



**State Authorization and Distance Education
NAICU Background Information
UPDATED – June 20, 2012**

Introduction

The Department of Education’s program integrity regulations related to state authorization of distance education¹ were struck down on procedural grounds by a federal appeals court on June 5, 2012.

However, the concern and confusion associated with this issue is far from resolved. While this court action removes the threat of a federal penalty for violating the Department’s regulation, it does not negate state laws and regulations on 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. Up to this point, many institutions had given little attention to state requirements related to their distance education offerings.

The confusing array of state requirements has also sparked renewed interest in efforts to develop reciprocity agreements among states. Most notably, the Presidents’ Forum and the Council of State Governments recently released a draft State Authorization Reciprocity Agreement (SARA), and are soliciting public comments on it.

This Document

This background paper is intended to address the following questions:

- What will the Department of Education do now?
- What should institutions be doing?
- What resources are available to assist with compliance?
- What’s happening with reciprocity discussions and related efforts?

Because the federal regulation is no longer in force, this paper does not discuss either the regulatory guidance issued previously by the Department of Education or the congressional legislation to repeal the regulation. See the [March 1, 2012, version](#) of this background paper for information about those topics.

¹ 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 Will the Department of Education do now?

Department officials indicate that they have not yet determined what they will do in response to the court decision.

One option would be to address the issue in a new regulatory process, since the regulation was struck down on strictly procedural grounds. Both courts ruled that the Department had violated the Administrative Procedures Act by failing to include the distance education requirements in the proposed regulations made available for public comment.

Alternatively, the Department could abandon further efforts to regulate in this area, or could defer action until the issues are further refined by various private organizations examining state distance education policies.

What Should Institutions Be Doing?

Major actions any institution offering distance education should take include—

1 – Identifying its online students’ states of residence.

2 – Determining exactly what a state requires—or if, in fact, it requires anything at all.

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.

3 --Establishing 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.

4 – Meeting 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 the program integrity regulations, and it was not struck down by the courts.

See also: “10 Steps You Can Take To Begin the Authorization Process” (posted May 17, 2012) <http://wcteblog.wordpress.com/2012/05/17/10-steps-to-begin-authorization/> for concise and useful advice about getting started.

What Resources Are Available to Assist with Compliance?

- ✓ **State Higher Education Executive Officers (SHEEO).** The SHEEO website (<http://www.sheeo.org/stateauth/stateauth-home.htm>) includes a large collection of documents related to state requirements, including:
 - ✓ A 768-page compendium of state laws and regulatory practices related to distance education. <http://www.sheeo.org/stateauth/stateauth-agency.htm>
 - ✓ Information about student complaint processes. http://www.sheeo.org/stateauth/Complaint%20Process%20Links_October%202011.pdf
 - ✓ A summary of fees charged by states. http://www.sheeo.org/stateauth/Distance%20Education%20State%20Fees_October%202011.pdf
 - ✓ Webinar regarding State Authorization Survey (April 30, 2012) (“To help address the need for institutions to assure they have legal authority to operate in all the states where they are providing instruction, SHEEO, working in close collaboration with NCHEMS, the National Center for Higher Education Management Systems, developed and administered a survey on authorization practices to all 78 state authorization agencies in the 50 United States, the District of Columbia, and 8 US Territories. . . .In this webinar, staff from NCHEMS and SHEEO briefly discuss the development and administration of the survey, then present a national analysis of a subset of survey results.”) <http://www.sheeo.org/pcn/Topic.aspx?id=1055>
- **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: <http://wcet.wiche.edu/advance/state-approval>
 - ✓ WCET’s blog: <http://wcetblog.wordpress.com/>

What’s Happening with Reciprocity Discussions and Related Efforts?

- The Presidents’ Forum and the Council of State Governments recently released a draft [State Authorization Reciprocity Agreement \(SARA\)](#), and are soliciting public comments on it.

Many details remain to be worked out, but the gist of the proposal is that a national reciprocity agreement would be established, with individual states choosing to join or not. Upon joining, a state would become the “home state” for institutions headquartered there. The home state would assume responsibility for approving these institutions, and that approval would apply to the institution’s operations in other states that are likewise parties to the agreement (“host state”). Conceptually, if all states participated in this agreement, an institution would need approval in only one state - the one in which it is based.

The process would be overseen by a SARA Policy Board, to be financed by fees on institutions operating in member states. Additional fees would be collected from institutions that operate in multiple states; and states themselves may charge fees to their home state institutions.

- On May 23, 2012, the Association of Public and Land-Grant Universities (APLU) and SHEEO announced the formation of the Commission on Regulation of Postsecondary Distance Education. The commission is headed by former Education Secretary Richard Riley, and includes 20 members from academia and state government. Arthur Kirk, president of Saint Leo University, is serving as the NAICU representative. Several members of this group have also been working on the State Authorization Reciprocity Agreement (SARA). For additional information, see: <http://www.aplu.org/page.aspx?pid=2344>.