

U.S. DEPARTMENT OF EDUCATION RELEASES STATE AUTHORIZATION, NOTICE AND DISCLOSURE, AND INSTITUTIONAL ELIGIBILITY REGULATIONS

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On November 1, 2019, the U.S. Department of Education (“Department”) [published](#) final regulations amending several Title IV regulations addressing institutional eligibility and operations. Institutions of higher education will be impacted most immediately by new regulations regarding state authorization; disclosure obligations regarding licensure and certification, which will apply to all programs at all institutions, not just distance education programs; and institutional eligibility, including revised provisions under which an institution may seek approval to operate in locations previously occupied by closed or closing institutions.

These new regulations are effective July 1, 2020. The Secretary of Education (“Secretary”), however, designated certain sections for early implementation on or after November 1, 2019, as detailed below.

The November 1 final regulations are the result of a negotiated rulemaking effort that the Department announced in 2018. The Department subsequently named a negotiated rulemaking committee, along with three subcommittees designated to address discrete issues and to make recommendations to the full committee. The committee and subcommittees met several times in the first months of 2019, ultimately resulting in an announcement on April 3, 2019, that the committee had reached consensus on all of the topics under review.

On June 12, 2019, the Department released proposed regulations for what it called the first “bucket” of issues covered by the negotiated rulemaking committee, and it invited public comment. The November 1 final regulations incorporate the few changes made by the Department in response to the 195 comments it received.

In the June 12 [announcement](#), the Department also said that it intended to issue proposed regulations covering the two remaining buckets of topics that were the subject of the negotiated rulemaking session, but those additional proposals have not yet been published. In its [press release](#) announcing the November 1 regulations, the Department again said that it “soon” will publish these additional regulations covering topics including distance education, TEACH grants, and faith-based institutions.

State Authorization

The new state authorization regulations included in the November 1 final rule build on and modify in significant ways the 2016 state authorization regulations promulgated in the final days of the Obama Administration. Implementation of the 2016 regulations initially was delayed by the Trump Administration. This decision was challenged in federal court, ultimately leading to a decision by the court in April 2019 to vacate the delay and put the 2016 regulations in effect as of May 26, 2019.

The November 1 regulations reaffirm an institution’s obligations to comply with the requirements of any state where the institution enrolls students in distance education programs in order for those students to

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be eligible to receive federal student aid. In accordance with revised 34 C.F.R. § 600.9(c)¹, the institution satisfies this requirement in any state that participates in a state authorization reciprocity agreement if the agreement covers the institution's operations in that state. The [State Authorization Reciprocity Agreement](#) ("SARA") currently counts 49 states (all except California) plus the District of Columbia, Puerto Rico and the U.S. Virgin Islands as members, but other agreements between states also may qualify under Section 600.2.

Importantly, however, the November 1 regulation changes the triggering determination for state authorization to the student's location, rather than the student's residence as provided in the 2016 regulations. Section 600.9(c) obligates an institution to have policies and procedures in place to determine a student's location at the time of initial enrollment and when the institution receives notice that the student has changed location to a new state.

The November 1 regulation also removes the requirement in Section 600.9(c) that an institution must demonstrate that each state where it enrolls distance education students has a process to handle student complaints. The Department determined that this requirement was redundant and that institutions already are required under [Section 668.43\(b\)](#) to provide students with contact information for filing complaints with the state approving agency. This regulatory change addresses an issue [raised](#) by the Department earlier this year, when the Department called into question the Title IV eligibility of students in California who are enrolled in distance education programs at some types of institutions located outside California.

Finally, the Department amended Section 600.9(b) to eliminate certain requirements regarding the eligibility of religious institutions. The Department emphasized its belief that states should determine which institutions are considered religious institutions and how such institutions are to be authorized to operate within their borders. The revised Section 600.9(b) makes clear that the Department considers an institution to be authorized to operate for Title IV purposes if it is exempt from state authorization as a religious institution.

Required Disclosures

The November 1 regulations impose significant new and amended disclosure obligations on institutions. Among these are disclosure requirements regarding professional licensure and certification, graduate placement results, transfer of credit policies, and pending legal or regulatory actions that could adversely impact an institution's continuing operations.

Professional Licensure and Certification

The 2016 state authorization regulations added a provision at Section 668.50(c) that requires institutions enrolling students in distance education programs to provide direct individual disclosure to those students regarding any determination by the institution that the institution's distance education programs do not meet professional licensure or certification prerequisites in the state where the student resides. The November 1 regulations both narrowed and expanded this requirement.

In an important initial step, the Department moved these regulations from Section 668.50, which applies only to distance education programs, to Section 668.43, which outlines information that all institutions

¹All regulatory references herein are to 34 C.F.R. unless otherwise noted.

must provide. The new Section 668.43(a)(5)(v) requires all institutions enrolling students in programs for which a specific professional license or certification is required by a state for employment to disclose information regarding whether completion of the institution's program is sufficient to meet the licensure or certification requirements in the state for that occupation. Specifically, an institution must disclose:

1. a list of all states for which the institution has determined that its curriculum satisfies the state's educational requirements for licensure or certification;
2. a list of all states for which the institution has determined that its curriculum does not satisfy the state's educational requirements for licensure or certification; and
3. a list of all states where the institution has not made a determination regarding whether its curriculum meets the states' educational requirements for required licensure or certification.

In accordance with Section 668.43(c), if the institution either (a) determines that its program does not meet the licensure or certification requirements in a state where a prospective student is located or (b) has not made any determination whether its program meets the licensure or certification requirements in a state where a prospective student is located, the institution must provide notice to that effect to the prospective student before he or she signs an enrollment agreement or, if the institution does not use enrollment agreements, before the prospective student makes a financial commitment to the institution. If the institution determines that its program does not meet the licensure or certification requirements in a state in which a current student is located, the institution must so advise the student within 14 days of such determination. The notices described in this paragraph must be made directly to the students in writing, which may include email.

To reiterate, these disclosure and notice requirements apply to all institutions and to all programs, irrespective of the mode of delivery, where professional licensure or certification is required by a state for employment in the field. Failure to provide this information clearly and accurately could subject institutions to a wide range of adverse impacts.

Graduate Placement Results

Section 668.41(d)(5) currently requires an institution to disclose any placement rate it "calculates" for any reason. The revised section now obligates the institution only to disclose any placement rates it "publishes or uses in advertising." The Department also notes that Section 668.43(a)(14) still requires an institution to disclose any placement rates that its state or accrediting agency requires it to calculate and report.

Transfer of Credit Policies

The November 1 regulations revised Section 668.43(a)(11) to require that, in addition to the publication of its policies regarding the transfer of credit from other institutions, an institution must identify "any types of institutions or sources from which the institution will not accept credits." The institution also must publish its policies regarding the assessment and acceptance of credit for prior learning experiences.

Potentially Adverse Information

If an institution's accrediting agency requires it to maintain a teach-out plan, new Section 668.43(a)(19) obligates the institution to disclose both the fact of and the reason for this requirement. Under Section

668.43(a)(20), if an institution is subject to a state or federal law enforcement action in which a final judgment would lead to adverse action by the state, the accrediting agency, or the Department that could jeopardize the institution's ability to continue operating, the institution must disclose the enforcement action.

Eligibility of Additional Locations

The Department revised certain provisions related to the eligibility of additional locations that it hopes will allow for more effective teach-outs in the case of closures. Current regulations require an institution that wants to establish an additional location in a facility previously occupied by an institution that closed to operate that location without Title IV eligibility for at least two years if (a) the institution either directly or indirectly acquired from the closed institution the location's assets (a term that the Department has interpreted very broadly), and (b) the closed institution owes a Title IV liability to the Department and is not making payments to satisfy that liability. Current regulations provide that the two-year waiting requirement will not apply if the institution agrees to be responsible for all Title IV liabilities and unpaid refunds of the closed institution. These provisions, of course, have derailed efforts by institutions to assume locations of closed schools in order to conduct teach-outs.

The revised Section 600.32 would allow an institution to seek approval of a new location previously occupied by an institution that closed and has unpaid Title IV liabilities if the applicant institution agrees to be responsible for the closed institution's liabilities incurred in the current academic year and up to one previous academic year, as opposed to the unlimited liability risk posed by the current regulations. Perhaps more importantly, the November 1 regulation provides that an institution conducting a teach-out at an institution that closed or that is pursuing an orderly closure under a teach-out plan approved by its accrediting agency and the Secretary may seek approval of the site as an additional location without assuming any of the closed or closing institution's Title IV liabilities, so long as the institutions are not related parties and share no common ownership or management.

Institutional Accreditation

The November 1 regulations revised Section 600.11, which addresses the eligibility of institutions that are changing accrediting agencies or seek to maintain institutional accreditation from multiple accrediting agencies simultaneously. An institution seeking to change accrediting agencies now must not only provide information regarding its current accreditation and demonstrating reasonable cause for changing accrediting agencies, it must also receive the Secretary's approval to proceed. An institution seeking multiple institutional accreditations similarly must provide reasoning for multiple accreditation to both the Secretary and the respective accrediting agencies and reasonable cause for such multiple accreditation to the Secretary. In both cases, the new regulations describe factors that the Secretary would and would not consider to constitute reasonable cause.

Effective Dates and Early Implementation

These new regulations are effective July 1, 2020. However, the Secretary designated the following sections of the new regulations for early implementation at each institution's discretion:

- Section 600.2 – Definitions

- Section 600.9 – State Authorization
- Section 668.43 – Institutional Information and Disclosures
- Section 668.50 – Distance Education Disclosures – Section Eliminated

The Secretary did not provide any guidance regarding how early implementation should be effectuated or documented, and institutions interested in early adoption should monitor announcements from the Department that may provide some clarity. In the absence of such guidance, an institution that wishes to implement some or all of these designated sections prior to July 1, 2020, would be well served to prepare and retain clear written documentation regarding which sections it has selected for early implementation and the effective date of implementation. Institutions also may wish to consult with their legal counsel.

Roger Swartzwelder advises regionally and nationally accredited institutions of higher education regarding legal, administrative, regulatory and accreditation matters.