

Session #13

Regulatory Update – State Authorization for Distance Education and Distance Education

Sophia McArdle, Greg Martin, and David Musser
U.S. Department of Education

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Topics

- State authorization for distance education
- Distance education

STATE AUTHORIZATION OF DISTANCE EDUCATION

Background and Context for State Authorization

- Under the Higher Education Act, for an institution in any State to be eligible to participate in Federal programs, it must be legally authorized by the State to provide postsecondary education
- Section 101(a)(2) of the HEA defines “institution of higher education” to mean, in part, an educational institution in any State that is legally authorized within the State to provide a program of education beyond secondary education

Background and Context for State Authorization

- Section 201(a)(2) of the HEA provides that a proprietary institution of higher education and a postsecondary vocational institution must be legally authorized within the State to provide a program of education beyond secondary education
- Pre-October 2010: No definition or description in regulations

Regulations

- Notice of Proposed Rulemaking: June 18, 2010
<http://edocket.access.gpo.gov/2010/pdf/2010-14107.pdf>
- Final Regulations: October 29, 2010
<http://edocket.access.gpo.gov/2010/pdf/2010-26531.pdf>

Effective Date: July 1, 2011

- Technical Corrections: April 13, 2011
<http://ifap.ed.gov/fregisters/attachments/FR041311ProgramIntegrityIssues.pdf>

State authorization

For institutional eligibility purposes for Federal programs, the State authorization regulations -

- Assure a State role in authorizing postsecondary institutions; and
- Clarify what is required for an institution to be considered legally authorized by a State

State Authorization for Distance Education providers

- Lawsuit: Association of Private Sector Colleges and Universities v. U.S. Department of Education, et al. District Court for DC, Civil Action No. 11-0138
- Court upheld the program integrity regulations with one exception - §600.9(c) concerning distance education - on procedural grounds
- The Court vacated §600.9(c), ruling that the Department should have included the distance education provision in the proposed regulations

Background

Program Integrity Issues negotiated rulemaking in 2014 included -

- State authorization of distance education providers as a component of institutional eligibility
- State authorization of foreign locations of domestic institutions

Regulations

- NPRM published July 25, 2016

<https://ifap.ed.gov/fregisters/attachments/FR072516.pdf>

- Final published December 19, 2016
Effective July 1, 2018

<https://ifap.ed.gov/fregisters/attachments/FR121916.pdf>

Regulations

- On July 3, 2018, with an effective date of June 29, 2018, the Department published a notice delaying the effective date of the amendments to 34 CFR 600.2, 600.9(c), 668.2, and the addition of 34 CFR 668.50, published December 19, 2016 until July 1, 2020 (Delay Rule) (83 FR 31296)
- Section 600.9(d), State authorization for foreign locations of domestic institutions, went into effect as scheduled (July 1, 2018)

Regulations

- August 2018, the National Education Association, the California Teachers Association, and individual plaintiffs filed a challenge to the Delay Rule
- Asked for the Delay Rule to be vacated and that the December 2016 Distance Education Rules be allowed to go into effect.

Background

- ED established the Accreditation and Innovation Committee and conducted negotiated rulemaking January – April 2019
 - Three subcommittees – Distance Learning and Educational Innovation, Faith-Based Entities, and TEACH Grants

Background

- Three “buckets” of issues – consensus reached on each of the 3 “buckets”
- State authorization of distance education and related disclosures were part of the distance learning and educational innovation “bucket”

Regulations

In the meantime –

- On April 26, 2019, the Court issued its Memorandum Opinion and Order, granting the Plaintiffs' motion for summary judgment and denying ED's cross-motion for summary judgment
- The Court vacated the Delay Rule, but stayed the vacatur for 30 days from the date of the order (April 26, 2019)

Regulations

- June 12, 2019, ED published an NPRM in the Federal Register that included the consensus language changes related to SADE and related disclosures

<https://ifap.ed.gov/fregisters/FR061219.html>

- July 29, 2019, ED published a Federal Register notice reflecting the Court's decision

<https://ifap.ed.gov/fregisters/FR072919.html>

Implementation Date of Regulations

- Final regulations were published in the Federal Register November 1, 2019
<https://www.govinfo.gov/content/pkg/FR-2019-11-01/pdf/2019-23129.pdf>
- While the effective date of final regulations is July 1, 2020, certain sections of the final regulations are designated for early implementation beginning on November 1, 2019

Implementation Date of Regulations

- Each institution or each agency may early implement the following sections, as appropriate, at its discretion:
 - Section 600.2
 - Section 600.9
 - Section 668.43
 - Section 668.50

State authorization: Religious institution definition §600.9(b)

The final regulations amend the current definition of a “religious institution” used for State authorization purposes in §600.9(b):

- An institution is considered to be legally authorized to operate educational programs beyond secondary education if it is exempt as a religious institution from State authorization under the State constitution or by State law
- Must still provide a State complaint process

SADE Final Regulations: §600.2 Definitions

State authorization reciprocity agreement:

- NPRM proposed to generally maintain the definition from the December 19, 2016 final regulations
- Change was made to the definition proposed in the NPRM in response to public comments

SADE Final Regulations: §600.2 Definitions

State authorization reciprocity agreement: An agreement between two or more States that authorizes an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence courses to students *located* in other States covered by the agreement and *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*.

State Authorization of Distance Education §600.9(c)

Final regulations addressing State authorization of institutions offering postsecondary education through distance education or correspondence courses are contained in §600.9(c)

SADE: §600.9(c)(1)(i)

- If an institution that meets the requirements under paragraph (a)(1) or (b) of this section offers postsecondary education through distance education or correspondence courses to students *located* in a State in which the institution is not physically located or in which the institution is otherwise subject to that State's jurisdiction as determined by that State, except as provided in paragraph (c)(1)(ii) of this section, the institution must meet any of that State's requirements for it to be legally offering postsecondary distance education or correspondence courses in that State.
- The institution must, upon request, document the State's approval to the Secretary; or

SADE: §600.9(c)(1)(ii)

- If an institution that meets the requirements under paragraph (a)(1) or (b) of this section offers postsecondary education through distance education or correspondence courses in a State that participates in a State authorization reciprocity agreement, and the institution is covered by such agreement, the institution is considered to meet State requirements for it to be legally offering postsecondary distance education or correspondence courses in that State, subject to any limitations in that agreement and to any additional requirements of that State *not relating to State authorization of distance education*.
- The institution must, upon request, document its coverage under such an agreement to the Secretary.

SADE: Revisions to §600.9(c)(1)(ii)

- Revised to be consistent with the revised definition of a State authorization reciprocity agreement
- Provides that an institution covered by a reciprocity agreement is considered to meet State requirements for it to be legally offering postsecondary distance education or correspondence courses in the State, subject to any limitations in that agreement and to any additional requirements of the State *not relating to authorization of distance education*

SADE: Revisions to §600.9(c)(1)(i) and (ii)

- Apply to institutions described in §600.9(a)(1) or §600.9(b)
- Refer to a student's *location*, not residence
- The reference to location, not residence, is also reflected in the revised definition of a State authorization reciprocity agreement

SADE: Determining student location

An institution must:

- Make a determination, in accordance with the institution's policies or procedures, regarding the State in which a student is located, which must be applied consistently to all students
- Upon request, provide the Secretary with written documentation of its determination of a student's location, including the basis for such determination

SADE: Determining student location

- Make a determination regarding the State in which a student is located at the time of the student's initial enrollment in an educational program, and, if applicable, upon formal receipt of information from the student, in accordance with the institution's procedures, that the student's location has changed to another State

SADE: State complaint process

- Regulations for a State complaint process under §600.9(c)(2) have been removed
- Current §600.9(a)(1) addresses the State complaint process

SADE: State complaint process

- Current §668.43(b) requires an institution to provide its students or prospective students with contact information for filing complaints with its State approval or licensing entity and any other relevant State official or agency that would appropriately handle a student's complaint

Disclosures related to distance education

- Disclosures under §668.50 had applied only to distance education providers and were removed as part of the consensus language from negotiated rulemaking
- Some similar disclosures are under §668.43 and apply to all institutions

Disclosures related to distance education

Prior institutional disclosure required under §668.50(b) – *public* disclosures.

(1): Whether the institution is authorized by each State in which enrolled students reside, whether that authorization is through a reciprocity agreement, and the consequences if a student moves to a State where the institution is not authorized.

Current requirement - No disclosure requirements specific to distance education or correspondence programs.

Institutions are required to disclose information about State authorization under 34 CFR 668.43(b).

Disclosures related to distance education

Prior institutional disclosure required under §668.50(b) – *public* disclosures.

(2) and (3): The State-based complaint process for each State in which the institution's students reside, including consumer complaints.

Current requirement - No disclosure requirements specific to distance education or correspondence programs.

Institutions are required to provide information about State-based complaint systems under 34 CFR 668.43(b).

Disclosures related to distance education

Prior institutional disclosure required under §668.50(b) – *public* disclosures.

(4): Any adverse actions a State has initiated related to distance education or correspondence programs.

(5): Any adverse actions an accrediting agency has initiated related to distance education or correspondence programs.

Current requirement - No disclosure requirements specific to distance education or correspondence programs.

An institution is required to give notice to students if an enforcement action or prosecution is brought against the institution by a State or Federal law enforcement agency in any matter where a final judgement against the institution, if rendered, would result in an adverse action by an accrediting agency against the institution, revocation of State authorization, or limitation, suspension, or termination of eligibility under *Title IV* [668.43(a)(20)].

Disclosures related to distance education

Prior institutional disclosure required under §668.50(b) – *public* disclosures.

(6): Refund policies with which the institution is required to comply by any State in which the institution's students reside.

Current requirement - No disclosure requirements specific to distance education or correspondence programs.

An institution is required to disclose all State refund policies it must comply with [668.43(a)(2)].

Disclosures related to distance education

Prior institutional disclosure required under §668.50(b) – *public* disclosures.

(7): Applicable educational prerequisites for State licensure or certification in each State in which its students reside or any other State where it has made a determination about those requirements. Institution must also disclose whether those programs meet such requirements or if the institution has not determined whether the program meets those requirements.

Current requirement - No disclosure requirements specific to distance education or correspondence programs.

If an educational program is designed to, or is advertised to, meet educational requirements for a specific professional license or certification required for employment in an occupation, the institution must disclose if program completion is sufficient to meet licensure requirements in a State for that occupation, including a list of all States that the institution has determined its program will meet, will not meet, or has not made a determination regarding such requirements [668.43(a)(5)(v)].

Disclosures related to distance education

Prior institutional disclosure required under §668.50(c) – *individualized* disclosures.

(1)(i) and (2): An institution is required to make *individualized* disclosures to prospective students in distance education or correspondence programs if the program the students are investigating do not meet licensure or certification prerequisites in the States in which the students reside, and must obtain acknowledgement from the student that he/she has received such disclosure.

Current requirement - No disclosure requirements specific to distance education or correspondence programs.

An institution must make *individualized* disclosures to prospective students for any program designed or advertised to meet State licensure requirements when its program would not meet educational prerequisites for licensure in the State where the students are located, or if the institution has not determined if the program would meet such requirements prior to a student's enrollment in the program [668.43(c)(1)]. There is no requirement for documentation of a student's acknowledgement of such disclosure.

Disclosures related to distance education

Prior institutional disclosure required under §668.50(c) – *individualized* disclosures.

Current requirement - No disclosure requirements specific to distance education or correspondence programs.

(1)(ii)(A): An institution is required to make *individualized* disclosures to enrolled or prospective students in distance education or correspondence programs about any adverse action that a State or an accrediting agency has taken within 30 days of the institution's becoming aware of such action.

No similar *individualized* disclosure are required.

Disclosures related to distance education

Prior institutional disclosure required under §668.50(c) – *individualized* disclosures.

(1)(ii)(B): An institution is required to make *individualized* disclosures to enrolled or prospective students in distance education or correspondence programs if it determines its program no longer meets State licensure requirements within 14 days of making such determination.

Current requirement - No disclosure requirements specific to distance education or correspondence programs.

An institution is required to make *individualized* disclosures to enrolled students in any program designed or advertised to meet State licensure requirements if the institution determines that the program no longer meets such requirements in the State where the student is located within 14 calendar days of the determination [668.43(c)(2)].

Student location as related to disclosures

- Individualized disclosures related to licensure or certification must be made directly to a student in writing, which may be through email
- An institution must determine a student's *location* using a process applied consistently to all students and must make such determination at the time of a student's initial enrollment and upon formal receipt of information from the student that the student's location has changed to another State

Student location as related to disclosures

- The institution must, upon request, provide written documentation of its determination of a student's location, including the basis for such determination [668.43(c)(3)]

DISTANCE EDUCATION

Distance Education

- The following slides are based on *Draft Consensus Language* resulting from Session 4 of Negotiated Rulemaking available using this link:

<https://www2.ed.gov/policy/highered/reg/hearulmaking/2018/index/html>

- Consensus was reached by negotiators
- NPRM has not been published

The following information related to Distance Education is for purposes of discussion only and does not reflect proposed or final rules.

We cannot respond to comments or suggestions related to changing the amendatory language.

Academic Engagement

- There is no current regulatory definition of “academic engagement”
- R2T4 regulations in §668.22 set requirements for activities that may be considered “academic attendance or “attendance at an academic related activity”
 - Used as the basis of establishing a student’s withdrawal date
 - Pertain only to section 668.22

Academic Engagement

- Most of §668.22(I)(7) relating to requirements for academic attendance and attendance at academically-related activities would be incorporated into a definition of “academic engagement” under §600
 - Applicable to R2T4 and other applications within Part 600 and Part 668
 - Specifies that academic engagement includes *interactive* tutorials or webinars
 - Clarifies that merely logging into a class or online tutorial is not academic engagement

Clock Hour (Distance Education)

- 50 to 60 minutes in a 60-minute period of attendance in a synchronous class, lecture, or recitation where there is opportunity for direct interaction between the instructor and students
 - Clarifies that programs offered via distance education may be measured in clock hours
 - Requires that institutions be capable of monitoring a student's participation during 50 out of 60 minutes in each hour
- Must meet all accrediting agency and State requirements and not exceed agency restrictions on the number of clock hours in a program that may be offered through distance education

Correspondence Course/Correspondence Student

- Correspondence Course
 - Definition refers to “instructors” rather than “the instructor”
 - Recognizes the increasing use of multiple instructors
 - Encompasses team teaching approach
 - Reference to correspondence programs being self-paced is removed
- Correspondence Student
 - Defined as a student whose enrollment in correspondence courses constitutes more than 50 percent of the courses in which the student is enrolled during the award year
 - Current regulations do not define “correspondence student”

Distance Education

- Definition would refer to “the instructor or instructors” rather than simply “the instructor”
- Would eliminate references to the various types of media described under the current definition, e.g., DVDs, CD-ROMs etc., and replaces those references with the phrase “other media”
- Would define an instructor as an individual responsible for delivering course content and who meets the qualifications for instruction established by the institution’s accrediting agency

Distance Education

- “Substantive interaction” would be defined under distance education as engaging students in teaching, learning, and assessment, consistent with the content under discussion, and including two of the following:
 - Providing direct instruction; assessing or providing feedback on a student’s coursework; providing information
 - Responding to questions about the content of a course or competency; facilitating a group discussion regarding the content of a course or competency
 - Other instructional activities approved by the institution’s or program’s accrediting agency

Distance Education

- Would require institutions to ensure *regular* interaction between a student and an instructor or instructors
 - Prior to the student's completion of a course or competency, provide the opportunity for substantive interactions with the student on a predictable and regular basis commensurate with the length of time and the amount and the amount of content in the course or competency
 - Monitor the student's academic engagement and success and ensure that an instructor is responsible for proactively engaging in substantive interaction with the student when needed, or upon request by the student

Direct Assessment

- Department approval would be required:
 - For the institution's first direct assessment program
 - When the institution offers a direct assessment program at a different level of offering (e.g. a first direct assessment master's degree program following experience offering direct assessment bachelor's degree programs) than what was previously approved

Direct Assessment

- Additional direct assessment programs at the same credential level would not require Department approval
 - Must be reported within 10 days after the change
- Institution would be required to explain how it excludes credit earned through prior learning assessment from consideration of a student's eligibility for *Title IV*

Direct Assessment

- Would permit preparatory coursework and coursework required by a State for teacher certification to be offered using direct assessment
- Would permit programs offered in part through credit or clock hours, and in part through credit hour equivalencies or clock hour equivalencies
 - Would require an institution to establish a methodology to reasonably equate each module in the direct assessment program to either credit hours or clock hours
 - A program would not be permitted to switch clock hour and credit hour equivalencies

Subscription-Based Program

- Standard or nonstandard-term direct assessment program in which the institution charges a student for each term on a subscription
 - Coursework would not be required to begin or end within a specific timeframe in each term
 - Expectation would be that the student completes a specified number of credits during the term
 - Students would have to complete a cumulative number of credits (or the equivalent) during or following the end of each term before receiving subsequent disbursements of *Title IV* funds
- Institution would have to establish a single enrollment status applicable throughout the student's enrollment in the program, except that a student could change enrollment status no more than once per academic year

Subscription-Based Programs

- Would establish a method of determining the number of credit hours (or the equivalent) that a student in a subscription-based program must complete before receiving subsequent disbursements
 - Determine (for each term) the minimum number of credit hours (or the equivalent) for the student's enrollment status for that period
 - Add together (following the determination above) the number of credit hours (or the equivalent) determined for each term that the student enrolled and attended (excluding the current and most recently attended terms)

Subscription-Based Programs

- Reasons for the proposed method to determine when a student in a subscription-based program is eligible for a subsequent disbursement
 - Current requirements for disbursement in term-based and non-term programs make it difficult to implement self-paced CBE programs
 - Requiring CBE coursework to begin and end within a specific timeframe limits students' flexibility to work at their own pace – may artificially delay a student's progress if the institution was required to deny his/her request to begin a new competency near the end of a term
 - Following non-term disbursement rules is more complicated for a CBE program than for a non-term program with strict progression
 - Proposed method would allow treating a subscription period as a payment period

Subscription-Based Programs

- Subscription-based disbursement method
 - Would require a student to complete a certain number of competencies in past subscription periods in order to receive *Title IV* funds in subsequent subscription periods
 - No requirement would exist for completion of *specific* competencies in a subscription period
 - Would permit coursework that overlaps or extends beyond the payment period start date and end dates

Subscription-Based Programs

- Subscription-based disbursement method allows *Title IV* disbursements at the start of a payment period
 - Would require student to have completed the number of credit hours (or equivalent) associated with student's enrollment status in prior payment periods
 - Flexibility over current rules for all self-paced programs that require completion of one-half the hours and weeks in an academic year for a second disbursement

Subscription-Based Programs

- Restrictions that would be placed on subscription-based programs
 - Limited to direct assessment programs that charge students for each term on a subscription basis
 - Expectation that the student complete a specified number of competencies during a term
 - Repeated coursework may not be included in a student's enrollment status
 - Institution must establish a single enrollment status that would apply to a student throughout his or her program

Satisfactory Academic Progress (SAP)

- Subscription-based program
 - No SAP pace calculation would be required
 - Student would not be able to receive a subsequent disbursement until the credit hours (or the equivalent) associated with the student's enrollment status in all prior payment periods are completed
 - Would ensure students may not continue to receive *Title IV* aid without progressing
 - Students would be allowed a single additional subscription period to catch up without losing eligibility for *Title IV* aid

Satisfactory Academic Progress (SAP)

- Non-term credit-hour and clock-hour programs
 - No SAP pace calculation would be required
 - Student would not be able to receive a subsequent disbursement until one-half the hours and weeks in the academic year are successfully completed
- Maximum timeframe
 - Maximum timeframe would still be required for all programs
 - Undergraduate programs measured in credit hours would have the option to express maximum timeframe in calendar time

Satisfactory Academic Progress

- GPA requirements would remain unchanged
 - Applicable to all programs
 - SAP policy must specify the GPA (or comparable assessment measured against a norm) a student is required to achieve at each evaluation
 - For a program of than two academic years (4 semesters/6 quarters), by the end of the second academic year, student:
 - Must have a GPA of at least a “C” or its equivalent, or
 - Academic standing consistent with graduation requirements

Final Audit/Program Review Determination

- Appeals of final audit determinations (FADs) or final program review determination (FPRDs) resulting from an institution's classification of a course or program as distance education, or the institution's assignment of credit hours; ED would rely on:
 - The requirements of the institution's accrediting agency or State approval agency regarding qualifications for instruction
 - The requirements of the institution's accrediting agency or State approval agency to determine if the work associated with the institution's credit hours aligns with commonly accepted practice in postsecondary education in applying the definitions of "distance education" and "credit hour"

R2T4 Withdrawals

- Student in a non-term program or a subscription-based program would be considered withdrawn if he/she is unable to resume attendance within a payment period or period of enrollment for more than 60 calendar days after ceasing attendance
- Student enrolled in subscription-based programs could only avoid withdrawal through a written confirmation of future attendance if he/she indicates the intent to resume attendance during the same payment period or period of enrollment

R2T4 Withdrawals

- For non-term and subscription-based programs, the student would be permitted to change his or her date of return if the student's program permits resumption of attendance no later than 60 calendar days after the student ceased attendance
- Student would not be considered withdrawn if he/she completes:
 - All the requirements for graduation from the program before completing the number of days or hours in the period that he/she was scheduled to complete
 - For a program offered in modules, one module that includes 50 percent or more of the number of days in the payment period, or combination of modules that when combined contain 50 percent or more of the number of days in the payment period; or
 - Coursework equal to or greater than the coursework required for the institution's definition of a half-time student for the payment period

R2T4 Leave of Absence

- Subscription-based programs would be added to the types of programs that do not require the institution to permit the student to complete coursework he or she began prior to the leave of absence to grant an approved leave of absence

Questions and Answers

Contact Information

Sophia McArdle, Ph.D.
U.S. Department of Education
Office of Postsecondary Education
Policy, Planning, and Innovation
400 Maryland Ave., SW Room 290-44
Washington, DC 20202
202-453-6318
sophia.mcardle@ed.gov

Gregory Martin
U.S. Department of Education
Office of Postsecondary Education
Policy, Planning, and Innovation
400 Maryland Ave., SW Room 294-14
Washington, DC 20202
202-453-7535
gregory.martin@ed.gov

David Musser
U.S. Department of Education
Federal Student Aid
Policy Implementation and Liaison
230 Dearborn Street
Chicago, IL 60603
202-377-3930
David.musser@ed.gov