
State Authorization

What It Requires and How To Become Compliant

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*This paper addresses **FIVE** common myths related to State Authorization. (1) State Authorization was introduced by the Federal Department of Education but court action ended it and no institutional action is necessary, (2) an institution can wait until the new reciprocity agreement is in place since it will do away with the need for individual State Authorization, (3) State Authorization only implicates institutions offering online or distance education, (4) an institution can wait to seek State approval until they have an admitted student from a particular State, and (5) institutions have little risk of negative impact from avoiding authorization.*

This 4-part status report reviews State Authorization requirements for higher education institutions. It clarifies a number of misconceptions and includes a description of what is meant by State Authorization, a summary of the Federal Department of Education actions, a description of the proposed reciprocity agreement (SARA), and a recommended plan for how institutions can most efficiently achieve and maintain compliance. Information in this report has been collected from numerous public reports and presentations given by regulatory and higher education experts.

Five common myths that this report will dispel are (1) State Authorization was introduced by the Federal Department of Education but court action ended it and no institutional action is necessary, (2) an institution can wait until the new reciprocity agreement is in place since it will do away with the need for individual State Authorization, (3) State Authorization only implicates institutions offering online or distance education, (4) an institution can wait to seek State approval until they have an admitted student from a particular State, and (5) institutions have little risk of negative impact from avoiding authorization.

As a result of the current fluid situation new information is monitored and updated reports will be produced as needed. To receive an updated report, or to ask a question pertaining to State Authorization please email Meri MacLeod at merim@digitalseminarian.com.

PART 1: State Authorization: What it Requires

In 2010, the Federal Department of Education (US ED) included in the renewal of the Higher Education Act an unexpected statement regarding distance education. It added a new Federal-level regulation [Chapter 34, §600.9(c)] stating that institutions must meet State requirements if they are offering programs to students that do not reside in the State where the institution is physically located. With this action the US ED drew attention to the long-standing State-level *requirements* and thus began a new regulatory reality for many higher education administrators, including religious institutions. What began as a short sentence in 2010 now encompasses many pages of regulatory guidelines. The Federal government drew attention to a long-standing American approach to post-secondary education explained as “the State’s role as part of our country’s approach to postsecondary oversight, and accountability – the so-called ‘triad’ formed by the Federal government, the states, and recognized accrediting

bodies.”¹

It Includes On-Campus and Online Education

Nearly all states have participated in the decades long practice of regulating postsecondary programs offered for their citizens. For some states their oversight may only entail the documentation that ensures a school is regionally accredited. But in many more states, institutions are expected to comply with numerous requirements and to report extensive data regarding institutional finances, enrollment figures, and activities related to admission criteria and outcomes for potentially on-campus (here after on-ground²) and online programs. An institution is expected to be able to demonstrate acceptable compliance to the Secretary of State’s approval *upon request*. For many schools, the 2010 action by the US ED was the first time they became aware that individual states have extensive legal requirements to which institutions are required to comply, implicating their “on-ground” as well as online programs.

As a result of their long-standing regulatory practices, states have developed their own systems with often different regulations, fees, interpretations, and forms – even for reporting the same information. There is no “one-size-fits-all.” Some states have a lengthy and more costly process of authorization, especially for high enrollment schools. Other states may require no action on the part of the school if the school does not meet the stipulations defined as “physical presence.” Understanding the complex regulations State-by-State for an institution is compounded by the periodic changes taking place among the states as they work to comply with the increased expectations of the US ED. One former regulator and legal advisor described the current context as “fluid” and “what seems rather straightforward can become significantly complex depending on the nature of the institution.”

As a result of the 2010 US ED announcement of required State Authorization, states have worked to provided more information on their websites. But that same website can be complex and confusing, especially when outdated documents are confused with more recent rulings. Cross checking documentation very carefully is essential. Further, as states make changes, such as the recent changes made in Massachusetts and Alabama, these changes

¹ The National Council for State Authorization Reciprocity Agreements. Update Newsletter Vol. 1 Issue 8, August 2014.
http://www.ncsara.org/files/docs/NC_SARA%20newsletter%20August%202014.pdf. Accessed August 27, 2014.

² Regulatory terminology refers to academic offerings that do not occur online as “on-ground” since implicated programs or courses may occur in locations other than an official campus.

may not be communicated to institutions, requiring the school to be proactive in keeping up-to-date with evolving regulations.

Adding to the fluidity of the present situation is the concomitant necessity for many states to take formal legislative action in order to comply with Federal expectations and/or to consider the proposed reciprocity agreement. This can negatively affect on an institution's application process. For example, Wisconsin's Department of Education stopped accepting new applications while the State legislature discussed if they would support membership in the reciprocity agreement (SARA). Once the legislative session ended, without a resolution, the department began accepting applications again. These often unanticipated disruptions to processing applications can delay enrollment plans resulting in financial loss for the institution.

It is most important for schools to realize that State Authorization *does not* only apply to distance education programs. There are numerous actions by a school that may have only on-ground programs that could "trigger" required authorization from a State. A school offering on-ground courses or programs with commuter students from outside the "home" State of a school could require approval from those states where a student resides. Consider for example: An accredited extension center is within commuting distance for students from several surrounding states. The institution may be required to have approval from each of the surrounding states where students reside in order to legally enroll those students.

Other actions that could State Authorization include where a faculty member resides, advertising in a State other than where the school is physically located, the "agents" of a school functioning in other states, and residential students who take online summer courses or an "internship" (referred to by regulators as externship) when back in their home State.

Regulatory Experts Urge Schools To Comply

It has been four years since the State Authorization law was highlighted and linked to Federal-level enforcement and distance education and states, reportedly, do not look kindly on schools that remain out of compliance, in either their on-ground programs or their distance education programs.

. . . [S]tates expect you to follow their laws PRIOR TO advertising, recruiting, or serving students in their State. State regulations have been

*in place for decades and are still in force.*³

Several factors make it particularly important for institutions to seek State Authorization without delay.

1. States have a heightened awareness of out-of-State schools and they have begun to issue substantial fines.
2. The next set of Federal requirements will likely give little lead-time for institutions to achieve compliance in order to prevent Federal penalties. The US ED is not required to give schools a lengthy period to acquire State Authorizations. Speculation is that new or updated requirements may be issued in early 2015.
3. The State approval process can be lengthy and unpredictable. Reportedly in August 2014 States took anywhere from two months to two years to complete their approval process of an institution's application. At any time a State may, as Wisconsin did, put a temporary hold on accepting applications, further delaying the process for a school. If States are flooded with requests after the next set of Federal regulations are issued, the approval process will, in all likelihood, become considerably longer, preventing schools from enrolling out-of-state students and conducting other regulated actions. While an institution is waiting for the completion of the application process they can't lawfully conduct any activity that violates State regulations, including enrollment.
4. Many States presently offer a religious exemption. It is unclear how long this provision may last but it can be a significant financial benefit to those schools that qualify.

Part II: The Federal Department of Education: Actions, Misunderstanding, and Coming Regulations

Every five years the US Higher Education Act is due to be updated. After years of neglect it was finally renewed in 2010. When the US ED issued their updated statement distance educators were surprised to see language related to distance

³ <http://wcet.wiche.edu/advance/state-approval-requirements>. Accessed on August 24, 2014. The National Council for State Authorization Reciprocity Agreements. Update Newsletter Vol. 1 Issue 8, August 2014.

http://www.ncsara.org/files/docs/NC_SARA%20newsletter%20August%202014.pdf. Accessed August 27, 2014.

education for the first time.⁴ The US ED issued the first of the “Program Integrity Regulations” at that time followed in March 2011 with the implementation requirements for these new regulations. It was the US ED that drew attention to the *existing* State Authorization requirements that had predated the introduction of Federal-level regulations with enforcement linked with Federal financial aid.

The Federal regulation stated that:

If an institution is offering post-secondary 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 distance or correspondence education in that State. An institution must be able to document to the Secretary of State’s approval upon request.⁵

If State(s) do not require an institution to be “authorized” then the institution “must be a able to show” that State Authorization was not required.⁶

Court Action Against US ED

In subsequent lawsuits, the courts “vacated” the procedural action taken by the Department when it introduced the new regulation (NOT the regulation itself) and that [ruling was upheld on appeal](#). The court ruled against the US ED because it failed to follow the *procedural* requirements for introducing a new regulation. The core objection from the courts was procedural NOT the new regulation itself. As a result, the US ED agreed that [it would not enforce](#) the State Authorization regulation for distance education programs *at the Federal level* but would expect **all institutions to obtain any required authorization from individual states for on-ground and distance education as required by states.**

While the US ED may not have been enforcing new regulations they have been busy implementing the proper procedure required for introducing new regulations. This means that new regulations may be announced in the not-too-

⁴ Link to the Federal register of regulations - <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr;sid=422e8e1e4276e7662af45f2cd8f09d1e;rgn=div2;view=text;node=20101029%3A1.25;idno=34;cc=ecfr;start=1;size=25>. Accessed on August 26, 2014.

⁵ Link to the Federal register of regulations - <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr;sid=422e8e1e4276e7662af45f2cd8f09d1e;rgn=div2;view=text;node=20101029%3A1.25;idno=34;cc=ecfr;start=1;size=25>. Accessed on August 26, 2014.

⁶ The National Council for State Authorization Reciprocity Agreements. Update Newsletter Vol. 1 Issue 8, August 2014. http://www.ncsara.org/files/docs/NC_SARA%20newsletter%20August%202014.pdf. Accessed August 27, 2014.

distant future. The exact timeline is uncertain but schools may not be given a lengthy period in which to seek compliance. In addition, the US ED may not allow an institution to simply show “a good faith effort” in seeking authorization since State regulations have not been newly introduced. Schools have been made aware of the intentions of the US ED since 2010.

There is a widespread mistaken belief that institutions don’t have to comply with State Authorization since the US ED is not enforcing it. “*The court’s ruling had no impact on State regulations.*”⁷ Those regulations are still in effect and states expect every school to follow their laws *prior to* advertising, recruiting, or serving students in their State.

Experts advise schools not to delay because State Authorization is not going away and non-compliance will have a negative impact on any school when the US Ed announces its new regulations. Be aware that there is a waiting period for completion of a State’s authorization process anywhere from two months to two years as of August 2014.

Part III: State Authorization Reciprocity Agreement (SARA)

The National Council for State Authorization Reciprocity Agreement (NC-SARA) was established in July 2013 after extensive national and regional deliberation and in coordination with the four regional State higher education compacts. The “goal is to make it easier for students to take online courses offered by postsecondary institutions based in another State.”⁸

SARA is not a Federal initiative, though the US ED is supportive and SARA is overseen by a national council (NC-SARA) and administered by the four regional education compacts: the Midwestern Higher Education Compact (MHEC) with twelve member states, the New England Board of Higher Education (NEBHE) with six member states, the Southern Regional Education Board (SREB) with sixteen member states, and the Western Interstate Commission for Higher Education (WICHE) with sixteen member states, leaving ten states that have not joined a regional compact.⁹

⁷ State Authorization for Distance Education: The Future for Regulations. Recorded on August 14, 2014. https://www.youtube.com/watch?v=6cop_8nNS9Y&feature=youtu.be. Last accessed on August 27, 2014.

⁸ Its purpose is to ensure that the SARA initiative provides a national solution for authorization of distance education courses and programs, rather than a variety of regional solutions. Member States agree to a set of “comparable national standards” for interstate offering of postsecondary distance education. <http://www.nc-sara.org>.

⁹ <http://www.nc-sara.org/content/regional-education-compacts>

SARA is a voluntary State membership organization. A State ‘joins’ or becomes a ‘member’ while a college or university ‘operates under’ or ‘participates in’ SARA. Further, each State can only join SARA *through* their regional higher education compact. Beginning in early 2014 states began the process of application for membership. The following nine states have been approved: Alaska, Colorado, Idaho, Indiana, Nebraska, Nevada, North Dakota, Washington, and Oregon, which required special legislative approval. The Wisconsin legislature deliberated on SARA membership but did not reach an agreement prior to their 2014 recess. Reportedly fourteen states require some form of legislative action in order to apply for membership in SARA and not all of these State legislatures meet annually.

Once fully operational, projected for 2016 at the earliest, it is expected that SARA will provide a benefit to institutions by centralizing the authorization process in a single State, called the institution’s ‘home State.’ This means that “institutions in a SARA State only need their home State authorization to be able to offer distance education to any other SARA member State.”¹⁰ But SARA will not completely replace the need for individual State Authorization since it may not include all states (the ten not members of a regional compact) and it only pertains to the approval of distance education courses and programs. SARA does not address the numerous other activities *regulated* by various states, such as externships, advertising, or out-of-state recruitment. It is also unlikely, given the numerous states that need special legislative action to approve membership in SARA that all states who may eventually become members of SARA will be a member by early 2016.

The best case scenario for SARA is a substantial reduction in the number of individual states to which an institution will need to apply for authorization— NOT the elimination of all institutional applications for State Authorization.

Part IV: A Plan for State Authorization Compliance

The following is a recommended approach to acquiring and maintaining State Authorization.

1. Project Overview

Regulatory compliance today involves both Federal and State level monitoring and reporting resulting in a growing area of higher education administration.

¹⁰ <http://www.nc-sara.org/content/basic-questions-about-sara>

Cross campus communication, implementation of new policies, effective data collection, and careful deadline monitoring will all be important for maintaining compliance long term. As a school begins, or expands, their work to obtain State Authorizations it can be helpful to have an overview of what the work entails and to realize that it is not a one-time project. The work will require an institution to gather the necessary resources in order to accomplish the following:

- Interpret complex and wide ranging regulations and procedures.
- Collect and maintain various kinds of data, such as student enrollment and out-of-state activities.
- Produce timely and detailed documents for reporting.
- Proactively seek out and assess ongoing regulatory changes.
- Monitor and execute critical and varied timelines for renewals.
- Implement new institutional policies necessary to maintain compliance, such as a consistently implemented policy to track student migration within the United States.¹¹
- Create effective communication processes across the institution regarding the impact of regulations on various departments, programs, and future academic plans.
- Monitor all institutional publications for required “disclosures” related to consumer protection and State authorization (e.g. Clery Act and Student’s Right To Know), whether Federal or State required.

Two aspects of the work often seem most challenging. The first is understanding and accurately interpreting the myriad of State statutes, codes, regulations, including their “official” guidance as it relates to the on-ground and online activities of an institution. A former State regulator described the regulations as “complex, nuanced, and widely varied by State.” Exacerbating the challenge is the current fluidity as states make a variety of changes in response to the evolving regulatory environment. What was listed by a higher education association’s website (e.g. State Higher Education Executive Officers Association) as a State’s policy, or even contact information can be quite different when an institution applies for approval. An important part of maintaining authorization involves staying current on regulation changes. “*It is not enough,*” reported legal advisor and former State regulator Jeannie Yockey-Fine “*to simply lookup, print, and store in a binder or folder [the current statutes]. The information is dynamic and often modified.*”¹²

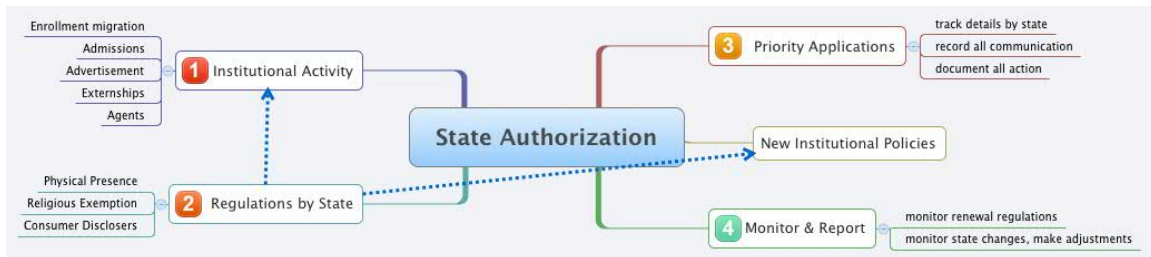
¹¹ Student migration refers to a student’s change of residence. State regulations can be triggered when an enrolled student moves across a State border but continues in their current academic program.

¹² State Authorization for Distance Education: The Future for Regulations. Recorded on August 14, 2014. https://www.youtube.com/watch?v=6cop_8nNS9Y&feature=youtu.be. Last accessed on August 27, 2014.

A second institutional challenge is the likely implementation of new policies and practices so that legal regulations are applied to new departments plans, such as a new advertising strategy in Admissions or a new educational program. Something as simple as a residential campus offering online summer courses to its enrolled students may trigger the need for State Authorization. Going forward institutions will need to proactively guide and monitor relevant departments on their authorized activities.

2. Four Step Action Plan

The following four steps, shown also in Figure 1 are suggestive and the lists under each step are *illustrative and NOT intended to be comprehensive*. Each institution will have it's own list of data it will need to compile and report on its distinct activities and the requirements of each State *at the time* of application



1. INSTITUTIONAL ACTIVITY - collect institutional data on all out-of-state activity, enrollment and legally required “disclosure”¹³ statements. Examples include:

- Advertising
- Recruiters and other “agents” of the school
- Students or faculty living across a State line
- Externships (previously known as internships)
- Physical presence State triggers
- Published disclosure statements (Federal & State)

¹³ Disclosure State authorized statements and various Federal or State regulations that require a school to make institutional information available to the prospective student “consumer,” such as the information required in the SRTK Act (Student’s Right To Know).

2. REGULATIONS BY STATE – become familiar with the primary areas states seek to regulate for on-ground and online students, such as the following:
 - Disclosures for consumer protection
 - Physical presence triggers
 - Exemptions, such as religious

3. PRIORITY APPLICATIONS - prioritize State applications according to those that are most mission-critical for the institution. Consider giving immediate priority to states where current students live outside the school’s home State, such as commuter and distance students. Other recommended priorities include states where the following are triggers:
 - Advertisement across State line or where out-of-state recruiters are active.
 - Out-of-state “agents” of the school teach, speak, or formally mentor students.
 - Religious exemptions are available and the institution, or a university department may qualify.

Numerous states still offer a religious exemption when a school, or department provides exclusively religious education as *defined by the State*. There are often a number of qualifications required for the exemption. Schools who appear to qualify are encouraged to apply for all available religious exemptions as soon as possible. It may bring some schools into compliance without needing to pay substantial fees.

- Conduct a cost benefit analysis to determine the second tier priority for applications.
- Create a tracking system for all communication and actions related to each State application. Monitor approval progress and implement all required actions once approval is granted.

4. MONITOR AND REPORT

- Create a flexible system to monitor renewal dates and reporting requirements, as well as any changes in regulations, fees or exemptions.
- Create internal systems to monitor regulated areas such as student migration.

Student migration involves the change of residence of a student across a State line between semesters or between academic years. It may trigger the need for a new State Authorization. National experts report that a school must have,

. . . A defensible policy by which the school tracks where each student lives at set points in the academic year, such as prior to [either] registration or completing Financial Aid forms. The policy must make sense and is tied to specific landmarks in the academic year, such as 'X' number of weeks prior to registration. [The policy] needs to be worked consistently and documented action is recorded in order to provide a defensible policy if questioned.¹⁴

Additional information can be accessed at the following links:

<http://wcet.wiche.edu/advance/state-approval-history>.

<http://www.nc->

[sara.org/files/docs/NC_SARA%20newsletter%20August%202014.pdf](http://www.nc-sara.org/files/docs/NC_SARA%20newsletter%20August%202014.pdf)

About the Author

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¹⁴ State Authorization for Distance Education: The Future for Regulations. Recorded on August 14, 2014. https://www.youtube.com/watch?v=6cop_8nNS9Y&feature=youtu.be. Last accessed on August 27, 2014.