




THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

**TO:** Adult Career and Continuing Education Services Committee

**FROM:** Kevin G. Smith 

**SUBJECT:** Proposed Amendments to Part 126 of the Commissioner's Regulations Relating to Online Educational Marketplaces to Implement Chapter 475 of the Laws of 2016

**DATE:** March 23, 2017

**AUTHORIZATION(S):**



## SUMMARY

### Issue for Decision

Should the Board of Regents amend Part 126 of the Commissioner's Regulations relating to online educational marketplaces to implement Chapter 475 of the Laws of 2016?

### Reason(s) for Consideration

Required by State Statute (Chapter 475 of the Laws of 2016) and Review of Policy.

### Proposed Handling

This proposed rule is being presented to the Adult Career and Continuing Education Services Committee for permanent adoption at the April 2017 Regents meeting. A copy of the proposed amendment is included as Attachment A.

### Procedural History

A Notice of Proposed Rule Making was published in the State Register on January 25, 2017. Supporting materials are available upon request from the Secretary to the Board of Regents. Following the 45-day public comment period required under the State Administrative Procedure Act, the Department received comments from one commenter. An Assessment of the Public Comment is included as Attachment B.

## **Background Information**

Education Law §§ 5001(1) and 5004(3) were amended by Chapter 475 of the Laws of 2016, which was signed by the Governor on November 28, 2016 and became effective immediately. The new law exempts an “online education marketplace” from the requirements for a private school agent certificate. It defines an online education marketplace as a website or internet-based online technology tool with which a licensed private career school or certified English as a Second Language (ESL) school contracts for marketing or advertising services, or services in connection with the collection of tuition and/or fees. These amendments provide a procedure whereby online education marketplaces, and the schools that contract with them, may lawfully conduct such activities without obtaining a private agent certificate pursuant to Education Law §5004, subject to certain conditions enumerated in the new law.

The new law requires the Commissioner to develop and implement regulations in certain areas:

- The new law prohibits an online education marketplace from soliciting, procuring or enrolling any student for instruction in a licensed private career school or certified ESL school, as defined in Commissioner’s regulations.
  - The proposed amendment defines soliciting or procuring as attempting to induce a prospective student to sign an enrollment agreement with a licensed private career school or private career school or certified English as a second language school as defined in section 5001 of the Education Law. It defines enrollment as the execution of an enrollment agreement between a prospective student and a licensed private career school or private career school or certified English as a second language school as defined in section 5001 of the Education Law.
- The new law also requires that upon receipt of any monies collected by an online education marketplace from a prospective student for payment of tuition and/or fees, the prospective student and the licensed private career school or certified ESL school shall execute an enrollment agreement in accordance with the Commissioner’s regulations. If the enrollment agreement is not executed, the monies shall be promptly returned to the prospective student in a timeframe and manner prescribed in the Commissioner’s regulations.
  - The proposed amendment requires that if no enrollment agreement is executed within 30 calendar days of receipt of such monies, the school shall return such monies to the student within 10 days of notification that no enrollment agreement exists.
- If an enrollment agreement is executed, the online education marketplace shall forward the monies received from the prospective student to the licensed private career school or certified ESL school in a timeframe and manner prescribed by the Commissioner in regulations.

- The proposed amendment provides that if an enrollment agreement is executed within 30 calendar days of receipt of such monies, then the online education marketplace shall pay all monies it has received to the school within 10 calendar days of receipt of notification that an enrollment agreement has been executed and, if the agreement is cancelled after execution, which is allowed by existing regulation, then the online education marketplace or school shall refund all monies it has received to the student within 20 days of cancellation.
- The new law also subjects online education marketplaces to the disciplinary mechanisms of Education Law § 5003 if they fail to comply with the requirements of the new law or the Commissioner's regulations, to the extent prescribed in regulations of the Commissioner.
  - The proposed amendment authorizes the Commissioner to take disciplinary action against an online education marketplace pursuant to Education Law §5003 in accordance with the due process procedures set forth in subdivision (b) of section 126.14 of the regulations, except that the Commissioner may impose any of the penalties set forth in section 5003 of the Education Law except those penalties set forth in Education Law §5003(6)(c)(3) and (6)(e).

### **Related Regents Items**

<http://www.regents.nysed.gov/common/regents/files/117accesd1.pdf>

### **Regents action**

Department staff recommends that the Board of Regents take the following action:

VOTED: That Part 126 of the Regulations of the Commissioner of Education, be amended, as submitted, effective April 19, 2017.

### **Timetable for Implementation**

If adopted at the April meeting, the proposed amendment will become effective on April 19, 2017.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 305, 5501 through 5010 and Chapter 475 of the Laws of 2016.

1. New subdivisions (bb), (cc) and (dd) shall be added to section 126.1 of the Regulations of the Commissioner of Education, to read as follows:

(bb) Solicit or Procure means inducing or attempting to induce a prospective student to sign an enrollment agreement with a licensed private career school, private career school or a certified English as a second language school as defined in section 5001 of the Education Law.

(cc) Enroll means the execution of an enrollment agreement between a prospective student and a licensed private career school or private career school or a certified English as a second language school as defined in section 5001 of the Education Law.

(dd) Online education marketplace shall mean a website or other internet-based online technology tool with which a licensed private career school or private career school or certified English as a second language school as defined in section 5001 of the Education Law contracts for marketing or advertising services, or services in connection with the collection of tuition and/or fees, to the extent authorized in section 5004(3) of the Education Law.

2. Subparagraph (i) of paragraph (1) of section 126.10 of the Regulations of the Commissioner of Education, shall be amended to read as follows:

(i) Nonpublicly funded ESL schools shall be exempt from the requirements of this Part and Article 101 of the Education Law, except as provided in this subdivision and

subdivisions 126.1 and 126.18 of this Part and paragraphs (b) and (c) of subdivision (1) of section 5001 of the Education Law, and subdivision (3) of section 5004 of the Education Law.

3. A new section 126.18 shall be added to the Regulations of the Commissioner of Education, to read as follows:

§126.18 Online education marketplaces.

(a) If a prospective student pays all or part of his/her tuition and/or fees to an online education marketplace in connection with such student's enrollment at a school, the prospective student and the school shall execute an enrollment agreement in accordance with section 126.7 of this Part within 30 calendar days of receipt of such monies by the online education marketplace. If an enrollment agreement is not executed within 30 calendar days, then the online education marketplace shall refund all monies received to such prospective student within 40 calendar days of receipt of such monies.

(b) If an enrollment agreement is executed within 30 calendar days of receipt of such monies, as described in subdivision (a) of this section, then the online education marketplace shall pay all monies it has received to the school with 10 calendar days of receipt of notification that an enrollment agreement has been executed. If the enrollment agreement is canceled pursuant to section 126.7(d)(9) of this Part, then the online education marketplace or school shall refund such monies to the student within 20 days of the cancellation of the agreement.

(c) An online education marketplace shall not receive from a prospective student an amount greater than the tuition or fees to be charged by the school to the student.

(d) An online education marketplace shall separately account for monies received from a prospective student for the payment of tuition or fees, and any remuneration and/or compensation received by the online education marketplace from a school in payment for services rendered to such school by the online education marketplace.

(e) A school shall also separately account for tuition or fees transferred to the school by an online education marketplace on behalf of a student in payment of tuition or fees, and any payments made by the school to an online education marketplace for services rendered to the school by the online education marketplace.

(f) Pursuant to section 5004(3)(b)(i)(5) of the Education Law, the Commissioner may take disciplinary action against an online education marketplace pursuant to section 5003 of the Education Law in accordance with the due process procedures set forth in subdivision (b) of section 126.14 of this Part, except that the Commissioner may impose any of the penalties set forth in section 5003 of the Education Law except those penalties set forth in subdivisions (6)(c)(3) and (6)(e) thereof.

(g) An online education marketplace is prohibited from offering advertising/marketing services to an unlicensed private career school or uncertified ESL school.

**8 NYCRR Part 126**

**ASSESSMENT OF PUBLIC COMMENT**

Below is a summary of the comments received since publication of a Notice of Proposed Rule Making in the State Register on January 25, 2017.

**1. COMMENT:**

One commenter suggested the following edits to the proposed amendment relating to the definition of “solicit” and “procure”:

126.1(bb) Solicit or Procure means inducing or attempting to induce a prospective student to sign an enrollment agreement with a licensed private career school, private career school or a certified English as a second language school as defined in Section 5001 of the Education Law. An online education marketplace that advertises, markets and collects fees for participation in classes offered by such schools shall not be considered to be inducing or attempting to induce a prospective student to sign an enrollment agreement for purposes of this Part or Section 5004 of the Education Law. In order for an online education marketplace to be found to be inducing or attempting to induce a prospective student to sign an enrollment agreement with any such school, the online education marketplace must provide a copy of such enrollment agreement to the prospective student or assist a prospective student in completing or signing an enrollment agreement.

**DEPARTMENT RESPONSE:**

The Department believes the current definition of solicit and procure is clear and it means to induce or attempt to induce a prospective student to sign an enrollment agreement. Moreover, Education Law 5001(1)(c) defines an "online education marketplace" as a website or other inter-net-based online technology tool with which a licensed private career school or certified ESL school *contracts for marketing or advertising services, or services in connection with the collection of tuition and/or fees, to the extent authorized in Education Law §5004.*

Therefore, the Department believes that the commenter's suggested edits are unnecessary because the purpose of the statutory exemption for online education marketplaces as set forth in Education Law §5001(1)(c), which includes the *contracting for marketing or advertising services, or services in connection with the collection of tuition and/or fees* may be effected without it.

## 2. COMMENT:

The same commenter suggested the following edits to the proposed amendment defining "enroll":

126.1(cc) Enroll means the execution of an enrollment agreement between a prospective student and a licensed private career school or private career school or a certified English as a second language school as defined in Section 5001 of the Education Law. An online education marketplace that advertises, markets and collects fees for participation in classes offered by such schools but does not execute an enrollment agreement shall not be considered to be enrolling for purposes of this Part or Section 5004 of the Education Law.

## DEPARTMENT RESPONSE

See Response to Comment #1. In addition, enrollment is already prescribed in section 126.7 of the Commissioner's regulations and therefore the Department does not believe that any revisions are warranted.

## 3. COMMENT:

The same commenter suggested the following edits to the proposed amendment governing the fulfillment of an accounting obligation.

126.18(b) If an enrollment agreement is executed within 30 calendar days of receipt of such monies, as described in subdivision (a) of this section, then the online education marketplace shall pay all monies, less its percentage as set forth in its contract with the school licensed under Article 101 of the Education Law, to the school within 10 calendar days of receipt



of notification that the enrollment agreement has been executed. If the enrollment agreement is cancelled pursuant to Section 126.7 (d) (9) of this Part, then the online education marketplace or school shall refund such monies to the student within 20 days of the cancellation of the agreement.

DEPARTMENT RESPONSE:

Education Law §5004(3)(b)(4) provides that a licensed private career school or certified ESL shall separately account for tuition and fees and payments made by the school to an online education marketplace for services rendered to the school by the online education marketplace. Therefore, this provision only relates to the tuition and fees to the school. Any payments made by the school to an online education marketplace for services rendered to the school by the online education marketplace must be separately accounted for, as required under the statute. Therefore, the suggested edits are not necessary.

4. COMMENT:

The same commenter suggested the following edits to the proposed amendment governing discipline of online education marketplaces:

126.8(f) Pursuant to section 5004 (3)(b)(i)(5) of the Education Law, the Commissioner may take disciplinary action against an online education marketplace pursuant to section 5003 of the Education Law in accordance with due process procedures set forth in subdivision (b) of section 126.14 of this Part, except that the Commissioner may impose only those penalties set forth in Section 5003 (6)(a).

DEPARTMENT RESPONSE:

Online education marketplaces should not be accorded different treatment under the Education Law than any other party covered by it. The proposed revisions would unduly limit the Department's reasonable discretion to determine appropriate penalties if

an online educational marketplace violates the law and therefore no revisions are warranted.

5. COMMENT:

The same commenter suggested the following edits to the proposed amendment prohibiting online education marketplaces from offering services to unlicensed or uncertified schools:

126.18(g) An online education marketplace is prohibited from offering advertising/marketing services to an unlicensed private career school or uncertified ESL school. An online education marketplace shall not be offering advertising/marketing services to such schools where such school, through a contract with an online education marketplace, represents and warrants to the online education marketplace that it is licensed. Where an online education marketplace has a contract with this provision, an online education marketplace shall not violate this Part or Section 5004 of the Education Law if it advertises, markets or collect fees from an unlicensed school.

DEPARTMENT RESPONSE:

Education Law §5004(3)(b)(6) is clear that an online education marketplace is prohibited from offering advertising/marketing services to an unlicensed private career school or uncertified ESL school. The proposed edits attempt to restrict the circumstances in which the Department may reasonably determine that a violation of the statutory prohibition referred to has occurred. Therefore, the Department believes that no revisions are warranted.