



KEEP THE CHAMPAGNE ON ICE

STATE REGULATION OF DISTANCE EDUCATION IS HERE FOR GOOD

By David L. LeFevre



In a much blogged-about court opinion, the DC Federal district court threw out part of the U.S. Department of Education's new regulatory regime for distance education—the “state authorization” regulations, for those inclined to use the industry lingo. When the decision was handed down in mid-July, public, private and proprietary institutions alike let out a collective sigh of relief. Institutions had begun the daunting task of researching, seeking exemptions from and obtaining state licenses for their distance education activities. The prospect of not having to go through miles and miles of red tape was welcome news. It appears, though, that the relief schools thought they had obtained is wishful thinking.

THE DISTRICT COURT RULING

Careful attention must be given to Judge Collyer's opinion because she did not invalidate the entire state authorization scheme—only a small part of it. The state authorization regulations, section 600.9 of the Code of Federal Regulations, consists of three subparts. Subpart (a) contains the requirement that state authorizing agencies have a process for reviewing student complaints. Subpart (b) contains the religious institution exception, and subpart (c) contains the requirement that distance education activities be authorized by states in which schools are not physically located. The court struck down only subpart (c); subparts (a) and (b) remain in full force and effect.

There is a difference between a statute and a regulation. The state authorization *statute* (which has been around since 1965) says that institutions must be “... legally authorized within such State to provide a program of education beyond secondary education.” Noticeably absent from the statute is any reference to a physical location. Strictly speaking, the regulation that the court vacated was unnecessary to begin with, and the Department of Education (ED) is keenly aware of that fact.

In his Dear College Letter of March 17, 2011, in response to the concerns of many institutions about the looming July 1, 2011 deadline, Secretary Duncan reminded schools that “an out-of-State institution offering distance education ... was always required to have

determined whether State approval was necessary and to have sought approval from the State where required prior to awarding title IV funds to students who reside in that State. Section 600.9(c) merely reinforces that such approval is required in a State that regulates out-of-State institutions offering distance education in the State.” This is a rather long-winded way of saying that the Department already requires schools to follow state law, so where a state regulates distance education, schools must be licensed. The statute itself gives the Department all the authority it needs. Nothing would prohibit a Department program reviewer from asking for evidence of state authorization. Nothing would prohibit the Department from “interpreting” the statute by adding a state authorization element to its Federal financial aid database system and denying aid to students who are residents of states where a school is not licensed or cannot produce evidence of an exemption from licensure. Moreover, since the additional requirements that the state authorize institutions “by name” and have a student complaint process were not struck down, the entire scheme survives.

In addition to the Federal substantive legal issues surrounding state authorization of distance education, there are the finer procedural points of the judge's decision. An order vacating a regulation is only effective when one of two things happen: the judge grants an injunction prohibiting its enforcement or the order becomes legally final, meaning that no party has

TC

appealed within 30 days after the order's issuance. In this case, it is very likely neither will happen. The judge denied APSCU's request for an injunction, so if either party appeals the ruling on 600.9(c), the distance education subparagraph will remain in effect until an appellate court renders a decision. By the time this article goes to press, it is very likely the Department will have appealed. The rumors around the Washington water cooler are that the Department thinks it has a very good case, so if it can convince the Justice Department that filing an appeal is worth the time and resources, it will do so. In that event, the rule stands until another judge rules on it, making the original district court's ruling, for all practical purposes, little more than an entry in a legal blog.

THE STATES GO MARCHING ON

State agencies need not wait for the Federal government to tell them to enforce their own laws; they are perfectly willing, and most times quite able, to do it on their own. And schools should not need the Federal government to tell them to comply with state laws they were already subject to. The real effect of the state authorization regulation (and the ensuing hundreds upon hundreds of applications, letters and filings sent to state agencies), then, was to shed a big, national spotlight on the issue of state regulation of distance education. A lawsuit over a Federal regulation will do nothing to snuff out the light that has already shone.

Having illuminated the possibility of unlicensed institutions operating within their borders, state agencies have already begun to act. In response to the requests of colleges and universities for clarification of the state's jurisdiction over distance education activities, at least five state education agencies (Arkansas, Kansas, Maine, Massachusetts, Oklahoma and Pennsylvania) are collecting census-type information from schools and inquiring into the extent of such things as advertising. Administrative rule changes are typically preceded by such data-gathering, so it is very likely more formalized distance education rules will come out of those states.

Several other state agencies have already openly indicated that they are reviewing their regulations, forms and processes. Alabama's agency updated its registration forms in April to reflect a broader interpretation of what activities will make a school subject to state jurisdiction. The relevant section on the Ohio state education agency website is "under construction." The Puerto Rican agency is in the process of creating a registration process

for any school offering education there.

There is also action on the legislative level as well. In Utah, for instance, the governor signed into law a bill (SB 210) that eliminates any physical presence requirement, which will have the effect of requiring any school whose students include Utah residents to obtain a license.

THERE IS HOPE YET

If there is any ray of sunshine in this otherwise dark outlook, it is this: not every state to have examined the issue has come out on the side of more regulation. Until very recently, Texas' rule for determining if a school should be licensed in the state was simply doing business in the state, but newly enacted legislation (SB 1534) limits the state's jurisdiction to institutions that have campus locations within the state of Texas. Once the bill becomes effective on September 1, neither the presence of faculty members nor administrative offices alone will trigger regulation.

Thirty states and Washington, DC have some form of requirement that a school have a campus, administrative facility, or learning center present in order to trigger the jurisdiction's licensure requirements (see map on page 25-26). Only 19 states appear to have cast their regulatory nets rather widely, with targeted advertising and resident distance education faculty being the most common non-location-based triggers. (Some states are in both categories because out-of-state public or private nonprofit universities are regulated differently than proprietary institutions. Also, some states are not included in either category because there is an indication that the regulatory regime will likely change in the near future.) Clearly the physical location crowd has more followers, but it is difficult to tell which style of regulation has more momentum.

What is clear is that the conversation will continue. As many as seven jurisdictions are reviewing their rules, and it is unlikely these states will stop the process now. The ED remains empowered to enforce its intended regulatory scheme. The small point vacated by a Federal judge is no reason to break out the bubbly. **TC**

"BY THE TIME THIS ARTICLE GOES TO PRESS, IT IS VERY LIKELY THE DEPARTMENT WILL HAVE APPEALED."

see map on page 30-31



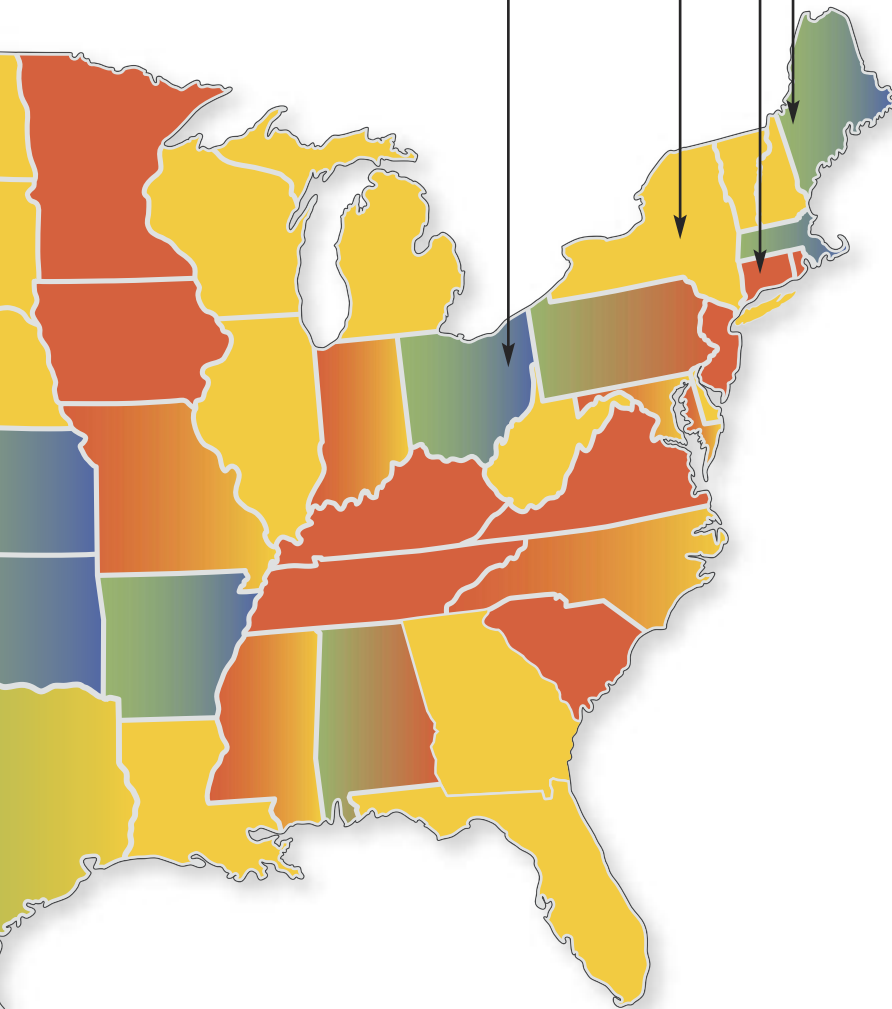
DAVID LEFEVRE is lead attorney for Dunn & Davison's office in Houston, Texas. His higher education practice includes regulatory consultation, advocacy of institutions in matters with higher education regulatory agencies, mergers and acquisitions and other general corporate matters for institutions and other businesses in the higher education space. He can be reached at DLeFevre@DunnDavison.com.

■ Ongoing change

■ Broad view

■ Narrow view

■ Too early to tell



- MO Different treatment as between for-profit and nonprofit/public; for nonprofit/public, if no campus or admin facility, no regulate; for for-profits, MD regulates
- MT No state authorization if accredited by CHEA accrediting agency
- NE If no campus or admin facility, no regulate
- NV On the lower end of broad view; advertising can be a trigger, but mere adjunct faculty presence is not
- NH If no campus, no regulate; but advertising may trigger (unsure if agency actually enforces that)
- NJ Mere faculty presence may trigger
- NM If no campus, no regulate
- NY If no campus, no regulate
- NC Any physical presence; will depend on agency interpretation; extremely likely to be different interpretations as between for-profits and public/private nonprofit
- ND If no campus, no regulate
- OH Direct access to policy statements removed from website; distance ed authorization section under construction
- OK Agency collecting information; decisions made ad hoc
- OR Any offering of degrees is trigger; simple process, though
- PA Agency collecting information; decisions made ad hoc; presence of faculty may trigger regulation
- PR In process of preparing registration procedure for out-of-state distance ed schools
- RI Adjunct presence may trigger regulation, but otherwise not regulate pure distance ed
- SC Low end of broad view; advertising may trigger, but faculty presence does not
- SD No regulation of distance ed
- TN Both advertising and faculty presence trigger regulation
- TX SB1534- if no campus, no regulate; both TWC and THECB will be issuing new rules around November
- UT If any Utah residents are students, will need to get exemption or license; SB 210 may require license for all distance ed with any nexus
- VT If no campus, no regulate
- VA Faculty or server presence may trigger regulation
- WA Advertising may trigger, but faculty presence alone does not; likely no campus or admin facility, no regulate
- WV Advertising or faculty presence may trigger regulation
- WI Public schools exempt; everyone else must get a license
- WY Any doing business in the state triggers regulation, but registration is fairly simple for degree-granting institutions