

State Authorization and Distance Education
NAICU Background Information
Updated April 28, 2011

Introduction

The Department of Education's new program integrity regulations related to state authorization of distance education are a source of concern and confusion within the higher education community. As the July 1, 2011, effective date of the new regulations rapidly approaches, most institutions offering distance education programs remain unsure about what they need to do to be in compliance, and are doubtful there is sufficient time to meet whatever may be required of them.

Responding to the concern and confusion about this regulation, the Department has issued two "Dear Colleague" letters that were intended to provide clarification of the distance education provisions. The second of these letters, issued on April 20, attempts to provide a more reasonable path towards implementation of those requirements, and offers some additional information regarding what constitutes a "good-faith" effort toward compliance between now and July 1, 2014.

NOTE: Some have interpreted this letter to mean that colleges will not have to worry about the new requirement until July 2014. As will be discussed further, this is not the case. All institutions offering distance education programs need to begin working on compliance now, if they are not already doing so.

For many reasons, this guidance has not dispelled concerns, nor has it offered justification for federal involvement in this area of state law. As such, NAICU remains committed to efforts to repeal or rescind this provision—along with the broader state authorization provisions and the federal definition of "credit hour."

This Document

This background paper is intended to address the following questions:

- What does the new regulation require?
- What constitutes a "good faith" effort to comply?
- What resources are available to assist with compliance?

What's Required?

The regulation itself is very short and states:

"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)]

Department officials have indicated that their intent in putting forward this regulation was to clarify that the general state authorization regulation did not pre-empt any state laws dealing with distance education. The practical effect, however, is that the federal government is now in the position of examining institutional compliance with state laws and penalizing those who are out of compliance with those laws.

Major compliance actions any institution offering distance education must take include:

1. 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; however, even in those cases, an institution needs to be able to demonstrate that state approval is not required.

2. 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.

3. 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.

What Constitutes a “Good Faith Effort” to Comply?

The Department has recognized that many institutions will not be able to identify all the state laws that may be applicable to them and to obtain the necessary state authorizations prior to this July 1. They also noted that many states are in the process of modifying their requirements.

Therefore, the April 20 “Dear Colleague” letter indicates that: *“the Department will not initiate any action to establish repayment liabilities or limit student eligibility for distance education activities undertaken before July 1, 2014, so long as the institution is making good faith efforts to identify and obtain necessary authorizations before that date. Evidence of good faith efforts by institutions could include any one or more of the following items:*

- *Documentation that an institution is developing a distance education management process for tracking students' place of residence when engaged in distance education.*
- *Documentation that an institution has contacted a State directly to discuss programs the institution is providing to students in that State to determine whether authorization is needed.*
- *An application to a State, even if it is not yet approved.*
- *Documentation from a State that an application is pending.”*

A quick read of this passage might lead one to conclude that developing a student tracking process would be a sufficient show of “good faith effort” between now and July 1, 2014. That is not the case. This is the list of things you need to begin doing now and to continue working on to assure you are in full compliance by no later than July 1, 2014.

As soon as the regulation goes into effect on July 1, 2011, Department auditors and program reviewers will be looking to determine whether an institution is making an adequate amount of progress towards coming into compliance by 2014. Some Department officials have characterized the steps listed in the “Dear Colleague” letter as being progressive in nature—such that an institution that is reviewed next year will be expected to have moved further down the list than one that is reviewed this year.

Where Can I Find Additional Information?

List of State Requirements

- **Department of Education:** One very positive aspect of the April 20 “Dear Colleague” is the Department’s announcement that it will develop a full directory of State requirements and make that directory available to the public on its Web site. The letter did not indicate when the directory would be completed. Previously, the Department had indicated that it did not intend to develop such a list.
- **Private Efforts:** The Department indicated that it will work with “appropriate parties” in the development of the directory—recognizing that a number of private efforts are already underway. These include:
 - **State Higher Education Executive Officers (SHEEO).** On April 21, SHEEO announced it would work in conjunction with NCHEMS, the National Center for Higher Education Management Systems, to develop a directory. Additional information about this project is available on the [SHEEO website](#).
 - **The Cooperative for Educational Technologies (WCET) of the Western Interstate Commission for Higher Education (WICHE)** has developed a document, [“State Approval Regulations for Distance Education: A ‘Starter’ List.”](#) The document was last updated on April 22, 2011, and was developed by WCET in cooperation with the Southern Regional Education Board, American Distance Education Consortium, and the University of Wyoming. This group does not intend to make further updates to this document, and will defer to the work of SHEEO in the further development of a directory.

- **Eduventures**, a consulting firm, completed a review of state requirements in January 2011. A notice on their [website](#) indicates this report has been updated, and will be updated again in early May. This notice indicates the May update “*will take account of the DoE’s extension, SHEEO’s efforts, and recent state and school activity.*”
- **The Dow Lohnes law firm** [issued a report](#) in 2006. This information is outdated, but is useful to the extent of getting an idea of the wide variation in state practices and policies. The report is now being updated.

Other Resources

- WCET also has an exceptionally useful Web site on the topic, including descriptions and analyses of the requirements—along with a number of pertinent links. See WCET’s [state approval page](#) and [blog](#).

Department of Education “Dear Colleague” Letters

- The [most recent guidance](#) was published on April 20, 2011.
- The earlier guidance regarding state authorization and distance education appears on pages 5-7 of the Department of Education’s March 17, 2011 letter. The [full letter](#)—which also addresses the general state authorization provisions, incentive compensation, and misrepresentation—is available on line.

Related Activities

- On April 27, NAICU joined 70 higher education associations and accrediting organizations in [a letter](#) requesting House and Senate education leaders to block regulations dealing with state authorization and the federal credit hour definition.
- NAICU joined a similar group of institutions and accreditors earlier this year in previous letters to Education Secretary Arne Duncan urging that he rescind both the credit hour definition ([February 16 letter](#)) and the state authorization provisions ([March 2 letter](#))—and to Virginia Foxx, who chairs the House Subcommittee on Higher Education and Workforce Training, asking her assistance in obtaining a one-year delay in the implementation of these regulations ([March 10 letter](#)).
- The Lumina Foundation recently made a \$300,000 grant to Excelsior College for the development of a common form and process for states to use in authorizing colleges that offer distance education programs. Excelsior president John Ebersole presented his concerns in [March 11 testimony](#) before a House subcommittee.