTION: Final regulations.

SUMMARY: The Department of Education (Department) issues this
final rule so that it may determine final allocations to
Historically Black Colleges and Universities (HBCUs) awarded
under section 314(a)(2) of the Coronavirus Response and Relief
Supplemental Appropriations Act, 2021 (CRRSAA).

DATES: These regulations are effective [INSERT DATE OF
PUBLICATION IN THE FEDERAL REGISTER].

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If you use a telecommunications device for the deaf (TDD)
or a text telephone (TTY), call the Federal Relay Service (FRS),
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SUPPLEMENTARY INFORMATION:

Background:

The CRRSAA was enacted on December 27, 2020, to help Americans cope with the ongoing economic and health crises created by the novel coronavirus disease (COVID-19) outbreak. Section 314 of the CRRSAA authorizes supplemental awards to institutions of higher education (IHEs) through the Higher Education Emergency Relief Fund (HEERF) initially established by section 18004 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (March 27, 2020). Section 314 of the CRRSAA also authorizes, in paragraph (a)(2)(A), additional awards to HBCUs eligible to receive assistance under two programs authorized by the Higher Education Act of 1965, as amended (HEA): the Strengthening HBCUs program authorized by part B of title III of the HEA, and the HBCU Masters program authorized by subpart 4 of part A of title VII of the HEA. Section 314 further specifies, in paragraph (a)(2), the amounts available for these additional awards and, in paragraph (a)(2)(A), the three-part formula for determining the allocations to each eligible HBCU.

This formula calls for the allocation of--

(1) 70 percent of funds according to a ratio equivalent to the number of Pell Grant recipients in attendance at the institution at the end of the school year preceding the beginning of the most recent fiscal year and the total number of Pell Grant recipients at all such institutions;

(2) 20 percent of funds according to a ratio equivalent to

the total number of students enrolled at the institution at the end of the school year preceding the beginning of that fiscal year and the number of students enrolled at all such institutions; and

(3) 10 percent of funds according to a ratio equivalent to the total endowment size at all eligible institutions at the end of the school year preceding the beginning of that fiscal year and the total endowment size at the institution.

The first two elements for determining allocations to HBCUs under section 314(a)(2)(A) of the CRRSAA reflect a familiar and straightforward methodology: institutions receive a share of funds commensurate with their respective shares of Pell Grant recipients and total overall enrollment at all eligible institutions. However, the third element, also known as the endowment factor, calls for allocating 10 percent of funds based on an inverse proportion of an institution's share of the total endowment funding at all eligible institutions. In other words, institutions with the smallest endowments receive the largest share of funds. This inverse proportion formula reflects the intent of Congress to direct additional funding to institutions unable to tap endowment resources to meet needs arising from the COVID-19 pandemic. Such institutions often have smaller enrollments or serve highly disadvantaged populations; consequently, they have not been able to build up significant endowment funds over time that might have been used to respond to the COVID-19-related disruptions to teaching and learning on

campus.

In fact, some institutions reported an endowment value of zero, which contributed to the circumstances requiring this final rule. Specifically, endowment data collected by the Department for the purpose of determining the allocation of funds through the endowment factor showed that, of 97 eligible institutions, nine reported an endowment value of zero. While it seems clear that Congress intended for such institutions to receive the largest share of endowment factor funding because of their complete lack of endowment resources to call upon in responding to the COVID-19 pandemic, it is not possible to generate the endowment ratios described in section 314(a)(2)(A)(iii) of the CRRSAA for these schools due to the mathematic principle that division by zero yields an undefined result and thus has no meaning. Therefore, it would be impossible to implement this formula in a manner consistent with the statutory text for certain eligible entities.

Excluding these schools entirely from the endowment factor calculation would seem contrary to the plain language of the statute, as the Act does not expressly exclude these entities and is meant to include all eligible institutions under part B of title III and subpart 4 of part A of title VII of the HEA. Moreover, even if the nine HBCUs with zero endowments could be excluded from the formula, there is a large enough gap between the institution with the lowest non-zero endowment and other institutions with non-zero endowments that the institution with

the lowest non-zero endowment would garner nearly all of the program funding (\$72.8 million) allocable through the endowment factor. The Department does not believe such an inequitable outcome would be consistent with the design of the endowment factor formula; rather, it indicates a technical oversight in developing the endowment factor.

In response to the inability to implement this formula in a manner consistent with the statutory text for certain eligible entities, the Department consulted with Congress to determine options for calculating awards to HBCUs under section 314(a)(2) of the CRRSAA. These discussions were focused on two goals: (1) ensuring that all eligible institutions with relatively low endowment values benefited from the endowment factor, and (2) ensuring that the endowment factor operated as intended, delivering significantly greater amounts of funding to those institutions with the smallest endowments rather than to those institutions with the largest endowments. This consultation took on additional urgency because of the possibility that additional HEERF appropriations for HBCUs would be provided on the basis of the formula in section 314(a)(2)(A) of the CRRSAA as part of the American Rescue Plan Act of 2021 (ARP).

Ultimately, Congress provided such additional appropriations in the ARP and directed IHEs to make allocations in accordance with the same terms and conditions as those provided in section 314 of the CRRSAA, with several exceptions. Of relevance here, Congress established a "floor" on the

endowment value used when allocating the ARP-provided HEERF funds based on the endowment factor. Section 2003(3) of the ARP specifies that an institution "that has a total endowment size of less than \$1,000,000 (including an institution that does not have an endowment) shall be treated by the Secretary as having a total endowment size of \$1,000,000" for the purposes of section 314(a)(2)(A)(iii) of the CRRSAA, which is used to determine allocations under the ARP. However, this provision does not apply to the HEERF funds appropriated in the CRRSAA.

Consequently, the Department determined that the best course of action would be to issue regulations on the endowment factor under section 314(a)(2). In the interim, on February 26, 2021, the Department awarded 90 percent of the funds provided to HBCUs under section 314(a)(2) of the CRRSAA--the funds allocated on the basis of factors 1 and 2 of the formula in section 314(a)(2)(A).

In considering alternatives for refining the methodology for implementing the endowment factor, the Department relied on analyses of options developed both prior to and during consultation with Congress regarding the challenges presented by the endowment factor under the CRRSAA.

We considered exclusion of the nine entities that reported an endowment position of zero. As stated above, we determined this was inconsistent with the plain language of the statute. Further, it would exclude the institutions with the greatest need--i.e., those institutions reporting endowment amounts of

zero--while allocating virtually all funds apportioned to the endowment factor to just two of the 88 eligible institutions with non-zero endowments. Such an outcome would be contrary to the purpose of any funding formula based on proportionality, which is to provide benefits to all eligible entities in proportion to one or more characteristics of those entities, and not to merely direct all or nearly all applicable funding to a few such entities.

Given that we cannot implement the formula in a manner consistent with the statutory text for certain eligible entities, we considered a variety of approaches. A rule that imputed a small dollar amount to the nine eligible institutions reporting zero endowment funding, such as \$1, would result in the allocation of nearly all funding to those institutions, effectively preventing the accrual of any benefits from the endowment factor to any other eligible institutions (approximately \$8.1 million would be awarded to each of the nine institutions with zero endowments and a balance of less than \$1,500 would be distributed among the remaining eligible institutions). Again, such an outcome would not, in the Department's view, be consistent with the basic equity principles that generally underlie the funding formulas enacted by Congress for the many formula grant programs administered by the Department.

The Department also explored an option that considered the relationship between the amount institutions receive through the

endowment factor and the sum of that value in combination with the institution's reported (or imputed, in the case of the institutions reporting \$0 endowments) endowment. The underlying principle of this approach was that while the endowment factor was to direct additional funding to institutions with the smallest endowments, such institutions should not benefit disproportionately when compared to other institutions with small endowments. For example, it would be both inequitable and inconsistent with the design of the endowment factor if an institution with a reported endowment of \$100,000 received \$3,000,000 from the endowment factor--effectively increasing its endowment-based resources to \$3,100,000--while another institution with a reported endowment of \$1,000,000 received \$500,000 from the endowment factor, effectively ending up with just half (\$1,500,000) of the endowment-based resources as the first institution. In other words, no institution's allocation from the endowment factor should exceed the resources available to any other institution based on the sum of its allocation from the endowment factor and its reported endowment. The Department's preliminary modeling of an option based on this principle produced an appropriately graduated distribution of endowment factor allocations to all 97 institutions, while directing 72 percent of funds to the bottom quartile of institutions ranked by endowment size, a result that the Department deemed both equitable and consistent with the core purpose of the endowment factor.

Importantly, for the purposes of this final rule, the \$1,000,000 floor endowment amount set by Congress for use in calculating endowment factor allocations under the ARP yields an equitable distribution of funds nearly identical to that of the Department's "imputed endowment size" model. Specifically, applying the ARP's \$1,000,000 endowment floor to the endowment factor in the CRRSAA would allocate \$54.3 million, or 75 percent of funds, to the bottom quartile of institutions ranked by endowment size.

Consequently, the Department has concluded that the equitable impact of the \$1,000,000 floor endowment threshold adopted by Congress for the purpose of calculating endowment factor allocations under the ARP, combined with its simplicity and the benefits of a uniform approach to determining endowment factor allocations across the ARP and the CRRSAA, make that same \$1,000,000 endowment floor the most appropriate manner to implement the endowment factor formula in section 314(a)(2)(A)(iii) of the CRRSAA, which cannot otherwise be implemented in a manner consistent with the statutory text for certain eligible entities.

SIGNIFICANT REGULATIONS:

Statute: Section 314 of the CRRSAA (division M of Public Law 116-260, December 27, 2020) provides for funding for eligible HBCUs. Specifically, section 314(a)(2)(A) specifies a three-part formula for determining the allocations to each eligible HBCU, including an endowment factor that allocates 10 percent of

the available funding according to a ratio equivalent to the total endowment size at all eligible institutions at the end of the school year preceding the beginning of that fiscal year and the total endowment size at the institution.

Current Regulation: None.

New Regulation: In new § 677.1, we provide that, for the purpose of calculating allocations under section 314(a)(2)(A)(iii) of the CRRSAA, an institution that has a total endowment of less than \$1,000,000, including an institution that does not have an endowment, will be treated by the Secretary as having an endowment of \$1,000,000.

Reasons: The Department is making this regulatory change to remedy a technical defect in the statute; allocate funds consistent with its best interpretation of the statutory purpose of the endowment factor; make the allocation methodology related to endowment size under the CRRSAA consistent with the refined methodology under the ARP; and ensure that the endowment factor operates to equitably deliver funding to eligible institutions based on the relative size of their endowments. See the Background section for a more detailed discussion of our reasons for this regulatory change.

Waiver of Proposed Rulemaking and Delayed Effective Date Under the Administrative Procedure Act

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed rules. However, the APA

provides that an agency is not required to conduct notice and comment rulemaking when the agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 553(b) (B)).

Congress enacted the CRRSAA to help Americans cope with the urgent economic and health crises created by the COVID-19 outbreak and created the HEERF to provide emergency financial aid grants to students and institutions. Section 314(b) (2) (B) of the CRRSAA requires the Secretary, to the extent practicable, to make awards to HBCUs under section 314(a) (2) by February 25, 2021. In the absence of this final rule, the Department would be unable to timely award the final 10 percent of funds appropriated by Congress to HBCUs under section 314(a) (2) of the CRRSAA in a manner that equitably benefits those HBCUs with limited endowments serving large numbers or percentages of students from low-income families. In light of the urgent economic challenges facing IHEs as a result of the current national emergency and the importance of awarding all available emergency funds appropriated by Congress as quickly as possible, particularly to those institutions without access to much-needed resources that can help address the disruption to teaching and learning caused by the COVID-19 pandemic, it would be impracticable and contrary to the public interest to conduct notice-and-comment rulemaking. Accordingly, there is good cause to waive the notice and comment requirements of the APA.

Moreover, the APA generally requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d)(3)). As described above, good cause exists for this rule to be effective upon publication in light of the current national emergency and the importance of awarding HEERF allocations to eligible institutions in a timely manner consistent with statutory intent.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and

obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866. Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a "major rule", as defined by 5 U.S.C. 804(2).

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency-

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(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including

potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

We are issuing this final rule only on a reasoned determination that its benefits would justify its costs. In choosing among alternative regulatory approaches, we selected those approaches that would maximize net benefits. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We have also determined that this regulatory action would not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

Need for Regulatory Action

The Department is issuing this final rule to clarify the methodology for calculating allocations to HBCUs in accordance with the endowment factor described in section 314(a)(2)(A)(iii) of the CRRSAA. The endowment factor is intended to provide additional funding to institutions with limited endowment resources available to address institutional and student needs arising from the COVID-19 pandemic. This final rule addresses a defect in the statutory allocation formula and permits the allocation of all available funds to eligible institutions as quickly as possible.

As detailed in the preamble of this final rule, in light of the current national emergency and the importance of delivering HEERF awards to institutions as soon as possible, notice-and-comment rulemaking would be impracticable and contrary to the public interest. Absent immediate implementation of this final rule, the Department would be unable to timely award the remaining HBCU funding in a manner consistent with the intent to provide funding to eligible HBCUs based on relative endowment size, with a potentially serious negative impact on both institutions and the students they serve.

Costs, Benefits, and Transfers

As noted elsewhere in this final rule, this regulatory change affects only the allocation of funding under the HEERF program. It does not impose or relieve any regulatory or compliance burden on regulated entities. In general, we do not

anticipate this final rule to impose any net costs on affected entities. However, to the extent that the receipt of funding under this program affects the marginal cost of administering funds, there may be some effects on participating institutions, but given the overall amount of funding administered under this program and the relatively small amount implicated by this rule, we expect those effects to be de minimis.

As noted above, this final rule will allow the Department to operationalize the statutory requirements of the CRRSAA relative to the endowment factor and limit unintended consequences. Since this rule is only intended to implement existing statutory requirements, we assess the impacts of this final rule relative to a pre-statutory baseline. In the absence of passage of the CRRSAA, none of the affected entities would have received additional funding under the HEERF program. Passage of CRRSAA resulted in additional funds being made available to these entities. Specific to this final rule, approximately \$72.8 million in additional funds will be made available to affected entities through the endowment factor implicated by this final rule. As noted above, we do not anticipate this rule resulting in any increased regulatory burden for affected entities and, even if the additional funding provided under the endowment factor did result in such increased costs, those costs would be far outweighed by the additional funding received. We do not anticipate this rule to result in any transfers between regulated entities given that, as

described above, the Department would not be able to implement the statutory requirements in a manner consistent with the statutory text for certain eligible entities without this final rule. As a result, in the absence of this rule, no entity would have received funds under the endowment factor.

Regulatory Alternatives Considered

The Department considered a wide range of options to address the issues posed by the statutory requirements. Initially, we considered whether it was possible to resolve the issue without regulating. As described elsewhere, we determined that it would not be possible to allocate funds for certain eligible entities under the endowment factor in a manner consistent with the statutory requirements because doing so would require the agency to divide by zero.

Alternatively, the Department could have pursued a rule where it sought to divide the entire amount of funds equally among the nine entities with zero-dollar endowments. Such an approach would have focused resources on entities with smaller endowments but would have created sizable disparities among entities. For example, an entity without an endowment would have received approximately \$8.1 million, while the entity with the smallest non-zero endowment (with an endowment of only \$6,400) would have received no funding.

The Department also could have pursued a rule that imputed a \$1 endowment for all of the entities without endowments, the minimum required adjustment to allow for formula allocations in

accordance with the statutory requirements. Using this approach, approximately 55 institutions would receive funds under the endowment factor. Of those, 45 would receive allocations of less than \$100. While this approach would be more equitable than the prior alternatives, we still do not believe such an approach would meet the spirit of the statutory requirement.

Under this final rule, all 97 eligible entities would receive funding, with the smallest allocation being approximately \$7,300. We believe that this final rule, which ensures that all entities receive at least some funding under the endowment factor while also heavily preferencing those entities with small or no endowments, best meets the statutory intent.

Regulatory Flexibility Act Certification

This analysis, required by the Regulatory Flexibility Act, presents an estimate of the effect of the final regulations on small entities. The U.S. Small Business Administration (SBA) Size Standards define proprietary IHEs as small businesses if they are independently owned and operated, are not dominant in their field of operation, and have total annual revenue below \$7,000,000. Nonprofit institutions are defined as small entities if they are independently owned and operated and not dominant in their field of operation. Public institutions and local educational agencies are defined as small organizations if they are operated by a government overseeing a population below

50,000.

For purposes of this analysis, the Department proposes to define a small institution as a two-year IHE with an enrollment of less than 500 FTE or a four-year IHE with an enrollment of less than 1,000 FTE. Under this proposed definition, we would identify 27 of the 97 affected entities as small. As noted above, we estimate that this final rule will result in benefits for all affected entities with no regulatory burden. Small institutions would, on average, see an increase of approximately \$952,400 and non-small institutions receiving an increase would see an increase of approximately \$407,900.

As such, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act of 1995

There are no information collection requirements associated with this regulatory action.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Assessment of Educational Impact

Based on our own review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This final regulation may have federalism implications.

Accessible Format: On request to the program contact person listed under FOR FURTHER INFORMATION CONTACT, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, and MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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List of Subjects in 34 CFR Part 677

Colleges and universities, Grant programs-education, Reporting and recordkeeping requirements.

Miguel Cardona,
Secretary of Education.

For the reasons discussed in the preamble, the Secretary adds part 677 to title 34 of the Code of Federal Regulations to read as follows:

PART 677 – HIGHER EDUCATION EMERGENCY RELIEF FUND PROGRAMS

Subpart A – Provisions Related to Historically Black Colleges and Universities

Sec.

677.1 Calculations.

677.2 [Reserved]

Subpart B – Reserved

AUTHORITY: 20 U.S.C. 1221e-3; section 314(a)(2), Pub. L. 116-260, Division M, 134 Stat. 1182.

Subpart A – Provisions Related to Historically Black Colleges and Universities

§677.1 Calculations.

For the purpose of calculating allocations under section 314(a)(2)(A)(iii) of the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (division M of Public Law 116-260, December 27, 2020), an institution that has a total endowment of less than \$1,000,000, including an institution that does not have an endowment, will be treated by the Secretary as having a total endowment of \$1,000,000.

§677.2 [Reserved]

Subpart B – Reserved

[FR Doc. 2021-08379 Filed: 4/21/2021 8:45 am; Publication Date: 4/22/2021]