



NASASPS Webinar

Federal Regulation of State Authorization: What's Next?

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The Department of Education's State Authorization Rules

- **State authorization is a condition of Title IV eligibility.**
- Historically, Department of Education only required state authorization in the states in which an institution was physically located.
- Between 2010 and 2016, ED issued new “program integrity” rules, including several provisions relating to state authorization.
- The state authorization rules apply to all types of educational institutions: public, for-profit, and private non-profit regardless of degree level.
- Really two parts—the “distance education rule” and the “on-ground rule.”

The Distance Education Rule

- **34 C.F.R. 600.9(c):** “If an institution...offers postsecondary education through distance or correspondence courses to students residing in a State in which the institution is not physically located **or in which the institution is otherwise subject to State jurisdiction as determined by the State**, . . . the institution must meet any of the State’s requirements for it to be legally offering distance or correspondence courses in that State. The institution **must, upon request, document the State’s approval to the Secretary...**” (emphasis added)

Distance Education Rule Has a Long, Tortured History

- ED first issued the rule in 2010, but it was thrown out on procedural grounds in APSCU v. Duncan in 2011 (affirmed on appeal in 2012).
- In 2013, ED initiated a negotiated rulemaking to re-issue the distance education rule (in a modified form), but failed to reach consensus.
 - ED's radical approach would have mandated that all states regulate distance education.
 - Eliminated option to have a "physical presence test" (as practical matter).
 - Prohibited any exemptions based on accreditation or years in operation.
- ED received significant pushback and "paused" this second rulemaking process.
- Meanwhile, ED staff maintained state authorization for distance education is required under the HEA, regardless of whether any regulation was in effect.

New “Final” Distance Education Rule

- In December 2016, the Department re-issued regulations requiring state authorization for distance education programs (81 Fed. Reg. 92232).
- Rules are scheduled to take effect July 1, 2018:
 - As before, the rule makes proof of state authorization for online programs a condition of “institutional eligibility” to participate in the Title IV federal loan programs.
 - Preamble to the final rule clarifies school would only lose Title IV funds for programs offered in the state(s) in which it failed to maintain a required approval, rather than institutional Title IV eligibility.
 - The rule also imposes new and burdensome requirements with respect to consumer disclosures, particularly for programs that lead to professional licensure.
- **These new requirements will be burdensome for all institutions—regardless of participation in SARA.**

Elements of Final Rule

- Three (3) key requirements of the new rule require:
 - Authorization of Distance Ed--Obtain authorization to offer online programs in each state where authorization is required or through participation in a reciprocity agreement;
 - New Disclosures--Publish and issue detailed consumer disclosures regarding online programs; and
 - Foreign Locations--Obtain authorization for physical locations located in foreign countries.

Distance Education Rule: Authorization Requirements

- Under the new rule, schools must obtain authorization in each state where authorization is required *or* satisfy the requirement through participation in a reciprocity agreement (like SARA).

BUT!

- The regulation provides that, for the purpose of satisfying the new rule, state reciprocity agreements cannot prohibit states from enforcing their own statutes and regulations, “whether general or specifically directed at all or a subgroup of educational institutions.”

Distance Education Rule: Authorization Requirements

- As written, rule actually seems to exclude SARA because, under SARA, states agree to abide by and enforce the terms of SARA, rather than their existing state laws.
- Outgoing Under Secretary Ted Mitchell attempted to clarify ED's position in a January 2017 letter, but the letter is not clear, nor dispositive as a legal matter.
- ED needs to issue more definitive guidance or the ambiguity will remain.
- NC-SARA and others have filed comments to address this problem.
- It is unclear how (or if) the new Administration will address the issue.

Distance Education Rule: Disclosure Requirements

- The new rule includes general disclosures that must be made publicly and individualized disclosures that will require direct communication with enrolled and prospective students.
- Disclosure requirements for online programs, particularly with respect to professional licensure, are burdensome and they **apply regardless of whether the institution participates in SARA.**
- Violations of the rule could result in fines under the HEA, a loss of program eligibility, or even institutional eligibility to participate in Title IV.

Distance Education Rule: Disclosure Requirements

- **General Disclosures**

- **Authorization:** How the distance education program is authorized (by state licensing agency or SARA) for each state in which students enrolled in the program reside.
- **Complaints:** How to submit complaints in the state in which the main campus is located or through SARA *and* how to submit complaints to the appropriate state agency in the student's state of residence (regardless of whether the institution is authorized by SARA).
- **Adverse Actions:** any adverse action taken by a state or accrediting agency against a distance education program for the previous five calendar years.
- **Refunds:** policies that the institution is required to comply with for any state in which the institution enrolls students (Note: even when the institution participates in SARA, the institution must follow individual state refund policies).
- **Licensure Requirements:** The applicable licensure or certification requirements for a career a student prepares to enter, and whether the program meets those requirements.

Distance Education Rule: Disclosure Requirements

- **Individualized Disclosures**

- **Licensure:** To all prospective students (prior to enrollment), when a distance education program or correspondence course does not meet the licensure or certification requirements for a state in which a student resides.
- **Adverse Action:** When an adverse action is taken against an institution's purely online distance education programs, to each enrolled and prospective student.
- **Change in Licensure Requirements:** Any determination that a program ceases to meet licensure or certification requirements to each enrolled and prospective student for a state in which a student resides, within 14 days of the determination.
 - "Prospective student" means an individual who has contacted an eligible institution requesting information concerning admission to that institution. 34 CFR §668.41.

Distance Education Rule: Disclosure Requirements

- **Making the General Disclosures**

- The Department declined to mandate any particular requirements about how these disclosures must be provided to students.
- For now, institutions can comply with the disclosure requirement by referring to a non-institutional website, including relevant state professional licensure board Web sites.
- Guidance issued in Dear Colleague Letter GEN-12-13 applies: make the link accessible from the institution's website and have the link prominently displayed and accurately described. **The institution is responsible for ensuring that the link is functioning and accurate.**
- “Institutions should not put the burden on the student making the determination about whether the program meets the prerequisites for licensure or certification.” 81 Fed. Reg. 92250-51.

Distance Education Rule: Disclosure Requirements

- **Making the Individualized Disclosures**
 - Must obtain acknowledgement from the student indicating that the student received the disclosure.
 - Acknowledgement can be combined with other acknowledgements (such as in the enrollment agreement).
 - Can also be included as an email link acknowledging receipt.

Distance Education Rule: Disclosure Requirements

- **Disclosing Licensure Requirements**
 - Schools must disclose all applicable prerequisites for licensure for professional programs *and* whether the school's programs satisfy those prerequisites **in each state where students reside**.
 - Must also disclose prerequisites for any state for which the institution has made such a determination.
 - If an institution has not determined whether its programs meet applicable state prerequisites for licensure, it must publish a statement to that effect.
 - If an institution determines that a program does not meet a state's professional licensure prerequisites, it must disclose that fact **directly to each prospective student** prior to enrollment, and obtain a letter of acknowledgement from any student who subsequently enrolls in the program.
 - Must also notify student within 14 days if a program no longer meets a state's requirements.

Distance Education Rule: Disclosure Requirements

- So, what programs require additional disclosures on licensure?
- ED says—programs that “foreseeably lead” to careers that require licensure in a state, “based on how an institution markets” a program.
- The disclosure applies to the program, not student-level qualifications (essentially, a “sit test”).
- Note that ED’s disclosure requirements are somewhat different from SARA’s.

SARA Disclosure Requirements

- SARA Policy on Professional Licensure

- “SARA has no effect on state professional licensing requirements. Any institution operating under SARA that offers courses or programs potentially leading to professional licensure must keep all students, applicants and potential students who have contacted the institution about the course or program informed as to whether such offerings actually meet state licensing requirements. For purposes of SARA, this must be done in one of two ways:
 - a. The institution may determine whether the course or program meets the requirements for professional licensure in the state where the applicant or student resides and provide that information in writing to the student, or
 - b. The institution may notify the applicant or student in writing that the institution cannot confirm whether the course or program meets requirements for professional licensure in the student’s state, provide the student with current contact information for any applicable licensing boards, and advise the student to determine whether the program meets requirements for licensure in the state where the student lives.” See SARA Policies, Section 8 (2017).

Distance Education Rule: Disclosure Requirements

- **Another New Challenge: Student Residence**

- The disclosure requirements create new obligations for institutions to determine an online student's state of legal residence, not just the state where a student may be physically located and disclose consequences if they move.
- **Institutions must therefore regularly track student's residence and/or confirm their legal state of residence.**
- The student's state of legal residence is:
 - where the student meets the requirements for residency under state law; or
 - an institution may rely on a student's self-determination of the state in which he or she resides unless the institution has information to the contrary.
- **Best way to comply would be requiring students to “declare” or confirm their state of residence prior to enrollment each term.**

Distance Education Rule: Disclosure Requirements

- **Tracking Student Residence (cont.)**

- Specific disclosures where the student's state of residence must be considered:
 - The Final Rule requires institutions to disclose to students the consequences of moving to a state where (i) the institution does not satisfy state authorization requirements or (ii) if the program does not meet the destination state's occupational licensure or certification requirements. (General Disclosure).
 - Complaint processes for the student's state of residence. (General Disclosure).
 - Determination that a program offered solely through distance education does not meet licensure or certification prerequisites in the state of the student's residence. (Individual Disclosure).

Distance Education Rule: Authorization for Foreign Locations

- **Authorization for Foreign Locations**

- The new rule requires domestic institutions to obtain authorization for every foreign branch campus or location where a school offers more than 50% of an educational program.
- The institution also must be able to provide documentation demonstrating authorization to the Department.
- One exception: foreign branch or additional locations on a U.S. military base do not require such authorization, but must be included within the scope of the institution's accreditation.
- By our estimate, the rule could impact approximately 300 Title IV-eligible U.S. institutions with foreign locations!

Distance Education Rule: Authorization for Foreign Locations

- **Authorization for Foreign Locations**

- What documentation is required to demonstrate proof of authorization?
 - Any license to operate required by the foreign government *or*
 - If no such license is required, documentation demonstrating that the foreign government is aware that the additional location provides postsecondary education and does not object to those activities.
 - The institution should document its efforts to obtain authorization.
- The new rule also requires that foreign branch campuses or additional locations be reported to an institution's home state on an annual basis.
- If the institution's home state excludes any foreign branch campus from an institution's authorization, the foreign campus or location will be not eligible for Title IV program purposes.

Relationship to Other Consumer Protection Regulations

- Increased emphasis in recent years on consumer protection in higher education, particularly with respect to distance education programs.
- The new distance education disclosure requirements intersect with other federal and state consumer protection laws, including:
 - ED's Misrepresentation rules (and state versions)
 - Borrower Defense to Repayment regulations
 - ED's Gainful Employment disclosures and certification statements
 - Other state and federal consumer protection laws (e.g., FTC Act or mini-FTC Acts) and accreditation standards.

Other Consumer Protection Regulations: Misrepresentation

- ED's Misrepresentation Rules (34 CFR 668.72)
 - The HEA prohibits an institution that participates in Title IV programs from engaging in "substantial misrepresentation" regarding three broad subject areas:
 - (1) the nature of the school's education programs,
 - (2) the school's financial charges, and
 - (3) the employability of the school's graduates.
 - Misstatements about the "nature of" institution's programs specifically includes any misstatements about state authorizations and approvals.
 - "Substantial misrepresentations" under federal Title IV regulations are subject to fines, return of funds, and the possible loss of Title IV.

Other Consumer Protection Regulations: BDTR

- State authorization misrepresentations can also serve as the basis for “borrower defense to repayment” claims (with ED later coming after institution).
- Suspended version of rule significantly expanded scope of “substantial misrepresentation.”
- Institutions should track this ongoing rulemaking closely.
- But, even under existing federal regulations, a cause of action under state law could serve as a basis for such a claim.

Other Consumer Protection Regulations: GE

- Gainful Employment (GE) Regulations (34 CFR 668.412 and 668.414(d)).
- Two elements: Certification and Disclosure
 - Beginning 2016, institutions were required to certify to ED that professional licensure programs (that are also gainful employment programs) satisfy the applicable professional licensure prerequisites in each state the institution is required to be authorized.
 - When the Distance Education Rule takes effect in 2018, the certification for physical locations will clearly also cover states in which the institution is required to obtain approval for distance education programs.

Other Consumer Protection Regulations: GE

- General Disclosure Element:
 - GE disclosure template requires disclosure of whether any GE program does or does not satisfy the applicable professional licensure prerequisites in (1) any state the institution is required to be authorized under 600.9, (2) any state within in any “metropolitan statistical area” in which the program is offered (as defined by OMB), or (3) any other state for which the institution has made a determination.
 - For any other state, must disclose that the institution has not made a determination.
- Like BDTR, GE rule also expected to change significantly, but this provision is still in effect.

Federal Distance Education Rules: Takeaways

- **Key Takeaways**

- 1) The regulation may be modified or suspended prior to the effective date of July 1, 2018, but currently we have no information on pending changes.
 - 2) ED's final distance education rule did not provide full and unconditional support for SARA and other reciprocity agreements.
 - 3) The rule imposes burdensome new disclosure requirements on all institutions, **regardless of participation in SARA.**
 - 4) New disclosures intersect with other federal and state compliance and consumer protection requirements, increasing risks for noncompliance.
- **Schools should monitor developments through the end of the year and plan to come into compliance with requirements prior to the July 1, 2018 effective date.**