

# Pursuing Regulatory Compliance for Digital Instruction in Response to Covid-19: Policy Playbook

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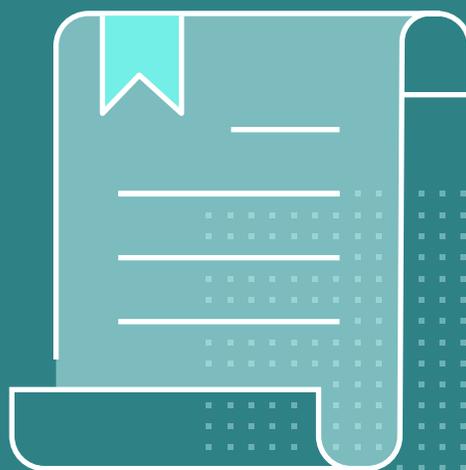
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## About WCET

WCET – the WICHE Cooperative for Educational Technologies, is the leader in the practice, policy, and advocacy of technology-enhanced learning in higher education. WCET is a member-driven non-profit which brings together colleges, universities, higher education organizations, and companies to collectively improve the quality and reach of technology-enhanced learning programs.

Learn more: <http://wcet.wiche.edu>



## About SAN

Working collaboratively, institutions can navigate state and federal regulations more efficiently than working on their own. WCET's State Authorization Network (SAN) is the leader for guidance and support for navigating regulatory compliance for out-of-state activities of post-secondary institutions.

Learn more: <https://wcetSAN.wiche.edu>



## About WICHE

Since 1953, the Western Interstate Commission for Higher Education (WICHE) has been strengthening higher education, workforce development, and behavioral health throughout the region. As an interstate compact, WICHE partners with states, territories, and postsecondary institutions to share knowledge, create resources, and develop innovative solutions that address some of our society's most pressing needs. From promoting high-quality, affordable postsecondary education to helping states get the most from their technology investments and addressing behavioral health challenges, WICHE improves lives across the West through innovation, cooperation, resource sharing, and sound public policy.

Learn more: <https://www.wiche.edu>



## About Every Learner Everywhere

Every Learner Everywhere advocates for equitable outcomes in U.S. higher education through advances in digital learning. Every Learner is a network of twelve partner organizations with expertise in evaluating, implementing, scaling, and measuring the efficacy of education technologies, curriculum and course design strategies, teaching practices, and support services that personalize instruction for students in blended and online learning environments.

Learn more: <https://www.everylearnereverywhere.org>

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# Table of Contents

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<b>Introduction to the Policy Playbook</b>	
Playbook Content & Sections . . . . .	7
Responding to Regulations . . . . .	8
A Quick Primer on the Regulatory Triad . . . . .	11
<b>Accreditation</b>	
Institutional Accreditation . . . . .	15
Programmatic Accreditation . . . . .	18
<b>Financial Aid Eligibility</b>	
Correspondence Education, Distance Education, and Regular and Substantive Interaction . . . . .	21
Determining Last Date of Attendance for Students Who Withdraw Without Notice . . . . .	26
Financial Aid & Satisfactory Academic Progress . . . . .	31
GI Bill Benefits for Student Veterans . . . . .	34
Consortia Agreements . . . . .	36
<b>State Authorization &amp; Licensure</b>	
State Authorization of Distance Education . . . . .	39
Professional Licensure . . . . .	42
<b>Course Level Regulations</b>	
Student Identity Verification . . . . .	47
Fair Use in Using Digitized Materials or Videos . . . . .	52
<b>Student Civil Rights</b>	
Accessibility for Students with Disabilities . . . . .	57
Additional Areas of Consideration . . . . .	62
<b>Appendix</b>	
Suggested Resources . . . . .	66
Special Topic Publications . . . . .	68
Glossary of Terms . . . . .	70

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# Introduction to the Policy Playbook

The spring 2020 term saw an unprecedented response to an unprecedented challenge as virtually every U.S. higher education institution offering face-to-face instruction rapidly switched to remote instruction, many in as little as one to two weeks.

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Such a shift massively disrupted the lives of students, faculty, staff, and administrators alike as institutions worked to redesign courses and provide faculty with a crash course in teaching remotely. Institutions struggled to resolve challenges ranging from the technological to the pedagogical to the administrative. For faculty and academic administrators new to teaching online, this rapid shift was often overwhelming and disorienting as they tried to simultaneously master unfamiliar technology tools, federal and state regulations, online student support systems, and pedagogical approaches.

Institutions, especially those with little distance education infrastructure, focused their resources and efforts on meeting the pedagogical and technological challenges to the utmost extent possible as they sought to complete the term remotely. Addressing the complex web of federal, state, and accreditation regulations governing distance education was a secondary concern for many institutions, and even the schools knowledgeable of this regulatory landscape were hard pressed to keep up with the growing numbers of waivers and regulatory interpretations governing distance education issued by the Department of Education beginning on March 5, 2020.

Additionally, the rules change once faculty adopt teaching modalities that require more use of digital technologies. Moving into a digital format invokes new intellectual property and accessibility rules. Moving courses completely (or mostly) online introduces new requirements for instructional interaction and assuring a student's identity for assessments. Faculty might not realize that making this transition is as if they have crossed an invisible state line and the laws have changed.

Regardless of whether institutions re-open for face-to-face instruction, navigating this regulatory landscape and educating faculty and staff on the importance of these regulations as a means of ensuring quality will be critical. Understanding and ensuring that institutions follow the associated regulations improves pedagogy, protects the institution from loss of financial aid eligibility and/or accreditation, and bolsters educational quality.

Institutions will not succeed at everything, but financial aid auditors and accrediting review teams always view not trying with greater disdain than they do when an institution tries and does not fully succeed. Regulatory compliance should be viewed as a journey that might never be completed as institutions respond to new regulatory changes.

By reading this Playbook and some of the cited resources, you will obtain a better understanding of the regulations. You will probably be able to identify the areas where you are doing well and where you are at risk. Each section provides links to actual regulations and Department guidance where available. Those documents, especially the Department guidance, can help you understand the issues and actions that need to be taken. Written for academic administrators new to online education, the Playbook can also be used to provide faculty with critical information on a range of distance education issues. Even administrators familiar with distance education may find this Playbook useful as a tool for educating the campus community and a handy compendium of regulations and resources.

Used in conjunction with [Delivering High-Quality Instruction Online in Response to COVID-19: Faculty Playbook](#), instructors and administrators have an overview of the most critical pedagogical and regulatory concerns surrounding online education quality and student success.

### **A Note on Terminology**

Many online educators refer to the quick pivot instruction that took place in the spring as remote teaching to differentiate it from intentionally designed online learning. In this document, remote instruction is used to describe instruction transitioned from face-to-face to an online modality during a term. Two other definitions are critical to understanding this area: online education and distance education. Although technically the two terms are not identical, they are often used interchangeably with online education operating as the most prevalent form of distance education. When referring to federal regulations, the term distance education will be used as that is the term defined in federal regulations.

**This Playbook is a tool for higher education administrators tasked with navigating this regulatory landscape during the uncertain future.**

# Playbook Content & Sections

The Playbook covers regulatory issues with the greatest impact on institutions, faculty, and students including:

- **Accreditation**
- **Federal Financial Aid Regulations**
- **State Authorization and Professional Licensure**
- **Course Level Regulations**
- **Student Civil Rights**

Each section includes:

## Introduction



## Policies & Regulations



## Institutional Impact



## Suggested Actions



## Resources & References



Additional supplemental essays on accessibility, financial aid, state authorization, and the interconnection between regulations and quality assurance are available via links at the end of the Playbook.

# Responding to Regulations

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## Understand the issues, assess risks, and identify initial priorities

Institutional leaders should take three immediate steps to address distance education regulations:

- 1. Focus on those regulations where non-compliance presents the greatest risks and understand the consequences of non-compliance, knowing that it will likely be impossible to address everything at once.**
- 2. Consider the campus culture, faculty/staff contracts, and the fiscal and health pressures being felt by all due to the pandemic when devising implementation strategies.**

Some institutions have a culture that allows them to move quickly, while others require a very deliberative process. Faculty and staff labor contracts (if any) will inform policy and may result in new negotiations. Leaders should be attentive to the added burdens already being created as a result of the pandemic and try to fit compliance into existing structures, such as existing faculty/staff development activities. Reflect on the properties of successful or failed past initiatives and apply those lessons to current regulatory compliance efforts.

- 3. Leaders should create a priority list of issues to be tackled.**

The institution's ultimate plan should be to abide by all regulations. Some regulations that put the institution at the greatest risk may require a long process to complete. The short list should include those issues on the risk list that can be completed in the short term, plus those that are *easy wins*. Meanwhile, plans for the steps to attack the more difficult and time-consuming issues need to be started. Leaders should start thinking about who can help facilitate the success of this strategy.

## Obtain high-level champions

To be successful, there needs to be a high-level champion or set of champions supporting the strategy. Start with identifying the scope of the intended target(s) for compliance. Is the focus on the entire institution, a college within a large university, or an academic program? Perform an honest examination of who is most directly in charge of the intended target area(s), such as the provost's office, a college dean, financial aid administration, the institution's attorney, or a federal compliance office. Leaders should identify who *makes things happen*. Some administrators have a reputation for understanding and navigating the system.

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It is a well-known fact that on some campuses, a well-placed executive assistant or advisor to the president may be the key to progress on any initiative. Work with supervisors or leadership to identify the champion or champions who will lend the power of their position to help achieve compliance.

### Work across the campus and search for lessons learned

Success often requires obtaining the cooperation of several players. For example, assuring that the *last date of attendance* is properly tracked could require cooperation between the financial aid office, IT, the registrar, the teaching and learning center, and individual faculty. When the players are identified, it may take individual conversations to get each of the administrative or faculty units to understand the issue and their role in the solution. In this discovery phase, leaders may uncover those who may try to block the path to implementing the strategy. The identified champion(s) may be helpful to move the strategy along.

Group work will be required at some point for the strategy to be successful. Depending on the institution's structure, an existing committee may be able to assume this work. Failing that (or in place of it), a task force lends some urgency, focus, and time limitations to accomplishing the tasks.

Additionally, leaders should seek the advice of the institution's general counsel. Whether as part of the group or in reviews along the way, it is important to make sure that the solution meets legal requirements and that the solution does not violate other laws or policies.

This also may be the time to reach out to and learn from those at other institutions. Pick *sister institutions* and canvas what they have done on the issue. Also, send out questions to discussion lists offered by professional associations (such as WCET's DISCUSS community) to learn what steps others have taken. There are probably others who have just completed this work and are happy to share what they have learned.

### Create defensible practices

In partnership with the champions, identify the group or groups to tackle the policies. The experts you assemble will create practices that *meet the intent* of the selected regulation. The group should create defensible practices based upon research and experience in higher education.

To create a *defensible practice* (or policy), leaders should fast-forward in their minds to a time when they might be sitting across from a financial aid auditor or accreditation review team. Can the reasons for creating the practice be logically articulated? Can it be defended? For example, doing nothing or creating a policy that no one knows about are both hard to defend as evidence of compliance.



Consider reaching out to groups such as WCET's DISCUSS community

It helps to be able to answer these questions:

- How does the practice **meet the intent** of the regulation?
- Are students **protected**?
- Is the **practice communicated** to the administrators, faculty, and students who need to know what to do to comply?
- Is the practice **applied evenly** across programs, courses, and/or students?
- Does the institution have **evidence that the practice was successful** in achieving the compliance goal?

### Document, document, document

Thinking about that seat across from the financial aid auditor or accreditation review team, it helps to have proof to support the answers to the above questions. Some of the federal regulations include language that require institutions to provide evidence of compliance upon request. Accrediting teams often ask for such evidence, as well, for issues that are part of the accrediting review process.

Be ready to show the actual policy language and/or descriptions and examples of practices. Illustrate how the practices were communicated to the proper individuals. Document problems, complaints, and updates that occur. There may be requests for evidence that it worked.

### A few critical caveats

**In response to the pandemic, the Department of Education (the Department), accreditors, and some states have waived a number of regulations related to distance education, but they have not waived all regulations.** For example, regulations on the approval of distance education programs by accreditors and the Department have loosened while accessibility regulations remain in full force. This regulatory landscape remains highly fluid and institutions should confirm all regulations with the appropriate agency. Additionally, many of the agencies involved in regulating distance education overlap with each other but institutional requirements may differ based on the regulatory entity. For example, the Higher Learning Commission (HLC) may have different distance education regulations than the Western Association of Schools and Colleges (WASC). Therefore, it is critical that administrators confirm all material found in this Playbook, especially pertaining to their institutional accrediting agency.

The federal regulatory response to the ongoing pandemic remains fluid. The information contained in this document is accurate as of **August 25, 2020**. Additional resources that may be helpful in the process of developing an institutional strategy are included at the end of the Playbook.

**Legal Disclaimer** – *The information and suggestions presented in this Policy Playbook are offered as general analysis and possible practices for an institution to pursue as it strives to support students with educational continuity and maintain state, federal, and accreditation compliance during the COVID-19 pandemic and beyond. The information should not be considered to be or used as legal advice. Legal questions about these topics should be directed to institutional legal counsel.*



*Comprehensive documentation helps provide proof of compliance*

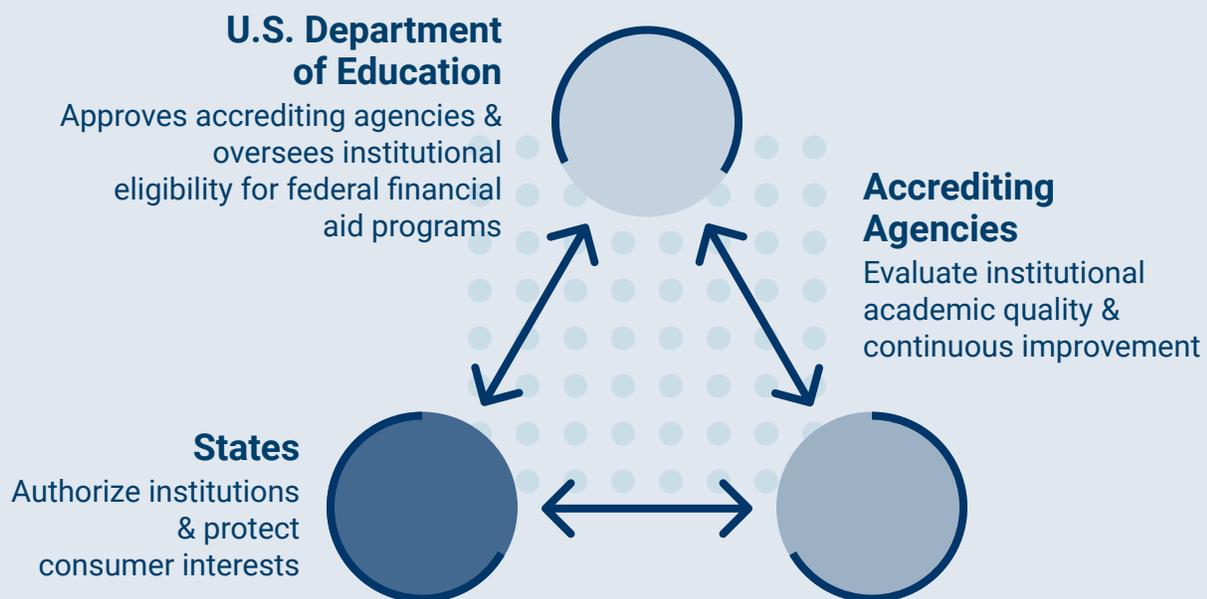
# A Quick Primer on the Regulatory Triad

## The Regulatory Triad

The regulatory landscape of U.S. higher education is jointly governed by federal regulators, state regulators, and accreditors which form *the triad*. Under the Higher Education Act (HEA), institutions must receive the approval of all three entities in order to participate in federal financial aid programs. In this model:

- the **U.S. Department of Education** (the Department) is tasked with approving accrediting agencies, and overseeing institutional eligibility for federal financial aid programs,
- **accrediting agencies** are tasked with overseeing institutional and programmatic academic quality, and
- **states** are tasked with ensuring consumer protection.

Ideally, the three entities form a balanced relationship that protects consumers and federal financial aid investments by ensuring academic quality with each providing a necessary piece of the triad.



## The U.S. Department of Education

The Higher Education Act (HEA) imbues the U.S. Department of Education with two critical roles: ensuring institutional compliance with federal financial aid regulations and approving institutional and programmatic accrediting agencies. As the agency responsible for the administration and fiscal integrity of over \$54 billion in direct federal student financial aid, the Department is required to ensure “the administrative capability and financial responsibility of an institution of higher education for financial aid,” according to Section 498 of the HEA. The HEA precludes the Department from directly assessing academic quality, however, which is seen as the purview of accreditors. As such, the Department does not directly assess institutional or program academic quality but instead exercises approval oversight for the accrediting agencies defining and monitoring academic integrity.

## Accrediting Agencies

Accrediting agencies play the critical role in establishing, applying, and enforcing quality standards as they relate to institutions and specialized programs. Institutional eligibility to disburse federal financial aid rests, in part, on approval by an accrediting agency recognized by the Department. These agencies also play a critical role in facilitating institutional continuous improvement and use a peer review model to regularly evaluate a range of issues including academic quality, student outcomes, and fiscal affairs.

The Department recognizes two types of accreditors:

1. **Institutional accreditors** accredit the entire college or university.
2. **Programmatic accreditors** focus on specialized programs.

Accreditation standards may vary between accreditors, although all accreditors recognized by the Department must adhere to minimum standards. Additionally, Congress has charged accreditors with reviewing and upholding several requirements of institutions as necessary safeguards to protect students receiving financial aid.

## States

The third leg of the regulatory triad is composed of state agencies responsible for authorizing colleges and universities within their borders and handling consumer protection complaints. State authorization is the bedrock for most institutions’ ability to offer degrees but their requirements vary considerably, especially across institution types (e.g., private vs public or nonprofit vs. for-profit), with some states requiring significantly more oversight and reporting than others. States are also tasked with providing students with a vehicle for filing and resolving consumer protection complaints. In order to receive federal financial aid, institutions must be both accredited by an accreditor recognized by the Department and authorized in the state(s) in which they operate.

## Enforcing Regulations

Repercussions for being out of compliance with any member of the triad jeopardizes institutional eligibility for federal financial aid funds including Pell Grants and other Title IV aid.

For example, institutions which fail re-accreditation reviews (which are conducted on a regular basis) or have their authorization revoked by their state risk having their students immediately lose eligibility for federal financial aid.

Institutions also undergo periodic financial aid *program reviews* (or audits) by the Department to check on compliance to financial aid regulations. Institutions found to be out of compliance not only risk losing financial aid eligibility but may be required to repay financial aid collected while out of compliance. And in some cases, non-compliance with regulations may also pose a litigation risk to institutions, especially from students who lack adequate access to educational resources or seek to show that a lack of educational quality hampers their ability to find employment. Additionally, because accreditation and authorization function as de facto indicators of minimum quality, institutions without accreditation or authorization risk decreased enrollments if students cannot access financial aid or view the institutions and programs as low quality.

### The Impact of COVID-19 on the Triad

Even under the best of circumstances, the interdependent relationships among members of the triad are complex, unclear, and sometimes difficult for institutions to navigate. Navigation of the triad has been made even more complex by the novel coronavirus pandemic as institutions scramble to understand intertwined regulations, especially regulations associated with distance education and educational technology. In some instances, this regulatory landscape may be new to faculty and administrators unfamiliar with online education while in other instances institutional administrators familiar with the regulatory landscape scramble to keep up with emergency regulations and related changes.

In early March, the Department announced the waiver of certain distance education regulations. Responding to the Department, many accreditors also announced waivers of distance education-related regulations. States, however, have varied significantly in the clarity of their guidance regarding temporary changes made to their higher education-related regulations. As a result, some institutions struggle to determine how to best comply with myriad regulations while in the midst of responding to a global pandemic.

Even under the best circumstances it is difficult to navigate the interdependent relationships and regulations among the triad – federal, state, and accreditors.

The pandemic further complicates the navigation.

# Accreditation

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## Chapter contents

- **Institutional Accreditation**
- **Programmatic Accreditation**

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As a critical component of the regulatory triad, accrediting agencies are responsible for evaluating the academic quality of an institution and/or its programs.

The U.S. Department of Education, in turn, relies on accretor actions to attest to academic quality for federal financial aid eligibility and maintains a list of Department-approved accrediting agencies. Accreditors must fulfill a number of Departmental requirements to retain recognition, including requirements associated with the approval of distance education at the institutional and possibly programmatic levels.

**Information in this section is current as of August 25, 2020.**

# Institutional Accreditation

The Department of Education issued an initial waiver on March 5, 2020, and updated that guidance on August 21, 2020. The waiver of both Departmental distance education approval and allowing accreditors to waive distance education approval is now extended through December 31, 2020, or the end of the payment period that includes the termination of the federally declared pandemic-related national emergency.

## Introduction



Under normal circumstances, the approval to offer distance education is a multi-step process that includes approval from an institution's accreditor as well as the U.S. Department of Education (the Department). Accrediting agencies are a critical component of the regulatory triad with primary responsibility for institutional and academic program quality. In early March 2020, the Department announced that it would waive regulations requiring Departmental approval of distance education programs and has extended that waiver through December 31, 2020, or the end of the payment period that includes the termination of the federally declared pandemic-related national emergency. Additionally, the Department announced that it would permit accreditors to also waive distance education review requirements.

## Policies & Regulations



Typically, when an institution develops online programs, whether fully online or a blended model, it must meet certain quality standards and obtain approval from both its accreditor and the Department. Failure to do so could result in the institution losing access to federal financial aid programs. On March 5, 2020, the Department of Education provided institutions with:

*broad approval... to use online technologies to accommodate students on a temporary basis, without going through the regular approval process of the Department in the event that an institution is otherwise required to seek Departmental approval for the use or expansion of distance learning programs. (Department of Education, 2020)*

Although the Department cannot unilaterally waive accreditor standards, it can waive its requirement that accreditors review institutional distance education plans and requirements as a part of the accreditation process. The Department is also allowing accreditors to conduct *virtual* site visits through December 31, 2020, or the end of the payment period that includes the termination of the federally declared pandemic-related national emergency, with the caveat that an on-site visit must follow any virtual site visit “in a timeframe that is reasonably practicable.” A focused on-site visit need only to confirm the presence of facilities and interview randomly selected students; it is not necessary for the on-site visit to replicate the entirety of the virtual site visit.

**This guidance provides flexibility for accreditor approval; however, accreditors are not required to waive any of their requirements and may still have requirements that are outside of federal authority** and must be observed by institutions. Institutional accreditors vary as to their responses and required processes to obtain approval for this conversion of face-to-face courses to online. Those processes might include submission of a waiver and/or communication with the institutional accreditor.

### Institutional Impact



Institutions that do not acquire the appropriate approvals from both the Department and their institutional accreditor risk the loss of accreditation and the right to disburse federal financial aid.

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### Suggested Actions



The following actions are recommended in order to ensure that institutions continue to meet Departmental and accreditor requirements:

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**Although the Department has granted broad approval of distance education programs through December 31, 2020,** institutions must still contact their institutional accreditor to determine if any further action is required.

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**Institutional accreditors have not been consistent in their responses to the pandemic.** Institutions should check with their accreditor to determine any processes or guidelines regarding distance education that must be followed.

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**Institutions should be mindful of the need to adhere to all quality standards** and should review departmental and accreditor online instruction standards and endeavor to fulfill those standards regardless of the need for Departmental or accreditor approval.

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**The Department recommends that institutions document any actions taken in response to COVID-19.** Should institutions wish to continue offering online instruction after the waiver period ends, they may be required to seek Department and/or accreditor approval for the continued delivery of online education. Therefore, institutions should document all actions taken in the transition to online instruction. As of August 25, 2020, no additional guidance has been provided.

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### Resources & References



- [The Council of Regional Accrediting Commissions. \(2020\). Assuring quality through accreditation during COVID-19.](#)
- [Federal Student Aid. \(2020, June 16\). Guidance for interruptions of study related to Coronavirus \(COVID-19\). Office of Postsecondary Education, US Department of Education.](#)

# Programmatic Accreditation

The Department of Education issued an initial waiver on March 5, 2020, and updated that guidance on August 21, 2020. The waiver of both Departmental distance education approval and allowing accreditors to waive distance education approval is now extended through December 31, 2020, or the end of the payment period that includes the termination of the federally declared pandemic-related national emergency.

## Introduction



Program accreditors provide assurance of educational quality for specialized academic and technical programs at postsecondary institutions. Specialized or programmatic accreditation normally applies to programs, departments, or schools that are parts of an institution. Program accreditation is in addition to accreditation by institutional accreditors such as the Higher Learning Commission (HLC) and Southern Association of Colleges and Schools Commission on Colleges (SACSCOC). There are select cases when a programmatic accrediting agency serves as the sole accreditor for professional schools and other specialized or vocational institutions that are freestanding in their operations. Program accreditation is typically required by a state licensing board to provide program approval for licensure in specialized fields such as nursing, medicine, law, and education.

Many programmatic accreditors have requirements regarding distance education programs in their fields. Much like institutional accreditors, many programmatic accreditors have offered more flexible requirements around the modality of instruction, experiential learning, and grading policies in response to the COVID-19 pandemic. Additionally, the Department of Education is offering certain flexibilities through December 31, 2020, or the payment period that includes the termination of the federally declared pandemic-related national emergency. These flexibilities include virtual site visits and waivers for distance education requirements.

## Policies & Regulations



More than 70 programmatic accrediting organizations exist nationwide. COVID-19 policy flexibility and adjustments vary per programmatic accrediting organization.

**Institutional Impact**



Institutions with specialized academic programs that must obtain programmatic accreditations should ensure that any adjustments made by the institution to their academic program curriculum due to COVID-19 meets programmatic accreditation standards.

Adjustments to an academic program curriculum may also require approval by a state licensing board.

**Suggested Actions**



The following actions are recommended in order to ensure that programs continue to meet licensure requirements.

**Institutions should identify academic programs that are subject to programmatic accreditation as well as any courses that require adjustments to maintain educational continuity.**

**Institutions should research requirements and possible flexibilities offered due to COVID-19 by programmatic accrediting organizations.** They should also review and comply with any programmatic accreditor requirements.

**The Department recommends that institutions document any actions taken in response to the COVID-19 pandemic.**

Institutions should be mindful of the need to adhere to all quality standards and should review Departmental and accreditor online instruction standards and endeavor to fulfill those standards regardless of the need for Departmental or accreditor approval.

**Resources & References**



- [The Council for Higher Education Accreditation \(CHEA\) maintains a list of programmatic accreditors.](#)
- [U.S. Department of Education. \(n.d.\) Programmatic accrediting agencies.](#)

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# Financial Aid Eligibility

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## Chapter contents

- **Correspondence Education, Distance Education, and Regular and Substantive Interaction**
- **Determining Last Date of Attendance for Students Who Withdraw Without Notice**
- **Satisfactory Academic Progress (SAP)**
- **GI Bill Benefits for Student Veterans**
- **Consortia Agreements**

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The second component of the regulatory triad involves the federal government and its regulatory role associated with financial aid. An institution's ability to remain eligible for federal financial aid, especially Title IV programs such as Pell, is connected to a number of financial aid regulations including regulations about course and program modality, interactions between faculty and students, and student satisfactory academic progress. In addition to these Title IV financial aid regulations, administrators should also be aware of distance education specific regulations that impact student use of GI Bill benefits.

**Information in this section is current as of August 25, 2020.**

# Correspondence Education, Distance Education, and Regular and Substantive Interaction

The Department of Education has NOT waived any regulations related to the definition of correspondence courses, distance education, and regular and substantive interaction due to the novel coronavirus pandemic. On August 24, 2020, the Department of Education released final correspondence and distance education regulations.

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## Introduction



One of the most critical federal regulations related to distance education and financial aid eligibility are the definitions of correspondence education and distance education found in 34 C.F.R. §600.2. This section will discuss the recent definitions and guidance the Department of Education provided on August 24, 2020, stemming from the 2019 negotiated rulemaking process.

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## Policies & Regulations



### Defining correspondence courses and distance education

Classification of a course as correspondence as opposed to distance can impact eligibility for federal financial aid. Institutions offering more than 50 percent of their total course offerings via correspondence or enrolling more than 50 percent of their students in correspondence are not eligible to participate in Title IV financial aid programs. Additionally, students enrolled in correspondence programs are limited to a half-time federal Pell Grant award.

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**34 C.F.R. §600.2 defines a correspondence course as:**

1. A course provided by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructor. Interaction between the instructor and student is limited, is not regular and substantive, and is primarily initiated by the student.
2. If a course is part correspondence and part residential training, the Secretary considers the course to be a correspondence course.
3. A correspondence course is not distance education.

The critical components of this definition are:

- Students are separated from the instructor.
- Interaction between the student and instructor is limited.
- Interaction between the student and instructor is not regular or substantive.

**Distance education is also defined in 34 C.F.R. §600.2 as:**

1. Education that uses one or more of the technologies listed in paragraphs (2) (i) through (iv) of this definition to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously.
2. The technologies that may be used to offer distance education include:
  - i. The Internet;
  - ii. One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;
  - iii. Audio conference; or
  - iv. Other media used in a course in conjunction with any of the technologies listed in paragraph (2) (i) through (iii) of this definition.
3. For purposes of this definition, an instructor is an individual responsible for delivering course content and who meets the qualifications for instruction established by an institution's accrediting agency.

*Continued on next page*

4. For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also include at least two of the following—
  - i. Providing direct instruction;
  - ii. Assessing or providing feedback on a student’s coursework;
  - iii. Providing information or responding to questions about the content of a course or competency;
  - iv. Facilitating a group discussion regarding the content of a course or competency; or
  - v. Other instructional activities approved by the institution’s or program’s accrediting agency.
  
5. An institution ensures regular interaction between a student and an instructor or instructors by, prior to the student’s completion of a course or competency—
  - i. Providing the opportunity for substantive interactions with the student on a predictable and scheduled basis commensurate with the length of time and the amount of content in the course or competency; and
  - ii. Monitoring the student’s academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

Thus, the critical distinguishing feature between correspondence and distance education is the **presence of regular and substantive interaction**.

## Defining regular and substantive interaction

Prior to August 24, 2020, there was no formal regulatory definition of regular and substantive interaction, but that changed with the new regulatory definition of distance education. Regular and substantive interactions must:

- be with an instructor as defined by the institution's accreditor;
- be initiated by the instructor;
- be scheduled and predictable;
- be academic in nature and relevant to the course; and
- include at least two of the following:
  - direct instruction,
  - coursework assessment or feedback,
  - information about the course content,
  - group discussion of the course content, or
  - other instructional methods approved by the institution's accreditor.

**Note:** The Department has NOT waived any regulations related to the definition of correspondence courses, distance education, and regular and substantive interaction due to the COVID-19 pandemic.

### Institutional Impact



Regular and substantive interaction is the distinguishing feature of distance education versus correspondence education.

Institutions risk losing access to student financial aid if more than 50 percent of their courses are classified as correspondence courses or more than 50 percent of their students are enrolled in correspondence courses. If an institution is audited by the Department's Office of Inspector General or as part of a periodic Departmental financial aid program review and found to be out of compliance, institutions may be required to repay financial aid associated with the correspondence courses and students.

**Suggested Actions**



The following actions are recommended in order to ensure that programs appropriately distinguish between correspondence education and distance education.

**All faculty teaching at a distance should receive training on what constitutes regular and substantive interaction and the potential consequences of non-compliance.**

**Institutions may also leverage data collected by their learning management system as evidence of student interactions in distance education courses.**

**Course syllabi should clearly delineate instructional activities.**

**The Department recommends that institutions document any actions taken in response to COVID-19 including changes in modality.**

**Resources & References**



- ☑ [Institutional eligibility under the Higher Education Act of 1965 as Amended: Definitions of correspondence education and distance education, 34 C.F.R. § 600.2 \(2019\).](#)
- ☑ [Davis, V.L. \(2017, October 17\). The OIG Report on WGU, Part 3: A Brief History of Regular and Substantive Interaction. WCET Frontiers.](#)
- ☑ [Davis, V.L. \(2019\). U.S. Federal Policy in Distance Education. In Moore, M.C. & Diehl, W.C. \(Eds.\), Handbook of Distance Education, 4th edition, \(pp. 351-365\). Routledge.](#)
- ☑ [Office of the Inspector General. \(2017\). Final audit report: Western Governors University was not eligible to participate in Title IV programs. \[Audit report\]. U.S. Department of Education.](#)
- ☑ [OLC, UPCEA, & WCET. 2019. Regular and Substantive Interactions: Background, Concerns, and Guiding Principles.](#)
- ☑ [U.S. Department of Education. 2011. Implementation of Program Integrity Rules.](#)

# Determining Last Date of Attendance for Students Who Withdraw Without Notice

The Department of Education has NOT waived any regulations related to the determination of the last date of attendance for students who withdraw without notice from courses, regardless of the modality used in offering the course.

## Introduction



There are many factors which may compel a student not to complete a course in which they are enrolled. While institutions have policies requiring students to notify the institution of their intention to withdraw, due to emergencies, illness, or other reason when the notification does not occur. Sometimes students simply *drop out* without notice and that triggers requirements for the financial aid office to determine when the student stopped attending.

Institutions disburse aid to students under the assumption that the student will complete the academic term. For students that withdraw before the end of the term, the financial aid office conducts a Return to Title IV (R2T4) calculation to ascertain the balance between how much aid the student *earned* for that term and how much was disbursed. For in-person courses, mere proof that a student attended a class is sufficient, while there is a higher bar for distance education courses. If an institution moves to remote or online learning for a term, they are subject to the higher bar of proof. The result could have a large impact on the amount of funds that the institution is expected to return or that students might receive.

If a student withdraws from a distance education course, the institution must determine the last date the student conducted an *academically related* activity – simply logging into an online class is not sufficient.

## Policies & Regulations



A list of requirements and procedures for an institution to perform the Return to Title IV calculations can be found in:

- **34 CFR 668.22(b)** – Withdrawal date for a student who withdraws from an institution that is required to take attendance.
- **34 CFR 668.22(c)** – Withdrawal date for a student who withdraws from an institution that is not required to take attendance. Most institutions fit into this category as attendance taking is not mandatory, but is an optional practice for faculty.

The purpose for the Return to Title IV calculation is succinctly explained on the *Federal Application for Federal Student Aid (FAFSA)* website:

*If the amount disbursed to the student is greater than the amount the student earned, unearned funds have to be returned to the Title IV programs. If the amount the student was disbursed is less than the amount the student earned, the school must make available to the otherwise eligible recipient the amount of Title IV funds that could have been disbursed as a post-withdrawal disbursement.*

A much more readable version of the regulations with detailed explanation of the requirements for financial aid administrators can be found in the *Federal Student Aid Handbook: 2019-20* in Volume 5 –Withdrawals and the Return of Title IV Funds 2019–2020. Here is the actual language from *The Handbook* explaining the requirements, particular to distance education courses:

*Documenting attendance when students are enrolled in distance education courses: **In a distance education context, documenting that a student has logged into an online class is not sufficient, by itself, to demonstrate academic attendance by the student.** A school must demonstrate that a student participated in class or was otherwise engaged in an academically related activity. Examples of acceptable evidence of academic attendance and attendance at an academically related activity in a distance education program include:*

- student submission of an academic assignment,
- student submission of an exam,
- documented student participation in an interactive tutorial or computer-assisted instruction,
- a posting by the student showing the student's participation in an online study group that is assigned by the institution,

*Continued on next page*

- a posting by the student in a discussion forum showing the student's participation in an online discussion about academic matters, and
- an email from the student or other documentation showing that the student-initiated contact with a faculty member to ask a question about the academic subject studied in the course.

Note the language from *The Handbook* again: **In a distance education context, documenting that a student has logged into an online class is not sufficient, by itself, to demonstrate academic attendance by the student.** The bold emphasis in this language is from the original text and highlights that logging into an online class is not sufficient to constitute academic attendance. *The Handbook* goes on to say that institutions must maintain documentation of the last date: "The determination of a student's withdrawal date is the responsibility of the school. A student's certification of attendance that is not supported by institutional documentation is not acceptable" (p. 5-66)." As a result, financial aid administrators might contact the faculty for a student who withdraws without notice. Those administrators might seek copies of exams, assignments, or other evidence of the student's last *academically related activity*.

### Institutional Impact



If an accurate determination of last date of attendance cannot be made, the institution might have to return a considerable amount of aid that was disbursed.

The determination of the last date of attendance is the beginning of a string of actions that could result in (but not limited to):

- The institution seeking a return of some of a student's financial aid disbursement because that student was disbursed more aid than was earned.
- The institution providing an additional award to the student because that student earned more aid than was disbursed.
- No action taken because the amount of aid disbursed was for what the student earned.

If the student cannot be found or if the student is unable to repay the aid, the institution is responsible for returning the amount of aid not earned to the Department. This process is also a key part of fraud protection and ensures there are not fake "students" who are waiting for the aid to be disbursed and then dropping out immediately. Since attendance or logging into an online class is not sufficient evidence, distance education administrators have often felt that the impact of determining the last date of attendance on distance education courses is greater than for similar courses held face-to-face.

*Continued on next page*

Finally, the Department expects institutions to have robust processes for addressing the complex requirements for Return to Title IV determinations and calculations. During a financial aid program review process by the Department, auditors may ask for evidence of the last day of attendance for a sample of students.

### Suggested Actions



The following actions are recommended in order to ensure that programs track a student's last date of attendance:

**Understand which courses fall under the *distance education* definition. The current Department definition (34 CRF 600.2).**

See the previous section on the definition of *distance education* and note that the Department is scheduled to release a revised definition in the near future. Therefore, courses that are partially online (e.g., blended, hybrid, hyflex) do not meet this definition. If, as the result of the pandemic, a face-to-face course moves to an emergency *remote learning* modality during the middle of the term, it also does not qualify as a distance education course.

**Institutions should alert faculty teaching distance education courses that the financial aid office may later request evidence of academically related activity for a student.**

It will also help to inform faculty of the reasons (and possible negative impacts on students and the institutions) if this evidence is not available. It will be important for faculty not to discard this the academic activities of students through the term and into the next term, as it may need to be retrieved for financial aid purposes.

**The Department recommends that institutions document any actions taken in response to COVID-19 including any changes related to financial aid and the last date of attendance.**

Financial aid administrators may seek to become closer allies of distance education faculty for the purposes of locating and providing the evidence of the last date of attendance. All will need to understand that simply logging into an online class is not sufficient evidence of an academically related activity. Since this evidence is being provided for financial aid purposes to financial aid administrators and would not be released to the public, sharing the student's work is allowable under Family Education Rights and Privacy Act (FERPA) restrictions.

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**Resources & References**



- [☑ Institutional eligibility under the Higher Education Act of 1965 as amended: Definitions, 34 C.F.R. § 600.2 \(2019\).](#)
- [☑ Treatment of Title IV funds when a student withdraws, 34 C.F.R. § 668.22 \(2010\).](#)
- [☑ Federal Student Aid. Federal student aid handbook with active index: 2019-20. U.S. Department of Education.](#)
- [☑ U.S. Department of Education. \(n.d.\). Family Education Rights and Privacy Act \(FERPA\).](#)

# Financial Aid & Satisfactory Academic Progress

The Department of Education issued initial guidance on satisfactory academic progress on March 5, 2020 and updated that guidance on August 21, 2020. Satisfactory Academic Progress (SAP) waivers and guidance are now extended through December 31, 2020, or the end of the payment period that includes the termination of the federally declared pandemic-related national emergency.

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## Introduction



In addition to paying attention to the differences between correspondence and distance education, regular and substantive interactions, and tracking last date of attendance for Title IV financial aid eligibility, institutions should also be aware of the impact that pandemic-related decisions could have on satisfactory academic progress (SAP) and student eligibility for continued Title IV federal assistance.

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## Policies & Regulations



34 CFR 668.34 outlines requirements for determining satisfactory academic progress for Title IV financial aid, including regulations related to student appeals.

### **These regulations require that institutional SAP policies:**

- Define satisfactory academic progress in a way that is consistent for all students, regardless of whether the student receives federal financial aid,
  - Cover all students regardless of level or attendance status,
  - Evaluate student progress at the end of each payment period for programs less than one year or annually for longer programs,
  - Specify the minimum GPA students must maintain (including at least a C for programs longer than two years),
  - Establish the pace for program completion at a minimum of 150% of completion time, and
  - Include a clear process that students can use to appeal institutional SAP findings.
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Generally, an SAP appeal is made based on events that are beyond a student's control, constitute an undue hardship, and can be directly connected to the student's poor academic performance. Such circumstances may include the death of an immediate family member, a major medical condition experienced by the student or an immediate family member, involuntary call to active military duty, or some other emotional or physical hardship. The Department of Education (the Department) gives institutions wide latitude over the SAP appeal process.

On March 5, 2020, the Department issued guidance that SAP appeals must include a specific basis but that institutions could consider "circumstances related to an outbreak of COVID-19." Such circumstances might include:

- Student or family member illness related to COVID-19,
- Compliance with quarantine, or
- "General disruption resulting from such an outbreak."

**The Coronavirus Aid, Relief, and Economic Security (CARES) Act passed at the end of March 2020, provided institutions with the authority to exclude credits impacted by COVID-19 in the attempted hours calculation of SAP.** Section 3509 of the CARES Act states that institutions must continue to have "reasonably determined that the student's failure to complete those credits was the result of a COVID-19 related circumstance" (CARES Act, 2020). The Act goes on to define such circumstances as including:

- Illness of the student or a family member,
- Acting as a caregiver for someone with the novel coronavirus,
- Serving as a first responder,
- Economic hardship,
- Added work hours,
- Loss of childcare,
- Inability to continue studies because of a shift to distance education, or
- Inability to access wi-fi.

Additionally, the Department provided institutions with flexibility in determining how pass/fail courses would be calculated into SAP decisions. On May 14, 2020, the Department granted institutions permission to temporarily modify existing policies or adopt new policies on how to treat pass/fail courses in the calculation of SAP. And on August 21, 2020, all SAP waivers and guidance were extended through December 31, 2020, or the end of the payment period that includes the termination of the federal pandemic-related national disaster.

### Institutional Impact



SAP policies are essential to student maintenance of federal financial aid.

Although the Department grants each institution considerable latitude in determining the basis of a student SAP appeal, institutions are required to develop and follow clear criteria. Failure to do so could jeopardize an institution's eligibility for Title IV financial aid.

### Suggested Actions



The following actions are recommended in order to ensure institutional compliance with Satisfactory Academic Progress requirements:

**Review your institution's published SAP policies to determine if modifications are needed, including making COVID-19 an explicit ground for appeal.**

**Make sure that students are informed of any pandemic-related changes to the school's SAP policy.**

**If you have not already done so, you may change the basis of your SAP calculation to take into account pass/fail courses as well as eliminating pandemic impacted courses from the attempted hours used to calculate SAP.**

**The Department recommends that institutions document any actions taken in response to COVID-19 including changes in modality and SAP processes.**

### Resources & References



- [☑ Satisfactory academic progress, 34 C.F.R. §668.34 \(2010\).](#)
- [☑ Federal Student Aid. \(2018, May 15\). Guidance for interruptions of study related to Coronavirus \(COVID-19\). U.S. Department of Education.](#)
- [☑ Federal Student Aid. \(2020, June 16\). Guidance for interruptions of study related to Coronavirus \(COVID-19\). U.S. Department of Education.](#)
- [☑ GovTrack.us \(2020\). S. 3548 – 116th Congress: Coronavirus Aid, Relief, and Economic Security \(CARES\) Act.](#)

# GI Bill Benefits for Student Veterans

Congress enacted two pieces of legislation allowing the Department of Veterans Affairs to continue paying the housing allowance and work study payments for veterans affected by COVID-19.

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## Introduction



The GI Bill provides benefits for students who are veterans or who have family members who are veterans and are enrolled in a postsecondary degree or certificate program. Both students and institutions must meet certain criteria to remain eligible for these benefits.

Because of restrictions placed on the use of GI Bill benefits for distance education, the COVID-19 pandemic impacted all higher education students but had a heavier impact on students using GI Bill benefits. Prior to the enactment of emergency legislation by Congress, the GI Bill directed that veterans who take all of their courses in a term at a distance receive only half of the Basic Allowance for Housing (BAH) that veterans who enroll completely on-campus or in a mix of face-to-face and online courses receive. Due to COVID-19, Congress enacted two pieces of emergency federal legislation to support veterans including providing full Basic Allowance for Housing benefits for veterans studying at a distance. The second piece of legislation ensures the continuing payment for work study jobs affected by the pandemic.

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## Policies & Regulations



### **Public Law No: 116-128**

*Enacted March 21, 2020*

#### **S.3503**

A bill to authorize the Secretary of Veterans Affairs to treat certain programs of education converted to distance learning by reason of emergencies and health-related situations in the same manner as programs of education pursued at educational institutions, and for other purposes.

The new law authorizes the Department of Veterans Affairs to continue educational assistance through December 21, 2020, for programs that have been converted to online due to an emergency or health-related situation.

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**Public Law No: 116-140***Enacted April 28, 2020***H.R.6322**

Student Veteran Coronavirus Response Act of 2020.

Additional emergency legislation was enacted to provide further relief for student veterans. Supplementary protections were included to preserve work study allowances, vocational rehabilitation, employment programs, and GI Bill eligibility through December 21, 2020, if the institution is forced to close. The emergency legislation will continue housing and other benefits payments during all emergencies, not just COVID-19.

**Importance of Legislation**

New emergency legislation ensures that GI Bill benefits remain protected through December 21, 2020.

Congress has indicated that supporting student veterans is a high priority in order to ensure that these students don't fall behind.

**Resources & References**

- ☑ [A Bill to Authorize the Secretary of Veterans Affairs to Treat Certain Programs of Education Converted to Distance Learning by Reason of Emergencies and Health-Related Situations in the Same Manner as Programs of Education Pursued at Educational Institutions, and For Other Purposes, Pub. L. No. 116-128, 134 Stat. 221 \(2020\).](#)
- ☑ [Student Veteran Coronavirus Response Act of 2020, Pub. L. No. 116-140, 134 Stat. 631 \(2020\).](#)
- ☑ [Defense Travel Management Office \(n.d.\) Basic allowance for housing \(BAH\).](#)
- ☑ [U.S. Department of Veterans Affairs. \(2020\). COVID-19 Information Affecting Education Benefits.](#)
- ☑ [U.S. Department of Veterans Affairs. \(2020\). Veterans Administration webinars.](#)

# Consortia Agreements

The Department of Education issued an initial waiver and permission to enter into temporary consortium agreements on March 5, 2020, and updated that guidance on August 21, 2020. The Department has also given accreditors permission to waive residency requirements associated with graduation. These waivers are now extended through December 31, 2020, or the end of the payment period that includes the termination of the federally declared pandemic-related national emergency.

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## Introduction



Consortium agreements allow a student to receive financial aid from their degree-granting institution while also taking courses at another institution. These types of agreements predate COVID-19. On March 5, 2020, the United States Department of Education (the Department) reminded institutions of this option and clarified that such consortia agreements may be temporary and used during the COVID-19 pandemic.

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## Policies & Regulations



Title IV regulations have long permitted institutions to deploy consortium agreements, which let a student receive financial aid from their degree seeking-institution while also taking courses at another institution. Both institutions must be signatories to a specific agreement for this purpose. In response to COVID-19, the Department explained that institutions may “enter into temporary consortium agreements with other institutions so that students can complete courses at other institution but be awarded credit by their home institution.”

In addition to providing institutions with approval to join temporary consortium arrangements, the Department also addressed requirements for students to complete a final amount of credits in residence at their institution. Although the Department does not have its own regulations about these partnerships, many accreditors do. The Department granted accreditors the ability to waive residency requirements that limit a student to taking a last set of credit hours only from the institution from which the student would graduate. This flexibility allows for potentially increased use of consortia agreements as a partial solution for helping students whose course of study has been interrupted due to the pandemic.

The Department's flexibility extends through December 31, 2020, or the end of the payment period that includes the termination of the federally declared pandemic-related national emergency.

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## Institutional Impact



Institutions can use temporary consortia arrangements to ensure that their students have access to a wide variety of courses so they can continue their academic progress regardless of where students are physically located.

Consortia agreements could also prove to be a longer-term method of expanding student choice as the institution navigates the on-going impact of the pandemic.

## Suggested Actions



The following actions are recommended in order to ensure that programs effectively use consortia agreements.

**Institutions should evaluate any current or former consortia agreements to determine if they can be leveraged to assist with continuity of instruction.**

The financial aid or registrar's office should have a record of previous consortia agreements. There may be partnerships that have worked well in the past, and if these partnerships can be set up again, advisors could encourage current students to follow that path.

**Institutions should seek partner institutions by thinking creatively about what courses students need.**

Are there particular programs at your institution that could especially benefit from a partner? Are there particular programs at your institution that could especially benefit students at a partner institution?

**Students should know that consortia arrangements could be an option for them.**

Review policies and determine if your institution has a mechanism for students to find partner institutions. If not, consider policies that will allow students to find partner institutions to work with.

**Determine if your institution already participates in a subject specific consortia.**

A number of subject specific consortia, such as NEXus for graduate nursing students, already exist, and institutions may be able to join one of these consortia for specialized programs.

**The Department recommends that institutions document any actions taken in response to COVID-19.**

## Resources & References



- [Written arrangements to provide educational programs, 34 C.F.R. § 668.5 \(2010\).](#)
- [Christopher Newport University. \(n.d.\). Sample consortium agreement form.](#)
- [Nursing Education Xchange \(n.d.\). What is NEXus.](#)
- [U.S. Department of Education. \(2020 March 5\). Guidance for interruption of study related to COVID-19.](#)

# State Authorization & Licensure

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## Chapter contents

- **State Authorization of Distance Education**
- **Professional Licensure**

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The third component of the regulatory triad that impacts institutions offering distance education are state agencies. In addition to accreditation and financial aid regulations, institutions may also be impacted by state authorization and professional licensure requirements as they offer more distance education, especially to students residing in other states.

**Information in this section is current as of August 25, 2020.**

# State Authorization of Distance Education

The Department of Education issued an initial waiver on March 5, 2020. The waiver by the Department indicated that it would accept the state authorization of the institution for the programs for which the students were enrolled prior to the interruption due to COVID-19.

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## Introduction



If an institution offers activities to any students located in another state, then the institution must obtain authorization according to the regulations of that state. States vary in how they regulate online learning occurring within their borders. Activities that may require state authorization include online courses, field and practical experiences, and recruiting.

This responsibility applies even for courses that started the academic term as face-to-face and then converted to remote instruction in response to COVID-19. The Department of Education guidance from March 5, 2020, provides flexibility regarding state compliance for purposes of Title IV. **However, that guidance does not absolve the institution from compliance with any state requirements applicable to the activities the institution is conducting.**

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## Policies & Regulations



### Institutional Compliance During the Covid-19 Pandemic

Because states maintain oversight authority for education within their borders, an institution offering distance or remote instruction may be responsible for gaining state institutional approval in those states where their students are located. In other words, approval by the Department of Education and an institutional accreditor does not always mean that an institution has gained all of the necessary approvals. Institutions may be approved to offer activities in states through individual state compliance or participation in reciprocity through SARA (State Authorization Reciprocity Agreements) for distance education activities. Institutions that do not participate in SARA may need to seek state institutional approval for their face-to-face students who returned to a different state when campuses closed.

More than 2,000 institutions relied upon their participation in reciprocity through SARA to provide state institutional approval for distance education in the states where their students were located due to the quick conversion to remote instruction. As students continue to be dispersed across the United States, reciprocity through SARA provides state institutional approval in 49 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands for out-of-state distance education activities of participating institutions.

Institutions that do not participate in reciprocity, either through choice or because the institution is located in California or the Pacific Territories (neither of which have joined SARA), must follow the specific state institutional approval requirements, if any, in each state where their students are located. Some states are offering an emergency institutional approval process for institutions from other states that are offering online courses to students located in their state due to the pandemic, while others are not. As a result, institutions may find no approval requirements to offer online courses to students located in some states while in other states, the institution may need to submit for state institutional approval.

Institutions that wish to offer online courses to students while they are located outside of the U.S. also may need to research requirements in each country as oversight varies in each country. If institutions offer distance education to students not located in the U.S., administrators should consult legal counsel to determine international requirements.

### Institutional Impact



Even if your institution never participated in distance learning until COVID-19 forced the mid-semester conversion, state authorization requirements apply for any state in which your students are located while completing online courses or field placements/practical experiences.

Consequences for noncompliance vary per state but could include fines, accreditation problems, lawsuits, and cease and desist letters. While the Department has provided some flexibility through at least the end of 2020, federal regulations do require institutions to document their approval to serve students in other states in order for the institution to participate in Title IV financial aid programs. As institutions plan modalities and formats for the coming years, state authorization compliance is an important consideration.

## Suggested Actions



The following actions are recommended to ensure institutional compliance with state authorization requirements:

### **Institutions should track the location of their students, both for online courses and field placements.**

Tracking allows institutions to prioritize which activities and states should be addressed first.

### **Institutional staff should review and comply with any state authorization requirements by checking state higher education resources for compliance requirements in the states where their students are located.**

Institutions in states that are members of SARA should consider obtaining state institutional approval through participation in reciprocity.

### **The Department recommends that institutions document any actions taken in response to COVID-19.**

## Resources & References



- ☑ [Institutional eligibility under the higher education act of 1965 as amended: Definitions, 34 C.F.R. § 600.2 \(2019\).](#)
- ☑ [Institutional eligibility under the higher education act of 1965, as amended: State Authorization 34 CFR § 600.9\(c\). \(2016\).](#)
- ☑ [Dowd, C., Silverman, D. \(2019, April 11\). Final regulations for state authorization released. WCET Frontiers.](#)
- ☑ [Federal Student Aid. \(2020, June 16\). Guidance for interruptions of study related to Coronavirus \(COVID-19\). Office of Postsecondary Education, US Department of Education.](#)
- ☑ [Gold, S., Ferreira, W., Ferenbach, G. \(2020, March 25\). Doing your homework when offering online programs internationally. Hogan Lovells.](#)
- ☑ [NC-SARA. \(n.d.\) National council for state authorization reciprocity agreements \(NC-SARA\).](#)
- ☑ [National Council for State Authorization Reciprocity Agreements. \(2020\). The state authorization guide.](#)
- ☑ [WCET State Authorization Network \(SAN\). \(n.d.\) WCET SAN website.](#)

# Professional Licensure

COVID-19 may have affected state educational requirements in some states and professions. However, the Department of Education has not offered any waiver or flexibility about providing professional licensure notifications.

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## Introduction



Institutions must provide notifications for prospective and enrolled students regarding on-ground and distance education programs leading to professional licensure or certification to indicate whether or not the curriculum meets state requirements or indicate that no determination is made. The institution must decide how it will approach the task to provide notifications and a process to complete state research to review state educational requirements.

Institutions that offer academic programs leading to professional licensure or certification must adhere to state and federal laws and regulations regarding these programs. State laws, regulations, or requirements may require an institution to obtain program approval to offer instruction and activities leading to licensure or certification in that state. New federal regulations, effective July 1, 2020, require institutions participating in Title IV programs to provide general and direct notifications regarding educational requirements to prospective and enrolled students in programs leading to professional licensure.

These notifications are required for all programs leading to professional licensure or certifications regardless of the modality of instruction. Institutions that participate in reciprocity for state institutional compliance through State Authorization Reciprocity Agreements (SARA) must provide general and direct notifications to prospective and enrolled students in courses and programs subject to SARA policy.

For the first time, the Department is requiring the students in on-campus programs leading to professional licensure also be notified whether the program meets the educational requirements in the state where the student was located prior to the financial commitment between the prospective student and the institution.

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## Policies & Regulations



### State Regulations and Requirements

Institutions must complete state research to determine if programs leading to licensure or certification require program approval by the state licensing boards in the states where their students are located. State program approval is in addition to institutional approval that may be required when students are located in a state in which the institution is not physically located. There is generally no uniform regulatory standard for professions and state licensing boards. Some of the issues that institutions should be aware of include:

- State licensing boards may be required by state laws and regulations to provide oversight of the programs leading to licensure and certification in their state.
- Program approval may be required for the student to obtain a license in the state.
- State licensing boards and professions vary per state, requiring institutions to complete research for each profession in each state.
- It is also possible that COVID-19 may have affected state licensing board oversight requirements for some professions, requiring institutions to review all states regardless of any previous findings.

### Federal Regulations

New federal Regulations for professional licensure notifications can be found in **34 CFR 668.43(a)(5)(v)** and **34 CFR 668.43(c)**. Institutions are required to provide general and direct notifications to prospective and enrolled students whether the institution's curriculum meets state educational requirements in each state for programs leading to professional licensure or certification regardless of modality of instruction.

- **34 CFR 668.43 Institutional Information** – Regulation that designates a set of notifications to be available to prospective and enrolled students regardless of modality of instruction.
- **34 CFR 668.43(a)(5)(v)** – Subsection of the regulation that specifies that a public notification must be provided by the institution when an educational program is designed to meet educational requirements for a license required for employment in an occupation or advertised as meeting the requirements for that occupation, including:
  - A list of states where the curriculum meets state educational requirements,
  - A list of states where the curriculum does not meet state educational requirements, or
  - A list of states for which the institution has made no determination.

- **34 CFR 668.43(c)** – Subsection of the regulation that specifies that an individualized notification must be provided to prospective and enrolled students.
  - **Prospective students** should be notified if the curriculum does not meet educational requirements or the institution has made no determination in the state where the prospective student is located prior to enrollment in the program. In the guidance provided by the Department, prior to enrollment in the program is intended to be prior to a financial commitment to the institution.
  - **Enrolled students** should be notified if the curriculum does not meet educational requirements in the state where the student is located within 14 calendar days of the institution making this determination.

COVID-19 may have affected state educational requirements in some states and professions. However, the Department of Education has not offered any waiver or flexibility about providing the professional licensure notifications. Institutions must decide whether to complete the state research to review state educational requirements to determine if the curriculum meets state requirements or indicate that no determination has been made.

## SARA Manual Section 5.2

Institutions that participate in reciprocity for state institutional approval through SARA must adhere to notification requirements for professional licensure notifications as directed by the SARA Manual. In June 2020, the NC-SARA Board agreed to align Section 5.2 of the SARA Manual with the federal regulations but maintained a former SARA requirement. In addition to meeting the federal regulations, for purposes of SARA, if no determination can be made about state educational requirements after all reasonable efforts, the direct written disclosure to the student must include the contact information for the state licensing board in the state where the student is located.

### Institutional Impact



Institutions must stay informed of state educational requirements for professional licensure and certification in states other than where the institution is physically located.

Institutions have increased their distance education offerings to include students in other states who wish to obtain a license or certificate where they are located. State licensing boards requirements vary and must be reviewed to ensure that the institution is obtaining any required program approvals.

*Continued on next page*

It is critical that institutions are transparent about whether the curriculum meets state educational requirements where the student is located so students can make informed decisions about their education to become a licensed professional. The new federal regulations require notifications for students who participate in face-to-face and distance education programs that lead to professional licensure or certification.

Beyond following state and federal regulations, students with claims that they are not properly informed as to whether an institution's program prepared them for the licensing requirements in their state may take legal action. If found out of compliance, the institution could be subject to a sizable legal payment. The addition of the federal notification requirements may help those seeking legal recourse if the institution has not done its research and provided the proper information.

### Suggested Actions



The following actions are recommended to ensure program approval from state licensing boards and to provide notifications for programs leading to professional licensure or certification.

**Institutions should identify the programs that lead to professional licensure or certification as well as the current location of students in those programs.**

**Institutions should review state licensing board requirements where students are located and seek program approval, if required by the state licensing board.**

This may involve documenting any changes to curriculum including meeting didactic learning objectives and experiential learning.

**Key institutional stakeholders should develop a process for how they will determine the educational requirements leading to professional licensure or certification in each state and territory.**

**Institutions must provide compliant general and direct notifications for programs leading to professional licensure.**

**Institutions should carefully document any changes made as a result of the national pandemic.**

### Resources & References



- ☑ [Federal regulations for professional licensure notifications: Effective July 1, 2020 34 CFR § 668.43\(a\)\(5\)\(v\) and 34 CFR 668.43\(c\).](#)
- ☑ [NC-SARA. \(2020\). NC-SARA board vote.](#)

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# Course Level Regulations

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## Chapter contents

- **Student Identity Verification**
- **Fair Use in Using Digitized Materials or Videos**

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In addition to the regulations that impact institutions and programs, there are also regulations for which the impact is felt mostly at the course level, especially in an online, blended, or hyflex course environments.

Two such policies that institutions should be particularly aware of are the regulations associated with student identity verification and intellectual property and the use of copyrighted materials in online classes.

**Information in this section is current as of August 25, 2020.**

# Student Identity Verification

On March 5, 2020, the Department of Education issued guidance to both institutions and accreditors in response to the pandemic and in the interest of maintaining academic continuity.

As part of that guidance, the Department provided accreditors with the option of waiving certain accreditation criteria during the state of national emergency including accreditor review requirements for student identify verification and student notification of charges associated with proctored exams. These waivers are now extended through December 31, 2020, or the end of the payment period that includes the termination of the federally declared pandemic-related national emergency.

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## Introduction



Instructors everywhere want to curtail cheating on exams, plagiarism, submission of purchased essays written by others, and all forms of academic dishonesty by students. While such activities occur in all modalities of course offerings, only for distance education is there a requirement regarding *student identity verification*. This regulation is among the standards that institutional accrediting agencies must apply to the institutions that they oversee. Essentially, the accrediting agency must require that institutions have processes to ensure that the student who registers for a course is the same one who *academically engages* in the course.

As faculty move into online courses, they should be aware that accreditors will be placing an additional focus on this issue. Accreditors will likely seek documentation of what actions faculty take to ensure that student identity was verified, what other steps were taken to preserve academic integrity, and what evidence the institution has compiled to show that these actions have worked.

Faculty and staff should review their accrediting agency's definition of distance education as it may differ slightly from the Department's definition. For example, some accrediting agencies define a distance education course as being fully at a distance with a few exceptions for orientations or proctoring. Other agencies define a distance education course when more than half the course is at a distance. This variability in definitions will have a big impact on which courses at an institution are subject to this regulation.

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## Policies & Regulations



Student identity verification is designed to address academic integrity in course participation and assessments, but the federal government's concern is in preventing financial aid fraud. Most regulations related to federal financial aid, such as those governing the last date of attendance, are administered by the Department. In contrast, student identity verification regulations are included in the criteria the Department uses for approving and overseeing accrediting agencies, who, in turn, are expected to enforce the regulation.

As of July 1, 2020, the regulation reads:

*34 CFR 602.17(g) and (h) Application of standards in reaching an accrediting decision.*

*(g) Requires institutions to have processes in place through which the institution establishes that a student who registers in any course offered via distance education or correspondence is the same student who academically engages in the course or program; and*

*(h) Makes clear in writing that institutions must use processes that protect student privacy and notify students of any projected additional student charges associated with the verification of student identity at the time of registration or enrollment.*

### Accrediting Agency Variations

Every accrediting agency should have a version of the above language in their handbook or criteria for institutional approval. There may be slight, but important, variations in how an accrediting agency implements this requirement. In many cases the regulatory definition is interpreted to mean *courses that are fully online*, except for online orientation or proctoring.

Some accrediting agencies have stricter requirements. For example, the Southern Association of Schools and Colleges Commission on Colleges (SACSCOC) in its "Guidelines for Addressing Distance and Correspondence Education" makes the following addition: "Note: This applies to courses in which the majority of instruction occurs when students and instructor are not in the same place." Therefore, a blended course in which more than half the instructional time is at a distance would be subject to student identity verification requirements under SACSCOC standards. This is an important distinction to understand as institutions move into many permutations of students meeting online vs. face-to-face as institutions search for ways to protect students and faculty from the effects of the COVID-19 virus while still maintaining continuity of instruction.

### Waivers from the Department

On March 5, 2020, the Department of Education issued guidance to both institutions and accreditors in response to the pandemic and in the interest of maintaining academic continuity. As part of that guidance, the Department provided accreditors with the option of waiving certain accreditation criteria during the

national state of emergency including accreditor review requirements for student identify verification and student notification of charges associated with proctored exams. On June 16, the Department extended some distance education waivers to December 31, 2020, although the wording is unclear as to whether some or all waivers were extended. Institutional leaders should remember, however, that the Department gave accreditors the option to waive these regulations, but the accrediting body is not required to implement the waiver.

### **Recent Changes to this Regulation**

As part of a regulatory change (separate from the aforementioned waiver), the U.S. Department of Education (the Department) made a minor, but important change, to this language as of July 1, 2020. The previous language included examples of ways to demonstrate compliance, such as the institution providing a secure log-in or requiring students to take exams in a face-to-face setting with a proctor. However, officials were worried that some institutions provided a log-in and did nothing further regarding student identity verification. A secure log-in is a very low bar for identifying that the student participating in a course is the same one who registered. It would be quite easy for a student to give a username and password to a friend for the purpose of taking an exam.

The intent behind the updated language is an increased expectation that the accrediting agency work with the institution to identify processes for student identity verification. As a result, the institution may be asked by the accrediting agency to provide evidence that the implemented process works. Since this is a new requirement, it is unclear as to what type of evidence the accrediting agencies will be seeking. A helpful resource is the International Center for Academic Integrity ([academicintegrity.org](http://academicintegrity.org)).

The removal of the log-in and proctoring language led to some proctoring software vendors claiming that the regulation requires institutions to buy their products. WCET asked a question about this claim during the comment period for this regulation, and the Department was clear that no such requirement exists. Institutions should be aware that with the recent regulatory change, institutional accrediting agencies might release new guidance on their expectations regarding student identity verification in the coming year.

### **The Notification Requirement in Section (h)**

Many institutions use proctoring software or sites as a part of their student identity verification process. Institutions are required to disclose any such costs to students at the time of enrollment. This allows students to calculate the full price of taking the course. Although some institutions have waited to notify the student in the syllabus or when the first exam occurs, that is too late. This will involve deep conversations with the registrar's office as to how to incorporate this notice into the institution's registration process.

### Institutional Impact



The assurance of academic integrity does not have to be perfect, but the institution needs to demonstrate that it has appropriate and updated policies, mechanisms in place (software, proctoring sites), and has provided faculty development for addressing the issue.

The main impact for not being able to provide student identity verification processes is in the institutional accrediting review process. An institution may have a finding if it has an inadequate process and/or does not have evidence supporting that their verification process works. The lack of notification of additional student charges for proctoring or other means of assuring student identity may result in the institution shouldering the full economic burden of proctoring costs.

### Suggested Actions



The following actions are recommended in order to ensure institutional compliance with student identity verification requirements:

#### **Research expectations from the institution's accreditor.**

As requirements for student identity verification vary among accrediting agencies, the first step administrators should take is to identify the expectations of the institutional accreditor and then identify the courses that are affected.

#### **Set clear policies for students and staff that outline the expectations that the student registered for the course is the one who academically engages in the course.**

There also should be reporting guidelines, consequences, and appeal processes. All of these should be disclosed to students in understandable language.

#### **Review and purchase useful tools and programs that can be used in courses to help with student identity verification.**

This could include in-person proctoring, proctoring software, and test banks.

#### **Provide development opportunities and support for instructors.**

Administrators should work with faculty and instructional designers so they understand the importance of assessment practices. Inform them of alternatives to the traditional high-stakes exam that some have found provide more student engagement and make cheating more difficult.

#### **Document any changes made to institutional policies.**

In anticipation of reporting to your institutional accrediting agency, document your processes and monitor the impact on student cheating.

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**Resources & References**

- ☑ [Application of standards in reaching an accrediting decision, 34 C.F.R. § 602.17 \(g\) and \(h\).](#)
  - ☑ [Federal Student Aid. \(2020, June 16\). Guidance for interruptions of study related to Coronavirus \(COVID-19\). Office of Postsecondary Education, US Department of Education.](#)
  - ☑ [Fields, L. \(2018, October 17\). UNLV pays a cost for not notifying students. WCET Frontiers.](#)
  - ☑ [Southern Association of Schools and Colleges Commission on Colleges. \(2011\). Guidelines for addressing distance and correspondence education.](#)
  - ☑ [U.S. Department of Education. \(2019, November 11\). Student assistance general provisions, the secretary's recognition of accrediting agencies, the secretary's recognition procedures for state agencies.](#)
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# Fair Use in Using Digitized Materials or Videos

The Department of Education has NOT waived any regulations related to copyright or fair use provisions in courses that have transitioned to remote instruction due to COVID-19.

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## Introduction



In a traditional face-to-face course, faculty are accustomed to using many kinds of copyrighted materials. Obtaining the rights for faculty and students to use a work in a course may happen in several ways. Traditionally, students purchase a required textbook or licensed software. Alternatively, faculty may rely on the concept of *fair use*, which is a legal doctrine that permits the use of copyrighted works, but only under certain conditions.

**When a course moves from face-to-face to a remote, hybrid, blended, or hyflex format, the calculus may change for whether the work is still covered by *fair use* or not.** While the factors for determining fair use remain the same, the act of digitizing materials and the opportunity for increased access and distribution of the work change the calculation. Unfortunately, there is no clear boundary that delineates which activities are considered fair use and which are not. This section provides an outline of the factors, but consultation with expert resources, librarians, or institutional attorneys may be needed in certain cases.

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## Policies & Regulations



Faculty may be surprised to learn that the *fair use* of copyright materials for educational purposes is not an absolute right but is actually a defense against legal action taken by the copyright holder. Unfortunately, this makes application of *fair use* more complicated than other rules outlined in this document.

According to the Copyright Law (17 U.S.C. § 102), copyright applies to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” The author of the work is granted ownership of that work for a set time and can control whether copies or certain derivations may be developed.

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There are limitations (or exceptions) to ownership that allow for use of a copyrighted work without the author's permission, as long as particular conditions are met. First among those limitations is fair use (17 U.S.C. § 107) which allows use of the work for purposes "such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research..."

Note that there is not an absolute right to use the work for those purposes, but it is a defense given certain factors outlined below. Since the boundaries are not clearly delineated, each work to be used should be evaluated against the factors below. If the factors signal that the work and the specific purpose for using the work are favorable for fair use, then the institution has a reasonable defense if it is sued by the author.

### The Four Factors in Determining a Fair Use

1. **The purpose and character of the use.**
2. **The nature of the copyrighted work.**
3. **The amount and sustainability of the portion used in relation to the copyrighted work as a whole.**
4. **The effect of the use upon the potential market for or value of the copyrighted work.**

Fair use (17 U.S.C. § 107) is determined on a case-by-case basis. Merely wanting to use a work for teaching purposes is a first positive step toward arguing for fair use, but the Copyright Law includes additional factors that all need to be considered.

In considering the following factors, a preponderance (not necessarily all) of the factors should point to fair use. However, if any one factor is particularly harmful to the author (e.g., the market for the work is damaged), that one factor may be sufficient to negate any fair use claim. Following each factor is a brief note on the impact of moving all or part of a course to a digital format on the determination for that factor.

#### 1. **The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes**

Examples of uses favorable to a fair use claim:

- The work is used for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."
- The use is for a non-profit purpose.
- The work is *transformative*, not used verbatim, but changed for a new purpose.

**Note:** Digitizing the content is unlikely to be considered transformative.

## 2. The nature of the copyrighted work

Examples of uses favorable to a fair use claim:

- The work is factual (e.g., a list of U.S. Presidents) vs. creative (e.g., a painting, novel, or movie).
- The work is published. Although Section 107 clarifies: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

**Note:** The change to a digital format may have an impact on this determination as it may be easy to find copyrighted works published online, but it might not be appropriate to share or use the work without permission.

## 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole

Examples of uses favorable to a fair use claim:

- A small quantity of the work is used.
- The *heart* (or most important part) of the work is not completely used.

**Note:** The change to a digital format may have an impact on this determination, as well. In a face-to-face class, a faculty person might copy a small part of a chapter to share with the class. In a digital format, it might be tempting to share the entire work from a pirated source because it is easier to share a link to it rather than create the needed excerpt.

## 4. The effect of the use upon the potential market for or value of the copyrighted work

Examples of uses favorable to a fair use claim:

- The use does not significantly reduce the revenue the author might receive for the work.
- Access to copies is limited to those in the course.
- The work is out-of-print and there is no pathway for licensing.
- A one-time use (e.g., as opposed to repeated use each time the class is taught).

**Note:** The change to a digital format has the greatest impact on this factor and it is also the one that is most likely to lead to legal action. As an example, in moving to a digital format, some faculty have created their own websites (outside the institution’s LMS) and included works that they commonly used in a face-to-face course. If access is not limited to those registered in the course, then an argument could be made that the work is freely available and sales are lost. Likewise, if a student can easily copy a work from an LMS and share it with their friends, the potential market may be harmed.

### Institutional Impact



An institution could be at risk of lawsuits if it is found that the institution is not doing its part to curb the misuse of copyrighted materials.

Due to COVID-19, the quick and wide-spread move to remote, blended, and Hyflex teaching without the necessary faculty development or oversight could put the institution at risk if courses violate fair use provisions.

### Suggested Actions



Institutional compliance with copyright and fair use regulations requires action by both individual faculty and the institution. Demonstrating proactive action to address this compliance requirement helps in any legal defense. The following actions are recommended in order to ensure institutional compliance with copyright and fair use requirements:

**Individual faculty should learn about the four factors of *fair use* and perform an assessment on any copyrighted materials they use, especially if they are now digital.**

**The institution should employ an expert on fair use questions and assess how faculty have addressed fair use in order to determine if the institution is at risk of legal action.**

**The institution should also create, expand, and/or promote faculty development opportunities regarding fair use.**

**The Department of Education recommends that institutions document any changes made to policies or practice as a result of the coronavirus pandemic.**

### Resources & References



- ☑ [Limitations on exclusive rights: Fair use, 17 U.S.C. § 107 \(2010\).](#)
- ☑ [Subject matter of copyright: In general, 17 U.S.C § 102 \(2010\).](#)
- ☑ [U.S. Copyright Office. \(n.d.\). Federal regulations, definitions, and resources.](#)
- ☑ [U.S. Copyright Office. \(n.d.\). More Information on Fair Use.](#)
- ☑ [U.S. Copyright Office \(n.d.\). Reproduction of Copyrighted Works by Educators and Librarians.](#)

#### **Institutional Advice on Copyright and Fair Use:**

- ☑ **Cornell University:** [Fair Use.](#)
- ☑ **Cornell University:** [Fair Use Checklist.](#)
- ☑ **University of Minnesota Libraries:** [Understanding Fair Use.](#)
- ☑ **University of Minnesota Libraries:** [Thinking Through Fair Use. \(A checklist for making usage determinations\).](#)
- ☑ **University of Texas Libraries:** [Copyright Crash Course. \(n.d.\).](#)

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# Student Civil Rights

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## Chapter contents

- **Accessibility for Students with Disabilities**
- **Additional Areas of Consideration:**

**Title IX**

**Privacy**

**Clery Act**

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A number of regulations protect student civil rights. None of these regulations are unique to online education but may take on different meanings in the online classroom. As institutions develop more online and hybrid courses in response to the pandemic, or even shift to remote instruction again, administrators should be aware of their responsibilities to protect student civil rights.

**Information in this section is current as of August 25, 2020.**

# Accessibility for Students with Disabilities

The Department of Education has NOT waived any regulations related to copyright or fair use provisions in courses that have transitioned to remote instruction due to COVID-19.

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## Introduction



Since the early 1970s, higher education accessibility for students with disabilities has been the subject of U.S. statutes. Starting with the 1973 Federal Rehabilitation Act and continuing with the 1990 passage of the Americans with Disabilities Act, higher education institutions have been responsible for providing students with appropriate and reasonable accommodations. A 2014 resolution agreement between the Department of Education's Office of Civil Rights (OCR) and the University of Cincinnati defined accessible as:

*A person with a disability is afforded the opportunity to acquire the same information, engage in the same interactions, and enjoy the same services as a person without a disability in an equally effective and equally integrated manner, with substantially equivalent ease of use. The person with a disability must be able to obtain the information as fully, equally, and independently as a person without a disability. Although this might not result in identical ease of use compared to that of persons without disabilities, it still must ensure equal treatment in the use of such technology. (OCR, 2013)*

In 2019, OCR opened investigations of over 200 schools for accessibility violations including those related to technology and communication.

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## Policies & Regulations



Higher education accessibility regulations stem from three pieces of legislation—the 1973 Federal Rehabilitation Act (FRA) and its subsequent amendments, the 1990 Americans with Disabilities Act (ADA) and its subsequent amendments, and the 2010 21st Century Communications and Accessibility Act (CCAA). These three acts work in tandem to ensure that postsecondary students receive access to high quality digital education.

### Section 504 of the Federal Rehabilitation Act and Titles II and III of the American with Disabilities Act

Because there is little difference between Section 504 and Titles II and III, these pieces of legislation are often considered together and address physical and academic accessibility at public and private institutions receiving federal funds. Under these statutes institutions are expected to provide appropriate academic adjustments in a way that is not discriminatory against students with disabilities. Appropriate academic adjustments, according to a September 2011 OCR student rights document, include auxiliary aids and services and “modifications to academic requirements as necessary to ensure equal educational opportunity” including, but not limited to, priority registration, course reduction, course substitution, note takers, recording devices, sign language interpreters, extended testing time, and adaptive hardware and software such as screen readers or voice recognition.

Importantly, OCR clarifies that institutions are “not required to lower or substantially modify essential requirements” or “make adjustments that would fundamentally alter the nature of a service, program, or activity, or that would result in an undue financial or administrative burden” (OCR, 2011).

Critically, both federal regulations and case law indicate that timeliness of communications is important. In a 2019 ruling in *Payon v. Los Angeles Community College*, the court ruled in favor of Payon and specifically called the institution out for using inaccessible learning technologies, in this case Pearson’s MyMathLab, as well as having inaccessible library resources and websites. Additionally, the court emphasized the need for timely communication for students with a disability. **In practice, this means that institutions should be able to communicate and provide resources as soon as a student self-identifies as needing accommodations and not wait until a request is made to start working on accommodations.**

Finally, institutions should be aware that their accessibility responsibilities do not end with instruction or making campus facilities accessible. Institutions should also consider how they communicate with all stakeholders, whether it be updates through an emergency alert systems or employment opportunities and applications. Just as institutions are required to provide accessible instruction, they also may not discriminate on the basis of a disability in employment, and campus facilities must be made accessible. Although most institutions focus on their Title II responsibilities, colleges and universities must still address their obligations under Title I, employment nondiscrimination, and Title III, physical accommodations.

## Section 508 of the Federal Rehabilitation Act and the 21st Century Communications and Accessibility Act

In 1998, the FRA was amended to include Section 508 which focuses on ensuring that the electronic and information technology of all federal agencies, including public, private, and for-profit higher education institutions, is accessible for all Americans. This section was refreshed by the United States Access Board in 2016 to incorporate the latest version of Web Content Accessibility Guidelines (WCAG 2.0) which updated accessibility standards for online courses and materials (29 USC 794[d]). In 2010, Congress passed the 21st Century Communications and Accessibility Act which requires all video and other communication technologies be made accessible for individuals with disabilities, including students.

### Institutional Impact



The above regulations have tremendous impact on colleges and universities regardless of course modality but especially for online and hybrid courses.

Institutions must ensure that students are able to access all instructional materials to the extent that it does not pose an “undue financial or administrative burden.” For online courses this would include video captioning, screen readable content, and descriptive image tags among other things.

It might also include special accommodations related to testing and other assessments, especially if an online proctoring service is being used. Notably the regulations do not require, as OCR wrote in a 2014 resolution agreement with the University of Cincinnati, “identical ease of use compared to that of persons without disabilities, it still must ensure equal treatment in the use of such technology.” Also, of note, institutions are not required to make adjustments or provide services that would result in an “undue financial or administrative burden.”

There are, however, significant repercussions for institutions that do not adhere to accessibility regulations. Institutions can be, and are often, sued for noncompliance. The results of such lawsuits often include damages to students and staff. Students may also file a complaint with OCR; notably, students have 180 days from the moment of impact to do so. If found guilty, OCR can levy heavy fines against an institution.

Throughout the COVID-19 pandemic, the Department of Education has consistently reminded institutions that no accessibility regulations have been waived. On March 16, 2020, OCR released a fact sheet stating, “Compliance with CDC’s recommendations should not create civil rights concerns” and further clarifying, “Whatever decisions are made by the school (such as decisions to temporarily suspend classes), schools must continue to comply with their non-discrimination obligations under federal civil rights laws, including Section 504 and Title II” (OCR, 2020).

*Continued on next page*

Additionally, OCR released a March 17, 2020, webinar regarding online continuity of instruction and accessibility as well as a May 12, 2020, questions and answers document highlighting institutional responsibilities in online courses.

### Suggested Actions



The following actions are recommended in order to ensure institutional compliance with accessibility regulations:

#### **Do not wait to begin addressing accessibility.**

Accessibility should not be a post hoc concern after an individual has filed a complaint.

#### **Create faculty development resources that include accessibility.**

These should include adaptive technologies and assistance to faculty for making course content accessible to screen readers.

#### **Conduct an accessibility audit of all online and face-to-face course content.**

#### **Understand the limits of screen readers and ways to appropriately format web and pdf content.**

Institutions should also consider ways to provide transcription services for all video and audio content.

#### **Develop clear, private communication pathways between faculty and your institution's Disability Services office so faculty are aware of student needs as soon as they are disclosed.**

#### **Develop multiple forms of the same content so it is accessible to all students.**

#### **Institutions should note that ensuring accessibility is not a *one-and-done* activity and requires an ongoing commitment.**

Institutions should always document the activities they are taking to be in compliance with accessibility regulations, especially during any remote learning shifts due to the COVID-19 pandemic.

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**Resources & References**

- ☑ [Nondiscrimination under federal grants and programs, 29 U.S.C. § 794 \(2018\).](#)
  - ☑ [Electronic and information technology, 29 U.S.C. § 794d \(2000\).](#)
  - ☑ [Equal opportunities for individuals with disabilities, 42 U.S.C. § 126 \(2008\).](#)
  - ☑ [Video programming accessibility, 47 U.S.C. § 613 \(2018\).](#)
  - ☑ [Office of Civil Rights. \(2014, December 28\). University of Cincinnati resolution agreement, OCR compliance review #15-13-6001. United States Department of Education.](#)
  - ☑ [Office of Civil Rights. \(2020, March 16\). Fact sheet: Addressing the risk of COVID-19 in schools while protecting the civil rights of students. United States Department of Education.](#)
  - ☑ [Office of Civil Rights. \(2020, March 16\). OCR Short Webinar on Online Education and Website Accessibility. United States Department of Education.](#)
  - ☑ [Office of Civil Rights. \(2020, May\). Questions and answers for postsecondary institutions regarding the COVID-19 national emergency. United States Department of Education.](#)
  - ☑ [Payan v. Los Angeles Community College District, 2:17-CV-01697-SVW-SK \(U.S. District Court, Central District of California, 2019\).](#)
  - ☑ [Rowland, C. \(2020, March 24\). Keeping accessibility in mind during the COVID-19 conversion of courses. WCET Frontiers.](#)
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# Additional Areas of Consideration

The Department of Education has not waived any regulations associated with Title IX, privacy, or the Clery Act.

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There are a number of additional regulatory areas that institutions may need to address as they continue online education as a response to the current pandemic. These include regulations related to:

## **Title IX**

## **Family Educational Rights and Privacy Act (FERPA)**

## **Clery Act**

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## Introduction



# Title IX of the Education Amendments of 1972

**The Department of Education has not waived any regulations related to Title IX.**

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex at institutions receiving federal funding. Department regulations, as of August 14, 2020, require institutions to hold live hearings that allow cross-examination, narrow the scope of sexual harassment related complaints, and allow institutions to eliminate mandatory reporting requirements.

## Policies & Regulations



In May 2020, the Department of Education's Office of Civil Rights (OCR) issued guidance on handling Title IX complaints during pandemic-related remote learning. This guidance explicitly states:

- Institutions cannot adopt a blanket policy that puts investigations on hold until normal operation.
- Institutions must make a "good faith effort" to respond to all complaints "promptly and effectively."
- OCR will evaluate institutional efforts on a case-by-case basis that takes into account delays caused by COVID-19.
- Institutions can use technology to hold investigations and hearings as necessary as long as privacy protections are in place.
- If institutions are forced to change processes or expect to experience delays related to COVID-19, institutions must promptly notify individuals of those changes.

## Institutional Impact



Failure to comply with Title IX regulations can lead to both a loss of federal financial aid assistance as well as private lawsuits. Institutions face increased scrutiny over their ability to handle Title IX complaints in a timely fashion.

## Suggested Actions



Institutions should review Title IX implementation plans and ensure that there are processes in place that will allow for the continuation of Title IX protections should institutions need to remain or quickly go back online. Institutions should make any changes to Title IX processes and timelines for virtual implementation public. Additionally, institutions should carefully document all policy changes and implementation delays during the novel coronavirus pandemic.

## Resources & References



- ☑ [Department of Education. \(2020\). Summary of major provisions of the Department of Education's title IX final rule.](#)
- ☑ [Office of Civil Rights. \(2020, May\). Questions and answers for postsecondary institutions regarding the COVID-19 national emergency. United States Department of Education.](#)

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**Introduction**

# Family Educational Rights and Privacy Act (FERPA)

**The Department of Education has not waived any regulations related to FERPA and student privacy.**

Under the Family Educational Rights and Privacy Act (FERPA), institutions are required to protect a student's personally identifiable information (PII).

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**Policies & Regulations**

Institutions must still receive student and/or guardian approval before sharing any student records or PII outside of the institution. As institutions shift to online learning, they increasingly rely on the electronic transmission of student data and must take steps to protect the PII of their students. Institutions should be aware that if they are working with a vendor with access to student data, the institution must own and direct the use of the data. The institution is responsible for data protection, not the vendor.

As a response to a public health crisis, institutions may leverage the law's health and safety exception if the disclosure of PII is necessary to prevent the spread of the novel coronavirus. Institutions may disclose limited PII if they believe an "articulable and significant threat exists to the health or safety of a student in attendance at the agency or institution" (Student Privacy Office, 2020).

Institutions may inform members of the campus community about COVID-19 cases on campus, but they may not disclose PII as a part of that notification. Additionally, as institutions increase the use of technology for instruction, they should be careful to ensure the safe transmission of student records data.

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**Institutional Impact**

Institutions found in violation of FERPA guidelines risk the loss of federal financial aid and open themselves up to potential civil litigation.

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**Suggested Actions**

Institutions should work with their IT offices to review network security measures to ensure that student PII is secure and remains private. Institutions should also require all staff working with PII to undergo training related to data security in general and specifically on accessing PII remotely.

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**Resources & References**

- [Family Educational Rights and Privacy Act, 34 C.F.R. §99 \(2000\).](#)
- [Student Privacy Office. \(2020, March\). FERPA and COVID-19 frequently asked questions. U.S. Department of Education.](#)

## Introduction



# Clery Act

**The Department of Education has not waived any regulations related to the Clery Act.** The Clery Act is a federal consumer protection law that requires institutions to disclose crimes and emergencies on or near their campuses. Regulations associated with the Clery Act can be found at 34 CFR § 668.46 and are related to Title IV financial aid eligibility.

Institutions are not required to provide ongoing notifications and updates regarding coronavirus cases on campus nor are they required to provide information on “cases among individuals who are not attending classes, working, or residing on campus or to require notifications to such individuals” (Office of Postsecondary Education, 2020). This guidance is effective through June 30, 2020, but may be extended at the discretion of the Department.

## Policies & Regulations



On April 3, 2020, the Department of Education issued guidance on Clery Act disclosures related to the novel coronavirus pandemic.

- Institutions are required to inform students and employees about COVID-19 and the health and safety precautions necessary to curb the transmission of the disease. Institutions are also required to encourage students and employees to seek out more information from health care providers, state health officials, and the Center for Disease Control’s COVID-19 resource page.
- Institutions may provide this alert through a single notification via the institution’s emergency alert system or by using a banner on the top of the homepage on the institution’s website.

## Institutional Impact



Failure to fulfill Clery Act requirements can lead to fines, loss of Title IV financial aid eligibility, and/or private litigation against the institution.

## Suggested Actions



It is recommended that institutions continue to ensure that students and employees have access to information on COVID-19 and health and safety precautions. Institutions should document the time and method of those notifications.

## Resources & References



- ☑ [Federal Student Aid. \(2020, April 3\). UPDATED Guidance for interruptions of study related to Coronavirus \(COVID-19\). U.S. Department of Education.](#)
- ☑ [Wendel, K., Lacey, A. \(2020, May 11\). Making Clery Act notifications during COVID-19. Thompson Coburn, LLP.](#)

# Suggested Resources

There will continue to be changes to the regulations, and the users of this Playbook will want to keep abreast of lessons learned from others as to what practices and policies worked for them.

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It is important that someone reads the actual regulations to ensure understanding of what is required in any changes. The following resources may be helpful in the process of developing the institutional strategy:

## Federal Regulations

- ☑ **The Electronic Code of Federal Regulations** was cited many times in the descriptions of specific regulations. Title 34, Chapter VI contains the regulations for postsecondary education and the U.S. Department of Education: <https://www.ecfr.gov/>
- ☑ **The National Association of Student Financial Aid Administrators** provides very detailed updates and advice on how to comply with any regulations having to do with Title IV (federal) financial aid. Work with your financial aid office to harvest their information: <https://www.nasfaa.org/>
- ☑ **Negotiated Rulemaking for Higher Education 2018-19** (the latest on the rules that went into effect on July 1, 2020, and those that are pending: <https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/index.html>

The U.S. Department of Education also maintains several pages related to distance education regulations, compliance, and COVID-19.

- ☑ **Main page:** <https://www.ed.gov/>
  - ☑ **COVID-19 Information:** <https://www.ed.gov/coronavirus>
  - ☑ **CARES Act information:** <https://www.ed.gov/coronavirus/cares-act-emergency-relief>.
  - ☑ **Information on waivers and flexibility:** <https://www.ed.gov/coronavirus/waivers-and-flexibility>.
  - ☑ **Information on remote learning:** <https://www.ed.gov/coronavirus/remote-learning>.
  - ☑ **Program information including FAQs and general guidance:** <https://www.ed.gov/coronavirus/program-information>.
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## Accreditation

Each institutional and programmatic accreditor may have unique regulations. Always check the websites of your institution's and program's accreditors.

- ☑ **Council for Higher Education Accreditation (CHEA):**  
<http://www.chea.org>
- ☑ **Directory of CHEA-recognized organizations:**  
<https://www.chea.org/chea-recognized-organizations>

## Organizations Providing EdTech and General Postsecondary Federal Regulatory Updates

- ☑ **American Association of Community Colleges (AACC):**  
<https://www.aacc.nche.edu/advocacy/>
- ☑ **American Public Land Grant Universities (APLU):**  
<https://www.aplu.org/policy-and-advocacy/>
- ☑ **Cooley, LLP:**  
Higher Education,  
<https://www.cooley.com/search-results?search=Higher%20Education&filters=all>  
  
Innovative Education Providers:  
<https://www.cooley.com/services/industry/innovative-education-providers>
- ☑ **EDUCAUSE:**  
<https://www.educause.edu/focus-areas-and-initiatives/policy-and-security/educause-policy>
- ☑ **New America Foundation:**  
<https://www.newamerica.org/>
- ☑ **Thompson Coburn, LLP:**  
<https://www.thompsoncoburn.com/services/industries/higher-education>
- ☑ **University Professional and Continuing Education Association (UPCEA):**  
<https://upcea.edu/news/government-affairs/>
- ☑ **WCET – the WICHE Cooperative for Educational Technologies:**  
Main website,  
<https://wcet.wiche.edu/>  
  
WCET State Authorization Network,  
<https://wcetsan.wiche.edu/>  
  
WCET's Frontiers Blog provides insights on changes and sharing lessons learned,  
<https://wcetfrontiers.org/>

# Special Topic Publications

The issues in this playbook represent critical regulatory issues impacting distance, remote, blended, and hyflex education. WCET invited several education experts to contribute in-depth looks at some of the most important regulatory issues in this field.

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WCET and Every Learner Everywhere are grateful to these experts for sharing their knowledge. Each paper is described below with a link to the publication housed on Solve. The Solve website may be used to browse a complete collection of resources developed by Every Learner Everywhere that cover a range of topics within digital learning, e.g. equity, remote instruction, and digital learning implementation. All resources are created or vetted by network partners and designed to help improve student experiences and outcomes in gateway courses, whether delivered in-person, online, or a hybrid of the two.

## **Catalyst for Change: Institutional Accreditation in the Midst of Covid-19**

Karen J. Solomon, Vice President for Accreditation Relations,  
Higher Learning Commission

The COVID-19 pandemic forced higher education institutions to provide remote, virtual education to students. The Department of Education waived many distance education regulations, including allowing accreditors the flexibility to allow for virtual site visits and to allow institutions to transition to distance education. This paper reviews the process for turning all evaluations virtual, the waivers specific to accreditation, and next steps for higher education accreditation.

[🔗 Read on Solve](#)

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## Structure Your Accessibility Work

Cyndi Rowland, WebAIM, National Center on Disability and Access to Education, Center for Persons with Disabilities, Utah State University

Digital accessibility is an important requirement that all higher education institutions must ensure for their communities. The COVID-19 pandemic showcased “vulnerability where accessibility was concerned.” There are competing priorities for resources for higher education staff, but it is imperative that institutions identify and remove accessibility barriers. This paper suggests a structure for accessibility work, reviews accessibility models, and analyzes recent Office for Civil Rights resolutions.

[Read on Solve](#)

## Financial Aid Basics

Jill Desjean, National Association of Student Financial Aid Administrators

Federal financial aid programs assist students with the financial aspects of completing their postsecondary education. To maintain federal financial aid eligibility, institutions must demonstrate that they are financially responsible, administratively capable, and able to adhere to consumer disclosure requirements. This paper discusses financial aid audits and reviews, aid for distance education, and key considerations for financial aid when moving to remote or distance education.

[Read on Solve](#)

## State Authorization

Cheryl Dowd, Director, State Authorization Network (SAN), WCET (The WICHE Cooperative for Educational Technologies)

The COVID-19 pandemic caused institutions to shift face-to-face courses to emergency remote formats to students disbursed throughout the country. Many institutions will continue remote/online learning formats for the foreseeable future. Institutional staff unfamiliar with state authorization compliance may have been surprised to learn that there may be state compliance requirements for institutions based on where a student is located. This paper shares the principles of state authorization for state institutional approval of distance education.

[Read on Solve](#)

# Glossary of Terms

Term	Definition
<b>Accreditation</b>	Accreditation, for higher education institutions, is a peer-reviewed process that examines institutional and programmatic quality. Accreditation is a critical component of institutional Title IV financial aid eligibility. The Department of Education recognizes two types of accreditors—institutional accreditors and programmatic accreditors. Re-accreditation reviews, which happen every five to ten years, are a critical part of institutional continuous improvement.
<b>American with Disabilities Act (ADA)</b>	Congress passed ADA in 1990. The legislation prohibits all forms of discrimination against individuals with disabilities including employment, education, and public and private accommodations.
<b>Blended</b>	Blended learning is a pedagogical approach that uses educational technology to supplement face-to-face instruction. Sometimes used as an alternative to the term <i>hybrid</i> .
<b>Correspondence education</b>	The regulatory definition of correspondence education can be found in 34 C.F.R. § 600.2. The Department of Education defines a correspondence course as one in which all instruction and instructional materials, including exams, are sent to students who are completely separated from the instructor. In a correspondence course, interaction between instructors and students is very limited, does not meet the regulatory definition of regular and substantive interaction, and interaction is primarily initiated by the student. Students receive less financial aid for correspondence courses than they do for face-to-face or online education. An institution that has 50% or more of its courses declared to be correspondence courses or 50% or more of its student declared as correspondence students may lose its right to disburse Title IV financial aid.
<b>Council for Regional Accrediting Commissions (C-RAC)</b>	<p>C-RAC is comprised of the seven largest higher education institutional accrediting bodies in the United States. Until recently, these bodies were considered regional accreditors by the Department of Education. However, a recent regulatory change eliminated the distinction between national and regional accreditors.</p> <p>C-RAC currently consists of the Accrediting Commission for Community and Junior Colleges (ACCJC), the New England Commission of Higher Education (NECHE), the Higher Learning Commission (HLC), the Middle States Commission on Higher Education (MSCHE), the Northwest Commission on Colleges and Universities (NWCCU), the Southern Association of Colleges and Schools Commission on Colleges (SACSCOC), and the Western Association of Schools and Colleges Senior College and University Commission (WASC).</p>

Term	Definition
<b>Distance education</b>	The regulatory definition of distance education can be found in 34 C.F.R. § 600.2. As of August 25, 2020, the Department of Education defines distance education as “education that uses one or more of the technologies listed in paragraphs (1) through (4) of this definition to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously.” The applicable technologies include the internet, open broadcast, closed circuit, cable, broadband, wireless communication devices, and audio conferencing. See <i>regular and substantive interaction</i> for a key component of identifying <i>distance education</i> activities.
<b>Fair use</b>	Fair use is associated with copyright law and is a defense against claims of copyright infringement. Under fair use, copying of copyrighted material can be done for limited and <i>transformative</i> purposes such as analysis or critique of the work.
<b>Higher Education Act (HEA)</b>	The Higher Education Act was originally passed in 1965 and has been reauthorized several times since then. HEA is the statutory source for most higher education regulations, especially those dealing with accreditation, Title IV financial aid requirements, and distance education. As of 2020, the period of time since the last reauthorization is the longest ever—twelve years.
<b>Hybrid</b>	Hybrid learning is a pedagogical approach that uses educational technology to replace some face-to-face instruction. Sometimes used as an alternative to the term <i>blended</i> .
<b>Hyflex</b>	Hyflex learning is a pedagogical approach that combines face-to-face instruction and online education. Unlike hybrid or blended learning where all students participate in the same modality at the same time, hyflex courses allow students to decide if they wish to participate fully online or face-to-face. Students may switch back and forth multiple times during the course. Hyflex variations developed in response to the pandemic assign students to cohorts that alternate between attending face-to-face and online.
<b>National Council for State Authorization Reciprocity Agreements (NC-SARA)</b>	NC-SARA is the coordinating council for a voluntary distance education state reciprocity program that, along with the four regional higher education compacts, administers an <i>effective and efficient</i> reciprocal state authorization process for higher education.

Term	Definition
<b>Online education</b>	Online education is a pedagogical approach where all instruction and interaction between the instructor as well as among students takes place via the internet. Online education is typically asynchronous, meaning that students are not logged into the class at the same time and interacting with each other in real time. However, online education can be synchronous.
<b>Regular and substantive interaction (RSI)</b>	Regular and substantive interaction is a regulatory term found in the definition of correspondence education as well as the definition of distance education. RSI describes the frequency and type of interactions between students and instructors. On August 25, 2020, the Department of Education added requirements for activities that address <i>substantive</i> interaction and what constitutes <i>regular</i> interaction. Student-initiated communications do not qualify for RSI.
<b>Regulatory Triad (“the triad”)</b>	The regulatory triad consists of the U.S. Department of Education, accrediting agencies, and state education regulators. The triad is designed to ensure educational quality and protect both consumer interests and the interests of the federal government. Institutions must receive approval from all three entities in order to participate in federal financial aid programs. In this model: <ul data-bbox="428 1045 1284 1241" style="list-style-type: none"><li>• the U.S. Department of Education is tasked with approving accrediting agencies,</li><li>• accrediting agencies are tasked with overseeing institutional and programmatic academic quality, and</li><li>• states are tasked with ensuring consumer protection.</li></ul>
<b>Remote education</b>	Remote education refers to the quick, unanticipated pivot of instruction from face-to-face to online during a term. Remote instruction is a reaction to emergencies or external events and is not <i>deliberately designed</i> online education.
<b>Satisfactory academic progress (SAP)</b>	Students wishing to remain eligible for Title IV federal financial aid must maintain satisfactory academic progress. This means that they must meet their institution’s minimum grade point standard as well as complete enough credit to remain on track for graduation.
<b>Site visit</b>	As a part of the accreditation process, accreditors typically send a team of peer reviewers to the institution to meet with institutional stakeholders, examine facilities, and otherwise assess the institution.

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Term	Definition
<b>State Authorization Reciprocity Agreement (SARA)</b>	SARA is a voluntary and regional approach to institutional approval to offer instruction outside of its state. States that join SARA agree to follow a common process in approving their own institutions' participation as well as agreeing to use a common set of guidelines in approving out-of-state institutions to operate in state, if the state is also a member of SARA. SARA, essentially, allows institutions to offer distance education outside of their own state without going through separate approval processes for each state in which they have students. As of August 25, 2020, California was the only state that had not joined SARA.
<b>Title IV</b>	This is the section of the Higher Education Act that covers the administration of federal student financial aid programs. This term is often used to delineate aid programs run by the U.S. Department of Education as opposed to other forms of student aid from sources such as the Department of Defense, Department of Veterans Affairs, institutions, or states.
<b>Web Content Accessibility Guidelines (WCAG)</b>	Developed by the Web Accessibility Initiative of the World Wide Web Consortium, the WCAG are suggested standards that make the internet more accessible for all end users but especially those with disabilities.

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