

# Primer

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## Laws relating to Education Sector in India

June 2017



## About NDA

Nishith Desai Associates (NDA) is a research based international law firm with offices in Mumbai, Bangalore, Palo Alto (Silicon Valley), Singapore, New Delhi, Munich and New York. We provide strategic legal, regulatory, and tax advice coupled with industry expertise in an integrated manner.

As a firm of specialists, we work with select clients in select verticals on very complex and innovative transactions and disputes.

Our forte includes innovation and strategic advice in futuristic areas of law such as those relating to Bitcoins (block chain), Internet of Things (IOT), Aviation, Artificial Intelligence, Privatization of Outer Space, Drones, Robotics, Virtual Reality, Med-Tech, Ed-Tech and Medical Devices and Nanotechnology.

We specialize in Globalization, International Tax, Fund Formation, Corporate & M&A, Private Equity & Venture Capital, Intellectual Property, International Litigation and Dispute Resolution; Employment and HR, Intellectual Property, International Commercial Law and Private Client. Our industry expertise spans Automobile, Funds, Financial Services, IT and Telecom, Pharma and Healthcare, Media and Entertainment, Real Estate, Infrastructure and Education. Our key clientele comprise marquee Fortune 500 corporations.

Our ability to innovate is endorsed through the numerous accolades gained over the years and we are also commended by industry peers for our inventive excellence that inspires others.

NDA was ranked the 'Most Innovative Asia Pacific Law Firm in 2016' by the Financial Times - RSG Consulting Group in its prestigious FT Innovative Lawyers Asia-Pacific 2016 Awards. While this recognition marks NDA's ingress as an innovator among the globe's best law firms, NDA has previously won the award for the 'Most Innovative Indian Law Firm' for two consecutive years in 2014 and 2015.

As a research-centric firm, we strongly believe in constant knowledge expansion enabled through our dynamic Knowledge Management ('KM') and Continuing Education ('CE') programs. Our constant output through Webinars, Nishith.TV and 'Hotlines' also serves as effective platforms for cross pollination of ideas and latest trends.

Our trust-based, non-hierarchical, democratically managed organization that leverages research and knowledge to deliver premium services, high value, and a unique employer proposition has been developed into a global case study and published by John Wiley & Sons, USA in a feature titled 'Management by Trust in a Democratic Enterprise: A Law Firm Shapes Organizational Behavior to Create Competitive Advantage' in the September 2009 issue of Global Business and Organizational Excellence (GBOE).

A brief below chronicles our firm's global acclaim for its achievements and prowess through the years.

- IDEX Legal Awards: In 2015, NDA won the "M&A Deal of the year", "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm" and "Best Dispute Management Firm<<http://idexlegalawards.in/ArticlePage.aspx?aid=6>>". Nishith Desai was also recognized as the 'Managing Partner of the Year' in 2014.
- Merger Market: has recognized NDA as the fastest growing M&A law firm in India for the year 2015.
- Legal 500 has ranked us in tier 1 for Investment Funds, Tax and Technology-Media-Telecom (TMT) practices (2011, 2012, 2013, 2014, 2017)
- International Financial Law Review (a Euromoney publication) in its IFLR1000 has placed Nishith Desai Associates in Tier 1 for Private Equity (2014, 2017). For three consecutive years, IFLR recognized us as the Indian "Firm of the Year" (2010-2013) for our Technology - Media - Telecom (TMT) practice.
- Chambers and Partners has ranked us # 1 for Tax and Technology-Media-Telecom (2014, 2015, 2017); #1 in Employment Law (2015 & 2017); # 1 in Tax, TMT and Private Equity (2013, 2017); and # 1 for Tax, TMT and Real Estate – FDI (2011).
- India Business Law Journal (IBLJ) has awarded Nishith Desai Associates for Private Equity, Structured Finance & Securitization, TMT, and Taxation in 2015 & 2014; for Employment Law in 2015
- Legal Era recognized Nishith Desai Associates as the Best Tax Law Firm of the Year (2013).

Please see the last page of this paper for the most recent research papers by our experts.

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# 1. Pre-Primary Education

## I. What is a pre-primary school?

'Pre-Primary School' is defined differently under different state laws. Generally speaking, preparatory schools for children between the age of 3 to 6 years are referred to as pre-primary schools.

The State of Tamil Nadu has differentiated between a pre-primary school and playschool. As per the Code of Regulations for Play Schools, 2015 ("**TN Code**") a school has been defined as a *"Play School and includes Kids School or any other Pre Kinder Garten School by whatever name it is called, which is established for imparting Informal Education to children in the age group of one and a half years to five and half years."*

## II. Do you require any approvals or permissions to set up a pre-primary school?

Pre- primary schools are unregulated in most states. In some states, the applicable state laws require that preschools should take prior approval of regulatory authorities for setting up/ running a pre-primary school. In certain states, a stand - alone pre-primary school is also regulated (for instance Andhra Pradesh), while in other states only pre-schools attached to a primary or secondary school are regulated. Thus, one needs to review the state laws to understand if any regulations are applicable to them, before setting up a pre-school.

Recently, in January 2017, the National Commission for Protection of Child Rights released the Regulatory Guidelines for Private Play Schools for the children of the age of three to six years. These guidelines set out various compliances for pre-schools, including the entity structure to be adopted by them for setting up such schools. Since these are guidelines, the states have the power adopt these guidelines and make a law on that basis.

## III. What are the types of entities or structures that can be used for setting up pre-primary schools?

In states where pre-schools or standalone pre-schools are unregulated, a pre-school can be set up as a for-profit entity as well. Thus, individuals, sole proprietorships, partnerships, societies, trusts and private limited companies can operate in the pre-school sector. However, states which regulate pre-schools usually specify in the state laws that trusts, societies and not-for-profit entities/ companies under Section 8 should be used for setting up pre-primary schools.

## IV. Are there any infrastructure norms or requirements for preschools?

Generally, no. But in some states where preschools are regulated, preschools need to comply with infrastructure norms and requirements prescribed under the relevant state laws.

## V. Is franchising allowed in the pre-schools segment?

Yes. In fact, large pre-school chains such as Euro kids etc., operate under a franchise model.

## VI. What should an investor know about the regulatory environment before investing in a pre-school?

This sector is largely unregulated with flexibility of structuring and operations. However, some states have specific laws to regulate pre-schools. If pre-schools are regulated in a particular state, investors should evaluate the state specific requirements to ensure that they are not onerous and do not impact the end objectives of the investor.

## VII. What is the role of IP and how important is it in the pre-school sector?

Apart from tangible assets such as land, furniture and fixtures, intangibles such as brand name of the pre-school (which is protected as a trademark), copyrighted material (such as teaching material, ambience manual, books etc.) and know how (such as teaching techniques and methodologies) are important assets.

Since franchising in pre-school sector is permitted and very popular as well, protection of brand name is key. A well established and protected brand leads to a higher valuation for the business as well. Thus, it is essential for schools to protect their names/brand names so as to prevent any other school or person from using the same or similar name. Likewise, it is essential not to use any similar or confusingly similar name of another school which may give rise to unwanted litigation at any stage.

Similarly, teaching material and the techniques are what makes one school unique vis-à-vis another. Hence, wherever possible, all innovative techniques and material should be protected under the relevant IP laws.

Further, agreements with the employees, consultants and third parties should have an express clause stating that the intellectual property created by them vests with the entity operating the school.

## 2. K-12 Education

### I. What is K-12 education?

K-12 education is a terminology used to refer to primary and secondary education system.

### II. What type of entities can be used for setting up a K-12 school?

Most states laws require that K-12 education should be offered by a not for profit entity i.e. a charitable trust or a society or a Company under Section 8. The only exception is the state of Hararyana, which permits a for profit/private limited company to set up a school.

### III. Which are the different boards of education regulating the K-12 education system in India?

There are Central (private and public) and State specific boards which are set up under the different State and Central laws. Some of the boards are:

- Central Board of Secondary Education (“**CBSE**”)
- Council for the Indian School Certificate Examinations (“**CICSE**”)
- International General Certificate of Secondary Education (“**IGCSE**”)
- Secondary School Certificate (“**SSC**”)

In addition there are:

- International Baccalaureate (“**IB**”) Education systems
- University of Cambridge International Examinations (“**CIE**”)

### IV. What kind of permissions are required to set up a K-12 institute?

The kind of permissions required for setting up K-12 schools depend on the state specific laws. Usually, there are permissions to be received from the state education department (such as a no objection certificate to start a school etc.) as well as from the local municipal bodies (water, fire and safety related permissions). Once a school has been established it is required to be affiliated to one of the boards as mentioned in the question above. These boards prescribe specific norms that are required to be fulfilled by the school.

## V. Do private schools have the flexibility to decide their own fees?

Usually, yes. However, the schools should not engage in profiteering or charge capitation fee (i.e. amount paid in the form of donation to obtain admission in a school or for promotions to another class). Certain states like the state of Gujarat, Tamil Nadu, Rajasthan and Maharashtra have enacted state specific laws to regulate school fees. These laws need to be complied with for the purpose of determining school fees. In Delhi, if land is taken on lease from the government, the lease agreement will typically have provisions dealing with school fees and its increase.

## VI. What is the Right to Education Act?

The Right of children to Free and Compulsory Education Act, 2009 (referred as “**RTE**”) is a central or federal law. ‘Right to Education’ means, free and compulsory elementary education in a neighborhood school to all children of India in the age group of 6-14. Under this legislation, neither is a child required to pay any fee or charges which prevents a child from obtaining education nor can he be held back, expelled or required to pass a board exam. This is a central law and the states have enacted state specific rules to implement the law. Failure to comply with the provisions of this legislation may result in penalty and closure of the school.

## VII. Does a private school which does not receive any grants from the government also have to abide by the RTE Act and corresponding rules?

Yes, all schools have to comply with the provisions of RTE Act. However, as per the judgment in the case of *Pramati Educational and Cultural Trust and Ors v. Union of India*, minority aided and minority unaided schools are exempt from the applicability of this Act.

## VIII. What is the consequence of school not complying with the provisions of RTE?

The RTE Act and its corresponding State specific rules make a school liable for a penalty of up to INR one hundred thousand.

Further, no school, other than a school established, owned or controlled by the appropriate government or the local authority, shall, after the commencement of this Act, be established or function, without obtaining a certificate of recognition from a relevant authority. Such certificate of recognition can be withdrawn by the authority in cases of contravention of the conditions of recognition.

## IX. What should an investor know about the regulatory environment in the K-12 education system?

K-12 education is heavily regulated by federal and state specific laws. Whilst foreign direct investment is permitted up to 100% under the automatic route, schools can be set up only by a not-for-profit entity under local laws. Since monies cannot be upstreamed to investors, in the traditional corporate sense, from a not-for-profit entity, careful structuring is required for investment planning and for upstreaming monies from such entities. The RTE Act and fee regulation regime (which regulates the fee that can be charged by the schools and the increase in such fees) may have an overall effect on the cash flows of the school.

## X. Are education institutions such as schools eligible for tax exemptions?

Yes, schools set up as not-for-profit entities are eligible for certain exemptions from income tax.

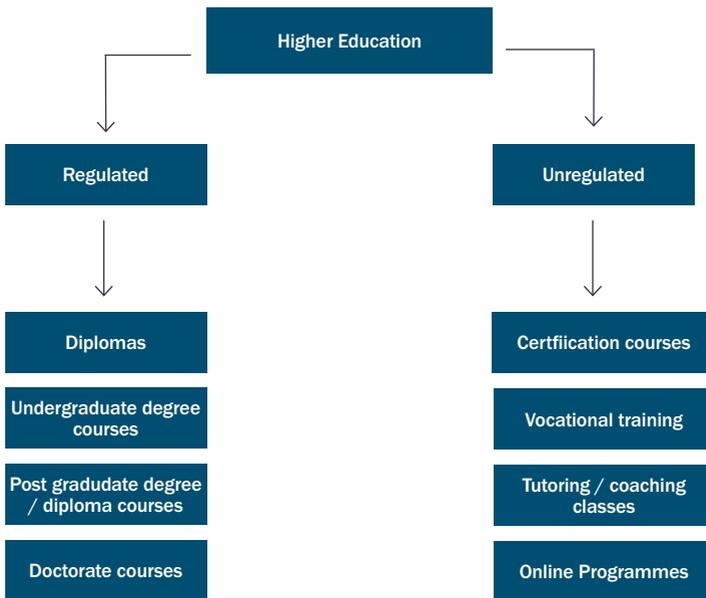
### 3. Higher Education and Edtech

#### 1. What does higher education include?

Higher education in India refers to education obtained post K-12. . It is broadly categorized into two segments:

- i. Regulated Sector: This includes diploma courses, bachelors/undergraduate degrees, masters/ post graduate degrees and pre-doctoral and doctoral programs. The regulated sector is further classified into technical and non-technical education.
- ii. Unregulated Sector: Unregulated courses include certification courses, vocational training, tutoring/coaching classes and online education programs. These courses do not lead to award of degree or diploma

A graphical representation of the Higher Education sector:



## II. Which are the regulatory bodies for higher education?

- i. All India Council for Technical Education (“**AICTE**”): The AICTE regulates technical courses, which are defined as programs of education, research and training, in engineering technology, architecture, town planning, management, pharmacy, applied arts and crafts.
- ii. University Grants Commission (“**UGC**”): The UGC regulates, non- technical courses that lead to the award of a degree. Non- technical education refers to courses other than technical courses.
- iii. Statutory Professions Councils such as the Medical Council of India, Bar Council of India, Dental Council of India, Indian Nursing Council etc.
- iv. Accreditation agencies
- v. State level education bodies such as the directorate of education.

## III. What is technical education and how is it regulated?

‘Technical Education’ has been defined in the All India Council for Technical Education Act, 1987 (“**AICTE Act**”) to mean *“programs of education, research and training in engineering, technology, architecture, town planning, management, pharmacy and applied arts and crafts and such other programme or areas as the Central Government may, in consultation with the AICTE, by notification in the Official Gazette, declare”*.

Technical courses are usually regulated by the AICTE. However, in the recent past, there has been regulatory ambiguity over the contesting and sometimes overlapping jurisdictions of AICTE and UGC specifically with respect to management programs which are as such covered in the definition of technical education under the AICTE Act.

## IV. What is non-technical education?

Non-technical education refers to courses, other than technical courses. To the extent they lead to the award of a degree or diploma, they are regulated by the UGC.

## V. Are separate licenses/permissions/approvals etc. required to offer courses in certain professional fields, such as teaching, law, business, computer science or nursing?

Yes. Certain professional courses are regulated by statutory professional councils in India. The Medical Council of India (MCI), Bar Council of India, Dental Council of India, Indian Nursing Council, etc., are some of the notable councils. These councils have been empowered to prescribe standards and formulate regulations with respect to their field of operation.

## VI. Are Foreign Educational Institutions (FEIs) allowed to establish an individual campus in India?

As per the current laws in India, foreign educational institutions (“FEI”) cannot establish an independent campus in India for the purpose of offering degree programmes.

In order to bring a change in the regulatory framework, the Indian government, on September 10, 2013, had issued a press release regarding its intention to allow FEIs to set up campuses in India (without having to collaborate with domestic educational institutions). As per the said press release, the Ministry of Human Resource and Development, which regulates education in India, was to finalize certain rules for allowing FEIs to set up campuses in India and issue foreign degrees. These rules were never published or notified. The discussion to allow FEI to set up campus in India seems to have gained momentum once again in recent times.

However, currently, the only manner in which the FEIs can offer a degree programme is through the means of a physical presence in India, is by way of collaboration with Indian institutes.

There are specific regulations by the AICTE and UGC that will need to be complied with if the FEI enters into collaboration with an Indian institute. The nature of regulations will depend on the nature of courses proposed to be offered. The relevant regulations are AICTE Regulation for Entry and Operation of Foreign Universities/Institutions Imparting Technical Education in India, 2005 and the University Grants Commission (Promotion and Maintenance of Standards of Academic Collaboration between Indian and Foreign Educational Institutions) Regulations, 2016 (“**2016 Regulations**”).

## VII. What is Distance Education?

Open and Distance Education (“ODL”) refers to a mode of study where a student may/ may not be required to attend classes in person. Education is imparted through various means, such as sharing of study material by the university/ colleges, study centers etc.

Such ODL programs could *inter alia* be offered by:

- i. Open Universities (“OUs”) - which offer education through distance mode and are established by an act of Parliament or state legislature;
- ii. Distance Education Institutions (“DEIs”) - which offer education through regular mode and ODL mode and are institutions that can be Central Universities, State Universities, Deemed to be Universities, institutions of national importance or any other institutions of higher learning recognized by central/state governments.<sup>1</sup>

Distance education in India is regulated to ensure the quality of education and to keep a check on credibility of the institutes offering such programs.

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1. [http://www.dec.ac.in/Documents/Recognition%20of%20open%20and%20Distance%20Learning%20\(ODL\)%20Institutions%20-%20Handbook%202009.pdf](http://www.dec.ac.in/Documents/Recognition%20of%20open%20and%20Distance%20Learning%20(ODL)%20Institutions%20-%20Handbook%202009.pdf)

## VIII. Does India recognize distance learning in Higher Education?

Yes. The Distance Education Council (“DEC”) was the principal body responsible for recognizing and regulating open universities and distance education system in India and only an institute recognized by the DEC could offer education through open and distance learning (ODL) mode.

The DEC has been dissolved in May 2013 and the UGC has assumed the functioning of the DEC. The UGC has adopted the ‘Guidelines of the DEC on Minimum Requirements for recognition of ODL institutions’, till such time the UGC frames regulation for ODL institutions.

## IX. Is online education regulated in India?

Yes and no! There is no specific legislation for regulating courses offered in India. To the extent such courses fall under the ambit of an ODL, they will be regulated by UGC. However, certification programs offered through online medium are usually unregulated. Further, several edtech programs have gained momentum. Such programs while being famous fall under the ambit of online unregulated courses.

## X. Does India recognize degrees obtained by pursuing online programs offered by international universities/ educational institutions?

The Association of Indian Universities (“AIU”) is the main body responsible for providing equivalence certification for foreign qualifications. AIU has certain criteria for recognizing a foreign degree, which inter alia includes the requirement that the student should pursue the programme of the study full time as a regular student on the campus of the foreign university. Given that students enrolled in online programmes are not full time students studying on the campus of the university, AIU does not recognize such online degrees. However, policy changes in this sector are expected soon.

In addition to the AIU, certain professional councils like Medical Council of India, Bar Council of India etc. also publish a list of foreign institutes and the qualifications offered by such institutes, for the purpose of recognizing the same in India.

## XI. What are the popular structures in the unregulated space?

To avoid the regulatory hassles, FEI’s are increasingly exploring opportunities in the unregulated sector. Some of the business models commonly adopted by FEIs are:

- Online programmes - Offshore business model

A number of international players provide education services in India, from outside India. Examples, MOOCs. Some providers even offer degree programmes through online medium to students in India.

- License Arrangement

FEIs may enter into license arrangements with Indian educational institutions wherein they license the brand name, curriculum, know how, etc. to the Indian party.

- Services Arrangement

FEIs also enter into a services arrangement with the Indian institute where they provide services such as advising on standards for the evaluation of students, teacher qualifications, advertising, infrastructure, etc.

- Combination of License and Service Arrangement

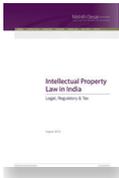
- Setting up of Knowledge/ Research Centers

## XII. What should an investor know about the regulatory environment in the higher education system?

It's complex! Both Central and State laws govern the regulated sector. The entity structure for offering higher education should be in the nature of not-for-profit. Since repatriation from a not-for-profit structure is not possible, the flow of funds need to be structured. However, there are no regulations for the online education space and thus it offers a great opportunity.



The following research papers and much more are available on our Knowledge Site: [www.nishithdesai.com](http://www.nishithdesai.com)

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## NDA Insights

TITLE	TYPE	DATE
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## Research @ NDA

**Research is the DNA of NDA.** In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Research has offered us the way to create thought leadership in various areas of law and public policy. Through research, we discover new thinking, approaches, skills, reflections on jurisprudence, and ultimately deliver superior value to our clients.

Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our "*Hotlines*". These *Hotlines* provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our *NDA Insights* dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research papers and disseminate them through our website. Although we invest heavily in terms of associates' time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with a much needed comparative base for rule making. Our *ThinkTank* discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

As we continue to grow through our research-based approach, we are now in the second phase of establishing a four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. The center will become the hub for research activities involving our own associates as well as legal and tax researchers from world over. It will also provide the platform to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear from you about any suggestions you may have on our research reports.

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