

State Authorization and MOOCs

The focus of this paper will be on whether or not an institution offering Massive Open Online Courses (MOOCs) needs state authorization in states other than where the institution is physically located.

BACKGROUND

Thousands of articles, presentations, webinars, and conversations have been published or have occurred over recent years regarding MOOCs. When MOOCs first appeared, to many they were an attractive means for the general public to gain information/education at no cost. Part of what added to the intrigue and interest in MOOCs was they were being offered by prestigious institutions like Harvard, MIT, Brown, Columbia, Emory, Vanderbilt, etc. (Kolowich, 2012). Those names alone gave the perception that these free courses were valuable and should be counted for credit toward a college education. However, as the development and exposure of MOOCs continues to grow, conversations are revolving more around the rigor, academic quality, and credit value of this innovation in postsecondary education.

With all of the interest in MOOCs, one critical factor has had very little attention - the regulatory implications of offering them. It is as though the regulations regarding offering online courses do not exist. Online postsecondary education is highly regulated and whether or not this applies to MOOCs depends on state laws and regulations ... and their interpretation.

While MOOCs might be offered through a third-party provider, the institution is ultimately responsible for meeting authorization requirements.

It is the responsibility of all postsecondary institutions to be in compliance with regulations – state and federal. While MOOCs might be offered through a third-party provider (such as Coursera, Udacity, EdX, or CourseSites), the institution

is still responsible for meeting authorization requirements. Regulators will deal directly with the institution regardless of what the Terms of Conditions might say on the MOOC provider's website.

State regulations regarding online courses and programs and other out-of-state activities an institution may perform in a state have been in place for many years. These regulations fall under the category of state authorization. The awareness of state authorization was raised significantly in 2010 when the U.S. Department of Education released the final regulations resulting from the reauthorization of the Higher Education Act. The Department proposed that an institution must be in compliance with state authorization regulations for the institution to be eligible to offer Title IV federal financial aid to students in states other than where the institution was physically located. For the full text of the regulation, see §600.9 (c) at <http://www.tinyurl.com/mazquyl>.

The federal regulation set off a firestorm because some thought it said an institution needed to be authorized in every state where it enrolled online students. In reality, only a few states require authorization if the only activity conducted by an institution is having online students residing in those states. Some states require an institution to apply for an exemption, while others do not require institutions to do anything at all.

Some thought the federal regulation said an institution must be authorized in every state. That is not the case either. Only in a very rare situation would an institution need authorization in all states. The federal regulation said that institutions must be in compliance with state authorization regulations, whatever they may be. If the federal government found an institution out of compliance with a state's authorization regulations it could lose the ability to offer Title IV federal financial aid to students residing in that state.

WHAT IS STATE AUTHORIZATION?

State authorization is formal permission from a state for an institution to conduct certain activities within the state. These activities include (but are not limited to) on-the-ground recruiting; targeted advertising; online students or online faculty residing in the state; face-to-face interaction



between the students and faculty; experiential activities like internships, clinicals, practica; or having a computer server located in the state. Also, the use of third parties for certain educational services may trigger the need for authorization. The requirements that “trigger” the need to seek authorization differ from state to state and it is the institution’s responsibility to know and follow those requirements.

The only way to know for sure if a state’s regulations apply to your institution is to read each state’s regulations in detail.

The primary purpose for state authorization is consumer protection. States need a mechanism by which their residents are protected from fraud or institutional practices that are unfair to the student. Without going into details on all of the triggers and the nuances with them, the focus in this paper will be on whether or not an institution offering MOOCs needs state authorization in states other than where the institution is physically located.

It is easy for institutions to assume they know (or believe) whether or not a state’s regulations apply to them. In reality, state authorization regulations apply to all types of institutions: private not-for-profit and for-profit; public; religious; degree and non-degree granting; tribal; and vocational. The only way to know for sure if a state’s regulations applies to a particular type of institution is to read each state’s regulations in detail, starting with the definitions. Definitions are the foundation for the remainder of the regulations. For example, the definition of “institution”, “operating”, or “physical presence” is different in each state. Even the term for authorization varies –from licensed to registered to certified, etc.

DIFFERENT TYPES OF MOOCs

This paper will address state authorization implications for three different types of MOOCs:

1. Offering a single non-credit bearing course that results in a certificate of completion but not an official institutional certificate.
2. Offering a single credit-bearing course that is not part of a certificate or degree program.
3. Offering a series of credit-bearing courses that are part of a certificate or degree program.

Each of these would likely be viewed differently by the individual states, but a distinction not addressed in this paper is whether or not tuition would be charged. If a course is free, one could surmise there is no consumer to protect, therefore state authorization would most likely not be required. Once money is involved, a consumer is present - one who deserves fair treatment. Whether or not charging tuition triggers the need for state authorization is not fully covered in this paper.

Offering a single non-credit bearing course that results in a certificate of completion but not an official institutional certificate.

Offering a single non-credit bearing course that results in a certificate of completion but not an official institutional certificate is another gray area. The Arkansas and Alabama regulations cited above do not specify if non-credit bearing coursework requires authorization.

Many may remember when in 2012 the Minnesota Office of Higher Education communicated to Coursera (which was providing the software platform for MOOCs for some highly-regarded universities) that institutions offering non-credit, free MOOCs to Minnesota residents must first be registered with that office. (Some press accounts reported that Minnesota notified Coursera that it could not provide the software platform, but that was erroneous.) Minnesota regulations require most degree-granting, postsecondary institutions that are private or out-of-state public, or those that grant degrees exclusively at the associate level or above, or those that use the term “academy”, “college”, “institute”, or “university” in their names to be authorized by the Office of Higher Education. Minnesota Private and Out-of-State Public Postsecondary Act 136A.61 Policy states:

“ . . . The legislature has also found and declares that this same policy applies to any private and public postsecondary educational institution located in another state or country which offers or makes available to a Minnesota resident any course, program or educational activity which does not require the leaving of the state for its completion.”

A significant outcry was heard when the press reported the communication to Coursera from the Minnesota Office of Higher Education about the MOOCs. As a result, the Minnesota legislature changed its regulations whereby under certain conditions, tuition-free educational courses could be offered by an institution without registration with the Office of Higher Education. A course is considered tuition-free if the school charges no tuition and the required fees and other required charges paid by the student for the course do not exceed two percent of the most recent average undergraduate tuition and required fees as of January 1 of



the current year charged for full-time students at all degree-granting institutions as published annually by the United States Department of Education as of January 1 of each year. (136A.653 Subd. 3a).

Offering a single credit-bearing course that is not part of a certificate or degree program.

Offering a single credit-bearing course that is not part of a certificate or degree program. Although state regulations are written in black and white, there are many gray nuances. For example, Arkansas regulates online courses offered to its residents. Its Code reads as follows:

“Any postsecondary education institution located in another state, other than those covered by 6-51-601 et. Seq., or those regulated by the State Board of Cosmetology, which desires to offer coursework or degrees in the State of Arkansas shall be required, prior to offering any coursework, to obtain certification to do so from the Arkansas Higher Education Coordinating Board.” (ACA 6-61-301. (b)).

It appears that offering a single credit-bearing course would require certification in Arkansas, even if it is not part of a certificate or degree program. The interpretation of the regulations would be made by the Arkansas staff. Other states like Wisconsin, Maryland, and Iowa – to name a few – also require authorization if online courses are being offered to residents of their states.

Offering a series of credit-bearing courses that are part of a certificate or degree program.

Offering a series of credit-bearing courses that are part of a certificate or degree program could fall within some states’ regulations. For example, The Alabama Code pertaining to the Commission on Higher Education reads as follows:

“It is the responsibility of the Alabama Commission on Higher Education to establish policies and procedures for reviewing and approval or disapproving all proposed postsecondary credit courses offered in the State of Alabama by any non-Alabama institution of education”. (Ala. Code 16-5-10 (14) (1975)).

Alabama Code pertaining to the Alabama Department of Postsecondary Education reads as follows:

No proprietary postsecondary school, except those enumerated in Section 16-46-3, shall operate within this state unless the school first secures a license from the Alabama Department of Postsecondary Education, regardless of whether the school enrolls Alabama students or has a physical presence within the State of Alabama”. (Ala. Code 16-46-1, as amended, May 31, 2011).

Here it says that for-credit courses offered by out-of-state institutions to residents of Alabama (including online) are regulated and the institutions must seek authorization. So it possible that either a single credit-bearing course not leading to a certificate or degree, or a series of credit bearing courses that do lead to a certificate or degree could all require authorization in Alabama. That decision would be made by the Alabama Department of Postsecondary Education. (As a side note, the term “proprietary postsecondary school” is defined differently by the states, and it can include public, not-for-profit, and non-degree granting institutions.)

“It depends:” If you are offering a MOOC you should check for the need to comply.

Each of the three types of MOOCs listed above poses a number of questions, the answers to which are, “it depends.” There is no blanket answer for any state authorization questions, including those regarding offering MOOCs in any form. Institutions hold the responsibility for compliance with each state and U.S. territorial regulations. It is best if they first read the regulations and seek answers to specific questions from the states or territories themselves. State authorization resources can be found at <http://sheeo.org/projects/state-authorization-postsecondary-education>.

OTHER STATE AUTHORIZATION CONSIDERATIONS REGARDING MOOCS

Another regulatory issue arises when MOOCs are offered for free as an incentive to entice students to enroll in a degree program in the future. While on the surface this appears to be a win/win, some states do not allow institutions to offer anything for free (or at a discount) as an incentive to enroll. Florida is an example. 6E-2.004(5)(b)(7), F.A.C reads:

An institution shall not permit the payment of cash or other nonmonetary incentives, such as but not limited to travel or gift certificates, to any prospective student as an inducement to enroll or visit the institution. An institution shall not use the word “free” or its synonyms in reference to any equipment, tuition, books, or other items in conjunction with recruiting or advertising. Any reduction of tuition or fees must comply with subsection 6E-1.0032(7), F.A.C.).

Therefore, the question could be asked, would a free MOOC offered by an institution as an incentive to enroll in a degree program in the future be prohibited by this regulation? With all the variables involved, the answer is likely, “it depends”, based on how the Florida Commission for Independent Education would interpret the regulation.



STATE AUTHORIZATION RECIPROCITY AGREEMENT (SARA)

The one partial relief on the horizon is SARA (State Authorization Reciprocity Agreement). SARA would provide for states to participate in a compact whereby institutions having authorization to operate in their home state will also have authorization to operate in the other states participating in the agreement. This is not a complete solution because it is not expected that all states will immediately choose to participate in the agreement. But, it will reduce the burden of keeping up with all state regulation nuances and changes and will reduce the cost to institutions for being in compliance with state authorization regulations. It is a great step in the right direction.

CONCLUSION

State authorization is very complicated and nuanced. Although there are hundreds of pages of statutes and regulations across the 50 states, the District of Columbia, and the U.S. territories, not every scenario within higher education – especially at this point in time when innovation, competency-based, and technology advances are changing at a very fast pace – can be addressed in real-time by the individual state regulations. That adds to the confusion and complication.

It would not be surprising if some states require authorization for institutions offering MOOCs, especially if tuition is charged or academic credit is granted.

It would not be surprising if some of the states that require authorization due to online students in their state receiving education from an out-of-state institution were to determine that some MOOCs fall under their purview, especially if tuition is charged or academic credit is granted. Not enough emphasis can be placed on the need and importance for all types of institutions offering any kind of online or distance education courses, or conducting any other activity outside of

their home states that trigger state authorization, to become familiar with the state authorization regulations and make every effort to get and keep in compliance with them.

Although many institutions would like to see state authorization go away, it won't. In fact, the regulatory oversight for higher education is increasing. Although the portion of the federal Program Integrity Rules that tied dispersing Title IV funds to state authorization was set aside on procedural grounds, it is under discussion during the U.S. Department of Education's current negotiated rulemaking process and many believe it will be reinstated. In addition, the Department of Defense has proposed requirements for its new Memorandum of Understanding stating that institutions providing veterans' and military benefits to its students must show they are authorized in every state that requires them to be authorized (based on the activities/triggers the institutions conduct out-of-state). Not all states – but all states that require it. As mentioned earlier, the requirements vary state by state.

To reiterate once more, it is important that institutions be aware of the current state regulations before offering online courses. This includes MOOCs, especially those that charge tuition, culminate in a certificate or credential, or are for-credit. And because of all the confusion that exists about state authorization, institutions would be wise to seek advice from seasoned professionals before deciding what steps to take. Even if the U.S. Department of Education or the Department of Defense do not require state authorization for institutions to disperse federal financial aid or veterans' and military benefits, the state regulations have been and are still in place and it is the responsibility and duty for every postsecondary institution to know and comply with them.

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