



**State Authorization and Distance Education  
NAICU Background Information  
UPDATED – November 22, 2013<sup>1</sup>**

## **Introduction**

The Department of Education’s program integrity regulations related to state authorization of distance education<sup>2</sup> were struck down on procedural grounds by a federal appeals court on June 5, 2012. In a July 27, 2012, “Dear Colleague” letter, the Department indicated that it would not enforce these requirements.

However, the concern and confusion associated with this issue is far from resolved. There is no longer a threat of a federal penalty for violating the regulation; however, state laws and regulations remain in force. As the July 27 letter notes, “institutions continue to be responsible for complying with all State laws as they relate to distance education.”

In fact, a significant byproduct of this regulatory effort is an increased awareness of the variety of ways in which states regulate distance education and an increased interest in enforcement of these state requirements. Previously, many institutions had given little attention to state requirements related to their distance education offerings.

The confusing array of state requirements has also sparked interest in the development of reciprocity agreements among states. Most notably, work on a State Authorization Reciprocity Agreement (SARA) is well underway.

## **This Document**

This background paper is intended to address the following questions:

- What is the role of the Department of Education now?
- What’s happening with the State Authorization Reciprocity Agreement (SARA)?
- What should institutions be doing?
- What resources are available to assist institutions?

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<sup>1</sup> Previous versions of this paper were issued on [March 1, 2012](#), and [October 22, 2012](#).

<sup>2</sup> The regulatory language that was struck down had provided:

*“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.”* [34 CFR §600.9(c)]

## What is the role of the Department of Education now?

**Regulatory:** The decision not to enforce the regulation does not preclude the Department from addressing the issue in a new regulatory process. In a November 20, 2013, Federal Register notice, Department officials announced that state authorization of distance education programs may be among the topics addressed in negotiated rulemaking sessions scheduled to begin on February 19, 2014. Nominations for membership on this rulemaking committee will be accepted until December 20. (In the public hearings held this spring related to proposed negotiated rulemaking topics, NAICU representatives recommended that the Department not develop federal regulations in this area.)

**Student Disclosures:** The Department *will continue to enforce related regulatory provisions*<sup>3</sup> that require an institution that offers distance education in multiple states to provide students with contact information for filing complaints with the State in which a student is located.

## What's Happening with the State Authorization Reciprocity Agreement (SARA)?

### *A Brief History –*

Over the past year or two, several organizations have worked on the development of a multi-state distance education reciprocity agreement, widely known as the State Authorization Reciprocity Agreement—or SARA.

The initial version was developed by the Presidents' Forum and the Council of State Governments and distributed for public comment in May 2012. The four regional interstate compacts—led by the Western Interstate Commission for Higher Education (WICHE)—held related reciprocity discussions and developed a proposal known as WICHE-SARA. The most important distinction between the two was the governance structure. SARA established a national governance structure, while WICHE-SARA worked through the existing regional structures, with a small national coordinating board.

In April 2013, the Commission on Regulation of Postsecondary Distance Education, headed by former Education Secretary Richard Riley, built upon the previous SARA and WICHE-SARA work.<sup>4</sup> Its [final report](#), *Advancing Access through Regulatory Reform*, serves as the framework for the development of SARA.

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<sup>3</sup> (b) *The institution must make available for review to any enrolled or prospective student upon request, a copy of the documents describing the institution's accreditation and its State, Federal, or tribal approval or licensing. The institution must also provide its students or prospective students with contact information for filing complaints with its accreditor and with its State approval or licensing entity and any other relevant State official or agency that would appropriately handle a student's complaint.* [34 CFR §668.43(b)]

<sup>4</sup> In general NAICU believes that this report is a positive step toward addressing a burdensome regulatory situation. At the same time, we are concerned about a recommendation that relied on the Department's flawed financial responsibility composite scores as a means for determining whether or not an institution is eligible to participate in a reciprocity agreement. For additional detail, see [April 12, 2013 Washington Update article](#).

### ***General Framework—***

Individual states will be able to choose whether or not to join the agreement. A state choosing to participate would become the “***home state***” for institutions domiciled there and would assume responsibility for approving those institutions. The approved institutions then could offer distance education in all other states that are parties to the agreement without being subject to further requirements--unless the institution has a “physical presence” in another state or states.

A key component of the proposed agreement is that “***physical presence***” would be defined as ongoing occupation of a physical location for instruction or administration in a state. Currently, individual states include a wide variety and scope of activities within their definitions of “physical presence.” For example, some states regulate out-of-state institutions that advertise in the state—while advertising does not trigger regulatory action in other states. The current patchwork of requirements makes compliance with applicable state laws difficult and confusing.

Conceptually, if all states participated in such a reciprocity agreement, an institution would need approval only by its “home” state. So, institutions offering only purely online services would be subject to the regulations of just one state. If an institution has a physical presence in more than one state, those other states may regulate the in-state activity of that institution.

Institutions need to be mindful that special conditions will be placed on “***experiential learning opportunities***” (i.e. clinical, practicum, residency, internship). Such activities would not trigger physical presence in a state only if: the institution has already obtained all necessary professional and licensure approvals that may be required by the state in which the activities take place; and if no more than ten students from each institution are physically present at the same time at a single field site.

### ***Current Plans and Activities—***

The four regional education compacts are establishing SARA entities to serve the states within their regions. They will then begin the state approval process. To be approved, a state must demonstrate that it has: (1) an effective institutional authorization process; (2) an effective consumer protection process; and (3) authority to enter into the reciprocity agreement. Once a state has been approved, institutions domiciled in the state can seek authorization for distance education purposes. Additional information is available [here](#).

This effort is still in its early phases, and a number of issues still must be resolved. For example, some states (New York, New Jersey, and Pennsylvania) do not belong to a regional compact. The current plan is to permit them to pay a fee to join a compact solely for purposes of participating in SARA, should they choose to do that.

A 22-member National Council for State Authorization Reciprocity Agreements ([NC-SARA](#)) has been appointed and held its first meeting on November 1, 2013. Arthur Kirk, president of Saint Leo University, who served as the NAICU representative on the Commission on the Regulation of Postsecondary Distance Education, is a member of the national board.

# What Should Institutions Be Doing?

Major actions any institution offering distance education should take include—

## **Activities related to current legal requirements:**

***# 1 – Identify the states of residence of your online students and determine exactly what (if anything) each of those states require.***

There is a confusing patchwork of state laws; and application of these laws may vary based on factors such as the type of institution or the location of students, faculty, and/or facilities. Some states don't regulate distance education at all.

***# 2 --Establish means to track changing circumstances with respect both to state requirements and student location.***

State requirements with respect to distance education change frequently; and an institution must develop a means to keep up with those changes. Likewise, institutions must be able to keep up with the locations of a mobile student population—in the event, for example, that a student moves from a state that does not regulate to one that does.

***# 3 – Comply with expanded student disclosure requirements.***

An institution offering distance education programs to out-of-state students must provide those students (and prospective students) with contact information for filing complaints with *any* relevant State official or entity that would appropriately handle complaints from those students—*whether or not the state in which a student resides otherwise regulates out-of-state distance education providers*. This requirement was included in a different section of the program integrity regulations and remains in force. (See footnote 3 on page 2.)

## **Activities related to interstate reciprocity:**

***Stay top of developments related to the State Authorization Reciprocity Agreement (SARA).***

SARA is generally regarded as the most promising alternative to an institution's needing to determine and comply with the laws of every state in which it has distance education activity. As such, the conditions placed on state and institutional participation in the agreement could have significant impact.

Each of the four regional compacts will establish SARA entities to deal with the states in its region.

## What Resources Are Available to Assist Institutions?

- **State Higher Education Executive Officers (SHEEO).** The [SHEEO website](#) has a large collection of documents related to state requirements and reciprocity efforts. This site includes links to a number of other useful information, including:
  - ✓ [State survey information](#), including a 921-page compendium of state laws and regulatory practices related to distance education (last updated in May 2013) and information about student complaint processes.
  - ✓ [Background documents](#) from the Department of Education and several other organizations about the state authorization regulation. (<http://www.sheeo.org/node/520>)
- **The Cooperative for Educational Technologies (WCET) of the Western Interstate Commission for Higher Education (WICHE).** WCET has done a consistently good job of following developments on this issue, providing pertinent descriptions and analyses of the requirements, and identifying resource materials.
  - WCET's [state approval](#) page.
  - WCET's [blog](#): Russ Poulin has posted several items about state authorization and SARA on the blog.
- **Regional Compacts –**
  - Western Interstate Commission for Higher Education** (<http://www.wiche.edu>): This site provides an overview of SARA and includes a number of links to additional background material. See: <http://www.wiche.edu/sara>.
  - Midwestern Higher Education Compact** (<http://mhec.org/sara>): This site provides information about upcoming meetings and events in the region. In addition, it provides a link to the PowerPoint from a webinar held on November 22, 2013.
  - New England Board of Higher Education** ([www.nebhe.org](http://www.nebhe.org)): Information on the site relating to SARA was last updated on September 16, 2013. See: <http://www.nebhe.org/programs-overview/sara/overview/>.
  - South Regional Education Board** ([www.sreb.org](http://www.sreb.org)): This site includes a news article describing the initiative. Additional information about it has not been posted.
- **Coming Soon.** Website of National Council for State Authorization Reciprocity Agreements: [www.nc-sara.org](http://www.nc-sara.org).