State Authorization for Online Programs

<table>
<thead>
<tr>
<th>Primary statutory cites:</th>
<th>HEA Secs. 101, 102, 485</th>
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<td>Primary regulatory cites:</td>
<td>34 CFR 600.2, Definitions</td>
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<td>34 CFR 600.9, State Authorization</td>
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<td>34 CFR 668.50, Institutional Disclosures for Distance or Correspondence Programs</td>
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For an institution of higher education to be eligible for Title IV funding, it must be accredited by an accrediting agency recognized by the Department of Education; it must enter into an agreement with the Department of Education and meet other agency requirements; and, it must be authorized by a state to offer postsecondary education. Collectively, these three requirements are known as the program integrity triad—a means of oversight and consumer protection for students, families, and taxpayers.

While the statutory provision for state authorization predates the original Higher Education Act of 1965, the Department has historically treated it as a “minimal” requirement. For example, the Department accepted general business licenses as proof of state authorization—meaning that an institution of higher education could receive access to Title IV dollars by obtaining the same status as a liquor store in some states. This minimal treatment by the Department led the state of California to believe that it could eliminate its state authorizing agency for for-profit colleges altogether, without any action by the Education Department affecting those schools’ eligibility for federal financial aid. And it did, in 2007. Moreover, the Department’s attitude toward state authorization caused some states to cede this function to accrediting agencies; California exempted WASC-accredited institutions from state oversight, for instance. This created a gap in the oversight of Title IV funds and illuminated a crack in the triad.

In 2010, the Obama administration sought to address this gap in oversight by clarifying that state authorization was a substantive federal requirement for participation in the federal financial aid programs. As part of that effort, the Department published a final rule that required, in part, that all Title IV-participating institutions be covered by a state-based consumer complaint system and be authorized, by name, to operate in that state. This requirement is known as state authorization of physical locations, or brick-and-mortar state authorization.

In comments to the Department of Education on the proposed brick-and-mortar rule, stakeholders asked for clarification regarding authorization requirements in situations where the institution did not have a physical presence or was offering programs through distance education. As such, the Department included this language in its final rule:

“(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 postsecondary distance or correspondence education in that State.”

In 2011, the distance-education part of the rule was struck down by a court on procedural grounds. While this part of the rule was created in response to public comments, the court said that the Department did not provide sufficient opportunity for notice and comment on this paragraph. The Department held another negotiated rulemaking on state authorization of distance education in 2014, and also added the state authorization of foreign locations to the agenda.

The Department of Education released a final rule on both subjects in December 2016, which would require Title IV-participating institutions to be authorized in every state where they enrolled students in distance-education or correspondence courses, if it were required by the state. Institutions of higher education could meet the requirement through participation in a state authorization reciprocity agreement, an agreement between two or more states that authorizes the college to provide distance- or correspondence education to students who live in the other states covered by the agreements. The Department also clarified that the reciprocity agreement could not prohibit any of the states in the agreement from enforcing their own regulations or laws, whether general consumer protection laws or specific higher-education provisions.

**NC-SARA**

In absence of a federal regulatory provision regarding state authorization and distance education, the National Council for State Authorization Reciprocity Agreements (NC-SARA) was created in 2013 to address the challenges surrounding distance education and the state approval process for institutions that did not have a physical presence in another state. NC-SARA created a new state approval framework through a multi-state reciprocity agreement called the State Authorization Reciprocity Agreement (SARA). Through this agreement, a state would agree to oversee their institutions that offered distance education programs in other participating states. In exchange, other states would do the same for their institutions. To date, 49 states currently participate in SARA, with California the only outstanding state.

But what started off as a solution for online-education complexities soon became a problem for state sovereignty and consumer protections. As part of the reciprocity agreement, participating states were prohibited from having any consumer protections that were targeted at higher education specifically and could only apply consumer protections of “general application,” meaning that a state could only pursue a course of action against a distance education program if it applied to other businesses in the state. And NC-SARA is the sole arbiter of what counts as “general.” The reciprocity agreement also prevents states from treating for-profit institutions differently from public or non-profit institutions. Several state Attorneys General have taken issue with the limit on state sovereignty and NC-SARA’s power as the interpreter of the reciprocity agreement. Moreover, while all states are responsible for policing their own institutions, students may not be able to depend on their own states for protections, and a state’s capacity to take action on behalf of its student may be curtailed by NC-SARA.
NC-SARA’s complaint process is also problematic. Any student enrolled in a distance education program covered by SARA must first file a complaint with the institution itself before involving the institution’s home state. Once the institution has addressed the complaint, the student may then appeal to the institution’s state, not their own. While the student’s state may be able to weigh in or “assist as needed,” the final resolution of the complaint rests with the institution’s state alone. This means that, under SARA, states are prohibited from resolving the complaints of their own residents against outside distance education providers. As some higher education advocates have pointed out, this severely limits states’ ability to protect their own students.

The regulations published in 2016 also required states to have a system in place for resolving complaints from online-education students, consistent with the brick-and-mortar authorization requirements that required a complaint system for the state’s students. And they also required certain disclosures to students about the nature of the program—like how to file a complaint against a program, actions taken against the program by states and accrediting agencies, and whether the program will lead to certification or licensure. As the Department described at the time, this information would “provide enrolled and prospective students with important information that will protect them.”

Those disclosures and the state authorization requirements for online programs were particularly important in light of growing concerns from the Government Accountability Office and the Department’s independent Inspector General about fraud, waste, and abuse of Title IV funds in the distance education space. The Department noted that the rule addressed the problem that “authorization requirements among states may differ, and students may be unfamiliar with or fail to receive information about complaint processes, licensure requirements, or other requirements of authorities in states in which they do not reside.

Delay of the 2016 Final Rule
The final rule governing state authorization of distance education programs was set to take effect on July 1, 2018, giving colleges nearly a year and a half to comply with the requirements of the final rule. However, Secretary Devos published a delay of the 2016 finale rule in the Federal Register on July 3, 2018.

As the basis for the delay, the Department pointed to two letters from organizations that were concerned with the appropriate format for the consumer disclosures, residency determinations for students, loss of Title IV for noncompliance, and consumer complaint system requirements. As several organizations, including New America, pointed out during the fifteen-day comment period, these issues could have easily been addressed through guidance to the covered institutions. In delaying the rule, Secretary DeVos noted that the change would make it more difficult for consumers to access consumer protections.

Present Rulemaking
The Department’s latest round of rulemaking proposes to eliminate all state authorization requirements for online programs, and to eliminate disclosures to students on whether the institution is authorized to operate in other states, complaint procedures, and whether the program will meet licensure requirements where the student lives. Secretary DeVos is, however, seeking comment on how to maintain and improve state authorization reciprocity agreements. This round of negotiations will mark the third rulemaking on state authorization in less than a decade, and the Department’s proposal will have major implications for the students in online programs who often do not realize their state may not be able to protect them from poor-quality and problematic institutions offering online education within its borders.