2011

State Approval Regulations for Distance Education: A 'Starter' List

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A partnership of WCET, SREB, ADEC, and the University of Wyoming

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On October 29, 2010, the U.S. Department of Education (USDOE) released the following new regulation for higher education institutions as "§ 600.9(c) State authorization"[1]:

> *"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."*

Institutions are expected to comply **in each state** in which they 'operate' by July 1, 2011. U.S. Department of Education officials have told us that institutions possessing proof that they are applying in a state by July 1 will be considered as 'good faith' that the institution is in compliance for the 2011-2012 year. We are waiting for the official release of this statement.

Purpose of this 'Starter' List

The need for state licensure/approval[2] is determined by the laws and regulations of each state, which vary significantly across the country. To assist institutions in finding and complying with these regulations, the WICHE Cooperative for Educational Technologies, Southern Regional Education Board, American Distance Education Consortium, and the University of Wyoming formed a partnership. This effort is one of several activities our organizations are coordinating in response to this issue.

The intent of creating this list is to provide institutions with a starting point for determining the states, if any, in which approval needs to be secured. The U.S. Department of Education will not provide a comprehensive state-by-state list. We believe many of our member institutions needed information immediately to allow them to plan how to meet the July 1 deadline.

Methodology

Given the short amount of time available to create the "starter list," we decided that this process had to be fast and lean. We took the following steps:

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[1] "Electronic Code of Federal Regulations", National Archives and Records Administration. Quoted from web page on February 28, 2011: 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

[2] We use the term "licensure/approval" in this document. States use a variety of terms (license, authorize, certify, approve, accredit, register) for the act of regulating institutions in their state.

Question development.

We focused on a small number of questions that could that would be the most helpful for institutional personnel in starting their research. Institutional regulations are complex. The distance education related activities that institutions conduct in each state vary greatly. The need for applying in a state often depends on the specific combination of state regulations and institution's activities. Given the uniqueness of state/institution interactions and the time constraint, we focused on a simple list of essential questions.

Researched websites, documents, laws, and regulations.

Based upon the experience of others and our time constraints, we did not conduct a survey. Representatives from each partner organization took responsibility for reviewing a subset of states. We reviewed the information that was readily available on websites or in other documents. We contacted states only when there was inconsistent, confusing, or missing information in the published materials.

Requested State Agency Feedback.

On January 28, 2011, our initial draft findings were published. That draft document was sent to each of the listed contacts, governing/coordinating boards represented by the State Higher Education Executive Officers, and others we thought could help us in a particular state. We asked state agencies to correct any inaccuracies in our report.

Forty states made official responses that have been incorporated into this document. States were contacted several times to obtain their input. Of the 11 outstanding states (DC, FL, HI, KS, ME, NJ, NM, OR, PA, SD, UT), one state is still seeking approval of their submission and another decided not to respond since legislation is pending. States that did not provide an official response are clearly labeled: "Information not verified by the state."

Caveats

This is not a comprehensive list with all the answers.

The National Center for Higher Education Management Systems took 1.5 years to complete their state-by-state accreditation analysis conducted for the Council for Higher Education Accreditation (see below). We performed our analysis in about a month. Given that the answers often depend on what activities (local sites, advertising, proctoring, employees) your institution is currently conducting in a state, creating a list with all the answers would be impossible.

We are not lawyers or state regulators.

We did our best as knowledgeable higher education professionals to find the appropriate state agency (or agencies) and regulations and to present factual information from our research. We did not make any legal assessments because we are not trained in the law. Though we tended to avoid interpretations of regulations, this was unavoidable in some cases.

State regulations will be a moving target in some states.
As a result of these regulations, higher education reorganization (CT, MD), pending legislation (CT, MD, ND, UT), or of other local priority-setting activities, we have heard that the state approval regulations are under review and might change.

There will be mistakes.
Given that some states did not provide feedback, our short timeframe, and the complexity of state laws and regulations, there are bound to be inaccuracies. Even in states that responded, we found that the answer may vary depending on who responds. We do not warranty this information in any way.

Other Resources

In compiling this list, we extensively consulted the following works:

- "State Uses of Accreditation: Results of a Fifty-State Inventory" (2010) – created by the National Center for Higher Education Management Systems for the Council for Higher Education Accreditation.
- "State by State Analysis (34 C.F.R. § 600.9)" (2010) – created by Kessenick, Gamma, & Free LLC for the Western Association of Schools and Colleges.
- "The State of State Regulation of Cross-Border Postsecondary Education" (2006) – Dow Lohnes PLLC.

These documents were used for guidance in finding the state regulatory agencies. They were also useful for triangulation purposes. We gained confidence if our research unearthed the same information found in these surveys.

You might also wish to check:

- In January 2011, Eduventures released "Online Learning Across State Borders: Assessing State Regulation of Out-of State Institutions." You may request a copy through by sending an e-mail to: bmaloney@eduventures.com.
- The Dow Lohnes law firm is also working on similar questions and a service that will help your institution navigate the regulations.

Thank You!!!

We thank the following for their efforts in leading this partnership and performing state reviews. This effort was not in our job descriptions. These individuals decided to step-up and collaborate to benefit the distance learning community, at large:

Bruce Chaloux	Janet Poley
Southern Regional Education Board	American Distance Education Consortium
Russ Poulin	Maggi Murdock
WICHE Cooperative for Educational Technologies	University of Wyoming

We also wish to thank the following individuals for their support in completing this document:

- Marianne Boeke and Stacey Zis, National Center for Higher Education Management Systems (Advice).
- Myk Garn, Southern Regional Education Board (Advice).
- Corrie Lynn Gosko and Timothy Pearse, University of Wyoming (State Reviews).

A special thank you to Megan Raymond of the WICHE Cooperative for Educational Technologies, who performed state reviews, contacted and re-contacted the states, coordinated data collection, and performed the final edits.

Thank you to many others who gave input and advice along the way.

Recommendations and Observations

Additional ways institutions could use this document. Beyond its obvious usage, the 'state authorization' issue and this document can be used to further the discussion with leaders and policymakers. This regulation limits distance education when it is a necessary tool in meeting national completion and access goals. Suggestions include:

- Cross check what is included and learn more about your own state regulations. This issue has become more difficult because the state licensure/approval laws and regulations have not kept pace with today's technological possibilities. Institutions and governing/coordinating boards in some states have helped those agencies in updating their language.
- Share the document or the fact that it exists with leaders on campus. While it is more detailed than administrators may want, it will be assuring to them to know that this level of detail exists.
- Invite state policymakers and legislators to a discussion on the similarities and differences.

A request to state licensing/regulatory agencies.
In the draft document, we made the following recommendation: "given the anticipated increase in institutional efforts to meet the new federal regulations, we strongly encourage state agencies/licensing authorities to provide a link from their main website to information institutions will need to begin the approval process...It is in the best interests of both states and the institutions with which they will be working to make this information about licensure/approval processes as easy as possible to access and understand." Whether it was from this recommendation or self-preservation, we are glad to see that a few states are providing clearer paths to this information on their website. For those that have not done so, we renew this recommendation.

State regulatory agencies in states that do not require regulation need to post a standing letter.
"How can I make these calls stop," was a plaintive request to us from one of the state regulators. State agencies are hearing from institutions and if it is not true already, they will soon be overwhelmed.

The requests for letters in these states are prompting some to consider imposing a charge for this service.

Our recommendation is that the state agency post a letter stating under what conditions a distance education institution needs to apply. If the institution does not need to apply, it should use this "standing letter" as proof.

A question we wished we would have asked.
Several states have processes that fall short of the full approval process, such as requesting an exemption or registering in the state. These processes range from sending an e-mail to the agency telling them that you are serving students in the state to filling out applications with fees attached. For those who follow in this work, we recommend that they better document these requirements.

Next Steps

This is a revised final document which includes updated information from several states that provided changes after the previous document was published on February 28th. States with revised information are listed in the index with "revised" and the date of the revision. This is the final "starter list" document planned to be published by this partnership. If we receive several more updates from states, we might post an update or an addendum, but we will no longer actively seek state input.

The State Higher Education Executive Officers (SHEEO) is "intending" to assume the task of creating an expanded and continually updated list of state regulations. Meanwhile, we have met with other organizations to discuss how they can help in creating a single, on-going list. While the final home for an on-going list has not been formally announced, we are confident that we will be able to "pass the torch" to a trustworthy organization. We will provide all of our information and advise them on additional questions that could be addressed.

Instead of working on this list, this partnership is turning its attention to:

- WCET, SREB, and ADEC are partnering with other higher education organizations in seeking that "§ 600.9(c) State authorization" regarding state authorization and distance education is either rescinded or delayed for two years. Organizations that we are partnering with include the American Council on Education (ACE), Association of Public and Land-grant Universities (APLU), and the University Professional and Continuing Education Association (UPCEA). If a delay is granted, it will allow institutions to better prepare to meet these regulations and for interstate reciprocal agreements to be developed.
- If the regulations are not delayed or rescinded, finding new ways to make these processes easier on institutions and state regulatory agencies.
- Informing institutions on the latest news and advice regarding this issue.

Watch for more background and updates on the "state approval" issue.
WCET's state approval page: http://wcet.wiche.edu/advance/state-approval
WCET's blog: http://wcetblog.wordpress.com

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Contents

States Regulating Distance Education at a Glance

Institutional personnel often worry about having to apply for approval in every state. To help them navigate through the approval processes, we created the chart on the next page. The states are categorized into one of the three following groups:

- 🔴 **Red –** *Nearly every institution will need to apply.* The state has specific regulations requiring institutions offering distance education (even without any physical presence) to students within the state to seek approval or licensure.
- 🟢 **Green –** *Few institutions will need to apply.* The state has no regulations on this issue or there are specific exemptions. In some states proprietary institutions might still need to apply.
- 🟡 **Orange –** *It depends.* If all the institution is doing is offering instruction to the student, then the institution will *probably* not have to apply. However, there are several "triggers" which could require you to seek authorization:

  - **Activities.** If you advertise in local media, advertise directly to students, require students to take a proctored exam locally, have any employee (including adjunct faculty) in the state, or do anything else in the state, check that state's regulations closely as you might need to seek approval.

  - **Type of Institutions.** The regulations for private, public, religious, and tribal institutions vary by state.

  - **Registration or Notification.** Even if you are not required to apply, a few states require the institution to register with the state, apply for an exemption, or to notify the appropriate agency that the institution is operating in the state. For a few states, this includes a fee.

The above list is not exhaustive and the conditions that trigger whether you need approval or not vary from state to state. Again, these categories reflect our interpretation. Only a review of each state's requirements will yield the answer for your institution.

Categorization of States Regulating Distance Education

Red Nearly Every Institution Will Need to Apply	Green Few Institutions Will Need to Apply	Orange It Depends
Massachusetts Minnesota Rhode Island	Alaska Colorado Hawaii Idaho Indiana Louisiana New Hampshire South Dakota	Alabama Arizona Arkansas California Connecticut Delaware District of Columbia Florida Georgia Illinois Iowa Kansas Kentucky Maine Maryland Michigan Mississippi Missouri Montana Nebraska Nevada New Jersey New Mexico New York North Carolina North Dakota Ohio Oklahoma Oregon Pennsylvania South Carolina Tennessee Texas Utah Vermont Virginia Washington West Virginia Wisconsin Wyoming