

U.S. Department of Education Issues Guidance on 2016 State Authorization Regulations and Ineligibility of California Distance Education Students for Title IV Federal Financial Aid

July 25, 2019

On July 22, 2019, the U.S. Department of Education (the “Department”) **announced** that, pursuant to the April 26, 2019 order of the U.S. District Court for the Northern District of California in *Nat’l Educ. Ass’n v. DeVos*, 379 F.Supp.3d 1001 (N.D. Cal. 2019), the Department’s 2016 State Authorization Regulations (81 Fed. Reg. 92232) (the “2016 State Authorization Regulations”), which had been delayed by the Department until July 1, 2020, took effect on May 26, 2019. Significantly, the Department explained that students residing in California who enroll in distance education courses with non-profit private or public institutions located out of state are ineligible for Title IV federal financial aid because institutions are unable to meet a requirement of the 2016 State Authorization Regulations with respect to such students.

The 2016 State Authorization Regulations were originally enacted in December 2016 and were to take effect on July 1, 2018. However, the Department delayed implementation until July 1, 2020. In its April 2019 ruling in *Nat’l Educ. Ass’n v. DeVos*, the U.S. District Court in the Northern District of California ruled against the delay, finding that it violated both the Higher Education Act of 1965, as amended, and the Administrative Procedure Act because the Department did not submit to negotiated rulemaking. As a result of the ruling, the 2016 State Authorization Regulations took effect on May 26, 2019.

2016 State Authorization Regulations set forth certain requirements for colleges and universities without a physical presence in a state to offer online or distance education courses to students in such state. One requirement is that an institution must document that the state in which enrolled students reside either (a) has a state process for review and appropriate action on complaints against the institution; or (b) participates in a state authorization reciprocity agreement, by which the institution is covered, that provides such a complaint process. While California does have a process for filing complaints against out-of-state for-profit institutions providing distance education in the state, it does not have a complaint filing process out-of-state non-profit private or public institutions providing distance education in the state, either through its own state process or through participation in a state authorization reciprocity agreement. The Department stated, “As a result, until California establishes such a process for out-of-state public and non-profit institutions or enters into an appropriate reciprocity agreement, those institutions will be unable to comply with the now-effective 2016

regulation if they provide distance education or correspondence courses to students residing in California. Thus, under the 2016 regulation now in effect, students residing in California receiving distance education or correspondence courses from out-of-state public or non-profit institutions are ineligible for title IV programs until such time as the State of California provides those institutions with an appropriate complaint process or enters into a reciprocity agreement.”

California is the only state that is not a State Authorization Reciprocity Agreement (SARA) participant, which impacts all out-of-state non-profit private and public institutions enrolling California residents in online or distance education courses. (The Commonwealth of the Northern Mariana Islands also does not participate in SARA.) However, it is important to note that, in order to rely on SARA to meet the requirement, the out-of-state institution must also be a SARA participant. Colleges and universities that do not participate in SARA must comply by documenting an applicable state complaint process. Therefore, institutions that are not SARA participants must confirm that each state in which its distance education students reside has such a process.

The Department noted that, as the result of consensus reached during its recent negotiated rulemaking, it has proposed a new regulation which eliminates the complaint documentation requirement. However, such regulation is not yet in effect. Further, the Department plans to file a motion for clarification or other appropriate pleading with the Ninth Circuit to address the impact on California students. In the meantime, institutions offering out-of-state distance education courses are bound by the 2016 State Authorization Regulations. It is hoped that the Department will resolve this difficult situation for higher education institutions and their impacted students by early implementation of the proposed new regulation. However, there is no way to know with certainty whether or when that may occur, so institutions should plan accordingly.

Colleges and universities should immediately determine the locations of students enrolled in their distance education courses to identify any students who may be impacted by the regulation and develop next steps. Cullen and Dykman LLP will continue to monitor the situation for updates from the Department on the proposed regulation or response from the Ninth Circuit, as well as any change in California’s complaint procedures in response to the regulations.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding these new regulations, or any other aspect of education law, feel free to contact Dina Vespia at (516) 357-3726 or via email at dvespia@cullenanddykman.com or Kevin McDonough at (516) 357-3787 or via email at kmcdonough@cullenanddykman.com.

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