



LoanNotes

COURTESY OF
AMERICAN EDUCATION
SERVICES

2

Administration of
Title IV Aid in Areas
Affected by a Disaster

3

Corrections to Program
Integrity Issues

5

April Dear Colleague
Letters

**Spotlight Coming
Next Month**

Consumer Information and
Disclosure Requirements



American Education Services

Compliance Spotlight: Program Integrity- Ability to Benefit (Part 3)



ADMINISTRATION OF TESTS FOR INDIVIDUALS WHOSE NATIVE LANGUAGE IS NOT ENGLISH AND FOR INDIVIDUALS WITH DISABILITIES

The following article is Part 3 in a series of three articles discussing the regulations governing ability to benefit (ATB). The goal of this series is to review ATB regulations as a whole, including the amendments made as a result of the Program Integrity Issues; Final Rules (34 CFR Parts 600, 602, 603, 668, 682, 685, 686, 690, and 691) published in the Federal Register dated October 29, 2010, and effective July 1, 2011.

INDIVIDUALS WHOSE NATIVE LANGUAGE IS NOT ENGLISH

Under §668.153, schools are required to comply with the below requirements if an individual whose native language is not English, and who is not fluent in English, wishes to do one of the following:

1. If the individual enrolls or plans to enroll in a program conducted entirely in his native language, then the individual must take a test approved under §668.146 and §668.148(a).
2. If the individual enrolls or plans to enroll in a program taught in English with an English as second language (ESL) component, the individual is required to take an English language proficiency assessment approved under §668.148(b) and, before the beginning portion of the program taught in English, a test approved under §668.146.
3. If the individual enrolls or plans to enroll in a program taught in English without an English as second language (ESL) component, or the individual does not enroll in any ESL component offered, the individual must take a test in English approved under §668.146
4. If the individual enrolls in an ESL program, the individual must take an ESL test approved under §668.148(b).
5. If an individual enrolls or plans to enroll in a program taught in the individual's native language that either has an ESL component or a portion of the program will be taught in English, the individual must take an English language proficiency test approved under §668.148(b) prior to beginning the portion of the program taught in English.

Program Integrity- Ability to Benefit (Part 3)

INDIVIDUALS WITH A DISABILITY

The U.S. Department of Education (ED) has eliminated the term “disabled student” from section § 668.142 and replaced it with the term “individual with a disability”. This term includes any person, not just a student, who:

- Has a physical or mental impairment which substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

ED has amended §668.153(b) to state that the school must use a test as described in §668.148(a)(2) or §668.149(a) for any individual with a disability who does not have a high school diploma or its equivalent, who is applying for Title IV, HEA program funds, and who seeks to demonstrate his or her ability to benefit through the testing procedure.

- ✓ Regulation §668.148(a)(2) allows for the test publisher or the State to modify a test used for an individual with disabilities so long as those entities follow the guidelines provided in the “Testing Individuals With Disabilities” section of the Standards for Educational and Psychological Testing; and provide documentation of the appropriateness and feasibility of the modifications relevant to test performance.
- ✓ Regulation §668.149(a) confirms that the Secretary considers any test which is modified, or any instrument that has been scientifically developed specifically for the purpose of measuring the ability to benefit from postsecondary training or education for an individual with a disability, to be an approved test for these purposes provided that the test or instrument measures both basic verbal and quantitative skills at the secondary school level.

REQUIRED DOCUMENTATION

The test administrator must ensure that proper documentation is kept supporting the determination that the individual is an individual with a disability who requires accommodations, including additional time to take the test, or a quiet room for taking an approved test. The documentation must also support why the individual is unable to be evaluated by the use of an approved ATB test.

The required documentation, including a diagnosis and any accommodation requirements if known, may be satisfied by a written determination by a licensed psychologist or physician.

Administration of Title IV Aid in Areas Affected by a Disaster

In light of the recent weather related disasters that have occurred in various parts of the country, we would like to remind schools of Dear Colleague Letter (DCL) GEN-10-16: “Guidance for helping Title IV participants affected by a major disaster”, released by the U.S. Department of Education (ED) on August 23, 2010. This DCL provides schools with guidance on how to address the administration of Title IV student assistance programs in areas affected by a “major disaster” as defined in The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122(2)).

Guidance is provided for regulatory relief to students, schools, lenders, guaranty agencies, and servicers. Unless otherwise stated, this regulatory relief guidance applies to all recipients of Title IV aid and their families who, at the time of the disaster, were living in, employed in, or attending a school located in a federally declared disaster area in the United States.



[Click here to view the DCL in its entirety.](#)

Corrections to Program Integrity Issues

The U.S. Department of Education (ED) published corrections to the Program Integrity Issues in the April 14, 2011 Federal Register. For your convenience, we have compiled all of the corrections into an easy-to-read chart.

[Click here to view the Federal Register in its entirety.](#)

	Page Citation	Regulatory Language
Program Eligibility: Clock-to-Credit-Hour Conversion		
1	66857: third column, first paragraph under the "Discussion" section	Remove language: "enrolled in payment periods or assigned to the 2011-12 and subsequent award years."
State Authorization		
2	66858: first column, second paragraph, last sentence of the paragraph labeled as the "Discussion" section	Add language: "While these final regulations do not require the creation of a State licensing agency, a State may choose to rely on such an agency to legally authorize institutions to offer postsecondary education in the State for purposes of Federal program eligibility."
3	66862: chart and accompanying notes	Remove chart and notes: The chart and its notes are removed. A corrected chart and notes has been added to clarify the third column, "A nonprofit institution has a State charter as a postsecondary institution by name." The correct charts accompanying notes can be viewed by clicking here .
4	66862: first column, first sentence of the fourth bullet, under the "Institutions considered legally authorized under amended §600.9:" heading	Add language: "A nonprofit institution has a State charter as a postsecondary institution by name ."
5	66865: beginning in the first column, under the "Changes" section	Remove language: "We have amended proposed Sec. 600.9 to provide that, if an institution is an entity that is established by name as an educational institution by the State and the State further requires compliance with applicable State approval or licensure requirements for the institution to qualify as legally authorized by the State for Federal program purposes, the State may exempt the institution by name from the State approval or licensure requirements based on the institution's accreditation by one or more accrediting agencies recognized by the Secretary or based upon the institution being in operation for at least 20 years."
Written Arrangements		
6	66873, first column, under the paragraph labeled as (2)	Add language: "Whether the commission, bonus, or other incentive payment is provided to any person or entity based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid, which are defined as activities engaged in for the purpose of the admission or matriculation of students for any period of time or the award of financial aid."
7	66876, third column, under the paragraph labeled as (2)	Add language: "Whether the commission, bonus, or other incentive payment is provided to any person or entity based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid, which are defined as activities engaged in for the purpose of the admission or matriculation of students for any period of time or the award of financial aid."
8	66878, first column, in the third paragraph of the "Discussion" section	Add language and remove language: "For this reason, we are making a change to §668.14(b)(22)(ii) to provide that institutions may make payments, including profit-sharing payments, so long as they are not provided to any person who is or entity engaged in student recruitment or admission activity or in making decisions regarding the award of title IV, HEA program funds."

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Corrections to Program Integrity Issues

	Page Citation	Regulatory Language
Written Arrangements (Cont.)		
9	66878, bottom of the first column, first paragraph of the "Changes" section	Add language and remove language: "For this reason, we are making a change to §668.14(b)(22)(ii) to provide that institutions may make payments, including profit-sharing payments, so long as they are not provided to any person who is or entity engaged in student recruitment or admission activity or in making decisions regarding the award of title IV, HEA program funds."
Written Arrangements (Cont.)		
10	66895, third column, first paragraph	Remove language: "If the student has not begun attendance in enough course to establish a half-time enrollment status, the institution may not make a first disbursement of a Direct Loan to the student (34 CFR 685.303(b)(2)(i)), or a second disbursement of Pell Grant funds , although the funds are included as aid that could have been disbursed in the Return of Title IV Funds calculation."
Misrepresentation		
11	66916, bottom of the second column, under the "Discussion" section	Remove the entire paragraph that begins at the bottom of the second column and ends in the third column. Add corrected paragraph: <u>"As noted elsewhere in this preamble, the Department enforces its regulations, including those in subpart F of part 668 within a rule of reasonableness. We strongly believe that the concerns voiced by many commenters have ignored this fact. For this reason, we agree to limit the reach of the ban on making substantial misrepresentations to statements made by any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs or those that provide marketing, advertising, recruiting, or admissions services. We have done this by narrowing the language in Sec. 668.71(b) and the definition of the term misrepresentation. As a result, statements made by students through social media outlets will generally not be covered by these misrepresentation regulations. Also, statements made by entities that have agreements with the institution to provide services, such as food service, other than educational programs, marketing, advertising, recruiting, or admissions services will generally not be covered by these misrepresentation regulations."</u>
12	66917, third column, second paragraph under the "Discussion" section	Add language and remove language: "With regard to the comments who stated that the "capacity, likelihood, or tendency to deceive or confuse" language will be confusing, in general, we have no reason to believe that this language will have any such effect. However, we recognize that the word 'capacity' is subject to a broad range of interpretations, so we have revised the regulations to state that a misleading statement is one that has the tendency or likelihood to deceive or confuse. Moreover, we do not believe that it is necessary to revise the regulations to state that a misleading statement must have both the capacity or tendency and likelihood to deceive because we believe that a statement that has any of the characteristics of the capacity, likelihood, or tendency to deceive or confuse is misleading."
13	66918, first column, under the "Changes" paragraph	Remove language and add language: Changes: None: "We have revised Sec. 668.71(c) to state that a misleading statement is one that has the tendency or likelihood to deceive or confuse."

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Corrections to Program Integrity Issues

	Page Citation	Regulatory Language
668.6 Reporting & Disclosure requirements for programs that prepare students for gainful employment in a recognized occupation.		
14	66950, second column, Sec. 668.8 (l)(2)	Added language: (2) The institution's conversions to establish a minimum number of clock hours of instruction per credit may be less than those specified in paragraph (l)(1) of this section, if the institution's designated accrediting agency, or recognized State agency for the approval of public postsecondary vocational institutions, for participation in the title IV, HEA programs has not identified any deficiencies with the institution's policies and procedures, or their implementation, for determining the credit hours, as defined in 34 CFR 600.2, that the institution awards for programs and courses, in accordance with 34 CFR 602.24(f), or, if applicable, 34 CFR 603.24(c), so long as—
668.14 Program participation agreement		
15	66950, third column, Sec. 668.14(b)(22)(ii)(B)	Add language and remove language: "Profit-sharing payments so long as such payments are not provided to any person who is or entity engaged in student recruitment or admission activity or in making decisions regarding the award of title IV, HEA program funds.
668.58 Interim Disbursements		
16	66957, first column, Sec. 668.58(a)(1)(iii)	Remove language: "Originate a Direct Subsidized Loan, or disburse any such loan proceeds for any previously certified originated Direct Subsidized Loan to the applicant."
17	66957, second column, Sec. 668.58(a)(2)(iii)(B)	Remove language: "Originate the Direct Subsidized Loan provided that the institution does not disburse Subsidized-Stafford-Loan-or Direct Subsidized Loan proceeds.
18	66957, second column, Sec. 668.58(a)(3)(ii)(C)	Remove language: "Originate the Direct Subsidized Loan and disburse the Subsidized-Stafford-Loan-or Direct Subsidized Loan proceeds for the applicant.

April Dear Colleague Letters

During the month of April, the U.S. Department of Education (ED) published several important Dear Colleague letters (DCL). Below is a summary of the DCLs, which can be viewed in their entirety at IFAP.ed.gov.

EDEXPRESS ONLINE TRAINING - RELEASE OF SECOND EDEXPRESS ONLINE TRAINING FOR 2011-2012 MODULE

On April 8, 2011, ED published DCL ANN-11-08: "EExpress Online Training - Release of Second EExpress Online Training for 2011-2012 Module" to announce the availability of the second training module for schools that process PELL and Teach Grant awards in the EExpress software.

[Click here to view the DCL in its entirety.](#)

IMPLEMENTATION OF REGULATORY REQUIREMENTS RELATED TO GAINFUL EMPLOYMENT PROGRAMS

On April 20, 2011, ED published GEN-11-10: "Implementation of Regulatory Requirements Related to Gainful Employment Programs" to provide summary information and operational guidance on State authorization, which is part of the Program Integrity Issues Final Rules published in the Federal Register on October 29, 2010. ED provides guidance on State authorization as it relates to distance education, including correspondence study and online education.

The letter was published in response to school concerns regarding GEN-11-05, which provides guidance on three areas of final regulations: State authorization, incentive compensation, and misrepresentation. Schools and their representatives have expressed concern with seeking and obtaining state authorization for distance education programs. To ensure compliance, schools are instructed to review all of the final regulations regarding program integrity issues published in the Federal Register on October 29, 2010.

[Please click here to read the DCL in its entirety.](#)

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STATE AUTHORIZATION UNDER THE PROGRAM INTEGRITY REGULATIONS



On April 20, 2011, ED published Dear Colleague Letter (DCL) GEN-11-11: "State Authorization under the Program Integrity Regulations" announcing that it will give schools until July 1, 2014 to come into compliance with the State authorization rules that pertain to distance education. (Note: On May 6, 2011, the DCL was amended and rereleased. The statement that was amended from the original release of the DCL is underlined in this article.) Under the distance education requirements, schools that enroll students through online and distance education programs will be required to seek State approval for distance education if the State requires it.

Since releasing DCL GEN -11-05 (dated March 17, 2011), ED has received complaints from schools and their representatives, with respect to difficulties those entities have encountered in receiving State authorization for distance education programs. While State authorization is not a new rule, in the past many schools have sought approval only for their brick-and-mortar institutions.

Under the State authorization regulations, a school may not use Title IV, HEA program funds for an attending student if the state in which the student is located in while receiving instruction has not granted to school State authorization.

SCHOOLS, STATES, AND HIGHER EDUCATION ASSOCIATIONS COORDINATE EFFORTS

ED recognizes that some States are considering modifications or updates to their authorization process to include distance education programs. In addition, some of those changes may be part of a broader effort to coordinate changes and to focus on streamlining the authorization process.

Some schools and higher education associations have been working together to gather information on States' requirements to assist schools in their compliance efforts. In the DCL, Eduardo M. Ochoa, Assistant Secretary for Postsecondary Education, says, "We believe these efforts are valuable and wish to work with the higher education community and States to encourage and support their development."

ED SUPPORTS COORDINATION EFFORTS

ED believes that the clarification and coordination of State laws requires the cooperation of the entire higher education community. ED is interested in working with the community to assist States in their effort to develop model reciprocal agreements, common applications, or other methods States could adopt to support their schools with regulatory compliance. ED welcomes suggestions from schools and associations about how this effort may be undertaken to best meet the needs of schools and States.

STATE AUTHORIZATION REQUIREMENTS DIRECTORY

ED has expressed its commitment to assist schools and States with this effort by developing a directory where States can communicate their authorization requirements. The database is intended to provide schools with a central location to review those requirements and submit the required State authorization applications. Once developed, the directory will be available on ED's Web site.

CLARIFICATION OF ENFORCEMENT

As part of its effort to work with the higher education community, ED has announced that it will not initiate any action to establish repayment liabilities or limit student eligibility for distance education program activities started prior to July 1, 2014 as long as the school has made a good faith effort to identify and obtain the necessary State authorizations prior to that date.

As identified by ED, schools may do one or more of the following as evidence of a good faith effort to identify and obtain State authorization:

- Document that the school is developing a distance education management process to track students' place of residence when engaged in distance education.
- Document that the school has contacted a State directly to discuss programs that the school provides to students in that State and determine whether authorization is required.
- Document that an application for authorization has been submitted to a State, even if it is not yet approved.
- Document that a State application is pending.

STATE LAWS REGARDING AUTHORIZATION

If the State has no applicable law, then the school is not required to take action. However, for schools whose States are in the process of developing new requirements or creating application procedures, those schools are required to seek authorization under the new requirements after they have been established. ED anticipates that schools will be better able to monitor State requirements with the assistance of those associations, States, and schools that are sharing information via the Internet concerning individual State authorization requirements and processes.

[Please click here to read the DCL in its entirety.](#)

IMPACT OF THE DEPARTMENT OF DEFENSE AND FULL-YEAR CONTINUING APPROPRIATIONS ACT, 2011 ON THE FEDERAL PELL GRANT PROGRAM



ED published, on April 27, 2011, DCL P-11-02, "Impact of the Department of Defense and Full-Year Continuing Appropriations Act, 2011 on the Federal Pell Grant Program." The DCL discusses the impact of the recently enacted Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Public Law 112-10) to:

- Federal Pell Grant Program Payment and Disbursement Schedules;
- Changes to the eligibility of students for second Scheduled Awards and changes to awarding a Federal Pell Grant for a 2011 crossover payment period; and
- The 2010-2011 award year.

2011-2012 FEDERAL PELL GRANT PROGRAM PAYMENT AND DISBURSEMENT SCHEDULES

The 2011-2012 Pell Grant maximum award or maximum eligible expected family contribution (EFC) used to develop the payment schedules for the 2011-2012 Payment and Disbursement Schedules, posted to the Information for Financial Aid Professionals (IFAP) Web site on February 1, 2011, are not affected by the Department of Defense and Full-Year Continuing Appropriations Act, 2011. Those schedules remain in effect for the 2011-2012 award year.

PELL GRANT AWARDS

Effective with the 2011-2012 award year, the Department of Defense and Full-Year Continuing Appropriations Act, 2011 repealed the Pell Grant provision that permits an otherwise eligible student to receive more than one Pell Grant in an award year.

2010-2011 AWARD YEAR

Students are still able to receive Pell Grant funds that exceed one scheduled award for the 2010-2011 award year, including the crossover payment period (a payment period that includes both June 30, 2011, and July 1, 2011).

2011-2012 AND SUBSEQUENT AWARD YEARS

Beginning in the 2011-2012 award year, no student will be eligible to receive more than one Pell Grant Scheduled Award. Students whose crossover payment period is assigned to the 2011-2012 award year, as well as any other subsequent payment periods that are in the 2011-2012 award year, will receive payments from their 2011-2012 Scheduled Award.

The earliest a student could be affected by the elimination of the authorization of a second Pell Grant award in a single year is Spring 2012.

ACADEMIC COMPETITIVENESS GRANT (ACG) AND NATIONAL SMART GRANT (SMART GRANT) PROGRAMS

2010-2011 is the last year for students to receive an Academic Competitiveness Grant (ACG) or a National SMART Grant (SMART Grant) program award. Schools are reminded that any ACG or SMART award for the 2011 crossover payment period must be assigned to the 2010-2011 award year.

[Please click here to read the DCL in its entirety.](#)

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Pennsylvania Higher Education Assistance Agency conducts its student loan servicing activities nationally as American Education Services (AES) and FedLoan Servicing.



American Education Services

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