Online Learning Challenges: State Authorization, Federal Regulation

In his 2011 State of the Union address, Barack Obama, president of the United States, stressed the importance of higher education to the nation’s future: “To compete, higher education must be within the reach of every American.” If this sounds familiar, it should. Presidents have been saying this since at least the 1980s. However, the Obama administration has tangibly demonstrated that it sees postsecondary education as central to the future of the United States. For example, it has consistently defended the Pell Grant increase initiated in 2009, even insisting on its preservation during debt-ceiling negotiations. To make the increase possible, it passed through Congress the most significant reform in federal student financial aid since the creation of the Direct Loan Program: the termination of the guaranteed student loan program, in which private lenders received subsidies to provide students with loans that the government largely guaranteed; and the reallocation of the program’s funds to expand the Pell Grant. In arguing for this shift, the administration stressed the need to maximize the country’s limited financial aid resources to support higher education access.

Even before the president’s speech, the U.S. Department of Education had begun to more actively exercise its regulatory authority over student financial aid, primarily motivated by concerns about for-profit institutions. Such institutions enroll 10 percent of postsecondary students while receiving roughly 25 percent of federal financial aid and accounting for 44 percent of student loan defaults within three years of graduation. Given these statistics, the department argued that the nation could no longer afford the double-edged sword of wasted resources and highly indebted students unable to repay their loans. It put forward new “program integrity” regulations to increase the likelihood that federal financial aid would support students in programs worth the personal and national investment.

The department acted, though, without fully realizing the impact its steps would have. The main example of this involves changes to the state authorization requirements for distance learning, including online learning. In its June 2010 notice of proposed rulemaking, the department reiterated the historical interpretation of state authorization—that is, to participate in federal financial aid programs, an institution had to be authorized to offer postsecondary education by the state in which it was physically located. The proposed regulations at that time simply clarified the standards for what counted as “state authorization.” When the department posted the final regulations in October 2010, however, it had inserted a new requirement for distance education programs. In essence, the new regulation clearly tied, for the first time, the financial aid eligibility of students in distance learning programs to whether their institutions are authorized by the state in which the student, not the institution, is located.

Department officials likely viewed this as a modest revision to address an earlier oversight. After all, institutions have to follow state laws where they operate, so they should know if they need state authorization to deliver online learning where they have students. As the department would find, however, the law of unintended consequences thrives on such assumptions. Under the prior interpretation of state authorization, institutions had forged ahead with the delivery of online courses and programs, focusing on whether their students could access federal aid, not whether the institution might run afoul of another state's laws. And few, if any, states were scouring the web for signs that authorization requirements were not being followed. Their processes were (and are) staffed largely to deal with a relative handful of new location-based or correspondence provider requests each year, not an online universe in which their citizens might easily access options from hundreds of providers located anywhere.

Concern about the reinterpretation of state authorization grew as institutions nationwide became aware that the new provision meant they had to fulfill the authorization processes, regardless of length or expense, of every state in which they had online students if they wanted to preserve those students’ access to federal financial aid. And some state processes could be quite lengthy and expensive, leading one online institution to estimate its cost for complying with all states' authorization requirements at $150,000–200,000 annually. Largely in response to college and university arguments about how burdens such as these might limit the provision of online learning, legislation was introduced in Congress to rescind the regulation. However, the new requirement was overturned in federal court before the bill could be acted on because the department had not allowed for sufficient public review and comment on it before publishing it in final form.

The department has filed a notice indicating that it will ask a federal appeals court to overturn the lower court's ruling, but the grounds for the appeal or when it might be heard is unknown at the time of this writing. To date, though, the distance learning provision has been the only part of its “program integrity” regulations overturned. With the regulations having taken effect on July 1, a number of complications for colleges and universities remain. For example, the issue of a
federal definition of the credit hour as included in the regulations remains unresolved. Many in higher education view the definition as vague and unworkable, especially for online courses and programs. It is also considered to be a significant encroachment on the ability of institutions and academic programs to appropriately define the credit hour in relation to the demands of a given program.8

In addition, the regulations impose a new standard on distance learning programs for determining the last date of attendance for students who unofficially withdraw from their courses before completion. Previously, institutions could use the last date on which an online student logged in to the institution’s learning management system or online course as the withdrawal date and could calculate how much of the student’s financial aid to return to the department on that basis. Now an online student has to have actively participated in an academically meaningful class or faculty discussion for attendance. This creates different standards for online and traditional courses where none existed previously. Worse yet, the department has tried to apply the new criteria retroactively in enforcement actions, requiring institutions to return funds they previously would not have returned and threatening “substantial financial penalties” for decisions taken under the prior regulations.9

And even though the state authorization provision was overturned, another requirement—that institutions must make available, to distance learning students, information about where they can file complaints against the institution in the student’s state—was not.10 Likewise, over 80 percent of institutions participating in federal financial aid programs must comply with new reporting requirements governing how programs that are intended to prepare students for specific occupations (both degree and non-degree programs at for-profit institutions, and largely non-degree programs at non-profit institutions) can show that they are preparing students for “gainful employment.”11

Collectively, these policy developments illustrate some critical considerations for online learning. Traditional institutions are encountering, and most likely will continue to encounter, significant effects from the federal efforts to limit proprietary-sector financial aid abuses. In many ways, these effects arise from a failure to adapt the regulatory framework for financial aid to the unique context of online learning. And although these effects have highlighted the need to update that framework and the relationships it defines between students, institutions, states, and federal agencies, much of the work has not been effectively started, much less accomplished. In the interim, traditional colleges and universities will continue to face the unintended consequences of federal action in the form of increased financial and administrative burdens, providing significant motivation for collective engagement by federal, state, and institutional stakeholders to develop a regulatory structure that works for online learning.

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