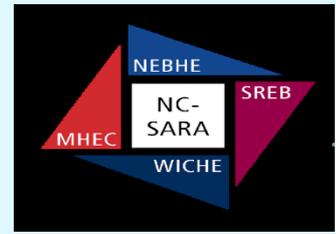


NC-SARA - Welcome



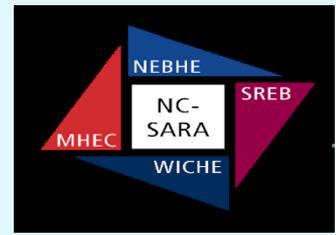
Final Federal Regulations – State Authorization

Tuesday, December 10, 2019

Please Note:

- **The webcast will begin at the top of the hour.**
- **There is no audio being broadcast at this time.**

NC-SARA - Logistics



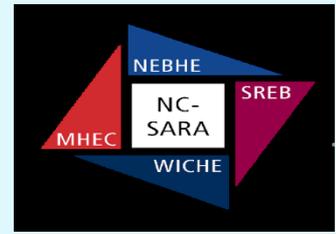
Welcome!

Please use the **Question and Answer** box for questions.

The webcast will be recorded.

This PowerPoint and any other resources referenced will be emailed next week to all who registered and available on our website.

Presenters



Moderator: **Marianne Boeke, Ph.D.**

Associate Director for Policy Research &
State Support, NC-SARA

Presenters:

Greg Ferenbach, J.D.

Counsel

Hogan Lovells U.S. LLP

Jeannie Yockey-Fine, J.D.

Associate Director for Regulatory Relations &
Policy Support, NC-SARA

A photograph of an audience in a conference room. A person in the foreground has their hand raised. A speaker is visible in the background.

State Authorization and Consumer Disclosures

Recent Changes in
Federal Regulations

Agenda



1. Background

- What is the federal state authorization rule, and how did we get here?

2. State Authorization and Professional Licensure Disclosure Requirements

- 2016 State Authorization Rule (effective now)
- 2019 State Authorization Rule (effective July 1, 2020, unless elect early implementation)
- NC-SARA Professional Licensure Disclosure Requirements (and other disclosure concerns)

3. Foreign Location Authorization (under federal rules)

4. Wrap-Up and Q&A



Part One -- What is the federal state authorization rule and how did we get here?

State Authorization Basics



34 C.F.R. § 600.9

- State authorization is a condition of Title IV eligibility.
- Historically, the U.S. Department of Education (ED) only required state authorization in the state(s) in which an institution was physically located.
- Between 2010 and 2016, ED issued new “program integrity” rules, including several provisions relating to state authorization.
- ED’s push led directly to the State Authorization Reciprocity Agreement (SARA), which allows member institutions to offer distance learning programs without securing state by state approvals.
- The federal state authorization rules apply to all types of educational institutions: public, for-profit, and private non-profit regardless of degree level.
- Three parts—the “distance education rule” (34 CFR § 600.9(c)) and the “on-ground rule” (34 CFR §§ 600.9(a) and (b)), plus foreign location authorization (34 CFR § 600.9(d)).
- Federal Title IV requirements are in addition to whatever a state requires under its own laws.

Distance Education Rule



34 C.F.R. § 600.9

- In 2010, for the first time, ED required proof of state authorization for distance education programs.
- After many years of litigation and rulemaking, the basic rule is substantially the same.
- **34 C.F.R. § 600.9(c):** “If an institution...offers postsecondary education through distance or correspondence courses to students residing in a State **in which the institution is not physically located or in which the institution is otherwise subject to State jurisdiction as determined by the State**, . . . the institution must meet any of the State’s requirements for it to be legally offering distance or correspondence courses in that State. The institution **must, upon request, document the State’s approval to the Secretary...**” (emphasis added)
- In 2016, ED also added a new eligibility requirement in **34 C.F.R. 600.9(c)(2)** that institutions operating distance education programs to students residing in states that the institution is not located must document that the state that the program is being offered in has a **process for reviewing and taking appropriate action on complaints** against the institution by those students

The “On Ground” or Campus-Based Rules

34 C.F.R. § § 600.9 (a) and (b)

- Part of the original 2010 program integrity rule package.
- Policy goal was to force states to play more active role in “Triad.”
- ED effectively required the states to meet certain minimal requirements for Title IV purposes.
- Schools required to show institutional authorization “by name” and availability of a state-level student complaint process.
- Discouraged use of blanket exemptions by states.
- These rules remain substantially intact.

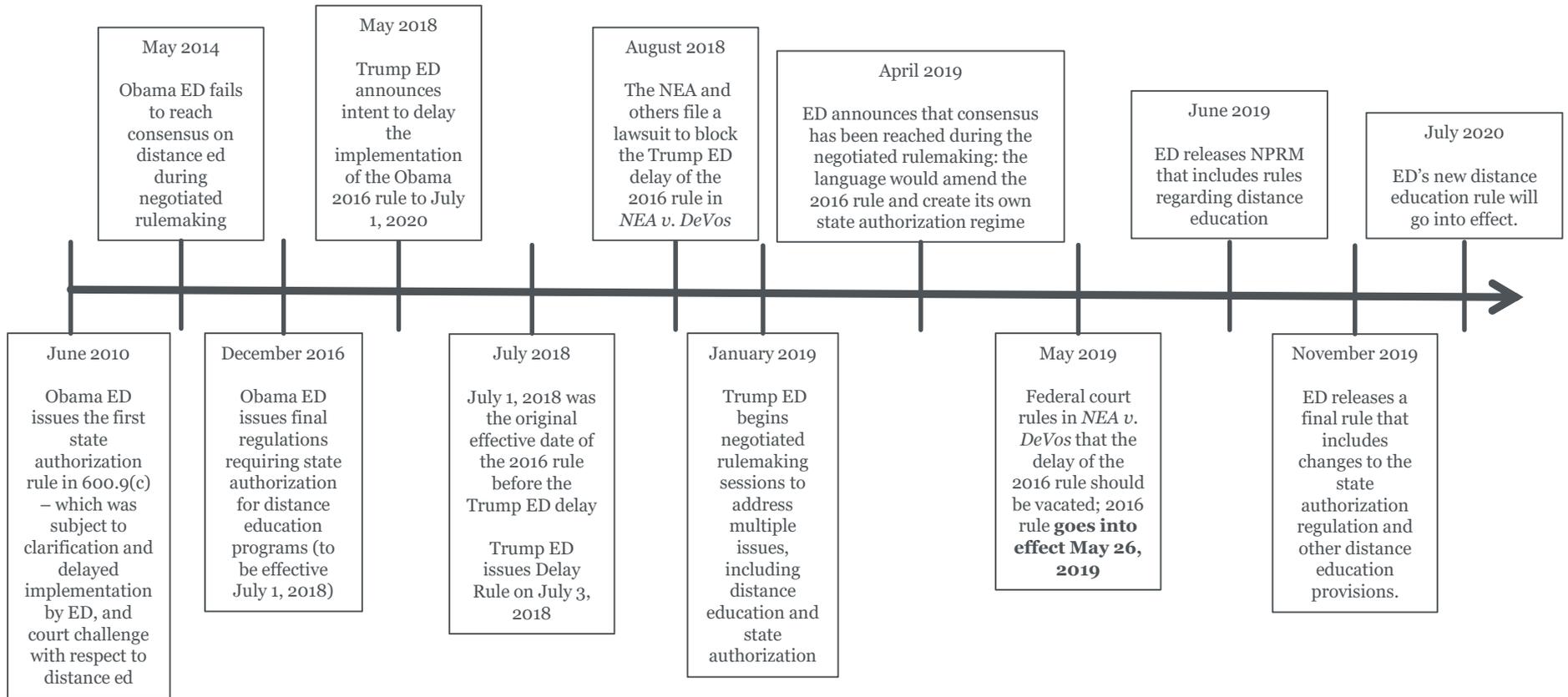
Federal State Authorization: a Brief History



34 C.F.R. § 600.9

- The distance education rule was the subject of a ten year legal battle(!).
- ED first issued the rule in 2010, but it was thrown out on procedural grounds in *APSCU v. Duncan* in 2011 (affirmed on appeal in 2012).
- In 2013, ED initiated a negotiated rulemaking to re-issue the distance education rule (in a modified form), but failed to reach consensus.
- ED's radical new approach would have mandated that all states regulate distance education: eliminated a state's option to have a "physical presence test" (as practical matter).
- Would have prohibited any exemptions based on accreditation or years in operation.
- ED received significant pushback and "paused" this second rulemaking process.

Timeline of the State Authorization Rule



DeVos Attempts to Delay 2016 Distance Education Rule

- On July 3, 2018, the DeVos-led Department of Education issued a final rule (“Delay Rule”) to delay for two years certain portions of the 2016 Distance Education Rule, which was set to go into effect July 1, 2018.
- This Delay Rule meant that the 2016 rule (as applied to distance education) would not take effect until July 1, 2020.
- ED also initiated a new rulemaking to promulgate a new rule.



NEA Sues DeVos to Prevent Delay



National Education Association v. DeVos, 345 F. Supp. 3d 1127 (N.D. Cal. 2018)

- In 2018, National Education Association (NEA) and various co-plaintiffs sued ED in U.S. District Court to block the Delay Rule.
- NEA argued that the Delay Rule was unlawful because the Higher Education Act (HEA) requires all regulations to go through the negotiated rulemaking process, and ED did not follow that procedure.
- ED argued that HEA permits an exception under the Administrative Procedure Act (APA) where that process would be “impracticable, unnecessary or contrary to the public interest.”

Judge rules for NEA plaintiffs



National Education Association v. DeVos, 345 F. Supp. 3d 1127 (N.D. Cal. 2018)

- Judge Laurel Beeler rejected ED’s argument and determined that any “impracticality” was caused by ED’s own delay in issuing the Delay Rule just before (actually—just after, on July 3!) the 2016 rules were to go into effect.
- Judge Beeler found the record is clear that ED had issues with 2016 rules way back in 2017, including specific concerns raised by ACE, NC-SARA and WCET.
- Held: “The Department did not have good cause to forego negotiated rulemaking with respect to the Delay Rule, and its failure to engage in negotiated rulemaking was not harmless error.”
- Ordered: Delay Rule is vacated; 2016 rules go into effect as of May 26, 2019.



The NEA case fallout-or what the heck happened in California?!?

- In response to the NEA decision, ED noted that California has a registration process for out-of-state for-profit institutions that provide distance education, but does not have a process to manage complaints for out-of-state public or non-profit institutions.
- Ruling from ED: “[U]nder 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.”
- Of course, California does not participate in SARA.
- CA subsequently addressed the situation by establishing a process under CA state law.

Part 2--What do the
2016 and 2019 rules
require regarding
authorization and
consumer disclosures?



2016 Rule – Currently in Effect



34 C.F.R. §§ 600.9, 668.41, 668.43, 668.50

- Three (3) key requirements of the 2016 rule:
 - Authorization of Distance Ed – Obtain authorization to offer online programs in each state where authorization is required, or through participation in a reciprocity agreement (e.g., NC-SARA);
 - New Disclosures – Publish and issue detailed consumer disclosures regarding online programs; and
 - Foreign Locations – Obtain authorization for physical locations located in foreign countries.

This rule is still the one currently in effect.



Distance Education Authorization Requirements

- Under the 2016 rule, institutions must obtain authorization in each state where authorization is required or satisfy the requirement through participation in a reciprocity agreement.
- The 2016 rule provides that, for the purpose of satisfying this requirement, state reciprocity agreements cannot prohibit states from enforcing their own statutes and regulations, “whether general or specifically directed at all or a subgroup of educational institutions” – which might be interpreted to exclude SARA.
- For practical purposes, ED seemed to be taking the position that SARA satisfies the definition of a state authorization reciprocity agreement, but language was unclear.

2016 Rule – Currently in Effect



Disclosure Requirements

- The 2016 rule includes general disclosures that must be made publicly and individualized disclosures that require direct communication with enrolled and prospective students.
- Disclosure requirements for online programs – particularly with respect to professional licensure – are burdensome, and they apply regardless of whether the institution participates in SARA.
- Violations of the rule could result in administrative enforcement actions, such as fines or a loss of program eligibility to participate in Title IV, or other consequences.

2016 Rule – Currently in Effect



General (Public) Disclosure Requirements

- **Authorization:** How the distance education program is authorized (by state licensing agency or SARA) for each state in which students enrolled in the program reside, and an explanation of implications if the student moves to a state where the program is not authorized.
- **Complaints:** How to submit complaints in the state in which the main campus is located or through SARA and how to submit complaints to the appropriate state agency in the student's state of residence (regardless of whether the institution is authorized by SARA).
- **Adverse Actions:** Any adverse action taken by a state or accrediting agency against a distance education program for the previous five calendar years.
- **Refunds:** Policies that the institution is required to comply with for any state in which the institution enrolls students (Note: even when the institution participates in SARA, the institution must follow individual state refund policies).
- **Licensure Requirements:** The applicable state licensure or certification requirements for a career a student prepares to enter, and whether the program meets those requirements (or a statement that the institution has not made such a determination with respect to a state).



General Disclosure Requirements

- **Making the General Disclosures**

- The Department declined to mandate any particular requirements about how these disclosures must be provided to students.
- Institutions can comply with the disclosure requirement by referring to a non-institutional website, including relevant state professional licensure board websites.
- Guidance issued in Dear Colleague Letter GEN-12-13 applies: make the link accessible from the institution's website and have the link prominently displayed and accurately described. The institution is responsible for ensuring that the link is functioning and accurate.
- “Institutions should not put the burden on the student making the determination about whether the program meets the prerequisites for licensure or certification.” 81 Fed. Reg. at 92250-51.

2016 Rule – Currently in Effect



Individualized Disclosure Requirements

- To each prospective student (prior to enrollment):
 - Any determination that the program does not meet the licensure or certification requirements for a state in which a student resides.
- To each enrolled and prospective student:
 - Any adverse action taken against an institution’s purely online distance education programs, within 30 days of the institution becoming aware of such action.
 - Any determination by the institution that a program ceases to meet licensure or certification requirements for a state in which a student resides, within 14 days of the determination.
- “Prospective student” means an individual who has contacted an eligible institution requesting information concerning admission to that institution.
34 CFR § 668.41.



Disclosure Requirements

- **Making the Individualized Disclosures**

- Must obtain acknowledgement from each prospective student who subsequently enrolls in the program indicating that the student received the pre-enrollment disclosure.
- Acknowledgement can be combined with other acknowledgements (such as in the enrollment agreement).
- Can also be included as an email link acknowledging receipt.



Recapping the Disclosure Requirements regarding Licensure

- Schools must disclose all applicable prerequisites for licensure for professional programs *and* whether the school’s programs satisfy those prerequisites **in each state where students reside**. This applies to programs that “foreseeably lead” to careers that require licensure in a state, “based on how an institution markets a program.”
- Must also disclose prerequisites for licensure/certification for any state for which the institution has made such a determination.
- If an institution has not determined whether its programs meet applicable state prerequisites for licensure, it must publish a statement to that effect.
- If an institution determines that a program does not meet a state’s professional licensure prerequisites, it must disclose that fact **directly to each prospective student** prior to enrollment, and obtain a letter of acknowledgement from any student who subsequently enrolls in the program.
- Must also notify students within 14 days if a program no longer meets a state’s requirements.



Disclosure Requirements

- **Practical Challenge: Tracking Student Residence**

- The disclosure requirements create obligations for institutions to determine an online student's state of legal residence, not just the state where a student may be physically located and to disclose consequences (concerning program authorization) if they move.
- **Institutions must therefore regularly track student's residence and/or confirm their legal state of residence.**
- The student's state of legal residence is:
 - where the student meets the requirements for residency under state law; or
 - an institution may rely on a student's self-determination of the state in which he or she resides unless the institution has information to the contrary.
- **Best way to comply would be requiring students to “declare” or confirm their state of residence prior to enrollment each term.**

NC-SARA on Professional Licensure

SARA Manual § 5.2 (Version 19.2, effective June 1, 2019)

- SARA requires its participating institutions to “keep all students, applicants and potential students who have contacted the Institution about the course or program informed as to whether successful completion of such offerings would actually meet state licensing or post-licensing requirements.”
 - Determine whether the course/program meets professional licensure requirement in state where student/applicant resides; provide information in writing
 - “*After making all reasonable efforts to make such a determination,*” notify student/applicant in writing that institution cannot confirm whether course/program meets state professional licensure requirement; provide current contact information for licensing board(s); advise student/applicant to make own determination

The 2019 State Authorization Rules



34 C.F.R. §§ 600.9, 668.41, 668.43, 668.50

- Final Rule Published on November 1, 2019
- Effective Date of July 1, 2020
- Option for **early implementation**, effective immediately, at the discretion of each institution (effected by memo to file)
- Only minor changes to proposed rule developed at the 2018 negotiated rulemaking
- Clarifies that the term “state authorization reciprocity agreement” includes agreements, like SARA, that limit a state’s ability to impose additional requirements **relating to authorization of distance education**

The 2019 Rule

Overview

- Key takeaways from the 2016 rule vs. the 2019 rule:
 - Authorization of Distance Ed—maintains essentially the same federal requirements for state authorization;
 - Final rule removes ‘CA problem;’ requirement to identify a valid state complaint process as a condition to eligibility (although **institutions** must still maintain a list of complaint agencies);
 - “Residence” vs. “Location” –changes the focus from students’ state of residence to students’ locations for purposes of authorizations and disclosures;
 - Disclosures – Modifies or eliminates many of the required disclosures for distance education programs and shifts some of those disclosures to 34 CFR 668.43 to apply to all institutions **regardless of modality**.



Eligibility Requirements-Definition of State Authorization Agreement

- The 2018 negotiators did not propose to modify the definition of “state authorization reciprocity agreement” to clarify the interaction with state consumer protection laws.
- However, in the final rule, ED clarified in the definitions that a valid state authorization agreement may not prohibit a member state from enforcing its own “general purpose” laws, and in 600.9(c)(ii) it added that reciprocity membership “counts” as state authorization:
- “...subject to any limitations in that agreement and to any additional requirements of that State not relating to State authorization of distance education.”
- Consumer advocates cried foul, claiming this would undercut their efforts to regulate for-profit institutions, but SARA does not restrict states from imposing other consumer protection laws, and never has.
- Warning: Many states do have potentially overlapping laws (e.g. MA, MD, CA), with state AG’s especially targeting for-profit schools.
- While this was more of a technical amendment the effect is still not entirely clear. This is a potential area for litigation.



Residence vs. Location

- Negotiators and ED agreed to modify Section 600.9(c)'s language that institutions receive state authorization for distance education programs when offered to students *residing* in states that the institution is not physically located.
- The new language would require institutions to receive authorization for states based on students' *locations*.
- The location versus residency distinction allows for institutions to avoid the thorny issues under 2016 rules related to determining the state of residency for its students.



Residence vs. Location

- The rule includes new subsections 600.9(c)(1)(ii)(A)-(C) which provide further guidance regarding the determination of a student's location.
 - Subsection A requires that institutions must consistently use the same policies and procedures to determine the state in which a student is located for all of its students.
 - Subsection B requires that institutions must, upon request, provide the Secretary with written documentation of its determination of a student's location and the basis for such a determination.
 - Subsection C requires that institutions make the determination of a student's location at the time of initial enrollment and upon formal receipt from the student of information about a change in that student's location.



Disclosure Requirements

- The 2019 rule significantly modifies the 2016 rule by removing the required disclosures for distance education programs.
- The 2019 rule keeps some of the 2016 disclosures regarding state professional licensure requirements, but the 2019 rule **requires disclosures of all such programs whether online or on ground** (now under Section 668.43).





Disclosure Requirements – the eliminated requirements

- The 2019 proposed rule removes the following disclosures required for distance education programs under the 2016 rule:
 - Whether the institution is **authorized by each state** in which enrolled students **reside**
 - Whether the institution is **authorized through a state authorization reciprocity agreement**
 - Explanation of the consequences, including ineligibility for Title IV, for a **student who changes their state of residence** to a state where the institution does not meet state requirements
 - A description of the **process for submitting complaints**, including contact information for the receipt of consumer complaints at appropriate state authorities or state reciprocity agreement authorities
 - **Adverse actions that state or accrediting agencies** have taken against the distance education program
 - **Refund** policies



Revised Disclosure Requirements – Professional Licensure

- The 2019 proposed rule modifies the 2016 rules for professional licensure requirements disclosures.
- The 2019 rule requires these professional licensure information disclosures **for all programs, both on the ground and distance education.**
- The 2019 proposed rule would require the following general disclosures:
 - A list of all states for which the institution has determined its curriculum **meets** the State educational requirements for licensure or certification.
 - A list of all States for which the institution has determined that its curriculum **does not meet** the State educational requirements for licensure.
 - A list of all States for which the institution **has not made a determination.**
- Note: Different than SARA.



Revised Disclosure Requirements for Professional Licensure – Individuals

- Both the 2016 and 2019 rules require individualized disclosures to enrolled and prospective students in certain situations.
- The 2019 rule requires that institutions send individualized disclosures to prospective students if a program does not meet licensure or certification requirements OR **if the institution has not made a determination** regarding whether the program meets requirements in the state that the student is **located**.
- The 2016 and 2019 rules both require institutions to notify enrolled or prospective students within 14 calendar days of making a determination that a program does not satisfy state requirements for licensure or certifications.
- The 2019 rule removes the requirement from the 2016 rule that institutions provide individualized disclosures to enrolled and prospective students regarding adverse actions initiated by state or accrediting agencies related to distance education programs.
- The 2016 rule requires that institutions receive acknowledgement that students received these disclosures. While the 2019 rule requires that institutions just make the disclosures **directly** to the students **in writing**.

Consumer Disclosures: Practical Considerations

Early implementation

- **Institutions should review revised 34 C.F.R. § 668.43** for compliance, especially if electing to implement the 2019 state authorization rules. 34 CFR 668.43 contains a long list of disclosure obligations, which have now been revised.
- ED modified the proposed language for 668.43(a)(2) from the NPRM. The final rule now indicates that institutions must make a general disclosure regarding enforcement actions and prosecutions **if the final judgement would result in an adverse action** by an accrediting agency, revocation of state authorization, or suspension/termination of Title IV eligibility.
- ED will likely audit compliance with this regulation in program reviews.
- As one of the primary consumer protection provisions in the Title IV rules, disclosures are an area of focus of consumer groups and student advocates.
- Accuracy of information disclosed may be a “sword or shield” in misrepresentation claims under Title IV, state law, FTC actions or in litigation.
- Possible tie-in to borrower defense rules.

The 2019 Rule

Key Takeaways

- Authorization of Distance Ed—maintains essentially the same federal requirements for state authorization;
- “Residence” vs. “Location” –changes the focus from students’ state of residence to students’ locations for purposes of authorizations and disclosures;
- Disclosures – Modifies or eliminates many of the required disclosures for distance education programs and shifts some of those disclosures to 34 CFR 668.43 to apply to all institutions **regardless of modality**;
- Adds certain general disclosures to 34 CFR 668.43;
- Disclosures regarding programs that lead to professional licensure should receive special attention.
- Institutions can opt for early implementation of the 2019 rule by preparing and internally filing a letter documenting the decision to early implement. Otherwise these 2019 rule goes into effect on July 1, 2020.



Part III

Foreign Location
Authorization

Foreign Location Authorization

What we're covering today

- 2016 Rule – Authorization requirements for Title IV-participating U.S. institutions' foreign additional locations and branch campuses

What we're NOT covering today

- Requirements associated with offering online programs to students located in foreign countries
- International dual/joint degree program requirements
- Study abroad requirements
- Requirements that apply to Title IV-participating foreign institutions

2016 Rule: Foreign Location Authorization



34 C.F.R. § 600.9(d); effective July 1, 2018

- For purposes of Title IV eligibility, Title IV-participating U.S. institutions must have legal authorization from the foreign country for foreign additional locations and branch campuses
- Preamble to final rule specifically states that the regulations do NOT apply to:
 - Study abroad or other arrangements whereby students attend less than half of the program at a separate foreign institution
 - Foreign institutions
 - Enrollment of Title IV-eligible distance education students in foreign countries
 - Programs for which the institution does not seek Title IV program eligibility

***The Trump Administration’s 2019 Rule
includes a definition of “additional location” that may affect
the interpretation of this rule.***

Foreign Location Authorization Requirements – § 600.9(d)

Branch campus, or additional location where 50% or more of educational program is offered

- If an institution offers an educational program at a branch campus in a foreign country, or 50% or more of an educational program at an additional location in a foreign country:
 - Branch campus/additional location must
 - Be “legally authorized by an appropriate government authority to operate in the country where the additional location or branch campus is physically located” (except U.S. military bases, facilities, or areas exempt from such authorization)
 - Meet any additional requirements for legal authorization in foreign country
 - Institution must
 - Provide documentation of such legal authorization upon ED’s request
 - Obtain approval from institution’s accrediting agency for branch campus or additional location, as applicable
 - Report foreign branch campus or additional location to institution’s home state at least annually, and comply with any limitation the state places on such locations/campuses
 - If home state limits authorization of institution to exclude foreign branch campus or foreign additional location, ED will not consider the branch campus or additional location to be legally authorized
 - Disclose home-state complaint process to enrolled and prospective students

Foreign Location Authorization Requirements – § 600.9(d)

Additional location where less than 50% of educational program is offered

- If an institution offers less than 50% of an educational program at an additional location in a foreign country, the institution must:
 - “[M]eet the requirements for legal authorization in that foreign country as the foreign country may establish”
 - Disclose home-state complaint process to enrolled and prospective students
 - If home state limits authorization of institution to exclude foreign additional location, ED will not consider the additional location to be legally authorized

Term of art: “additional location”

2016 Rule

- “[A]ny location of an institution that is geographically apart from the main campus and does not meet the definition of a branch campus.” 81 Fed. Reg. 92232, 92241 (Dec. 19, 2016).

2019 Rule (does not address § 600.9(d))

- “A facility that is geographically apart from the main campus of the institution and **at which the institution offers at least 50 percent of a program** and may qualify as a branch campus.” 84 Fed. Reg. 58834, 58914 (Nov. 1, 2019).

How might this affect the foreign location authorization requirements related to an additional location where less than 50% of the educational program is offered?

Questions?

Hogan Lovells Presenters



Greg Ferenbach

Counsel

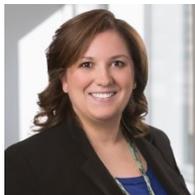
Education Practice
Washington, DC
T 202 637 6457
Greg.ferenbach@hoganlovells.com



Megan Masson

Associate

Education Practice
Washington, DC
T 202 637 7565
Megan.mason@hoganlovells.com



Michelle Tellock

Senior Associate

Education Practice
Washington, DC
T 202 637 6561
Michelle.tellock@hoganlovells.com



Ray Li

Associate

Education Practice
Washington, DC
T 202 637 4858
Ray.li@hoganlovells.com



www.hoganlovells.com

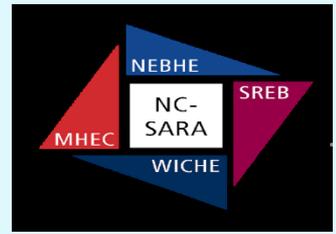
"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing.. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

Resources



For Questions: Info@nc-sara.org

NC-SARA Website: www.nc-sara.org