

LEGAL UPDATES

PUBLISHED: APRIL 18, 2013

## Moving from Complexity to Coherency in the Regulation of Distance Education

In 2010, the U.S. Department of Education issued “program integrity” rules, including its “distance education” rule. These rules attempt to address rapid growth in student debt and default rates at some post-secondary institutions – mostly colleges and universities.

The distance education rule requires higher education institutions that offer distance education to students in a state to meet that state’s authorization requirements, regardless of whether the institution itself is physically located there – see Code of Federal Regulations, Title 34, Section 600.9(c). However, a federal court vacated the rule on procedural grounds.

The department retains authority to reissue the rule following proper procedures. On April 15, 2013, the department announced that it would hold hearings on the subject in May.

Although the federal distance education rule is currently invalid, states do impose a patchwork of regulatory requirements on distance-education providers:

Some states require authorization regardless of an institution’s physical presence in the state.

States that do require some “physical presence” as a predicate to their authority have varied definitions of the term.

Some states require institutions to seek accreditation; others do not.

Some states issue their authorization at the institutional level; others do so on a program-by-program basis.

This complexity makes compliance, whether regional or national, time consuming and expensive.

## **Responding to the Complexity**

In 2012, the Commission on the Regulation of Postsecondary Distance Education formed within the higher-education community with the goal of replacing this patchwork of conflicting state requirements with interstate reciprocity. The Department of Education acknowledged the feasibility of a reciprocity approach when it issued regulations that do not pre-empt states from entering reciprocity agreements.

The commission has now published its recommendations.

## **The Proposed Coherency**

The commission's proposal aims for coherency in distance education regulation. It proposes a system based on five major themes:

### **1. Interstate reciprocity and physical presence**

Participating states would agree on a uniform set of standards for state authorization. States would participate by opting into reciprocity through their participation in existing regional compacts, and institutions would only benefit if their home states participate.

An institution's home state would grant authorization for reciprocity purposes. However, other states could regulate activity occurring within their borders for institutions having a physical presence there.

Central to this recommendation is the call for a uniform and narrow definition of "physical presence." It would include use of an actual physical facility for instructional or administrative purposes. It would not include many activities that states now often use as physical presence triggers, such as advertising, residence of faculty members, recruiting, contractual services, or experiential learning opportunities.

### **2. A regional approach to governing interstate reciprocity**

Because developing a national system would be time and resource intensive, the commission proposes that reciprocity agreements be overseen by the four regional education compacts that already exist: the Midwestern Higher Education Compact, the New England Board of Higher Education, the Southern Regional Education Board and the Western Interstate Commission for

Higher Education. It also recommends a national coordinating board to assist the compacts with alignment.

### **3. Accreditation and institutional quality**

The commission recommends that institutional accreditation by a federally recognized accreditor is a sufficient guarantee of academic quality for distance-education programs under the interstate reciprocity agreements.

### **4. Consumer protection**

The commission's proposal requires states to focus on institutions with a physical presence within their borders, allowing states to rely on responsible regulation of distance education by institutions' home states. Therefore, the commission notes that states must be vigilant in protecting the distance learner by having effective means to investigate and resolve their complaints. It also recommends that accreditors share with home-state agencies a summary of adverse actions regarding distance-education programs and providers.

### **5. Institutional financial responsibility**

The commission believes that Title IV reporting requirements and the accreditation process are sufficient to establish an institution's fiscal viability. Therefore, it recommends that the reciprocity agreements not impose additional or duplicative requirements.

Home states would ensure financial responsibility before authorizing an institution to participate in the interstate reciprocity agreement. Public institutions would be presumed financially responsible based on their state's backing. Private, nonprofit and for-profit institutional financial responsibility would be determined based on their Department of Education Title IV financial responsibility composite scores.

The four regional compacts are now making preparations to admit states into the interstate reciprocity system and plan to start accepting states later this year.

## **What This Means to You**

Institutions should start encouraging their states to participate in the reciprocity system and to prepare for applying for admission to it. This may require adjustments in state law; institutions can

advocate for laws with their respective state legislators. In this regard, the commission report contains a guide to help states identify the core conditions for their participation.

### **Contact Information**

If you have questions, please contact your Husch Blackwell attorney, Joe Cornelison at 816.983.8280 or Hayley Hanson at 816.983.8377.

Husch Blackwell regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please contact us if you would like to receive updates and newsletters or request a printed copy.

Husch Blackwell encourages you to reprint this material. Please include the statement, “Reprinted with permission from Husch Blackwell LLP, copyright 2013, [www.huschblackwell.com](http://www.huschblackwell.com)” at the end of any reprints. Please also send email to [info@huschblackwell.com](mailto:info@huschblackwell.com) to tell us of your reprint.

This information is intended only to provide general information in summary form on legal and business topics of the day. The contents hereof do not constitute legal advice and should not be relied on as such. Specific legal advice should be sought in particular matters.