



THE COMMONWEALTH OF MASSACHUSETTS

August 24, 2016

The Honorable John B. King, Jr.
Secretary of Education
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

RE: Comment on Notice of Proposed Rulemaking - State Authorization Regulations

Dear Secretary King:

Thank you for the opportunity to comment on the proposed state authorization regulations in the Department of Education's ("Department") July 25, 2016, *Program Integrity and Improvement* Federal Register Notice (34 C.F.R. Parts 600 and 668) ("Notice"). This consolidated response is submitted on behalf of the Massachusetts Board and Department of Higher Education (the Commonwealth's SHEEO agency), the Office of the Attorney General, and the Executive Office of Education.

We appreciate the Department's effort to update these rules in light of the evolving landscape of higher education, while reinforcing the important role States play in advancing quality and protecting students. And we strongly encourage the Department to provide two clarifications regarding its proposed definition of "State authorization reciprocity agreement" to ensure that the plain language of the definition reflects the Department's clear intent to promote the States' consumer protection function.

We are pleased that the Department has proposed to update its state authorization rules to address the expansive growth of distance education in higher education. Reciprocity, for example, is a compelling solution to address process issues raised for institutions by the growing prevalence of distance education programs, and there may be great virtues for state higher education agencies in a reciprocity approach as well. We also agree with the Department that as the postsecondary education landscape evolves, States must continue to play a critical oversight role. In addition to establishing public systems of higher education and administering certain oversight functions for private institutions, a State provides consumer protections to its students and serves as an accessible and accountable venue for students to register complaints such as those related to fraud, waste, and abuse and to seek relief for any harm suffered as a result. We applaud the Department for its attention to the State's consumer protection role throughout its Notice.

The Department observes, with respect to multi-state reciprocity agreements created to meet the requirements for state authorization, "we strongly believe that a State should be active in protecting its own students, and therefore such agreements should not prohibit a participating State from enforcing its own consumer protection laws." It goes on to emphasize, "Thus, any reciprocity agreement that would prohibit a participating State from enforcing its own consumer protection laws would not comply with our proposed definition of a State authorization reciprocity agreement, nor meet the requirements for State authorization under 34 CFR 600.9." Further, the Department's proposed regulatory language, at 34 C.F.R. § 668.50(b)(3), requires an institution to disclose "[a] description of the process for submitting *consumer* complaints in each State in which the program's enrolled students reside, including information for receipt of consumer complaints at the appropriate

State authorities” (emphasis added). This disclosure is mandated in addition to the required disclosure of the applicable student complaint process and applies in instances when a State authorization reciprocity agreement governs. We observe further, and would welcome the Department’s confirmation, that any reciprocity arrangement joined by *States* pursuant to this federal regulation cannot undermine the rights afforded to an individual *student* by the laws of the State in which he or she lives. While preserving States’ rights to enforce their own laws is essential to consumer protection, so too is maintaining the legal rights of students established in State statute and regulation.

Given the Department’s clear interest in ensuring that the proposed state authorization regulations do not curtail a State’s full authority to enforce its consumer protection laws, we recommend that the Department provide two clarifications regarding its proposed definition of “State authorization reciprocity agreement” found at 34 C.F.R. § 600.2.¹

First, the Department should clarify that a State authorization reciprocity agreement cannot prevent a State from enforcing its consumer protection statutes *and regulations*, both general *and specific*. The proposed definition states that a State authorization reciprocity agreement may not prevent a State “from enforcing its own consumer protection laws.” We understand and assert that the most reasonable understanding of the term “its own consumer protection laws” encompasses a State’s consumer protection statutes and the regulations interpreting such statutes, both general and specific, including those directed at all or a subset of educational institutions. It is reasonable to conclude based on the stated purpose of these state authorization rules that states’ consumer protection laws, encompassing both statutes and regulations, ought to continue to play an integral role in the oversight of distance education. We therefore encourage the Department to confirm this interpretation either through a discrete revision within the definition, if the Department should deem it necessary, or in any discussion provided in its Final Notice.

To put this request into context, Massachusetts long has been viewed as a leader in higher education; the Department of Higher Education’s comprehensive regulations governing degree-granting authority establish high standards for program quality. Likewise, we also consider the Commonwealth to be a bellwether with respect to the protections provided to our college students; the Office of the Attorney General recently promulgated rigorous pre-enrollment disclosure regulations regarding cost, graduation rate, job placement, and loan default rates. The regulations also require compliance with our state educational refund statute.² These provisions apply specifically to proprietary and occupational schools, including distance learning programs and aim to protect students from unfair and deceptive practices, many of which were noted by the Department in its Notice. Indeed, the Attorney General is currently using these standards and is investigating multiple distance learning programs. The leading State authorization reciprocity agreement to date (NC-SARA) states that “general-purpose laws enforced by state...law enforcement agencies shall not be affected or superseded” by the reciprocity agreement. However, NC-SARA expressly requires States to exempt distance learning programs participating in the agreement from any state consumer protection provisions directed specifically at educational institutions.³ This standard has been reiterated repeatedly by NC-SARA spokespersons; under their interpretation, consumer protection laws specifically targeted to the higher education community would be inconsistent with that provision. Therefore, a clarification of the Department’s proposed definition of a State authorization reciprocity agreement is critical.

¹ While we believe the proposed regulations as drafted sufficiently cover the points we raise below, we are mindful of comments the Department has received that request alterations that would effect a different result. The two clarifications we seek thus would provide an explicit endorsement of our understanding of the draft rules.

² See 940 CMR 31.05; M.G.L. c. 255, § 13K.

³ *Id.* at 5.1.5-5.1.7; National Council for State Authorization Reciprocity Agreements, State Authorization Reciprocity Agreements Policies and Standards, May 5, 2016, p. 5; See also New Sara FAQs, March 13, 2014, <http://www.nc-sara.org/content/new-sara-faqs>.

Second, the Department similarly should clarify that a State authorization reciprocity agreement cannot bar any State from membership on grounds related to its consumer protection laws. The Department’s emphasis on consumer protection in its proposed definition of “State authorization reciprocity agreement” – indeed, the one and only criterion for such an agreement in this provision – reinforces our confidence that a State’s consumer protection statutes and regulations should never be a barrier to its entry into such a reciprocity agreement. We therefore suggest the following revision to the proposed definition of “State authorization reciprocity agreement” at 34 C.F.R. § 600.2:

State authorization reciprocity agreement. An agreement between two or more States that authorizes an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence courses to students in other States covered by the agreement and does not prohibit ~~a participating any~~ State from enforcing its own consumer protection ~~laws~~statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions.

In theory, relying on the language proposed by the Department in its Notice, a prospective State authorization reciprocity agreement could cite the word “participating” and attempt to refuse to admit an otherwise eligible State for membership in or force a State to withdraw from an agreement on the grounds that the State’s consumer protection laws are too rigorous. This would run counter to the Department’s declaration that each “State should be active in protecting its own students,” and we feel certain this is a scenario that the Department does not sanction.

In sum, we appreciate that the Department’s proposed state authorization regulations aim to account for the evolving nature of higher education, including through its endorsement of the concept of multi-state reciprocity. We also commend the Department on its consistent elevation of the State’s critical consumer protection role. We strongly encourage the Department to provide the two recommended clarifications in its Final Notice in order to achieve its envisioned framework for state authorization.

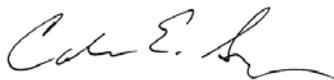
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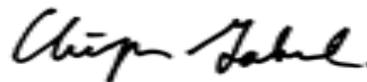
James A. Peyser, Secretary
Executive Office of Education



Maura Healey
Massachusetts Attorney General



Carlos E. Santiago, Commissioner
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Christopher F. O. Gabrieli, Chair
Board of Higher Education