

# Cooley

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On Friday, June 19, 2015, the US Department of Education ("ED" or "the Department") issued a [Dear Colleague Letter](#) (GEN-15-10) ("DCL") reminding institutions that the current state authorization requirements (34 CFR § 600.9) will take effect on July 1, 2015 and that enforcement will not be delayed for another year.

As you may recall from previous updates, ED actually issued two distinct state authorization rules in 2010 as part of the Program Integrity Rules: the "On-Ground Rule" which relates to an institution's physical locations, and the "Distance Education Rule," which relates to an institution's online offerings. Although the Distance Education Rule was vacated by a federal court in 2011, the On-Ground Rule remained in place. However, up until now, ED has repeatedly delayed broad enforcement of the Rule. Instead, ED enforced the rule on a limited basis, requiring institutions deemed to hold insufficient authorization to initiate the process to obtain further authorization. The new DCL confirms that ED will no longer provide a stay as to enforcement of the On-Ground Rule for institutions in the process of obtaining authorization as of July 1, 2015. The DCL reiterates that an institution's physical locations must be duly authorized in order for the institution to be eligible to participate in the Title IV programs. The DCL does not address, and ED has otherwise been silent regarding, the Department's plans to establish requirements for purely online distance learning programs. ED abandoned a previous, controversial proposal following a negotiated rulemaking in 2014.

While enforcement of the On-Ground Rule has been largely postponed for the last few years, the Department has issued inconsistent and confusing guidance to institutions and states about what oversight is sufficient to satisfy the federal requirements. Essentially, ED has developed a two-part test for determining whether an institution's state meets the On-Ground Rule mandate: (1) whether the institution is sufficiently authorized by a state agency, and (2) whether the institution is subject to a student complaint process. Unfortunately, state laws vary considerably and do not fit neatly into the Department's ambiguous standards. For example, [ED issued a DCL in 2013](#) indicating that participating in a state grant program or entering into an articulation agreement with an in-state public institution could satisfy the first part of the test. ED has also given inconsistent guidance regarding whether the first part of the test might also be satisfied simply by having organizing documents that recognize the entity as an "educational institution." Adding to the confusion, ED has never identified publicly which states have established processes that allow institutions to comply, and which do not.<sup>1</sup>

Beyond confirming the widely-held expectation that ED will not be delaying enforcement of the On-Ground Rule again, the DCL provides limited additional information to institutions and states:

1. The DCL confirms that ED does not intend to institute any broad, immediate enforcement actions. Rather, ED will assess compliance with the On-Ground Rule "in the ordinary course of business, including when an institution applies to the Department for recertification for Title IV aid, for additional locations or programs, or other matters requiring such review."
2. The DCL indicates that institutions should contact their state authorizing agency for confirmation that their institution satisfies the On-Ground Rule.

Unfortunately, while framed as a notice, the Department again fails to provide clear guidance as to whether institutions have anything to worry about in the first place, and therefore leaves institutions exposed to arbitrary enforcement (and risk of loss of Title IV eligibility) at a later date. This risk is heightened at for-profit institutions, which, in our experience, have plainly been targeted for selective enforcement. We recommend that institutions that are concerned about whether they are validly authorized should consider contacting their state authorizing agency as suggested by ED to request written evidence that the Department has

recognized that state's process as compliant for Title IV purposes. Institutions should also maintain written documentation that the institution has been approved according to state law, which will be critical in case the issue comes up in a future ED review.

As mentioned in our last [update](#), we are in the process of requesting all communications between ED and state authorizing agencies related to the On-Ground Rule under the Freedom of Information Act ("FOIA"). Due to the Department's backlog of FOIA requests, we expect delays in the processing of our request; however, we will provide additional alerts if we receive new information.

If you have any questions, please do not hesitate to contact us.

## NOTES

1. ED abandoned an earlier plan to issue letters to institutions the Department deemed out-of-compliance.

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