

TOPIC:

STATUS OF FEDERAL REGULATION OF STATE AUTHORIZATION

INTRODUCTION:

The past few years have seen a flurry of developments in the area of state authorization, especially for distance education programs. In 2010, as part of the “Program Integrity” rulemaking, the U.S. Department of Education (“ED” or “the Department”) issued new regulations governing the state authorization requirements of institutions eligible to receive federal student financial assistance. [\[1\]](#) In 2012, the U.S. Court of Appeals for the District of Columbia affirmed a district court decision vacating the portion of those regulations related to the state authorization requirements for distance education (albeit on grounds easily remedied should the Administration decide to re-implement them).

In the interim, the constant evolution of state authorization requirements has caused significant confusion. At a fundamental level, however, the regulatory landscape is now relatively clear. First, institutions remain subject to underlying state laws that may require authorization for distance education programs independently of any federal mandate. Second, the federal state authorization rules that are unrelated to distance education remain in effect. Indeed, on January 23, 2013, the Department issued a “Dear Colleague” letter reminding institutions that the enforcement stay of the “On-Ground Rule” (discussed further below) would end on June 30, 2013, and that institutions must now comply with them. [\[2\]](#) Third, state authorizing agencies are more active than ever, even as state reciprocity regimes take shape. And finally, the Department has indicated that it may use alternative mechanisms to enforce its “Distance Education Rule” – despite the courts’ elimination of that rule. All of these considerations make a comprehensive state authorization compliance strategy essential to any institution seeking to thrive in the distance education world.

DISCUSSION:

1. Background

For an institution of higher education to be eligible for Title IV federal student financial aid, it must be (1) accredited by an accrediting agency recognized by the Secretary of Education and (2) authorized by a state. [\[3\]](#) Historically, ED has not defined what it means to be “authorized” by a state and many states exercised minimal regulatory oversight over authorized institutions. In general, ED only required that an institution be authorized by the state where it is physically located. This typically meant the state where its main campus was located, and other states where branches or additional locations were physically within the boundaries of those other states. Until recently, whether an institution was required to be authorized to enroll students in distance education programs in a

particular state was not a question that many institutions concerned themselves with. All this changed in late 2010.

2. The Distance Education Rule

On October 29, 2010, ED issued a set of “Program Integrity” regulations. [4] Among other things, these rules required that in order for its students to be eligible for Title IV student financial assistance, an institution must be able to demonstrate to ED that it meets the legal authorization standards of every state in which it operates (the “Distance Education Rule”). [5] The Distance Education Rule deferred to each state’s own definition of what constitutes “operating” in that state and what requirements, if any, each state will impose upon distance education programs. [6] Separately, the new ED regulations provided that, to demonstrate state authorization, and therefore to be eligible for the Title IV programs, each state would be required to have a process in place for the authorization of any institution with a physical campus in that state and a process for the review of any student complaints against institutions (the “On-Ground Rule”). [7] In response to an outpouring of criticism, ED subsequently determined that it would not enforce the Distance Education Rule until 2014 if an institution could demonstrate “good faith” efforts at compliance. [8]

The Distance Education Rule was challenged in court, and in July 2011 the U.S. District Court for the District of Columbia vacated the rule on procedural grounds, holding that the Department did not provide proper notice of the proposed rule change under the federal Administrative Procedures Act. [9] This decision was upheld by the U.S. Court of Appeals for the D.C. Circuit in June 2012. [10] The rulings prevented the Department from enforcing the Distance Education Rule as written, which had essentially linked state authorization requirements for distance education to Title IV eligibility.

3. State Agencies Awakened

The elimination of the Distance Education Rule did not affect any of the underlying state laws. Thus, as a matter of state law, institutions are still obligated to seek authorization in those states that require approvals for distance learning activities. Many states have amended their laws or regulations in response to the Distance Education Rule and some states have become more vigilant in enforcing their requirements as a result of the federal government’s actions.

Since the Distance Education Rule was released in late 2010, over half of the states have revised their laws regarding the regulation of online programs in a variety of ways. Many others are currently considering legislative or regulatory amendments. Quite a few states have also developed or changed their distance education regulatory policies through written (or even verbal) guidance. [11] While there is no clear pattern to these changes, a few states have taken steps to greatly expand their jurisdiction over distance education.

A recent example of a state moving in this direction is Maryland. On May 22, 2012, Senate Bill 843 became law in Maryland. The new law requires institutions to register even purely distance education degree programs with the Maryland Higher Education Commission (“MHEC”). [12] Historically, Maryland had been a “physical presence” state, meaning that it only required institutions with some activity on the ground, for example having a local address or conducting externships, to be authorized by MHEC. The new law expanded MHEC’s jurisdiction to any institution enrolling students into distance education programs, even if they were purely online. While these purely online programs are not subject to as rigorous a regulatory review as those with a physical presence, this was a significant change requiring a substantial application as well as yearly fees and reporting requirements. [13]

4. Further Developments at the Federal Level

Unfortunately, recent court decisions have not ended the uncertainty about the federal role in state authorization. As noted, neither decision precludes ED from re-issuing the rule, and in response to the Court of Appeals decision, ED issued a “Dear Colleague” letter in July 2012 in which it stated that even though it could not enforce the new rule, it was longstanding ED policy that “state authorization extends to students receiving distance education” and that institutions may still be asked to demonstrate any necessary state authorizations “during audits and program reviews.” [14] It remains to be seen whether ED will re-introduce the Distance Education Rule or whether it will seek to enforce its underlying policy through other means, as further discussed below. In any event, the July 2012 “Dear Colleague” letter plainly suggests that ED will continue to push institutions to comply with state law.

There have also been indications that ED may seek to enforce its views indirectly through other agencies. For example, the President’s Executive Order of April 27, 2012 [15] and recent legislation [16] to protect veterans from aggressive marketing by schools direct the Departments of Defense and Veterans Affairs to adopt policies similar to those of ED. As a result, the U.S. Department of Defense has stated that it plans to finalize a Memorandum of Understanding (MOU), which includes a state authorization provision that all participating institutions will be required to sign. Specifically, a Defense Department official has indicated that the MOU is expected to require institutions to be authorized in states “where services will be rendered” if the relevant state agency (or agencies) requires authorization for the institution’s activities. [17] If adopted, this provision would bring back the portion of the state authorization requirements related to distance education that were invalidated by the Court of Appeals in 2012, at least for institutions enrolling students who receive active duty military tuition assistance or recruit on military bases.

5. Possible Alternate Enforcement Mechanisms: The “Where to Complain” and Misrepresentation Rules

Institutions operating distance education programs appear to be enjoying a temporary respite from federal enforcement of state requirements, but it is uncertain how long that informal grace period for “good faith” compliance efforts will last. In particular, institutions should be wary of other new “program integrity” regulations that ED could use as a way to enforce the “spirit” of the Distance Education Rule. Two obvious alternative approaches available to ED are the “Where to Complain Rule” [18] and the “Misrepresentation Rule.” [19]

The Where to Complain Rule requires institutions to disclose to students the complaint agency in every state where students reside. [20] In other words, even if a state does not require an institution to be authorized to enroll students there, the institution still must provide the relevant complaint agency information. The list may be posted on the institution’s website, and the institution may also post a link to a list containing the contact information for all relevant state agencies as long as it is appropriately marked. [21] Importantly, this rule also requires an institution to “make available...upon request” copies of documents describing its accreditation and state authorizations. [22] Compliance with this requirement is easily audited by ED.

The Misrepresentation Rule also presents a significant compliance risk. This rule revised the existing ban on any “substantial misrepresentation.” Such “substantial misrepresentations” now include misrepresentations about the status of the state authorization of a program. [23] Specifically, a misrepresentation includes any “false, erroneous or misleading statements concerning...whether [the program or institution] has been authorized by the appropriate State educational agency.” [24] The regulation goes on to state that this “includes, in the case of a degree that has not been authorized by the appropriate state educational agency...any failure by an eligible institution to disclose these facts in any advertising or promotional materials that reference such degree.” [25] How ED will enforce this provision remains to be seen; but schools plainly need to be careful about

how they reference their state authorizations in catalogs, websites, and advertisements. The potential penalties for violation of the Misrepresentation Rule are severe, including up to a loss of Title IV eligibility. [\[26\]](#)

The Misrepresentation Rule was challenged in the same litigation that resulted in the federal court vacating the Distance Education Rule and the Court of Appeals directed ED to narrow and clarify some elements of the rule; [\[27\]](#) however, these mandated modifications do not affect the rule as applied to state authorization issues.

6. The On-Ground Rule

While the Distance Education Rule has received most of the attention, other aspects of the Program Integrity rules related to state authorization are worth noting. With regard to the On-Ground Rule, [\[28\]](#) as noted above, ED released on January 23, 2013, a “Dear Colleague” letter reminding institutions and state educational agencies that enforcement of the remaining portion of the state authorization regulations will begin on July 1, 2013. [\[29\]](#) Unfortunately, the requirements of the On-Ground Rule are poorly defined, at least for some institutions, which has resulted in further confusion.

The On-Ground Rule contains two requirements that both states and institutions must satisfy: (1) institutions must be sufficiently authorized by a state (commonly referred to as the “home state”), and (2) institutions must be subject to some process in that state for addressing student complaints. Although these regulations technically went into effect in July 2011, ED stayed enforcement until July 1, 2013, because ED recognized that some states would not have sufficient authorization and/or complaint review processes in place by the original deadline. [\[30\]](#) If ED determines that an institution does not hold adequate authorization from a state or is not subject to a student complaint process in that state, the institution could lose Title IV eligibility for students in that state, even if the state law itself does not make it possible for the institution to meet ED’s requirements. Notably, the complaints can be handled either by the state educational agency or some other state regulator, such as the Attorney General. [\[31\]](#)

To date, ED has not officially indicated which, if any, states have regulatory processes that do not allow an institution to comply with the On-Ground Rule. At least two states have amended their laws to ensure that institutions can be adequately authorized in those states. [\[32\]](#) Hawaii also seems to need legislative action to comply with the On-Ground Rule, and the legislature there is currently working to have an authorizing system in place prior to the July 1, 2013 deadline. [\[33\]](#)

The authors of this Note are aware that the Florida Commission for Independent Education and ED officials have been in discussions regarding the sufficiency of Florida’s “Licensure by Means of Accreditation” (LBMA) for purposes of the On-Ground Rule. ED officials have indicated, at least preliminarily, that they do not believe that the Florida LBMA regulations are sufficient authorization for Title IV purposes. This interpretation of the state authorization regulations is both unexpected and alarming because it raises serious questions about the compliance of similar approval processes in other states, some of which are less robust than Florida’s. At a minimum, ED’s recent unofficial interpretation calls into question the sufficiency of the process for at least some institutions in ten additional states: Alaska, California, Georgia, Hawaii, Montana, New Mexico, Oregon, South Dakota, Texas, and Utah.

Official clarification from the Department on the sufficiency of the Florida LBMA – and on the sufficiency of approvals from the ten other states with similar processes (at least for some institutions) – remains critical. One should also note that it is unlikely that such states could revise their laws prior to the July 1, 2013 deadline.

7. A Glimmer of Hope: Reciprocity Agreements

One constructive response to ED's initiative has been an ongoing effort, initiated by the National Council of State Governments, a consortium of distance educators known as the President's Forum, the State Higher Education Executive Officers Association ("SHEEO") and various regional education associations, to develop a state law reciprocity regime by which authorization in one's home state would be respected in other states.

A draft reciprocity agreement, the State Authorization Reciprocity Agreement ("SARA"), has been circulated and efforts to implement it may begin as early as 2014. [34] The current thinking is that the four regional higher education compacts (Western Interstate Commission for Higher Education, Midwestern Higher Education Compact, New England Board of Higher Education, and the Southern Regional Education Board) would be responsible for implementing the agreement in their respective regions. [35] States that elect to participate in the agreement would certify which of their institutions would be eligible for reciprocity. States that do not belong to a regional compact would still be able to participate under a separate certification process.

There are plans to host a joint conference later in 2013 to complete this important work and inform states and institutions about the next steps necessary to implement reciprocity regimes. While reciprocity holds great promise for limiting the number of approvals that may be required, we caution that it may take many years to implement nationally. It also seems unlikely that all states will participate. Progress towards reciprocity, while not a "magic bullet," is a positive development that may deter ED from introducing new distance education enforcement rules.

CONCLUSION:

While ED's ultimate intentions for the state authorization rules remain to be seen, an institution's path forward on state authorization now seems relatively clear. To avoid compliance problems at the federal and state levels, as well as potential student issues, institutions having or anticipating a strong distance education presence must be proactive in developing a comprehensive state authorization strategy. Institutions should determine the jurisdictions where state licensure is required, based on the programs they offer and the activities they conduct, and devise a plan to obtain the necessary approvals. They should also continue to monitor regulatory developments at both the federal and state levels. While reciprocity agreements hold promise for a far simpler regulatory landscape in the future, they will not eliminate all state authorization concerns, and may take considerable time to implement.

ENDNOTES:

1. See Stephanie J. Gold and Elizabeth B. Meers, [NACUANOTE: U.S. Department of Education Program Integrity Rules – Part I: State Authorization, Incentive Payments, and Misrepresentation](#) (June 23, 2011).

2. U.S. Dept. of Educ. "Dear Colleague" Letter (GEN-13-14), Jan. 23, 2013.

3. 20 U.S.C. § 1091; 34 C.F.R. § 600.4.

- [4.](#) 75 Fed. Reg. 66,832-975 (Oct. 29, 2010).
- [5.](#) 34 C.F.R. § 600.9(c).
- [6.](#) See *id.*
- [7.](#) 34 C.F.R. § 600.9(a)-(b).
- [8.](#) U.S. Dept. of Educ. “Dear Colleague” Letter (GEN-11-11), Apr. 20, 2011.
- [9.](#) *Career Coll. Ass’n v. Duncan*, 796 F. Supp. 2d 108, 134 (D.D.C. 2011) *aff’d in part, rev’d in part sub nom. Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012).
- [10.](#) *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 463 (D.C. Cir. 2012).
- [11.](#) Because these “jurisdictional” rules are often vague, their application to a set of facts generally relies heavily on agency discretion.
- [12.](#) Other common physical presence triggers include local advertising, recruiting, and having faculty in the state. How a state defines the term “physical presence” greatly varies. Tennessee, for example, takes the position that a billboard advertising an institution’s programs triggers state authorization requirements.
- [13.](#) See MD. CODE REGS. 13B.05.01 (2012).
- [14.](#) U.S. Dept. of Educ. “Dear Colleague” letter (GEN-12-13), July 27, 2012.
- [15.](#) Exec. Order 13,607, “Establishing Principles of Excellence for Educational Institutions Serving Service Members, Veterans, Spouses, and Other Family Members,” Apr. 27, 2012.
- [16.](#) Pub. L. No. 112-249 (H.R. 4057), Jan. 10, 2013 (extending the ED incentive compensation ban to institutions eligible to receive veterans education benefits).
- [17.](#) Carolyn Baker, Chief of Voluntary Educ., Dep’t of Def., Military Cmty. & Family Policy Office, “DOD Memorandum of Understanding the Implementation of the Principles of Excellence” (EO 13607) at the Nat’l Ass’n of Veterans Program Adm’rs Annual Conference (Oct. 10, 2012).
- [18.](#) 34 C.F.R. § 668.43(b).
- [19.](#) 34 C.F.R. § 668.71-75.
- [20.](#) 34 C.F.R. § 668.43(b).
- [21.](#) U.S. Dept. of Educ. “Dear Colleague” Letter (GEN-12-13), July 27, 2012.
- [22.](#) 34 C.F.R. § 668.43(b).
- [23.](#) 34 C.F.R. § 668.72(n).
- [24.](#) *Id.*
- [25.](#) *Id.*
- [26.](#) 34 C.F.R. § 668.71(a)(1). In *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d at 463, the D.C. Court of Appeals held that ED could not use this rule to revoke an institution’s Title IV

eligibility without some level of due process; however, the Court did not alter ED's ability to issue such a punishment if it did so with adequate due process.

[27.](#) ED has yet to issue any additional guidance or new regulations to address the court's concerns.

[28.](#) 34 C.F.R. §600.9(a) and (b)

[29.](#) U.S. Dept. of Educ. "Dear Colleague" Letter (GEN-13-14), Jan. 23, 2013.

[30.](#) 75 Fed. Reg. 66,863.

[31.](#) 75 Fed. Reg. 66,865-66.

[32.](#) Utah amended its process for accredited institutions in 2011. Utah S.B. 210 (effective May 10, 2011). South Dakota, which did not previously have an authorization process, developed one in 2012. South Dakota S.B. 191 (signed Mar. 2, 2012).

[33.](#) Hawaii S. B. 46 (2013) and H. B. 1200 (2013), *available at* http://www.capitol.hawaii.gov/session2013/Bills/HB1200_.HTM (last visited Feb. 19, 2013).

[34.](#) A working draft of the agreement, dated August 2012, is *available at* http://presidentsforum.excelsior.edu/meetings/12-10-3_docs/SARA_August_2012_Draft.pdf (last visited Feb. 14, 2013).

[35.](#) The most recent draft of the "Implementation of SARA" from September 2012 is *available at* <http://wcet.wiche.edu/wcet/docs/state-approval/san-mtg-10-31-12/WSARADRAFT-Sept25DrafttoSteeringCommittee.pdf>.

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RESOURCES:

- [NACUA Resource Page: State Authorization Rule](#)
- [State Higher Education Executive Officers \(SHEEO\) Resource Page: State Authorization of Postsecondary Education](#)
- [Higher Education Compliance Alliance Resource Page: Program Integrity Rules](#)

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