



◎ State Authorization:  
A Presentation for the Distance Education &  
Training Council

Elise Scanlon  
Elise Scanlon Law Group  
1501 M Street, NW, 7th Floor  
Washington, D.C. 20005  
202-872-6767  
[www.elisescanlonlawgroup.com](http://www.elisescanlonlawgroup.com)

# OVERVIEW

- Program Integrity Principles
- Federal Regulations
  - Institutions
  - Recognized Institutional Accrediting Organizations
- History and Current disposition of law and regulation
- DETC standard
- Commerce Clause

# State Authorization

- ◎ **State Authorization:** State authorization is required by the Higher Education Act for a postsecondary institution to participate in federal student aid and other federal funding programs. Some states have failed to establish how they approve and monitor postsecondary programs. The regulations clarify, for federal program purposes, the minimum a state must do including for schools that offer distance or correspondence education.

# State Authorization

## **Program integrity principles**

- ◎ Each member of the “program integrity triad” of oversight entities for schools participating in the Title IV programs — state approval agencies, accreditors recognized by the Department, and the Department — plays an important role in providing appropriate oversight of schools and protection of students.
- ◎ State authorization to offer postsecondary education programs must be explicitly provided or affirmed.

# State Authorization

## Program Integrity Principles

- ◎ States need to enforce applicable state laws regarding schools and their prospective/enrolled students.
- ◎ States need a process to handle complaints about schools that enroll (or seek to enroll) students there.
- ◎ If a state has other licensing or approval requirements, a school must comply unless the state exempts the school and the Department's rules permit exempted schools to participate in Title IV programs

# State Authorization

- ◎ State requirements are categorized by the Department based on a school's authority to operate. A school may be:
- ◎ (1) established by name as a postsecondary educational institution,
- ◎ (2) authorized by name as a business entity operating in the state, or
- ◎ (3) authorized by name as a nonprofit charitable organization operating in the state. The nature of the authority granted by the state determines school requirements.

# State Authorization:

- ◎ Elements of the Regulation
- ◎ For an “educational institution” (public, private nonprofit, or for-profit): a school’s state authorization is acceptable to the Department if the school meets or is exempt by name from state requirements. State exemptions acceptable to the Department include accreditation or 20 years or more in operation.
- ◎ For a “business entity operating in a state” (for-profit): a school’s state authorization is acceptable to the Department if the school meets all applicable state requirements and is approved/licensed by name to offer postsecondary programs. No exemptions from state rules are acceptable to the Department.

# State Authorization

## Elements of the Regulation

- ◎ For a “nonprofit charitable organization operating in a state” (nonprofit): same rules as for a business entity operating in a state. No exemptions from state rules are acceptable to the Department.
- ◎ **Schools offering distance education must meet state requirements wherever they offer their programs.**



# State Authorization

- ◎ In its June 2010 notice of proposed rulemaking, the department reiterated the historical interpretation of state authorization—that is, to participate in federal financial aid programs, an institution had to be authorized to offer postsecondary education by the state in which it was physically located.

# State Authorization

- ◎ October 2010 final regulations: tied the financial aid eligibility of students in distance learning programs to whether their institutions are authorized by the state **in which the student**, not the institution, is located.

# State Authorization

Provision overturned in federal district court

because the Department of Education had not allowed for sufficient public review and comment on the regulation before publishing it in final form

# State Authorization

- ◎ Department of Education has announced that State Authorization will be a subject of new negotiated rulemaking.
- ◎ Department of Education has postponed implementation of the regulation relative to state agencies until July 1, 2014.

# State Authorization

- ◎ The Department is currently unable to enforce the state authorization rule found in 34 CFR 600.9(c) requiring colleges to meet applicable approval and other requirements in each state where they deliver distance or correspondence education programs to students in that state.

# State Authorization

BUT . . .

the Department is pointing out that States may enforce their own laws against institutions that offer distance or correspondence education to students in the state and that institutions are responsible for complying with these State laws and regulations

# State Authorization

AND . . .

If the agency is an institutional accrediting agency, it may not accredit or pre-accredit institutions that lack legal authorization **under applicable State law** to provide a program of education beyond the secondary level. 34 CFR §602.28

# State Authorization: DETC's Standards

“The institution must be properly licensed, authorized or exempted or approved by the applicable state educational institutional authority. The institution must also be in compliance with all local, state and federal requirements. Exemptions from state law must be supported with State issued documentation.”

DETC Manual p. 11.



# State Authorization

## Dormant Commerce Clause

The premise of the doctrine is that the U.S. Constitution reserves for the United States Congress at least some degree of exclusive power "to regulate Commerce among the several States" (Article I, § 8). Therefore, individual states are limited in their ability to legislate on such matters in ways that "unduly burden interstate commerce."

The Dormant Commerce Clause is a doctrine deduced by the U.S. Supreme Court and lower courts from the actual Commerce Clause of the Constitution. Justice O'Connor has written that: "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." [1]

# Commerce Clause

- ◎ The Dormant Commerce Clause: Central prohibition is on protectionist state legislation that discriminates against out-of-state commerce.
- ◎ Strict Scrutiny: If a state law discriminates against out-of-staters, it is subject to the strictest scrutiny. Law must serve a legitimate local purpose and there must be no less discriminatory alternatives.
- ◎ When a state law is nondiscriminatory on its face but nonetheless impinges on interstate commerce, the Court will apply a balancing test. Where the law serves a local public interest (consumer protection) and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

# Questions and Comments

# STATE AUTHORIZATION: A PRESENTATION FOR THE DISTANCE EDUCATION & TRAINING COUNCIL

Elise Scanlon  
Elise Scanlon Law Group  
1501 M Street, NW  
7<sup>th</sup> Floor  
Washington, D.C. 20005  
202-872-6767  
[elise.scanlon@elisescanlonlawgroup.com](mailto:elise.scanlon@elisescanlonlawgroup.com)