

Federal and State Regulations on 'State Authorization' of Distance Education

Where is the history of the federal regulation?

October 2010 – The U.S. Department of Education (USDOE) released its regulation (see box on right) requiring institutions to document that they had the proper approval to serve students in other states. Subsequently, the USDOE issued two 'Dear Colleague' letters to help clarify the regulation.
<http://edocket.access.gpo.gov/2010/pdf/2010-26531.pdf> p. 66866

July 2011 – The U.S. District Court of the District of Columbia 'vacates' the regulation on procedural grounds. A hearing on the USDOE's appeal of this decision took place in February 2012. A ruling is expected mid-2012. Even if they lose, they can reissue the regulation, which would address the court's procedural objections.
https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2011cv0138-28

February 2012 – The U.S. House of Representatives approves HR 2117. If enacted into law, the bill would repeal both the USDOE's state authorization and credit hour regulations. The bill is not expected to pass in the Senate. <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.2117>:

What is the history of the state regulations?

States have the authority to regulate institutions offering education within the state's boundaries, regardless of the educational modality (face-to-face, online, other) being used. States regulations vary from having no regulation to having very strict requirements. Even if you have no physical presence, some states expect you to comply. States with regulations expect that your institution obtains the necessary approvals before advertising or serving students in their state. **Bottom line: The state regulations predate the federal regulation and remain in effect. Neither the court order nor any pending federal regulation changes the fact that institutions are expected to follow state laws.**

What are institutions required to do?

Institutions must comply with any applicable state approval or licensure requirements in each state in which it 'operates.'

What does "operating," "physically located," or "physical presence" in a state mean?

These definitions vary greatly from state to state. For some states, very few institutions will need to apply. For a small number of states, almost every institution will need to apply.

The State Authorization Regulation Chapter 34, § 600.9(c)

"If an institution is offering postsecondary education through distance or correspondence education to students in a State in which it is not physically located or in which it is otherwise subject to State jurisdiction as determined by the State, the institution must meet any State requirements for it to be legally offering distance or correspondence education in that State. An institution must be able to document to the Secretary the State's approval upon request."

e-CFR: <http://tinyurl.com/47vxesx>

In the majority of states, the need to seek authorization depends on the specific combination of that state’s laws and the activities that the institution is conducting in that state. For some states, if all you are doing in the state is offering distance education courses, you will not need to apply. However, if you are also conducting any one of a list of “trigger” activities (i.e., advertising in local media, using direct advertising, requiring local proctors, employing faculty or marketers in that state), you could be required to apply. The list of “trigger” activities varies by state.

Is there a state-by-state list of regulatory agencies?

Based on work by WCET, the Southern Regional Education Board, the American Distance Education Consortium, and the University of Wyoming, the State Higher Education Executive Officers organization has the most current information. Their website includes agency profiles of more than 80 agencies, a listing of student complaint links, and a summary of fees. <http://www.sheeo.org/stateauth/stateauth-home.htm>.

What about reciprocal agreements between states?

The Presidents’ Forum of Excelsior College and the Council of State Governments are working on a model agreement to address this issue. Draft language is expected to be available for public comment in late April 2012. Most states will need to change some regulations if they wish to participate. If legislatures act during their 2013 legislative sessions, institutions will first see relief in the summer of 2013 and only in those states that choose to join the reciprocal agreement.

The regional higher education compacts (WICHE, SREB, NEBHE, and MHEC) are considering their role in developing and implementing any reciprocal agreement. The Southern Regional Education Board’s (SREB) Electronic Campus agreement is being updated to address this issue for public and non-profit institutions. It is unclear if all the Southern states will join the agreement.

What if we do not comply?

If the federal regulation is reinstated, institutions found not to be in compliance will be asked to reimburse federal financial aid funds for students in the non-compliant states. For state regulations, there are often cease-and-desist orders and fines. The greatest weapons for state regulators may be in using the media to notify students in their state and policymakers in your state that your institution is out-of-compliance. Students could file lawsuits against institutions that have not received the proper local approval and did not notify the student. Institutions may run afoul of the U.S. Department of Education’s new “misrepresentation” regulations if an institution does not adequately disclose its approval status to students in a state. <http://tinyurl.com/7zkxbes>

<p>WCET Updates on State Authorization Website with updates: http://wcet.wiche.edu/advance/state-approval</p> <p>WCET blog with updates and recommendations: http://wcetblog.wordpress.com/</p>	<p>Support our work. Join WCET: http://wcet.wiche.edu/contact-us/join-wcet</p> <p>WCET’s State Authorization Team Russ Poulin: rpoulin@wiche.edu Megan Raymond: mraymond@wiche.edu</p>
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