

TRYING TO EXPAND DISTANCE  
LEARNING: A LIVING EXAMPLE  
OF ACCREDITATION AND THE  
REDUCTION IN INSTITUTIONAL  
AUTONOMY

By: David A. Armstrong

# Topics to be Discussed:

- I. Fast Facts
- II. Regulatory Language
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- III. USDOE Dear Colleague Letters
  - A. March 17, 2011
  - B. April 20, 2011
- IV. Career College Ass'n v. Duncan, 796 F.Supp.2d 108 (D.D.C. 2012)
- V. Key Regulatory Language
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- VI. Regulatory Requirements for Institutions
- VII. Penalty for Noncompliance
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# I. Fast Facts

- A. Number of students taking any distance education courses = 4,277,000
- B. Percent of all students taking any distance education courses = 20.4%
- C. Number of students taking their entire program through distance education = 769,000
- D. Percent of all students taking their entire program through distance education = 3.7%
- E. This data is from 2007-2008 and has most likely risen during the previous years

# II. Regulatory Language

## A. 34 C.F.R. § 600.9

1. (a)(1) An institution...is legally authorized by a State if the State has a process to review and appropriately act on complaints concerning the institution including enforcing applicable State laws...
2. (i)(A) The institution is established by name as an educational institution by a State through a charter, statute, constitutional provision, or other action issued by an appropriate State agency or State entity and is authorized to operate educational programs beyond secondary education, including programs leading to a degree or certificate.
3. B) The institution complies with any applicable State approval or licensure requirements, except that the State may exempt the institution from any State approval or licensure requirements based on the institution's accreditation by one or more accrediting agencies recognized by the Secretary or based upon the institution being in operation for at least 20 years.]
4. **(c) 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. (as we will see later, this will be vacated by the court)**

# III. USDOE Dear Colleague Letters

## A. March 17, 2011

1. Designed in a question and answer format (Distance education starts on question 15)
2. Question 20: Does an institution have to identify where a student is located and seek approval from the State before enrolling the student in an online program if such approval is required by that State? What happens if the student moves to another State?
  - a. Answer 20: Yes. If a State requires such approval for the provision of distance or online education to students located in the State, a student is eligible for title IV, HEA funds only if the required State approval has been obtained. While the location of the student is initially determined at the time of enrollment in a program, consistent with other determinations of student eligibility, it must also be reevaluated each time an institution makes a new award to a student.
3. Question 21: Is there a minimum number of enrollments that would trigger the need for an institution to have a State's approval to offer distance education in the State (*a de minimus test*)?
  - a. Answer 21: There is no Federal minimum number of enrollments that triggers compliance. It is up to a State to establish the conditions for when State approval is required. States may decide to adopt their own *de minimus tests*.
4. <http://ifap.ed.gov/dpcletters/attachments/GEN1105.pdf>

# III. USDOE Dear Colleague Letters (cont'd)

## B. April 20, 2011

1. 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
2. Examples of good faith:
  - a. Documentation that an institution is developing a distance education management process for tracking students' place of residence when engaged in distance education
  - b. 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
  - c. An application to a State, even if it is not yet approved
  - d. Documentation from a state that an application is pending
3. The Department promises to be a partner and help institutions comply with State regulations
4. <http://ifap.ed.gov/dpcletters/attachments/GEN1111.pdf>

# IV. Career College Ass'n v. Duncan, 796 F.Supp.2d 108 (D.D.C 2012)

- A. Plaintiff's challenged the regulations under the Administrative Procedure Act ("APA") and the United States Constitution arguing the regulations exceeded the Higher Education Act's commands and were arbitrary and capricious
- B. Court held: "[plaintiffs] were undoubtedly prejudiced by their inability to attempt to persuade the Department prior to its adoption of final regulations concerning added authorization requirements for distance and internet education institutions. Accordingly, the Department failed to comply with the APA's notice requirement on this aspect of its new regulations. **The Court will vacate 34 C.F.R § 600.9(c)**"
  - 1. ONLY vacated § 600.9(c), all other sections remain intact
  - 2. The section was vacated because of the APA's notice requirement, not on the merits of the regulation
  - 3. The Department can reissue the regulation, and if notification requirements are met, many expect § 600.9(c) to be valid and legal
  - 4. Institutions still must follow state law
- C. Some advise institutions to act as if the regulation is still intact
- D. The Department has appealed this decision

# V. Key Regulatory Language

- A. (i)(A) The institution is established by name as an educational institution by a State through a charter, statute, constitutional provision, or other action issued by an appropriate State agency or State entity and is authorized to **operate** educational programs beyond secondary education, including programs leading to a degree or certificate.
  - 1. The word “operate” varies state by state
  - 2. Must look for “trigger” actions that constitute “operating” under state law. Some states have very few trigger actions while others have so many that most institutions would be considered to “operate” within that state
- B. (c) 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.
  - A. Again, this phrase varies state by state
  - B. Essentially any state in which your institution has no physical location or is not registered within the state



# VI. Regulatory Requirements for Institutions

- A. Register and be approved by name by each state in which you are not “physically located” and are “operating”
- B. Comply with all state approval and licensure requirements
- C. Provide students with contact information for filing complaints with the institution’s accrediting agency and the applicable state agency (was not vacated)
- D. These must be in place by July 1, 2014 but good faith efforts are currently sufficient
- E. States are permitted to offer reciprocal agreements
- F. Essentially is state-by-state accreditation

# VII. Penalty for Noncompliance

## A. Federal noncompliance

1. Institutions will have to reimburse the federal government for federal funds received by students in noncompliant states
2. Some believe that institutions could face penalties from the USDOE for “misrepresentation” if disclosure of state approval is insufficient

## B. State noncompliance

1. Fines
2. Cease and desist orders
3. If an institution did not notify a student of its lack of approval, a student could file a lawsuit against the institution

# VIII. Why Does This Matter?

- A. Another regulatory hurdle that must be cleared by the institution
- B. By subjecting the institution to up to 50 different states' regulations, the autonomy of the institution greatly diminishes
- C. Extremely work intensive, as all of the responsibility essentially falls on the institution
  - 1. Very difficult for small institutions
  - 2. Small institutions may rely upon distance learning more than anyone
- D. Compliance with these requirements can be costly
  - 1. Some states have authorization fees
    - a. Colorado = \$6,000 for non-accredited schools and \$3,000 for accredited\*
    - b. Massachusetts = \$10,000 for an out of state institution plus \$2,000 for each degree requested
    - c. Virginia = \$6,000\*
- E. Competing interests
  - 1. Institutional autonomy vs. state's rights vs. federal rights
  - 2. Accreditation is further intertwined between these competing interests, making compliance that much more difficult for all involved

# IX. What Should You Do?

- A. Because of the court's vacating opinion, the future of the regulation is still up in the air, making it difficult to decide how to approach the July 1, 2014 deadline
- B. Three broad approaches:
  - 1. Ignore the regulations since a key aspect has been judicially vacated
    - 1. Dangerous and somewhat impractical since other aspects of the regulations are still in effect
  - 2. Act as if the regulations stand as proposed and apply in every state in which you "operate" and are "not physically located"
    - 1. Will ensure future compliance, but if the regulation does not get reissued or the appeal fails, then this could constitute wasted time and resources
  - 3. Comply with the minimum requirements that demonstrate good faith and wait to see if the regulations will be modified or repealed.
    - 1. Still prepared for the possible future regulations, but you will not be allocating resources needlessly
    - 2. Currently, this is the Notre Dame College approach
- C. You must make the decision that is best for your institution. There is no right answer. Apply the unique characteristics of your institution to the available guidance in order to make a well-informed decision

# X. Helpful Resources

- A. Western Interstate Commission for Higher Education:  
<http://wcet.wiche.edu/advance/state-approval>
- B. <http://wcet.wiche.edu/wcet/docs/state-approval/StateAuthorizationWCETTtwo-pager11-23-11.pdf>
- C. State Higher Education Executive Officers:  
<http://www.sheeo.org/stateauth/stateauth-home.htm>
- D. Electronic Code of Federal Regulations:  
<http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr;sid=422e8e1e4276e7662af45f2cd8f09d1e;rgn=div2;view=text;node=20101029%3A1.25;idno=34;cc=ecfr;start=1;size=25>