



State authorization of distance education: An update

Colloquy Online recently asked Lester Ruiz and Oliver McMahan to field some frequently asked questions about the distance education law, the authorization process, and their implications for ATS Commission accreditation.

Schools offering online courses face a federal requirement that they seek authorization from all states in which their students reside, under the US Department of Education's State Authorization Requirement (SAR) of 2010. While federal enforcement of the regulations has been challenged and delayed, states still expect institutions to follow their laws and regulations, and requirements vary considerably from state to state. Many schools have established their own state authorization departments and/or work collaboratively to achieve compliance. The consequences of noncompliance range from fines, to loss of Title IV financial aid funding, to lawsuits from students, to actions by the ATS Commission on Accrediting Board of Commissioners.

Q: Over the past five years, we've seen a number of rulings and reversals on the issue of state authorization for distance learning. Do you think regulation is going to remain in effect for some time?

Before the State Authorization Requirement became law, the US Department of Education (USDE) issued the original "state authorization" language for comment as

Readers should review the current [ATS Commission guidelines on state authorization](#), which outline the steps Commission staff are taking to ascertain how member schools are following the various state authorization regulations. The regulations are currently at the state level, not the federal level—at least regarding distance education.

part of a required “negotiated rulemaking” process. The original language did not include anything about distance education, however, and the distance education community consequently did not weigh in on the issue. So when the SAR relative to distance education (CFR §600.9(c)) was released in 2010, it prompted challenges and a lawsuit brought by the Association of Private Sector Colleges and Universities. As a result, on July 12, 2011, the United States District Court for the District of Columbia struck down the distance education portion of the regulations, and on June 5, 2012, the [US Court of Appeals](#) agreed.

Regardless of what the USDE does from here, many state regulations will likely continue.

A more detailed history of the state approval requirements is available on the website of the [Cooperative for Educational Technologies](#) (WCET) of the Western Interstate Commission for Higher Education.

Q: Does the SAR apply to any online course or just comprehensive distance education programs (i.e., programs offering six or more courses online)?

The rules that govern this regulation vary greatly according to both the laws and regulations of each state and the activities of each institution. Which activities require authorization, the application processes, and the costs to comply must be assessed carefully for each case.

One of the key issues is whether the offering of online courses or distance education programs establishes “physical presence” according to a particular state’s regulations. Schools should keep in mind that there are multiple ways to establish physical presence and multiple definitions of activities that trigger physical presence and therefore signal the need for compliance. Schools should also understand that state authorization involves both distance education and physical presence regulations, although the latest USDE ruling applies only to physical presence.

For some states, few if any institutions will need to apply, although schools should always check each state

The State Authorization Regulation Chapter 34, § 600.9(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 distance or correspondence education in that State. An institution must be able to document to the Secretary the State’s approval upon request.”

to determine its regulations. For other states, simply offering any instruction online or any distance education course in general to students in that state is sufficient to qualify for physical presence, and almost every institution will need to apply. As an example, in some states, schools that are simply offering distance education courses need not apply, but those schools could be required to apply if they are also conducting any one of a list of trigger activities in a local market away from their main campuses—promotion, media advertising, direct contact to prospective students, instructors or proctors, events, field experience, and contracts with individuals, groups, or third parties relative to the use of personnel, facilities and/or services. What this might mean for a distance program is that some states will still require authorization for any field experiences, practicums, internships, and so forth required for completion of a course or program, even if it is the student, living in that state, who secures the site or supervisor of the experience. See the [State Authorization Reciprocity Agreement \(SARA\) website](#) for more details.

Q: What are schools in the loan program accountable to do in pursuit of state authorization?

The requirements vary from state to state as to which activities require authorization, how to apply, and the costs. Before July 1, 2015, it was important to establish a case for due diligence, demonstrating that an institution

was actively working with states in which it was offering distance education, including online courses and programs. Since that date, due diligence is still necessary, but it has been complicated by the requirement that while the distance education portion of the regulation has been vacated, the physical presence portion of the regulation has not, which means that schools must still comply. When an institution that already has been authorized for Title IV, and eligibility for federal student loan funds is up for review and reauthorization, the provision requiring states' authorization for both distance education and physical presence are part of the mandated criteria. Even if an institution is not up for reauthorization, it is still subject to the state's authorization provision.

Q: How does the State Authorization Reciprocity Agreement help schools to achieve compliance?

SARA is a cooperative arrangement that makes compliance more efficient for both the states and the schools. The National Council for State Authorization Reciprocity Agreements (NC-SARA) oversees the SARA agreements, which are implemented by four regional higher education interstate compacts: the Midwestern Higher Education Compact (MHEC), the New England Board of Higher Education (NEBHE), the Southern Regional Education Board (SREB) and the Western Interstate Commission for Higher Education (WICHE). Once a state joins SARA, accredited degree-granting institutions in the state that offer distance education courses can seek approval to participate in the agreement. Once approved, these institutions are authorized to operate not only in their home states but in the other participating SARA states as well.

The state in which the institution's main campus is located must be a SARA state in order for the institution to participate in SARA. The first step for an institution is to apply with that state's SARA authorizing agent. Many times, the state SARA authorizing agent is also part of the state's educational approving agency. After approval on the state level, the state recommends the institution to the regional SARA authority. After acceptance by the regional authority, the institution becomes a



participating institution in SARA. Essentially, the institution agrees to the SARA standards held in common by all SARA-participating states and institutions.

Q: What are the costs for a school to participate with a SARA?

SARA charges a national fee of \$2,000 for any school whose enrolled FTE is less than 2,500. Each state is also allowed to charge its own fee, but that varies widely by state. Schools should contact their home state to see what fee, if any, their state may charge.

Q: Are there other options to help schools with compliance?

As noted, SARA is not the only institution whose goal is to assist schools with distance education programs



to meet the expectations of states and federal government through reciprocity agreements. As noted already, regional higher education compacts, the Presidents' Forum, the Council of State Governments, and the Commission on Regulation of Postsecondary Distance Education have worked together on a single reciprocity plan—all of which provide useful information on their websites.

Q: What states have joined the SARA initiative? If it's such a good thing, why don't all states join?

SARA participation is entirely voluntary for institutions and for the states. Some states have been waiting for the agreement to be finalized. As of October 26, 2015, 29 states had joined the SARA initiative. Those states include Alaska, Arizona, Arkansas, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Vermont, Virginia, Washington, Wyoming, and West Virginia. Currently, there are nine more states where SARA-enabling legislation has been passed in the state legislature. Four more states are applying for SARA, including Connecticut, New York, California, and Pennsylvania. Also, there

are two states, Georgia and North Carolina, that are applying for SARA even though they have determined that no legislation is needed to enable participation in SARA; seven states and the District of Columbia have not applied for SARA, including Delaware, Florida, Kentucky, Massachusetts, New Jersey, South Carolina, and Wisconsin.

According to Marshall Hill, director of the National Council for State Authorization Reciprocity Agree-

ments, "We expect several more states to join SARA by year's end, followed by others in 2016."

Q: Must schools deny admission to students from states that have not provided authorization?

In every state, there is a path to authorization, exemption, and compliance. For some schools, it is easier and less costly simply to deny admission to students from particular states rather than pursue authorization. The decision includes calculations about not just institutional capacity but also whether the costs of compliance are in line with the institution's mission and projected distance education student enrollment.

Q: How does the ATS Board of Commissioners understand its role in the enforcement of SAR? What sort of actions does/would the board impose?

The twofold task of ATS Commission accreditation is "quality assurance" and "educational improvement." To this end, the Board of Commissioners takes very seriously the mandate to ensure that its member schools "conduct their operations in compliance with all applicable laws and regulations with regard to state, provincial, and federal authorities" (Standard 2, section 2.2).

It is important to underscore, however, that, in general, member schools are accountable not only to the Commission Standards, but also, and probably more importantly, to the states and the federal government.

Moreover, the expectation of the ATS Commission Standards is that ATS member schools that participate in US federal student financial assistance programs will “comply with prevailing governmental guidelines regulating these programs” (Standard 2, section 2.7). Failure to comply with these guidelines is cause for “review of an institution’s overall conformity to the Commission Standards of Accreditation” (Standard 2, section 2.7). As with other demonstrated failures to conform to the Commission Standards and depending on the seriousness of noncompliance, the Board of Commissioners, following its established practice, could take actions ranging from required reports, to focused visits, to notations, to probation and, finally, withdrawal of accreditation.

Where distance education is concerned, ATS Commission accreditation processes expect each member school to verify that the school is “in compliance with all applicable laws and regulations” for each state in which it operates—as defined by that state (including any Canadian school offering distance education to US residents). For example, a school petitioning for comprehensive distance education must verify in its application how it abides by “all applicable laws and regulations.” Schools with initial or comprehensive evaluation visits will also be asked as part of the evaluation to verify any applicable state authorizations for any extension or distance education offerings. For more information on this changing and challenging issue, please also consult [Cooperative for Educational Technologies](#) (WCET) and [State Higher Education Executive Officers Association](#) (SHEEO).

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Q: What final advice would you give to member schools regarding state authorization?

There is no question that state authorization is a complex, time-consuming, and resource-intensive requirement to which schools must attend, especially those that are interested in or participate in Title IV funding. While it is important to consult with Commission staff regarding the implications of state authorization for the implementation of a school’s degree programs, there is no substitute for a school consulting its own legal counsel. It would also be helpful to carefully review the [National Council for State Authorization Reciprocity Agreements](#) as well as another helpful resource, the [State Higher Education Executive Officers Association](#). SHEEO conducted an extensive survey in 2012 of all departments of higher education in all 50 states and Puerto Rico regarding states authorization. The survey summary, state by state, is available on the SHEEO website. The information is still very helpful, though some states have revised their criteria since that 2012 survey.



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