

UPDATE: Online Learning Across State
Borders- *Assessing state regulation of out-of-
state schools*

31 March 2011

Continuing and Professional Education Learning
Collaborative (CPE-LC)
Online Higher Education Learning Collaborative
(OHE-LC)

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Introduction

- This is an update of Eduventures report “Online Learning Across State Borders: Assessing State Regulation of Out-of-State Schools” (January 2011)
- The focus of our January report was state-by-state policy with respect to various “in-state” distance learning-related activities (e.g. enrolling state residents, recruitment, marketing, faculty presence) by out-of-state schools
- Our January report was prompted by the final version of the federal Department of Education’s “Program Integrity” rules (October 2010) that require all Title IV eligible schools to obtain formal approval to operate in every state where they in some sense “operate” at a distance, and where the state requires said authorization. School compliance is required by July 1st 2011
- The Department’s (DoE) rules caused widespread concern given:
 - State rules on out-of-state schools and distance learning are inconsistent between states, often unclear, patchily enforced and rarely take adequate account of the contemporary nature and scale of online delivery
 - Only a small proportion of schools with online programs, by our estimate <10%, have state authorization as out-of-state providers of distance learning
 - Given the above two points, and a generally held view that states lack the capacity to deal with a significant uptick in authorization, widespread compliance by July 1st 2011 seems unlikely
- The present document summarizes development from late January to late March 2011. Please see our January report for commentary on states not discussed here

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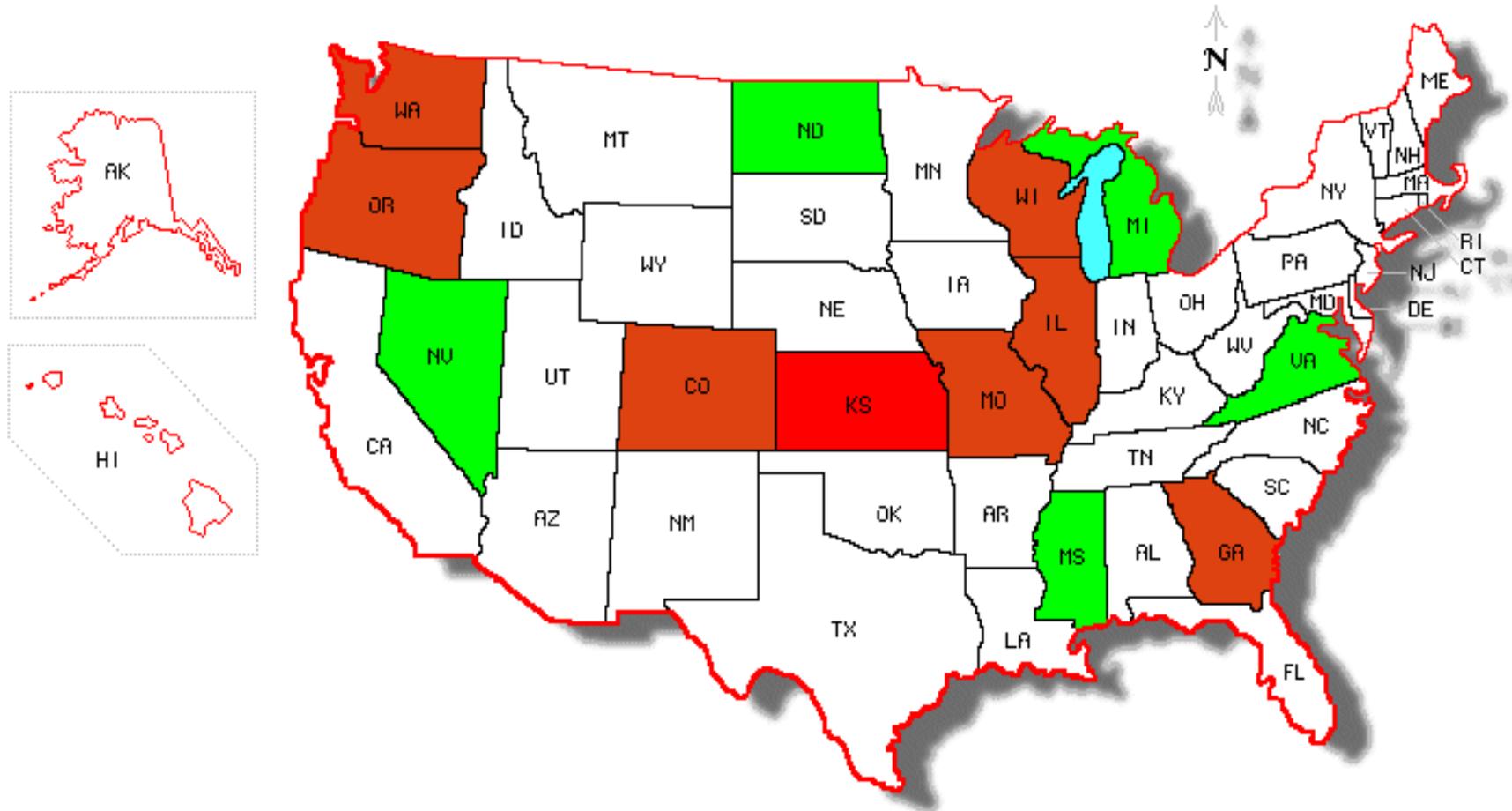
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Update on School Responses- concern, uncertainty; seeking information, reform, withdrawal

- **Update on Schools**. To date, school responses have been one or more of the following:
 - Lack of awareness, particularly outside “distance learning units” and personnel
 - Uncertainty, panic; claims that the rule will stifle innovation
 - Extreme reactions- i.e. planning to either seek licensure in every state, or halt distance enrollment in all but the school’s home state
 - Speculation over the relationship between the new rule and numerous distance learning circumstances (e.g. military students, students moving states mid-program, summer students studying online from their home state, noncredit students, community college or employer partnerships etc)
 - Dispatch of letters to state regulators seeking authorization or asking about the need to comply; a few schools, typically for-profit, are deep in the midst of applications in certain states
 - Mapping distance enrollment by state, and prioritizing states to target for prospective authorization
 - Speculation as to what the DoE might , by July 1st 2011, consider compliance or a good faith effort
 - Various collective attempts to collect better information on state requirements (Presidents’ Forum, WCET) and/or seek reform or withdrawal of the rules (multi-agency letters under ACE, APSCU suit, senator’s letter). Mention of nascent efforts by some accreditation regions to craft reciprocity agreements among member states

As of March 27th 2011, 14 state agencies (21%) known to have published a new/updated statement on out-of-state schools/distance learning



- **Medium Jurisdiction** (recruitment or faculty, not pure online); or ambiguity
- **Broad Jurisdiction** (enrolling residents in pure online programs)
- **Narrow Jurisdiction** (conventional physical presence)

About 1/3 of agencies with new statements imply conventional, narrow jurisdiction; but not every circumstance highlighted

- Eduventures reading of clarified state positions to date (if state has more than one agency, the specific agency is named):

Narrow Jurisdiction (MI, MS, ND, NV, VA)

- **Michigan**- no jurisdiction over pure online, in-state marketing, faculty or in-state course components (e.g. internships, practicums). No jurisdiction over in-state recruiters if schools awards bachelor's degrees or above. **Next Step**: for schools that consider themselves exempt, no further action implied
- **Mississippi**- no jurisdiction over pure online. **Next Step**: no further clarification or guidance offered. Implied that schools “not domiciled, incorporated, or otherwise located” in MS are exempt from authorization
- **North Dakota**- notice of pending legislation to exempt pure online and modest forms of physical presence, such as practicums. **Next Step**: implied that schools may await outcome of legislative proposal
- **Nevada**- pure online, in-state faculty and non-physical in-state marketing do not require authorization. **Next Step**: As MI
- **Virginia**- reiterates prior disavow of jurisdiction over pure online. Online plus physical presence does require authorization. **Next Step**: As MI

Comparison with Eduventures January 2011 report- recent statements essentially in line, but leave ambiguity in some cases

About 60% of agencies with new statements disavow pure online for all/some schools; but assert marketing, faculty and/or perpetuate significant ambiguity

- **Medium Jurisdiction** (or Ambiguous) (CO, GA, IL, MO, OR, WA, WI), Part 1
 - **Colorado** (Division of Private Occupational Schools- associates' degree and below)- no jurisdiction over pure online; but jurisdiction over any marketing to CO residents (exact scope unclear). **Next Step**: implied that schools need only take action if marketing to CO residents
 - **Georgia**- no jurisdiction over pure online; but jurisdiction over marketing that “originates in GA” (unclear) and in-state paid faculty. **Next Step**: schools either need to seek licensure or write to seek exemption and will get a letter confirming status
 - **Illinois**- (Board of Higher Education- regulates out-of-state degree-granting schools and credit-bearing programs)- authorization for pure online “may not be necessary”. Implies that home state approval/accreditation may remove need for authorization for some forms of physical presence (detail unclear). **Next Step**: schools should submit a status determination via an online submission form, and Board staff will respond
 - **Missouri**- out-of-state public schools exempt from jurisdiction over pure online; non-public schools referred to “proprietary school” rules, which appear to offer no new clarification. **Next Step**: out-of-state public schools that enroll MO residents online must send a letter confirming recognized accreditation. No new next step for non-public schools save to review existing rules and respond accordingly

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- **Medium Jurisdiction** (or Ambiguous) (CO, GA, IL, MO, OR, WA, WI), Part 2
- **Oregon** (Office of Degree Authorization)- no jurisdiction over pure online. No further clarity on in-state marketing or faculty. **Next Step**: schools may, voluntarily, seek confirmation of exemption via ODA form (\$250, at least 3 weeks for processing)
- **Oregon** (Private Career School Office)- emphasis on conventional physical presence, plus in-state marketing (detail unclear). **Next Step**: for schools that consider themselves exempt, no further action implied
- **Washington** (Higher Education Coordinating Board- regulates out-of-state degree-granting schools and credit-bearing programs)- emphasizes conventional physical presence (including servers), but includes marketing to state residents. **Next Step**: invites schools to seek determination, but implied voluntary if school sees no infringement
- **Wisconsin**- asserts jurisdiction over pure online, but notes statute that historically has allowed exemption for out-of-state public schools. Main rules imply, irrespective of control, that “equivalent” approval in another state may also merit exemption. No new clarity on in-state marketing or faculty. These caveats suggest somewhat limited jurisdiction but considerable ambiguity remains, particularly for non-public schools. **Next Step**: schools invited to contact agency if they require formal exemption, but implied that many schools may assume exemption until further notice

Comparison with Eduventures January 2011 report- most recent statements essentially in line, but leave some ambiguity. GA, IL and WI statements suggests a more limited stance

Only one agency with a new statement asserts unambiguous jurisdiction over pure online

- **Broad Jurisdiction** (KS)
- **Kansas**- The Regents' site makes no explicit reference to the DoE intervention but includes the following statement: "Kansas statutes require any school serving Kansas students, no matter the means of delivery, to be approved by KBOR (Board of Regents). However, many schools offering programs and degrees via the Internet do not seek KBOR approval. To protect themselves, students should contact KBOR before enrolling in schools offering distance learning programs." This language implies a stricter stance than summarized in Eduventures January 2011 report, but may be clarification rather than a new position. Federal intervention suggests KS may be able to address perceived widespread non-compliance.
Next Step: this is a state that schools might be advised to prioritize for formal compliance. See "What should schools do now?" section for further guidance

“Dear Colleague” reiterates DoE’s position; offers little new information

- On March 17th, the U.S. Department of Education (DoE) released the much anticipated “Dear Colleague” letter concerning implementation of Program Integrity regulations. State Authorization was one topic covered, including out-of-state schools and distance learning
- **Main Points on Out-of-State Schools and Distance Learning:**
 - **Status Quo.** Reiteration of the DoE’s view that out-of-state schools have always been required to obtain any required state authorization prior to awarding Title IV to students residing in a particular state
 - **“Good Faith” Effort?** By July 1st 2011, “good faith” efforts from schools will include authorization and applications for authorization in states where this is required of the school concerned. Schools must notify the DoE when an application is ruled on. A school is considered legally operating in a state if that state does not regulate out-of-state distance learning
 - **Complaints.** A school must provide current/prospective students with contact information to file a complaint with its accreditor and any relevant state agency/official, regardless of whether the State otherwise regulates out-of-state distance learning
 - **Exceptions?** Military students, and students who move state, must be reviewed on a case-by-case basis. The DoE’s interest is limited to Title IV eligible students/programs only; although states are free to regulate other provision
 - **Professional Licensure.** If a state requires an out-of-state school offering distance learning to state residents to seek that states’ professional licensure for a certain program, as well as or instead of more general authorization, then the school must comply

Recent public DoE comments seek to calm sector's fears

- On March 28th 2011, The Presidents' Forum convened it's "Federalization of Higher Education" meeting, in Washington, DC. The main focus of the event was federal intervention on state regulation of out-of-state schools and distance learning
- One panel at the meeting featured two senior representatives from the U.S. Department of Education:
 - Eduardo M. Ochoa, Assistant secretary of Postsecondary Education
 - David A. Bergeron, Acting Deputy Assistant Secretary for Policy, Planning & Innovation
- **Key Points from this Panel**
 - Emphasized the rule will be enforced in a "reasonable" manner, and school concern is understandable but unwarranted. Federal intervention will spur states to clarify their position
 - Judged state regulation to not impede federal purpose- hence declined to preempt state law
 - See compliance as a longstanding "cost of doing business", and dispute school claims that the cost is burdensome
 - DoE does not have an internal digest of state requirements, will rely for the time being on third party digests, and will accept, until further information becomes available, a school's citation of such a digest as a "good faith" effort to understand which states require it to be authorized (assuming the school has then acted accordingly)
 - No new, special oversight is planned on this issue. Rather, school compliance will be considered as part of routine Title IV audits and accreditation processes
 - The objective, in line with DoE reviews generally, is to bring schools into compliance, not "suddenly" remove Title IV eligibility for a certain state by July 1st 2011 or any other date

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Conclusions- regulatory imperative appears more limited, but much ambiguity remains

- **Summary of Situation.** Few states have declared, but trend to date suggests a limiting of jurisdiction, and a growing awareness among agencies of the impracticality of enforcing broad jurisdiction
 - This trend suggests that most states will disavow jurisdiction over pure online
 - In-state marketing/recruitment and faculty remain more ambiguous, but will likely prove relevant to relatively few schools. As with pure online, any broad jurisdiction over marketing/recruitment or faculty will pose comparable administration challenges for states.
 - The significance of in-state professional licensure remains very unclear at present
 - Many states that have limited their jurisdiction imply, if few explicitly state, that no further action is required from schools that consider themselves exempt
 - No sign yet of any state or agency using a numerical threshold approach- e.g. authorization only required for schools with an online student or faculty headcount above a certain size
 - The coming months should see remaining agencies declare, which will test the above hypotheses
 - DoE public comments suggest that the sectors' worst fears, in terms of enforcement and consequences, may be unfounded; but much uncertainty remains about scope of compliance at school level, and the detail of DoE action post-July 1st

What should schools do now?

In Eduventures view, schools should proceed as follows:

- **Public Schools with Modest or Average Online Headcount-** based on prior and current evidence, most relevant agencies are unlikely to require authorization for pure online, faculty presence or in-state recruitment/marketing; and other agencies may rely on home state approval or accreditation. Based on our prior and present report, a few states (AL, AR, IN, KS, KY, LA, MN, NM, WY) suggest broadest jurisdiction, and should be prioritized in terms of seeking clarification from agencies and acting upon advice. The situation is fluid, and clarifying information will emerge about these and other states/agencies
- **Private NonProfit Schools-** as “Public Schools” above, plus cases where non-public schools are treated differently (MO, discussed in this report, is a clear example)
- **Public or Private Schools with Large Online Headcount-** as “Public Schools” above, plus attention to states where in-state recruitment/marketing is called out. Such schools may be visible test cases for particular agencies
- **For-Profit Schools-** as “Public Schools” above, plus heightened “visibility” caution compared to larger nonprofits. No evidence that proprietary-specific agencies, where applicable, will take a broader stance, but few have declared
- **All Schools-** beyond the above comments, if a school considers that it’s activity in a state may require authorization or formal exemption, it should seek clarification from the relevant state agency

Next steps for Eduventures on this issue

- Eduventures will continue to monitor developments, and will provide another update at the end of April 2011
- Eduventures member institutions are encouraged to contact the author, or their Account Manager, to seek clarification on particular circumstances
- *Eduventures Consulting Services* is working with a number of schools to coordinate specific authorization processes. If this service is of interest, please contact Laura Boothroyd- 857-221-9818 or lboothroyd@eduventures.com
- Eduventures will continue to work with The Presidents' Forum, WCET, SHEEO, Dow Lohnes and others focused on state regulation and distance learning
- To address questions to the author, please contact:
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- Eduventures helps member schools to answer key questions, grow revenues, and better serve their students
- Eduventures Learning Collaboratives are:
 - Academic Leadership
 - Continuing & Professional Education (CPE-LC)
 - Development
 - Enrollment Management
 - Online Higher Education (OHE-LC)
 - Schools of Education
- The present report grew out of research and discussions within our CPE-LC and OHE-LC memberships, serving Deans and Directors of Continuing Education and Distance Education. Close to 200 schools are members of one or both of these programs
- For questions about Eduventures reports and services, please contact Blair Maloney at bmaloney@eduventures.com or **617-532-6063**