

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

What is the history of the STATE regulations?

States have long had the authority to regulate institutions offering education within the state's boundaries, regardless of the educational modality (face-to-face, distance, other) being used. States' regulations vary from having no regulation to having very strict requirements. Even if you have no physical presence, a few states still expect you to comply. The definition of "presence" varies widely.

What is the history of the FEDERAL regulation?

October 2010 – The U.S. Department of Education (USDOE) released its regulation (see back of page) requiring institutions to document that they have 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. The USDOE appealed the ruling.

https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2011cv0138-28

June 2012 – The U.S. Court of Appeals affirms the USDOE's ability to issue the regulation, which had been contested by the complainant. The Court upholds the District Court's ruling to vacate the regulation on procedural grounds.

[http://www.cadc.uscourts.gov/internet/opinions.nsf/969CEC5FCB92F81685257A14004F3131/\\$file/11-5174-1377087.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/969CEC5FCB92F81685257A14004F3131/$file/11-5174-1377087.pdf)

July 2012 – USDOE announces it will "not enforce the requirements of 600.9(c), although institutions continue to be responsible for complying with all State laws as they relate to distance education."

<http://ifap.ed.gov/dpclatters/GEN1213.html>

The State Regulations

The state regulations predate the federal regulation and remain in effect. Neither the Court orders nor any pending federal action changes the fact that states expect institutions to follow their laws. States with regulations expect that your institution obtain the necessary approvals before advertising or serving students in their state.

March 2013 – Since July, WCET has sought clarification on several points from the USDOE on their announcement. Since the Court rulings vacated 600.9(c) on procedural grounds, the USDOE could simply reissue the regulations. Will the USDOE re-implement it? The USDOE has not decided, due to leadership openings not yet being filled.

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

These definitions vary greatly from state to state. Many states require almost no institutions to apply for authorization, while others require almost every institution to apply. 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 many 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 (e.g., advertising in local media, using direct advertising, requiring local proctors, employing faculty or marketers in that state, conducting internships or practica in the 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?

The State Higher Education Executive Officers (SHEEO) organization profiles of regulations of more than 70 agencies (some states have more than one).

<http://sheeo.org/projects/state-authorization-postsecondary-education>

What about reciprocal agreements between states?

The Presidents' Forum and the Council of State Governments created a "model" State Authorization Reciprocity Agreement (SARA). Based on that "model," the regional higher education compacts (WICHE, SREB, NEBHE, and MHEC) created an "implementation" version of SARA. The Commission on Regulation of Postsecondary Distance Education is a committee formed by SHEEO and APLU to address authorization issues. In April 2013, they will release a final report. Their report is heavily based upon the work of the other two efforts. All of these groups now support the Commission's document. Reciprocity implementation will be a joint effort of the four regional higher education compacts. See the most recent documents at:

<http://wcet.wiche.edu/advance/state-approval>.

What if we do not comply?

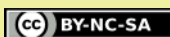
For state regulations, there are often "cease-and-desist" orders and fines. Typically, a state's first steps are to work with the institution to bring it into compliance or to have it stop serving students in a state. Students could file lawsuits against institutions that have not received the proper local approval and did not notify the student.

If the USDOE reinstates its regulation, institutions found not to be in compliance will be asked to reimburse federal financial aid funds for students in the non-compliant states. The USDOE still has its new "misrepresentation" regulation, which requires institutions to disclose its authorization status to students in a state. <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=703a0de3f1a6dccb54976fd595880ac&rgn=div6&view=text&node=34:3.1.3.1.34.6&idno=34>

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The Federal Regulation Chapter 34, §600.9(c) *Now Vacated and Not Enforced*

"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."

WCET Updates on State Authorization

Website with updates:

<http://wcet.wiche.edu/advance/state-approval>

WCET blog with Updates and Recommendations:

<http://wcetblog.wordpress.com/>

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Available online:

<http://wcet.wiche.edu/wcet/docs/talking-points/WCETTalkingPoints-State-Auth-04-08-2013.pdf>

Contact wcetinfo@wiche.edu for information about WCET's Connect, Learn, and Advance agenda, and how to join WCET.