Hogan Lovells

Distance education rule appears on schedule for July 1 effective date

March 6, 2018

In the waning days of the Obama Administration, the U.S. Department of Education (ED) released final regulations regarding state authorization for distance education and foreign country authorization for certain locations outside the United States. *See* 81 Fed. Reg. 92,232 (Dec. 19, 2016). In addition to authorization requirements, the regulations impose significant new disclosure obligations. The regulations are scheduled to go into effect on July 1, 2018. Although ED has taken action to delay or amend certain other regulations promulgated during the Obama Administration, it has so far left this final rule untouched.

This advisory addresses key aspects of the final regulations related to state authorization and distance education. Even for institutions that participate in the National Council for State Authorization Reciprocity Agreements (NC-SARA), these regulations require additional effort to address compliance, and the implementation date is now only a few months away.

In a separate advisory we will address the final regulations regarding authorization of locations outside the United States.

Background

The final rule details regulatory requirements for institutions that offer distance education or correspondence courses to students who are located outside the state where the institution is located. ED previously attempted to promulgate such rules in 2010, but a court vacated the rules based on ED's failure to comply with the Administrative Procedure Act's notice and comment requirements. ED conducted a negotiated rulemaking in 2014, and the negotiators failed to reach consensus. ED published a proposed rule in July 2016 and the final rule in December 2016.

State authorization requirement

Under the final rule, if an institution offers distance education or correspondence courses to students who reside in a state in which the institution is not physically located or in which the institution is otherwise subject to that state's jurisdiction, the institution must satisfy the state's requirements for it to legally offer distance education or correspondence courses in that state.

An institution may satisfy the state authorization requirement through participation in a "state authorization reciprocity agreement." The final rule defines "state authorization reciprocity agreement" as "[a]n 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 residing in other States covered by the agreement and does not prohibit any State in the agreement from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions."

In connection with the state authorization requirement, the final rule also includes documentation obligations. In order for ED to consider an institution to be legally authorized in a state in which the institution offers distance education or correspondence courses, the institution must document that the state has a process for review and appropriate action on student complaints about the institution. Institutions must have such documentation for each state in which enrolled students reside. Alternatively, institutions operating under a state authorization reciprocity agreement may have documentation as designated by that agreement: either for each state in which enrolled students reside, or for the state in which the institution's main campus is located. According to ED, "[i]nstitutions will be asked to provide documentation of the State's complaint process when an institution is seeking certification or recertification or if a question arises due to a complaint, program review or audit, not on an annual basis." *Id.* at 92,238.

ED explains in the final rule's preamble that the state authorization requirement applies only to programs that are eligible for federal student financial aid under Title IV of the Higher Education Act, as amended (Title IV). Failure to obtain required state authorization would cause only the relevant programs, not the institution as a whole, to lose Title IV eligibility in that state. *Id.* at 92,235. ED cautions that institutions must use the disclosure process and conversations with prospective students to ensure that students understand and consider that relocation to another state could affect the Title IV eligibility of their program. *Id.* at 92,236.

Disclosure requirements

Under the final rule, an institution that offers a program that can be completed solely through distance education or correspondence courses, excluding internships and practicums, must make certain public and individual disclosures to prospective and enrolled students. In the preamble to the final rule, ED defines "prospective student" as "an individual who has been in contact with an eligible institution requesting information concerning admission to that institution." *Id.* at 92,245. ED also states in the preamble that the existing definition of "enrolled student," which is codified at 34 C.F.R. § 668.2, applies: "Enrolled: The status of a student who (1) Has completed the registration requirements (except for the payment of tuition and fees) at the institution that he or she is attending; or (2) Has been admitted into an educational program offered predominantly by correspondence and has submitted one lesson, completed by him or her after acceptance for enrollment and without the help of a representative of the institution."

Public disclosures

Public disclosures must be made available to the program's enrolled and prospective students. Although the regulation provides that the Secretary will determine the form and content of such disclosures, to date ED has provided no pertinent guidance. The following information must be provided in the public disclosures.

- Whether the institution is authorized to provide the program by each state in which enrolled students reside.
    - If so, the institution must provide a description of the process for submitting complaints – including contact information for the appropriate authority that handles consumer complaints – both for the state in which the institution's main campus is located and for each state in which the program's enrolled students reside.

- Whether the institution is authorized through a state authorization reciprocity agreement to provide the program.
    - If so – and if the state authorization reciprocity agreement establishes a complaint process – the institution must describe that process and include contact information for the appropriate authority that handles consumer complaints, as outlined in the reciprocity agreement. The institution must also provide consumer complaint information for each state in which the program's enrolled students reside.
- An explanation of the consequences – including ineligibility for federal student financial aid – for a student who changes his or her state of residence to a state where the institution's program does not meet state authorization requirements or, in terms of gainful employment programs, licensure or certification requirements.
    - According to ED, "[a]n institution is not required to dismiss a student from a program if the student moves to a State in which the institution is not authorized … [H]owever, the institution may not disburse additional Federal student aid to the student if the institution has information that the student has moved to another State in which the institution is not authorized … [A]n institution may rely on a student's self-determination [of his State of residence] unless the institution has information that conflicts with that determination." *Id.* at 92,236.
- Any adverse actions a state entity has initiated against the institution related to postsecondary education programs offered solely through distance education or correspondence courses, along with the year such adverse action was initiated. An institution must disclose any such adverse actions that a state entity initiated in any of the prior five calendar years.
    - Although ED declined to define in the final regulations what constitutes "State adverse action," it noted that it considers "[a]dverse actions [to] include any official finding for which an institution can appeal an administrative or judicial review, any penalty against an institution including a restriction on an institution's State approval, or the initiation of a civil or criminal legal proceeding … [as well as] any settlement of a legal proceeding initiated by a State entity, regardless of whether the institution had to admit any wrongdoing." *Id.* at 92,247.
- Any adverse actions an accreditor has initiated against the institution related to postsecondary education programs offered solely through distance education or correspondence courses, along with the year such adverse action was initiated. An institution must disclose any such adverse actions that an accreditor initiated in any of the prior five calendar years.
    - In the final rule's preamble, ED points out that 34 C.F.R. § 602.3 defines "adverse accrediting action" as "the denial, withdrawal, suspension, revocation, or termination of accreditation or preaccreditation, or any comparable accrediting action an agency may take against an institution or program." ED also explains that it views the definition as a starting point only, and it considers "any downgrade in accreditation status, [including] being placed on show cause or probation," as an adverse action that must be disclosed to students. *Id.* at 92,263.

- State refund policies for the return of unearned tuition and fees.
    - ED explains in the final rule's preamble that participation in a state authorization reciprocity agreement does not provide an exemption from this requirement. *See id.* at 92,248–49.
- Educational prerequisites for professional licensure or certification for the occupation for which the program prepares students.
    - Such information must be disclosed for each state in which the program's enrolled students reside and for any other state that the institution has made a determination regarding prerequisites. Disclosures must indicate whether the institution's program satisfies the state-specific prerequisites. If the institution has not made a determination regarding its program's satisfaction of a particular state's prerequisites, the institution must make a statement to that effect.

Individualized disclosures

Individualized disclosures must be made "directly and individually" to each student. For prospective students, such disclosures must include any determination by the institution that its program does not meet licensure or certification prerequisites in the state in which a prospective student resides. This information must be disclosed to the prospective student before enrollment in the program; if the prospective student still decides to enroll in the program, the institution must obtain an acknowledgement from the student that he or she received the disclosure. In the final rule's preamble, ED indicates that such acknowledgement can be combined with other acknowledgements the student provides to the institution during the enrollment process. *Id.* at 92,252. The institution must be able to demonstrate that an acknowledgement was obtained from the student.

With respect to both prospective and enrolled students, an institution must provide individualized disclosures of adverse actions initiated by a state or accreditor (as described in the fourth and fifth bullets above regarding public disclosures) within 30 days after the institution becomes aware of such action. Additionally, any determination by the institution that the program no longer meets licensure or certification prerequisites of a state must be disclosed individually to both prospective and enrolled students within 14 calendar days after that determination.

We are available to respond to questions.

Contacts

Stephanie Gold
Partner, Washington, D.C.
T +1 202 637 5496
stephanie.gold@hoganlovells.com

Megan Mason
Associate, Washington, D.C.
T +1 202 637 7565
megan.mason@hoganlovells.com