

The State Authorization Rule Still Lives – Be Ready

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Recently, the House Committee on Education and the Workforce that is working on the long-overdue reauthorization of the Higher Education Act released its proposal, the Promoting Real Opportunity, Success, and Prosperity through Education Reform ([PROSPER](#)) Act. See [our analysis](#) of this bill, which is an opening salvo in what is going to be a long and complex legislative process. Among other proposals, the act would rescind the long-delayed [final rule](#) on state authorization for distance education programs that is slated to go into effect on July 1, 2018 (the Distance Ed Rule) and prohibit the Department of Education from another rulemaking in this area.

However, the act is a long way from becoming law. In the meantime, the Distance Ed Rule remains on the books. It was not part of the Department of Education's agenda for upcoming negotiated rulemakings, and the Department has not indicated any intention to suspend or delay implementation of the rule. What is certain is that if the Distance Ed Rule does go into effect on schedule on July 1, 2018, schools that are not prepared to meet its many requirements will be in for a very rude, and potentially expensive, awakening.

The Distance Ed Rule requires *all* institutions (public, private and proprietary) to (i) obtain authorization to offer their programs from each state where authorization is required or through participation in a reciprocity agreement, regardless of the mode of delivery, (ii) obtain authorization from foreign countries for physical locations located in their territory and (iii) provide specific consumer disclosures regarding their online programs.

Though many institutions have long monitored their compliance with individual state authorization requirements, the detailed disclosures present a new challenge. While the initial state authorization rule was the driving force behind SARA, and many schools have secured participation in SARA or obtained state approvals where they are still required, the additional requirements embedded in the Distance Ed Rule are significant. The requirement for demonstrating foreign site approval can be complex and will require institutions to have supporting documentation of authorization that may be difficult to obtain in some countries.

Altogether new is the requirement that every institution must provide information on state refund policies for every state in which either resident students *or students enrolled in online programs* reside. This represents a substantial disclosure obligation that will consume many pages on a website.

However, for most schools, the most burdensome aspect of complying with the Distance Ed Rule will be the disclosures regarding online programs that lead to professional licensure. Under the Distance Ed Rule, all schools – regardless of whether they participate in SARA – are required to disclose the requirements for professional licensure in the relevant occupation *in each state in which students enrolled in the program reside*. Importantly, the disclosures must inform students whether, upon successful completion of the particular program they will – or will not – be eligible for licensure to practice the particular profession. Note that the federal requirements for professional licensure disclosures are similar to, but not identical to, disclosure requirements already in place under SARA.

Aside from the considerable amount of data gathering needed to support such disclosures (which is one driver for getting ready *now*), the Distance Ed Rule will require institutions to closely track where students enrolled in online programs reside *during the course of their studies*. This means that if a student enrolls in an online program as a resident of one state, and then moves to another state mid-program, the institution would need to provide the student with current information on licensure requirements (as well as state-mandated refund policies) in the new jurisdiction. Now is the time to consider the current capabilities of student data systems so that the relevant disclosures can be made in a timely manner. This is particularly important because the new disclosures must be available to prospective students prior to their *enrollment*, which makes the July 1, 2018, deadline all the more critical.

While the ultimate fate of the Distance Ed Rule remains in flux, it would be a mistake to put off the preparatory work that will be needed to secure compliance. Aside from the potential Title IV liabilities for violating the Distance Ed Rule itself, remember that failing to disclose consumer-sensitive information can create the basis for litigation under state law (whether brought by a state AG or privately), and if it represents a violation of state law could – even under the limited scope of current federal law – also provide the basis for a [Borrower Defense to Repayment](#) claim.

We will be closely following the continuing saga of the Distance Ed Rule. Watch this space.

Nancy Anderson focuses on regulatory issues affecting higher education institutions, including compliance with federal, state and accrediting agency requirements.

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