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AUTHORS

CANDACE R. MCLAREN

AMY E. MCCALL

JOSHUA W.B. RICHARDS

Strategies for Dealing with the Title IV Ineligibility of CA-Resident Students Under the Retroactive Distance Education Rule

SUMMARY

On Monday, July 22, 2019, the Federal Student Aid Office of the U.S. Department of Education (ED) announced that the Distance Education Rules that were originally scheduled to go into effect on July 1, 2018, and were then subsequently delayed to July 1, 2020 were, as the result of a court decision, in effect immediately retroactive to May 26, 2019. Among other things, these Distance Education Rules require that states have a complaint process for in-state students to make complaints about out-of-state distance education programs. California does not have a compliant complaint process for non-profit and public schools (but does have a compliant complaint process covering for-profit programs). Thus, students of distance (online and correspondence) programs who reside in California and attend public and non-profit schools located outside of California are no longer eligible to receive Title IV aid. While we have every reason to believe that the situation may be remedied through the political process, at this time those California-resident students may not receive Title IV funding for distance education programs at out-of-state public and non-profit schools.

Institutions are understandably concerned and seeking guidance regarding short and mid-term steps to take in the wake of ED's announcement. We recommend that any non-California school that offers distance education (online or correspondence programs) to students resident in California conduct three initial assessments:

1. how many (and specifically which) students who are resident in California are currently scheduled to start distance education programs and have completed FAFSAs for the 2019-20 school year?
2. which California-resident students have received Title IV funding for distance education programs since May 26, 2019? and finally,
3. which California-resident applicants are already in the pipeline for distance education programs?

The answers to these questions will allow schools to determine the level of the risk, and their tolerance for that risk. Each school will have to make that risk assessment independently.

The risks include, but are not limited to:

- A lengthy political process to reach resolution of this matter;
- Losing enrollment due to CA-resident students turning to programs where they are certain to be Title IV funding eligible;
- Permitting CA-resident students to continue in programs and being unable to recover Title IV funding or alternative funding from those students; and
- Public relations backlash from notifying CA-resident students of their obligation to pay for their programs in full.

There are many possible political solutions to this conundrum. California may designate a complaint mechanism for those students of out-of-state public and private non-profit universities (a possible short-term solution) or may choose to join NC-SARA (a longer term solution and unlikely given California's reluctance to join NC-SARA to this point). ED may find a legal work-around through its rule making authority, or might choose a different enforcement date for the regulations now effective as of May 26, 2019.

But for now, Title IV aid cannot be lawfully provided to California residents attending distance education programs at schools not resident in California. Because of the retroactive nature of ED's announcement, it is likely that many schools have already distributed Title IV aid to students who are now deemed ineligible. While a technical violation, our current recommendation is to assess which students may have been affected in order to be prepared to handle this situation in whatever way ED determines appropriate in the future, but not take action in the immediate aftermath of ED's July 22 announcement. We recognize that the complicated nature of on-line terms makes this an ongoing issue. For the immediate time being, we recommend not processing new Title IV funding requests for those students made ineligible by this retroactive implementation of the Distance Education Rules. Affected students should be made aware that, because of the change in the federal regulations and California's failure to provide a compliant Student Complaint Process, schools must halt processing those students' Title IV aid.

To that end, schools should develop a communications plan in order to inform CA-resident students of any risk that is being passed to them for non-payment of Title IV funds. Notice might be different depending on the status of the student, i.e., a student with one more term or block to complete a program might be treated differently than an applicant. The important thing is to ensure that students receive sufficient information to make informed decisions about the costs of a program. Examples of notice for applicants might include: a banner across distance education pages; notice of the issue when a student proceeds to an electronic application; or an e-mail to students from California who apply. The actual method of notification is not as important as is providing the information to the student or prospective student.

To provide some context as you describe this issue to your institutional colleagues, here is some additional background on how we got here. After the change of administration in early 2017, without the benefit of negotiated rule making, ED announced that the implementation of the Distance Education Rules, originally set for July 1, 2018, would be delayed until July 1, 2020. In the interim, ED engaged in negotiated rule making and has now proposed new distance education rules that are scheduled to go into effect July 1, 2020. These proposed distance education rules do not include the Student Complaint Process requirement.

In its July 22, 2019 announcement, ED stated that, due to the holding of the United States District Court of the Northern District of California in *National Education Association, et al v. Devos*, Case 3:18-cv-05173-LB (D.C.N.Ca. 2019), the 2016 Distance Education Rules were effective retroactively to May 26, 2019. The court's ruling in *NEA v. Devos* is based on ED's failure to engage in negotiated rulemaking as required by the Higher Education Act, 20 U.S.C. § 1098a(b)(2).

While California does not have a Student Complaint Process for public and non-profit, California's Bureau for Private and Post-Secondary Education does take complaints about private for-profit institutions; as such, private for-profit schools can meet the requirements of the Distance Education Rules. ED expressly acknowledged this issue in its July 22nd announcement, stating: "As a result, until California establishes . . . 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." Compliance with the 2016 State Authorization Regulations Q&A, July 22, 2019.

For more information or for questions or assistance relating to this alert, please feel free to reach out to the authors or your regular Saul Ewing Arnstein & Lehr point of contact.

This Alert was written by Candace R. McLaren, a partner in the Firm's Higher Education Practice, Amy E. McCall, counsel in the Practice, and Joshua W.B. Richards, vice chair of the Practice. Candace can be reached at 202-295-6646 or at candace.mclaren@saul.com. Amy can be 412-209-2510 or at amy.mccall@saul.com. Joshua can be reached at 215-972-7737 or at joshua.richards@saul.com. This publication has been prepared for information purposes only.

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