

DISTANCE EDUCATION AND TRAINING COUNCIL

Regional Meeting

Straight Talk on
State Authorization

DISTANCE EDUCATION AND TRAINING COUNCIL

Straight Talk on State Authorization

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DETC Regional Meeting

January 31, 2014 * The Gemological Institute of America * Carlsbad, CA

9:30 – 10:00 a.m.

Registration, Lobby

Stop by the registration table in the lobby to pick up your registration materials and enjoy refreshments before the meeting begins at 10:00 a.m. in the S. Tasaki Graduation and Lecture Hall.

10:00 a.m. – 12:00 p.m.

Regional Meeting, S. Tasaki Graduation and Lecture Hall

Informative presentations regarding state authorization will be given by DETC Executive Director Leah Matthews, Elise Scanlon, Principal, Elise Scanlon Law Group, and Jeannie Yockey-Fine, Senior Manager, State Regulatory Services at Cooley LLP.

Key elements of this presentation include:

- state authorization expectations and requirements at the federal, state and institutional accreditor levels;
- interpretation of guidance from the Department of Education;
- suggested strategies for DETC institutions; and
- State Authorization Reciprocity Agreements.

12:00 – 1:00 p.m.

Lunch, Committee Gallery Room

Enjoy a working lunch with other attendees in the Committee Gallery Room while participating in a Q&A with the speakers.

1:00 – 2:00 p.m.

One-on-One Consultation, Committee Gallery Room

After the working lunch Q&A, attendees will have the chance to get their institution specific questions answered from the presenters via one-on-one meetings.

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

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NOTES

OVERVIEW

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

NOTES

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.

NOTES

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.

NOTES

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

NOTES

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.

NOTES

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.

NOTES

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.**

NOTES

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.

NOTES

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.

NOTES

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

NOTES

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.

NOTES

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.

NOTES

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

NOTES

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

NOTES

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.

NOTES

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]

NOTES

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."

NOTES

Questions and Comments

NOTES



Demystifying State Authorization Policies

Jeannie Yockey-Fine, Cooley
LLP

January 31, 2014

NOTES

What Institutions Have Done

Common Myths

The Federal Regulation

The State Regulators

Reciprocity

What Should You Be Doing Now?

QUESTIONS

NOTES

▶ MYTH:

- ▶ “The federal rule was vacated, so I don’t have to worry about state authorization.”

▶ FACT:

- ▶ The revocation of the federal rule had no impact on state law. And there are alternative means for ED to trip up institutions that are not complying with state laws.

NOTES

▶ MYTH:

- ▶ “I don’t have to worry about state authorization until 2014 because the Dept. of Education issued an extension.”

▶ FACT:

- ▶ The Dept. of Education extension only applies to federal enforcement of the “on-ground rule” and does not alter state laws.

NOTES

▶ MYTH:

- ▶ “I do not need to be authorized in a state if the only students I have in that state are on military bases.”

▶ FACT:

- ▶ Only a very small handful of states exempt institutions enrolling only students on military bases. Most will require institutions to be authorized if they meet they meet the physical presence test.

NOTES

▶ MYTH:

- ▶ “I do not need to be authorized in a state if I only have one or two students enrolled there.”

▶ FACT:

- ▶ Only a couple of states have a *de minimis* test that exempts an institution with a small number of students. Usually, it does not matter if you have 1 or 100 students in the state.

NOTES

▶ MYTH:

- ▶ “I don’t need to worry about state authorization, because reciprocity is right around the corner.”

▶ FACT:

- ▶ Even if reciprocity stays on schedule, large scale adoption by states is years away. And some states (usually the most difficult) will likely never participate. And that means that institutions in those states cannot participate.

NOTES

What has your institution done (or not done) on state authorization?

- 1) No action taken.
- 2) Initial steps, no formal contacting a state.
- 3) Contacted states, no application.
- 4) Applied to one or more states.
- 5) Applied/received ALL authorizations.

http://wcet.wiche.edu/wcet/docs/state-approval/UPCEA/2013UPCEA-WCET-SloanCStateAuthorizationReport_FULL.pdf

NOTES

▶ MYTH:

- ▶ “No one ever gets in trouble for not getting authorization in a state.”

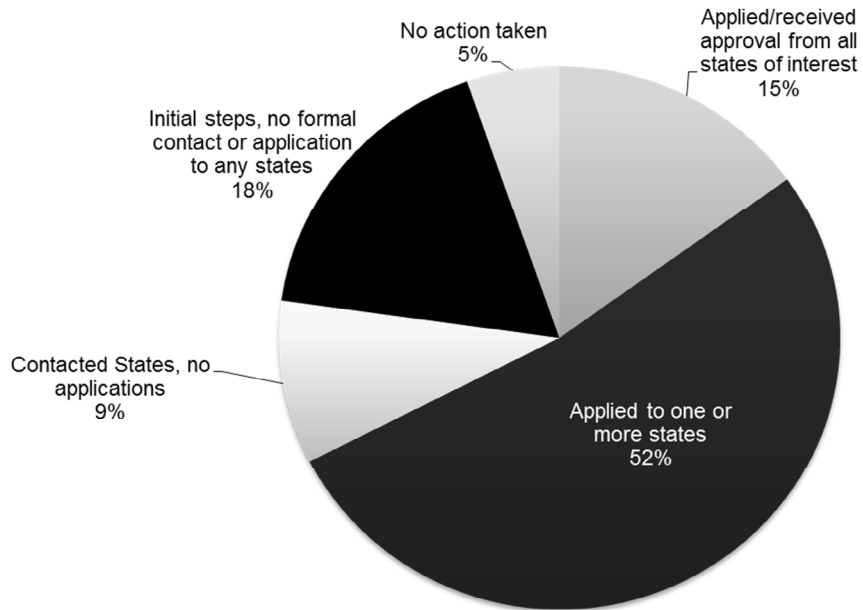
▶ FACT:

- ▶ Penalties are becoming more common. Most often, these consist of cease-and-desist letters, forced teach-outs, enrollment freezes, and fines. Some states even provide for criminal penalties, although these are rarely applied.

NOTES

What has your institution done (or not done) on state authorization?

2013



http://wcet.wiche.edu/wcet/docs/state-approval/UPCEA/2013UPCEA-WCET-SloanCStateAuthorizationReport_FULL.pdf

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NOTES

"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..."

<http://tinyurl.com/mazquyl>

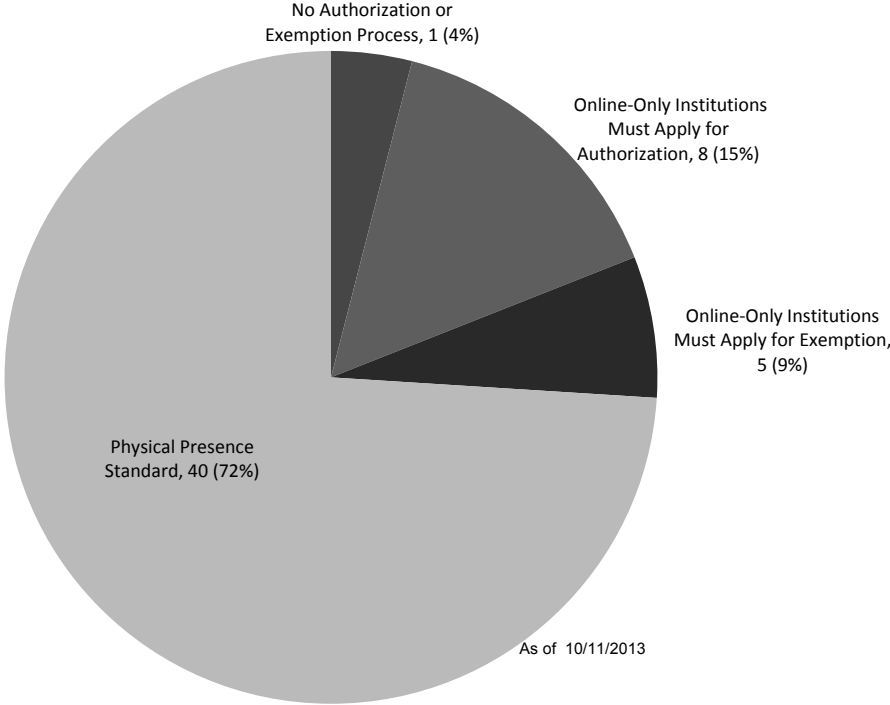
NOTES

“...the institution must meet any State requirements for it to be legally offering distance or correspondence education in that State. An institution must be able to document to the Secretary the State’s approval upon request.”

<http://tinyurl.com/mazquyl>

NOTES

Authorization Standards for Degree-Granting Online Institutions by State



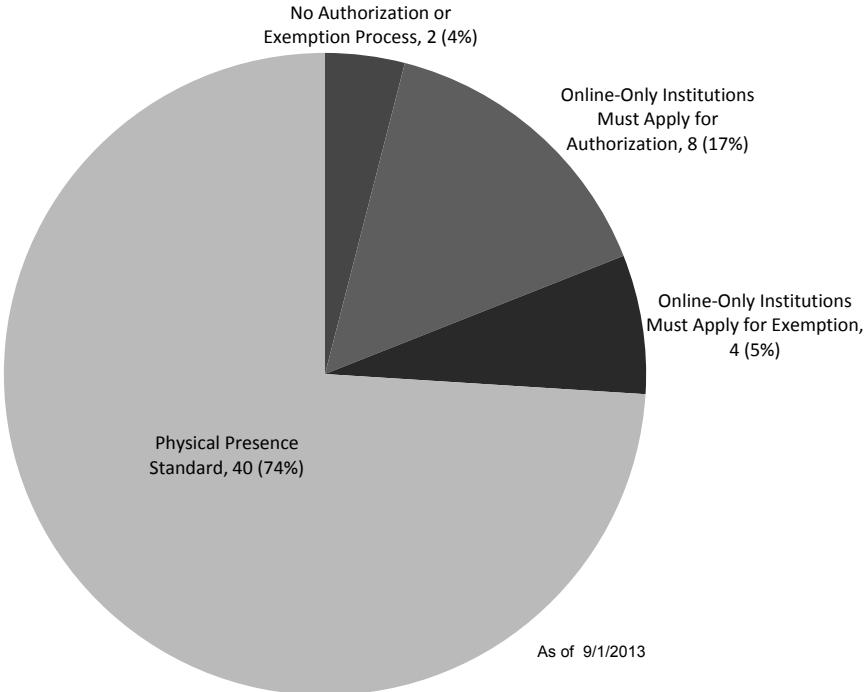
NOTES

States Where Purely Online Degree Institutions Must Be Authorized

- ▶ Alabama
- ▶ Arkansas
- ▶ Iowa
- ▶ Maryland
- ▶ Minnesota
- ▶ Montana
- ▶ Wisconsin
- ▶ Wyoming

NOTES

Authorization Standards for Non-Degree Online Institutions by State



NOTES

- ▶ Alabama
- ▶ Iowa
- ▶ Montana
- ▶ Nebraska
- ▶ New Hampshire
- ▶ Texas
- ▶ Wisconsin
- ▶ Wyoming

NOTES

Which States Require Authorization?

- ▶ Other states do not require authorization, but exclusively online programs must obtain an exemption:
 - ▶ Alaska
 - ▶ Illinois
 - ▶ North Dakota
 - ▶ Oregon
 - ▶ Utah
- ▶ Most states (approximately $\frac{3}{4}$) still require some level of “physical presence” to trigger licensure

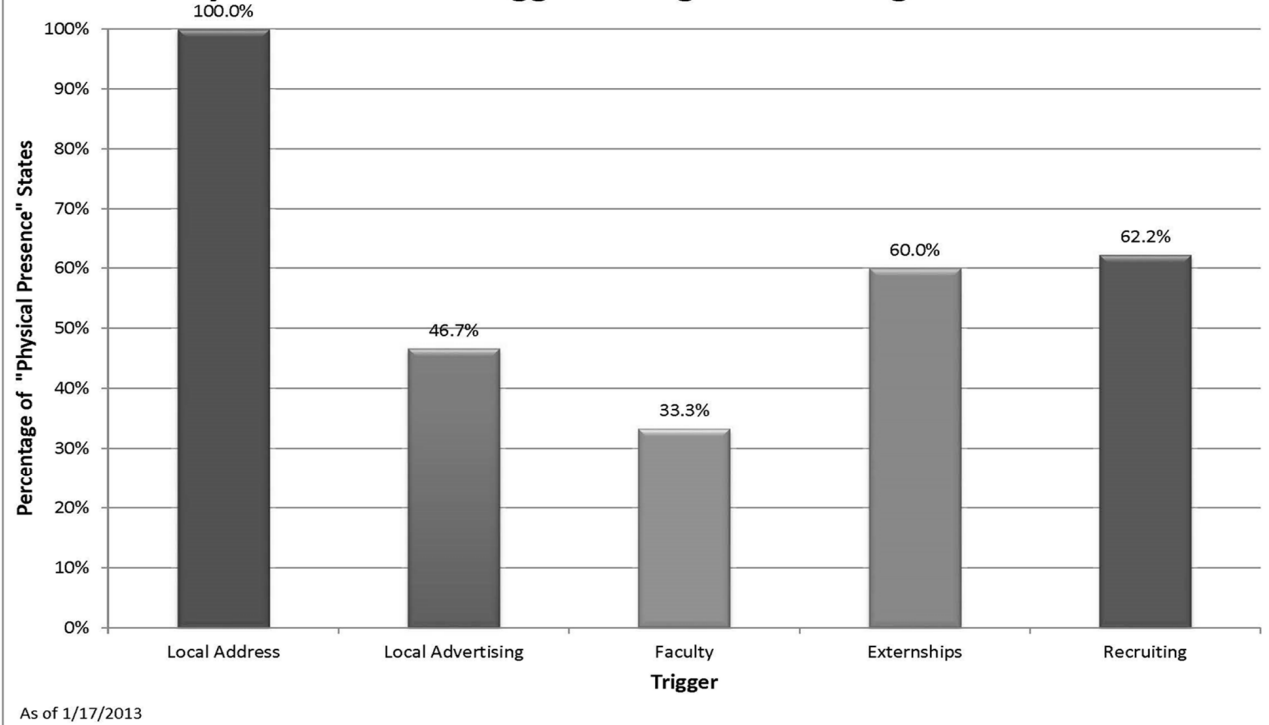
NOTES

Determining Physical Presence – The Most Common “Triggers”

- ▶ Local Address/Site
- ▶ Local Advertising
- ▶ Faculty
- ▶ Externships
- ▶ Recruiting Activities (usually on ground)

NOTES

Physical Presence Triggers - Degree-Granting Institutions



As of 1/17/2013

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NOTES

- ▶ No cease and desist letters
- ▶ No surprises when a student graduates and then can't get licensed in a state because of lack of authorization
- ▶ Understand the world of professional licensure

NOTES

Florida

State Agency	Commission for Independent Education					
Jurisdiction	Degree-granting Institutions			Non-degree Institutions		
	Public	Private non-profit	Proprietary	Public	Private non-profit	Proprietary
Authorization for an Exclusively Online Program	Yes	Yes	Yes	Yes	Yes	Yes
Physical Presence Triggers	No					
Formal Requirements	Local Address	Local Advertising	Faculty	Externships	Recruiting	
	Yes	Yes	No*	Yes*	Yes*	
Staff Guidance	Institutions must obtain approval from the CIE if they operate in the state. "An institution operates in Florida if it: (a) maintains for any purpose related to offering a degree, diploma, or credit a physical location in Florida, a mailing address in the state, a telephone or facsimile number in the state, or a mail forwarding service or telephone answering or relay service in the state or advertising any such presence; or (b) by any means or device, facilitates in Florida any part of a scheme to offer a degree, diploma, or credit, or any activity connected with the administration, promotion, recruitment, placement, instruction, fee collection or receipt, or any other function of a purported independent postsecondary educational institution." <i>Fla. Stat. Ann. § 1005.02(14)</i>					
Agency Contact	If faculty meet face-to-face with students in the state, authorization is required. Programs with only externship activities or limited recruiting may not need to obtain approval. Reviews for such programs are on a case-by-case basis. Sporadic recruiting in the state does not require authorization.					
Web Access	Address any questions to Samuel Ferguson, Executive Director; but, send the question to Susan Hood at 850-245-3206, susan.hood@fldoe.org					
Approval Processing Time	For regulations: http://www.fldoe.org/cie/rulesandlaw.asp For forms: http://www.fldoe.org/cie/nsa_app1.asp					
Approval Process Overview	6 months					
Initial Fees	Register as a corporation with the Secretary of State. Submit complete application and any additional information CIE staff requests.					
	Varies based on institutional characteristics. See http://www.fldoe.org/cie/pdf/chapter6E_rules.pdf					

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NOTES

State Agency	Commission for Independent Education
Renewal Fees	See http://www.fldoe.org/cie/pdf/chapter6E_rules.pdf
Authorization Period	1 year
Student Complaint Contact Information	Florida Commission for Independent Education 325 W. Gaines Street, Suite 1414, Tallahassee, FL 32399-0400 http://www.fldoe.org/cie/complaint.asp
Legislative & Regulatory Developments	None

NOTES

Nebraska

State Agency	Board of Nursing	
Contact	Sheila Exstrom, Nursing Education Consultant 402-471-4917, Sheila.exstrom@nebraska.gov	
Web Access	Agency: http://dhhs.ne.gov/publichealth/Pages/crl_nursing_nursingindex.aspx Regulations: http://dhhs.ne.gov/Pages/reg_t172.aspx	
Programmatic Approval Required?	Required for institution to offer online Post-RN programs?	Required for institution to offer clinical experiences?
	No	No, but faculty must be licensed in NE or licensed in a Compact state.
Program Approval Process	Institutions offering online post-licensure nursing programs do not need to be approved in the state.	
Program Requirements for Advanced Licensure	<p>Students are eligible to become licensed as Advanced Practice Registered Nurses (APRN) in Nebraska. Applicants must be currently registered nurses in Nebraska, must have completed a master's or doctoral degree, and must have passed an approved credentialing examination. If applicants do not have 2000 hours of supervised practice as an APRN and cannot demonstrate 45 hours of coursework in pharmacotherapeutics, advanced health assessment, and pathophysiology or psychopathology, they must apply for "jointly approved protocols" with a collaborating physician. When these requirements are complete, APRNs will be eligible for full practice. A list of approved certifying examinations is in the regulations.</p> <p>Specializations: Certified Nurse Practitioner, Clinical Nurse Specialist, Certified Nurse-Midwife, Certified Registered Nurse Anesthetist</p>	
Staff Guidance	Nebraska is a member of the Nurse Licensure Compact, which allows registered nurses in member states to practice in Nebraska and faculty members from those states to oversee clinical experiences.	

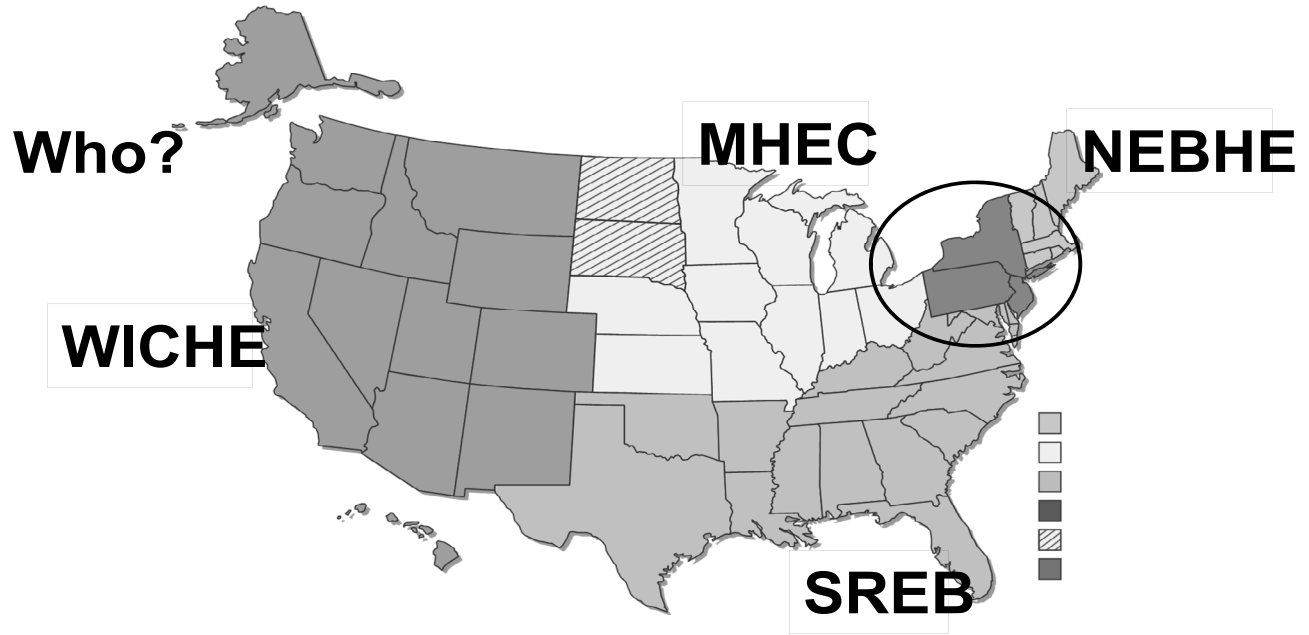
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NOTES

State Agency	Board of Nursing
Institutional Authorization	No, unless the institution has a physical presence beyond enrolling students into an online program with a clinical component.
Legislative and Regulatory Updates	None

NOTES

State Authorization Reciprocity Agreement (SARA)



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NOTES

Which Institutions may join?:

- ▶ Institutions located in participating states
- ▶ Regionally or nationally accredited institutions
- ▶ Degree-granting institutions

NOTES

Institution Can:

- ▶ Advertise
- ▶ Offer distance courses / programs.
- ▶ Have faculty/employees in a state.
- ▶ Conduct proctored exams in a state.
- ▶ Serve military on bases/posts.
- ▶ Offer (non-licensure) field experiences.

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NOTES

Institution Can NOT:

- ▶ Conduct field experiences in licensure programs without proper approvals.
- ▶ Establish a physical location.
- ▶ Establish administrative offices.

NOTES

What should our institution do now?

- ▶ Don't Wait for State Reciprocity!
- ▶ Create an institutional plan to move forward with state authorization
 - ▶ Minimize the "Silo Effect"
 - ▶ Discuss Best Practices with other institutions
 - ▶ Join organizations to help with information sharing
 - ▶ WCET State Authorization Network (SAN)
 - ▶ National Association of State Administrators and Supervisors of Private Schools (NASASPS)

NOTES

- ▶ Once you have made initial contact:
 - Consider the length of time required for your application and approval process in determining when and where to apply
 - Check back with states you haven't heard from with a friendly follow-up email
 - Try a phone call as a follow-up
 - Single point of contact is best

NOTES

- ▶ Do your homework before contacting any agency:
 - ▶ Read rules
 - ▶ Read any guidance the agency may have already published on its website
 - ▶ Consider the programs that will be offered
 - ▶ Consider the physical presence triggers that you may have, if any
- ▶ Most state regulators are reasonable people
- ▶ Email is the method preferred by most state regulators

NOTES

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NOTES

DETC Regional Meeting

January 31, 2014

Meeting Evaluation Form

Please complete this evaluation with regard to the Regional Meeting as a whole. Your honest feedback is the best way to improve future DETC meetings!

Please rate the Regional Meeting in the following areas:

	Excellent	Good	Fair	Poor	Awful
1. Pre-Meeting Information and mailings	①	②	③	④	⑤
2. The Regional Meeting website	①	②	③	④	⑤
3. Quality of the General Sessions	①	②	③	④	⑤
4. Quality of the afternoon one-on-one Sessions	①	②	③	④	⑤
5. Time/Duration of the Meeting	①	②	③	④	⑤
6. Quality and variety of food	①	②	③	④	⑤
7. Your Overall Experience at the Regional Meeting	①	②	③	④	⑤
8. What was your favorite part of the Regional Meeting?					
9. What would you most like to change about the Regional Meeting?					
10. What is something you've experienced at other events that you'd like to see implemented at future DETC Meetings?					

Thank you for your cooperation in evaluating the Regional Meeting! Please leave your completed evaluations at the registration table.

Regional Meeting

January 31, 2014 * The Gemological Institute of America * Carlsbad, CA

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