

## State Authorization and Distance Ed, Federal Regulatory Update: 2014 Program Integrity and Improvement Negotiated Rulemaking

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## Overview

1. "In the before" – The lead-up to the 2014 Neg Reg (Michael)
2. "The main event" – The Neg Reg process and draft regulation (Russ)
3. "In the after" – What's happened since (Leah)



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## A long time ago, in a galaxy far, far, away . . .

- There was the Higher Education Act, which recognized the traditional prerogative of states to regulate higher education
- The HEA defined "institution of higher education" as being "an educational institution in any State that . . . legally authorized within such State to provide a program beyond secondary education" (20 USC § 1001(a))
- For a long time, that was it on the federal level
- States had a free hand in determining what "legally authorized" meant

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### 2010 Program Integrity Neg Reg

- The Department sought to define, for the first time, what it mean to be “legally authorized” by regulation in the 2010 Program Integrity Neg Reg
- The June 18, 2010 NPRM set forth standards for “on-ground” state authorization in 600.9(a) and (b) – the minimum requirements for legal authorization in the institution’s home state
- Based on comments and questions about its application to distance education, the Department added new 600.9(c) to the final rule published on October 29, 2010

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### 2010 Program Integrity Neg Reg

600.9(c) was straightforward and elegant:

*(c) 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, the institution must meet any State requirements for it to be legally offering postsecondary distance or correspondence education in that State.*

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### 2010 Program Integrity Neg Reg

***The reaction was strong!***




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### 2010 Program Integrity Neg Reg

- Much wailing and gnashing of teeth followed
- As did a lawsuit challenging the distance ed regulation
- Twelve days after it took effect, the US District Court vacated 600.9(c) on procedural grounds
- 600.9(c) was the regulatory Lady Jane Grey ("The Nine Day Queen")



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### 2010 Program Integrity Neg Reg

- In 2012, the US Court of Appeals affirmed the execution (er, ruling)
- The "on-ground" regulations (found in 600.9(a) and (b)) remained unaffected by the court decisions
- So did state regulatory requirements, which have always been enforceable as a matter of state law
- The Department stated in a July 2012 DCL that it would comply with the USCA decision and not enforce the distance ed rule

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### From One Neg Reg to the Next

- The Department resolved to bring the distance ed rule back from the dead and make it an unambiguous Title IV requirement
- Which leads us to the 2014 Neg Reg . . .



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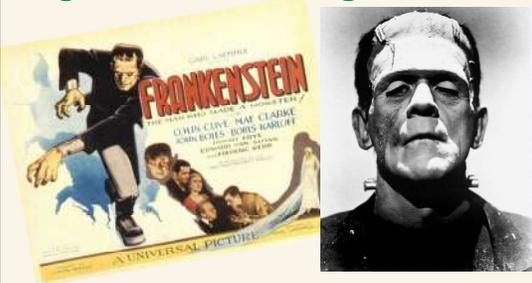
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### Negotiated Rulemaking



<http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/programintegrity.html>

### Negotiated Rulemaking: The Issues

1. Clock to Credit Hour Conversion
2. State Authorization of Distance Education
3. State Authorization of Foreign Locations
4. Cash Management (for Financial Aid Refunds)
5. Retaking Coursework
6. Definition of Adverse Credit for Direct PLUS Loan Eligibility

### Negotiated Rulemaking: The Committee

- |                        |                         |
|------------------------|-------------------------|
| Students               | 2-Year Public           |
| Accrediting Agencies   | 4-Year Public           |
| Legal Assistance Orgs. | Private Non-Profit      |
| Consumer Advocacy      | Private For-Profit      |
| State AG's             | Minority Serving Inst.  |
| Third-Party Servicers  | Distance Ed             |
| Business & Industry    | Financial Aid Admins.   |
| Lenders                | Business Officers       |
|                        | Department of Education |

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### Negotiated Rulemaking: What Happened?



Photos: <http://theditroomfloor.blogspot.com/2013/06/rarely-seen-photos-from-good-bad-and.html>

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### Negotiated Rulemaking: What Happened?

- Support for the use of reciprocity.
- Require more notice regarding licensure programs.
- Define home state for students in foreign countries.
- Exempt activity duty military and families...*sort of*.

<https://wcbtblog.wordpress.com/2014/05/29/state-auth-negreg-what-happened/>

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### Negotiated Rulemaking: What Happened?

Disallow states from exempting institutions.  
  
(active review of every college)

If lose state authorization, immediate loss of federal aid.  
  
(no discretion for US ED)

<https://wcbtblog.wordpress.com/2014/05/29/state-auth-negreg-what-happened/>

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### Negotiated Rulemaking: What Happened?

Exempt college if it enrolled *fewer than 30 students* in a state (unless state regulation is more restrictive).

Assure absolutely that student understood licensure issues... and expand to all programs, not just distance.



<https://wceblog.wordpress.com/2014/05/29/state-auth-negreg-what-happened/>

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### Federal Regulations – What’s Next?

June 2014 -- Department “pauses” on state authorization for distance ed (600.9(c)) regulation. (<http://wceblog.wordpress.com/2014/06/26/pause-on-state-auth/>)

October 31, 2015 – Deadline for issuing new regulation for implementation by June 2016.

July 1, 2015 - Implementing 600.9 (a) and (b): the “on ground” rule.

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### Federal Regulations – Meanwhile, in Congress...

Higher Education Act reauthorization may happen this year.

H.R. 970 - Rep. Foxx's "Supporting Academic Freedom Through Regulatory Relief Act"

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### Federal Regulations – Meanwhile, in Regulations...

Department of Defense has tied  
"Tuition Assistance" to state  
authorization. (<http://www.dodmou.com/>)

2,656 institutions signed DoD MOU

"Gainful Employment" and  
"Teacher Prep" regulations are  
tied to 600.9.

*One year later...*

Caution! "On ground" rule compliance  
timeframe will expire July 1, 2015

Implementing 600.9 (a)  
and (b): the "on ground"  
rule is required.

*No further extensions  
beyond July 1.*

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### 600.9(c) remains "up in the air"

- No published regulation
- "Pause button" status continues
- No timeline for development at this time

*However...*

### Themes from NegReg that Prevail

- Consumer protections
- Misrepresentation concerns
- Investigative demands
- Professional licensure
- Navigating state authorization for military service members

### 2014 Negotiated Rulemaking Legacy

- Expanding accountability and enforcement roles for accreditation organizations and states
- New partners for the "triad"
- The composition of a negotiated rulemaking committee defines the outcome
- External scrutiny of peer review decisions

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### What to do in the meantime?

- Institutions that offer distance education must continue work on state authorization
- Clear and open communication, educate yourself on the issues
- Follow Russ on the WCET Frontiers Blog!
- Support SARA's progress on reciprocity
- Center our efforts on serving our students

Thank You!

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