

ED to Propose New Rules for Online Education

June 13, 2016

Last week, the Department of Education (ED or the Department) submitted to the Office of Management and Budget (OMB) proposed new or amended state authorization regulations. The proposed regulations relate to state authorization requirements that would become a condition of Title IV eligibility, including state approval requirements for distance education programs.

While the text of the rule is not yet public, it is likely the Department will take one of two policy approaches: it may require educational institutions to comply with all applicable state laws in states where they offer distance education, which leaves it to each state to determine what is required, or it may require institutions be authorized by every state in which they offer distance education, which would require all states to authorize distance education (and many currently do not).

The first potential approach is the one the Department took in 2010, when it proposed the original distance education rule as part of a package of program integrity regulations. The rule was ultimately vacated in federal court on procedural grounds. In short, this proposal would require an institution participating in Title IV federal student aid programs to be authorized in any state in which it enrolls students into a distance education program, but only if state law requires the institution to be so authorized. Institutions would also need to document their state approval. This approach would allow states to set their own standards to determine which institutions and programs need to be authorized to offer online programs in their state, consistent with the long history of federalism in US higher education.

The second approach that may be offered would stem from the Department's controversial 2014 negotiated rulemaking that followed in the wake of the federal court decision vacating the 2010 rule. This iteration – a major departure from the first 2010 proposal – would require that all states actively regulate distance education in the state. Unlike the 2010 proposal, this proposal would require institutions, as a condition of Title IV eligibility, to obtain authorization in *all* states in which they offer distance education. This approach would effectively eliminate the state's ability to determine what level of authorization is appropriate. The proposal would also eliminate the option for states to use a "physical presence" test, as many do, and prohibit states from offering an exemption based on accreditation or years in operation. If ED takes this route, the federal government will no longer fully defer to states to set their own approval standards. States may establish higher standards, but still must meet ED's minimum standards. Such a policy would require many states to amend their laws to comply with federal requirements, and would pose a significant burden to both states and institutions. Based on recent policy developments at the Department, we think a rule package that more closely resembles the 2014 proposal is more likely.

The Department could also tack on other distance education requirements as part of the rulemaking. In particular, there is some speculation that ED may be contemplating additional requirements for programs leading to licensure similar to those included in the Gainful Employment Rule. In particular, the Department could require institutions to certify that their professional programs lead to licensure in each state where they are offered.

Following review by OMB, which we expect will be completed before the end of the month, ED will issue a notice of proposed rulemaking for public comment, following which institutions will have an opportunity to file comments on the proposal. After the comment period, ED will likely issue a final rule, which must be issued in final form by November 1 in order to take effect by July 1, 2017.

We will continue to closely monitor these developments.

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