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April 2023 State Authorization Updates & Information [1]

April 7, 2023 by erika.swain@cu.edu [2]

Hi everyone!

It's been an interesting couple of months on the regulatory front, and I had really hoped (or thought) that it might not veer into the state authorization space. And then… sigh… we won't be so lucky.

I'm not sure how many of you heard about or read the Department of Education's Dear Colleague Letter from February about Third-Party Servicers, but it was a doozy and has been occupying a lot of headspace when it comes to the recruitment and delivery of Title IV-eligible programs. Essentially, the ED issued some subregulatory guidance that expanded the scope of what is considered a third party (i.e., not the institution). To add insult to injury, they also required everyone—everyone—to report all of their new relationships by September 1. <insert screaming here> And oh, by the way, the ED said you're not allowed to contract with foreign entities for these services, and if there's a data breach, the institution, not the third party, is at fault. <screaming intensifies>

The ED graciously gave everyone about 30 days to respond, and the higher ed community took advantage of that, submitting more than 1,000 comments about how poorly planned this guidance was, how catastrophic it could be for many institutions, and how it wouldn't address the root issues (like the misuse of federal funds, misleading marketing, and student loan increases).

You can read more about this in The Chronicle or WCET, and you can read the Dear Colleague Letter here [3].

You don't need to do anything at the moment. In fact, most of us are waiting to see if the ED will repeal or revise the guidance. There's a lawsuit by 2U (which… they're dealing with a lot of issues from their actions as an OPM, so this might just be a "SQUIRREL!" moment for them). The study abroad sector and companies like D2L (based outside of Toronto) are also raising concerns.

I was more than content to set this aside for a month, but then the TPS issue popped up in the state authorization realm. Some of us, and our colleagues across the country, contract with third parties to perform tasks or actions on behalf of our institutions (think recruiting or advising, for example). Some states require institutions physically performing those actions within their borders to seek approval for having a physical presence. Since these third parties may be acting on behalf of our institutions, if they're based in one of those states, the state may require the institution to seek approval for physical presence.

What does that mean? If CU Boulder has contracted with a third party to recruit students, and

that third party is incorporated in a state with physical presence regulations that include recruitment, CU Boulder would need to contact that state and go through the same process as if we were setting up a physical location to deliver a degree there. Failure to do so could result in the institution being "expelled" from recruiting or offering education in that state (even online).

What does this mean for us? For now, while the discussions unfold, connect with the folks on your campus working on TPS issues to help them understand the potential need for physical presence permissions. Begin gathering information about the companies, their actions on behalf of or under the name of your campus, and where they are located. Start researching the state requirements around physical presence. Some states, like VT, don't pay attention to this, while others might require a process to approve a "location."

Fun Fact: Colorado is a state where other institutions would need to seek this type of approval.

In other news, last month I attended the HLC Annual Conference—one of my favorites (I'm biased, lol). There was a session led by the state authorization team from Grand Canyon University and the AZ State Portal Entity on professional licensure disclosures. Interestingly, aside from myself and the presenters, no one in the room worked in state authorization or SARA compliance as part of their regular job. Also notable was how complicated GCU's process has become (they had to contract with a TPS to manage it), and that AZ requires institutions using the "unable to determine" option to show evidence that a "reasonable effort" was made first. If you've followed concerns around the SARA policy language in 5.2, a lot of focus is on this phrase. What does "all reasonable effort" mean, and how is it applied?

There are several proposals before NC-SARA to remove that phrase, so this is something to watch—especially as state authorization comes up for discussion in the next Negotiated Rulemaking session (estimated November 2023). Additionally, NC-SARA policy proposals from the Century Foundation aim to strengthen states' responsibilities in SARA for institutional reviews and general-purpose laws.

What does this mean for us? For now, review where and how you've used the "unable to determine" choice for your professional licensure programs. How have you documented this? What evidence would you have if called upon to defend your choice?

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