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**News****'State Authorization' Struck Down**

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WASHINGTON -- Higher education hates the U.S. Education Department's recently enacted regulation requiring institutions to seek and gain approval from any state in which they operate, and has fought it on multiple fronts. Late Tuesday colleges and universities got at least a temporary reprieve from the part of the rule to which they most object -- its application to online programs in which even one student from a state enrolls. A federal judge voided that part of the regulation in [a ruling](#) that otherwise upheld rules the department crafted over the past 18 months to try to protect the integrity of federal financial aid programs.

[Tuesday's ruling](#) by the U.S. District Court for the District of Columbia came in [a lawsuit](#) that the Association of Private Sector Colleges and Universities filed in January on behalf of the for-profit colleges it represents. The career college group had challenged the state authorization regulation and two of the other "program integrity" rules -- those that effectively bar incentive compensation for recruiters, and that hold colleges accountable if they misrepresent their programs and results.

While many traditional nonprofit colleges strongly opposed the state authorization regulation, they opted not to join the career college group's lawsuit, hoping instead that [Congress would step in](#) to block enforcement of that rule and another creating a federal definition of a "credit hour." The House has done so, but Senate action to follow suit appears unlikely.

But for now, at least, the part of the state approval rule that has drawn the most concern has been voided by the federal court, which upheld the other parts of the department's regulatory package.

Judge Rosemary M. Collyer disregarded the private-sector-college group's arguments that the Education Department had exceeded its authority in enacting the incentive compensation and misrepresentation regulations and that the rules are "arbitrary and capricious."

"While APSCU is understandably frustrated at its inability to provide merit-based pay increases to recruiters based on the easiest to measure and, arguably, most logical merit metric -- numbers recruited -- that does not mean the regulations are themselves impermissible interpretations of the [Higher Education Act] or otherwise unreasonable, especially in light of congressional concerns with recruitment practices," the judge wrote regarding the incentive compensation rule.

And while the judge conceded that the regulation defining the ways in which colleges can be found to misrepresent their institutions may be far from perfect, citing several flaws in wording and logic, she concluded that the department was well within its authority to enact it. "Just because it may be possible for the department to run amuck in unreasonable and punitive enforcement does not mean that the regulations, as drafted, will ineluctably lead to such a loss of balance and reason," Collyer wrote.

The judge sided with the career college group, however, in its challenge to the state authorization rule. She points out that the department had expanded the regulation to apply to online programs between the time that it released its Notice of Proposed Rulemaking last July and the final version of the regulation in October.

"An agency may promulgate a final rule that is different from a proposed rule, but only if the final rule is a 'logical outgrowth' of the proposed rule," and if interested parties "should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."

"Indeed, the Department neither 'expressly asked for comments on [this] particular issue [n]or otherwise made clear that the agency was contemplating a particular change' to the authorization obligations of distance educators," Collyer wrote. Hence, that aspect of the rule is invalid, she concluded.

An Education Department spokesman said agency officials were "happy that the court fundamentally upheld the three regulations challenged by APSCU. We're still reviewing the opinion and considering our options on the one portion of our state authorization regulation that the court did not affirm."

Officials at for-profit and online colleges alike cheered the judge's ruling on the state approval regulation. "We believe this is a major victory for innovation in higher education and an important answer to the Department's obvious over-reach in this area," APSCU said in [a prepared statement](#), while asserting that the ruling "leaves in place regulations that are harming the students served by APSCU's members and that are causing changes in the ways that schools can reward outstanding job performance and inform students about their programs."

Russell Poulin, deputy director for research and analysis at the WICHE Cooperative for Educational Technologies, which advocates for online programs, strongly opposed the state authorization requirement. But in a blog post, he made a point that [other college officials have made in recent weeks](#): that even if the judge's ruling is eventually upheld, or Congress blocks the regulation, the attention the federal government has drawn to state laws and rules has irrevocably changed the landscape for online programs. "State regulators are newly aware that there are many institutions operating in their states without approval," he said.

— [Doug Lederman](#)

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