



## State Authorization

**Primary Statute:** HEA Sections 101, 102, and 485

**Primary Regulations:** 34 CFR 600.2, 600.9

### Background

Federal funds for higher education are governed by the so-called “[program integrity triad](#),” and have been since the Higher Education Act was enacted in 1965. To access federal financial aid, institutions must be certified to participate in the Title IV federal aid programs by the U.S. Department of Education (ED); accredited by an agency recognized by ED; and authorized to operate and offer an education beyond high school by their states (state authorization). The certification by ED assures that institutions have minimal policies and procedures in place to protect federal taxpayer dollars, accreditors are meant to ensure institutions meet a minimum bar for educational quality, and the states are largely responsible for consumer protection.

Together, those three separate-but-overlapping legs of the triad are meant to work together to protect students and taxpayers in higher education. These requirements have not always been effective in ensuring postsecondary educational quality nor have they been adequate in protecting students or taxpayers. In some cases, it has resulted in members of the triad failing to take action or waiting for another member of the triad to act instead.

Although the requirement for state authorization has been enshrined in law since even before passage of the Higher Education Act of 1965, ED historically [viewed](#) the requirement “as minimal.” Institutions could be exempted from oversight by their states, for instance, once they obtained a basic business license, and the Department would accept the business license as sufficient for meeting the statutory requirement. Moreover, there has been substantial variation in the rigor applied by accreditors and states and their willingness to sanction low-performing colleges. While some states took an active role in higher education oversight--for instance, investigating colleges, requiring institutions to pay into state tuition recovery funds, and accepting and pursuing student complaints--others limited what they required from institutions or were limited in their ability to enforce colleges’ compliance.

### 2010 Regulations

In 2009, the Obama Administration launched a wide-ranging program integrity rulemaking. Among the issues for consideration was state authorization. In identifying the impetus for including state authorizations as an issue for the rulemaking, the Department [cited](#) a particular example, one in which California’s Bureau for Private Postsecondary and Vocational Education - the entity responsible for oversight of for-profit institutions of higher education in the state - was eliminated by the state

legislature, without any replacement in place. California for-profit institutions continued to qualify for federal student aid, despite being unable to meet the state authorization requirement anymore. The Department also cited state laws that deferred authorization to the approval of some accreditors<sup>j</sup>). The lax interpretation of the state authorization requirement, the Department argued, had “undermined” the intent of the program integrity triad.

In 2010, the Department issued [proposed regulations](#) that stated an institution was authorized to operate if a state had an affirmative authorization process specific to higher education; a state could feasibly take adverse actions against an institution; and a state had a process to review and “appropriately act on” complaints about institutions. Certain institutions could be exempt as religious institutions under a state constitution.

Several commenters, in response to the proposed rules, asked how the authorization requirements would apply to institutions that offered distance education and may not have a physical presence in a given state; commenters sought clarity on whether inter-state reciprocity agreements could qualify an institution. The Department published a final rule in 2010 that required distance-education institutions to meet any applicable authorization requirements in states in which they enrolled students, regardless of whether they had a physical presence in that state. The final rules also expanded exemptions for some institutions to include institutions established by name by a state through a charter, statute, or constitutional provision and whose state had exempted them from approval requirements based on accreditation by certain recognized accrediting agencies or based on having been in operation for at least 20 years. It also clarified the definition of religious institutions eligible for exemption from the requirements.

The Association of Private Sector Colleges and Universities (now Career Education Colleges and Universities) [challenged](#) the final rule in court. In 2011, a judge [ruled](#) that the Department had made procedural errors in expanding the final regulation to include added authorization requirements for distance-education institutions, because the substantive change from the proposed rule meant that the public had not had a chance to meaningfully comment on the provision. The distance-education provision of the rule was struck down, but the remainder of the rule--requiring authorization of brick-and-mortar institutions--stood.

Although the Department did not immediately implement that portion of the rule, it remained controversial. Lawmakers attempted several times to prevent the Department from implementing the rule, though none of those efforts were successful and from July 1, 2011, to July 1, 2015, the Department annually delayed the rules from taking effect. Finally, the rules [took effect](#) in July 2015.

### **NC-SARA**

In 2013, the National Council for State Authorization Reciprocity Agreements was established to streamline the process for institutions offering online education to obtain state approval, as well as to reduce the fees associated with doing so in multiple states. Through NC-SARA, member states agree to

oversee the institutions headquartered in their states that offer online education; and other member states must accept that oversight.

As part of the agreement, institutions are prohibited from enforcing consumer protection laws unless they are generally applied -- meaning they are applied not just to institutions of higher education, but also other businesses in their states. That means higher education-specific state laws, such as fees associated with a State Tuition Recovery Fund, cannot be enforced against out-of-state colleges enrolling in-state students online.

## **2016 Regulations**

In 2013, the Department began a new rulemaking on state authorization and other program integrity matters. The rulemaking addressed two issues: the distance education question that had been struck down in court, and authorization of foreign locations of domestic institutions.

The Department did not publish these regulations immediately. It was not until July 2016, in the final year of the Obama Administration, that the agency published the [proposed state authorization rule](#); and not until December 2016 that the agency [finalized](#) the regulations.

The final regulations required institutions offering distance education or correspondence programs to meet the authorization requirements of the states in which they operate -- a similar requirement to the one included in the 2010 rules. As with brick-and-mortar state authorization, the state had to include a complaint system in order to qualify. It also specified that institutions could meet these requirements through a state authorization reciprocity agreement, if both they and the states in which they operate were participants. Forty-nine states (California being the only exception) and the District of Columbia are now member states in NC-SARA (see section on NC-SARA). However, the rules required that, in order to qualify as a state authorization reciprocity agreement under the regulations, the agreement must not "prohibit any state in the agreement from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions." NC-SARA did not meet that requirement and would be required to change its policies when the rules took effect on July 1, 2018.

The final rules also specified that branch campuses of institutions located in foreign countries had to be authorized to operate by that country if at least half of a program could be completed there; or had to meet any other requirements of that country if less than half of a program were offered there.

Finally, the rules created an extensive disclosure regime for distance-education programs, requiring them to provide prospective and enrolled students with information such as the complaint process for the institution's state authorizer; adverse actions against the institution by states or accrediting agencies; and whether the program met licensure and certification requirements in the student's state, if applicable. If the program did *not* meet licensure requirements in the student's state of residence, those disclosures would need to be individually provided to prospective or enrolled students.

## Implementation of the 2016 Regulations

The new rules were scheduled to take effect on July 1, 2018. However, the Trump Administration took office before its effective date. In May 2018, the Department proposed an emergency regulation delaying the effective date of the state authorization rule by two years (effective June 29, 2018, until July 1, 2020). The authorization rule for foreign locations of U.S. institutions took effect as planned.

Two teachers unions (the National Education Association and the California Teachers Association) [sued](#) the Education Department in August 2018 over procedural concerns with the rule that moved the effective date of the state authorization regulations. In April 2019, a judge [ruled](#) in favor of the unions, and ordered that the rule take effect at the end of that May.

In July 2019, the Department abruptly [announced](#) that, with the rule now in effect, California--the only state not participating in NC-SARA--did not meet the authorization requirements by virtue of lacking an appropriate student complaint system, so colleges could effective immediately no longer enroll California students using federal student aid in online programs. The state set up the complaint system within a week of the announcement, and California online students' aid eligibility was restored.

## 2020 Regulations

Around the same time that the Department delayed implementation of the 2016 regulation, in July 2018, the Department [announced](#) its intent to re-regulate on state authorization and a number of related and unrelated issues including accreditation, distance-education rules, TEACH grants, and provisions related to faith-based institutions and entities. The negotiated rulemaking led to the creation of three separate subcommittees, something that was unprecedented at the time; subcommittee sessions were held between January and March 2019. State authorization was among the most heated issues for the rulemaking but ultimately negotiators reached consensus, largely because a legal aid representative on the committee offered support if the Department would retain what was effectively the state authorization requirement for online programs in the 2016 regulations. This would have increased states' authority to regulate out-of-state institutions within a reciprocity agreement like NC-SARA.

While the proposed rule included the relevant state authorization language agreed to in consensus, the [final rule](#) did not. Issued in November 2019, the final regulations maintained the requirement that institutions be authorized to offer distance education wherever they enroll students, including through a reciprocity agreement, but removed the provision requiring reciprocity agreements to allow states to enforce their higher education-specific laws. Reciprocity agreements still cannot prohibit states from enforcing general consumer protection laws that apply to all types of businesses in the state.

The final regulations also removed the bulk of the 2016 disclosures required to be sent to students. Rather than requiring individual outreach to students in every state where educational programs do not meet licensure requirements, schools are obligated to do so only in states where they have made a proactive assessment of licensure requirements, leaving institutions a potential loophole to avoid making the disclosures if they choose not to make a proactive determination of licensure requirements in the student's home state.

The new rules took effect on July 1, 2020.

**Acknowledgment:** PNPI would like to thank Clare McCann, formerly of New America, David Bergeron, member of the board of College Unbound, and Terrell Halaska Dunn of HCM Strategists for their contributions to the writing and editing of this memo.

**Updated September 2021**

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<sup>i</sup> For example, California institutions accredited by the Western Association of Schools and Colleges Senior College and University Commission [WSCUC] were exempted under a prior California law from state authorization requirements.