

ED Publishes Final State Authorization for Distance Education Rule

November 5, 2019

On Friday, November 1, the Department of Education published its final state authorization for distance education regulations in the Federal Register, [available here](#). The rule draws on the 2016 version of the state authorization regulations, ordered into effect by a federal court decision in May of this year, but contains important changes, notably around the scope of professional licensure disclosures and eliminating the requirement for states to maintain an adequate process for reviewing student complaints. The regulations are slated to take effect on July 1, 2020, but as expected, ED will allow institutions to opt for early implementation as of November 1, 2019, which would bypass compliance with the 2016 rules currently in effect.

As background, the new distance education regulations follow ED's April 2019 negotiated rulemaking, which, to the surprise of many, reached consensus on the two key requirements of the state authorization rule:

- the requirement that institutions obtain any required state authorizations for distance education programs as a condition of eligibility to offer federal student aid to students located in such states; and
- consumer disclosure requirements, particularly around programs that prepare students for professional licensure.

The consensus rule was published in a notice of proposed rulemaking (NPRM) on June 12, 2019, and ED accepted public comments on the rule through July 12. The final rule largely follows the NPRM and consensus rule.

Eligibility

The final rule retains 34 C.F.R. § 600.9(c), initially implemented in the 2016 state authorization regulations, and part of the rule package that became effective in May of this year. Section 600.9(c) mandates that institutions satisfy any requirements under state law to enroll students in distance learning programs in any state in which the institution is not physically located or in which the institution is otherwise subject to the state's jurisdiction. Satisfying such state requirements is a condition of Title IV eligibility. Alternatively, an institution can satisfy this requirement if it participates in a state authorization reciprocity agreement (as defined in the rule) that covers the institution's activities in the relevant state or territory.

ED clarified that, under the new rule, a qualifying state authorization reciprocity agreement cannot "prohibit any member State of the agreement from enforcing its own general-purpose State laws and regulations outside of the State authorization of distance education." The revised definition resolves lingering confusion under the 2016 law definition and clarifies that states may still enforce "general-purpose" consumer protection laws against institutions operating in their jurisdiction under a reciprocity agreement as long as those laws are not specific to out-of-state education providers.

Note also that the final rule eliminates the 2016 rule's requirement that institutions offering distance education courses to students in any state in which they are not physically located be able to demonstrate that such state has a process for resolving student complaints. Ambiguity around this requirement gained attention in July of this year, when ED announced that California lacked a complaint process and that California residents enrolled at out-of-state public and nonprofit institutions were therefore ineligible for federal student aid funds. In response, California rushed to put in place a student complaint process, and ED has stated it will accept California's process as meeting the requirements under the 2016 version of the rule currently in effect. However, the incident raised concerns that some states other than California do not have an adequate complaint process in place to satisfy the rule. ED eliminated the complaint process in the new rule entirely, stating that it is not necessary since schools are required to provide students with contact information for filing complaints with its State licensing agency under 668.43(b).

Disclosure Requirements Applicable to ALL Institutions Regardless of Delivery

Under the final rule, institutions offering programs, ***regardless of mode of delivery***, that are either (1) designed to meet educational requirements for a specific vocational license or certification that is required for employment in an occupation or (2) advertised as meeting such requirements must inform both prospective and currently enrolled students of the specific states in which:

- The institution has determined its curriculum meets the state educational requirements for licensure or certification
- The institution has determined its curriculum *does not* meet the state educational requirements for licensure or certification
- The institution has not made a determination that its curriculum meets the state educational requirements for licensure or certification

The final rule requires institutions to make the required professional licensure disclosures “readily available.” An institution satisfies this requirement by publishing the required disclosures in their catalogs or on their website. However, in certain cases described below, institutions must make disclosures directly to prospective and enrolled students via email or other electronic communication:

- Direct disclosures to prospective students: if the institution has determined that its program’s curriculum does not meet the state educational requirements for licensure or certification in a state in which a prospective student is located, or if the institution has not made such a determination, the institution must provide notice to that effect to the prospective student prior to enrollment. Specifically, the final rule clarifies that institutions must provide the disclosure to prospective students before the student signs an enrollment agreement, or if the institution does not provide an enrollment agreement, before the student makes a financial commitment to the institution. Unlike the 2016 state authorization rule, this final rule does not require institutions to obtain a prospective student’s acknowledgment of the disclosure.
- Direct disclosures to currently enrolled students: if an institution determines its program’s curriculum does not meet the requirements in a state where a current student is located, the institution must notify that student within 14 calendar days of making such a determination.

False or misleading disclosures regarding the ability of a student to obtain licensure or practice a trade or profession in a particular state may lead to violations of the [Title IV misrepresentation rules](#), which carry serious penalties and may invite private lawsuits, or even FTC or State Attorneys General investigations.

The final rule also requires institutions to make several other disclosures, including:

- a description of transfer of credit policies;
- a description of any written arrangements the institution has entered into;
- whether the institution is required to maintain a teach-out plan by its accrediting agency, and the reason why such a plan is required;
- the institution’s refund policy;
- contact information for filing complaints with the institution’s accreditor and state authorization agency; and
- notice of any enforcement actions or prosecutions brought against the institution in any matter where a final judgment against the institution would result in adverse action by an accrediting agency, revocation by the state authorization agency, or limitation, suspension, or termination of eligibility under Title IV. The Department amended the proposed rule to remove the requirement that institutions also provide notice of on-going investigations.

Tracking Student Location

The committee also agreed to move away from the 2016 rule’s residency standard that requires institutions to determine each student’s state of residency, but imposes new requirements on schools to assign and track student location.

The final rule requires institutions to determine in which states students are located for the purpose of issuing state-specific disclosures, such as those regarding eligibility to sit for licensure. The consensus rule also establishes when an institution must determine a student’s location – at the time of the student’s initial enrollment in an educational program and when the student notifies the institution their location has changed – but allows institutions to establish their own procedures for making that determination. Thus, institutions must document the change of address process and consistently apply their policies and procedures regarding student location to all students, including students enrolled in on-ground programs. The preamble to the final rule noted that institutions may make different determinations for different types of students (undergraduate versus graduate, for example).

Early Implementation

The rule’s official effective date is July 1, 2020. However, ED is allowing institutions to opt for early implementation as of November 1. This means that institutions can choose to comply with the 2020 rule rather than the 2016 rule at any point, and should weigh their individual circumstances to determine whether early implementation is appropriate. ED has not

provided specific instructions or guidance on how to adopt early implementation.

Please contact us if you would like assistance in deciding whether to adopt early implementation, understanding the new disclosure requirements, or drafting an appropriate notice. And watch CooleyED for more commentary and analysis on what these important rules are likely to mean for the regulation of distance learning and higher education.

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