

AMERICAN COUNCIL ON EDUCATION



OFFICE OF THE PRESIDENT

March 2, 2011

Secretary Arne Duncan  
U.S. Department of Education  
LBJ Education Building, Room 7W311  
400 Maryland Avenue, SW  
Washington, DC 20202

Dear Secretary Duncan:

On behalf of the 60 higher education associations and accrediting organizations listed below, I write to express our serious concerns regarding the state authorization regulations in Section 600.9 of the Oct. 29, 2010, final program integrity rule. These final regulations significantly expand and complicate the existing federal requirements for institutions to be “legally authorized” in a state. While the final rule reflects changes from the draft proposal, these changes do not address the concerns we raised during the rulemaking process. In addition, the final rule includes an entirely new and problematic provision regulating distance education programs.

We request the department’s immediate assistance in addressing our concerns.

**I. General state authorization requirements and potential for state overreach**

Since its inception, the Higher Education Act has required that an institution of higher education be legally authorized within a state to provide postsecondary education. States have approached this authorization function in a variety of ways—particularly with respect to non-public institutions. Unfortunately, the new regulations will significantly complicate and confuse these prior efforts. We have grave concerns about this federal effort to define these relationships and do not believe it is either wise or appropriate for the federal government to pursue this course of action. Although the preamble to the new regulations includes an illustrative list of arrangements the department would consider to be either in or out of compliance, this list is inadequate to dispel confusion about what is expected of an individual institution. In addition, there is no accurate compilation of existing state requirements that might be used to gauge whether or not the policies of any given state pass muster.

The ambiguity of the regulations also raises the concern that state officials may overreach by imposing requirements on private, non-profit institutions that go well beyond the grant of authority to operate as postsecondary institutions and that have

nothing to do with the program integrity objectives of the new regulations. These institutions vary widely in terms of the missions they serve, but what they share is a commitment to fulfilling those missions. Although the final regulations reflect some acknowledgement of mission-based issues in provisions relating to religious mission, they are too narrowly drawn to alleviate these broad concerns, particularly in light of the fact that they could result in state actions that would exceed the scope of the Department's intentions and interfere with religious mission.

## **II. Distance education requirements**

Section 600.9(c) of the new state authorization regulation requires institutions offering distance education programs to: (1) meet any state requirements necessary to be legally offering postsecondary distance education in that state, and (2) upon request, document to the secretary the state's approval. This rule essentially places the federal government in the role of enforcing state statutes—a role inappropriate for it to assume. We support the right and responsibility of states to regulate the quality and nature of the education being delivered within their respective borders. In cases where a state notifies an institution that it is not in compliance with state regulations, the institution must take appropriate steps to bring itself into compliance. Distance education providers have a responsibility to fully comply with state law, even though this can be challenging. States can and do enforce their own distance education laws, and the prior absence of a federal regulation on this topic has in no way hindered their efforts.

Even more troubling is the fact that there is no way to guarantee that an institution has met the department's interpretation of any state's regulations, and no way for an institution to ensure it would satisfy these federal interpretations if audited. Furthermore, if an institution is unable to obtain the federally required documentation by July 1, it will be forced to discontinue enrolling students from that state, even though it has fully complied with all state distance education requirements. Failure to do so could threaten Title IV eligibility for the entire institution.

Because of these uncertainties, this new rule could force campuses to pull back on legitimate and creative distance education programs, leaving the students most in need behind. These programs are often most needed in rural states that have small and dispersed populations and where distance education opportunities are arguably most vital. In addition, these changes could have a particularly negative impact on members of the military and their families, who frequently relocate to new states, as well as other citizens who are attempting to develop new skills to successfully compete and participate in the emerging economic recovery.

Further, the final distance education regulation could seriously hamper efforts to meet the president's 2020 goal—a goal the academic community wholeheartedly supports and endorses. This concern is not theoretical. One leading public flagship university initially decided to stop enrolling students from other states after the rule was first published. Only after careful reconsideration has it reversed its original decision. If other institutions were to follow the initial path this university chose, it would come at the expense of students and our shared goal.

**REQUESTED ACTION:**

We believe the best course of action would be to rescind the new state authorization regulation in its entirety. This is a conclusion we have not reached lightly and only after determining that our concerns cannot be addressed through modification. As finalized, the regulation creates serious concerns for our private, non-profit institutions—in particular for religiously-affiliated and other mission-based institutions—and threatens the ability of both public and private institutions to serve students through effective distance education programs.

For these reasons, we ask you to rescind Section 600.9.<sup>1</sup> We thank you for your consideration of our request.

Sincerely,



Molly Corbett Broad  
President

MCB/lw

On behalf of:

**Higher Education Associations**

American Association of Colleges for Teacher Education  
American Association of Community Colleges  
American Association of State Colleges and Universities  
American Council on Education  
American Distance Education Consortium  
Association of American Universities  
Association of Governing Boards of Universities and Colleges  
Association of Jesuit Colleges and Universities  
Association of Public and Land-grant Universities  
Council for Christian Colleges & Universities  
Council of Independent Colleges  
EDUCAUSE  
Hispanic Association of Colleges and Universities  
Lutheran Educational Conference of North America  
NASPA - Student Affairs Administrators in Higher Education  
National Association of Independent Colleges and Universities  
National Association of Student Financial Aid Administrators  
Southern Regional Education Board

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<sup>1</sup> As a technical matter, we note that there are requirements in Section 668.43 related to Section 600.9 that should also be eliminated.

University Professional and Continuing Education Association  
Women's College Coalition  
WICHE – Cooperative for Educational Technologies

**Accreditation Organizations**

Accreditation Commission for Midwifery Education  
Accreditation Council for Pharmacy Education  
Accreditation Review Commission on Education for the Physician Assistant  
Accrediting Bureau of Health Education Schools  
Accrediting Commission of the American Culinary Federation Education Foundation  
Accrediting Commission of Career Schools and Colleges  
Accrediting Council for Continuing Education and Training  
Accrediting Council for Independent Colleges and Schools  
Accrediting Council on Education in Journalism and Mass Communications  
American Board of Funeral Service Education  
American Council for Construction Education  
Association for Biblical Higher Education  
Association of Advanced Rabbinical and Talmudic Schools  
Association of Specialized and Professional Accreditors  
Commission on Accreditation of Allied Health Education Programs  
Commission on Accrediting of the Association of Theological Schools  
Commission on Collegiate Nursing Education  
Commission on Institutions of Higher Education, New England Association of Schools and Colleges  
Council for Accreditation of Counseling and Related Educational Programs  
Council for Higher Education Accreditation  
Council of Arts Accrediting Associations, including:  
    National Association of Schools of Art and Design  
    National Association of Schools of Dance  
    National Association of Schools of Music  
    National Association of Schools of Theatre  
Council on Academic Accreditation in Audiology and Speech-Language Pathology  
Distance Education and Training Council  
Joint Review Committee on Education in Radiologic Technology  
Joint Review Committee on Educational Programs in Nuclear Medicine Technology  
Middle States Commission on Higher Education  
National Accrediting Agency for Clinical Laboratory Sciences  
National Council for Accreditation of Teacher Education  
National League for Nursing Accrediting Commission

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Northwest Commission on Colleges and Universities

Society of American Foresters

Southern Association of Colleges and Schools Commission on Colleges

The Higher Learning Commission of the North Central Association of Colleges and Schools

Western Association of Schools and Colleges, Accrediting Commission for Senior Colleges and Universities

Western Association of Schools and Colleges, Accrediting Commission for Community and Junior Colleges