

## **An Advisory by the Arts Accrediting Associations on State Authorization**

### **The Issue**

In October 2010, the United States Department of Education (USDE) released final versions of a number of higher education regulations. These regulations, which went into effect on July 1, 2011, are referred to as the “program integrity” regulations. One set of regulations addresses the issue of state authorization; in other words, the authorization process and requirements at the state level that an institution must undergo and meet in order to be authorized to operate in a particular state. The regulations on state authorization may be found within the [Code of Federal Regulations \(CFR\), Title 34, Part 600.9](#).

### **Supplementary Guidance from USDE**

In August 2011, the U.S. Department of Education posted a set of questions and answers related to the state authorization regulations on its website. This information is updated from time to time. Please click [here](#) to view USDE’s Q&A addressing state authorization.

Although the effective date for these regulations was July 1, 2011, USDE has granted a number of extensions over the years, delaying enforcement and giving institutions additional time to comply as states have worked to finalized their authorization processes. The last extension gave institutions until July 1, 2015 to comply. On June 19, 2015, USDE issued a [“Dear Colleague” letter](#) reminding postsecondary institutions of this deadline.

### **Accreditation Implications**

The Basic Criteria for Membership requirements articulated by the arts accrediting associations, outlined in each association’s Standards for Accreditation, include guidelines applicable to state authorization.

Free-standing institutions holding accreditation with any one of the arts accrediting associations should ensure that their relationships with state authorizing bodies remain current.

For schools and programs that are affiliated with a larger institution, matters of state authorization and accreditation are normally under the purview of a regional or institutional accrediting agency.

### **The Fundamental Principle – The Locus of Opposition**

The Higher Education Act mandates that institutions of higher education must be legally authorized within a state in order to provide postsecondary education. This has been the case since the Act’s inception. Now, Part 600.9 of the October 2010 program integrity regulations complicates individual state’s authorization policies that have been established for institutions. Many within the higher education community view these

regulations as a case of inappropriate federal overreach into decisions best left to the states themselves. For further information on this issue, see the short paper [“Foundational Principles in Federal Law on Accreditation and Higher Education”](#) prepared by the Association of Specialized and Professional Accreditors (ASPA). There is also concern regarding the effects this rule will have on private, non-profit institutions, particularly those with religious affiliations and those that are mission-based.

Many in the higher education community took particular issue with the state authorization regulations concerning distance education, which required institutions to obtain authorization from the home states of all of institution’s distance education students. Although a federal court ultimately struck down the distance education requirements in June 2012, the other state authorization regulations remain in effect. (For more information on the court case, please see the section “Judicial Challenge” below.)

### **Congressional Efforts to Rescind**

Such legislative proposals have included the 2011 House bill [H.R. 2117](#), *Protecting Academic Freedom in Higher Education Act*; the 2011 Senate bill of the same name, [S. 1297](#); the 2013 and 2015 versions of the House bill *Supporting Academic Freedom through Regulatory Relief Act*, [H.R. 2637](#) and [H.R. 970](#), respectively; and the 2015 Senate bill of the same name, [S. 559](#). These most recent proposals came on the heels of the release of a bipartisan task force report titled [Recalibrating Regulation of Colleges and Universities: Report of the Task Force on Federal Regulation of Higher Education](#) that argued that colleges and universities are overregulated.

In order for the state authorization regulations to be rescinded, both the House and the Senate would have to approve a bill introduced during a session of Congress, a joint House-Senate resolution would have to pass both chambers, and the President would have to sign the bill into law. Thus far, none of these proposals have advanced to this stage.

In June, 2015, during the Fiscal Year 2016 appropriations process, education subcommittees in both the House of Representatives and the Senate approved appropriations bills which would prohibit the USDE from using any newly appropriated funds to develop or enforce regulations that expand “the federal government’s role in higher education, until Congress has the opportunity to weigh in through the [Higher Education Act] reauthorization process, as appropriate.” Among these regulations are those pertaining to state authorization of institutions.

On December 18, 2015, the current administration signed into law the *Consolidated Appropriations Act, 2016*, combining multiple bills, appropriations, and an omnibus spending bill that will fund the federal government for the remainder of fiscal year 2016 (through September 30, 2016). Language regarding the prohibition of the expansion of the USDE is not present in the bill. Neither is it present in the current continuing resolution that funds the government through December 9, 2016.

### **Judicial Challenge and USDE Response**

Prior to its effective date of July 1, 2011, many in the higher education community voiced strong opposition to the final state authorization rule.

It is important to note that the distance education component of the regulation was added to the final rule shortly before it was published in in the *Federal Register* in October 2010. There was no opportunity for comment on the issue of distance education during the period of negotiating rulemaking.

This lack of opportunity for comment and additional concerns about the regulation led the Association of Private Sector Colleges and Universities to file a lawsuit against USDE in January 2011. In July 2011, a federal judge voided the section of the state authorization regulation related to distance education. USDE filed an appeal.

Then in June 2012, the U.S. Court of Appeals for the District of Columbia echoed much of the federal judge's earlier decision and vacated Part 600.9(c) of the program integrity regulations, those related to state authorization in instances of distance education. In its [decision](#), the Court stated that USDE had "failed to provide adequate notice of the rule to regulated parties [prior to the finalization of the rule]." The remainder of the state authorization regulations were upheld.

In late July 2012, USDE released a "Dear Colleague" [letter](#) related to state authorization. Its answer to Question 7 addresses the court ruling. It states that "[a]s a result [of the Appeals Court Ruling] institutions must comply with provisions found in 600.9(a). The Department will not enforce the requirements of 600.9(c), although institutions continue to be responsible for complying with all State laws as they relate to distance education."

In the meantime, state laws regarding state authorization for distance education programs remain.

### **State Action and Reciprocity Agreements**

After the state authorization regulations went into effect, a number of states quickly passed laws that required institutions offering distance education to apply for state authorization in order to be eligible to enroll students from their state. Many states continue to enforce such authorization requirements despite the court's vacating of these particular regulations due to their own changes in state law. In an effort to facilitate cooperation, some states have established reciprocity agreements – in other words, states have agreed to accept each other's authorization. In addition, the [National Council for State Authorization Reciprocity Agreements \(NC-SARA\)](#) has been created.

### **Negotiated Rulemaking**

In early 2014, the U.S. Department of Education, wishing to reinstate the vacated state authorization regulations related to distance education, began a set of negotiated rulemaking sessions on this and other matters of program integrity and improvement. Negotiated rulemaking is the process by which certain government agencies draft, revise, and finalize federal regulations. Various stakeholders are represented during the negotiations, and the public is given the opportunity to provide comment on drafts prior to finalization.

On the negotiated rulemaking agenda was both state authorization of distance education and state authorization of foreign locations of domestic institutions. USDE has yet to

release a Notice of Proposed Rulemaking (NPRM) on either of these topics, claiming that its examination of these issues is not yet complete.

It is reported that the Department is likely to include in its proposals language that will recognize the validity of states' reciprocity agreements, but this is purely speculation at this time.

### **Conclusion**

The National Office of the arts accrediting associations will continue to monitor this issue. Guidance on the regulations should be sought directly from USDE staff. For assistance in interpreting accreditation standards, please contact the National Office for Arts Accreditation.