
Updated Guidance from U.S. Department of Education

Regulatory Flexibility Due to COVID-19 National Emergency

On Friday, April 3, 2020, the U.S. Department of Education (“Department”) issued [Updated Guidance for Interruptions of Study Related to Coronavirus \(COVID-19\)](#). This new document updated guidance that the Department originally issued on [March 5, 2020](#), and subsequently supplemented with [COVID-19 FAQs](#) on March 20. We discussed the March 5 guidance and the FAQs in an earlier [Client Alert](#) on March 20.

We emphasize that institutions are being granted a substantial degree of flexibility in these guidance documents, which not surprisingly do not always provide detailed instructions or address every possible question or technical issue. **Institutions are strongly advised to carefully and contemporaneously document every decision they make regarding changes to policies and academic programs in response to the COVID-19 emergency.** This documentation should explain the change in as much detail as possible, including the rationale for the decision and, wherever available, the specific guidance or analysis on which the institution relied in making the decision. This documentation should be retained in a secure, central location so that it will be retrievable in the months and years ahead without regard to staff turnover or technology updates.

Summary of Previous Guidance

The March 5 and March 20 guidance provided institutions with broad authority to move instruction temporarily to a distance education online format without first obtaining any Department approval that might otherwise be required. The guidance initially covered only those students who were already enrolled on March 5 but was extended on March 20 to include students who enroll in payment periods that begin on or before June 1, 2020, including new students. The Department also granted flexibility to accrediting agencies to waive certain of their typical requirements regarding the initiation of distance education programs.

The Department stressed in its March 5 guidance that institutions planning to move courses and programs to online delivery would be expected to comply with the Department’s requirements for distance education. These requirements include ensuring that instructors initiate regular and substantive communication with students, either collectively or individually.¹

¹ The Department provided additional information regarding its expectations for regular and substantive interaction in proposed regulations published on April 2 and discussed in more detail below.

Finally, the Department outlined flexibility given to institutions regarding a number of Title IV processing issues. Among the topics for which regulations were relaxed were leaves of absence, the temporary use of non-standard terms, federal work study payments, potential changes to the academic year, professional judgment, satisfactory academic progress, attendance and Return of Title IV Funds policies, enrollment status changes and NSLDS reporting.

April 3 Updated Guidance

The Department's newest guidance updated several areas of interest to institutions. And, it clarified that the flexibilities outlined in its COVID-19 guidance documents generally remain in effect through June 30, 2020, unless a 2019-2020 award year payment crosses over to the new award year, in which case the effective date is extended to the end of the crossover payment period.

Accommodations for Students

The Department reiterated that its goal is to help institutions accommodate students during the present COVID-19 emergency, although it remains constrained in some areas by statutory requirements. It provided institutions the latitude to adjust their schedules to help students complete terms, without regard to whether such adjustments would convert the calendar to a non-standard term or non-term program, and it relaxed the leave-of-absence requirements for students with COVID-19-related issues.

Distance Education

The Department also restated its earlier guidance regarding the flexibility of institutions to convert programs to distance education delivery and the ability of accrediting agencies to waive their typical distance education review requirements, although it encouraged accrediting agencies to take prompt action to develop new policies and procedures that would allow them to review and approve distance education programs rapidly. The Department again emphasized the importance of regular and substantive interaction with students initiated by instructors and discussed the methods by which instructors can do so, and it reminded institutions that student privacy requirements must be maintained.

With regard to students with disabilities, the Department reiterated the obligation of institutions to provide access to distance education programs to all students and to accommodate students who need academic adjustments or other reasonable modifications "where doing so would not impose an undue burden nor cause a fundamental alteration." The Department recognized the challenge that the current situation imposes and invited institutions to consult with the Office for Civil Rights regarding accessibility issues and questions.

General Title IV Provisions

The Department provided additional guidance and direction on a host of general Title IV provisions. It also noted a number of areas where it continues to review both the CARES Act,

signed into law on March 27, and other aspects of the COVID-19 emergency with the intent to issue additional guidance as it becomes available. Specifically, the Department indicated that new guidance will be forthcoming regarding Return of Title IV Funds requirements, due dates for compliance audits and audited financial statements, various reporting requirements, satisfactory academic progress determinations, and campus-based funding use and allocations.

Regular and Substantive Interaction

As we discussed above, the Department has granted broad flexibility to institutions that have had to close their brick-and-mortar campuses to convert their programs to distance education delivery without going through the normal Department approval process. The Department has emphasized, however, that institutions must comply with the Department's expectations for distance education programs so that the programs remain eligible for federal student aid.

A key element of the Department's requirements is that instructors must initiate regular and substantive interaction with students, whether individually or collectively, using technology described in 34 CFR § 600.2:

Distance education means education that uses one or more of the technologies listed in paragraphs (1) through (4) of this definition to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include—

- (1) The internet;
- (2) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;
- (3) Audio conferencing; or
- (4) Video cassettes, DVDs, and CD-ROMs, if the cassettes, DVDs, or CD-ROMs are used in a course in conjunction with any of the technologies listed in paragraphs (1) through (3) of this definition.

The Department noted that “distance learning does not require the use of sophisticated learning management systems or online platforms, although accreditors may have additional standards.” And, it emphasized that the acceptable technologies include email and telephone.

One aspect of this current definition that has challenged the Department and institutions is the meaning of “regular and substantive interaction,” which is not explained in regulation. On April 2, 2020, however, the Department released a [Notice of Proposed Rulemaking](#) (“NPRM”) outlining proposed regulations regarding distance education that have been in development since a negotiated rulemaking session achieved consensus on a range of topics in April 2019. In this NPRM, the Department proposes to revise the definition of “Distance Education” in Section 600.2 to include its expectations for regular and substantive interaction. The Department's discussion regarding this proposed change is found on pages 10-11 of the NPRM (85 *Fed. Reg.* 18638, 18647-18648, Apr. 2, 2020).

The revised definition of Distance Education as proposed by the Department is provided below in its entirety, including updates to the list of acceptable technology in paragraph (2) and a

proposed new definition of instructor in paragraph (3). Although the definition is proposed rather than final, it was issued following a negotiated rulemaking session that achieved consensus and therefore is likely to be adopted as final. In any case, it provides clear indication regarding the Department's current interpretation of regular and substantive interaction in paragraphs (4) and (5):

Distance education:

(1) Education that uses one or more of the technologies listed in paragraphs (2)(i) through (iv) of this definition to deliver instruction to students who are separated from the instructor or instructors and to support regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.

(2) The technologies that may be used to offer distance education include—

(i) The internet;

(ii) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(iii) Audio conference; or

(iv) Other media used in a course in conjunction with any of the technologies listed in paragraph (2)(i) through (iii) of this definition.

(3) For purposes of this definition, an instructor is an individual responsible for delivering course content and who meets the qualifications for instruction established by an institution's accrediting agency.

(4) For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also includes at least two of the following—

(i) Providing direct instruction;

(ii) Assessing or providing feedback on a student's coursework;

(iii) Providing information or responding to questions about the content of a course or competency;

(iv) Facilitating a group discussion regarding the content of a course or competency; or

(v) Other instructional activities approved by the institution's or program's accrediting agency.

(5) An institution ensures regular interaction between a student and an instructor or instructors by, prior to the student's completion of a course or competency—

(i) Providing the opportunity for substantive interactions with the student on a predictable and regular basis commensurate with the length of time and the amount of content in the course or competency; and

(ii) Monitoring the student's academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

Conclusion

The Department continues to monitor and evaluate the impact of the COVID-19 emergency on institutions of higher education and their students. Additional guidance is expected on a number of topics, including both technical issues and information regarding emergency funding designated for institutions and their students in the CARES Act, and we will provide further updates as warranted.

In the meantime, we reiterate the importance of documenting changes implemented by institutions in response to the current emergency. And, we encourage institutions to contact us regarding any issues or questions that may arise from the Department's guidance, the CARES Act or any other facet of the COVID-19 emergency.

Maynard Cooper is a full-service firm with attorneys experienced in all regulatory and operational aspects of higher education, including federal and state oversight, accreditation, employee and benefits issues, and real estate concerns. We are ready to help institutions of higher education deal with the challenges created by the COVID-19 emergency.

[Roger Swartzwelder](#) advises regionally and nationally accredited institutions of higher education regarding legal, administrative, regulatory and accreditation matters.

This Client Alert is for information purposes only and should not be construed as legal advice. The information in this Client Alert is not intended to create and does not create an attorney-client relationship.