March 26, 2018

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Ave, SW
Washington, D.C. 20202

Dear Secretary DeVos:

We respectfully ask that you issue guidance clarifying aspects of the 2016 State Authorization of Distance Education and Foreign Locations final rule, namely to address the preferred format for consumer disclosures and residency determinations. These were the same issues identified by three representatives of the distance education community (WCET, NC-SARA, and DEAC) in a letter to the Acting Assistant Secretary of Postsecondary Education, Frank Brogan, earlier this month.

As you know, state authorization is a vital part of the program integrity triad. At its heart, the state authorization requirement recognizes and respects the sovereignty of States. It builds on the foundations of our democratic structure in ensuring a partnership between States and the Federal Government in the oversight of higher education.

The United States Department of Education strengthened this partnership through its state authorization regulations. Essentially, these regulations stated that the Department of Education would not provide taxpayer funding to an institution of higher education that was not approved by a State and ensured that a State would have a way to act on the complaints of its denizens. Given the expanding role of technology in higher education, the Department further clarified the state authorization requirements for institutions seeking to offer programs through distance education. That regulation simply said that an institution offering programs through distance education would only have to obtain state authorization where any State required it. The Department also provided for reciprocity agreements, in which nearly all States participate, and required institutions to provide basic information to States, students, and their families in certain situations.

The final rule was published in the Federal Register nearly fifteen months ago. For more than a year, the distance education community has spent valuable time and resources preparing for compliance with this important rule. Awards have even been given to model programs and institutions.[1] With less than five months until the rule takes effect on July 1, 2018, the Department should do all it can to ensure that those efforts were not in vain, that State sovereignty and students still matter. Departmental guidance clarifying the agency's expectations for institutions on small areas of confusion identified in the letter will help accomplish that goal.

[1] https://wcet.wiche.edu/SANsational%202017

As noted above, the letter to Acting Assistant Secretary Brogan only sought clarification on two administrative issues, which should in no way impede the implementation of this rule. For instance, concerning the residency issue, the Preamble to the final rule states that "an institution may rely on a student's self- determination of the State in which he or she resides unless the institution has information to the contrary." The Department can use this and other language to provide further guidance to institutions seeking to comply with the rule. Additionally, concerning consumer disclosures, the Department should provide guidance to the community that the disclosures should, at a minimum, be prominently posted on program websites in a manner that ensures visibility to both enrolled students and potential students. This guidance will provide flexibility for the community as it presents vital information to students. On the subject of providing such information to students, one of the authors of the recent letter to the Department has stated that it is "the right thing to do."[2] We agree.

Departmental guidance will pave the way for successful implementation of this rule and send a clear message that the Department will not stand in the way of States, nor will it impede efforts to bolster and strengthen consumer protections for students. It is the right thing to do.

Sincerely,

Amy Laitinen
Director, Higher Education Initiative, New America

Yan Cao
Fellow, The Century Foundation

National Consumer Law Center (on behalf of its low-income clients)

Service Employees International Union (SEIU)

CC: Mr. Frank Brogan
Mr. James Manning

[2] https://wcetfrontiers.org/2017/12/04/house-hea/

wcet WICHE Cooperative for Educational Technologies

DEAC DISTANCE EDUCATION ACCREDITING COMMISSION

National Council for State Authorization Reciprocity Agreements
A voluntary, regional approach to state oversight of distance education

February 7, 2018

Frank Brogan
Acting Assistant Secretary of Postsecondary Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Dr. Brogan,

Thank you for the opportunity to meet with you and your team at the U.S. Department of Education. I appreciate your interest and willingness to listen to a discussion about critical issues on accreditation and distance education. To follow up on our discussion on state authorization, my colleagues and I respectfully would like to bring to your attention concerns in the higher education distance education community regarding the USDE's rules on state authorization of distance education set to go into effect July 1, 2018 (34 CFR -- Sections 600 and 668). Those of us who represent major postsecondary distance education organizations receive many questions about implementing the rules. The institutions we represent clearly desire to comply with the rules, but are struggling with how to prepare to do so.

Compliance with the new rules will be a costly and burdensome effort for most colleges and universities that offer distance education. These institutions need a clear understanding of USDE's expectations. Specifically, the rules require institutions to provide (for each state where students are enrolled in distance education programs) public and individualized disclosures of state authorization status for every state, complaint resolution processes for every state, and details on state licensure eligibility for every discipline that requires a license to enter a profession (e.g., teaching, counseling, dietician, nursing). The rules also require institutions to comply with refund policy requirements for each state where students are enrolled, regardless of membership in the State Authorization Reciprocity Agreements. Clarification is needed on the USDE's desired format for the disclosures. Another area of concern is that issue is that the regulation defines "residence" in a way that conflicts with state laws and common practice.

The U. S. House of Representatives' draft of the PROSPER Act would remove those rules and forbid issuing future regulations on the topic. But even if the removal of state authorization is included in future HEA reauthorization legislation, reauthorization is highly unlikely to occur before July 1, 2018, when the rules go into effect. The U.S. Department of Education could (1) delay the rules and submit the issues to additional negotiated rulemaking or (2) issue clarification via a dear colleague letter on USDE's expectations for compliance. A third option would require Congress to take action to delay or suspend implementation. Otherwise, the rules will go into effect, as written, with the potential for broad misunderstandings.

Institutions that know the most about these issues are the most concerned. WCET's State Authorization Network includes 700 institutions. (WCET is an acronym for the WICHE Cooperative for Educational Technologies.) Institutional participation in the State Authorization Reciprocity Agreement (SARA) now includes about 1,750 institutions from the current 48 SARA member states (plus the District of Columbia and the U.S. Virgin Islands). DEAC (the Distance Education Accrediting Commission) accredited institutions are a part of the WCET and SARA communities. Our institutions want to comply with the regulatory environment, but many questions remain.

Thank you for your consideration. If there is any way we can provide assistance or further details, we would be pleased to do so.

Sincerely,

Russell Poulin
Director, Policy & Analysis
The WICHE Cooperative for Educational Technologies

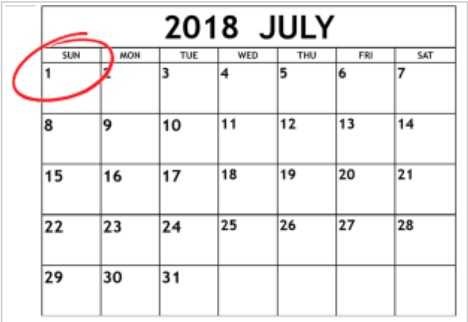
Marshall Hill
Executive Director
National Council for State Authorization Reciprocity

Leah Matthews
Executive Director
Distance Education Accrediting Commission

State Authorization for Distance Ed Federal Regulation to be Implemented 07/01/2018

Frequently Asked Questions: Overview and Direction of the Regulations

The U.S. Department of Education is scheduled to implement state authorization for distance education regulations on July 1, 2018. There is still some uncertainty about whether the Department will implement the regulation and, if they do, what institutions need to do to comply. WCET and its State Authorization Network (SAN), the National Commission for State Authorization Reciprocity Agreements (NC-SARA), and the Distance Education Accrediting Commission (DEAC) have asked for clarification from the Department more than once and through different channels.



This Frequently Asked Questions Document provides an overview of the status and a few recommendations on how to proceed on the following topics:

1. The Status of the Regulations – As Best We Know It.
2. The Federal State Authorization Regulation – What are the Big Outstanding Questions? And What Should We Do?

    Reciprocity.

    Complaints.

    Residence vs. Location.

    Notifications.

More detailed information will be provided to State Authorization Network members.

1. Topic Area: The Status of the Regulation – As Best We Know It

Q: Will this regulation go into effect?

The Department and Congress have had numerous opportunities to kill this regulation. We thought they would have done so by now, if that was their intent. We have received mixed signals about the future of the regulation in recent weeks. On March 30, Politico had a convincing report that "state authorization" was one of a handful of regulations that could be "under review" soon. That would likely delay implementation and result in a rulemaking panel to rewrite the regulation. We think this is a likely outcome, but we also predicted they would have acted on it – one way or the other – by now.

To clarify, neither WCET nor WCET/SAN are recommending a review. We have long believed that complying with state laws and regulations is reasonable.

As an institution, it is important to remember our mantra for the last year, that: "A regulation is a regulation until it is not a regulation." Until we are told otherwise, institutions should expect to comply.

Q: What about the bill in the House of Representatives, the PROSPER Act? Won't that bill do away with this requirement?

The PROSPER Act will not pass, as is.

For a bill to go into effect, it must pass the House, the Senate, and be signed by the President. The House Bill is the product of one party. The PROSPER Act is a first attempt at reauthorizing the Higher Education Act, which covers the basic federal regulations for the higher education / federal government relationship. An update (or "reauthorization") is long overdue. The Senate is working on a bipartisan version of the reauthorization of the Higher Education Act that will likely differ greatly from the PROSPER's provisions.

Since it is an election year and summer Congressional breaks are coming, many pundits believe that if reauthorization does not happen by June or, maybe, July, that it is probably dead for this year. Such action is appearing to be unlikely, but this Congress has had a tendency to suddenly produce bills and hurry them through.

Our current thinking is that reauthorization probably will not happen this year, therefore Congress will probably not change the state authorization regulation.

Q: If Congress does cease requiring federal state authorization, can I stop worrying about state authorization and drop my SARA and WCET/SAN memberships?

No.

Regardless of what the federal government does, the states will still have their regulations and will expect you to comply.

2. Topic Area: The Federal State Authorization Regulation – What are the Big Outstanding Questions? And What Should We Do?

WCET, NC-SARA, and DEAC have submitted to the Department of Education a list of questions that would need to be answered and recommendations on changes that should be made. For some of these items, we have heard trusted experts provide opposing opinions on what colleges are supposed to do to comply with the regulatory language. IF the regulation goes into effect on July 1, below are some of the top issues that should have been addressed long before now…because compliance takes time:

2.a. Reciprocity – Will reciprocity be recognized by the Department of Education as a path to demonstrate compliance in a state?

When the regulation was originally released, it seemed to recognize reciprocal agreements that did prohibit states from enforcing their own laws. Essentially, that would have negated reciprocity since the agreement would lack any enforcement capacity. Shortly after we released our analysis of the new regulation, Department of Education personnel told WCET and NC-SARA staff that we had misinterpreted the meaning of the regulatory language. Instead, they said that their intention was that a reciprocal agreement would not be recognized if there was a "conflict" between state law and reciprocity agreement requirements. Since states joining SARA agree to its provisions, "conflict" is removed before it can join. A letter from the Undersecretary of Postsecondary Education describing this clarification of the Department's intent was sent to WCET and NC-SARA. While this letter does not hold the force of rule, it is our understanding that Department personnel fully support NC-SARA and, if the regulation goes into effect, that this clarification will be codified. It is highly unlikely that the Department would undermine the will of 48 (soon 49) states, the U.S. Virgin Islands, and the District of Columbia.

What Should You Do? Don't' Panic. The Department is very supportive of reciprocity. We expect clarification to be positive for SARA.

2.b. Complaints – Institutions are required to "document" the complaint processes for students in each state, what do we do about states (like California) that do not have a compliant process? Should we stop enrolling students from California?

If a state has joined SARA, then SARA has processes to handle complaints.
California will not join SARA this year and might not next year. California has complaint and oversight processes for out-of-state for-profit institutions, but not out-of-state publics or non-profit institutions. They are aware of the issue, but it will take legislative action to fix it. Such action does not appear to be imminent. This could be a problem if you enroll students in California at a distance.

If you are at an institution that is not a SARA member, there are other states that do not have a complaint process for you. That could be a problem for enrolling students in those states, as well.

What Should You Do?

Some have recommended citing the California Attorney General's office as the handler of complaints. Since that office has openly declined this responsibility, the action might not withstand a financial aid review by the Department of Education.

Both the Department and California officials are aware of the issue. It is our hope and belief that (if the regulation goes into effect) that they will create some type of accommodation so as not to harm students. If they don't we should all scream loudly…very loudly.

We can't give you an absolute answer on this one as too many possible scenarios. We suggest that you:

Count how many distance students that you have or will have in California.

Communicate with your institution's legal counsel.

Determine the level of risk that your institution is willing to assume.

Act accordingly.

Be prepared to act.

2.c. Residence vs. Location – Since state authorization is based upon the location of the student, why does the regulation use "reside" or "state of residence" so often in the regulation?

This is another one on which state authorization experts have differed in their advice. Some have suggested that institutions need to collect the student's official state of residence in addition to location. That's lots of extra work.

During the 2014 Negotiated Rulemaking Marshall Hill (NC-SARA), Leah Matthews (DEAC), and Russ Poulin (WCET) all served as negotiators or alternates. We made sure that all references in the regulations being developed at that time referenced location and not residence. It is too bad that our work was forgotten. We see this as an error in the current regulation and are urging them to correct it.

What Should You Do?

Again, we cannot give you a definite answer, but we should have more clarity soon…we hope.

Assess the amount of work this would take.

Determine the level of risk that your institution is willing to assume.

Act accordingly.

2.d. Notifications – How do we implement the new required notifications?

Institutions are expected to make several public (via websites) or individualized (direct) communication with the student notifications. There are several details that need to be clarified, such as "what exactly is an adverse action," "do SARA institutions report state refund policies," and several questions about notifications for programs that lead to professional licensure or certification.

What Should You Do?

For programs that lead to professional licensure or notification, the requirements are close to those already required by SARA. Also, the lack of proper notifications on these programs has been the leading cause of student lawsuits against institutions, protect yourself.

For SARA institutions, you should review SARA requirements, proceed in determining your program's applicability in any state you will enroll students at distance for that program. Comply with state regulations. Notify students of your status for that program in his/her state.

For institutions that are not a member of SARA, we still think that the threat of lawsuits makes this work worthwhile.

For the other notifications, if you have not implemented them yet, you may wish to wait for clarification. Again, determine the level of risk that your institution is willing to assume.

Finally…

To be clear, institutions should be preparing for the July 1, 2018 regulations, to the best of their ability, until we hear further information. To that end we have attempted to summarize the aspects of the regulation into somewhat of a check list of requirements for you to download. WCET and WCET|SAN are committed to providing information as soon as it becomes available and guiding institutions through whatever we learn in the upcoming months.

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