

June 9, 2015

This alert provides a brief update on recent developments related to the federal rules on state authorization as well as an update on new proposed regulations in California.

## No further extension of enforcement of "On-Ground Rule"; ED to forgo letters to individual institutions

The US Department of Education ("ED" or "the Department") has decided against an earlier plan to send letters to every institution believed to be out-of-compliance (or rather, located in a state that is considered out-of-compliance) with the federal state authorization requirements at 34 C.F.R. § 600.9(a), also known as the "On-Ground Rule." Compliance with the rule is a condition to eligibility to participate in the Title IV programs.

As you may recall, the Department has determined that the On-Ground Rule creates a two-part test for states. First, the states where an institution is physically located (i.e. where a Title IV eligible institution has a physical campus) must take a sufficiently active role in regulating the institution. Second, the institution must be covered by a *student* complaint process in the state. Apparently ED does not believe that a general *consumer* complaint process fulfills this second requirement.

ED has not been consistent in its application of this rule and it has largely postponed enforcement of the On-Ground Rule since the rule's introduction in July 2011 (except in cases relating to for-profit schools). ED staff has indicated that the Department does not intend to postpone the effective date again, and the rule is scheduled to become fully "effective" on July 1, 2015.

Our understanding is that, instead of sending letters to institutions, ED now intends to work directly with the relevant states where it has concerns about one or both parts of the On-Ground Rule to bring state rules into compliance with federal requirements. Because ED has declined to provide a list of the states where it believes the process is insufficient, we have submitted a Freedom of Information Act request seeking the Department's correspondence with states on this issue. We will continue to monitor this issue and provide updates when information is available. We also encourage clients to let us know if they encounter pressure from ED related to this issue.

ED has revealed nothing further of its plan to re-introduce the distance learning provisions of the state authorization rules vacated by the courts in 2012 (formerly at 34 C.F.R. § 600.9(c)). The Department "paused" action on a new rule in 2014 after a negotiated rulemaking revealed serious reservations with ED's approach.

## California seeks to provide path for nonprofit schools to maintain BPPE exemption

The California legislature is currently considering an educational "trailer bill" to the annual budget that would provide California private *nonprofit* institutions with a possible path to maintain their exempt status with the Bureau for Private Postsecondary Education ("BPPE") while complying with the federal On-Ground Rule.

In 2013, ED issued a Dear Colleague Letter (GEN 13-20) providing a list of state actions that the Department would deem sufficient to meet the first part of the On-Ground Rule (active regulation). Most notably, an institution could be exempt from oversight by the educational regulatory agency if it participated in a state grant program or had an articulation agreement with an in-state public institution for the acceptance of transfer credits by the in-state public institution.

ED's guidance would allow regionally accredited institutions in California to maintain their exemption from BPPE if they participated in the Cal Grant program; however, such institutions must also demonstrate that they are covered by a student complaint process in California. Under the California Private Postsecondary Education Act

of 2009, BPPE lacks jurisdiction to apply its student complaint process to exempt institutions. (ED and the California Attorney General determined that the state's standard consumer complaint process was insufficient to satisfy the second part of the On-Ground Rule.)

To allow institutions to comply with the On-Ground Rule, the legislature previously amended the Private Postsecondary Education Act of 2009 to allow exempt institutions to waive their exempt status and instead obtain a licensure by means of accreditation. Institutions that did so became fully subject to BPPE's jurisdiction.

The proposed amendment in the trailer bill would allow exempt, private nonprofit institutions based in California to enter into an agreement with BPPE to utilize BPPE's student complaint process. Thus, if those institutions also participate in Cal Grant or have an articulation agreement with a California public institution, they would be able to maintain their exemption from full BPPE oversight and still satisfy the On-Ground Rule's requirements. This option would not be made available to any for-profit institutions nor does it appear to be available to non-California nonprofit institutions that have a physical location in California.

While this is a positive development for nonprofit California institutions, it also raises many questions that will not be answered until BPPE develops the complaint agreement. It is not clear, for example, what consumer standards BPPE will apply: many are inapplicable to exempt institutions.

In general, trailer bills that are attached to the budget tend to be enacted. The trailer (and the full budget) must be passed before the legislature's session ends on June 15th.

## California BPPE proposed regulations

On June 4, 2015, the California BPPE published a Notice of Proposed Regulations in an effort to finalize a regulatory package implementing amendments to the Private Postsecondary Education Act of 2009 that were enacted last year. While some changes address existing concerns, others may be challenging for institutions to implement and will mark, as has been the case in higher education generally, another data set that is inconsistent with those reported to (or by) other governmental and accrediting entities.

Institutions operating under the oversight of the BPPE should carefully review the proposed regulatory package available on [the BPPE website](#).

Among other things, the proposed regulations would:

- Make changes to the Annual Report in two substantive areas.
  - First, the regulations would require new data to be provided as part of the institution's report including campus, accreditors, and financial aid information (including available federal and state programs, other funding sources, and the total percentage of institutional revenue that comes from public funds).
  - Second, the regulations would change the filings date from September 1 to December 1 of each year.
- Make significant changes to how data is measured and reported for the Annual Report and the required Performance Fact Sheets (PFS), including:
  - A change to the defined term for students graduating within 100% of published program length for inclusion in the report and PFS as "on-time graduates" as opposed to simply "graduates". This is likely an attempt to clarify what a "graduate" is, as it is separately defined in the Act as anyone who completes training and earns a diploma or degree, without regard to timeliness. Additionally, graduates within 150% of published program length may now be separately reported in the Annual Report and PFS, as noted below.
  - The proposed definition of "gainfully employed" for purposes of reporting job placement data, which has been in discussion in the BPPE Advisory Committee for over a year, now includes only on-time graduates who are employed in jobs that align with the US Bureau of Labor Statistics SOC codes that also match the intended outcome for the training as identified by the institution. In addition, the on-time graduate must be employed in a single in-field position or concurrent aggregate single positions that total at least 30 hours per week for 21 calendar days with the "expectation of continued employment". There is also new language intended to address on-time graduates who seek freelance or self-employment opportunities. This section reflects a compromise position between the advisory committee members' conflicting proposals of a 14-day verification period and a nine-week verification period.

- The proposed regulations also add new requirements to the PFS regarding disclosure of total program charges and Federal Student Aid (FSA) data, including cohort default rates, percentage of enrolled students receiving federal student loans, the average amount of federal loan debt for on-time graduates and the percentage of graduates with federal student loans.
- Institutions not participating in the FSA program must disclose why they are not reporting student debt information, including an explanation of accreditation status if that is the reason the institution does not participate in the FSA program.
- Completion rates may now be separately reported for "on-time graduates" as well as those completing within 150% of published program length (instead of the more confusing 100% and separately reported 101%-150% graduates.)
- For programs where passing a licensing exam is required for employment, the proposed regulations allow placement rates to be measured beyond the current limit of six months from graduation to include a period of six (6) months from the announcement of exam results for the first available exam. The proposal also further defines the "first available" exam metric in relation to reporting licensing exam passage rates.
- The date that the PFS must be updated and available to students has also been changed to December 1 to align with the new Annual Report date.

The scheduled hearing date for public comment on these proposed regulations is July 21, 2015. Written comments on the proposed regulations must be received by the BPPE before 5 pm PST on July 20, 2015, or may be presented in person at the hearing. The information about the methods for submitting comments can be found on [the BPPE website](#).

Finally, please note that there are additional BPPE regulations that were passed via the urgency process in early 2015, and new amendments to the Act and other proposed legislative action are currently pending in the Legislature that may impact your institution.

For further guidance respecting California law changes, please feel free to contact [Kate Lee Carey](#) in our San Diego office.

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