



## **DEPARTMENT OF EDUCATION'S PROPOSED REGULATORY LANGUAGE STATE AUTHORIZATION OF DISTANCE EDUCATION PROVIDERS AS A COMPONENT OF INSTITUTIONAL ELIGIBILITY**

**May 21, 2014**

### **BACKGROUND**

The Department of Education's on Program Integrity and Improvement negotiated rulemaking panel completed its work on May 20, failing to reach consensus on two of six topics they considered. The proposed regulations dealing with state authorization of distance education programs were one of the two areas where the group could not reach agreement. This issue was included in this negotiated rulemaking process because the Department's previous regulation in this area was struck down in court.

The Department's final proposal essentially attempts to apply to all distance education programs the same state authorization requirements that an institution must meet in the State in which it is located. In other words, a state would have to have a process for authorizing distance education programs offered by out-of-state providers--whether or not they choose to do so now. The estimated 45 states that currently offer regulatory exemptions based on accreditation or similar criteria would no longer be permitted to do so.<sup>1</sup>

The prior distance education regulation was two sentences long and stated that an institution offering distance education must "meet any State requirements for it to be legally offering postsecondary distance or correspondence education in that State." The new proposal runs to 14 paragraphs and requires that each state authorize "by name" all institutions providing distance education services to 30 or more of its residents and have a process for resolving complaints about those institutions.

The proposal also expands related student disclosure requirements related to complaint processes and establishes new requirements related to occupation-related programs. This new requirement applies to both distance and on-the-ground programs. It requires an institution to assure that an occupation-related program meets all requirements for graduates to receive certification or sit for licensure or certification exams, unless the institution obtains written acknowledgement that a student understands the program will not fulfill the necessary requirements or that other requirements (if applicable) must be fulfilled to obtain certification or sit for exams.

Throughout the negotiated rulemaking process, the negotiator representing private, non-profit colleges and several others cited the scope, complexity, and confusing language of the proposal as significant problems. Unfortunately, they were not successful in persuading the negotiators representing the Department to address these concerns.

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<sup>1</sup> Technically, the Department is not regulating the states, but is rather prescribing state requirements an institution would need to meet in order to be eligible to participate in Higher Education Act programs.

## TALKING POINTS

- **It is not clear why there is any need to write separate regulatory provisions for distance education programs.** There is already a basic state authorization regulation in effect and that should be enough. States have chosen to regulate – or not to regulate – distance education providers as part of their regulatory processes.
- **Questions and confusion continue to surround the state authorization requirements of in-state institutions, so placing parallel requirements with respect to distance education programs would replicate these problems in the distance setting.**
- **The Department’s proposal goes well beyond assuring that institutions are in compliance with applicable state laws with respect to distance education. It vastly expands the reach of the federal government in this area. Specifically—**
  - **It would also require states to develop new requirements.** Currently, an estimated 45 states choose to provide exemptions (i.e. based on accreditation) to some institutions that offer distance education services to residents of their states. States would no longer be able to offer any exemption from regulation.
  - **It introduces a completely new requirement related to occupation-related programs— applicable to both distance and on-the-ground programs.** It requires an institution to assure that an occupation-related program meets all requirements for graduates to receive certification or sit for licensure or certification exams, unless the institution obtains written acknowledgement that a student understands the program will not fulfill the necessary requirements or that other requirements (if applicable) must be fulfilled to obtain certification or to sit for exams.
- **The proposal would add complications to the State Authorization Reciprocity Agreement (SARA) activities currently underway.** The proposed regulations provide that participation in a reciprocity agreement like SARA would satisfy the requirement that an institution be authorized “by name” to provide distance education in a state. However, participation in such an agreement would not satisfy requirements relating to the resolution of student complaints. SARA, for example, assigns responsibility for complaint resolution to the “home state” of the institution participating in the agreement. The proposed regulation, however, would require that both the home state and the state in which the student is receiving on-line education would be responsible for resolving any complaints. Consequently, SARA would need to revise its requirements to assure that participating institutions are in compliance.
- **In general, the additional burden and confusion that this proposal would generate will discourage the kind of educational innovations that institutions are trying to encourage in order to reduce costs and expand opportunity.**

The proposal offered by the Department at the final negotiated rulemaking session is attached. It is likely that this will be the language included in proposed regulations expected to be issued this summer.

All documents related to this negotiated rulemaking process may be found at:  
<http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/programintegrity.html>.

## Issue Paper 2

### Program Integrity and Improvement Issues

**Issue:** State authorization of distance education providers as a component of institutional eligibility

**Statutory cites:** §§101(a)(2); 102(a)(1); 102(b)(1)(B); 102(c)(1)(B) of the HEA

**Regulatory cites:** 34 CFR §§600.4(a)(3); 600.5(a)(4); 600.6(a)(3); 600.9

#### Updated summary since April 23-25 meeting:

Proposed §600.9(c)(1)(i)(C) would be amended to exclude members of the armed forces, or a member's spouse or dependent child, from being counted in the unduplicated headcount of students who have commenced attendance in distance or correspondence education in the State during the prior award year.

Proposed §600.9(c)(6) would be amended to clarify that the State's approval is provided on a program-by-program basis, rather than describing the approval as a State programmatic approval, to make clear that, in this case, the State approves each distance or correspondence education program individually.

Proposed §600.9(c)(8)(ii) would be amended to remove the examples of items that a State could review, in addition to proof of accreditation and institutional authorization; and would instead provide that the State has an active process that examines the institution and its programs in order for the institution to show that it is not being authorized by the State solely on the basis of accreditation, years in operation, or other comparable exception.

Proposed §600.9(c)(8)(iii) would be amended to clarify that those institutions exempted from State approval or licensure requirements based solely on accreditation, years in operation, or other comparable exemption, would remain legally authorized in that State to provide title IV, HEA program funds to students enrolled on or before June 30, 2018, for the duration of the student's distance or correspondence education program.

#### Change:

#### 600.2 Definitions

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*Legally Authorized:* Except as otherwise provided in Part E with respect to foreign institutions, the legal status granted to an institution, in accordance with §600.9, by a State in which the institution provides postsecondary education.

## 600.9 State authorization.

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(c) *State authorization of distance or correspondence education providers.* (1) Subject to paragraph (c)(2) , (c)(3), and (c)(11) of this section, an institution described under §§600.4, 600.5, and 600.6 that offers an educational program (as defined in §600.2) through distance or correspondence education to students in a State in which the institution is not physically located is considered to be legally authorized in that State for purposes of institutional eligibility for funding under the HEA if--

(i)(A) For an institution that offers or will offer 50 percent or more of a postsecondary education program through distance or correspondence education to students in that State--

(1) The State has a process to review and appropriately act in a timely manner on complaints concerning the institution, including enforcing applicable State law, and has the final authority to resolve complaints and enforce applicable State law; and

(2) The institution meets State requirements that it be approved or licensed by name--

(i) By the State to offer postsecondary distance or correspondence education, including programs leading to a degree or certificate, in that State;

(ii) To offer postsecondary distance or correspondence education, including programs leading to a degree or certificate, in that State under a State-to-State agreement administered by the participating States; or

(iii) To offer postsecondary distance or correspondence education, including programs leading to a degree or certificate, by a State that approves and annually reviews the administration of a State authorization reciprocity agreement administered by a non-State entity.

(B) The requirements in paragraph (c)(1)(i)(A)(2) are deemed satisfied if an institution's total enrollment of students who have commenced attendance in distance or correspondence education in a State, based on unduplicated headcount, does not exceed 30 students during the prior award year, excluding any member of the armed forces, or a member's spouse or dependent child, who received title IV, HEA funding pursuant to paragraph (c)(11) of this section; and

(ii) Notwithstanding paragraph (c)(1)(i) of this section, the institution meets the additional requirements for legal authorization in that State as the State may establish.

(2) An institution described under paragraph(c)(1) of this section must meet the requirements under §668.43(b) with respect to providing students with information on the student complaint process.

(3)(i) An institution described under §600.4, 600.5, or 600.6 that solely provides distance education must additionally demonstrate that it is legally authorized to operate in its home State consistent with paragraphs (a) and (b) of this section. For purposes of this section, the institution's home State is the State in which the institution's principal office is physically located.

(ii) If such an institution decides to change its home State, the institution must apply for legal authorization and provide the Secretary with documentation demonstrating that it is legally authorized in its new home State under paragraph (a) or (b) of this section to be considered an eligible institution.

(4) An institution described under §600.4, 600.5, or 600.6 that meets the requirements under paragraph (a) or (b) of this section for a State in which the institution or any of its additional locations is physically located is considered to be legally authorized to offer distance or correspondence education to students physically located in that State as long as it meets that State's applicable requirements for offering distance or correspondence education.

(5) An institution described under §600.4, 600.5, or 600.6 that is authorized to offer distance or correspondence education under paragraph (c)(1), (c)(3), or (c)(4) of this section is considered to be legally authorized for purposes of providing title IV, HEA program funds to a student located in a foreign location or foreign country.

(6) If, under the requirements of paragraph (c)(1)(i)(A)(1) of this section, a State provides State approval to an institution described under §600.4, 600.5, or 600.6 to offer distance or correspondence education on a program-by-program basis, the institution is considered to be legally authorized for purposes of providing title IV, HEA funding to students in that State who are enrolled in the State-approved distance or correspondence education program.

(7) An institution must provide documentation of each applicable State approval or license to the Secretary upon request.

(8)(i) An institution is not considered to be legally authorized to offer postsecondary distance or correspondence education in a State for purposes of institutional eligibility for funding under the HEA if it is exempt from State approval or licensure requirements based solely on accreditation, years in operation, or other comparable exemption.

(ii) The State is not considered to have exempted an institution under paragraph (c)(8)(i) if the State has an active process that examines the institution and its programs.

(iii) Notwithstanding paragraph (c)(8)(i), an institution exempted from State approval or licensure requirements based solely on accreditation, years in operation, or other comparable exemption remains legally authorized in that State to provide title IV, HEA program funds with respect to a student enrolled on or before June 30, 2018, in an eligible distance or correspondence program or enrolled in such program on or before a later date announced by the Secretary in the Federal Register, for the duration of the student's program.

(iv) An institution may request a one-year extension to the deadline referenced in paragraph (c)(8)(iii) for each State in which it can present evidence that the State has initiated, but not completed, replacing the exemption with an active process as described in paragraph (c)(i)(ii), or that the institution is actively pursuing legal authorization in good faith but the State has not completed processing the application for legal authorization. An institution may request such extensions for each State unless otherwise prohibited by the Secretary in the notice specified in paragraph (c)(8)(iii).

(9) The Secretary considers an institution to meet the provisions of paragraph (c)(1) or (c)(4) of this section if the institution is authorized by name to offer distance or correspondence education beyond secondary education by--

(i) The Federal Government; or

(ii) As defined in 25 U.S.C. 1802(2), an Indian tribe, with respect to students who legally reside on tribal lands, if the tribal government has a process to review and appropriately act on complaints concerning an institution and enforces applicable tribal requirements or laws.

(10)(i) Notwithstanding paragraphs (c)(1), (c)(2), (c)(3), (c)(4), (c)(5), and (c)(6) of this section, an institution is considered to be legally authorized to operate distance and correspondence educational programs beyond secondary education in a State if it is exempt from State authorization as a religious institution under that State's constitution or State law.

(ii) For purposes of this paragraph, a religious institution is an institution that meets the requirements of paragraph (b)(2) of this section.

(11)(i) If an institution enrolls a member of the armed forces, or a member's spouse or dependent child, in distance or correspondence education while the member's home or permanent duty station is in a State where the institution is authorized to offer that distance or correspondence education under paragraph (c)(1) or (c)(4) of this section, and the member's home or permanent duty station subsequently changes so that neither the member's home nor permanent duty station is in a State where the institution is authorized to offer distance or correspondence education under paragraph (c)(1) or (c)(4) of this section, the institution is considered to be legally authorized in that State or foreign location for purposes of providing title IV, HEA program funds to the member, or the member's spouse or dependent child, for the duration of the member's, or the member's spouse's or dependent child's, enrollment in the program in which he or she originally enrolled, provided the member, or the member's spouse or dependent child, is continuously enrolled at the institution.

(ii) For purposes of this section--

(A) A member of the armed forces is a member of the armed forces who is on active duty for a period of more than 30 days;

(B) The terms "armed forces" and "active duty for a period of more than 30 days" have the meaning given those terms in 10 U.S.C.101.

(C) The member of the armed forces is considered to be continuously enrolled during periods of military mobilization or other service-related circumstances beyond the control of the service member.

(12) An institution described under paragraph (c)(1), (c)(3), or (c)(4) of this section that loses its State authorization to offer distance or correspondence education is considered to be an ineligible institution in that State for the purpose of providing HEA program funds and must immediately provide notice to current students and prospective students, as such terms are defined in 34 CFR 668.41, that it is prohibited from disbursing Federal student aid to students participating in distance or correspondence education in that State because the institution is no

longer considered to be legally authorized by that State. This information must also be immediately posted prominently on the institution's website.

(13)(i) If an institution was considered to be legally authorized to offer distance or correspondence education by a State under paragraph (c)(1)(i)(A)(2)(ii) or (c)(1)(i)(A)(2)(iii) of this section and the State withdraws from or is removed from the State-to-State or State authorization reciprocity agreement, or the non-State entity administering the State authorization reciprocity agreement ceases to operate, the institution is considered an ineligible institution in that State for the purpose of providing HEA program funds except if the Secretary has determined the institution's authorization is extended under paragraph (c)(13)(ii). If the loss of eligibility occurs, the institution must immediately provide notice to current and prospective students, as the terms are defined in 34 CFR 668.41, that it is prohibited from disbursing Federal student aid to students participating in distance or correspondence education because the institution is no longer considered to be legally authorized by the State, unless it can demonstrate that it meets the requirements to be legally authorized under another approach described in paragraph (c)(1) of this section. This information must also be immediately posted prominently on the institution's website.

(ii) Notwithstanding paragraph (c)(13)(i) of this section, the Secretary considers an institution to remain legally authorized in that State for such additional time as identified by the State and agreed to by the Secretary based on an ongoing review of documentation submitted by the institution of steps taken and to be taken by the institution and the State to enable the institution to meet the requirements of paragraphs (c)(1), (c)(2), and (c)(4) of this section, as applicable.

(14) If an institution offering distance or correspondence education is considered to be legally authorized consistent with paragraph (c)(6) of this section and the State withdraws its authorization for the institution to offer the distance or correspondence education program in that State, the institution is prohibited from disbursing Federal student aid to students participating in the distance or correspondence education program in that State. The institution must immediately provide notice to current students and prospective students, as the terms are defined in 34 CFR 668.41, that it is prohibited from disbursing Federal student aid to students participating in that distance or correspondence education program. This information must also be immediately posted prominently on the institution's website.

(d) Notwithstanding paragraphs (a), (b), (c), and (e) of this section, an institution is not considered to be legally authorized for purposes of institutional eligibility for funding under the HEA with respect to programs offered in a State if those programs do not meet the educational, and as applicable, programmatic or institutional accreditation requirements for graduates of those programs to receive certification or sit for the licensure or certification examinations required in the State in the occupation for which the program is intended, unless the institution obtains written acknowledgement from each student in that State before enrollment that graduation from the program –

(i) Will not fulfill educational, or as applicable, programmatic or institutional accreditation requirements to received certification, or to site for the licensure or certification examination in that State; and

(ii) If applicable, that additional coursework, field experience, or other academic requirements must be completed to fulfill requirements to receive certification, or to sit for licensure or certification examinations in that State.

No additional changes were made to §668.43, other than updating cross-references. The information provided below is the same as provided for the April 23-25 meeting, but reiterated here for completeness.

**Summary of change to §668.43:**

Section 668.43(a) and (b) would be amended to require that an institution disclose to enrolled and prospective students specific information regarding the student complaint process if the institution (1) offers or will offer 50 percent or more of a postsecondary education program through distance or correspondence education to students in a State and is authorized in that State under a State-to-State agreement or a State authorization reciprocity agreement administered by a non-State entity; or (2) is located in a State but has either an additional location at which 50 percent or more of a program is offered or will be offered, or a branch campus, that is located in a foreign country, i.e., not in a State.

In conjunction with current regulations, these additions would mean that an institution would be required to make the information regarding the student complaint procedures that apply to distance/correspondence education and foreign locations/branches readily available to enrolled and prospective students through appropriate publications, mailings or electronic media (§668.41(d)). In addition, a brief description of this student complaint procedure information would be incorporated into the list of information that an institution must provide to enrolled students in an annual notice, together with an explanation of how to obtain the information (§668.41(c)). An institution would be required to provide the annual notice containing this information on a one-to-one basis through a direct individual notice to each enrolled student. The institution would be required to make this notice through an appropriate mailing or publication, including direct mailing through the U.S. Postal Service, campus mail, or electronic mail. Posting on Internet or Intranet Web sites would not constitute notice. If the institution disclosed the consumer information by posting the information on a Web site, it would be required to include in the notice the exact electronic address at which the information is posted, and a statement that the institution will provide a paper copy of the information on request (§668.41(c)(2)).

**Change:**

**§668.43 Institutional information.**

(a) Institutional information that the institution must make readily available to enrolled and prospective students under this subpart includes, but is not limited to—

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(6)(i) The names of associations, agencies or governmental bodies that accredit, approve, or license the institution and its programs and the procedures by which documents describing that activity may be reviewed under paragraph (b)(1) of this section; and

(ii) The information regarding accreditor and State complaint processes required under paragraphs (b)(2), (b)(3) and (b)(4) of this section;

\* \* \* \* \*

(b)(1) The institution must make available for review to any enrolled or prospective student upon request, a copy of the documents describing the institution's accreditation and its State, Federal, or tribal approval or licensing.

(2) The institution must also provide its students or prospective students with contact information for filing complaints with its accreditor and with its State approval or licensing entities and any other relevant State official or agency that would appropriately handle a student's complaint.

(3) For an institution that offers or will offer 50 percent or more of a postsecondary education program through distance or correspondence education to students in a State and that is authorized in that State under a State-to-State agreement or a State authorization reciprocity agreement administered by a non-State entity under 34 CFR 600.9(c)(1)(i)(A)(2)(ii) or 600.9(c)(1)(i)(A)(2)(iii), respectively, the institution must disclose to enrolled and prospective students in accordance with §668.41 that--

(i) The institution is participating in a State-to-State agreement, or a State authorization reciprocity agreement administered by a non-State entity, as applicable; and

(ii) If the student is not satisfied with the result of the student complaint process provided for under the agreement, and the State in which the student receives the distance or correspondence education did not actively participate in the complaint process, the student may utilize the student complaint process in the State in which the student receives the distance or correspondence education.

(4) For an institution that is located in a State that has an additional location at which 50 percent or more of a program is offered or will be offered or a branch campus that is located in a foreign country, i.e., not in a State, the institution must disclose to enrolled and prospective students in accordance with §668.41 that students at the branch campuses or additional locations may utilize the complaint process of the State in which the main campus of the institution is located for any complaints regarding that additional location or branch campus.