

Settled for now: ED publishes final state authorization rules

November 6, 2019

On November 1, the U.S. Department of Education (ED) published a [final rule](#) that addresses topics related to two prongs of the regulatory triad: accreditation and state authorization. In this alert, we address certain aspects of the federal state authorization rules applicable to virtually all institutions of higher education.

Last Friday's final rule is the latest step in a long process that began in 2010, when ED promulgated new 34 Code of Federal Regulations § 600.9 to clarify the state authorization requirements institutions must satisfy to maintain Title IV eligibility, including entirely new rules related to distance education. After a series of court challenges and negotiated rule-making sessions, ED promulgated revised provisions late in 2016, including extensive new consumer disclosure requirements. Under the Trump administration, the 2016 state authorization rules were delayed until July 1, 2020, while ED conducted yet another negotiated rule-making, this time resulting in a consensus rule. But in *National Education Association v. DeVos*, 379 F.Supp.3d 1001 (N.D. Cal. 2019), a federal court ordered the 2016 rules to go back into effect, causing considerable confusion with respect to California, as we reported in a [prior alert](#).

The 2019 final rule appears to bring an end to this period of great uncertainty. While the 2016 rules are still technically in effect until July 1, 2020, Secretary DeVos – as expected – exercised her authority to permit early implementation of the 2019 rules, effective immediately and at the discretion of each institution.

The 2019 final rule does not significantly differ from the [proposed rule](#) achieved through consensus earlier this year. However, the 2019 final rule notably includes the following changes related to state authorization:

- Clarifies the 2016 rules' definition of a "state authorization reciprocity agreement," which left unclear to what extent states can supplement their own state authorization requirements on top of standards agreed to in state authorization reciprocity agreements. The new language confirms that institutions with reciprocity agreements are considered authorized subject to additional state requirements **not relating to authorization of distance education**.

While the negotiators were unable to reach consensus on a new definition of "state authorization reciprocity agreement," a technical correction by ED was arguably justified to avoid undercutting the [State Authorization Reciprocity Agreements \(SARA\) regime](#), or even a subsequent determination that SARA membership was insufficient for Title IV eligibility

purposes. Partly as a result of this change, we would expect some states to continue to propose consumer protection laws "unrelated" to state authorization of distance education, which will be an ongoing compliance challenge.

- Revises new 34 Code of Federal Regulations § 668.43(a)(20) to provide that an institution must disclose enforcement actions or prosecutions by law enforcement agencies that, upon a final judgment, would result in an adverse action by an accrediting agency, revocation of state authorization, or suspension/termination of Title IV eligibility. Investigations that have not reached enforcement action or prosecution do not need to be disclosed.

While the 2019 rules retain the basic principle that distance education requires proof of state authorization (or SARA membership), the new rules changed the 2016 rules in several important respects. Our [prior analysis](#) comparing the state authorization provisions of the 2016 rules to the 2019 proposed rules revealed these important changes:

- ED amended 34 Code of Federal Regulations § 600.9(c)(2), which contained a requirement that states have a complaint process for distance education students as a condition of Title IV eligibility. This provision of the 2016 rules was the basis of considerable confusion last summer when ED determined California, the only non-SARA state, did not have a sufficient complaint process, thus jeopardizing the Title IV eligibility of many distance education students in California.
- ED changed the focus of the state authorization regulations from a student's state of **residence** to a student's state of **location**. The 2019 rules require that institutions develop policies to determine a student's location at the time of initial enrollment, and adjust that determination based on formal notification by the student.
- The 2019 rules rescinded the 2016 rules' general consumer disclosure provisions that applied only to distance education programs. The 2019 rules require fewer of those disclosures but they now apply to **all** programs regardless of modality.
- The 2019 rules revise the institutional disclosure requirements for educational programs that prepare students for professional licensure. The requirements apply to programs that "foreseeably lead" to careers that require licensure in a state. The 2019 rules expand this disclosure requirement to **all** institutions, regardless of whether the relevant programs are offered via distance education or on-the-ground. The 2019 rules require all institutions with such programs to determine whether the programs satisfy the educational requirements for relevant state licensure agencies in each state in which students are located.
 - Institutions will need to make a general disclosure of three lists of states: (1) all states in which the program meets the educational requirements for professional licensure; (2) all states in which the program does not meet the educational requirements for professional licensure; and (3) all states for which the institution has not made such a determination.
 - Institutions will need to make individualized disclosures to prospective and enrolled students if: (1) a program does not meet the educational requirements for professional licensure in the state the student is located in; or (2) the institution has not made such a determination.
- The 2019 rules made no changes to the 2016 rules' requirements related to authorization of foreign locations at 34 Code of Federal Regulations § 600.9(d). Those provisions became effective July 1, 2018. *See* 83 Fed. Reg. 31296, 31298 (July 3, 2018).

The 2019 final rule also contains many changes related to accreditation that are beyond the scope of this alert, including greater flexibility for institutional accreditors, new substantive change requirements, and more.

Finally, the spring 2019 multi-issue negotiated rule-making addressed several other topics about which consensus was reached, including changes to current distance education regulations and issues related to faith-based institutions. ED has acknowledged that these topics will be addressed at a later time.

For more information on the state authorization portions of the 2016 and 2019 rules, please see our [July 2019 webinar](#).

We are available to assist with these topics as needed.

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