

Proposal on the Department's Proposal on In-State State Authorization Exemption (Section 600.9(a))

Submitted by: **Erika Linden** and **Scott Dolan** (Private, Nonprofit Institutions of Higher Education)
Robert Anderson (State Officials, including State higher education executive officers, State authorizing agencies, and State regulators of institutions of higher education)

Submitted February 14, 2024

The Department is proposing to eliminate, by 2030, current regulations that exempt institutions from in-state state authorization or licensure requirements if: (1) the institution is established by name as an educational institution by a state through a charter, statute, constitutional provision, or other action; and (2) state law provides an exemption to institutions based on an institution's accreditation by an accreditor recognized by the Secretary of Education or based on the institution being in operation for at least 20 years. The language proposed below (blue text) would revise the Department's proposed changes (red text) from Issue Paper 2: State Authorization distributed prior to session 2 with the objective of retaining these exceptions.

Rationale

Although the Department has stated that it plans to eliminate the in-state state authorization exemptions, it has not clearly identified any abuses that are occurring due to exercise of the exceptions in section 600.9(a). At the same time, we know that eliminating the in-state state authorization exemptions would cause enormous upheaval for both states and private, nonprofit institutions of higher education. (Because public institutions are, by definition, established by the states and for-profits are typically more heavily regulated by states, the current state authorization exceptions primarily affect the private, nonprofit sector.) Private, nonprofit institutions of higher education located in states with these exemptions and grandfather clauses rely on these exceptions to meet the federal state authorization requirement and qualify for Title IV aid.

Historically, in-state state authorization, which is required by the Higher Education Act, is a very basic requirement that an institution be legally recognized to operate in the state as a postsecondary institution. It should not be confused with the totally separate and distinct concept of state oversight, nor with state authorization of distance education programs via reciprocity agreements. This fundamental confusion between the authorization and oversight roles of states led to significant disruption for states and for private, nonprofit institutions during the implementation of the 2010 regulations which established the state authorization requirement in federal regulations.

The confusion during the implementation of the 2010 regulations led to a series of state actions, from legislatures needing to pass special legislation to officials having to dig for ancient documents (including, original charters from English kings in cases where institutions predate the existence of their states), to state agencies needing to undertake massive certification efforts for long established, brand-name institutions. One of the most unfortunate consequences of this years-long effort was the diversion of finite state resources that could have been better spent to bolster states' consumer oversight in circumstances that most needed their attention.

The current exceptions became an important path out of the chaos created for many states and should not be undone. The exceptions have also ensured that states are able to focus oversight resources on

programs, institutions, and situations that warrant the most vigorous consumer protection efforts. Altering these exceptions would cause significant turmoil for both states and private, nonprofit institutions by subjecting institutions to a whole series of state laws that were never intended to apply to them and by forcing states to divert resources that would be better focused on institutions at risk. The additional compliance costs imposed on institutions would also either leave institutions with fewer resources to provide financial aid to their neediest students or force institutions to raise tuition to cover the compliance costs.

As some negotiators and public commenters have noted, the Department's proposal also raises serious concerns around federalism that could lead to unnecessary legal battles. At the heart of these concerns is whether the Department has both the constitutional and statutory authority to dictate to states which of their laws apply to which schools and under what circumstances.

At a more practical level, many states do not have the same type of oversight boards for private, nonprofit institutions that they might have of trade schools. There is often no entity that is authorized to oversee independent colleges in this manner. The Department should not require states to establish substantial new oversight bureaus if states, in their own judgment, do not deem it necessary.

For example, in Kansas, there is no state coordinating board that oversees private, nonprofit institutions based on a 50-year-old state agency determination. Because of that existing statutory exemption, after 2010, the state legislature was forced to pass new statutory language individually naming all 22 Kansas private, nonprofit institutions as exempt from state laws governing other higher education sectors. The private, nonprofit institutions do have to comply with state consumer protection regulations for all private entities. Eliminating the federal exception for institutions named in state laws would render all private, nonprofit institutions in Kansas ineligible for Title IV unless Kansas passed new legislation that somehow allows these colleges and universities to meet the amended state authorization requirements.

In Illinois, independent, nonprofit colleges and universities established before July 18, 1945, are largely exempt from operational and program oversight by the state's coordinating board, the Illinois Board of Higher Education (IBHE). Independent nonprofit colleges and universities established on or after July 18, 1945, are required to seek approval for operations and programs from the IBHE. Eliminating the federal exception for institutions recognized in Illinois state statute would likely result in the majority of the 48 independent, nonprofit institutions in Illinois losing eligibility for Title IV unless Illinois passed new legislation to reauthorize institutions that have long been recognized by the state.

In Florida, private, nonprofit colleges and universities are currently exempt from state licensure by means of their SACSCOC accreditation. Eliminating the federal state authorization exemption based on accreditation status would, contrary to the state's intent, subject the private, nonprofit sector to the oversight of the Commission for Independent Education, the board that licenses for-profit institutions in Florida. As a result, approximately 30 private, nonprofit institutions in Florida would be subject to a wide range of burdensome and expensive new requirements, such as new reporting and compliance requirements and an additional annual fee of over \$10,000 per school.

The fallout from the 2010 changes to state authorization rules was a painful process that did not necessarily enhance protections for students. The proposed elimination of the current in-state state authorization exceptions would cause a similar level of mass disruption in a majority of states. We respectfully request that the Department specifically explain:

1. What are the problems the Department is trying to solve that were not resolved after the enactment of the 2010 version of 600.9(a)?
2. What is the data on specific abuses that have occurred from institutions authorized by the existing exemptions?

The Department should not eliminate the current exceptions in the absence of a compelling reason to do so.

Proposed Language 600.9(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

(ii) ~~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.~~

...

(3) The institution ~~may be~~ is 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~~ 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 ~~authorizes it~~ is authorized 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.~~ 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.

Alternate Proposed Language

Alternatively, the Department could preserve the existing exceptions by maintaining the current regulatory language in 600.9(a)(1).

(a)

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