

Newly Published Federal Regulations and Professional Licensure Disclosures

Background

Until recently, the U.S. Department of Education (DOE) had no published regulations specifically regarding distance education and state authorization, complaints, adverse actions by a state or accrediting agency, visibility of refund policies, and disclosures pertaining to professional license or certification programs. An attempt to publish such regulations was made in 2010 but in 2011, the United States District Court set aside a portion of those regulations on procedural grounds. The order to vacate the regulations was affirmed in 2012 by the United States Court of Appeals. In July 2016, the DOE proposed new regulations for distance education, and after receiving public comments, the regulations were published December 19, 2016 with an effective date of July 1, 2018.

Traditionally, institutions have concentrated on ensuring that any professional license or certification program was approved or accepted in the state in which the institution was physically located. However, with the explosion of distance educational offerings, it became evident that institutions were teaching students out-of-state, yet not ensuring those students would be eligible to sit for a license or certification exam out-of-state.

Serious consumer protection concerns exist when a student is taking a distance education program leading to professional licensure or certification from an out-of-state institution. The student must (and deserves to) be aware whether or not the program meets the professional licensure or certification requirements in the state where the graduate plans to practice the profession. An institution exposes itself to the risk lawsuits if the student is unable to sit for the licensure exam or practice the profession due the institution's failure to inform the student that their chosen program does not meet the professional licensing requirements of that state. An example of this situation occurred in Oregon a few years ago. The out-of-state institution had not done the research and therefore had not informed the student whether or not that program met the professional licensing requirements for the Oregon Board of Psychologist Examiners. The program did not meet Oregon's requirements and the graduate was left with having spent probably thousands of dollars and countless hours expecting a result the institution should have known and disclosed was not possible. These situations directly impact the lives and livelihoods of students.

Federal Regulations Currently in Place

The DOE already has regulations in place regarding disclosures about professional licensure and certification programs offered on campuses. These can be found in the Program Integrity rules from 2010 ((34 CFR (B)(VI)(668) (F) (<http://www.ecfr.gov/cgi-bin/text-idx?rgn=div8&node=34:3.1.3.1.34.1.39.6>)) and the Gainful Employment regulations from 2014 (34 CFR § 668.414(d).

New Federal Regulations

In 2016, the DOE proposed new regulations (CFR 668.50), which require an institution to disclose certain



information about its distance education or correspondence programs or courses to its students, prospective students, and the general public. Compliance with these new regulations is tied to an institution's continued ability to disperse Title IV federal financial aid for the affected programs. The new regulations require seven public disclosures to be placed on the institution's website and catalog, and up to three disclosures must be sent directly to students and prospective students via email, postal mail, etc. when certain conditions have been met. Here is a summary of the disclosure requirements:

Required Public Disclosures

For distance education programs and correspondence courses offered by an institution of higher education, the institution must publicly disclose:

- How the distance education program or correspondence course is authorized (34 CFR 668.50(b)(1)); institutions must also explain to students the consequences of relocating to a state where the institution does not meet state authorization requirements, or in the case of a gainful employment program, where the program does not meet licensure or certification requirements in a state.
- How to submit complaints to the appropriate state agency responsible for student complaints or to the state authority reciprocity agreement, whichever is appropriate based on how the program or course is authorized (34 CFR 668.50(b)(2)); institutions must provide contact information for receipt of complaints.
- How to submit complaints to the appropriate state agency in the student's state of residence (34 CFR 668.50(b)(3));
- Any adverse actions taken by a state agency against an institution of higher education's distance education program or correspondence course and the year that the action was initiated for the previous five calendar years (34 CFR 668.50(b)(4) and 34 CFR 668.50(b)(5));
- Any adverse actions taken by an accrediting agency against an institution of higher education's distance education program or correspondence course and the year that the action was initiated for the previous five calendar years (34 CFR 668.50(b)(4) and 34 CFR 668.50(b)(5));
- Refund policies that the institution is required to comply with (34 CFR 668.50(b)(6));
- The applicable licensure or certification requirements for a career a student prepares to enter, and whether the program meets those requirements (34 CFR 668.50(b)(7)).
 - An institution is required to disclose the applicable educational prerequisites for professional licensure or certification the program prepares the student to enter in any state in which the program's enrolled students reside, or any other state for which the institution has made a determination regarding such prerequisites.
 - The institution will also be required to disclose whether the distance education program or correspondence course does or does not satisfy those applicable educational prerequisites for professional licensure or certification. Distance education programs and correspondence courses enroll students from a multitude of states where they do not have a physical presence and their programs may not necessarily lead to licensure or certification, which would be important for students to know. For any state for which an institution has not made a determination with respect to the licensure or certification requirement, an institution is required to disclose a statement to that effect.

- This disclosure does not require an institution to make a determination with regard to how its distance education programs or correspondence courses meet the prerequisites for licensure or certification in states where none of its enrolled students reside, but does require an institution to disclose whether it has made such determinations and, if it has made a determination, whether its programs meet such prerequisites.

Required Individualized Disclosures

Additionally, these institutions must also disclose directly, through email or written correspondence:

- When a distance education program or correspondence course does not meet the licensure or certification requirements for a state to all prospective students (34 CFR 668.50(c)(1)(i));
- Under proposed §668.50(c)(1)(i), an institution is required to provide an individualized disclosure to prospective students when the institution determines that an educational program being offered solely through distance education or correspondence courses, excluding internships or practicums, does not meet licensure or certification prerequisites in the state of the student's residence. The institution is required to obtain an acknowledgment from the student that the communication was received prior to the student's enrollment in the program.
- When an adverse action is taken against an institution's postsecondary education programs offered by the institution solely through distance education or correspondence student to each enrolled and prospective student (34 CFR 668.50(c)(2)); and
- Any determination that a program ceases to meet licensure or certification requirements to each enrolled and prospective student (34 CFR 668.50(c)(2)).

State Disclosure Requirements

As presented in an earlier paper written in 2015 and updated in 2017, a number of states also have disclosure requirements regarding professional licensure and certification programs (<http://wcet.wiche.edu/documents/talking-points/state-auth-institutional-disclosures>.) These individual state disclosure requirements are especially important for institutions that do not participate in the State Authorization Reciprocity Agreement (SARA). Those institutions still need to address all state authorization matters on a state-by-state basis. In addition to Florida, Georgia, Oregon, Wisconsin, and Massachusetts highlighted in that article, North Dakota has the following disclosure requirement:

Chapter 15-18.1-17. Compliance with professional board registration and certification requirements.

A postsecondary educational institution shall give written notification to potential students applying for enrollment in a course or program that customarily leads to professional registration or certification of the status of the course or program compliance with the registration or certification requirements of the appropriate professional board in the state. A postsecondary educational institution shall give written notification to all students enrolled in a program or course that customarily leads to professional registration or certification of any change in the status of the course or program compliance with the registration or certification requirements of the appropriate professional board in the state.

SARA Disclosure Requirements

SARA also has disclosure requirements for its participating institutions as demonstrated below. (http://www.nc-sara.org/files/docs/NC-SARA_Manual_Final_2016.pdf).

7.2.1 Disclosure and Reporting Requirements

An institution must demonstrate, and the designated home state entity must verify, that the institution provides to current and prospective students (and, where applicable, to the U.S. Department of Education) the information required for federal Title IV disclosures and reporting. This includes current required disclosures and reporting requirements, as well as any future requirements that the Department may adopt.

The SARA Manual then lists the details regarding the required disclosures, including:

Providing information on programs preparing students for licensed professions, including explicit statement of whether the program, including clinical or experiential practice, meets licensure standards in all states in which the institution enrolls students;

An Important Distinction Between Federal, State, and SARA Disclosure Requirements

When reading the detailed language of the federal, state, and SARA regulations or policies, there is a very important distinction that, unfortunately, causes more confusion for institutions and students. State authorization regulations and the SARA policies do not regulate on a student's state of residence. Rather, it is the activities conducted by an institution that are regulated. In other words, states may regulate the activity of having an online student in their state. It doesn't matter what the state of residency is. SARA policies follow that same model.

The new federal regulations, however, consistently reference the student's state of residence, even though public comments encouraged this language be changed before publishing the regulations. So, it appears institutions need to disclose information to students for where they are located when taking distance education or correspondence courses as well as the student's self-reported state of residence. This confusion was likely unintentional, but it does exist, and it remains to be seen how this can or will be resolved or enforced by the DOE.

Will New Regulations Stay in Place?

With the transition of the new federal administration, the Congressional Review Act allows that any regulation published since May 30, 2016, may be reversed with a simple majority vote. The new distance education regulations fall into that timeline and they could still be reversed. At the time of this writing it does not appear as though these regulations will be reversed. If the regulations are not reversed, institutions have a lot of work to do to come into compliance by July 1, 2018.

Steps for Institutions to Take in Preparation for New Regulations

Preparing for compliance with the new federal regulations is no easy task. Here are some steps to take just for the disclosure requirements:

1. Institutions need to know and be able to report where their distance education students are located and what is their state of residence. This could take significant resources just for the technology to track the students' locations.
2. Institutions need to research the professional licensure or certification requirements for any state where their graduates intend to practice. This includes data on what type of degree is required, how many credits, is programmatic accreditation required, the number of field experience hours, qualifications of site supervisors and faculty, exams to be taken, if there are state-specific additional requirements for licensure or certification, and if the state professional licensing board needs to review and/or approve the program (list is not all-inclusive).
3. After the detailed research is done, compare the institution's program requirements with those of each state and determine and document if it meets each state's requirements.
4. Create appropriate disclosures to be published on the website and catalog, as well as the individual disclosures to be sent to students and prospective students as mandated in the new regulations.
5. Review the states' professional licensure requirements on a regular basis to watch for changes. If changes occur, revise and publish the new disclosures.

Institutional Challenges for Disclosure Compliance

It will be challenging for institutions to decide where on the website or in the catalog to display all of the required disclosures. In addition to the federal regulations, as mentioned earlier, individual state professional licensing boards may have disclosure requirements as well as institutional accreditors, programmatic accreditors, the Department of Defense, etc.

Another challenge will be to determine how to keep disclosures up-to-date and accurate. Regulations change, standards for professional licensure or certification change, requirements by accreditors may change – all of these will need to be monitored and updated accordingly.

Thirdly, an institution will need to determine which department is ultimately responsible for all aspects of the required disclosures. Creating disclosure language is not easy. The disclosures need to be easily understood by the general public, yet must be worded in a way that protects the students and institution legally.

One of the overarching challenges is knowing how the DOE will interpret and enforce the new regulations. In at least one case, the regulations conflict with state authorization regulations (residence of students) and it is unclear how that will be managed. Confusion abounds across the country regarding state authorization, SARA, professional licensure, etc. It is a challenge for everyone to figure it all out.

Conclusion

The new federal regulations will require institutions to change what they are currently doing in a number of areas. Although 2018 may seem like a long way off, institutions really should already be making plans as to how they will comply with each section of the regulations. The potential loss of Title IV federal financial aid funds for non-

compliance is real and ultimately it is the students who suffer the greatest loss if their institutions neglect to do what it takes to get into compliance.



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