

**Commission on Regulation of Postsecondary Distance Education:
A Call to Action in Light of Federal and State Legal and Policy Issues and Trends**

***A Working White Paper to Inform Commission Deliberations and Recommendations
June 8, 2012*
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Purpose: This Paper is intended to serve as a working draft for review by Commission members in advance of their first meeting in order to inform discussion at that meeting, and as a foundation for ongoing deliberations.

I. Introduction

The Commission on Regulation of Postsecondary Distance Education [The Commission] was established to develop and provide recommendations that will address the costs and inefficiencies faced by postsecondary institutions that must comply with multiple (often inconsistent) state laws and regulations as they endeavor to provide educational opportunities to students in multiple state jurisdictions. In that context, the Commission will be called upon to address key issues associated with appropriate government oversight, consumer protection, and educational quality related to distance education.¹

This paper has been developed to inform Commission deliberations and ultimate recommendations regarding these important issues. To set the stage for those activities, this paper provides background information regarding the central policy and legal issues and developments that should be considered as the Commission embarks on its mission.

As explained in more detail below, the regulation of distance education is of growing significance as distance education providers work in more than one state—and often in many states. Complexity, confusion and costs of compliance can be reduced if state laws and regulations embody common principles and/or if rules are established that narrow compliance obligations (i.e., requiring compliance with the rules of a single jurisdiction), even as appropriate consumer protection and quality of service are assured.

Indeed, concerns persist regarding possible abuses in the delivery of distance education that may require specific forms of government oversight that is not now being consistently and coherently provided. The current "system"—in which states seek to protect their citizens as consumers (in various ways) and the U.S. Department of Education ("the Department") continues to be engaged in protecting the investment and quality of Pell Grants and student loans through its regulations and compliance activities—lacks an overarching, coherent framework and focus.

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¹ Pursuant to the Commission's initial working definition of "distance education," it will focus on those education opportunities provided for credit by postsecondary institutions across state lines through online education services.

The work of the Commission will be to focus on these issues and to offer grounded and principled recommendations that reflect the core aims of efficiently ensuring high-quality programs and consumer protection in a rapidly changing education landscape.

II. Distance Education Today

Postsecondary distance education programs expand educational opportunities for students by providing a flexible, accessible method to acquire new skills and fulfill degree requirements. Postsecondary institutions increasingly depend on distance education to advance the goals of raising college completion rates and preparing students for 21st-century careers. With over five million students using online technology to access postsecondary courses, distance education has emerged as a viable alternative and supplement to the traditional in-classroom university experience.²

Distance education can provide enhanced and expanded academic options for all students—nearly 30% of college and university students take at least one online course³—with non-traditional students, including military personnel, having especially benefited from the surge in online educational offerings.⁴ A central value for students taking online courses is their ability to tap into an expanded universe of course offerings and find the programs or courses that best meet their interests and schedules, regardless of geographical location. (Institutions providing distance education typically do not limit student enrollment by geographic area.) According to a 2008 survey by the U.S. Department of Education (the "Department"), higher education institutions offered distance education primarily to meet student demands for flexible scheduling and to expand college access for underserved students.⁵ In addition, institutions of higher education appear to focus on the potential of distance learning to address a variety of other student and institutional needs, from student expectations for easy access to curricular materials, to the generation of increased revenues, to the enhancement of their reputation and “brands.”

² I. Elaine Allen and Jeff Seaman, *Class Differences: Online Education in the United States*, Babson Survey Research Group and The Sloan Consortium, November 2010, p. 2.

³ *Id.*

⁴ While federal monitoring and research on distance education programs is in its nascent phase, data collected by the U.S. Government Accountability Office (GAO) shows that distance education is creating educational opportunities for many traditionally underserved students including older students, military personnel, working students, and students with families. U.S. Government Accountability Office, GAO-12-39, *Higher Education: Use of New Data Could Help Improve Oversight of Distance Education* (2011).

⁵ *Id.* at pp. 9-10.

In A Nutshell: Characteristics of Distance Education Students

Demographic trends among students who were enrolled in distance education programs based on 2009-10 national postsecondary data reflect:

- Distance education students are about three years older than students not enrolled in distance courses.
- Women are more likely to be enrolled in distance education than men. Both undergraduate and graduate students in distance courses are more likely to be married and have dependents.
- More students enrolled in distance education work full-time, especially those in graduate programs.
- Students of all races and ethnicities participate in distance education, with white students making up a slightly larger share of students enrolled in distance education compared to all students in higher education.
- Significant numbers of current and former members of the military are involved in distance education: 45% of active duty service members, 29% of reservists, and 30% of veterans enrolled in postsecondary programs. Taken together, these groups represent about 7% of all students who take distance education courses, compared with 4% of all students not enrolled in distance courses.
- About 10% of all students enrolled in distance education have a disability.

Source: U.S. Government Accountability Office, GAO-12-39, *Higher Education: Use of New Data Could Help Improve Oversight of Distance Education* (2011).

In a Nutshell: Characteristics of Distance Education Providers

Distance education has experienced substantial growth in the last seven years and continues to grow faster than overall higher education enrollments. During the 2009-2010 school year, almost half of postsecondary institutions offered distance education courses. Among these institutions, a few trends stand out:

- Public schools are more likely to offer distance programs than private nonprofit or private for-profit institutions.
- Among public schools, two-year institutions are more likely than four-year institutions to offer distance education opportunities.
- Minority-serving institutions (other than Hispanic-serving institutions) are as likely or more likely to offer some distance education than all schools combined.
- While 96% of schools with 20,000 or more students offered distance education, only 23% of schools with fewer than 1,000 students did so.

Sources: 1. Elaine Allen and Jeff Seaman, *Class Differences: Online Education in the United States*, Babson Survey Research Group and The Sloan Consortium (2010); U.S. Government Accountability Office, GAO-12-39, *Higher Education: Use of New Data Could Help Improve Oversight of Distance Education* (2011).

The "borderless" nature of distance education has resulted in many institutions serving students from a large number of states. An institution may have national reach but only serve a small number of students in any given state through online courses. As such, the oversight methods used to monitor traditional on-campus, in-classroom courses may not fully cover the operations of these multi-state distance education providers.

The rapid growth of distance education programs has outpaced the ability of states and the federal government to provide a coherent and comprehensive system of regulation appropriately attentive to issues of consumer protection and quality that, at the same time, reflects the unique features of distance education. One result is that education providers face a morass of individual state regulations with varying degrees of complexity and costs. And the demand that distance education providers operating in multiple states comply with any applicable state requirements for offering postsecondary distance education casts a glaring light on that challenge, and its potential consequences.⁶ The current inconsistent and burdensome regulatory scheme ultimately can act to hinder students' access to valuable postsecondary opportunities if institutions choose to limit their operations to a fewer number of states because of those hurdles—a prospect notably at odds with national postsecondary education goals and national needs.

III. Legal and Policy Background

A. State Law and Policy Regarding Distance Education

State laws and regulations governing institutions of higher education have typically only addressed the conduct of institutions physically located within the state, with state authorization requirements generally having provided a gatekeeper function to protect citizens from fraud and poor quality programs.⁷ The emergence of online educational services has complicated the regulatory environment and requires states to determine how to best regulate out-of-state providers delivering educational services to students in their states primarily through the Internet.

Over the last two decades or more, states have, in fact, adopted and adapted varying approaches to the authorization of online providers, with some states requiring institutions to acquire authorization regardless

⁶ Most visibly articulating this reality (as is reflected in certain state requirements), the U.S. Department of Education (USED) on October 29, 2010 issued "Program Integrity Rules" promulgated under the Higher Education Act. Among other things, and as described in more detail below, these Rules required that institutions of higher education offering distance education comply with requirements in each state in which their students are located. As explained below, these rules are in current limbo, given a federal court ruling in June of 2012.

⁷ Presidents' Forum Task Force, "Aligning State Approval and Regional Accreditation for Online Postsecondary Institutions: A National Strategy," (Fall 2009).

of physical presence in the state and others making no substantive reference to out-of-state providers of distance education at all.⁸

The lack of uniformity across state regulations has led to limited inter-state and multi-state reciprocity compacts, in which member states agree to recognize each other's institutional authorization decisions. At least one of the four regional compacts, the Southern Regional Education Board's Electronic Campus, gives students the opportunity to choose online courses from over 300 colleges and universities across 16 member states. To be a part of the Electronic Campus, institutions must be authorized to operate in their home state. The member states of the compact have agreed not to demand any additional requirements from out-of-state institutions participating in the Electronic Campus.

B. Federal Law and Policy Regarding Distance Education

The federal government's oversight power over distance education providers emanates from its management of student aid programs.⁹ Even though the federal role is limited in scope, much of the recent growth in distance education can actually be attributed to significant changes in the provisions of the Higher Education Act (HEA) in 2006 and the Higher Education Opportunity Act (HEOA) of 2008. The 2006 amendments to the HEA excluded distance education programs from a 1992 rule stating that schools were not eligible for federal student aid programs if more than 50% of their courses were offered by correspondence or if more than 50% of their students were enrolled in correspondence courses.¹⁰ The HEOA also clarified accrediting agency duties in regard to distance education. Agencies are not required to have separate standards for evaluating distance education and recognized agencies are not required to obtain approval to expand their scope of accreditation to include distance education, if notice is provided to the Department.¹¹

Prompted by "the rapid growth of enrollment, debt load, and default rates" at some institutions, in 2009, the Department initiated a Negotiated Rulemaking process to develop new regulations under the HEA.¹² In June 2010, the Department released a proposed set of rules, including provisions regarding state authorization requirements for institutions. In October 2010, the Department issued final "Program Integrity" rules promulgated under the HEA.¹³ The rules included the following provision (codified at 34 C.F.R. § 600.9 (c)) which was not included in the proposed rules:

⁸ Eduventures, "Online Learning Across State Borders: Assessing State Regulation of Out-of-State Schools," available at http://www.accet.org/downloads/program_integrity/state_reg_report_jan11.pdf (Jan. 2011).

⁹ Regulation of higher education has traditionally been understood to be under the constitutional purview of the states. As the Presidents' Forum 2009 Task Force Report explains, the federal government had "virtually no role in the oversight of colleges and universities" until the passage of the post-World War II GI Bill. The Higher Education Act of 1965 established the first federal student financial aid program thereby granting the federal government a more meaningful role in oversight as colleges and universities must agree to certain requirements and comply with federal law as a condition of receiving federal funds for students.

¹⁰ Higher Education Reconciliation Act of 2005, Pub. L. No. 109-171, Title VIII, Subtitle A, 120 Stat. 4, 155 (2006).

¹¹ 20 U.S.C. § 1099b(a)(4)(B)(i)(I), (II).

¹² U.S. Department of Education, "Department of Education Establishes New Student Aid Rules to Protect Borrowers and Taxpayers," available at <http://www.ed.gov/news/press-releases/department-education-establishes-new-student-aid-rules-protect-borrowers-and-tax> (last retrieved May 30, 2012).

¹³ Reciprocity and Distance Education, 75 Fed. Reg 66,866-67 (Oct. 29, 2010) (to be encoded 34 C.F.R. § 600.9).

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.¹⁴

The Department further explained that the provision "in no way preempt[ed] any State laws, regulations, or other requirements established by any State regarding reciprocal agreements, distance education, or correspondence study."¹⁵ The Department declined to regulate or require federal authorization for reciprocal agreements. The final rules also included a provision requiring institutions to provide current and future students with contact information for filing complaints with the institution's accrediting agency and the appropriate state agency that would handle the student's complaint.¹⁶ The final Program Integrity rules went into effect on June 1, 2011.¹⁷

Following the release of the final Program Integrity Rules, the Association of Private Sector Colleges and Universities sued the Department arguing that interested parties were not given sufficient notice and an opportunity to comment on the state authorization rule. In *Career College Association v. Duncan* (796 F.Supp.2d 108 (2011)), 34 C.F.R. § 600.9 (c) was vacated on the grounds that the Department did not provide proper notice-and-comment as required by the Administrative Procedure Act. On appeal, the District of Columbia Court of Appeals, in June 2012, upheld the lower court's decision and ruled that § 600.9 (c) was "not a logical outgrowth" of the Department's proposed Program Integrity rules. Although the Department has not yet indicated what next steps will be, the decision would appear to require that the Department engage in some form of notice and comment in the event that it decides to reissue the state authorization rule (or some variant thereof).¹⁸

In this context, it bears noting that both the U.S. House of Representatives and the U.S. Senate have also taken action to repeal 34 C.F.R. § 600.9 (c). The House passed H.R. 2117 (the Protecting Academic Freedom in Higher Education Act) in February 2012. The bill would repeal several of the state authorization regulations including § 600.9. A companion bill in the Senate, S. 1297, was introduced in June 2011 but has not moved out of the Senate Committee on Health, Education, Labor, and Pensions. President Obama has indicated that he would not support the repeal of the rules as they "help ensure the integrity" of the federal student aid programs.¹⁹

¹⁴ 34 C.F.R. § 600.9 (c).

¹⁵ 75 Fed. Reg. 66867 (Oct. 29, 2010).

¹⁶ 34 C.F.R. §668.43 (b).

¹⁷ In March 2011, the Department released a "Dear Colleague" letter intended to provide guidance for the Program Integrity Rules. The guidance established that for the 2011-12 award year, the Department would consider institutions to be making a "good-faith effort" at compliance with the regulation if the institution met certain conditions. See Eduardo M. Ochoa, Office of Postsecondary Educ., U.S. Dep't of Educ., Implementation of Program Integrity Regulations, at 6 (Mar. 17, 2011). In a later April 2011 "Dear Colleague" letter, the Department clarified that it would not initiate any enforcement action to require repayment or limit student eligibility before July 1, 2014. See Eduardo M. Ochoa, Office of Postsecondary Educ., U.S. Dep't of Educ., State authorization under the Program Integrity Regulations, at 2 (May 6, 2011).

¹⁸ See generally Kelly Field, "Appellate Court Sides with For-Profit Colleges on Tossing Out a Controversial Rule," *The Chronicle of Higher Education*, June 5, 2012.

¹⁹ Kelly Field, "House Votes to Repeal Two Controversial Education Department Rules," *The Chronicle of Higher Education*, February 28, 2012.

IV. The State Regulatory Landscape After the State Authorization Rule

The promulgation of the federal state authorization regulation (§600.9 (c)) and resulting focus on state authorization has called attention to and elevated the dialogue regarding the inconsistent state regulatory scheme surrounding multi-state distance education providers. Notably, these state requirements existed before the rule and will continue to impact multi-state providers, regardless of future U.S. Department of Education action.²⁰

As detailed below, the pronounced variability among state laws regarding authorization makes compliance, in a national or even regional sense, an extremely time-consuming and expensive task. Some states require any distance education provider, regardless of physical presence in the state, to seek authorization from the state before offering courses to students. For states that require institutions with a physical presence to seek authorization, there are numerous legal definitions regarding what constitutes a "physical presence"--dependent upon, for example, whether the providers owns actual property in the state, advertises its operations in the state, or engages in recruiting activities in the state. In addition, some states require providers to seek accreditation while others do not. Finally, almost every state requires an institutional fee for the authorization process, which may vary based on the type of program and number of students being served. All of these requirements may be further complicated by the type of programs (degree vs. non-degree) and provider (public, private, for-profit, religious/tribal) seeking authorization.²¹ Institutions must also constantly monitor state regulations to ensure that they are meeting current requirements in a policy environment of consistent change.

A. Physical Presence

Each state has its own definition of what constitutes "operating" or having a physical presence in the state. The spectrum of state requirements spans from demanding all online providers to acquire state authorization regardless of physical location to having no particular requirement for out-of-state online providers. The majority of states fall in the middle of the spectrum in requiring authorization if the institution has some "physical presence" within the state. The Department has not yet published a list of State authorizing methods or agencies for distance education so institutions are depending on directories and lists developed by the distance education community and in some cases expending inordinate amounts of their own time and resources in order to determine and comply with variable authorization requirements.

The most recent directory of state authorizing agency requirements was produced by the State Higher Education Executive Officers (SHEEO).²² The SHEEO survey builds on a number of distance education community resources and provides a comprehensive listing of authorization requirements in each state.²³

²⁰ As the Department's March 2011 guidance notes, "[a]n out-of-State institution offering distance education, including online education or correspondence study to students in a State that regulates these offerings, was *always* required to have determined whether State approval was necessary and to have sought approval from the State" (emphasis added) prior to awarding title IV funds. The guidance goes on to explain that § 600.9 (c) "merely reinforces" the need for State approval in all states where a provider operates. *See also*, Paul E. Lingenfelter, "The Federalization of Higher Education?," presented at the Presidents' Forum Conference, March 28, 2011.

²¹ States may have different approval requirements for degree and non-degree programs and may further distinguish requirements if the program is in a specialty area (such as nursing or education). This differentiation may require a provider to follow multiple authorization procedures in one state.

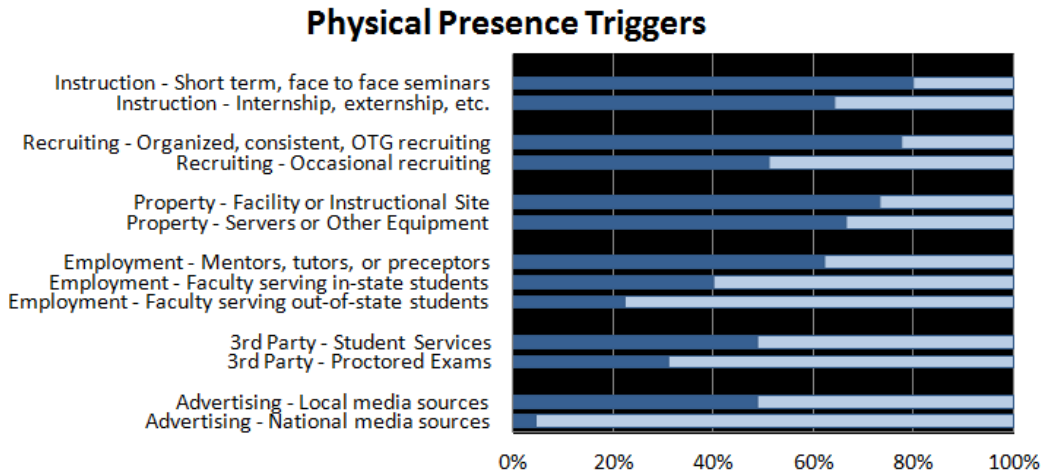
²² State Higher Education Executive Officers, "State Authorization Survey," available at <http://www.sheeo.org/stateauth/stateauth-home.htm> (last retrieved May 30, 2012).

i. No Physical Presence Required

According to the SHEEO survey, only eight state agencies (AL, AR, MA, MN, MT, WI and WY) expressly require all online education providers to acquire state authorization regardless of whether the provider is physically located in the state.²⁴ Almost every institution will be required to seek authorizations in these states regardless of the number of students enrolled at the institution.

ii. Physical Presence of Some Type

The SHEEO analysis found that 77 percent of state agencies regulate distance education providers with a physical presence in the state.²⁵ These physical presence triggers include face-to-face instructional activities, internships/externships, recruitment activities, actual facilities (may house administrative offices or equipment), staff or faculty employed in the state, third-party contracts for services administered in the state, and advertising.²⁶ The chart below shows the different physical presence triggers state agencies use to determine whether an institution requires authorization. The chart also shows the percentage of state agencies (reporting data in the SHEEO survey) using each of the physical presence triggers.



Source: SHEEO State Authorization Survey Webinar Presentation, April 30, 2012

iii. Exempt Status

Four state agencies (AK, IL, OR, UT) require online providers to obtain an express exemption from state authorization even if the provider has no physical presence in the state.²⁷ These exemptions may require the provider to provide evidence of national or regional accreditation as a quality assurance check.²⁸

²³ These community resources include the WCET "Starter List," Dow Lohnes annual survey of state authorizing agencies, the Presidents' Forum survey, Eduventures survey, and state-led efforts in Florida and Massachusetts.

²⁴ Marianne Boeke and Sharmila Basu Conger, "Webinar: The SHEEO State Authorization Survey," available at <http://www.sheeo.org/pcn/Topic.aspx?id=1055> (last retrieved May 30, 2012).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

B. Accreditation

Accreditation is another factor state agencies may consider in determining whether an institution may be authorized to operate within a state. According to the SHEEO survey, at least 54% of reporting agencies require accreditation as a prerequisite to state authorization.²⁹ Accreditation may be required from a regional, national, or specialized accrediting agency. Without specific recognition of another state's accreditation standards, an institution may be forced to seek accreditation from multiple agencies in order to operate within a state. Well-established institutions, with a sustained history of accreditation, may still have to pursue approval for small or moderately sized distance education services being provided outside of the institution's state.

C. Compliance Costs

State agencies generally require institutions to pay a fee for authorization. The fee structures vary greatly by state (from \$0 to \$10,000+) and may increase if the institution offers multiple programs or degree types. Additional fees include site visits, surety bonds, and renewal fees.³⁰ Cost estimates for institutions to achieve full compliance range from \$76,100 for a public community college to comply with requirements in five states for 257 students to \$5.5 million for a public university system to comply with 49 states.³¹ These estimates do not include the additional expense of staff time which may cost some institutions as much as \$195,000.³² State authorization procedures often duplicate those of accrediting agencies creating unnecessary and redundant costs for institutions. For those states where an institution has very few students, the cost of compliance may exceed tuition revenue.

V. Potential Strategies to Address Multi-State Regulation

The Commission will likely consider a number of strategies and potential solutions that can address the issues of costs, duplication of efforts, oversight, quality assurance, and consumer protection that have been described in this overview. Potential strategies and solutions for consideration include:

- The drafting of model state laws and regulations for adoption by individual states. These model state laws and regulations could provide a more consistent definition of "physical presence" than encoded in present law. Such laws and regulations could also account for the transient nature of students and only require full authorization when an institution reaches some threshold number of students or offered courses.
- The analysis and development of reciprocal agreements. The Presidents' Forum and the Council of State Governments has already developed a draft reciprocity agreement for states. This draft agreement provides a starting point to discuss the core standards states will need to agree on in

²⁸ Eduventures, "Online Learning Across State Borders: Assessing State Regulation of Out-of-State Schools," available at http://www.accet.org/downloads/program_integrity/state_reg_report_jan11.pdf (Jan. 2011).

²⁹ Marianne Boeke and Sharmila Basu Conger, "Webinar: The SHEEO State Authorization Survey," available at <http://www.sheeo.org/pcn/Topic.aspx?id=1055> (last retrieved May 30, 2012).

³⁰ WCET, State Authorization - Cost of Compliance Estimates (April 8, 2011), available at <http://wcet.wiche.edu/wcet/docs/state-approval/StateAuthorizationCostsofCompliance04-08-11.pdf>.

³¹ *Id.*

³² *Id.*

order to recognize each other's authorization decisions. The Commission may also discuss how these draft agreements can be adapted to the needs of existing regional higher education compacts.

The Commission might also address other strategies and approaches that could complement and inform the Commission's focus on cost and burden reduction recommendations described above. These areas of focus may include the following:

- The roles for accreditation agencies to help ease the burden of multi-state authorization may surface as a key issue as the Commission considers the role of accreditation in light of state laws and interests associated with educational quality and consumer protection. One method to ease the burden on institutions that may merit focus, for instance, relates to the potential development of a supplemental accreditation system for distance learning that holds all institutions accountable to agreed upon standards for quality and delivery.
- In the context of Title IV eligibility requirements, and multiple responsibilities of other actors, the Commission may explore core elements of an optimal federal policy set, including technical assistance/support to institutions that may be subject to federal requirements associated with ensuring quality in distance education.

VI. Conclusion

The advent of large scale distance education programs has led to the unprecedented availability of educational opportunities to students across the United States. State and federal oversight of distance education is important to the continued growth of the sector but such oversight cannot overly burden multi-state distance education providers. Unless alternatives are developed to the current 50+ state compliance system, many providers may choose to limit the states where distance education is offered.