REGULATORY IMPLICATIONS OF DISTANCE LEARNING

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Regulatory Implications of Distance Learning
The External Environment

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1. Higher Education as a highly regulated industry.
   a. Regulated as to place (i.e. where allowed operate), content (i.e. nature of offerings and their quality), control (i.e. type of ownership and qualifications of "owners," outcome (i.e. credential awarded) and delivery method (e.g. "conventional" ("face-to-face"), correspondence, telecommunications).
   b. Regulated by states, accreditors and the federal government.

2. Primary regulation is state authorization.
   a. State authorization primarily speaks to where institution can operate and what outcome (i.e. credential) it can provide.
      i. State authorization is customarily location-specific. Instruction is expected to be offered at a specific location to learners attending at that location. Instruction offered at a different location (generally) requires a separate or amended authorization.
      ii. Often (but not always), state authorization is at least in part derivative of accreditation. States often defer to accreditors for qualitative review.

3. Secondary regulation is accreditation.
   a. Accreditation historically speaks to whether an institution meets generally accepted standards for an institution of its type, and delivers the educational services and operates substantially in the manner it describes itself.3

1/ See, for example, ORE.REV.STAT. §345.030(3) (1997).

2/ See, for example, ALASKA ADMIN. CODE. tit. 14 §48.030(b) (1998). "The Commission [on Postsecondary Education] may exempt * * * (7) a program offered within the state by an out-of-state institution that is authorized to operate by the state in which it is located and is nationally or regionally accredited.

b. Accreditation is always predicated on an institution having state authorization to operate. For example, among the General Institutional Requirements of one of the regional accrediting organizations is the requirement that:

"[The institution] has legal authorization to grant its degrees, and it meets the legal requirements to operate as an institution of higher education wherever it conducts its activities." and the accompanying explanation: "An institution of higher education, no matter in which state(s) it is located, must hold appropriate state ** authority to exist and to grant its degrees."  4

A. Accrediting agencies are non-governmental entities, but increasingly operate within guidelines and standards established by the U.S. Department of Education to achieve "recognition" by the Secretary of Education as a "reliable authority as to the quality of education or training offered [by an accredited institution]." 5

4. The Federal role in regulation of higher education is secondary to that of the States and derivative of the action of accrediting agencies.

a. Control of education has historically been deemed to fall within the powers reserved to the States. 6 Statutory language follows this formulation. For example, the General Education Provisions Act provides:

"No provision of any applicable program shall be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system **." 7

b. In higher education, the Federal role is almost exclusively to provide resources to allow students enrolled at "eligible" institutions to participate in the Federal programs of

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6/ See, HEA, Title IV, Part H, Subpart B, 20 U.S.C. 1099b. for the statutory authority of the Secretary to prescribe standards for recognized accrediting agencies, and 34 CFR Part 602 for the regulations that specify in some detail how accrediting agencies must operate. While an accrediting agency need not be "recognized" by the Secretary of Education to function, accreditation by a "recognized" accreditor is a prerequisite for institutional participation in the Federal student aid programs. See, HEA, §1201(a)(5), 20 U.S.C. 1141. Since virtually all colleges and universities need to participate in the federal student aid programs, the recognition of the accreditor is essential.

7/ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Const., X Amend.

student financial assistance. The definition of an eligible institution primarily relies on state authorization and voluntary accreditation.

As used in this chapter - (a) The term "institution of higher education" means an educational institution in any State which ** (2) is legally authorized within such State to provide a program of education beyond secondary education, ** and (5) is accredited by a nationally recognized accrediting agency or association **. 

i. The assumption is always that the institution has a physical nexus within a State:

"For purposes of qualifying an institution of higher education for participation in programs under this title, the Secretary shall determine the legal authority to operate within a state **."

5. Conundrum of the regulation of distance learning.

a. What is different? Students may not physically be within the jurisdiction in which institution is licensed, and the institution may not be "physically present" within the jurisdiction where students are located.

b. Likewise, the student may be located outside of the geographic scope of the institution's accrediting agency.

c. Two key questions:

i. **What is being regulated? Is it the institution, the content being delivered, the delivery mechanism, the recipient (learner), or all of the above?**

ii. **Who has the right to regulate? The state in which the institution is located, the state where the student is located, both or neither?**

(1) In the case of (b) above, which accrediting agency has jurisdiction? How does the U.S. Department of Education determine if an institution has "legal authority" to operate outside of its domicile.

6. Question of balancing institutional rights with the power of the states to protect "their" citizens.

a. Basic institutional rights include choice of method (modality) of delivery (e.g. "face-to-face" or "mediated"); choice of timing of delivery (e.g. synchronous (i.e. real time) or asynchronous (i.e. time-shifted); choice of place of delivery (e.g. at "principle domicile" (e.g. main campus) of institution, at another physical location campus within same state,

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\[1\] Higher Education Act of 1965, Sec. 1201(a), 20 U.S.C. 1141(a) (emphases added)(hereafter "HEA").

\[2\] HEA, §498(a), 20 U.S.C. 1099c
at another physical location in a different state, at a virtual location within the same state or at a virtual location in another state (or country).

7. How the balance is being struck.

   a. By the states. A majority of states have taken the position that if an institution does not have a physical presence within its borders it lacks jurisdiction to apply its regulatory requirements.

      i. The question remains: what is "physical presence." There is a continuum of interpretations.

         (1) Offering instruction "on the ground" (i.e. with instructors actually present within the state).\textsuperscript{10/} This is the most common standard.

         (2) Having any institutional personnel (e.g. advisors) or agents (e.g. recruiters) present within the state.\textsuperscript{11/}

         (3) Granting an academic credential to residents of the state from a location remote from the state.\textsuperscript{12/}

         (4) Using an "intermediary" (e.g. cable system) to deliver the educational service.\textsuperscript{13/} This raises serious Commerce Clause and possibly First

\textsuperscript{10/} \textit{See, for example}, 13 KAR 1:020(1) "A college which offers courses or conducts academic programs in Kentucky shall be licensed. ** An out-of-state college shall be licensed separately for each instructional site in Kentucky."

\textsuperscript{11/} \textit{See, for example}, Georgia Code 20-3-250.2. "As used in this part, the term: (1) "Agent" means any natural person owning any interest in, employed by, or representing for remuneration a nonpublic postsecondary educational institution within or outside this state and who, by solicitation in any form made in this state, enrolls or seeks to enroll a resident of this state for education offered by such institution, or who offers to award educational credentials, for remuneration, on behalf of any such institution, or who holds himself or herself out to residents of this state as representing a nonpublic postsecondary educational institution for any such purpose.

\textsuperscript{12/} \textit{See, for example}, Georgia Code 20-3-250.2 (12) "Nonpublic" [college] means a private postsecondary educational institution not established, operated, or governed by the State of Georgia, or any public or private postsecondary educational institution legally operating in another state or nation that conducts postsecondary activities in Georgia or offers postsecondary instruction leading to a postsecondary degree or certificate granted to Georgia residents from a location outside Georgia.

\textsuperscript{13/} \textit{See, for example}, Oregon's unique regulation, which states in pertinent part: "[A]

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Amendment issues. The law in question has never been enforced over the objection of an institution.

ii. Once the regulatory requirement attaches, there is enormous variety among the states as to how to treat telecommunicated learning.

(1) Many have not added provisions specifically dealing with telecommunicated learning, resulting in standards (designed for campus-based institution, such as library volumes or per student classroom space) which are difficult or impossible to apply to virtual programs.

(2) There are a few exemplary efforts to create a new regulatory model for distance learning programs and institutions, mainly adopting the WICHE good practices.  

b. By the accreditors. Generally, an institution's accreditation, even though granted by a "regional" accreditor with a defined geographic scope, extends to all of the institution's programs, no matter where offered.

i. But the program must be within the "scope of accreditation," and some accrediting agencies have chosen to delimit such scope so that an institution is only allowed to offer programs at a distance within a specified geographic area (typically specified states), usually in the form of a stipulation annexed to the institution's Statement of Affiliation Status.

"Stipulations place limits on the development of new activities or new programs, including limits on the size, extent, or location of certain of the institution's activities."  

ii. Offering a program via telecommunications may be a "substantive change" if the institution has not previously offered similar programs at the same degree level. Accreditors are required by Federal regulation to review substantive changes  

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13/ (...continued)

representative of a school" includes "a provider of an instructional communications medium * * * regardless of whether there was cooperation [between the school and the provider]." OAR §583.030.0015(6)(1997). While the statute excludes out-of-state interactions where "all learning or evaluation * * * is accomplished through private interstate communications in which the student acts alone within the state," the use of a cable system to distribute telecourses has been at least tentatively determined by the authorizing agency to fall outside of this exemption.


15/ See, for example, Handbook of Accreditation, Commission on Institutions of Higher Education, North Central Association of Colleges and Schools, 1997, p. 118.
before they are included in the scope of accreditation.\textsuperscript{16} The regulation defines "substantive change" as encompassing:

"The addition of courses or programs that represent a significant departure, in terms of either in the content or method of delivery, from those that were offered when the agency most recently evaluated the institution."\textsuperscript{17}

iii. All of the regional accreditors have adopted as the starting point for their accreditation of telecommunicated learning the "Principles of Good Practice" promulgated by the Western Interstate Commission on Higher Education.\textsuperscript{18} Each has then added its own interpretive guidelines.\textsuperscript{19}

(1) Guidelines are typically more outcome oriented than is still the case with "conventional" instruction.

iv. The regional accrediting agencies have agreed among themselves to generally allow the agency that primarily accredits an institution to have responsibility for its interregional distance learning activities, although a recent study still identifies discontinuities.\textsuperscript{20}

(1) The establishment of "mega-institutions" such as Western Governors University has encouraged the regional accreditors to take the next logical, but difficult, step of creating an interregional committee consisting of the directors of each of the regions within which WGU will operate to act in tandem on its accreditation.

v. Since accreditors, unlike state regulators, are not immune from the application of the antitrust laws,\textsuperscript{21} either working in consort (see above) or establishing

\begin{footnotesize}

\textsuperscript{16} See, 34 CFR §602.25(b)(1).

\textsuperscript{17} See, 34 CFR §602.25(b)(iii).


\textsuperscript{19} See, for example, "Guidelines for Distance Education," Handbook of Accreditation, Commission on Institutions of Higher Education, North Central Association of Colleges and Schools, 1997, pp. 170-172.


\textsuperscript{21} Witness the recent CID proceeding commenced against the American Bar

(continued...)
\end{footnotesize}
"service areas" (i.e. specific states within which a state may enroll students in its distance learning program, regardless of whether that state is in the accreditation region) could raise interesting antitrust issues.

c. By the Federal government

i. Until 1992, the Department of Education considered all telecommunicated learning except synchronous (i.e. live) instruction to be "correspondence study," which significantly reduces the ability of students to access federal aid for their participation in such programs.

ii. The 1992 Higher Education Amendments distinguished telecommunicated learning from correspondence in most instances. "A student enrolled in a course of instruction at an eligible institution of higher education ** that is offered in whole or in part through telecommunications and leads to a recognized associate, bachelor, or graduate degree conferred by such institution shall not be considered to be enrolled in correspondence courses unless the total amount of telecommunications and correspondence courses at such institution equals or exceeds 50 percent of such courses. 

iii. The Department recently issued a "Dear Colleague Letter" to clarify its position on distance learning:

"Over the past year there has been rapid growth in the number of institutions providing courses and degree programs in various modes of distance education. As a result the Department has received many inquiries concerning the eligibility for Title IV, HEA student financial assistance of students enrolled in distance education courses and of institutions that offer these courses. It has become apparent that there is a need to clarify how distance education affects institutional and student eligibility under the Title IV, HEA Programs." 

The statutes and regulations governing the Title IV, HEA Programs were developed when far fewer institutions were actively engaged in distance education as we are coming to understand it today. As a result, institutions are finding it difficult to apply some of those statutory and

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21/ (...continued)
Association respecting standards for the accreditation of law schools, which resulted in an agreement by the ABA to make material changes in its policies.


regulatory requirements to distance education programs. The purpose of this letter is to set forth the statutory and regulatory provisions currently applicable to the various forms of distance education programs ** and to address some of the questions institutions have posed concerning the awarding of Title IV, HEA Program funds to students enrolled in distance education programs **.

The Department recognizes that significant changes in the HEA are required to accommodate new modes of delivering educational programs. To that end, the Department's proposals for reauthorization of the HEA, if adopted, would expand the availability of Title IV, HEA Program funds to students in distance education programs. These proposals, along with others that address the need to respond to changes in educational delivery, are currently under discussion as a part of the reauthorization of the HEA.24/

iv. The DCL highlights a number of significant economic differences between a course of study being defined as "correspondence" versus "telecommunications, such as in calculating "Cost of Attendance":"

"For a student engaged in a program of study by correspondence, generally the only costs that can be included in the student's cost of attendance are tuition and fees and, if required, books and supplies. Travel and room and board costs can only be included if they are incurred specifically in fulfilling a required period of residential training.

Generally, a student who is studying via telecommunications does not have any restrictions placed on his or her cost of attendance unless the financial aid officer determines (using his or her professional judgement) that telecommunications instruction results in a substantially reduced cost of attendance."

v. Currently, the Congress appears prepared to adopt language that would create an experimental program to allow the Secretary of Education to waive almost any part of the HEA and the attendant regulations to enable a select group of institutions (probably between five and ten) to experiment with utilizing the federal student aid programs in a telecommunicated learning format.25/

SEC. 487B. DISTANCE EDUCATION DEMONSTRATION PROGRAMS. (a) PURPOSE—It is the purpose of this section—

24/ The Department's reauthorization proposals may be found on the Internet. http://www.ed.gov/offices/OPE/PPI/Reauthor/

25/ Higher Education Amendments of 1998, Sec. 470, H.R. 6, 105 Cong., 2d Sess. The companion Senate bill has similar language.
(1) to allow demonstration programs that are strictly monitored by the Department of Education to test the quality and viability of expanded distance education programs currently restricted under this Act;

(2) to provide for increased student access to higher education through distance education programs;

(3) to help determine the most effective means of delivering quality education via distance education course offerings; and

(4) to help determine the appropriate level of Federal assistance for students enrolled in distance education programs.

(b) DEMONSTRATION PROGRAMS AUTHORIZED-

(1) IN GENERAL- The Secretary is authorized to select institutions or a consortia of institutions for voluntary participation in a Distance Education Demonstration Program that provides participating institutions with the ability to offer distance education programs without regard to the current restrictions in part F or G of this title or part A of title I.

(2) EXEMPTIONS- The Secretary is authorized to exempt any institution or consortia participating in a Distance Education Demonstration Program from any of the requirements of parts F or G of this title, or part A of title I, or the regulations prescribed under such parts.

vi. At present, Congress is considerably more wary of distance learning than is the Administration, primarily due to concerns over possible fraudulent conduct and resultant misuse of Federal funds.26

(1) Very large organizations like the Western Governors University and the California Virtual University, not to mention the emergence of the British Open University as an active participant in the U.S. telecommunicated learning scene, are likely to create a critical mass for more flexible access to federal funds for students enrolled in distance learning programs.

8. International regulation of distance learning courses.

a. Regulations of courses delivered into the U.S.: There is none. No treaty or statute governs. Right now, a foreign institution could deliver courseware into any U.S. jurisdiction via telecommunications without any regulation, excepting overt fraudulent conduct which is subject to general consumer fraud or criminal statutes. While the foreign entity could offer a degree the worth of which would be up to the beholder, and credits earned in the program would not be readily transferable, unless the foreign

26/ "The Department [of Education] has taken an aggressive position on distance education in its reauthorization proposals. The legislation that the House passed and the bill that will come to the Senate floor for vote at some point take a much more conservative position on distance education." Assistant Secretary of Education David Longanecker, quoted in Information Technology in Postsecondary Education, Vol 1, No. 11, June 9, 1998.
institution is accredited in its home jurisdiction and that accrediting body is given credence by U.S. institutions, the competitive opportunity is considerable.

b. Regulation of courses originating with a U.S. institution and delivered overseas: There may be a great deal. The First Amendment is a uniquely American concept, and many nations restrict what can be communicated via their telecommunications systems or even via satellite.

c. Without some form of treaty or international convention, rational control over the transnational distribution of postsecondary education will be extremely difficult. There are nascent efforts aimed at reaching consensus in cross-boundary delivery of postsecondary education.\textsuperscript{277}

\textsuperscript{277} The Global Alliance for Transnational Education (GATE) is one organization active in this area. http://www.edugate.org/
Business Issues: Public-Private Ventures in Telecommunicated Learning

Using a For-Profit Related Entity to Capitalize Distance Learning

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The use of telecommunications as the intermediary for the delivery of educational services suggests the potential for a bifurcation between the academic institution that \textit{creates the knowledge and conducts the educational process} and the \textit{financing, marketing and delivery} of the educational service.

Institutions clearly may, and do, outsource non-academic functions. This is particularly so in the case of telecommunicated learning, where the learner is remote from the resources of the campus.

Accrediting standards and state laws recognize the need to rely on external providers for items as central as \textit{learning resources}.\textsuperscript{1}

Core academic functions consist of:

- Selection and maintenance of the faculty.
- Development of the curriculum and its content.
- Establishment of criteria for admission to an academic program.
- Admitting students to the academic program.
- Providing instruction.
- Evaluating student performance.
- Awarding the academic credential.

\textsuperscript{1} "The school shall provide \textit{or assure} for its faculty and students \textit{access} to educational resources in print and other media. \textsuperscript{**} The school may arrange for comprehensive privileges from libraries of other organizations, provided that it can prove convenient access and extensive use." Ore.Admin.Reg. 583-030-0035(17), 1998. \textit{See also, "A Special Note on Libraries and Other Learning Resources," Handbook of Accreditation, Commission on Institutions of Higher Education, North Central Association of Colleges and Schools, September 1997, p. 37."}
All other functions could be provided by one or more entities acting under contract to or on behalf of the institution, such as:

- Marketing of the program.
- Recruitment of students.
- Enrollment processing.
- Physical production of the courseware.
- Distribution (delivery) of the courseware (e.g. satellite, Internet).
- Information resources/virtual library/virtual bookstore.
- Student services.
- Secure testing.
- Registrar, bursar and financial management.

The entity or entities could be outside contractors.

or

The entity could be a for-profit entity controlled by the Institution but capitalized in the marketplace, i.e. the institution's Educational Services Corporation (ESC).

A for-profit ESC that is controlled by the institution may be capitalized by private investment and ultimately through a public offering.

The institution contributes to the ESC in return for its share of the ESC’s equity intellectual property in the form of:

- A license to use the institution's name and marks.
- The right to market and distribute the institution's courseware.
- Tangible assets that are appropriately used by the ESC in the fulfillment of its duties to the institution.
- The goodwill associated with the institution's name and marks.

An investor contributes cash and possibly certain tangible resources supportive of the distribution of the institution's courseware.

The investor's capital contribution provides the ESC with the working capital necessary to support the production (via contract back to the institution), marketing and distribution of the courseware.

Upon an initial public offering of the stock of the ESC, the equity interest of the institution becomes liquid, with the potential for creating substantial endowment value.