

From: Carolyn Fast, Negotiator for Consumer Advocates/Civil Rights (Primary)
To: Department of Education and Negotiation Committee Members
Date: March 6, 2024
Re: Department's Most Recent Proposal on State Authorization (Issue Paper 2)

The Department's proposal on reciprocity agreements is a step backward from its prior proposals and would leave the current, consumer protection-deficient system in place for the vast majority of institutions and affected students. We urge the Department to preserve the language included in the original Session 3 State Authorization paper to ensure that online students in *all* schools – not only the largest ones – are afforded the protection of state consumer protection laws wherever they live.

If the Department continues with its current approach, we suggest the following changes to the Department's proposal, which, in addition to the incorporation of an adequately low enrollment threshold for requiring direct authorization, would help to address critical consumer protection deficiencies.

Negotiator-proposed language is shown with green highlighting.

Issue Paper 2: State Authorization Session 3: March 4-7, 2024

Issue: Complaint System and Governance in State Authorization

Statutory cites: § 101(a) of the Higher Education Act of 1965, as amended (HEA)

Regulatory cites: 34 CFR 600.2 and 600.9

Proposed Regulations Redline:

§ 600.2 Definitions.

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 located in other States covered by the agreement. ~~and cannot prohibit any member State of the agreement from enforcing its own general-purpose State laws and regulations outside of the State authorization of distance education. [Moved to 600.9(d)(1)(ii)(2)(i)] If a State authorization reciprocity agreement is administered by an organization, the governing body of such organization must consist solely of representatives from States, including regulatory bodies, enforcement agencies, and attorneys general offices, and licensing bodies, and members of the general public. Public members must be separate from and independent of States, institutions, and accrediting agencies, and must not be:~~

~~(1) A current or former employee of, member of the governing board, owner, or shareholder of, or consultant to, an institution or program that is subject to the State authorization reciprocity agreement;~~

~~(2) A current or former member of any trade association or membership organization related to, affiliated with, or associated with an institution or program that is subject to the State authorization reciprocity agreement;~~

~~(3) A current or former employee of or consultant to an accrediting agency that accredits an institution or program that is subject to the State authorization reciprocity agreement; or~~

~~(4) A current or former employee or member of the program integrity triad other than States including the Department of Education and accrediting agencies); [Edited and Moved to 600.9(d)(2)(3)]~~

§ 600.9 State authorization.

(a)

(1) An institution described under §§ 600.4, 600.5, and 600.6 is legally authorized by a State if the State:

~~(i) Ensures the institution complies with any applicable State authorization or licensure requirements, except as described in subsection (3) of this section, and continues to meet a State's general purpose or education-specific laws and regulations; and~~

~~(i) Requires the institution to comply with any applicable State authorization or licensure requirements and all applicable State laws and regulations, except as provided under paragraph (d)(2)(ii);~~

~~(ii) h-Has a process to review and appropriately act on complaints concerning the institution, including enforcing applicable State laws. and the institution meets the provisions of paragraphs (a)(1)(i), (a)(1)(ii), or (b) of this section~~

~~(i)~~

~~(A) The institution is established by name as an educational institution by a State through a charter, statute, constitutional provision, or other action issued by an appropriate State agency or State entity and is authorized to operate educational programs beyond secondary education, including programs leading to a degree or certificate.~~

~~(B) The institution complies with any applicable State approval or licensure requirements, except that the State may exempt the institution from any State approval or licensure requirements based on the institution's accreditation by one or more~~

~~accrediting agencies recognized by the Secretary or based upon the institution being in operation for at least 20 years.~~

~~(ii) If an institution is established by a State on the basis of an authorization to conduct business in the State or to operate as a nonprofit charitable organization, but not established by name as an educational institution under paragraph (a)(1)(i) of this section, the institution—~~

~~(A) By name, must be approved or licensed by the State to offer programs beyond secondary education, including programs leading to a degree or certificate; and~~

~~(B) May not be exempt from the State's approval or licensure requirements based on accreditation, years in operation, or other comparable exemption.~~

(2) The Secretary considers an institution to meet the provisions of paragraph (a)(1) of this section if the institution is authorized by name to offer educational programs beyond secondary education by—

(i) The Federal Government; or

(ii) As defined in 25 U.S.C. 1802(2), an Indian tribe, provided that the institution is located on tribal lands and the tribal government has a process to review and appropriately act on complaints concerning an institution and enforces applicable tribal requirements or laws.

(3) The institution may be exempted from requirements for initial or renewed application for authorization or licensure if:

~~(i) The institution is offering distance education in that State under a State authorization reciprocity agreement, as defined in § 600.2, to students in that State, but is not physically located in that State;~~

~~(ii) Not later than July 1, 2030, a charter, statute, constitutional provision, or other action issued by an appropriate State agency or State entity establishes the institution by name as an educational institution and authorizes it to operate educational programs beyond secondary education, including programs leading to a degree or certificate; or~~

~~(iii) Not later than July 1, 2030, a State action exempts the institution based on the institution's accreditation by one or more accrediting agencies recognized by the Secretary or based on the institution being in operation for at least 20 years.~~

(i) the State authorizes it to operate educational programs beyond secondary education, including programs leading to a degree or certificate and--

(A) It is a public institution backed by the full faith and credit of the State; or

(A)(B) a charter, statute, or constitutional provision, or other action issued by an appropriate State agency or State entity establishes the institution by name as an educational institution; and authorizes it to operate educational programs beyond secondary education, including programs leading to a degree or certificate, though this exemption shall expire on July 1, 2030; or

(ii) A State action exempts the institution based on the institution being in operation on or before November 8, 1965 without undergoing a change of ownership; or

(iii) A State action exempts the institution based on the institution's accreditation by one or more accrediting agencies recognized by the Secretary or based on the institution being in operation for at least 20 years, though this exemption shall expire on July 1, 2030.

(iv) An institution exempt from initial State authorization or licensure requirements under this section that undergoes a change in ownership shall

(A) not be exempted from the requirements of 34 CFR 600.20(h)(3)(ii), which requires that the institution receive approval for the change in ownership from each State in which the institution is physically located or, for an institution that offers only distance education, from the agency that authorizes the institution to legally provide postsecondary education in that State; and

(B) seek initial approval for State authorization.

(b) An institution is considered to be legally authorized to operate educational programs beyond secondary education if it is exempt as a religious institution from State authorization under the State constitution or by State law.

(c)

(1)

(+) If an institution that meets the requirements under paragraph (a)(1) ~~or (b)~~ of this section offers postsecondary education through distance education or correspondence courses to students located in a State in which the institution is not physically located or in which the institution is otherwise subject to that State's jurisdiction as determined by that State, ~~except as provided in paragraph (c)(1)(ii) of this section~~, the institution must meet any of that State's requirements for it to be legally offering postsecondary distance education or correspondence courses in that State. The institution must, ~~upon request~~,

(i) ~~Document~~ the State's approval to the Secretary; or

~~(ii) If an institution that meets the requirements under paragraph (a)(1) or (b) of this section offers postsecondary education through distance education or correspondence courses in a State that participates in a State authorization reciprocity agreement, and the institution is covered by such agreement, the institution is considered to meet State requirements for it to be legally offering postsecondary distance education or correspondence courses in that State, subject to any limitations in that agreement and to any additional requirements of that State not relating to State authorization of distance education. The institution must, upon request,~~

(ii) For institutions participating in a State authorization reciprocity agreement under § 600.2, submit documentation of its coverage under such an agreement to the Secretary.

(2)

(i) For purposes of this section, an institution must make a determination, in accordance with the institution's policies or procedures, regarding the State in which a student is located, which must be applied consistently to all students.

(ii) The institution must, upon request, provide the Secretary with written documentation of its determination of a student's location, including the basis for such determination.

(iii) An institution must make a determination regarding the State in which a student is located at the time of the student's initial enrollment in an educational program and, if applicable, upon formal receipt of information from the student, in accordance with the institution's procedures, that the student's location has changed to another State.

~~(3)~~

~~(i) A State authorization reciprocity agreement must include a process for communicating information received on complaints regarding institutions or programs subject to the State reciprocity agreement to the State in which a student is located at the time of the student's initial enrollment, as determined in accordance with paragraph (c)(2) of this section.~~

~~(ii) If a State authorization reciprocity agreement is administered by an organization, the agreement must require that complaints received by States from institutions subject to the State reciprocity agreement are communicated to the organization. The organization must make information received on complaints public at least annually, including but not limited to the number and type of complaints by institution that is subject to the State reciprocity agreement.~~

(d) If an institution is authorized to offer distance education in another State under a State authorization reciprocity agreement, as defined in § 600.2:

~~(1) It may be exempted from initial State authorization or licensure requirements in that State.~~

(12) Such agreement must:

~~(i) Provide for a State-led process through which participating States can propose and collectively adopt, modify, or eliminate substantive policies of the agreement, including policies on State and institutional participation and the scope of reciprocity. Such a process, and such State-adopted or modified policies, cannot be overruled by any external entities that administer the agreement;~~

~~(iii) Allow any member State of the agreement to enforce its own applicable general purpose general-purpose State laws and regulations to institutions approved pursuant to the agreement, including conditioning or revoking authorization under the reciprocity agreement based on violations of such State laws and regulations, -outside of the initial approval for State authorization of distance education -except for authorization or application fees and processes;~~

[Moved from 600.2]

~~(iii) Include a process for communicating information about a student's complaints related to State authorization and the reciprocity agreement's policies to the State in which the student is located in accordance with paragraph (c)(2)(i)-(iii) of this section, including the time of the student's initial enrollment or, if there has been a formal receipt of information from the student in accordance with the institution's procedures, that the student's location has changed to another State;~~

~~(iv) Permit the member States responsible for receiving, and providing a final determination on, a student complaint, as determined under the agreement's policies, to, at the States' discretion, accept, investigate, and resolve complaints about an institution without the student first going through the institution's own procedures for resolution of grievances under limited circumstances. Reasons for executing State discretion include but are not limited to impracticability, impossibility, inaction by the institution, and possible harm to the student;~~

~~(iiiv) Provide that complaints received by States about institutions subject to the State reciprocity agreement must be communicated to the organization(s) that administer(s) the agreement. The organization(s) must make information received on complaints public at least annually, including but not limited to the number and type of complaints by institution that is subject to the State reciprocity agreement;~~

~~(ivvi) Provide that complaints alleging criminal offenses or violations of a State's general-purpose laws, including but not limited to fraud, misrepresentation, and harassment, may be made directly to appropriate State agencies in the institution's or student's home State; and~~

(vii) permit member States to, at their State's discretion, accept, investigate, and resolve complaints about an institution of higher education that have not yet been submitted to and resolved by the institution of higher education; and

(vi) Not delegate authority to establish policies or to make determinations related to eligibility for State or institutional participation in the agreement to any entity that is not exclusively composed of representatives from member State regulatory or enforcement agencies.

(223) If administered by an organization, the governing body of such organization must consist solely of representatives from State regulatory and licensing bodies, enforcement agencies, and attorneys general offices. [Moved from 600.2]

(34) As a condition of participation, the An institution that enrolls more than 100 students in any State in which the institution does not have a physical presence is not eligible to continue to obtain authorization in such State through a reciprocity agreement. Such institutions must obtain within one year direct authorization from any participating State where it enrolls more than 5100 students and shall be subject to all applicable laws and regulations of such State. Reciprocity agreements cannot prohibit participating States from applying all applicable State laws to such institutions.

(de) An additional location or branch campus of an institution that meets the requirements under paragraph (a)(1) of this section and that is located in a foreign country, i.e., not in a State, must comply with §§ 600.8, 600.10, 600.20, and 600.32, and the following requirements:

(1) For any additional location at which 50 percent or more of an educational program (as defined in § 600.2) is offered, or will be offered, or at a branch campus—

(i) The additional location or branch campus must be legally authorized by an appropriate government authority to operate in the country where the additional location or branch campus is physically located, unless the additional location or branch campus is physically located on a U.S. military base, facility, or area that the foreign country has granted the U.S. military to use and the institution can demonstrate that it is exempt from obtaining such authorization from the foreign country;

(ii) The institution must provide to the Secretary, upon request, documentation of such legal authorization to operate in the foreign country, demonstrating that the foreign governmental authority is aware that the additional location or branch campus provides postsecondary education and that the government authority does not object to those activities;

(iii) The additional location or branch campus must be approved by the institution's recognized accrediting agency in accordance with § 602.22(a)(2)(ix) and (c).

(iv) The additional location or branch campus must meet any additional requirements for legal authorization in that foreign country as the foreign country may establish;

(v) The institution must report to the State in which the main campus of the institution is located at least annually, or more frequently if required by the State, the establishment or operation of each foreign additional location or branch campus; and

(vi) The institution must comply with any limitations the State places on the establishment or operation of the foreign additional location or branch campus.

(2) An additional location at which less than 50 percent of an educational program (as defined in § 600.2) is offered or will be offered must meet the requirements for legal authorization in that foreign country as the foreign country may establish.

(3) In accordance with the requirements of 34 CFR 668.41, the institution must disclose to enrolled and prospective students at foreign additional locations and foreign branch campuses the information regarding the student complaint process described in 34 CFR 668.43(b), of the State in which the main campus of the institution is located.

(4) If the State in which the main campus of the institution is located limits the authorization of the institution to exclude the foreign additional location or branch campus, the foreign additional location or branch campus is not considered to be legally authorized by the State.