Cooley

Final Distance Education Rule: ED Backs Away from State Reciprocity Agreements

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The Department of Education (ED or the Department) **announced** the publication of its final rule on state authorization for distance education programs on December 16, 2016. Although the final rule is similar to what ED proposed on July 25, 2016, it surprisingly provides that the State Authorization Reciprocity Agreement (SARA), which is quickly approaching 47 member states, would not satisfy the basic authorization requirements of the rule. While ED's action is disappointing to the many individuals, institutions, organizations, and state officials who have worked for the near universal adoption of SARA, the good news is that the new rule will not take effect until July 1, 2018, providing ample time to cure its defects.

When the proposed federal rule was released six months ago, there appeared to be broad consensus that the regulations would support the multi-state SARA arrangement as satisfying the requirement that institutions obtain authorization in each state where they are required to be authorized. ED's change effectively removes SARA from the definition of a "State authorization reciprocity agreement" for the purpose of complying with the new regulations. Curiously, the final rule states that state authorization reciprocity agreements acceptable for the purposes of satisfying the new rule cannot prohibit any states from enforcing any of their own statutes and regulations, "whether general or specifically directed at all or a subgroup of educational institutions." This approach flies in the face of the very purpose of SARA, (and any reciprocity agreement) which is to provide a common set of authorization laws and institutional standards to which all participating states would agree. This unexpected change could therefore undo years of work to create a streamlined system for state licensure of distance programs, replacing a patchwork of laws, rules, and requirements that were extraordinarily burdensome on institutions and provided many students with substantially less protection than they have now under SARA. And of course ED's position disregards the intent of the many state legislatures that have passed laws authorizing their state to participate in SARA over the last several years. ED apparently bowed to pressure from those who want to change the terms of SARA (notably the MA AG's office, which put out a press release taking credit for the change) and who claimed – incorrectly, we believe – that SARA would impede the ability of states to protect the interests of their citizens.

The rest of the final rule remains largely unchanged. As in the proposed rule, the final rule requires institutions to meet all state requirements for legally offering distance education in any state in which institutions are offering distance education courses, but only to the extent the state has any such requirements. Also, while the language of the rule appears to make state authorization for distance learning a condition of institutional eligibility in the Title IV programs, the preamble to the final rule clarifies that failure to hold a required authorization in a state will only result in inability to disburse Title IV funds to eligible students who are enrolled in distance learning programs while present *in that state*, rather than institution-wide.

The additional public disclosure requirements are also substantially the same as the proposed rule, including: (1) disclosing all prerequisites for professional licensure in the relevant occupation(s) in any state in which they enroll students or any other state for which the institution has made such a determination, specifying whether the program meets those requirements; (2) disclosing whether the institution is authorized to provide the program in each state in which enrolled students reside; (3) a description of the process for submitting student complaints; (4) disclosing any adverse action initiated by an accrediting agency or state entity in the prior five calendar years; and (5) disclosing all refund policies for any state in which enrolled students reside.

Separate from the distance learning rules, the new regulations require institutions to be able to demonstrate that they hold all relevant foreign governmental approvals for their foreign campuses. This provision also remains largely unchanged from the July

proposal.

Over the course of the next eighteen months, as the positive attributes of SARA become even more obvious and the degree to which the rule contravenes the intent of most states becomes more publicized, we believe that the rule will be revisited and likely revised before it goes into effect on July 1, 2018. Republicans in Congress have long argued for the return of more authority to the States, and as the new Administration seems similarly disposed, we expect that the regulation may be replaced by Congress either as part of the reauthorization of the Higher Education Act or through the Congressional Review Act (CRA), which empowers Congress to review any regulation issued in the last 60 days of an administration. (**See our full alert on the CRA**.) And of course, a new Secretary of Education may simply initiate the process of amending the rule to return it to its SARA-friendly form, or indeed to eliminate it entirely in recognition of the successful state-based effort that makes federal oversight seem more and more unnecessary.

We will continue to track this issue closely and provide you with updates as we learn more.