

State Authorization Across State Borders

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ISSUE

States have always had the ability to regulate institutions conducting instruction or other postsecondary activities in their states. In Fall 2010, a Federal regulation was first released tying institutional and student eligibility for Title IV Federal Financial aid to an institution complying with State laws. Colleges and universities were to be expected to demonstrate compliance with regulations in a State in which the institution is not physically located or is otherwise subject to State jurisdiction. This regulation, 34 C.F.R. §600.9(c), was vacated in 2012 by the Federal courts on procedural grounds. Since that time, attempts to re-establish the regulation have met difficulty reaching a final effective solution. In 2014, a rulemaking panel failed to reach consensus on a proposed rule. A subsequent rule, released in by the Department of Education in 2016, has since been delayed and sent back to rulemaking.

BACKGROUND

Primary Regulatory Reference:

- 34 C.F.R. §600.9(c), as originally released in October 2010, conditions the participation in Title IV financial aid on compliance with state authorization regulations in any state in which the institution offers distance education:

“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. An institution must be able to document to the Secretary the State's approval upon request.”

Other Regulatory References:

2016 Final Regulations:

- 34 CFR §600.2 - Definitions
State Authorization Reciprocity Agreement
- 34 C.F.R. §600.9(c) - State Authorization - (revised language)
- 34 C.F.R. §668.50 - Institutional disclosures for distance or correspondence programs
General
Public disclosures
Individualized Disclosures

History

Based upon the 10th Amendment to the US Constitution, states have always had the ability to regulate institutions conducting post-secondary activities (e.g., enrolling students, marketing, conducting internships, physical location, employees located in a state) in their states. In 2010, the Department of Education built on the state regulations with Program Integrity Rules designed to ensure accountability by institutions who distribute Title IV Federal Financial Aid funds. Among these new rules was a regulation for State Authorization (34 C.F.R. §600.9). Never before had there been a regulation tying institutional eligibility for student financial aid to the college or university possessing the proper approvals in states other than where the institution is physically located.

Proposed regulatory language was released in the summer of 2010, but it only addressed how an institution is deemed legally authorized by the State where the institution is located. The final regulation, published in fall of 2010, included additional language about authorization of the institution offering distance or correspondence education to a student in a State in which the institution is not physically located or is otherwise subject to State jurisdiction. Additionally, the regulation directed that the institution must document the State's approval upon request.

In the 2011 lawsuit Career College Assn d/b/a Association of Private Sector Colleges and Universities v. Arne Duncan, Secretary, US Dept. of Education, a Federal court vacated 34 C.F.R. §600.9(c) on procedural grounds; the Department failed to comply with the Administrative Procedure Act's notice requirement. The Second Circuit Court of Appeals upheld this holding in 2012. These legal setbacks for the Department do not absolve higher education institutions from significant regulatory requirements because individual state legislatures continue to regulate higher education activities taking place within their borders. Additionally, the Court upheld the Department of Education's authority to implement state authorization requirements as a condition for participation in Title IV, provided the department complies with the relevant requirements of administrative law.

Enforcement of the state authorization regulation subsection applying to distance and correspondence education, 34 C.F.R. §600.9(c), was originally set for June 2011, but was delayed for two years once Department personnel realized that most institutions were not able to comply within the original timeline. This deadline became moot when the court vacated the rule.

The Department's subsequent attempts to implement state authorization regulation have failed. In 2014, the U.S. Department of Education included "State Authorization for Distance Education" among the issues to be considered by a new negotiated rulemaking committee, but that committee did not reach consensus. As a result, the Department issued its own regulation in December 2016 that was slated to go into effect July 1, 2018. In June 2018, the new administration announced its intention to delay the effective date of the regulation for an additional two years so that it could be considered by a new negotiated rulemaking committee. The delay is currently in effect but is pending a lawsuit challenging the legality of the delay. The plaintiffs, which are the California Teachers Association and the National Education Association, argued that because the notice of the delay was not published in Federal Register until July 3, 2018--which was two days after the regulation was supposed to become effective--the delay is not legal. In the meantime, institutions are operating under the assumption that the regulations are delayed.

Reciprocity as a Means to Authorization

Another consequence of the 2010 regulation is that it highlighted the difficulties that the patchwork of state laws, which were motivated by the need to protect consumers, created for institutions offering distance education across state lines. The state laws were often written before distance education became as prominent as it is today. Even when the laws fit with modern technology, individual states chose to regulate different activities with varying levels of complexity. The result? Institutions hoping to offer distance education contended with 50 sets of rules--the regulations of their home state and then 49 others.

In 2011, to address this problem, higher education leaders began to develop the State Authorization Reciprocity Agreement (SARA). The resulting interstate agreement acknowledges the traditional roles within higher education's accountability triad. It lays out a framework for state-to-state reciprocity and requires states to approve their in-state institutions for SARA participation (based upon a series of criteria, such as institutional accreditation, financial stability, and agreeing to reporting requirements) and to resolve student complaints. States retain their ability to oversee institutions conducting postsecondary activities in their state, but according to mutually agreed upon guidelines. SARA membership is available to degree-granting postsecondary institutions from all sectors: public colleges and universities; independent institutions, both non-profit and for-profit. Participating institutions agree to follow the [Interregional Guidelines for the Evaluation of Distance Education Programs \(Online Learning\)](#) for best practices in postsecondary distance education developed by leading practitioners of distance education and adopted by the [Council of Regional Accrediting Commissions \(C-RAC\)](#).

In 2014, Indiana became the first state to join SARA, and, as of January 2019, forty-nine states, (plus Puerto Rico, U.S. Virgin Islands, and Washington, DC) have all joined SARA. Almost two thousand institutions are participating in SARA through an initial application and annual renewal process with oversight of the institution by the institution's home state.

The regulations released in December 2016 contained some confusing language concerning the ability of states to enforce their own laws and regulations for postsecondary institutions even if it participated in a reciprocity agreement. This would have, essentially, negated the purpose of any reciprocity agreement. Early in 2017, Secretary of Education Ted Mitchell wrote a letter to WCET and NC-SARA stating that this was not the intent of the Department's language and that state laws could not be in "conflict" with a reciprocity agreement in which it participates.

Location vs. Residence

The Department's 2016 version of 34 C.F.R. §600.9 ([81 FR 92262](#)) would have required institutions to seek authorization in the states in which students reside--not the states in which students take courses or complete field placements for credit. This use of "reside" and "residence" conflict with state laws and common practice. WCET and SAN, in an [August 2017 letter](#) to the Department, shared the following:

"State regulations are focused on oversight of institutions for activities provided in the State. Consequently, to be compliant in each State and therefore offer verification to the Department, the institution must

follow the compliance process required for the activity occurring in a particular State REGARDLESS of the official residency (where the student votes or pays taxes) of the student.”

The Department's use of the term “reside” conflicts with its own previous guidance on which institutions have long relied. For example, see the paragraph from a [2011 Dear Colleague letter](#). While this is an “historical record,” it falls in line with the generally accepted standard of practice mentioned above. The *italicized, red-lettered* emphasis is in the original.

One of the specific issues addressed in DCL GEN-11-05 was State authorization in the context of distance education, including correspondence study and online learning. Under the State authorization regulations, a student that is enrolled in an educational program offered by an institution cannot use Title IV, HEA program funds for that program if the institution the student is attending does not have State authorization in the State in which the student *is located while receiving instruction*. This is true for all educational programs, including distance education. As explained within the preamble to the October 2010 regulations, if a State fails to timely comply with the State authorization requirements at 34 C.F.R. §§ 600.9(a), and (b), for programs other than distance education, an institution may obtain extensions until July 1, 2013, to secure compliance with these State authorization requirements.

Question 20 from a March 2011 Dear Colleague Letter also explains that institutional compliance requires the institution to apply regulations of the state where the student is located while taking distance education courses. Note that the student's official residence is not germane:

Question 20: Does an institution have to identify where a student is located and seek approval from the State before enrolling the student in an online program if such approval is required by that State? What happens if the student moves to another State?

Answer 20: Yes. If a State requires such approval for the provision of distance or online education to students located in the State, a student is eligible for title IV, HEA funds only if the required State approval has been obtained. While the location of the student is initially determined at the time of enrollment in a program, consistent with other determinations of student eligibility, it must also be reevaluated each time an institution makes a new award to a student.

Any subsequent regulation on this topic should abandon this definition of “reside” and use the word “located.”

Professional Licensure Notification

SARA participation by the institution has no effect on requirements that state professional licensing boards (e.g. nursing, teaching, psychology) impose. Institutions that wish to offer, via distance education, programs that traditionally lead to professional licensure must also seek approval by state licensing boards. Imagine a physical therapy graduate student enrolled in an online doctoral program from an Arizona university. She lives in Maryland and hopes to practice there after she graduates. Her Arizona university would have to evaluate the regulations of the state licensing board in Maryland in order to make sure the student would be eligible to sit for a licensing exam in Maryland, where she is located as a student in the program. State licensing board requirements vary state to state and profession by profession, making compliance an onerous task for institutions.

But the consequences for noncompliance are steep. Absence of program approval by the professional licensure board could cause a student to be barred from seeking licensure in a state. Federal regulations direct that in order to participate in Title IV, HEA programs, that the institution must not engage in misrepresentation (34 C.F.R. §668.71). Misrepresentation could include misleading statements or omission of statements for which a person could reasonably be expected to rely to the person's detriment. Additionally, Federal regulations specifically direct that institutions must refrain from misleading students as to whether the program meets requirements to seek a license or participate in the recognized occupation for which the program is represented (34 C.F.R. §668.72(c)).

A Dear Colleague Letter from March of 2011 confirmed that an institution must comply with relevant regulations both from higher education authorities and from professional licensing boards. See question 5:

Question 5: If, for example, in order to offer a diploma in nursing, State law requires a nursing school to be licensed by a State education agency as well as by the State's board of nursing, must the school document both licenses to be eligible for the title IV, HEA student financial assistance programs?

Answer 5: Yes. To be eligible to participate in the title IV and other HEA programs, an institution must be in compliance with all applicable State laws, which include that all requisite licenses are current and in good standing.

Departmental Guidance

The key element of a Federal regulation intending to ensure compliance with State law, which is aimed at protecting consumers, is the correlation to how states regulate out-of-state activities of an institution. Requiring institutions to comply with State laws as a prerequisite for the institution to participate in Title IV Programs is a reasonable protection of Federal financial aid expenditures.

The State process for determining institution oversight is based on geography (i.e. location of activity, rather than the modality) of education. Related to understanding the focus of State oversight is the importance of a regulation plainly defining state reciprocity agreements to provide uniform state oversight as agreed upon by the individual states choosing to participate in the reciprocity agreement. Additionally, a regulation requiring disclosures related to program approval for programs leading to professional licensure must also include language related to the location of the activity. The purpose of the disclosure is to protect the consumer from the pursuit of a program in a location where the program may not meet the necessary prerequisites for licensure or certification where the student is located.

The 2010 Federal regulation, as previously indicated, focused on tying institutional and student eligibility for Title IV Federal Financial aid to an institution complying with State laws. Demonstration of compliance with regulations in a State which the institution is not physically located or is otherwise subject to State jurisdiction was required of the colleges and universities. State oversight of institution activities is part of consumer protection of learners located in the state.

The Federal Courts ruled that the Department of Education had not complied with the Administrative Procedure Act (APA) notice requirement and therefore the ruling to vacate the 2010 Federal Regulation was on procedural grounds. The Court also acknowledged the State oversight as the location of the activity. The court opinion included the description of the original regulation regarding distance education in the following manner: *“The new regulations require online and distance education providers to obtain authorization from States in which their students are located and studying, and not simply from the State(s) in which the schools have physical campuses or conduct classes.”* It appears clear at the time of the original regulation that location was the point for which authorization should be determined.

When the Department of Education released the 2016 version of the Federal Regulation for State Authorization of Distance Education, 34 CFR 600.9 (c), there was implementation difficulty by referring to the student’s “residence” for purposes of institution authorization. To fulfill the intention of the Federal regulation to ensure compliance with State law, the Federal regulation addressing the “residence” of the student is not consistent with State oversight of activities for institution authorization and is not accurate for the consumer protection needed for the student. Activity in the state is the trigger to determine oversight by the State where the activity occurred. Therefore, the state where the student is “located” for the activity of the institution is where the State would consider oversight of the institution and provide protection to the student.

The Department caused confusion over the jurisdictional implications between “residence” and “location” and the manner in which the State’s determine whether oversight is required. A state regulator offered the following explanation of state oversight in a recent publication:

“For most states, the residency status of the student is not a particularly relevant factor. I would suggest that even where regulation is triggered by student enrollment, the state is really focusing on the delivery site. To my knowledge those states do not ask if the person enrolling is a resident just that the person is accessing the education from within that state. Certainly, in Missouri, our oversight process is triggered by the type and level of activity of the educational institution rather than the resident status of the enrolling student.” (Dowd & Poulin, 2018)

CONCERNS

Some states, institutions, and students have a number of major concerns understanding what is required of institutions to engage in activities outside of the home state of the institution in order to be in compliance with States’ laws and Federal regulations.

1. The ability for reciprocity agreements among states to be an alternative to the institution obtaining individual state approval. State authorization reciprocity agreements apply to higher education regulations only and are subject to generally applicable state laws. However, the scope of generally applicable (i.e., apply to any entity doing business in the state) regulations should be contained so that they do not eliminate the utility of the reciprocity agreements. For example, if a state attorney general would be able to enforce the tuition refund regulations of its own state--regardless of the terms that the reciprocity agreement placed on refund policies--then the reciprocity agreement would no longer be useful.
2. Determining whether the Federal jurisdiction is determined by the student’s location or student’s state of residence. States have jurisdiction over the activity located in their state. The Department of Education indicated location in the 2010 version of the regulation and in subsequent guidance that institutions and state regulators have used for years.
3. The institution’s responsibility to notify students about the status of approval by any pertinent professional boards in the state where the student is located. Understanding what type of notice would be required for new students and what is required if there is a change of status or adverse action against the institution.
4. The ability to provide a succinct regulation that will protect students and be reasonable for institutions to comply. Questions arise about creation of a Federal regulation that would approve an institution for purposes of Federal Financial Aid yet violate state law where the

student is located. For example, a Federal regulation that exempts military students would be contrary to state laws in most states.

5. Determining what is expected of the institution when a state does not have a formal complaint process.

PRINCIPLES

The most significant issue related to a State Authorization Federal regulation at this time is the lack of departmental understanding of state regulatory oversight. In its efforts to develop a Federal regulation that corresponds to state regulatory oversight for the purpose of consumer protection, the negotiated rulemaking's Accreditation and Innovation Committee and its Distance Learning and Education Innovation Subcommittee will need to examine and resolve a number of issues.

(1) Federal Aid Eligibility Should Be Tied to Institutions Following State Laws and Regulations.

The Department should return to the objective of the 2010 regulation that simply ties Title IV aid to institutions following state law. Institutions must comply with state law, when applicable, for the activities that occur in the state. An institution's failure to comply with applicable state laws is a violation of that state's laws and the institution will be subject to consequences as designated by the state. A Federal regulation should acknowledge compliance with the state law as the foundation of compliance with the expectations for eligibility for Federal financial aid.

(2) The U.S. Department of Education Recognizes Reciprocity as Pathway to State Approval.

The Department should acknowledge national voluntary interstate reciprocity as a means for institutional compliance with state regulations. Through reciprocity agreements, states do not outsource their compliance to another entity. Instead they agree to change their laws and regulations to match the standards set by the states working together. Any attempt by a Federal regulation to indicate that a state can choose to enforce regulations conflicting with the agreed upon reciprocity agreement, undermines reciprocity. The Federal regulation must clearly direct that states choosing to participate in a reciprocity agreement are bound by the terms of the agreement or institutions from that states are not eligible for the benefits of reciprocity.

a. Reciprocity is an acceptable alternative for individual state approval of an institution.

States vary widely regarding regulatory oversight of activities that occur in their state. Uniformity of state requirements can be managed through reciprocity agreements and states can work in partnership to protect students.

- States vary as to activities subject to oversight, process for approval, renewals, and reporting.
- Reciprocity provides uniformity of approved activities and responsibilities of the institutions.
- Reciprocity ensures consumer protection through required oversight of the designated activities in each state that participates in reciprocity.

b. States that agree to participate in reciprocity agree to change their laws and regulations to match those that are addressed in the reciprocity agreement.

- States volunteer to participate in a national reciprocity agreement.
- States accept the parameters of the reciprocity agreement that creates the uniform oversight of the activities as designated by the agreement.
- Implementing state laws and regulations that conflict with the reciprocity agreement undermines the value and cooperation established in a reciprocity agreement to provide students with flexibility and protection.
- The reciprocity agreement has no effect on state laws not addressed in the agreement.

(3) Authorization is Based on Student Location.

State oversight of an institution's activities is focused on consumer protection of learners located in the state. The 2016 version of the [Federal Regulation](#) for State Authorization of Distance Education, 34 CFR 600.9 (c), caused implementation difficulty by referring to the student's "residence" for purposes of institution authorization. To fulfill the intention of the Federal regulation to ensure compliance with State law, the Federal regulation addressing the "residence" of the student is not consistent with State oversight of activities for institution authorization. Additionally, the focus on "residence" is not accurate for the consumer protection needed for the student and could result in students being directed to state agencies that have no jurisdiction over institution in question. It is imperative that a Federal regulation be consistent with the focus of the State laws in order to protect the student by indicating the location of an activity rather than residence of the student.

a. Residence of the student may be a different state than where the student is located, that is where the student participates in a course or other activity.

- States determine oversight of activities in their state.

- Students may have a residence for purposes of voting and driver's license in a State that is different from the location of the student's activity with the institution (e.g., a student with official residence Virginia may be located in Texas while enrolled in an institution from California. Texas has jurisdiction over the California institution and the student).

b. Authorization is solely based on location and should not be based on modality.

- States regulate activities as stated in the laws and regulations developed by the state legislature.
- Consumer protection is the foundation of the oversight of the activity in the state, not only the modality.
- Focusing on "distance education" in past attempts to create a Federal state authorization regulation has only served to confuse. Federal regulations should simply follow the legal jurisdiction of the student as being within a state (as is covered in 34 CFR 600.9 (a) and (b)), in another state, or in another country.

(4) Requiring notifications for programs leading to professional licensure.

For Licensure Programs, institutions must be required to publish disclosure as to whether the institution's program meets academic requirements for licensure or certification in the location the student participates in the program. Disclosures of professional board approval in the state where the student participates in the program protects the student from completing an academic program only to discover that the program did not meet state requirements. Institutions should only be required to provide notifications for states in which the institution offers an activity or program.

a. Professional licensure disclosures provide consumer protection for students pursuing an academic program for a profession with specified state prerequisites.

- Institutions continue to develop programs and marketing to out-of-state students with online programs that may lead to licensing or certification.
- State licensing boards vary in terms of program approval and prerequisites to obtain a license or certification.
- Institutions often declare that the student should be responsible for determining if the institution meets licensure prerequisites for the out-of-state student, but it is unreasonable for students to be expected to understand the complexities of the state rules and how they apply to each institution's academic program.

- Students may be swayed by the marketing and flexibility of an online program to achieve academic goals of a licensed profession without the experience and understanding of the implications of the varying state licensure board prerequisites that must be met to obtain a license or certification.

b. *The state professional licensure disclosure to the student must be focused on the location of the activity.*

- The student's natural expectation and need for protection arises from the location for which the student participates in the activities of the academic program leading to licensure or certification.
- A Federal regulation requiring disclosures by the institution must include a simple direction to provide a public disclosure whether a program meets the prerequisites in the state where students are located to participate in the program.
- It must be disclosed that if the student relocates to another state to continue or complete the program that the program may not meet state prerequisites for licensure in the new state.
- Additionally, if there are changes to the institution's approval status for a program in a state, students should be notified of that change.

References

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