

State authorization redux: New rules would retain disclosure requirements for professional licensure programs

April 29, 2019

The U.S. Department of Education's (ED) [2019 negotiated rule-making process](#) recently ended with the negotiators somewhat unexpectedly reaching consensus on proposed regulatory language on a variety of topics, including the federal requirements for state authorization of postsecondary institutions, a topic with which ED has [struggled for nearly a decade](#). The consensus language is available at the bottom of the page on ED's [negotiated rule-making website](#).

ED Principal Deputy Under Secretary Diane Auer Jones mentioned in her keynote address at the [National Association of State Administrators and Supervisors of Private Schools \(NASASPS\)](#) annual conference that no substantive changes to the language agreed upon are likely. Proposed language is expected to be formally released by ED as a notice of proposed rule-making in the next few months with an opportunity to comment. Final regulations released by November 1, 2019 would be effective July 1, 2020.

Although ED initially proposed during the negotiated rule-making process to eliminate the federal state authorization rule for distance education and correspondence courses entirely, under the [consensus language](#), eligibility for Title IV of distance education and correspondence programs would continue to be tied to approval by the states, either through direct state approval or participation in a state authorization reciprocity agreement. In reaching consensus, three further important points were agreed upon by ED and the nonfederal negotiators.

First, the definition of a state authorization reciprocity agreement at 34 CFR §600.2 would remain the same as in the suspended 2016 regulations. The negotiators were unable to agree on revised language that would have clarified the circumstances under which a state could go beyond the requirements of a state authorization reciprocity agreement to implement its own state laws that could potentially conflict with the current state authorization reciprocity agreement, known as [SARA](#). Negotiators were also unable to agree on revised language that would have confirmed that SARA meets the federal requirement as written, as has been assumed. ED may be able to clarify the intent of the definition when it issues the final rules.

Second, additional clarification would be added to 34 CFR §600.9 regarding tracking of students enrolled in distance education and correspondence courses for Title IV purposes. Institutions

must determine where its students are located, do so consistently with all students, and be able to demonstrate to ED how that determination was made. Student location must be determined at the time of initial enrollment and adjusted upon formal notification of a change in location from the student.

Finally, agreement was reached on the scope of disclosures required by institutions with regard to programs leading to professional licensure, such as graduate nursing and teaching programs. Disclosures would be required regardless of modality – online or on-ground. Regulatory language concerning disclosures for professional licensure and certification would be included in 34 CFR §668.43 (Institution Information). According to the [consensus language](#) agreed to by the negotiators, notifications to all students must be provided as to whether the state's licensure requirements will be met wherever the student is located. Both general and direct disclosures would be required depending on the institution's determination of whether the program meets relevant state requirements for licensure or certification in the state where the student is located.

Specifically, institutions would be required to provide a list of states where the institution has determined that a program satisfies applicable licensure requirements for the program, a list where the institution has determined that the program does not meet such requirements, and a list of states where the institution has not yet made a determination. The institution would be required to provide this information to all prospective and enrolled students.

If the institution has determined that its program will not meet the state requirements, or a determination has not been made, a direct disclosure in writing to the prospective student would be required to be made before enrollment. This could be accomplished through email or other electronic means. If a student is currently enrolled and a determination is made that a program will not meet the state professional requirements, the written notice must be made within 14 days of such determination.

While the consensus professional licensure disclosure language is an improvement over the 2016 regulatory language, at least from an institutional perspective, the proposed disclosure requirements may be burdensome to some institutions and would require careful planning and management. And, in a final twist, a federal judge that considered a challenge to ED's delayed implementation of the Obama administration's state authorization rules determined on Friday, April 26 that that the delay was illegal, which will cause institutions to have to comply with the more cumbersome Obama-era rules regarding distance education (beginning 30 days from the court order) until any new, consensus-based rules take effect. The [court's ruling](#) considerably complicates the task of developing and maintaining a sound compliance program, particularly with regard to programs leading to professional licensure.

Please let us know if you require further information about complying with the proposed state authorization rule changes. Additional advisories about other aspects of the rule-making will be forthcoming.

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