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# New rules limit states' oversight of online colleges. How will they react?

The Education Department's state authorization regulations for distance education could curb states' options as consumer advocates when overseeing out-of-state institutions.

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State attorneys general were left out when the U.S. Department of Education rewrote its state authorization rules for distance education. The department "didn't feel attorneys general had a strong role to play in the potential regulations compared with other groups overseeing colleges," a spokesperson told Bloomberg early last year.

But the end result, announced Nov. 1, will certainly affect attorneys general, because it reduces their ability to regulate distance education. The new rules expressly forbid states from enforcing laws that go beyond the requirements of any interstate agreement they belong to that authorizes out-of-state institutions to offer distance education in their state. Because every state but California is part of such an agreement, most state laws on distance learning will be void when the rules go into effect July 1.

"It does set up a situation where colleges can go to states with fewer protections," said Clare McCann, deputy director for federal higher education policy at the left-leaning think tank New America.

Currently, the only national reciprocity agreement between states on distance learning authorization is called SARA (State Authorization Reciprocity Agreement). It permits institutions that offer distance or online education to operate in every participating state, as long as those states' legislatures have authorized a state agency to enter the agreement.

Previously, Obama-era regulations defined "state authorization reciprocity agreement" to specify that participating states could enforce their own laws, "whether general or specifically directed at all or a subgroup of educational institutions." But a provision of the new rules revises that language to say only that participating states may enforce their own "general-purpose State laws and regulations." Thus, the new definition renders state laws specific to distance education unenforceable.

When announcing the final rule, the department said it was persuaded by public comments that the old language was unclear. Russ Poulin, executive director of the WICHE Cooperative for Educational Technologies, said the 2016 language was confusing because permitting states to enforce their distance education laws seemed to undermine the goals of a reciprocity agreement.

"If everybody has the same rules and does things differently, then ... it's not really reciprocity," he told Education Dive in an interview.

Nicholas Kent, senior vice president of policy and research at trade group Career Education Colleges and Universities, agreed.

"What the department is saying here is, 'Listen, if you are a state, and if you choose to enter into a voluntary reciprocity agreement, that should mean something,'" he said.

In an informal letter in early 2017, Ted Mitchell, who at the time was the outgoing undersecretary of education, tried to clarify the

Obama administration's definition. He wrote that states themselves must meet the terms of a state authorization reciprocity agreement in order to participate in it. In Poulin's view, this says the same thing as the Trump administration's final rule does — meaning there has effectively been no change in states' rights.

The state of California appears to disagree.

"We remain concerned that state authorization reciprocity agreements can unduly limit states' ability to protect students from misconduct by out-of-state schools, and are pleased that California has preserved the Attorney General's enforcement authority," a spokesperson for the California Department of Justice told Education Dive in an email.

## A 'huge hole'

None of the six states Education Dive contacted granted an interview to discuss how the new rule affects them. However, several states have passed laws in recent years that are likely to be affected because they specifically regulate online learning. In Maryland, for example, a law effective last July requires certain online institutions to disclose job placement rates and median earnings of graduates, as well as whether the program satisfies state professional licensure rules. In May, Maine created requirements to report similar information to state regulators.

Those laws follow several high-profile cases in which online education institutions, particularly for-profits, have been fined or settled lawsuits over consumer fraud.

In December, for example, the University of Phoenix agreed to pay the Federal Trade Commission $191 million to settle deceptive advertising claims. Similar claims were filed against Corinthian

Colleges and ITT Technical Institute, which were forced to close after becoming ineligible for federal student aid. In the wake of those closures, the Department of Education was required to forgive thousands of those students' loans — although it continued collecting from some of them.

Because of this history, Robyn Smith, senior attorney of the Legal Aid Foundation of Los Angeles, who sat on the rulemaking panel as a consumer advocate, believes the new rule opens "a huge hole in oversight and consumer protection."

"Congress, under the Higher Education Act, required states to be part of the oversight and regulatory triad," said Smith, who is also of counsel to the National Consumer Law Center, in an interview with Education Dive. "They are charged with consumer protection."

Smith said she felt so strongly about this that, as part of the rulemaking panel, she made concessions in other areas in order to keep the 2016 language. That was the consensus presented to the department — but in the final rule, the department changed it, saying it was persuaded by public comments. Smith issued a press release the day the final rules were published in the Federal Register, saying she was outraged.

Smith doesn't believe states will respond by leaving SARA. She said that's because the Higher Education Act requires state authorization as a condition of providing federal student aid, both to institutions in the state and to students living there. If a state pulls out, its students and institutions abruptly lose their funding, which would be disruptive and politically unpopular.

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McCann, of New America, said states also have limited legal options. Laws of general applicability might help, but they usually address outright fraud, she said, whereas many higher education regulations concern preemptive measures such as disclosures of costs or graduates' job placement rates. In addition, those laws often address issues that wouldn't fall under the purview of a general law, such as the institutions' rates of graduation, debt and job placement.

The Illinois attorney general's office told Education Dive in an email that attorneys general have long been an important part of the department's negotiated rulemakings. "We are disappointed at the department's decision to end that practice and exclude our office and other state attorneys general from" that process, spokesperson Tori Joseph said.

Although the office of Massachusetts Attorney General Maura Healey declined to talk on the record about the new rule, it echoed Joseph's comments in an email to Education Dive, saying that attorneys general should have been part of the rulemaking process.

"As attorneys general, we ... routinely field complaints from borrowers about their student debt, and we have brought consumer protection actions against student loan servicers, student debt adjusters, and abusive for-profit schools," wrote Jillian Fennimore, a spokesperson for the department. "It is critical that state AGs have a voice in this matter."