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State-Oversight Rule Draws Protests From Colleges and Congress

By Kelly Field

Washington

Senate Republicans are urging the Education Department to withdraw a rule that would require states to step up their oversight of colleges, warning that it could "threaten the academic freedom and mission" of private institutions.

In a letter sent to Secretary of Education Arne Duncan last month, Sen. Michael B. Enzi of Wyoming, the top Republican on the Senate education committee, and six other lawmakers in his party threatened to use "all available legislative remedies" to prevent the changes from taking effect in July.

"While some states may continue to show restraint in respecting the independence of higher education, we are concerned that other states could choose to use these regulations as an excuse to become deeply involved in setting course requirements, quality measures, faculty qualifications, and various mandates about how and what to teach," the senators wrote.

At issue is a rule, [finalized](#) in late October, that sets federal standards for "state authorization," the process by which states approve colleges to operate within their borders. The regulation also reminds colleges that they must seek state approval to enroll students through online and distance education if the state requires it.

Though the state authorization rule has been overshadowed by the more controversial "gainful employment" rule, which would penalize programs with low loan-repayment rates, it will have an effect on a much wider swath of academe, from small for-profit institutions to large state university systems. If a college isn't authorized to operate in a state, or is not exempt from that state's requirements, it can't receive federal aid from its students.

Education Department officials argue that the rule is necessary to protect students and taxpayers from fraud and abuse. And consumer advocates say the changes recognize the critical role that states play in consumer protection.

But critics of the rule, including many college lobbyists and leaders, say it infringes on state sovereignty, "federalizing" what has long been a state prerogative. Many colleges fear that the rule will make it even harder for online educators to operate across state lines. And some private and religious colleges worry it will invite government intrusion into academic affairs.

Fred Sellers, a senior policy analyst at the Education Department and the chief architect of the rule, says colleges may be "overreading" the regulation. He described the new requirements as a "clarification" of states' and colleges' responsibilities under federal law, rather than a policy change.

"I don't think it's that big a deal," he said.

Still, he put colleges on notice that the department will be monitoring them more closely than it has in the past. Colleges should be prepared to provide proof of authorization in the event of a program review, audit, or student complaint, Mr. Sellers said.

"They should be making sure everything is in order now," he said.

No Single Standard

Under the Higher Education Act, colleges must be legally authorized to provide postsecondary education in every state where they operate.

But the law does not specify how states should approve colleges, leaving it to state lawmakers and administrators to set their own standards for approval.

The result has been a patchwork of policies at the state level. Some states, like Hawaii and Wyoming, allow colleges to operate with only a business license. Others, including New York and Ohio, send teams of reviewers to scrutinize applicants. A number of states, including California, defer their decision to accreditors, deeming institutions "authorized" if they have regional accreditation.

There is even more variety in how states regulate distance education, according to a 2006 survey by Dow Lohnes, a law firm. In some states, only colleges with branch campuses in the state must seek approval. Others require any college that even advertises in the state to be authorized.

Until recently the Education Department took a hands-off approach to the law. Before certifying a college to award federal aid, officials would confirm that it was authorized in its home state and states with physical campuses. But officials didn't check whether an institution was authorized in every state in which it enrolled

students, and they didn't punish institutions that weren't.

Because no one was watching in Washington, some colleges chose not to seek approval from states where they enrolled students through online or distance-education programs only. Meanwhile, diploma mills shopped around for states with weaker regulations, moving their operations when a state cracked down.

The turning point came in 2007, when California's Legislature allowed a law authorizing a state agency with oversight over for-profit colleges to [expire](#). Though the lapse left the 400,000 students then attending California's for-profit colleges with fewer consumer protections, the Education Department allowed the colleges to continue receiving aid, explaining that federal law only required institutions to comply with state laws regarding authorization. Since California no longer had any laws, department officials reasoned, the colleges were in compliance.

But the lapse raised doubts in Washington about whether the states were doing their part to protect the federal student-aid programs.

In large part, the new rule is a response to the breakdown in California. It would set minimum standards for state authorization, requiring states to approve, or exempt, institutions by name, and have in place a process to review and act on complaints about colleges.

States could continue to exempt some authorized colleges from additional approval or licensure if they were accredited or had been in operation for more than 20 years, but they could not offer blanket exemptions. Mr. Sellers said the department does not view accreditation as "an appropriate default."

"We want the states to provide some direct, positive act," he said during a recent Webcast on the rule.

Some college leaders see the change as a vote of no confidence in regional accreditors, which have their own processes for dealing with student complaints against colleges.

"It's a slap in the face of the regional accreditors," said William L. Armstrong, a former U.S. senator and the president of Colorado Christian University. "They're saying they don't trust regional accreditors to do what they've been doing all these years."

He worries that the rule opens the door to the politicization of the authorization process, allowing state politicians to impose their social agendas on private and religious colleges like his. Though the

rule contains an exemption for certain religious colleges, like seminaries and Talmudic schools, it wouldn't apply to institutions that offer degrees in subjects other than religion.

But consumer advocates, like Margaret Reiter, a former prosecutor with the California attorney general's office, says the department should have gone further, eliminating accreditation as an exemption altogether.

"You can't rely on accrediting agencies to oversee colleges adequately," said Ms. Reiter, who was a member of a rule-making team that helped the department draft its rules. "They never were intended as regulatory bodies, and the states have used them that way."

High Costs

It's unclear how many states would have to change their laws to comply with the new rule. Mr. Sellers says he expects most states to satisfy the new requirements, or come close. But a recent survey conducted on behalf of the Western Association of Schools and Colleges, a regional accreditor, found that as many as 38 states would have to amend their laws to comply.

To give state legislatures time to act, the department will allow colleges to request up to two one-year waivers from the new requirement.

Ultimately, though, the federal government has no way of forcing states into compliance. If a state legislature chooses not to update its laws, the only consequences will fall to colleges and students, who will become ineligible to award and receive federal student aid.

Colleges say it's unfair to hold their institutions and students accountable for state inaction, and they accuse the department of meddling in state decision-making. They say the new requirements are an unfunded mandate that will further stress already strained state budgets.

Others worry that states may begin to view authorization as a revenue-generating tool, increasing their application fees to pad their budgets. That prospect is particularly troubling to online educators, many of which enroll or seek to enroll students in nearly every state.

In the past, many of these institutions didn't bother to seek approval from states where they had relatively few students, particularly if the state was lax in its oversight. The new rule makes clear that colleges must seek approval for online programs if a state requires

it.

Registration fees for colleges vary considerably by state, from \$100 in Wyoming to \$3,500 in Tennessee (plus \$300 per program), said Gregory Ferenbach, a lawyer with Dow Lohnes who advises colleges on regulatory compliance. When employee time and other costs are taken into account, it can cost colleges tens of thousands of dollars to register a single site, he said.

Robert W. Mendenhall, president of Western Governors University, an online, nonprofit college, said he is seeking approval from a state (which he would not name) that has asked for 50 pages of documents on every degree his college offers and plans to send a team of 25 reviewers to investigate the college.

Some states set up barriers to entry from out-of-state educators, he said, to protect their own institutions.

For colleges with large online programs, the cost of sifting through 50 state statutes and filing multiple applications could be considerable, said Paul H. Shiffman, assistant vice president for strategic and governmental relations at Excelsior College, a nonprofit, online-only college with 30,000 students.

"It makes it difficult for any institution with a national footprint to serve students," he said.

Mr. Shiffman says the compliance burden would fall disproportionately on nonprofit and public colleges, since many large for-profit companies have already sought approval from multiple states.

David S. Baime, senior vice president for government relations at the American Association of Community Colleges, says many of his member colleges are "very concerned" about the rule change.

In the 2006-7 academic year, 96 percent of community colleges offered credit-granting courses online, enrolling 4.8-million students, according to a 2008 report from the National Center for Education Statistics.

Toward Standardization

The intensity of colleges' concerns and confusion about the rule was on display last week, in a [Webcast](#) hosted by the Western Interstate Commission for Higher Education's Cooperative for Educational Technologies, a national membership-based organization focused on distance education. Close to 500 people registered for the Webcast in just over 48 hours, forcing the group to shut down registration early.

During the hour-long session, participants bombarded Mr. Sellers, a presenter, with questions, asking how they should deal with military students and students who move to another state midterm, and whether states would have the capacity to handle an onslaught of new applications. Several participants begged the department to create a central list of state authorization requirements after Mr. Sellers said it was considering doing so.

But Michael Goldstein, another lawyer at Dow Lohnes, says the rule may be less burdensome than colleges fear. Only 15 states require purely online programs to seek approval, he said. The majority require it only when colleges have a physical presence in the state, such as a testing center.

Still he says, the new rule could lend momentum to a longstanding effort to standardize state requirements. On Monday, Excelsior College announced that it had received a \$300,000 grant from the Lumina Foundation for Education to develop a common form and process that states could use when authorizing colleges.

"We are not opposed to state oversight," said John F. Ebersole, president of Excelsior College. "All we're asking is that states standardize their rules, so we don't have to meet a different set of expectations every place we have a student."

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