

Mountain or Speed Bump: Update on New & Proposed Department of Education Distance Education Regulations

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Background:

The U.S. Department of Education (ED) has been very active in developing new and amended regulations affecting institution participation in Title IV HEA programs:

- New regulations were released last fall that will be effective July 1, 2024.
- Additionally, the Department recently completed negotiations that considered several regulatory changes for distance and digital education, but those would become effective no earlier than July 1, 2025.

The proposed changes are aimed at protecting students as consumers, but will they raise barriers that are mountainous or just speed bumps for institutions offering distance education?

New Final Federal Regulations Affecting Distance Education Effective July 1, 2024 - Certification Procedures 34 CFR 668.14(b)(32)

Introduced additions to the financial aid “Program Participation Agreement” –

- A Program Participation Agreement (PPA) is an agreement between the institution and ED for institutions to participate in Title IV HEA Programs.
- The institution “certifies” through the signature of the institution’s president that it comply with the elements of the agreement.

The additions that affect “distance education” include:

- An academic program must be programmatically accredited or pre-accredited if required by a state or federal agency.
- For academic programs leading to a license to enter a profession:
 - Satisfy state educational requirements where the institution is located.
 - For students enrolled on or after July 1, 2024
 - Satisfy state educational requirements for licensure where the student is located at the time of initial enrollment OR
 - Satisfy state educational requirements for licensure where the student attests they intend to seek employment.
- Comply with all State laws related to closure, including record retention, teach-out plans or agreements, and tuition recovery funds or surety bonds. (SARA seems to cover.)

Regulations in Development During the Winter 2024 Federal Rulemaking Committee Meetings Affecting Distance Education Will Not Be Effective Until July 1, 2025, At the Earliest!

State Authorization – Reciprocity

The [Department’s proposes creating section 600.9\(d\) that](#) (pages 5-6) would require that a state authorization reciprocity agreement include additional parameters for institutions to be authorized in other states. The agreement and the institution would need to follow the proposed parameters for the institution to remain eligible for Title IV Federal Aid. Proposed parameters that must be included in reciprocity agreement that affect institutions are as follows:

- **Limit of 500 students** enrolled by the institution in a state for two consecutive years for the institution to maintain state authorization through reciprocity.
 - More than 500 enrolled students would require individual state authorization for that state.
 - The language was brief and missing many implementation factors.
- **Enforcement of certain state-specific laws**, regardless of participation in reciprocity.
 - Institutions are subject to applicable general-purpose state laws. (those enforceable on any business).
 - State laws related to closure, if any in a state. For each state, institutions in a reciprocity agreement would still need to follow each state’s record retention or teach-out plans and pay into tuition recovery funds or surety bonds. (Unlike the 2024 regulations cited above, SARA would no longer cover these requirements.)
- **Complaint process requirements** related to states and the national organization.
 - Permit students to complain directly to the state agency without first seeking resolution at the institution if permitted by state statutes and regulations.

Distance Education

The Department proposed several changes to current distance education regulations:

- **Require attendance-taking for all distance education courses** (see the [sections of 668.22 on page 4](#)). For distance education, merely logging in does not count for attendance. Students need to actively engage in an [“academic engagement” activity](#), such as taking a test, submitting a paper, or participating in an online discussion about course content. If a student does not have a documented absence or has **not performed an “academic engagement” activity in 14 days**, the institution must “document a student’s withdrawal date.”
- **Disallow asynchronous distance education courses for clock hour programs** (see [section 600.2 on page 1](#)). For institutions using the “clock hour” method of financial aid disbursement, they can no longer use asynchronous courses. Note that this has no impact on institutions that use the credit hour for financial aid purposes.
- **Categorize distance education programs into a “virtual location”** (see [section 600.2 on page 1](#)) for all programs offered 100% at a distance education, notwithstanding requirements for students to complete on-campus or residential periods of 90 days or fewer. Institutions are to create a subset of the “additional locations” to collect information about students in these programs.

Regulatory language and references are subject to change. The information should not be considered legal advice. Legal questions should be directed to legal counsel.

- **Redefine the thresholds for “substantive change” reviews for distance education programs** (see [section 602.22 on page 25](#)). The Department is suggesting returning to a version of the old review standard. Additionally, it will replace “substantive change” guidance issued in 2021 and put the new requirement into regulation. The Department proposes that accrediting agencies conduct a “substantive change” review of distance education programs or institutions when they traverse any of the following thresholds:
 - For the first time an institution offers 50% of a program through distance education. OR
 - An institution enrolls at least 50% of students in distance education. (A distance education student is one who enrolls in at least one distance education course.) OR
 - An institution offers at least 50% of its courses through distance education.
- **Defines a distance education course** (see [section 600.2 on page 1](#)) as one in which instruction takes place exclusively at a distance “notwithstanding in-person non-instructional requirements, including orientation, testing, academic support services, or residency experiences.”

Books & Resources/Inclusive Access

The [Department’s proposed language](#) (page 3) would create 668.164(c)(1)(ii)(A) and (B). This proposed language would only allow institutions to include the cost of instructional materials in tuition and fees under the following circumstances:

- A student is incarcerated OR
- The following conditions are met:
 - The institution individually discloses the cost of such books, supplies, and other educationally related goods and services prior to any authorization being signed, AND
 - The student explicitly opts in to such a program, AND
 - The institution makes those books and supplies available at or below competitive market rates.

Next steps

Institutions that enroll students in distance education courses and programs using Title IV financial aid should:

- Review current processes to determine what changes might need to be made should the proposed language be finalized as regulations.
- Work with your government relations department to contact your federal and state elected officials.
- Be prepared to explain the impact on students that the proposed language would have.

Resources

US Department of Education rulemaking site: bit.ly/EDRulemaking2024

WCET *Frontiers* blog post updates: <https://wcet.wiche.edu/frontiers/>

- After final week of rulemaking/most current update: bit.ly/NegRegWeek3Update
- WCET & SAN Call for Action on rulemaking: bit.ly/NegReg2024CallForAction

SAN Federal Regulations Landing Page: <https://wcetsan.wiche.edu/resources/federal-regulations>

SAN Getting Started with Compliance Management Gateway:

<https://wcetsan.wiche.edu/resources/getting-started>