

Confusion Over Distance Education Rules

Colleges seek guidance about looming federal requirement for online colleges to tell students whether academic programs meet licensing requirements in their home states.

By [Lindsay McKenzie](#), Inside Higher Ed, March 9, 2018

Colleges are struggling to prepare for new distance education rules, which are scheduled to take effect in July.

Under the new regulations, all higher education institutions that offer classes online must demonstrate that they are authorized to operate in every state where they enroll students who receive federal financial aid. The rules also mean that institutions must make clear their refund policies and procedures for receiving student complaints.

Additionally, institutions must provide specific information to students who are pursuing professions that require state licensure, which is common for nurses, teachers and counselors, among others. Institutions will be required to inform students if they are taking a program that will not qualify them to practice their chosen profession where they live. This means every institution must track the requirements for professional licensing in every state where they operate. Failure to meet these requirements could result in institutions losing eligibility for federal financial aid.

The [regulations](#) were first published by the U.S. Department of Education in December 2016. But higher education groups say many institutions are unsure about how to follow the rules and are waiting for additional guidance from the department.

The language in the regulations about licensing information is confusing, said Leah Matthews, executive director of the Distance Education Accrediting Commission. Matthews is seeking clarification from the Education Department on several aspects of the regulation -- particularly what is meant by a student's "state of residence" and which format institutions should use for the required disclosures.

Matthews recently co-authored a letter to the department on this issue with Marshall Hill, the executive director of the National Council for State Authorization Reciprocity Agreements, and Russell Poulin, director of policy and analysis with the WICHE Cooperative for Educational Technologies.

"The institutions we represent clearly desire to comply with the rules, but are struggling to prepare to do so," the letter said.

Sharyl Thompson, CEO of Higher Education Regulatory Consulting, agreed with Matthews that the language in the regulations is confusing. One of the issues, she said, is that the new rules don't use standard language about state authorization.

For example, Thompson said, references to a student's state of residence throughout the regulations were problematic. The need for state authorization is not actually determined by where students live, she said, but where they are located when studying. For example, a student who is a resident of Kentucky might take a course online while in Arkansas, said Thompson. "Kentucky doesn't require authorization for having online students, but Arkansas does," she said.

"This may sound like splitting hairs, but this is the reality in state authorization. Using the term 'reside' is contradictory to state authorization general practices and regulations," said Thompson.

Without a clear definition, she said, institutions will decide what "reside" means, and it may not meet the department's intention. Thompson said she was disappointed that the department had failed to address this issue, despite many people highlighting it during a public comment period about the regulations.

Wrong Degree for the Job

Several observers agreed that the professional licensure aspect of the regulation will be the most challenging for colleges. Many are participants in the [State Authorization Reciprocity Agreement](#), which means that because the colleges are authorized to provide online courses in their home state, they are also allowed to operate in other member states. However, SARA does not cover the individual state-by-state requirements for professional licensure. This means institutions will have to spend significant time researching the requirements for different professions in different states and checking if their licensure-track programs meet those requirements.

"The hours it takes to research, document, create and publish disclosures is enormous," said Thompson. "It can easily take five hours just to research one profession in one state." And Thompson said the department's burden calculation had "grossly underestimated" how long it would take institutions to do the work.

One of the aims of the regulation is to help students avoid a situation where they complete a degree, only to realize that it isn't the one they need. How many students this has happened to is unknown, but several lawsuits have accused colleges of misleading students about where their credentials would cover licensure requirements. Iowa's attorney general, for example, [sued Ashford University](#) in 2014 over allegations that the university told prospective students its online degree would qualify them to teach in Iowa, when this was not in fact the case.

Greg Ferenbach, a lawyer with Cooley LLP, said many complaints of this nature are settled out of court before a lawsuit is filed, with the institution "usually denying any wrongdoing, but making amends."

Thompson said [existing regulations](#) require institutions to notify students if they are taking a course that will not lead to professional licensure, but these rules are designed for campus-based programs -- not online ones -- and are "not nearly as detailed" as the pending rules.

Brian Muys, a spokesman for the American Public University System, said his institution “proactively and transparently” discloses whether an online program meets state licensure requirements. The APUS website, however, advises prospective students to do their own research before applying, and suggests they get in touch with admissions staff if they have questions.

While Muys said his institution would be tracking the regulations carefully, not all institutions are concerned about them. David Baime, senior vice president for government relations and policy analysis for the American Association of Community Colleges, said the regulations are “pretty clear” and have a straightforward intent. Though many community colleges offer online courses, most are “primarily local institutions” that focus on their home states, Baime said, and work closely with their state agencies and accreditors.

Chris Bustamente, president of Rio Salado College in Arizona, a majority-online community college, agreed that the regulations have a "clear intention" but said adhering to the rules would create some challenges.

One complication, he said, is that some professional boards do not review programs from out-of-state institutions. In this case, an institution would need to work with the state regulatory agency and the professional board to decide if a program meets requirements for licensure or not, said Bustamente. While there is still work to do, Bustamente said he is "serious about putting students first," adding that there are "opportunities within this mandate to improve the student experience."

Bustamente and Matthews, of the Distance Education Accrediting Commission, said they would like to see the development of collective directories of information that could make researching different complaint processes and state requirements for different professions “less burdensome” on individual institutions. However, the department has ruled out taking the lead in creating such resources. The department said creating a centralized federal website that lists the complaint processes of each state, for example, might be mistaken for formal approval of these processes. Additionally the department said it felt individual institutions were best placed to identify and obtain the necessary approvals from the states where they operate, as the institutions will need to “establish and maintain a working relationship with those state agencies.”

The Way Forward

Matthews, Poulin and Hill said in their letter that the department could offer a clarification on the regulations in a Dear Colleague letter. Alternatively, the feds could consider delaying when the rules would go into effect.

The timing of the implementation of the regulation is important, because GOP leaders in the U.S. House of Representatives are currently pushing a bill that would completely eliminate it as part of their [reauthorization of the Higher Education Act](#). The so-called PROSPER Act would remove the pending regulations and forbid future regulation.

Congress appears to be far from passing that legislation. But even if the bill is enacted as currently written, that scenario is highly unlikely before July. This could mean that colleges spend time and money preparing for regulations that might be rendered unnecessary a short time later.

Ferenbach said some colleges expect the department to suspend the regulations before they go into effect. But he warns that “there is not much evidence that they will actually do that.”

In a [blog post](#) Ferenbach co-wrote in December, he advised colleges to prepare for the regulations as if they will go into effect. Those that don’t could be in for a “very rude, and potentially expensive, awakening,” he said. Thompson said she also is advising institutions to proceed as if the regulation would go ahead.

However, Ferenbach said the chance that the PROSPER Act will pass both chambers of Congress as currently written is “virtually nil.” He noted that while some parts might make it into a Senate version, “it seems highly unlikely that Senate Democrats will support the outright repeal of state authorization or other Obama-era regulations.”

Thompson, of Higher Education Regulatory Consulting, said she’s not sure the department will delay the regulations. She said the issue doesn’t appear to be high priority for the department, despite uncertainty costing institutions “considerable time, effort and money in preparing for something that may not exist in just over four months.”

Thompson said a Dear Colleague letter probably would not provide enough clarity. “The regulations themselves need to be written more clearly.”

Liz Hill, a spokeswoman for the federal Department of Education, said the department “is aware of the many concerns expressed about this rule.” This issue “is just one of several reasons Secretary [Betsy] DeVos has called for a top-to-bottom review of the department’s regulations,” Hill said in an email. She added that DeVos is “committed to making sure the rules on the books do not limit students from having access to an education that is high quality, nimble and meets their 21st century needs.”

Obligation to Help?

Cheryl Dowd, director of the State Authorization Network for the WICHE Cooperative for Educational Technologies, recently wrote a [blog post](#) urging institutions to be more proactive in helping students be sure they are enrolled in the right academic program for the career they want, regardless of whether or not regulations require them to do so.

“We have often heard that it should be the student’s responsibility to determine licensure applicability. But how is a student who has not taken the first course in their chosen profession supposed to know how a curriculum matches their state’s academic requirements?” said Dowd.

Institutions choose which states they operate in, she said, and are not required to enroll students from other states. As such, Dowd said colleges should be checking requirements in other states

before offering programs there. “Shouldn’t the institution have the responsibility to determine if the program the institution chose to offer in that state meets the prerequisites in the state?” she said.

While she acknowledged that institutions have reported that the process is “difficult,” Dowd said her organization and NC-SARA are working to coordinate research and simplify implementation “as much as possible.”

She encouraged institutions to take the regulations seriously, even if they don't go into effect this year. “If the new state authorization regulation is delayed or rescinded, your institution will still be subject to SARA (if you are a member), state, legal and moral obligations.”