

State Authorization: Responses to Questions Addressed during Session 3

In response to a request from non-Federal negotiators for comments presented by the Department in response to questions from negotiators, the Department is providing written response.

Q1: In introducing the conversation about education-specific laws, what issues or problems is the department trying to address?

Response: In crafting this language, the Department is balancing the goals of ensuring that institutions have a reasonable path to offer distance education to students who do not reside within their borders by ensuring institutions participating in reciprocity will not be subject to the most burdensome authorization requirements while ensuring that States have the choice and ability to protect their students if an institution located in another State tries to take advantage of students or is at risk of closure. We are concerned about past situations in which States have raised concerns about institutions that are physically located outside of its borders and taking advantage of students while the State is limited in its ability to apply its own consumer protection laws in these areas to protect its residents. That can hamper State efforts to try and step in and help students if there is evidence that an out-of-State school is taking advantage of students. It can also minimize the ability of students attending a school that closed to access protections offered to students attending physically in their state such as tuition recovery funds to repay any tuition paid out of pocket.

Q2: How are these issues and concerns different than the Department's original concerns, which focused on "complaints and governance"?

Response: The Department has stated from the beginning that it is concerned that the structure of reciprocity agreements have shortcomings that fail to protect students and taxpayers and that reduce States' oversight of institutions. This is an area the Department also addressed in recently finalized certification procedure rules. After hearing concerns and compelling reasoning from negotiators about how States are limited in enforcing those recently finalized rules, as well as a proposal from negotiators, the Department proposed to readdress the issue here.

Q3: For the issues/problems identified, what evidence or data can the department provide about the scale and scope of the issues?

Response: The Department does not have data to identify the number of students enrolled in distance education through reciprocity.

Q4: How will the introduction of education-specific language help to resolve these issues and in what ways? What is the department's ultimate rationale for how this will fix the most pressing issues?

Response: The Department has removed education-specific from the proposed regulations. The Department asked for input about rules and regulations specific to institutions of higher education that do not fall under general purpose laws and which may fall under the category "education-specific" which came at the suggestion of several negotiators.

Q5: Would the Department's proposed language disallow SARA's current policy that prevents states from enforcing education-specific authorization requirements on out-of-state institutions?

Response: The Department’s language is not specific to SARA. For Title IV purposes, under the proposed language, if an institution is participating in reciprocity, that reciprocity agreement must allow any member State to enforce its laws and regulations outside of initial approval, application, or fees, if it chooses to do so. It will ultimately be up to States to make that determination and as put forward from some negotiators, we understand States may decline to avail themselves of this enforcement option. However, we think it’s important to allow States the ability to enforce their laws if they so choose. We know that at least one State legislature is considering legislation in this area.

Q6: Where, specifically, in the Higher Education Act does the department derive regulatory authority over state authorization? Such authority is not included in Section 495 on State authorization.

Response: HEA 101 requires institutions to be “legally authorized” by the State in order for it to participate in the Title IV programs. Since the statute does not define, what “legally authorized” means the Department must define this through regulation. The Department is defining the term for purposes of participation in a Federal program. The Department is not defining “legal authorization” for any other purposes.

Q7: 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)?

Response: As mentioned in issue paper 1, The Department is concerned that existing State authorization regulations, which allow States to exempt certain institutions from State approval and licensure requirements if the institution is accredited by an accrediting agency recognized by the Secretary or if the institution has been in operation for 20 years, do not ensure sufficient State oversight of those institutions. State exemptions of certain categories of institutions from approval weaken the program integrity triad for institutions that want to participate in the Federal student aid programs, making students and taxpayers vulnerable. The Department has seen examples of abuses such as misrepresentation that should fall under State authority and enforcement, but do not.