October 23, 2015

On October 15, 2015, the US Department of Education ("ED") issued a **long-awaited notice** announcing an "Experimental Sites Initiative" ("ESI") to permit limited access to federal loan and grant programs for students enrolled in certain kinds of short, non-institutional educational programs.

New providers that are not part of "traditional" institutions of higher education, such as those offering coding "boot camps," MOOCs, and other short-term programs, are increasingly attractive to policymakers and learners alike as a way to earn marketable credentials more quickly and at less cost. The idea of providing aid for students enrolled in these programs gained momentum earlier this year after Senator Lamar Alexander, Chairman of the Senate HELP Committee, which is working on the reauthorization of the Higher Education Act, solicited ideas on how best to enable access to federal funds for such programs. Following on that opening, this summer the White House hosted an informal summit on the topic and just recently Senators Rubio and Bennet offered a legislative proposal that would substantially widen provider eligibility for participation in the Title IV programs. ED's newly announced pilot program is further evidence of the seriousness with which these kinds of programs are now taken—as well as the continuing concern over protecting federal grants and loans from abuse.

Contrary to some press reports, the ESI is a very narrow program, reflecting longstanding concerns about abuse of the Title IV programs and a general discomfort within the Department over the growth of online programs and for-profit institutions. It is especially important to note that the ESI does not permit participation by any new Title IV-eligible institutions. Only institutions currently eligible to participate in the federal grant and loan programs may even apply to be selected as an "experimental site." What the new program does offer are limited waivers from certain Department rules to facilitate partnerships between traditional institutions and non-traditional providers. Reduced to its simplest form, the ESI allows Title IV-eligible institutions to contract with a non-institutional provider to enable the provider to offer more than 50% of an eligible program to students of the institution. As a result, students would be able to receive federal grants and loans to attend ESI programs.

Institutions seeking to join the ESI effort must agree to participate in a new quality control initiative intended to assess the success of the pilot. That assessment will include review of outcomes by an as-of-yet unidentified "quality assurance entity" approved by ED, which appears most likely to be an accreditor employing new standards developed by ED.

A few notable considerations:

- Enrollment in the pilot program is only useful where more than 50% of an educational program is delivered by a non-accredited entity. A collaborative effort in which less than 50% of a program is offered by a non-accredited entity does not, as long as it is approved by the institution's accreditor, need to seek participation in the ESI program.
- Acceptance into the pilot will not alter or affect any requirements imposed by other regulators. In particular, all necessary accreditor and state educational agency approvals still will need to be secured. This goes for the institution and possibly the partner entity as well: for example, state authorization may still be necessary if, under state rules, the partner entity would be considered a "school" or otherwise trigger licensure requirements.
- The pilot program provides very limited waivers from existing Title IV regulations. While it will allow the non-eligible entity to provide 50% or more of an educational program and remove or modify certain other restrictions related to program length and satisfactory academic progress, all other Title IV requirements remain in place. Importantly, credit hours still need to be calculated in accordance with ED standards. (Note that this Experimental Site program is different from the similarly-named ED program allowing certain experiments regarding competency based education and direct assessment.) Likewise, the Incentive Compensation rules that prohibit payment to employees or entities on the basis of success in securing enrollments also apply to

the program, *including the partner entity*: a non-institutional provider participating in the program must pay its own employees in accordance with the Incentive Compensation rules, and revenue sharing arrangements between the institution and the partner entity must also be in accordance with those rules. Failure to do so may result in the imposition of severe sanctions against the Title IV-participating institution.

- Participating institutions will be required to agree to additional terms in their Program Participation Agreement (PPA). Institutions participating in the pilot program may also be subject to enhanced oversight by the Department, including additional reporting and site visits. While ED has not disclosed the additional PPA terms, it is important to note that failure to comply may have serious consequences for the eligible institution.

The ESI certainly represents an important step forward in bringing the Title IV programs into harmony with the enormous changes that are occurring in the postsecondary education field. However, because the pilot program is circumscribed by what the Department sees as its very limited discretionary authority to waive regulations, it doesn't significantly relieve core regulatory constraints that limit the ability to award Title IV assistance to students enrolled in many kinds of non-traditional learning activities. Authority for significant innovation still awaits legislative action.

ED will be accepting applications to the ESI until December 14, 2015. If you have questions about the process, or the advisability of participating, please feel free to contact us.