

# **Special Commission on Interstate Reciprocity Agreements**

## **Report to the General Court**

**October 31, 2016**

## A. Purpose and Context

This report is filed pursuant to Outside Section 187 of the Fiscal Year 2017 Budget, ch. 133 of the Acts of 2016.<sup>1</sup> This 2016 legislation established the Special Commission on Interstate Reciprocity Agreements to examine and make recommendations to the General Court regarding the Board of Higher Education entering into interstate reciprocity agreements. The legislation focused specifically on agreements that authorize accredited, degree-granting postsecondary institutions located in the Commonwealth to participate voluntarily in an agreement to provide distance learning programs<sup>2</sup> to students in other states in accordance with the terms of the agreement. The legislation directed the Special Commission to convene at least four times, including at a public hearing to gather testimony from interested parties. The Special Commission was charged with issuing a report of its findings and recommendations to the Board of Higher Education, the Clerks of the Senate and House of Representatives, the Senate and House Chairs of the Joint Committee on Higher Education, and the Chairs of the House and Senate Committees on Ways and Means by October 31.

To meet its charge, the Special Commission met four times between August and October 2016. The enabling law established compositional requirements for the Special Commission in order to ensure a representative cross-section of various perspectives. Consistent with this requirement, the Commission was comprised of the following members:

### Ex Officio Members

1. Secretary of Education James Peyser, Executive Office of Education (chair)
2. Senator Michael Moore, Co-Chair, Joint Committee on Higher Education
3. Representative Tom Sannicandro, Co-Chair, Joint Committee on Higher Education
4. Commissioner Carlos Santiago, Department of Higher Education
5. Ms. Gabrielle Viator, Assistant Attorney General, Office of the Attorney General

### Legislative Appointees

6. Ms. Patricia Gentile, President, North Shore Community College
7. Representative David Muradian, Member, Joint Committee on Higher Education

### Gubernatorial Appointees

8. Mr. Michael Alexander, President, Lasell College
9. Mr. Jahziel Chase, Student, Bristol Community College
10. Ms. Kerry Healey, President, Babson College
11. Mr. Michael Horn, Member, International Association for K-12 Online Education
12. Mr. David Koffman, Director of Communications & Policy, Massachusetts Community College Executive Office
13. Ms. Christine Lindstrom, Higher Education Program Director, Public Interest Research Group
14. Ms. Jacqueline Moloney, Chancellor, University of Massachusetts Lowell
15. Ms. Abby Shafroth, Staff Attorney, National Consumer Law Center
16. Ms. Tanya Zlateva, Dean, Boston University

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<sup>1</sup> See **Appendix A** for relevant statutory and regulatory provisions, including Outside Section 187.

<sup>2</sup> Distance learning can encompass a variety of methods of educating students who are not physically present at a school. Today, distance learning primarily occurs through the online delivery of education; the terms “distance learning” and “online learning” therefore will be used interchangeably throughout this report.

These individuals possess substantial professional expertise in the fields of postsecondary education and consumer protection and offered a variety of perspectives on the issue of interstate reciprocity in distance education.

The Special Commission's report proceeds by [1] discussing state authorization and interstate reciprocity, [2] summarizing the work of the Special Commission in fall 2016, and [3] providing the Special Commission's final recommendations.

## B. State Authorization

In Massachusetts, certain colleges and universities are established by the Commonwealth's Constitution, state statute, or charter. (All public institutions and most private institutions established prior to 1943 are so authorized.) The Board of Higher Education ("BHE") approves all other institutions physically located in Massachusetts to offer postsecondary degree programs.<sup>3</sup> The BHE's regulations establish the process by which these institutions seek and can receive authorization to grant degrees, conduct credit-bearing courses, and use the terms "junior college," "college," or "university" as part of their names. Under G.L. ch. 15A, § 9, and ch. 69, § 31A, and BHE regulations, most institutions in Massachusetts must obtain BHE approval to offer a new degree-granting program.<sup>4</sup> Massachusetts thus is considered a "program review state;" it differs from other states that do not exercise review policies for programs and from others that conduct program reviews for only a subset of institutions, such as only those that are public.<sup>5</sup>

Under the federal Higher Education Act ("HEA"), in order to participate in the HEA programs, including student financial aid programs, a postsecondary institution in any state must be "*legally authorized* within such State to provide a program of education beyond secondary education."<sup>6</sup> The U.S. Department of Education's ("USDE") state authorization regulation further outlines the State's role in authorization, explaining that a state may authorize a postsecondary institution through a charter, statute, constitutional provision, or other action issued by the appropriate state agency and that a state must have a process to review and act on complaints concerning a postsecondary institution, including to enforce applicable state laws.<sup>7</sup> Massachusetts's statutes and regulations provide for this necessary oversight.

The growth of online education raises new questions for state and federal policymakers. Currently, the BHE does not exercise oversight over out-of-state, online education providers that are not physically present in the Commonwealth ("an out-of-state institution"). This is true of many states.<sup>8</sup> Federal

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<sup>3</sup> Currently, there are 117 postsecondary institutions operating with a physical presence in the Commonwealth – 29 public institutions and 88 private institutions of which 22 are exempt from the BHE's program approval regulations because they are established by the Commonwealth's Constitution, state statute, or charter.

<sup>4</sup> See **Appendix A** for relevant statutory and regulatory provisions, including the BHE's program approval regulations.

<sup>5</sup> Preliminary research suggests that 11 other states require some level of program approval for both public and private institutions; 16 states exercise program review of only public institutions; 2 exercise program review of only private institutions; and 18 other states operate little to no program review procedures.

<sup>6</sup> 20 U.S.C. § 1001(a)(2) (emphasis added).

<sup>7</sup> 34 C.F.R. § 600.9. USDE has proposed changes to these regulations, discussed *infra*. As of the date of this report, the final regulations have not been issued.

<sup>8</sup> As of July 2013, nine states regulated degree-granting and non-degree granting, for-profit schools that offer online education with no in-state physical presence, and twelve other states regulated a subset of schools that offer online education with no physical presence. Nat'l Consumer Law Ctr. and Student Loan Borrower Assistance, *Wake-Up Call to State Government: Protect Online Education Students from For-Profit School Fraud* (Dec. 2015), available at <http://www.nclc.org/images/pdf/pr-reports/brief-ensure-ed-integrity-2015.pdf>.

regulations likewise do not address a state’s authorization responsibilities for online programs offered by out-of-state institutions and do not mandate state jurisdictional oversight. Yet online education enrollments continue to grow even as overall higher education enrollment has declined. Recent data indicate that one in four students takes at least one online course, and one in seven enrolls exclusively in online education.<sup>9</sup> In July 2016, USDE found that, “2,301 title-IV-participating institutions offered 23,434 programs through distance education in 2014. Approximately 2.8 million students were exclusively enrolled in distance education courses, with *1.2 million of those students enrolled in programs offered by institutions from a different State.*”<sup>10</sup>

These facts prompted the following question for the Special Commission’s consideration: To comply with federal and/or state law, does an institution need to seek and obtain separate authorization from each state in which it enrolls students in a wholly online program?

### C. Interstate Reciprocity

Multistate reciprocity has emerged as one strategy to address this evolving landscape. Under a multistate reciprocity agreement, the action of one state pursuant to the terms of the agreement is accepted by the other member states. Reciprocity can have the advantage, then, of applying state resources more effectively and efficiently. Institutions may be better equipped to navigate a reciprocal regulatory arrangement in which they need to interface with only one, rather than all, state members. And reciprocity can enhance students’ access to education options that address their academic interests and financial needs.

While regional reciprocity agreements have existed in higher education for various purposes (e.g., tuition discounts), there currently is only one national reciprocity agreement that addresses state authorization requirements. Launched in 2014, the State Authorization Reciprocity Agreement (“SARA”) is managed by a national organization (NC-SARA) and the four regional compacts, including the New England Board of Higher Education (“NEBHE”) for the New England states. SARA applies to distance education programs and courses offered by degree-granting postsecondary institutions. The SARA agreement establishes that when a SARA member state (“the home state”) approves for participation in SARA one of its authorized and physically present institutions for participation in SARA, the institution can provide distance education to students in all other member states (“the host states”). To date, SARA is the largest and only interstate agreement of its kind; more than 40 states are members.<sup>11</sup>

Discussions about SARA, including those of the Special Commission, have identified advantages and concerns with this multistate reciprocity agreement. SARA is touted as lowering the costs of regulatory compliance for institutions, increasing online options for students, and reducing state regulators’ administrative burdens. SARA establishes a certain quality and financial stability standards for

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<sup>9</sup> See, e.g., Online Learning Consortium, *Online Report Card: Tracking Online Education in the United States* (2016), available at <http://onlinelearningconsortium.org/read/online-report-card-tracking-online-education-united-states-2015/>; WICHE Cooperative for Educational Technologies (WCET), *IPEDS Fall 2013: Higher Ed Sectors Vary Greatly in Distance Ed Enrollments*, available at <https://wcetfrontiers.org/2015/03/05/ipedssectors/>.

<sup>10</sup> USDE, Program Integrity and Improvement; Proposed Rule, 81 Fed. Reg. 48597 (July 25, 2016) (to be codified at 34 C.F.R. §§ 600, 668) (emphasis added), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-07-25/pdf/2016-17068.pdf>.

<sup>11</sup> See **Appendix C** for materials regarding SARA.

participating institutions<sup>12</sup> as well as a student complaint process. Compellingly, nearly all states now have joined SARA or evinced their intent to join the coming months. Resistance to joining the agreement primarily stems from concerns about SARA’s capacity to offer sufficient consumer protection to participating students. The SARA complaint process generally requires that the institution’s home state (and not the student’s) resolve complaints. In other words, if a Massachusetts student were to file a complaint against an institution based in a different state, that state – and not the Massachusetts Department of Education (“DHE”) – would be empowered to arbitrate the issue, and the student and DHE in large part would have to accept the determination made by that state.<sup>13</sup>

Further, under SARA, a member state can enforce against out-of-state SARA-participating institutions only its general consumer protection laws that apply to all industries. A member cannot enforce statutes or regulations that apply specifically to institutions of higher education or a subset thereof. In Massachusetts, following investigations and enforcement actions against certain for-profit schools for violations of the Massachusetts Consumer Protection Act, the Office of the Attorney General (“AGO”) promulgated regulations on for-profit institutions that would have to be waived to participate in SARA. These regulations prohibit specific unfair and deceptive conduct such as false or misleading advertising; making false or misleading representations regarding future earnings, program completion, and job placement rates; and engaging in aggressive, high-pressure sales tactics.<sup>14</sup> The AGO regulations also require a number of institutional disclosures to prospective and current students. Under SARA, Massachusetts also would be prohibited in the future from applying new statutes or regulations governing the conduct of postsecondary distance learning programs to SARA-participating institutions.

#### **D. USDE’s Proposed Regulation Amendments**

On July 25, USDE issued draft amendments to its state authorization regulation for public comment. The new regulations would recognize interstate reciprocity as an avenue by which an institution offering distance education courses could comply with the state authorization requirement. The draft rules defined “State authorization reciprocity agreement” as follows:

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 State from enforcing its own consumer protection laws.

On August 24, Attorney General Maura Healey, Board of Higher Education Chairman Chris Gabrieli, Secretary Peyser, and Commissioner Santiago submitted a comment to USDE requesting that USDE make clear that a state authorization reciprocity agreement cannot prohibit any state from enforcing all of its

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<sup>12</sup> To participate in SARA, among other things, an institution must be accredited by an accrediting agency recognized by the USDE; commit to adhere to the guidelines for distance education established by the Council of Regional Accrediting Commissions; and (for private institutions) maintain a sufficient federal financial responsibility rating.

<sup>13</sup> SARA does provide for an avenue by which a member state can raise a claim with the relevant regional compact that another state has failed to abide by the SARA policies. And a member state can complain to NC-SARA that a regional compact is not ensuring that its member states abide by the SARA standards. Ultimately, though, if the member state remains dissatisfied with how the institution’s home state addresses complaints about the institution, there is no avenue by which that member state can bar the out-of-state institution from operating in its state short of withdrawing from SARA. With SARA only recently developed, these avenues have not been utilized and there is no body of evidence regarding the effectiveness of SARA’s policies.

<sup>14</sup> See **Appendix A** for relevant statutory and regulatory provisions, including the AGO regulations.

consumer protection statutes and regulations, both general and specific.<sup>15</sup> If this recommendation is embraced in the final federal rule, the SARA policy presumably will need to be adjusted to permit states, like Massachusetts, to join and continue to enforce consumer protection requirements, including those that apply specifically to the postsecondary education industry. USDE’s final rule is expected in early November.

### E. Work of the Special Commission

The following table summarizes the work of the Special Commission, which met four times between August and October 2016. Appendices to this report provide the minutes of each meeting and associated materials.

<b>Meeting</b>	<b>Purpose</b>	<b>Agenda</b>	<b>Appendix Materials</b>
August 29	To orient the members to their legislative charge and provide background information.	<ol style="list-style-type: none"> <li>1. Welcome and Introductions</li> <li>2. Charge and overview of Special Commission</li> <li>3. Presentation on State Authorization of Postsecondary Institutions and Interstate Reciprocity</li> <li>4. Discussion</li> </ol>	<p><b>Appendix D</b></p> <ul style="list-style-type: none"> <li>• Minutes</li> <li>• PowerPoint presentation</li> </ul> <p><i>Note: the State’s comment to USDE and SARA background materials were provided at this meeting; they are included in other appendices to this report</i></p>
September 14	To gather public testimony about interstate reciprocity agreements from interested parties.	<ol style="list-style-type: none"> <li>1. Welcome and Introductions</li> <li>2. Public Testimony</li> </ol>	<p><b>Appendix E</b></p> <ul style="list-style-type: none"> <li>• Minutes</li> <li>• List of persons testifying</li> <li>• Written testimony</li> </ul>
October 18	To explore alternative recommendations that the Special Commission could make to the General Court and BHE.	<ol style="list-style-type: none"> <li>1. Welcome and Introductions</li> <li>2. Background Resources: AICUM Survey and Case Examples</li> <li>3. Discussion of Criteria for Recommendations and Recommendation Alternatives/Options</li> </ol>	<p><b>Appendix F</b></p> <ul style="list-style-type: none"> <li>• Minutes</li> <li>• AICUM survey data</li> <li>• Case example handout</li> </ul>
October 31	To reach consensus on recommendations to make to the General Court and BHE.	<ol style="list-style-type: none"> <li>1. Welcome and Introductions</li> <li>2. Review of Draft Report</li> <li>3. Discussion and Conclusion</li> </ol>	<p><b>Appendix G</b></p> <ul style="list-style-type: none"> <li>• Motions and Votes</li> <li>• Data on Massachusetts Public Institutions’ Enrollment</li> </ul> <p><i>Note: Minutes for this meeting will be on file with the Executive Office of Education.</i></p>

<sup>15</sup> See **Appendix B** for USDE’s *Federal Register* notice and the letter submitted to USDE by the Massachusetts Attorney General, BHE Chairman, DHE Commissioner, and Secretary of Education.

## Recommendations and Findings of the Special Commission

The Special Commission members unanimously support interstate reciprocity as an effective and compelling way to address state authorization of postsecondary institutions in an age of online education. All members agree that there are advantages for students, institutions, and states via a multistate approach to regulating online education.

In light of the members' professional experiences and perspectives; the information gathered and considered during their tenure on the Special Commission; and the robust discussions and presentations at each of its four meetings in Fall 2016, the Special Commission on Interstate Reciprocity Agreements recommends to the General Court and the BHE the following two-pronged approach for the Commonwealth's policy on interstate reciprocity agreements.

1. Members of the Special Commission unanimously agree that if USDE promulgates final regulations that embrace the recommendation made to USDE by the four Commonwealth officials, Massachusetts should join SARA. In other words, if the federal regulation requires interstate reciprocity agreements (for the purposes of federal law) to permit states to enforce their consumer protection statutes and regulations, both general and specific, such that SARA will need to amend its policies and permit enforcement of the Massachusetts regulations on for-profit schools, Massachusetts should join SARA.<sup>16</sup> This has been described by Special Commission members as the ideal scenario. Massachusetts would participate in an established reciprocity agreement in which more than 40 states are now members. This arrangement would foster expansion of Massachusetts students' access to affordable online programs and enable Massachusetts-based institutions to offer their high-quality online programs across the nation more effectively and efficiently. The Massachusetts Department of Higher Education also could benefit from the administrative oversight of out-of-state institutions provided by sister agencies in other states. At the same time, the AGO would continue to enforce its regulations on for-profit schools. The Special Commission thus recommends that the Commonwealth become a member SARA state if the federal state authorization regulations bar SARA from prohibiting a state from enforcing all of its consumer protection laws and the SARA agreement accordingly is amended.
2. If the final federal regulations do not align with the Commonwealth's recommendation, the Commonwealth should consider two alternative policy approaches, each supported by some (though not all) of the Special Commission members.
  - (i) The first alternative for the Commonwealth is to join SARA as it currently exists, while continuing to advocate for changes that enable the AGO's regulations on for-profit schools to be enforceable against SARA-participating institutions.<sup>17</sup> This approach would allow Massachusetts to realize the benefits of SARA noted above, including with respect to student access to online opportunities and institutions' ability to operate competitively in many jurisdictions. As other states have joined SARA, some simultaneously have increased their requirements for out-of-state institutions that are not participating in

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<sup>16</sup> The Special Commission did not explore whether legislation is needed for Massachusetts to join SARA or any other interstate reciprocity agreement.

<sup>17</sup> The likelihood that further advocacy to the USDE on this topic will be successful is questionable at best; it is unlikely that USDE will reopen its newly promulgated regulations in the near future. Separately, as a SARA member, Massachusetts could petition NC SARA for changes to the SARA agreement; SARA has established a process by which a policy can be amended by its members.

SARA – for example, increasing annual registration fees. Being one of only a handful of states that are not SARA members puts the Commonwealth’s institutions at a competitive disadvantage. However, joining SARA “as is” requires that the AGO cede its authority to enforce its regulatory requirements related to mandatory disclosures, high-pressure sales tactics, and misrepresentation. In the wake of the collapse of Corinthian Colleges and ITT Tech, and numerous investigations and actions addressing predatory practices in the for-profit school industry, protection of students is front of mind for members of the Special Commission.

- (ii) The second alternative for the Commonwealth is to develop its own interstate reciprocity agreement(s), which could be bilateral or multilateral. Massachusetts could continue to engage in negotiations with SARA in collaboration with like-minded states for desired modifications (including as discussed in this paragraph), though chances for success are questionable. Otherwise, Massachusetts can develop its own multistate reciprocity agreement that addresses the concerns raised regarding SARA. For example, the alternative agreement could enable member states to continue to enforce their consumer protection statutes and regulations, including those specific to the higher education industry. In addition, the agreement might require that participating institutions meet particular standards regarding student outcomes. For example, the agreement could set a standard based on the federal gainful employment regulation, which establishes expectations related to program costs, whether students graduate, how much graduates earn, and how much debt graduates accumulate. Developing its own reciprocity agreement could enable the Commonwealth to take advantage of the benefits of reciprocity while crafting an agreement that reflects its consumer protection and quality assurance priorities. However, the practicality of this alternative approach is unclear. It will require significant administrative resources to develop an agreement and whether other states will participate in arrangement, when nearly all have joined SARA,<sup>18</sup> is unknown. Thus, the Special Commission recommends that should the legislature support this avenue, it provide the Department of Higher Education with funding adequate to execute alternative reciprocity arrangements within two years.

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<sup>18</sup> A SARA member state is free to participate in other reciprocity arrangements.