XAVIER BECERRA
Attorney General of California
CHERYL FEINER
MICHAEL NEWMAN
Senior Assistant Attorneys General
CHRISTINE CHUANG
Supervising Deputy Attorney General
JULIA HARUMI MASS
JASLEEN SINGH
SHUBHRA SHIVPURI
JOSHUA SONDHEIMER
LEE I. SHERMAN (SBN 272271)
Deputy Attorneys General
300 S. Spring St., Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6404
Fax: (213) 897-7605
E-mail: Lee.Sherman@doj.ca.gov
Attorneys for Plaintiffs Eloy Ortiz Oakley and Board of Governors of the California Community Colleges

(List of other Plaintiffs' counsel continued on next page)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ELOY ORTIZ OAKLEY, in his official capacity as Chancellor of California Community Colleges et al.,

Plaintiffs,

v.

BETSY DEVOS, in her official capacity as the United States Secretary of Education; U.S. DEPARTMENT OF EDUCATION,

Defendants.

Case No. 20-cv-03215-YGR

PLAINTIFFS' STATEMENT REGARDING INTERIM FINAL RULE

Judge: Honorable Yvonne Gonzalez Rogers
Trial Date: None Set
Action Filed: May 11, 2020

JOHN SHUPE
Lynch and Shupe, LLP
316 Mid Valley Center # 180
Carmel, CA 93923-8516
Telephone: (650) 579-5950
Fax: (650) 579-0300
E-mail: jshupe@lynchshupelaw.com
Attorney for Plaintiff Foothill-De Anza Community College District

JEFFREY M. PRIETO
General Counsel
Los Angeles Community College District
770 Wilshire Boulevard
Los Angeles, CA 90017
Telephone: (213) 891-2188
Fax: (213) 891-2138
E-mail: prietojm@laccd.edu
Attorney for Plaintiff Los Angeles Community College District

JP SHERRY
General Counsel
Los Rios Community College District
1919 Spanos Court
Sacramento, CA 95825
Telephone: (916) 568-3042
E-mail: sherryj@losrios.edu
Attorney for Plaintiff Los Rios Community College District

MATTHEW T. BESMER
General Counsel
State Center Community College District
1171 Fulton Street
Fresno, CA 93721
Telephone: (559) 243-7121
E-mail: matthew.besmer@scccd.edu
Attorney for Plaintiff State Center Community College District

LJUBISA KOSTIC
Director, Legal Services & EEO
San Diego Community College District
3375 Camino del Rio South, Room 385
San Diego, CA 92108
Telephone: (619) 388-6877
Fax: (619) 388-6898
E-mail: lkostic@sdccd.edu
Attorney for Plaintiff San Diego Community College District

Plaintiffs file this Statement in response to the Court's June 12 Order, ECF No. 40, directing Plaintiffs to address the procedural, substantive, and timing impacts, if any, of Defendants' (DoE) forthcoming Interim Final Rule (IFR) publication, ECF No. 39-1, on Plaintiffs' pending motion for preliminary injunction, ECF No. 16 (PI Mot. or PI Motion). In summary:

- The IFR confirms that DoE has made a final determination that Title IV's and 8 U.S.C. § 1611's (§ 1611) eligibility restrictions govern HEERF Assistance, reinforcing Plaintiffs' need for urgent relief.
- The IFR does nothing to diminish Plaintiffs' legal claims and demonstrates that DoE's interpretation is not entitled to deference.
- The IFR is essentially a repackaging of the arguments that DoE already offered to the Court in its Opposition brief (Opposition or Opp'n), ECF No. 20, and at the June 9 hearing, and provides the Court with further grounds for finding the eligibility restrictions on HEERF Assistance to be arbitrary and capricious.

Plaintiffs also note the federal district court for the Eastern District of Washington, after considering the IFR, preliminarily enjoined DoE's imposition of Title IV's eligibility restrictions on HEERF Assistance in Washington State without additional briefing. Order Granting Pl.'s Mot. for Prelim. Inj., *Washington v. DeVos*, No. 20-cv-00182-TOR (E.D. Wash. June 12, 2020), ECF No. 31 (*Washington* PI Order) (filed in this case as ECF No. 41-1). Plaintiffs are prepared to promptly address any issues the Court requests but submit that further briefing is unnecessary and that postponing resolution of Plaintiffs' request for preliminary relief will compound the irreparable harm that Plaintiffs and their students have already suffered as a result of DoE's unlawful actions.

I. PROCEDURAL IMPACT

The IFR has no procedural impact on Plaintiffs' pending PI Motion, irrespective of the mechanism by which DoE imposes the eligibility restrictions on HEERF Assistance. Plaintiffs' Complaint alleges that DoE's imposition of any eligibility restrictions on HEERF Assistance is unlawful and unconstitutional. *See, e.g.*, Compl. ¶¶ 5-6 (May 11, 2020), ECF No. 1. The Prayer

for Relief seeks to enjoin the imposition and enforcement of eligibility restrictions on HEERF Assistance, whether or not set forth in DoE's guidances. *See, e.g.*, *id.* Prayer for Relief No. 3 (seeking an injunction against "imposing and enforcing the eligibility requirements identified in the April 21 HEERF Assistance Guidances or *otherwise* restricting eligibility for HEERF Assistance to only those who are eligible under Title IV of the Higher Education Act of 1965") (emphasis added). The PI Motion likewise argues that the CARES Act does not impose eligibility restrictions on HEERF Assistance, nor does it delegate authority to the DoE Secretary to do so, *see* PI Mot. 12-17, and Plaintiffs' proposed order requests that DoE be enjoined from "[i]mposing or enforcing *any* eligibility requirement for students to receive [HEERF Assistance]. . . ." [Proposed] Order Granting Pls.' Mot. for Prelim. Inj. 1 (May 13, 2020), ECF No. 16-1 (emphasis added). The IFR contains the same eligibility restrictions as previously imposed by DoE and thus harms the Plaintiffs in the "same fundamental way." *Massachusetts v. HHS*, 923 F.3d 209, 220 (1st Cir. 2019) (quoting *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993)) (substantive challenges to interim final rule were not rendered moot when final rules were published during the course of litigation and where the final rules are "sufficiently similar" to the challenged interim final rules); *see also Cuviello v. City of Vallejo*, 944 F.3d 816, 824-25 (9th Cir. 2019) (challenge to an ordinance is not mooted by an amendment to the ordinance when the "gravamen of [plaintiff's] complaint and the irreparable harm that [plaintiff] alleges remain unaffected by the amendments;" the court is "particularly wary of legislative changes made in direct response to litigation").[1]

In addition, the IFR confirms that DoE's eligibility restrictions on HEERF Assistance are binding on Plaintiffs, *see* IFR 20, and the IFR constitutes a final agency action that is ripe for review. *See Public Citizen v. DOT*, 316 F.3d 1002, 1019 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752 (2004); *Beverly Enters. v. Herman*, 50 F. Supp. 2d 7, 17 (D.D.C. 1999) (concluding interim final rule was final agency action subject to challenge under the APA); *see also Nat. Res.*

[1] There are other grounds that the IFR is unlawful that are not raised in Plaintiffs' Complaint or PI Motion, including that it violates the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12. Because those claims were not raised in Plaintiffs' Complaint or PI Motion, Plaintiffs do not raise them here, but reserve their right to challenge the IFR on those grounds.

Def. Council v. EPA, 966 F.2d 1292, 1299 (9th Cir. 1992) ("[A]n agency action is ripe for review if the action at issue is final and the questions involved are legal ones.").

II. SUBSTANTIVE IMPACT

The IFR only further supports Plaintiffs' existing arguments that DoE's imposition of HEERF eligibility restrictions: (a) violate the separation of powers; (b) are ultra vires; (c) are in excess of statutory authority and arbitrary and capricious in violation of the APA; and (d) violate the Spending Clause. The IFR relies on substantive arguments Defendants offered in their briefing and which Plaintiffs have already addressed. While the IFR provides additional grounds for finding the eligibility restrictions arbitrary and capricious, the Court may find that Plaintiffs are likely to succeed on all of their claims and that preliminary relief is warranted without addressing the new grounds for finding the IFR arbitrary and capricious at this stage of the litigation.

A. DoE's Interpretation of the CARES Act in the IFR is Not Entitled to Deference

The IFR provides no new basis for affording deference to the agency's position, and the IFR's claim of deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), is misplaced. IFR 7. "To determine whether the *Chevron* framework governs at all . . . there is a threshold 'step zero' inquiry in which we ask whether 'it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [whether] the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Sierra Club v. Trump*, 929 F.3d 670, 692 (9th Cir. 2019) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)) (alteration in original). As Plaintiffs argued in their reply brief (Reply), ECF No. 21, the CARES Act did not delegate authority to the DoE Secretary to promulgate HEERF eligibility criteria. Reply 6. The IFR does not identify any delegation from Congress to issue rules arising from the CARES Act itself. Instead, the IFR invokes 20 U.S.C. §§ 1221e-3 and 3474 as the statutory authority for issuing the IFR on HEERF eligibility criteria. IFR 7. These provisions only authorize the DoE Secretary to issue rules in connection with her functions. *See* 20 U.S.C. §§ 1221e-3 (authorizing rules "to carry out functions otherwise vested in

the Secretary by law or by delegation of authority pursuant to law"), 3474 (authorizing Secretary "to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage functions of the Secretary or the Department").

Such authority for regulating administrative functions does not authorize the imposition of substantive eligibility requirements or funding conditions. Reply 6 n.5; *see Gonzalez v. Oregon*, 546 U.S. 243, 259, 264-65 (2006) (statute authorizing the Attorney General to promulgate rules "for the efficient execution of his functions" under the Controlled Substance Act do not authorize a rule that substantively altered medical standards for the care and treatment of patients; "[w]hen Congress chooses to delegate a power of this extent, it does so not by referring back to the administrator's functions but by giving authority over the provisions of the statute he is to interpret"); *City of Chicago v. Sessions*, 888 F.3d 272, 287 (7th Cir. 2018) (imposing grant conditions "is a tremendous power of widespread impact" and "not the type of authority that would be hidden in a clause without any explanation, and without any reference or acknowledgement of that authority in the statute that actually contains the grant itself"). Moreover, when Congress has previously authorized the DoE Secretary to impose funding conditions or set eligibility criteria for a program, it has done so explicitly. PI Mot. 14. No authorization or delegation for imposing funding conditions or setting eligibility criteria for HEERF Assistance is present in the CARES Act. Hence, there is no delegation and *Chevron* is inapplicable. *See Gonzalez*, 546 U.S. at 258, 268 (*Chevron* deference not warranted where statute did "not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law").

Even if *Chevron* were applicable, DoE's position does not warrant deference. Under *Chevron* step one, courts first look to the intent of Congress to determine whether "the statute is silent or ambiguous with respect to the specific issue." *Chevron*, 467 U.S. at 843. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43; *see also Freeman v. Gonzales*, 444 F.3d 1031, 1043 (9th Cir. 2006) (an agency rule that is "contrary to congressional intent and frustrate[s] congressional policy" is not entitled to deference) (quoting *Akhtar v.*

Burzynski, 384 F.3d 1193, 1202 (9th Cir. 2004)).

The IFR states that DoE's interpretation was based on its "conclu[sion] that Congress intended the category of those eligible for 'emergency financial aid grants to students' in section 18004 of the CARES Act to be limited to those individuals eligible for title IV assistance." IFR 8. Similarly, the DoE Secretary previously said that the eligibility restrictions were based on DoE "following the law" written by Congress. RJN Ex. I. As such, the issue here is "a pure question of statutory construction for the courts to decide" without deference to the agency's interpretation. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987); *see also Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

Furthermore, as discussed in Plaintiffs' prior briefing, Congress's intent in the CARES Act is clear: higher education institutions are permitted to distribute HEERF Assistance without any eligibility limitations. PI Mot. 12-17; Reply 5-12. There are no "ambiguous" terms for the agency to interpret. Under normal rules of statutory construction, the term "students" in subsection (c) of § 18004 governing HEERF Student Assistance must have the same meaning as the term "students" used in subsection (a)(1)(B) governing the funding formula, which includes students who are not eligible under Title IV or § 1611. Reply 9. The IFR omits any recognition that the formula mandated by Congress in subsection (a)(1)(B) encompasses *all* students (not exclusively enrolled in online learning at the start of the pandemic). *See* IFR 14 n.2 (discussing DoE's calculation of the HEERF allocation without acknowledging that Congress required that DoE account for all of these students); *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 361 (2013) (agency manual was not entitled to even *Skidmore* deference where agency "fail[ed] to address the specific provisions of the statutory scheme" relevant to the statute's interpretation).

Even if there were ambiguities in the CARES Act that resulted in reaching *Chevron* "step two," as discussed previously and below, DoE's interpretation is not "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Finally, DoE is not entitled to deference in addressing any ambiguities resulting in the imposition of a funding condition not unambiguously

authorized by Congress. Reply 13 (citing *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997)).

B. The IFR Provides No Persuasive Justification for Imposing Eligibility Restrictions on HEERF Assistance

The IFR restates many of the arguments that DoE made in its Opposition to justify the imposition of Title IV's and § 1611's eligibility restrictions on HEERF Assistance. *Compare* Opp'n 13-19 *with* IFR 6-14. The IFR acknowledges that the "emergency financial aid grants" a part of HEERF Assistance "by definition, do not constitute Federal financial student aid under the HEA, including title IV of the HEA." IFR 11. This necessarily means that HEERF Assistance cannot be subject to Title IV's restrictions because Title IV's eligibility restrictions only apply to grants "under" Title IV. 20 U.S.C. § 1091(a); Reply 6. The IFR's discussion that grants authorized by 20 U.S.C. § 1138(d) are subject to Title IV's eligibility restrictions only further supports that Title IV's restrictions do not apply to HEERF. IFR 11. In 20 U.S.C. § 1138(d), Congress *explicitly* incorporated Title IV's eligibility requirements by providing that "students who do not meet the requirements of section 1091(a) of this title" are ineligible for that funding source. No such language appears in § 18004 of the CARES Act.

DoE reiterates in the IFR the argument that the term "emergency financial aid grants" in § 18004 of the CARES Act must have the same meaning as the use of "emergency financial aid grants" in § 3504, which explicitly authorizes higher education institutions to use their "allocation *under . . . Title IV*" (emphasis added) to provide emergency financial aid grants to students. Opp'n 18; IFR 10-11. As the Eastern District of Washington court determined, the IFR fails to recognize that "Section 3504 authorizes the reallocation of funds that have already been awarded under Title IV and are clearly subject to Title IV restrictions" while "Section 18004 selectively incorporates certain Title IV definitions in a manner that does not indicate an intent to subject HERRF funds to Title IV restrictions." *Washington* PI Order 27; *see also* PI Mot. 13.

The IFR's discussion of other instances in which the CARES Act incorporates certain elements of Title IV repeats the arguments DoE made in its Opposition and does not address key principles of statutory construction. *Compare* IFR 11-13 *with* Opp'n 18-19. As Plaintiffs

previously argued, "Congress's incorporation of some elements of Title IV with 'surgical precision,' but not Title IV's eligibility requirements, demonstrates that Congress consciously declined to adopt such requirements for HEERF Assistance." Reply 7 (quoting *Navajo Nation v. HHS*, 325 F.3d 1133, 1139-40 (9th Cir. 2003)).

Finally, the IFR provides no explanation for the application of § 1611's eligibility restrictions on HEERF Assistance beyond that made in DoE's Opposition. *Compare* IFR 8-9 *with* Opp'n 13-15. For the reasons detailed in Plaintiffs' reply (at 8-12), the more specific one-time emergency disbursement of HEERF Assistance in the CARES Act is not subject to the general prohibition in § 1611, particularly where § 1611's purposes are not furthered by its application to HEERF.[2]

C. The IFR Further Demonstrates that DoE's Eligibility Restrictions on HEERF Assistance Are Arbitrary and Capricious

The IFR does not cure DoE's arbitrary and capricious action, and Plaintiffs have demonstrated a likelihood of success on this claim based on the existing briefing. As Plaintiffs have explained, DoE first told higher education institutions they could provide HEERF Assistance to "all students," RJN Ex. D, and then "failed even to acknowledge its change in position regarding the HEERF Eligibility Requirements, much less provide a 'reasoned explanation.'" PI Mot. 17 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009)). DoE's Title IV and § 1611 eligibility restrictions contradict that prior statement, and the IFR reflects *no recognition* of DoE's prior position that all students are eligible to receive HEERF Assistance.

The IFR also exacerbates, rather than resolves, the internal inconsistencies in DoE's agency action. PI Mot. 18. The IFR recognizes that the CARES Act emergency assistance grants

[2] The Washington district court found plaintiff's argument that § 1611 does not apply to HEERF to be "reasonable and compelling" but that "Plaintiff has not shown that it is likely to succeed on its argument." *Washington* PI Order 21. The court's reasoning in reaching that conclusion, however, does not evidence any consideration of Plaintiffs' arguments here that: (a) the specific provisions of the CARES Act control over the general prohibition in § 1611; (b) the purposes of the CARES Act and § 1611 demonstrate that § 1611's eligibility restrictions are not applicable to HEERF Assistance; and (c) HEERF Assistance is not a federal public benefit under § 1611. Reply 8-11.

"by definition, do not constitute Federal financial student aid under the HEA, *including title IV of the HEA*." IFR 11 (emphasis added). Yet the IFR applies Title IV eligibility restrictions without explanation other than to say that *a different* funding source, authorized in 20 U.S.C. § 1138(d), is subject to Title IV's eligibility restrictions. *Id.* As already noted, *supra* 6, Congress explicitly incorporated Title IV's eligibility restrictions for that funding source and did not do so for HEERF Assistance, thus leaving that internal inconsistency unexplained. In addition, DoE continues to try to have it both ways: while the IFR first disavows Title IV's requirements with respect to certain procedural requirements under section 482 and 492 of HEA because "the rule does not relate to the delivery of student aid funds under title IV" and "implements the CARES Act, not title IV," IFR 21, the IFR then singles out student relief as subject to Title IV's eligibility requirements, *id.* at 8.

The IFR does nothing to undercut Plaintiffs' additional arguments that DoE's eligibility restrictions are arbitrary and capricious because DoE "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem," and "offered an explanation for its decision that runs counter to the evidence before the agency." PI Mot. 19 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). By imposing eligibility restrictions on HEERF Assistance, the IFR relies on factors that Congress did not intend, which the DoE Secretary previously acknowledged stating that "the only statutory requirement is that funds be used to cover expenses related to the disruption of campus operations due to coronavirus." RJN Ex. D. Separately, the IFR's explanation of the inconsistency between the formula for allocating funds and the HEERF eligibility restrictions, IFR 14 n.2, ignores the congressional command that the Secretary "shall" distribute funds in accordance with the formula created by Congress, which accounts for all students not previously enrolled in online education, § 18004(a)(1)(B), 134 Stat. 281, 567.

Based on the existing briefing, these aforementioned grounds are sufficient for finding that Plaintiffs are likely to succeed on their arbitrary and capricious claim. The IFR's policy justifications for imposing eligibility requirements on HEERF Assistance only provide further bases for setting aside the agency action as arbitrary and capricious. Among the new independent

grounds that Plaintiffs would address on briefing for final judgment are the following:

- The IFR states that existing Title IV eligibility standards provide higher education institutions with clarity, and that "using a generic, broad standard" would instead require DoE and institutions to "wade through a litany of specific questions" to determine eligibility. IFR 16. But there is no evidence in the IFR to support that determination, and evidence submitted by Plaintiff Districts evinces the contrary. *See generally* App'x of Decls., ECF No. 16-4. The IFR ignores the obvious alternative of providing institutions with discretion to use HEERF Assistance without the contested eligibility restrictions, as originally allowed in the April 9 letter. RJN Ex. D; *see State Farm*, 463 U.S. at 48 (alternative way of achieving the objectives of the statute should have been addressed and adequate reasons given for its abandonment).
- The IFR asserts that the Title IV eligibility requirements are necessary to avoid "waste, fraud, and abuse," because without such eligibility requirements, individuals who were not "qualified" would be "incentivize[d]" to enroll as students and institutions would "take advantage of this dynamic to further their bottom line." IFR 17-18. That rationale fails to consider facts before the agency that HEERF Assistance is intended for students already enrolled at the time of passage, including those students who may have become ineligible for Title IV *because* of circumstances borne out of the pandemic (*e.g.*, ability to maintain Satisfactory Academic Progress).
- The IFR's analysis of the costs of the agency's actions is cursory and inadequate as it fails to consider: (a) the costs of the eligibility exclusions against the purported benefit of the IFR; and (b) the impact on the other categories of students excluded due to the Title IV eligibility requirements. *See, e.g.*, IFR 30; *see also State Farm,* 463 U.S. at 52, 54 ("reasoned decisionmaking" requires agencies to "look at the costs as well as the benefits" of their actions); *Gresham v. Azar*, 950 F.3d at 93, 103 (D.C. Cir. 2020) (HHS's approval of State Medicaid work requirements held arbitrary and capricious where it failed to adequately consider the loss in coverage that would result, undermining foundational statutory purpose). The primary benefit the IFR attributes to employing the Title IV

eligibility requirements is the efficiency gained by using the existing FAFSA process. *See* IFR 17, 29-30. But the IFR then provides that students may be permitted to fill out an application that must be created by each institution, in which students certify their eligibility under Title IV in lieu of completing a FAFSA. *Id.* at 30. If such self-certification applications are sufficient, the FAFSA process is unnecessary, negating DoE's justification for imposing the Title IV eligibility requirements.

- The IFR further disregards or underestimates the burdens imposed on higher education institutions. *See Michigan v. EPA*, 135 S.Ct. 2699, 2712 (2015) (EPA's actions held unreasonable when it disregarded costs relevant to its decision to regulate power plants). The IFR makes no mention of the harm to diversity and inclusion that results from excluding students based on Title IV's and § 1611's requirements. *See* PI Mot. 6-11. It also significantly underestimates the amount of time institutions will need to administer DoE's eligibility requirements, which entails navigating a complex FAFSA process or verifying eligibility for students who self-certify. IFR 17 n.5, 30, 41 (estimating five hours per institution to implement Title IV eligibility requirement); *see Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("When an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.").

For purposes of final judgment, Plaintiffs submit that additional briefing on these further arbitrary and capricious arguments is warranted, but none is necessary for the Court to grant preliminary relief on the already-briefed arbitrary and capricious grounds, or on the basis of Plaintiffs' other legal claims.

D. The IFR Further Demonstrates that DoE's Eligibility Restrictions Violate the Spending Clause

The IFR reinforces Plaintiffs' Spending Clause claim as the IFR relies on the purported "ambiguous" terms of the CARES Act to impose eligibility restrictions on HEERF Assistance. *See* IFR 7. As Plaintiffs argued previously, "[t]his concession is fatal to the restrictions because when 'Congress intends to impose a condition on the grant of federal moneys, it must do so

unambiguously.'" Reply 13 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Independently, the eligibility restrictions violate the Spending Clause's prohibition on post-acceptance conditions, which the IFR does not (and cannot) change. PI Mot. 20-21; Reply 14. The IFR also creates a new Spending Clause ambiguity. Previously, Defendants argued that the HEERF Institution Assistance portion of funds is not subject to Title IV's eligibility limitations, even if the institution uses a portion of those funds to make monetary payments to students. Opp'n 7. The IFR, however, does not include any language allowing higher education institutions to use HEERF Institution Assistance for non-Title IV eligible students. As such, institutions are now in even less of a position "to exercise their choice knowingly, cognizant of the consequences of their participation" in HEERF Assistance. *Pennhurst*, 451 U.S. at 17; *see also* PI Mot. 20; Reply 13.

III. TIMING CONSIDERATIONS

Plaintiffs respectfully submit that additional briefing is unnecessary at this stage and urge the Court to rule on Plaintiffs' PI Motion as soon as possible to address the needs of Plaintiffs and approximately 800,000 California community college students who are suffering irreparable harm as a result of DoE's HEERF eligibility restrictions. PI Mot. 22-25; Reply 14-15. Although similarly-situated federal agencies have issued 24 Interim Final Rules implementing provisions of the CARES Act since April 13, ECF No. 38, DoE waited until June 11, 2020, *after* the hearing on Plaintiffs' PI Motion, to issue an IFR that only confirms what was clear on April 21, 2020: DoE has unlawfully imposed eligibility restrictions on HEERF Assistance. The question of whether Title IV's and § 1611's eligibility restrictions apply to HEERF Assistance has been extensively briefed and argued, and the IFR retreads arguments Defendants have already made in this case. While Plaintiffs remain ready to promptly address any issues at the Court's request, Plaintiffs submit that no further briefing is necessary. Because of the students' urgent and ongoing need for emergency assistance to address the disruptions caused by the COVID-19 pandemic, the equities strongly favor the issuance of a decision on Plaintiffs' PI Motion.

Dated: June 14, 2020

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
CHERYL FEINER
MICHAEL NEWMAN
Senior Assistant Attorneys General
CHRISTINE CHUANG
Supervising Deputy Attorney General
JULIA HARUMI MASS
JASLEEN SINGH
SHUBHRA SHIVPURI
JOSHUA SONDHEIMER

/s/ Lee I. Sherman

LEE I. SHERMAN
Deputy Attorneys General
Attorneys for Plaintiffs Eloy Ortiz Oakley and Board of Governors of the California Community Colleges

/s/ John Shupe

JOHN SHUPE
Lynch and Shupe, LLP
Attorney for Plaintiff Foothill-De Anza Community College District

/s/ JP Sherry

JP SHERRY
General Counsel
Attorney for Plaintiff Los Rios Community College District

/s/ Jeffrey M. Prieto

JEFFREY M. PRIETO
General Counsel
Attorney for Plaintiff Los Angeles Community College District

/s/ Matthew T. Besmer

MATTHEW T. BESMER
General Counsel
Attorney for Plaintiff State Center Community College District

/s/ Ljubisa Kostic

LJUBISA KOSTIC
Director, Legal Services & EEO
Attorney for Plaintiff San Diego Community College District

ATTESTATION OF SIGNATURES

I, Lee I. Sherman, hereby attest, pursuant to Local Civil Rule 5-1(i)(3) of the Northern District of California that concurrence in the filing of this document has been obtained from each signatory hereto.

/s/ Lee I. Sherman

LEE I. SHERMAN
Deputy Attorney General
Attorney for Plaintiffs Eloy Ortiz Oakley and Board of Governors of the California Community Colleges