State Authorization of Distance/Correspondence Educational Activities

There is nothing new about states regulating educational activities taking place within their borders. For years, public colleges and universities that engaged in distance learning and correspondence education activities reaching students in other states were, for the most part, operating in ignorance of approval requirements in those states. Enforcement of those requirements by the states was essentially limited to consumer protection efforts to protect students from predatory practices of for-profit schools.

Things changed in October 2010 when the U.S. Department of Education published the following regulatory requirement for distance learning/correspondence educational activities as part of its fourteen "Program Integrity" measures:

> 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 postsecondary distance or correspondence education in that State. An institution must be able to document to the Secretary the State's approval upon request. 34 CFR §600.9(c)

This regulatory requirement went on to deny students enrolled in a distance/correspondence educational program offered by a postsecondary education institution the use of Title IV, HEA program funds for that program if the institution the student was attending did not have state authorization in the state in which the student was located while receiving instruction. The regulation was to become effective July 1, 2011.

The Association of Private Sector Colleges and Universities responded in July 2011 by filing a lawsuit in the U.S. District Court of the District of Columbia. The court decided that the Department of Education (DoE) failed to provide notice and opportunity for comment on §600.9(c) as required by the Administrative Procedure Act. As a result, that regulatory requirement was held not to have been validly promulgated. The DoE appealed and in June 2012, the U.S. Court of Appeals affirmed the District Court's ruling. In July 2012, the DoE advised in a Dear Colleague Letter (DCL) that it would "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 April 2013, the DoE announced the initiation of a "negotiated rulemaking" process including consideration of state authorization regulations. This would appear to be a remedial measure to provide notice and opportunity for comment on §600.9(c) as required by the Administrative Procedure Act. In view of the 2012 DCL's admonition that "institutions continue to be responsible for complying with all State laws as they relate to distance education," it would be reasonable to expect the negotiated rule to be effective without delay.

Compliance with the authorization requirements of the various states is a time-consuming and costly task. A few states require authorization without regard to a physical presence "trigger" within its borders. Most require a trigger within its borders by an institution, such as having students meet for classes face-to-face, ownership or lease of a physical classroom location, on-the-ground student recruiting, contracts to deliver services (such as examination proctors), local media advertising, or employment of faculty living in the state.

Authorization requirements vary widely from state to state. One state demands reciprocal visits of campus and regulatory officials, at the expense of the education institution seeking authorization. Some authorization fees are one-time fees while others are payable annually. Some states have more than one regulatory agency to satisfy. Activities such as clinical experiences for nursing students have additional professional licensure requirements. Bonds must be posted in some states. Since laws change, statutes establishing authorization requirements must be constantly monitored.

One possible solution to the state authorization burden is the proposed State Authorization Reciprocity Agreement (SARA). SARA provides for participating states to agree on a uniform set of standards for state authorization. Those standards ensure that institutions can easily operate distance education programs in multiple states as long as they meet certain criteria relating to institutional quality, consumer protection, and institutional financial responsibility. In addition, SARA would provide a definition of physical presence for all participating states to adopt as a prerequisite for participation in the Agreement. Of course, even if a number of states eventually agree on some version SARA, there is no guarantee that the DoE would accept its standards for authorization.

UAH is continuing to work on obtaining the appropriate state authorizations.