I. INTRODUCTION

A. U.S. institutions, sometimes working with foreign institutions, have developed an array of overseas education programs for foreign nationals (as well as U.S. students studying abroad). See generally E. Meers and L. Sostowski, Cross-Border Activities of Colleges and Universities, ABANA Review 7 (Winter 2005). Some include:

1. U.S. corporation offering educational programs solely overseas. For example, American University of Beirut is a New York education corporation with a campus in Lebanon. http://www.aub.edu.lb/main/about/Pages/history.aspx.

2. U.S. institution setting up campus overseas to serve international students. For example, New York University opened a campus in Abu Dhabi as “the first comprehensive liberal arts and science campus in the Middle East to be operated abroad by a major American research university.” http://nyuad.nyu.edu/about/index.html.

3. U.S. institution “partnering” with foreign institution. Such arrangements include, but are not limited to, “dual degree” programs in which students receive degrees from both a U.S. institution and a foreign institution for completion of the same educational program. For example, The Johns Hopkins University-Nanjing University Center for Chinese and American Studies offers a two-year Master of Arts in International Studies, “the only joint academic program authorized to offer a master’s degree fully accredited in China and in the United States.” http://nanjing.jhu.edu/about/index.htm.


5. “A typology of six categories for student mobility includes: branch campuses, independent institutions, acquisitions/mergers, study centre/teaching sites, affiliation/networks, and virtual universities.” D. Chapman and R. Sakamoto, “The

B. Growth of transnational (and beyond) / higher education programs

1. According to the Observatory on Borderless Higher Education, at least 162 international branch campuses were operating in 2009, and 14 international branch campuses have closed since 2004. R. Becker, International Branch Campuses, Markets, and Strategies (3/21/11) (abstract).

2. “Higher education institutions from 22 countries have established branch campuses abroad, compared with institutions from 17 countries in 2006. Most of these campuses (111 out of 162) were created by institutions in the Anglophone nations, with the USA continuing to overshadow all others with its 78 offshore bases accounting for 48% of the total.” G. Williams, “Will Higher Education Be the Next Bubble to Burst?” in Europa 3, 5.

3. “Today, only a handful of branch campuses remain in Japan compared with the over 30 US institutions that were established in the late 1980s to the early 1990s.” D. Chapman and R. Sakamoto, “The Changing Face of Cross-Border Higher Education,” in Europa at 9, 10.

4. “Currently, there are six US universities in Education City [Qatar] and 30 post-secondary institutions from around the world in the Dubai International Academic City.” Id.

5. “Between the pure satellite programs – still relatively rare – and the much more numerous partnership efforts, the Western university presence in China has become very large. One report found that as of August 2006, more than 1,300 joint programs were in operation, with another 378 in the works.” B. Wildavsky, The Great Brain Race: How Global Universities Are Reshaping the World 62 (2010).

6. “[M]any institutions – 130 by one count – have entered the Indian market through partnerships or ‘twinning arrangements,’ whereby students study in India with local private institutions for part of their program (usually using the U.S. college’s curriculum) and in the United States for the rest.” Id.

C. Different kinds of programs call for different contractual and registration structures

1. Institutional goals

2. Nature of program

3. Legal requirements in foreign country

4. Legal risk management – See generally M. Michaelson, Legal Pitfalls and Pratfalls in Overseas Ventures, Trusteeship 23 (Jan.-Feb. 2009)

5. Other considerations
II. IDENTITY OF OVERSEAS CAMPUS

A. The identity of the overseas campus is important for a number of reasons

1. U.S. institution wants control over the academic program and other aspects of operation

2. For accreditation purposes U.S. institution needs control over the academic program and other aspects of operation

3. U.S. faculty teaching overseas want academic freedom and other customary protections

4. U.S. students want to be able to use federal student financial aid at the overseas campus

5. Foreign partner often wants the “brand” of the U.S. institution

6. Foreign students often want a U.S. degree to facilitate admission to graduate or professional school or employment in the U.S.

B. What is the overseas campus from an education regulatory standpoint in the U.S.?

1. Study abroad site

   (a) A U.S. institution may award federal student financial aid to a student enrolled in a study abroad program if:

      (i) the student remains enrolled as a regular student in his or her eligible home school; and

      (ii) the eligible home school awards academic credit for the study abroad program. However, the student’s study abroad program does not have to be a required part of his or her degree program. 34 C.F.R. § 668.39.

   (b) Generally, institutions establish study abroad programs using one of the following three mechanisms:

      (i) the home school sends the student to a foreign institution that may or may not be eligible to participate in federal student financial aid programs;

      (ii) the home school allows the student to complete a portion of his or her program through a separate, eligible U.S. host school that offers a study abroad program through a foreign institution that may or may not be eligible to participate in federal student financial aid programs; or

      (iii) a home school has a written arrangement with a study abroad organization that represents one or more foreign schools to which the home school sends its student. U.S. Department of Education (“ED”), 2009-10 FSA Handbook at 2-98.
In all cases, the eligible U.S. institution must enter into a written arrangement to provide educational programs with the foreign school (or foreign organization). Such written arrangements must adequately describe the duties and responsibility of each entity and satisfy the requirements of 34 C.F.R. § 668.5(b), infra.

2. Additional location or branch campus

(a) In contrast, when the U.S. institution sends its own faculty and students to a foreign location of the institution, such an arrangement is not considered a study abroad program under 34 C.F.R. § 668.39. Instead, ED considers the foreign site an additional location under 34 C.F.R. § 600.32 or a branch campus under 34 C.F.R. § 600.2.

(b) U.S. degree-granting authority

(i) It is a question of state law whether the U.S. institution needs authorization from the state in which it is located to offer educational programs at foreign locations.

(ii) For example, New York exempts from its approval of off-campus instruction requirements (see N.Y. Comp. Codes R. & Regs. tit. 8, § 54.1) units of New York institutions “located outside the State or on territory over which the Federal government has asserted exclusive jurisdiction.” Id. at § 54.2. However, all courses offered for credit by the institution at the out-of-state location must “be part of a registered degree program offered by the institution and are subject to the same quality standards required of all registered curricula . . . .” New York State Education Department, Office of College and University Evaluation, Approval & Registration – Off-Campus Instruction, available at http://www.highered.nysed.gov/ocue/aipr/Off-CampusInstruction1.html.

(c) Accreditation

(i) Institutional accreditation: Foreign locations must be included within the scope of an institution’s institutional accreditation in order for those locations to be accredited and eligible for federal student financial aid. While federal student financial aid is generally not available to foreign students, U.S. institutions may want to offer such aid to U.S. and other eligible students attending their foreign locations. See 34 C.F.R. §§ 668.32(d), 668.33 (to be eligible to receive assistance under Title IV of the Higher Education Act (“HEA”), student must be a U.S. citizen or national, a U.S. permanent resident or “intending citizen,” or a resident of certain Pacific islands). Institutional accreditors generally consider the addition of a foreign location a substantive change subject to the accreditors’ substantive change approval policies and procedures.

accreditors therefore have many policies in common, but some variations remain. This outline focuses, by way of example, on the Middle States Commission on Higher Education (“Middle States”). 1/

(1) Middle States allows an accredited institution to include a foreign location within the scope of its accreditation by establishing the location as an “additional location” or a “branch campus”. See International Programs Offered by Accredited Institutions, available at http://www.msche.org/?Nav1=Policies&Nav2=INDEX (“International Programs”).

1. Middle States defines an “additional location” as a location that is geographically apart from the main campus and at which the institution offers at least 50 percent of an educational program but that lacks the independence of a branch campus. Middle States also considers the establishment of an additional location to be a substantive change, which the accreditor must approve before the location is included in an institution’s accreditation. See Substantive Change Policy Statement (Nov. 18, 2010) available at http://www.msche.org/documents/updated-substantive-change-policy-11-18-10.pdf (“Substantive Change Policy”); see also 34 C.F.R. § 602.22. In most cases, Middle States will conduct a site visit to the additional international location within six months after operations commence. During such a site visit, Middle States will take into account the same “special considerations” that it considers during a

1/ Middle States accredits institutions in Delaware, the District of Columbia, Maryland, New Jersey, New York, Pennsylvania, Puerto Rico, and the U.S. Virgin Islands. The other regional accreditors are:

- Southern Association of Colleges and Schools, Commission on Colleges (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia), www.sacscoc.org
- Western Association of Schools and Colleges, Accrediting Commission for Community and Junior Colleges and Accrediting Commission for Senior Colleges and Universities (California, Hawaii, the United States territories of Guam and American Samoa, the Republic of Palau, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, and the Republic of the Marshall Islands), www.wascweb.org.

2. Middle States defines a “branch campus” (in a manner consistent with ED’s definition provided below) as “a location of an institution that is geographically apart and independent of the main campus of the institution” in that it offers courses in educational programs leading to a degree, certificate, or other recognized educational credential, has its own faculty and administrative organization, and its own budgetary and hiring authority. Middle States considers the addition of a branch campus a substantive change, which the accreditor must approve before the branch is included in an institution’s accreditation. Middle States must also conduct a site visit within six months after establishment of a branch campus. See Substantive Change Policy; see also 34 C.F.R. § 602.24(a). During a site visit to an international branch campus, Middle States will take into account certain “special considerations,” including political and cultural concerns, effects of distance on oversight, availability of resources, and language and communication issues. See Substantive Change Visits.

3. Additional locations and branch campuses are listed on an institution’s “Statement of Accreditation Status,” available through http://www.msche.org/institutions_directory.asp.

(2) An institution must also receive prior approval from Middle States for any additional types of substantive changes related to the institution’s establishment of a foreign location, such as a significant change in the institution’s established mission or objectives, or the addition of courses or programs that represent a “significant departure” from existing program offerings or methods of delivery. See Substantive Change Policy.

(iii) Specialized accreditation.

(1) Some specialized accreditors accredit programs worldwide (e.g., Association to Advance Collegiate Schools of Business (“AACSB”), Accreditation Board for Engineering and Technology (“ABET”)).

(2) Others, like the National Association of Schools of Art and Design (“NASAD”), limit accreditation to the U.S.; the Liaison Committee on Medical Education (“LCME”) limits accreditation to the U.S. and Canada.

(d) U.S. Department of Education

(i) As noted above, a student is eligible to receive federal student financial aid if, with limited exceptions, the student is a U.S. citizen or national, a U.S. permanent resident or “intending citizen,” or a resident of certain Pacific
islands. 34 C.F.R. §§ 668.32(d), 668.33(a). Among other criteria, the student also must be enrolled in an institution that is eligible to participate in federal student financial aid programs. Id. §§ 668.32(a)(1)(i).

(ii) The HEA and ED regulations distinguish among different types of institutions that may participate in federal student financial aid programs under Title IV of the HEA. Nonprofit and public colleges and universities in the U.S. are generally classified as “institutions of higher education.” An “institution of higher education” is “located in a State.” Id. §§ 600.4(a) and 600.5(a). “State” means a “State of the Union, American Samoa, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.” Id. § 600.2.

(iii) ED’s regulations do not define the term “additional location” except to the extent that it is a “location of an institution . . . not designated as an eligible location” in its previous eligibility reports. See id. § 600.32(e).

(1) If an institution wishes to award federal student aid to students at an additional location at which it will offer 50 percent or more of an educational program, the institution must seek ED’s prior approval to establish such an additional location if the institution: (i) participates in the federal student financial aid programs under provisional certification; (ii) receives federal student financial aid under the reimbursement or cash monitoring payment method; (iii) has acquired the assets of another institution that provided educational programs at that location during the preceding year and participated in the federal student financial aid programs during that year; (iv) would be subject to a loss of eligibility under the cohort default rate regulations if it added the location; or (v) ED previously notified the institution that it must apply for approval of an additional location. See id. § 600.20(c).

(2) Even if the institution does not need to obtain prior approval from ED, the institution must notify ED within 10 days after establishing an additional location if the institution wishes to disburse federal student financial aid to students at that location. See id. § 600.21(a)(3).

(3) Whether seeking prior approval or providing notice, an institution must submit to ED evidence that the additional location is accredited by the institution’s institutional accreditor and licensed by the appropriate state agency.

(iv) ED defines “branch campus” as a “location of an institution that is geographically apart and independent of the main campus” in that the location: (i) is permanent in nature; (ii) offers courses in educational programs leading to a degree, certificate, or other recognized educational credential; (iii) has its own faculty and administrative or supervisory organization; and (iv) has its
own budgetary and hiring authority. *Id.* § 600.2. An institution must submit
documentation of a branch campus’s state authorization and accreditation
status, among other materials, and receive ED’s approval prior to awarding
federal student financial aid to students attending that branch campus. *Id.* §
600.20(c)(4)-(5).

(v) An institution’s additional locations and branch campuses recognized by ED
are listed in its “Eligibility and Certification Approval Report” (“ECAR”).

3. Foreign institution

(a) An accreditor that does not accredit institutions or programs outside the U.S. may
treat an overseas campus as a separate higher education institution. This approach
may cause students to be treated as students of a foreign institution for purposes
of federal student financial aid, professional licensure, and other purposes.

(b) ED regulations currently define a “foreign institution” as an “institution that is not
located in a state.” *Id.* § 600.52. On November 1, 2010, ED issued new
regulations pertinent to foreign institutions that, effective July 1, 2011, add a
number of new requirements to this definition. *See 75 Fed. Reg. 67,170 (2010).*
These new requirements make it less likely that an additional location or branch
campus of a U.S. institution would be considered a foreign institution for federal
student financial aid purposes.

(c) Under the new rule a “foreign institution”

(i) Has no U.S. location except for clinical training for foreign medical,
veterinary, or nursing schools

(ii) Has no written arrangements with institutions or organizations in U.S. that
would permit students enrolled in the foreign institution to take courses from
institutions located in U.S.

(iii) Does not permit Title IV-eligible students to enroll in any course offered by
the foreign institution in the U.S., including research, work, internship,
externship, or special studies except certain independent research done by
individual doctoral student in U.S.

(iv) Is legally authorized by the education ministry, council, or equivalent agency
of country in which the institution is located to provide an educational
program beyond secondary education level

(v) Awards degrees, certificates, or other recognized educational credentials that
are officially recognized by country in which institution is located

(d) New rule for “educational enterprises”
(i) “Educational enterprise” consists of two or more locations offering all or part of an educational program that are directly or indirectly under common ownership.

(ii) If an educational enterprise enrolls students both within a State and outside a State and the number of students who attend locations outside a State and would be eligible for federal student financial aid is at least twice the number of students enrolled within a State, then locations outside a State must apply to participate as one or more foreign institutions.

(e) Otherwise eligible students attending a foreign institution may receive federal student financial aid if the foreign institution meets certain eligibility criteria. See 34 C.F.R. part 600, subpart E. However, a foreign school may participate only in the Federal Direct Loan program. See 20 U.S.C. § 1002(a).

C. What is the campus from an education regulatory standpoint in the other country?

1. Answer depends on local law
2. Consider potential conflicts with desired U.S. status

III. ACADEMIC STANDARDS AND OTHER ACCREDITATION REQUIREMENTS -- MIDDLE STATES AS CASE STUDY

A. Middle States prescribes standards for international programs, the Middle States-accredited institution, and “affiliated providers”.

B. All international programs should:

1. Meet all accreditation standards
2. Meet standards for quality of instruction, academic rigor, educational effectiveness, and student achievement comparable to those of other institutional offerings. Resources such as student services should be appropriate to the culture and mores of the international setting.
3. Be rooted in the institution’s mission and have clear educational goals
4. Reflect the educational emphasis of the U.S. institution, including commitment to general education, with appropriate adaptation to the culture of the location abroad
5. Be included in the regular budgeting and auditing processes of the U.S. institution, and be offered without diminishing its financial support for its U.S. operations
6. Provide Middle States on request with accurate financial records for the program, including accounting for funds designated for third parties without any contractual relationship
7. Meet all internal and external approval requirements, such as that of the governing body, system administration, government bodies, and accrediting associations, both in
the U.S. and abroad, including consultation with national quality assurance agencies in countries where programs are offered.


C. The Middle States-accredited institution should:

1. Notify Middle States in advance, in accordance with the substantive change policy, *supra*, if the institution alters its mission or goals

2. Ensure adequate supervision of the program both on-site and by the home campus, including recruitment and admission of students and supervision of the teaching and administrative staff abroad responsible for the educational quality of the international program. Visits from overseas representatives to the home campus are encouraged.

3. Share with prospective and enrolled students information such as:
   
   (a) The learning goals of the program
   
   (b) The relationship, if any, to a foreign institution
   
   (c) Grading practices and policies for assigning credit, especially if several institutions are involved with a single overseas institution or consortium
   
   (d) Significant differences between the home campus experience and what can be expected abroad
   
   (e) The extent of responsibility assumed by the program for housing participants
   
   (f) What services will and will not be provided

4. Maintain official records of academic credit earned in the international program if academic credits earned abroad are applicable to degree programs in the Middle States-accredited institution. The official transcript should follow the Middle States-accredited institution’s practices in identifying every site or through course numbering the credits earned in its off-campus programs.

5. Inform students in advance that they will ordinarily not receive credit for foreign study undertaken without prior planning or approval by the students’ home campus administrators

6. Assure fair reimbursement to participants if the program is not delivered as promised for reasons within the institution’s control, or because of international exigencies

*International Programs; see also Characteristics of Excellence* at 61.
D. Affiliated providers

1. “An ‘affiliated provider’ may be a subsidiary, parent, ‘sister’ or other entity (for-profit or non-profit) legally related to the institution or unrelated (except through contractual arrangement) to the accredited institution. Depending on the specific relationship, such providers may or may not be included within the scope of the institution’s accreditation.” Relevant factors might include matters such as use of the same or similar names, ownership, incorporation, governance, management, control of curricula, finances, acceptance of credits, degree-granting authority, faculty and other personnel, processes, and extent of activities. *Characteristics of Excellence* at 60-61.

2. If a Middle States-accredited institution is offering programs with an “affiliated provider,” the institution should:

   (a) Whether or not the affiliate is included within the scope of the institution’s accreditation, make clear to Middle States and the public the nature of the affiliation with “particular attention to such issues as”:

      (i) Whether the provider offers its own programs or grants its own degrees

      (ii) Whether students are distinct from or considered to be students of the parent institution

      (iii) What student learning and support services are available

      (iv) Whether courses offered by the affiliated provider are applicable to a degree program offered by the accredited institution.

   (b) Give attention to the impact of the affiliated entity on the institution’s resources and ability to fulfill its mission and goals.

*Characteristics of Excellence* at 60-62.

IV. SELECTED OBLIGATIONS UNDER U.S. LAW WITH RESPECT TO STUDENTS AT FOREIGN CAMPUS


B. Education records

1. The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and its implementing regulations, 34 C.F.R. pt. 99 (collectively, “FERPA”), provide for access by students to their education records and regulate disclosure of personally identifiable information from such records to third parties.

2. FERPA applies to all “components” of an educational institution receiving funds from ED. 34 C.F.R. § 99.1(d).
3. Is a foreign campus a “component” of the U.S. college or university for purposes of FERPA?

(a) ED’s Family Policy Compliance Office does not appear to have addressed the question.

(b) ED trains foreign schools that participate in federal student financial aid programs to comply with FERPA. E.g., U.S. Dep’t of Educ., FSA COACH for Foreign Schools, at http://www2.ed.gov/offices/OSFAP/fsacoach/foreignschools/module.htm#m-1008-1-6.

4. Privacy laws of host country may also apply.

C. Campus security


(a) Any building or property that is owned or controlled by the institution and used by the institution in direct support of, or in a manner related to, the institution’s educational purposes, but is not “within the same reasonably contiguous geographic area” is considered a separate campus for purposes of the campus security regulations. 20 U.S.C. § 1092(f)(6)(B); 34 C.F.R. § 668.46(a).

(i) Middle States, for example, defines an “additional location” as geographically apart from the main campus. Substantive Change Policy.

(ii) A branch campus by definition is “geographically apart and independent of the main campus”. 34 C.F.R. § 600.2.

(b) Congress recently amended the Clery Act to exempt foreign institutions. 20 U.S.C. § 1092(f)(1).

2. Must a U.S. institution include foreign campuses in its Clery Act reports?

(a) ED interprets the Clery Act to apply to all locations of an institution that receives federal student financial aid, even if a particular location is not eligible for such funding. ED, Handbook for Campus Safety and Security Reporting at 2 (Feb. 2011) (“Campus Safety Handbook”).

(b) ED directs U.S. institutions to comply with the Clery Act with respect to their foreign locations. A foreign location that a U.S. institution owns or controls and has an organized program of study and administrative personnel on site is a separate campus for Clery Act purposes. Id. at 3, 17.

(c) ED has compared an institution’s campus security reports with the locations listed as eligible for federal student financial aid on the institution’s ECAR. If the
institution has not filed campus security reports for all of the locations listed on the ECAR, including foreign locations, ED has found the institution out of compliance with the Clery Act.

D. Civil rights compliance

1. Americans with Disabilities Act ("ADA")

(a) Title II of the ADA requires all state and local governments to provide people with disabilities with an equal opportunity to benefit from all of their programs, services, and activities. 42 U.S.C. § 12132, 28 C.F.R. pt. 35.

(b) Title III of the Americans with Disabilities Act prohibits public accommodations, including universities, from discriminating on the basis of disability in the full and equal enjoyment of their goods, services, facilities, privileges, advantages or accommodations. 42 U.S.C. §12182; 28 C.F.R. pt. 36.

(c) Do these provisions of the ADA apply to foreign campuses?

(i) U.S. Department of Justice advised that Title III “may not provide jurisdiction for the provision of accessible services in foreign countries.” U.S. Dep’t of Justice Letter re: Access Abroad, Nat’l Disability L. Rep. 262 (July 29, 1999); see also Letter from J. Wodatch to B. Smith (April 6, 1993) (finding “considerable reason to doubt” that Title III applies to public accommodations outside the U.S.), available at http://replay.waybackmachine.org/20020614015527/http://www.usdoj.gov/crt/foia/cltr062.txt

(ii) The U.S. Court of Appeals for the Ninth Circuit assumed that the ADA (and Section 504) applied to a disabled student in a study abroad program where a U.S. college sponsored the program and its faculty taught courses. Bird v. Lewis & Clark Coll., 104 F. Supp. 2d 1271 (D. Or. 2000), aff’d, 303 F.3d 1015 (9th Cir. 2002) (U.S. university provided reasonable accommodation to disabled student in study abroad program); see also Tecza v. Univ. of San Francisco, 2010 WL 1838778 (N.D. Cal. May 3, 2010) (assuming that the ADA applied to disabled law student while he was enrolled in University’s summer study abroad programs in Dublin and Prague, but dismissing student’s ADA (and Section 504) claims because he received “sufficient accommodations” except in only a “few instances”).

(iii) The U.S. Supreme Court held that Title III could apply to some operations of a foreign ship where the ship was in U.S. waters and carried passengers to and from the U.S. Spector v. Norwegian Cruise Line, 545 U.S. 119 (2005).

2. Civil rights laws applicable to recipients of federal financial assistance

(a) These laws prohibit recipients of federal financial assistance from discriminating on the basis of race, color or national origin; sex; handicap; and age, respectively:

The National Association of College and University Attorneys
(i) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.; 34 C.F.R. pt.100 (ED implementing regulations)

(ii) Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; 34 C.F.R. pt. 104 (ED implementing regulations)


(b) The laws cover “all of the operations” of a college, university, or other postsecondary institution, or a public system of higher education. 20 U.S.C. § 1687; 29 U.S.C. § 794(b); 42 U.S.C. §§ 2000d-4-a, 6107(4); 34 C.F.R. §§ 100.13(g), 104.3(k), 106.2(h), 110.3.

(c) Do “all of the operations” include foreign campuses?

(i) Title IX


(2) A federal district court ruled that Title IX did not apply to a claim by a U.S. citizen who was a full-time student at a foreign university and alleged sexual harassment that occurred only in the foreign country, even though the university maintained an office in the U.S. Phillips v. St. George’s Univ., 2007 WL 3407728 (E.D.N.Y. Nov. 15, 2007).

(ii) Section 504

(1) In a case pre-dating Saudi Aramco, a federal district court held that Section 504 applied to a trip to Spain sponsored by a public school district, even though students paid a substantial portion of the expenses, where regular salaried teachers served as chaperones, the school district sponsored and planned trip, and students would be under supervision of school district personnel during trip. Wolff v. S. Colonie Sch. Dist., 534 F. Supp. 758 (N.D.N.Y. 1982), aff’d, 714 F.2d 119 (2d Cir. 1982); see also Bird v. Lewis & Clark College, supra; Tecza v. Univ. of San Francisco, supra.

(2) The views of ED’s Office for Civil Rights (“OCR”) on the application of Section 504 and the ADA to overseas programs have varied among regional offices over time. Compare Letter from L. Close to L. Coor (Dec. 3, 2001), available at http://www.nacua.org/documents/OCRComplaint.
SignLanguageInterpreter.pdf (OCR Region VIII concluded that “neither Section 504 nor Title II [of the ADA] requires the University to provide auxiliary aids and services in overseas programs. Nor does either statute otherwise prohibit discrimination on the basis of disability in overseas programs.”) with College of St. Scholastica, No. 05-92-2095, 1992 NDLR (LRP) LEXIS 1110, *; 3 NDLR (LRP) 196 (Sept. 15, 1992) (OCR Region V concluded that Section 504 required college to pay for interpreter services for deaf student on study abroad program) and St. Louis Univ., 1 Nat’l Disability L. Rep. P 259 (Dec. 12, 1990) (OCR Region VII applied Section 504 to university’s study abroad program in Spain, but university’s denial of computer as auxiliary aid to accommodate student’s learning disability did not violate Section 504 for other reasons). See generally A. Kanter, The Presumption Against Extraterritoriality As Applied to Disability Discrimination Laws: Where Does it Leave Students with Disabilities Studying Abroad? 14 Stan. L. Pol’y Rev. 291, 309 (2003).

V. CONTRACT ISSUES

A. Accreditation requirements – Middle States as case study

1. “Any institution accredited by [Middle States] is held responsible for all activities carried out in the institution’s name. [Middle States] accreditation standards, policies, and procedures, especially [Middle States] policies regarding outcomes assessment, advertising, and recruitment, apply to any contractual arrangements as well as to the [Middle States-accredited] institution’s regular activities.” Middle States, Policy -- Contracts by Accredited and Candidate Institutions for Education-Related Services at 1, available at http://www.mscche.org/documents/P3.2-ContractsforServices[1].doc (“Policy on Contracts”); see also Characteristics of Excellence at 60.

2. If a Middle States-accredited institution contracts with an international institution to provide any aspect of the educational experience, the contract should:

(a) Be in English and in the primary language of the host institution

(b) State that the legal jurisdiction under which its provisions will be interpreted will be that of the Middle States-accredited institution

(c) Provide protection for enrolled records for storage of records

(d) Assure that the conduct of courses meets the standards of the Middle States-accredited institution’s regular programs as disclosed fully in the institution’s publications

(e) Assure that the credit-granting institution adequately reviews and approves work performed in each functional area by the contractor

(f) Be executed only by duly designated officers of the institution and their counterparts within the contracting institution
(g) Clearly establish

(i) Services to be performed by each party

(ii) Period of the agreement

(iii) Conditions under which any possible renewal, renegotiation, or termination of the contract can take place

(iv) Appropriate protection for enrolled students in the event that the contract is terminated or renegotiated

(v) Procedures for grievances regarding any aspect of the offerings

(vi) Appropriate avenues for addressing perceived breaches of contract.

(h) Explicitly define:

(i) The institution(s) awarding academic credit

(ii) Educational courses, program(s), and services included in the contract

(iii) How outcomes assessment will be conducted

(iv) How faculties of the contracting entities will periodically review the courses and programs

(v) How student support services necessary to the courses/program(s) will be assured

(vi) How student access to learning resources requisite for the courses/program(s) will be assured

(i) Explicitly state financial arrangements that

(i) specify the compensation and other considerations for services provided by each of the parties

(ii) set forth a mechanism to account for the services provided by each of the parties

(iii) meet all legal requirements for federal and state student aid programs that might be used by students or the contracting entities.

Characteristics of Excellence at 60-61; International Programs at 1; Policy on Contracts at 2-4.

3. Obligations of the Middle States-accredited institution vis a vis foreign party
(a) Confirm that the foreign party to the contract is legally qualified to enter into the contract. *International Programs* at 1. Author’s note: The institution can confirm so through diligence and appropriate representations in the contract.

(b) Inform the non-Middle States-accredited party that the contract does not imply or extend any accredited status to that entity. *Policy on Contracts* at 1. Author’s note: The contract can so specify.

(c) Be responsible for the accuracy of all advertising and promotional materials. *Policy on Contracts* at 2; see also *Middle States, Policy on Advertising, Student Recruitment, and Representation of Accredited Status* (effective Nov. 19, 2010), available at http://www.msche.org/documents/P4.2-AdvertisingRecruitmentrevised62509-1.pdf.

(d) Be ultimately responsible for admissions criteria, appointment of faculty, content of courses/programs, instructional support services (library/information resources, etc.), institutional and student learning outcomes assessment. *Policy on Contracts* at 2. Author’s note: The obligations of the Middle States-accredited institution to control core functions may conflict with similar obligations of the foreign institution under comparable standards of its quality assurance agency.

4. In addition, if the foreign party is not regionally accredited, the Middle States-accredited institution must:

   (a) Be responsible for review and approval of the content of the courses/programs through institutional representatives who have credentials appropriate to the level and content of the course or program.

   (b) Follow all procedures established by the institution’s governance structure and by Middle States for approval of the courses/programs.

   (c) Have not only the contractual obligation, but also systematic processes to oversee advertising and recruitment, admissions, appointment of faculty, content and rigor of course/program(s), evaluation of student work, award of credit/certificates/degrees, outcomes assessment, academic advising, and support services.

   *Id.* at 4-5.

5. The Middle-States accredited institution must submit the contract to

   (a) Federal and state agencies when required by regulation

   (b) Middle States

      (i) When required by federal or state regulations

      (ii) When appropriate, as part of a request for approval of a substantive change *(see Substantive Change Policy, supra)*

The National Association of College and University Attorneys
When requested by Middle States and evaluators acting on its behalf

Policy on Contracts at 4.

B. ED requirements

1. Current regulation on written arrangements

(a) Under a study abroad program, if an eligible institution (that is, a U.S. postsecondary education institution that qualifies to participate in federal student financial aid programs under Title IV of the HEA) enters into a written arrangement with a foreign institution, or an organization acting on behalf of a foreign institution, under which the foreign institution provides part of the educational program of students enrolled in the eligible institution, ED considers that educational program to be eligible for Title IV aid if the program otherwise satisfies the requirements for written arrangements between eligible institutions and ineligible institutions or organizations described below. 34 C.F.R. §§ 600.2, 668.5(b).

(b) If an eligible institution enters into a written arrangement with an institution or organization that is not an eligible institution under which the ineligible institution or organization provides part of the educational program of students enrolled in the eligible institution, ED considers the educational program to be eligible for Title IV aid if:

(i) The ineligible institution or organization has not had its eligibility to participate in Title IV programs terminated by ED, or has not voluntarily withdrawn from participation in those programs under a termination, show-cause, suspension, or similar type proceeding initiated by the institution’s state licensing agency, accrediting agency, guarantor, or ED;

(ii) The educational program otherwise satisfies the requirements for an eligible program in 34 C.F.R. § 668.8 (e.g., in the case of an institution of higher education, the program leads to a degree, is at least a two-academic-year program that is acceptable for full credit toward a bachelor’s degree, or is at least a one-academic-year training program that leads to a certificate, degree, or other recognized educational credential and that prepares a student for gainful employment in a recognized occupation);

(iii) The ineligible institution or organization provides only a limited portion of the educational program:

(1) Not more than 25 percent of the educational program or

(2) More than 25 percent, but not more than 50 percent of the educational program; the eligible institution and the ineligible institution or organization are not owned or controlled by the same individual, partnership, or corporation; and the eligible institution’s accrediting agency has specifically determined that the institution’s arrangement
meets the agency’s standards for the contracting out of educational services. 34 C.F.R. § 668.5(c).


(a) If an eligible institution enters into a written arrangement with another eligible institution, or with a consortium of eligible institutions, under which the other eligible institution or consortium provides part of the educational program to students enrolled in the first institution, ED considers that educational program to be an eligible program if the educational program offered by the institution that grants the degree or certificate otherwise satisfies the requirements for an eligible program in 34 C.F.R. § 668.8 (e.g., in the case of an institution of higher education, the program leads to a degree, is at least a two-academic-year program that is acceptable for full credit toward a bachelor’s degree, or is at least a one-academic-year training program that leads to a certificate, or other nondegree recognized educational credential and that prepares a student for gainful employment in a recognized occupation). 75 Fed. Reg. at 66948 (emphasis added).

(b) For written arrangements between eligible and ineligible institutions, the new regulation adds circumstances in which an education program would be ineligible for Title IV aid because ED has rejected the ineligible institution for participation in Title IV programs. Id.

(c) If an institution enters into a written arrangement, it must provide to prospective and enrolled students a description of the arrangement, including but not limited to:

(i) The portion of the educational program that the institution that grants the degree or certificate is not providing;

(ii) The name and location of the other institutions or organizations that are providing the portion of the educational program that the institution that grants the degree or certificate is not providing;

(iii) The method of delivery of the portion of the educational program that the institution that grants the degree or certificate is not providing; and

(iv) Estimated additional costs students may incur as a result of enrolling in an educational program that is provided, in part, under the written arrangement. Id. at 66948, 66954.

(d) Under ED’s new regulation on misrepresentation, ED may hold an institution participating in Title IV programs responsible for substantial misrepresentations made to students, prospective students, and others concerning the nature of the program, financial charges, and the employability of graduates made by an ineligible institution, organization, or person with whom the institution has an agreement to provide educational programs. Id. at 66958-59.
C. Termination (including teach-out)

1. Under ED regulations relating to recognition of accreditors, an institutional accreditor must require an institution it accredits or preaccredits to submit a teach-out plan to the accreditor for approval, among other circumstances, if the institution notifies the accreditor that it intends to close a location that provides 100 percent of at least one program. 34 C.F.R. § 602.24(c)(1).

(a) A “teach-out plan” is a written plan developed by an institution that provides for the equitable treatment of students if an institution, or an institutional location that provides 100 percent of at least one educational program, ceases to operate before all students have completed their program of study, and may include, if required by the institution’s accreditor, a teach-out agreement between institutions. Id. § 600.2.

(b) The accreditor must evaluate the teach-out plan to ensure it provides for the equitable treatment of students under criteria established by the accreditor, specifies additional charges, if any, and provides for notification to the students of any additional charges. Id. § 602.24(c)(2).

2. The accreditor may require an institution it accredits or preaccredits to enter into a teach-out agreement as part of its teach-out plan.

(a) A teach-out agreement is a written agreement between institutions that provides for the equitable treatment of students and a reasonable opportunity for students to complete their program of study if an institution, or an institutional location that provides 100 percent of at least one educational program, ceases to operate before all enrolled students have completed their program of study. Id. § 602.3.

(b) If the accreditor requires a teach-out agreement, the institution must submit the agreement to the accreditor for approval. The accreditor may approve the teach-out agreement only if the agreement is between institutions that are accredited or preaccredited by a nationally recognized accrediting agency, is consistent with applicable standards and regulations, and provides for the equitable treatment of students by ensuring that the teach-out institution:

(i) Has the necessary experience, resources, and support services to

(1) Provide an educational program that is of acceptable quality and reasonably similar in content, structure, and scheduling to that provided by the institution that is ceasing operations either entirely or at one of its locations; and

(2) Remain stable, carry out its mission, and meet all obligations to existing students; and

(ii) The teach-out institution demonstrates that it can provide students access to the program and services without requiring them to move or travel substantial
distances and that it will provide students with information about additional charges, if any. *Id.* § 602.24(c)(4)-(5).

3. Middle States as case study


(b) The institution must give notice to Middle States “no later than six months prior to the planned closing/merger date. Such plans will ordinarily be reviewed through the Substantive Change approval process.” (emphasis added).

(c) The institution may continue to grant its degree “[w]hen a student chooses to continue at another institution but is within a year or 18 months of completing an academic degree in the closing institution”.

(d) When faculty and staff are no longer needed, “the institution should make every effort to assist them in finding alternative employment.” The institution should provide reasonable notice to all affected employees, explaining the reasons “for retaining some personnel longer than others.”

(e) Students “have the right to expect basic minimal services during the final semester”.

(f) Middle States policy also addresses such topics as transfer of students to the teach-out institution, academic transcripts and financial aid records, completion of the institution’s obligations, provision for faculty and staff, closing date, disposition of assets, and other considerations.

4. If the institution has agreements with third parties with respect to the foreign campus, the institution should review termination provisions of relevant contracts.

5. The foreign host country may have laws and regulations relating to program closure. Institutions should consult in-country counsel with respect to campus closure.