Regulating Online Postsecondary Education: State Issues and Options

Background

States and their colleges and universities face competing pressures when it comes to meeting the economy's demand for a more educated workforce. They must expand student access and completion of certificates and degrees but do so within lasting fiscal constraints. That is forcing states to consider a range of options for cost-effectively expanding their capacity to meet workforce needs, including greater use of online programs from all types of in-state and out-of-state institutions. Pursuing that option will require that governors ensure that their states' policies and regulations regarding online programs protect consumers while promoting greater access, particularly for working adults.

Online courses and programs have become a much more prominent part of postsecondary education in the United States in recent years. The number of students taking an online course has nearly quadrupled over the past decade, with nearly one-third of all postsecondary students in the nation—including many working adults—currently taking at least one course online. Just under two-thirds of all chief academic officers of colleges and universities stated in a recent survey that online learning is "critical" to the long-term strategy of their institution, compared with about 50 percent a decade earlier.[1]

At the same time, the rapid rise of online postsecondary education has sparked debate about quality assurance. There is an ongoing debate in the academic community about whether online learning is superior or inferior to the classroom-based model, with two-thirds of academic leaders maintaining that online education is at least as good as face-to-face instruction.[2] The general public is slightly more skeptical, with 49 percent believing that online courses provide as much value as ones taught in the classroom.[3]

States play a significant role in online education, both as providers and as regulators. On the provider side, state colleges and universities have been offering courses and programs by distance education for decades, and states made a significant step into the field with the creation of Western Governors University in 1995. Today, more than 90 percent of public two- and four-year institutions offer distance learning opportunities to their students, an increase of 10 percentage points from a decade ago.[4] Although state universities' online ventures have had mixed success, the push is clearly in the direction of more digital learning. Public universities in California, Washington, and Florida have recently announced online ventures, and a recent dispute between the president and the governing board at the University of Virginia was in part about the uni-

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[1] Allen, I. Elaine, and Jeff Seaman, *Going the Distance: Online Education in the United States, 2011* (Wellesley, MA: Babson Survey Research Group, 2011).

[2] Ibid.

[3] FTI Consulting, "Innovation in Higher Education Survey," October 2012, http://www.northeastern.edu/innovationsurvey/pdfs/survey-results.pdf.

[4] U.S. Department of Education, National Center for Education Statistics, "Integrated Postsecondary Education Data System (IPEDS)," fall 2001 and fall 2010, Institutional Characteristics component, http://nces.ed.gov/datalab/tableslibrary/home.aspx.

versity's pace in developing a strong online presence.[5]

States also serve as regulators of online education. According to the federal Higher Education Act and state statutes, states are responsible for the integrity of the postsecondary education provided within their borders, including online programs. States are expected to authorize institutions to offer courses and programs, to verify that the institutions themselves are legitimate enterprises, and to provide a venue for students to lodge complaints against institutions. That work occurs in concert with academic reviews performed by regional and national accrediting agencies and administrative and financial reviews performed by the U.S. Department of Education, forming what has come to be known in the postsecondary community as "the accountability triad."[6]

As providers and regulators of online education, states occupy a unique and challenging niche. They must simultaneously promote access and quality assurance, working in coordination with the federal government and accreditation agencies. The expectation that state regulators can ensure both access and quality will only grow with the continued expansion of online programs by public, private, and for-profit institutions. As a result, governors should consider calling for a review of current state laws and regulations surrounding authorization of online programs, focusing on questions in three key areas:

- *Purpose*. What is the state trying to accomplish through the authorization process?
- *Requirements*. What is required of institutions seeking authorization? How do the requirements relate to the purpose(s) of authorization?

- *Capacity and cost*. Does the state have a sustainable model for authorization, assuming that the number of online institutions and programs seeking authorization will continue to grow? Could economies of scale be realized by joining with other states to authorize online institutions and programs?

Recent federal action underscores the timeliness of state-level reviews of existing authorization policies. In October 2010, the U.S. Department of Education issued regulations designed to clarify the Higher Education Act requirement that all institutions receive authorization from <u>all</u> states in which they enroll students. Of particular note was the clarification that postsecondary institutions would be required to demonstrate that they had sought and/or received authorization in each state in which they enrolled students.[7]

The regulations generated a significant amount of confusion and controversy among both postsecondary institutions and states, and an organization representing for-profit colleges filed a lawsuit challenging them. In 2012, a federal appeals court upheld a lower court ruling that voided the regulations related to online education on a technicality, but the requirement that postsecondary institutions—including institutions with online programs—obtain state authorization still stands in federal law (and in most states' laws as well).[8]

The State of the States

Over the years, states have developed widely varying policies and processes for authorizing postsecondary institutions. Those policies and processes have also grown in complexity, largely in response to the growth of online and hybrid (online and on-site) pro-

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[5] Hebel, Sara, "UVA Board Members' E-Mails Reflect Worry about Online Education," *Chronicle of Higher Education*, June 20, 2012.
[6] *Accreditation* is defined by the Council for Higher Education Accreditation (CHEA) as "a process of external quality review created and used by higher education to scrutinize colleges, universities and programs for quality assurance and quality improvement." *Authorization* is a state-led process designed to ensure that postsecondary institutions are meeting acceptable minimum standards for offering programs, defined by the Presidents' Forum as "an important gatekeeper to ensure that citizens will be protected from fraud and poor quality offerings." Institutions are required to be accredited to be eligible for federal student aid funds, and many states require institutions to be accredited as a condition of authorization.
[7] U.S. Government Printing Office, *Federal Register* 75, no. 209 (2010): 66946–47.
[8] Nelson, Libby, "Backing off State Authorization," *Inside Higher Ed*, July 31, 2012.

grams. The result is that online institutions and traditional postsecondary institutions with online programs now face a multilayered patchwork of regulations in several key areas that may hinder the access to high-quality online programs:

Authorizing agencies. In 15 states there is more than one authorizing agency. Typically different entities are responsible depending on whether an institution seeking authorization is for-profit or not-for-profit, or whether or not the institution offers degree programs.[9] Additionally, most states require out-of-state institutions offering certain professional programs, such as nursing or teacher education, to seek approval from the state's professional licensure body because there is no national licensure in those and a number of other professions.

Requirements and exemptions. In 34 states non-public and out-of-state institutions providing online education are required to seek authorization only if they have a physical presence in the state. The remaining states require institutions to be authorized regardless of whether they have physical presence in the state. Some allow institutions to seek exemptions based on accreditation or lack of physical presence, and others have multiple authorizing agencies with different requirements depending on the type of institution (degree-granting versus non-degree-granting).[10]

Among the states that require authorization only where the institution is physically present, the definition of physical presence varies considerably. The most common criteria include having property or a physical address, providing face-to-face instruction such as clinical courses, and conducting recruiting activities. Others include advertising (in local media or in national media accessed in the state), providing stu-

dents local access to services such as proctored exams, and even having Internet servers located in the state. It is possible for an online program to meet the physical presence standard in one state and not meet it in a neighboring state, complicating regulatory compliance for online providers.[11]

Costs. Several states charge no fees for authorizing online programs, but in some states fees exceed $10,000 for a single institution, not counting the cost of items such as surety bonding to cover liabilities in the event of institutional closure. Complexity is another issue when it comes to fees, as a number of states assess several separate fees for the same institution and make certain fees contingent on specific institutional characteristics (e.g., number and type of courses offered).[12]

Accreditation requirements. In more than half the states accreditation is a requirement for authorization, and for most of those states, the accreditation must be from one of the nation's six regional accrediting agencies.[13] That raises the question of possible overlap and even duplication between the accreditation and authorization processes in many states, since both focus on many of the same things. For example, the authorization process may require institutions to provide information on financial health and instructor credentials and host a site visit from an outside team of experts, all of which is also required for regional accreditation. State authorization reports are generally available to accrediting agencies, but accreditors generally do not share their reports with state authorizing entities.

The current patchwork of state regulations regarding online education poses challenges for states, institutions, and students. First, the cost and complexity of the authorization process for online programs that enroll students in multiple states, such as Western Gov-

[9] Western Cooperative for Educational Technologies, "State Approval Regulations for Distance Education: A 'Starter' List," Boulder, CO, 2011.
[10] Conger, Sharmila Basu, and Marianne Boeke, "The SHEEO State Authorization Survey: Development/Data Collection/Analysis," presentation to SHEEO Peer Consultation Network, April 30, 2012.
[11] Ibid.
[12] Conger and Boeke, "The SHEEO State Authorization Survey."
[13] Ibid.

ernors University, may reach the point where those programs will stop enrolling students from states with higher costs and duplicative requirements. Several institutions recently announced that they have already begun to do that.[14] Such moves can reduce access for students in the state, particularly place-bound working adults. Reduced access can in turn deprive states of timely and cost-effective means of meeting workforce needs, particularly in high-demand fields.

Second, as the number of online programs and institutions grows, many states will have to decide how much to regulate and how to pay for the regulatory process. That will especially be the case in states where the cost of authorization is partially or fully subsidized by the state. Because of the number of common elements among state authorization processes, states could generate efficiencies by collaborating.

Recent Developments

Largely in response to the proposed federal regulations, a number of states have begun to re-examine their authorization rules. An April 2012 analysis by the Western Interstate Commission for Higher Education (WICHE) Cooperative for Educational Technologies (WCET) found that 18 states have made changes to their authorization rules in the past year, and as many as 24 additional states are considering changes.[15] For example, Maryland has a new law requiring all out-of-state institutions that enroll its residents in online courses to pay a $1,000 fee and register with the state's Higher Education Commission, and Minnesota has stepped up its enforcement on institutions—including online programs—that are not in compliance with its authorization rules.[16]

Regional and national organizations have also launched efforts to help simplify and streamline the authorization process across states. The Presidents' Forum (a group representing leaders of institutions with online programs) and the Council of State Governments have developed a model state authorization reciprocity agreement (SARA) that establishes minimum standards for authorization and provides that the online education activity of an institution initially authorized in a participating state (i.e., its home state) would be recognized in other participating states. The draft agreement, developed by experts in authorization and accreditation, also provides for participating states to rely on accrediting agencies to perform basic quality assurance functions.[17] WICHE has developed a similar draft agreement (W-SARA) in cooperation with the nation's three other regional postsecondary compacts,[18] and talks are under way to merge those efforts.[19]

Additionally, the State Higher Education Executive Officers (SHEEO) and the Association of Public and Land-grant Universities (APLU) have formed a Commission on Distance Education to "develop and provide recommendations that will address the costs and inefficiencies faced by postsecondary institutions that must comply with multiple state laws and regulations as they endeavor to provide educational opportunities to students in multiple state jurisdictions."[20] The commission's final report, which is expected to endorse the idea of regionally based interstate reciprocity agreements, is scheduled to be released in early 2013.

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[14] Kelderman, Eric, "Despite Halt in Federal Enforcement, States Move Ahead with Regulations for Online Programs," *Chronicle of Higher Education*, August 7, 2012.

[15] WICHE Cooperative for Educational Technologies (WCET), "WCET State Authorization Network: Statement of Work and Call for Participation-Year 2," Boulder, CO, April 2012.

[16] Kelderman, "Despite Halt in Federal Enforcement, States Move Ahead."

[17] Council of State Governments and Presidents' Forum, *State Authorization Reciprocity Agreement: Working Draft*, Lexington, KY, April 2012.

[18] Midwestern Higher Education Compact, Southern Regional Education Board, and New England Board of Higher Education

[19] Western Interstate Commission for Higher Education (WICHE), *WICHE Newscap*, June 2012, http://wiche.edu/newscap/current.

[20] State Higher Education Executive Officers (SHEEO), "Commission on Regulation of Postsecondary Distance Education: Inaugural Meeting Summary, June 12, 2012," Boulder, CO, June 2012.

Moving Forward

As states consider a number of options for changing their authorization policies and practices for online postsecondary programs, governors should consider requesting a review of existing laws and regulations in this area. The review would be designed to identify opportunities for simplifying and streamlining the process and to explore the possibility of joining an interstate reciprocity agreement for authorization. The review should address questions that include the following:

Purpose of authorization.
What is the primary purpose of the state's authorization policies for online education? Do existing policies erect unnecessary barriers for institutions that are accredited and authorized to operate in other states?

Requirements of authorization.
If the state requires authorization for online programs that have a physical presence, how is physical presence defined? How consistent is that definition with those of other states? Does the state's definition need to be reviewed and perhaps refined?

If the state requires accreditation for authorization of online programs, do authorization and accreditation requirements overlap? If so, in what areas and can the two processes be streamlined?

Capacity and cost of authorization.
If the state currently has multiple agencies overseeing authorization of online programs, is consolidation a viable option? What would be the costs and benefits of consolidation?

Does the state's current authorizing agency (or agencies) have staffing adequate to handle a significant increase in requests for authorization and complaint resolution?

How does the state finance its authorization and consumer protection efforts (fees, state funds, combination)? Does the current model need to be revisited?

Would the state consider joining a multistate compact or reciprocity agreement for authorizing online programs? Why or why not?

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