

BOARD OF HIGHER EDUCATION
REQUEST FOR COMMITTEE AND BOARD ACTION

COMMITTEE: Academic Affairs

NO.: AAC 18-08

COMMITTEE DATE: October 24, 2017

BOARD DATE: October 31, 2017

BOARD OF HIGHER EDUCATION AUTHORIZATION FOR MASSACHUSETTS TO ENTER INTO THE STATE AUTHORIZATION RECIPROCITY AGREEMENT (SARA) AND DELEGATION OF AUTHORITY TO COMMISSIONER

MOVED: The Board of Higher Education approves the Department's participation in the State Authorization Reciprocity Agreement (SARA) and delegates to the Commissioner the authority to take the necessary steps to pursue Massachusetts' entry into (SARA), subject to compliance with all applicable state and federal laws, and consistent with the attached background materials.

The Commissioner is further directed to report back to the Board of Higher Education and provide status updates as needed.

Authority: M.G.L. c. 15A, § 9 (as amended by 2017 Mass. Acts ch. 47, § 10); c. 69, § 31A

Contact: Constantia T. Papanikolaou, General Counsel
Patricia A. Marshall, Ph.D., Deputy Commissioner for Academic Affairs and Student Success

BACKGROUND

The Board of Higher Education (BHE) has engaged in a comprehensive review of the jurisdictional challenges posed by the proliferation of online education delivery model offered by out-of-state institutions, and the need for the BHE to reconsider its existing regulatory approach. The BHE's review has included, among other things, a 2012 BHE-led task force review (AAC 14-64) and, more recently, participation in a 2016 Special Commission on Interstate Reciprocity (SCIRA) convened by the legislature and chaired by the Secretary of Education (see Section III below). Within that context, the discussion has included whether to join an interstate reciprocity agreement which would authorize accredited, degree-granting postsecondary institutions located in the Commonwealth to provide distance learning programs to students in other states in accordance with the terms of the agreement.

The BHE is in a position to move forward with joining an interstate reciprocity agreement, of which there is currently only one – the State Authorization Reciprocity Agreement (SARA), as the BHE now has the legislative authority to do so (see Section VI below), and remaining consumer protection issues regarding a potential conflict between the for-profit school regulations of Massachusetts Attorney General's Office (AGO) and SARA requirements have been addressed (see Section V below).

Accordingly, consistent with the BHE's new legislative authority on reciprocity, and consistent with the recommendations of the SCIRA report, the Commissioner of the Department of Higher Education (DHE) recommends that the BHE authorize the Commonwealth's participation in SARA. To effectuate this decision, it is also recommended that the BHE delegate to the Commissioner the authority to take all necessary steps to pursue Massachusetts' entry into SARA, consistent with the attached timeline and process. (See Attachment D)

The background information set forth below, along with the attached materials, is intended to provide BHE members with relevant information on reciprocity and SARA to help inform the Board's decision.

I. Program Review and Approval

In Massachusetts, the BHE approves almost all institutions of higher education physically located in Massachusetts to offer postsecondary degree programs.¹ 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 the BHE's enabling legislation (M.G.L. c. 15A, § 9, and c. 69, § 31A) and regulations (610 CMR 2.00), most institutions in Massachusetts must obtain BHE approval to offer a new degree-granting program. Massachusetts thus is considered a "program review state." The BHE does not currently exercise oversight over out-of-state, online education providers that are not physically present in the Commonwealth and are operating 100% online.

II. Reciprocity

Other states, however, have exercised oversight over out-of-state, online education providers to varying degrees, for example by requiring online providers to either register or submit to institutional and/or programmatic authorizations or approvals. In Massachusetts, it is presently the responsibility of the Massachusetts institution wishing to offer online education in another state to familiarize itself with each state's rules and to comply with those rules, which can require considerable monetary and staffing resources. Multistate reciprocity, therefore, 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. For example, if a Connecticut institution is approved to offer degrees by Connecticut, the other states that are members of the reciprocity agreement defer to Connecticut's approval of that institution and must permit the institution to offer online educational programs in their states so long as the institution remains in good standing with Connecticut.

As mentioned above, SARA is currently the only national reciprocity agreement that addresses state authorization requirements. As of the date of this motion, 48 states are members of SARA.

III. Special Commission on Interstate Reciprocity Agreements (SCIRA)

Signed into law on July 8, 2016, the FY17 Budget included Outside Section 187, which established SCIRA and charged the Commission with examining and making recommendations to the legislature and the BHE regarding interstate reciprocity

¹ Certain colleges and universities are established by the Commonwealth's Constitution, state statute, or charter, or were established prior to 1943, and are not subject to the BHE's oversight. However, if a pre-1943 institution wishes to join SARA, it will be required to submit to the BHE's oversight in certain limited ways.

agreements and whether Massachusetts should enter into one. SCIRA was chaired by EOE Secretary James Peyser, and included Commissioner Santiago, the Attorney General, representatives of several public and private higher education institutions, consumer protection advocates, and other stakeholders as members.

In its October 31, 2016 final report, SCIRA declared its support for interstate reciprocity as an effective and compelling way to address state authorization of postsecondary institutions, and all SCIRA members agreed that there are advantages for students, institutions, and states to a multistate approach to regulating online education. (A courtesy copy of the SCIRA report, which was previously distributed to BHE members, is attached as Attachment A). SCIRA recommended unanimously that, if the US Department of Education (USDOE) promulgated final regulations that embraced the recommendations made by the Commonwealth (see Section IV below), Massachusetts should join SARA. In other words, if the federal regulations required interstate reciprocity agreements to permit states to enforce their consumer protection statutes and regulations, both general and specific, such that SARA would need to permit enforcement of the Massachusetts regulations on for-profit schools, SCIRA recommended that Massachusetts join SARA.

IV. USDOE Regulations

On July 22, 2016, USDOE released proposed regulations that, in part, were intended to clarify the federal state authorization requirements for postsecondary distance education. In response to the USDOE's proposed regulations, on August 24, 2016 the Commonwealth, by and through the Commissioner, the Chair of the BHE, the Secretary of Education, and the Massachusetts Attorney General, submitted comments and suggested revisions to the regulations to USDOE. The Commonwealth's chief request was that USDOE clarify in the regulations that member states to an interstate reciprocity agreement explicitly be permitted to enforce both their statutes and regulations, be they general or specific in application. This issue had been central to the Commonwealth's reluctance to enter SARA to date because, SARA as drafted and applied, would not permit the Massachusetts Attorney General to enforce 940 CMR 31.00, the consumer protection regulations that apply solely to for-profit schools. The Attorney General's regulations have been an essential part of that office's recent success in cracking down on unfair and deceptive practices on the part of for-profit schools, obtaining student debt relief for students at for-profit schools, and fulfilling the office's important consumer protection function.

The final USDOE regulations were released on December 16, 2016, and the Commonwealth's recommendations were adopted: the final rule provided that interstate reciprocity agreements cannot prohibit a state from enforcing its statutes and regulations, including those specific to all or a subset of educational institutions. From that point forward, the Commonwealth has been exploring the process of joining SARA.²

² Due to the recent change in the presidential administration, there has been uncertainty as to whether the USDOE regulations as finalized under the previous administration would be preserved. There has also

V. Resolution of Regulatory Enforcement and Consumer Protection Issues

Over the last several months, the AGO has worked with representatives of NEBHE and AICUM to reach a possible resolution of the outstanding issues surrounding the enforcement of 940 CMR 31.00. The DHE was informed that the parties had reached a satisfactory understanding and that, if certain documents were executed and certain representations were confirmed, the AGO would not object to Massachusetts becoming a SARA state. The resolution involves two components:

- 1) The execution of a Memorandum of Understanding (“MOU”) between the AGO and the DHE, wherein the AGO agrees that institutional disclosures required by the SARA agreement are an acceptable alternative to the disclosures required of for-profit schools and occupational programs under 940 CMR 31.05, but that all other existing regulations regarding consumer protections set forth in 940 CMR 31.00 would be otherwise unaffected by Massachusetts’ entry into SARA. (See Attachment B)
- 2) A letter from NEBHE confirming that NEBHE and NC-SARA understand and agree that, with the exception of the institutional disclosures section of the AGO’s for-profit regulations, all other existing AGO consumer protection regulations would remain in full force and effect, and otherwise unaffected by Massachusetts’ entry into SARA. (See Attachment C)

Both documents have recently been executed and are attached to this motion.

VI. Statutory Authority and the FY18 Budget

The BHE’s legal authority to act on matters is narrowly defined by the explicit powers enumerated in its enabling legislation. Prior to July 2017, Chapter 15A, the primary law governing the BHE and its powers and duties, did not grant the BHE any explicit authority with regard to negotiating or entering into interstate reciprocity agreements such as SARA. The statute also did not grant the BHE broad powers that could be interpreted to permit the BHE to enter into SARA without explicit authority. It was determined that additional legislation granting the BHE the authority to enter into an interstate reciprocity agreement would be required.³ The legislature did grant the BHE such authority through FY18 budget language. The FY18 budget was signed into law on

been some disagreement on whether the USDOE regulations would actually require interstate reciprocity agreements to permit states to enforce their consumer protection laws of specific application. However, because the AGO and NEBHE were able to resolve the issues surrounding enforcement of the AGO’s for-profit school regulations, Massachusetts should be able to move forward with submitting an application to join SARA, subject to BHE approval, without final resolution of the questions surrounding the federal regulations.

³ Of the 48 states that have already joined SARA, 40 introduced new legislation permitting their educational oversight entities to do so.

July 17, 2017 as Chapter 47 of the Acts of 2017, and it included an outside section (Section 10) that added language to Chapter 15A explicitly permitting the BHE to enter into a reciprocity agreement subject to the finalization of an MOU with the AGO, as discussed above.

VII. SARA Application Process

As the BHE now has the authority to enter into a reciprocity agreement, the BHE needs to determine whether to exercise that authority and authorize the submission of an application to join SARA to NEBHE-- which is the regional compact that serves as the gatekeeper for SARA states in New England, New Jersey, and New York. To be accepted into SARA, Massachusetts must agree that it can and will operate under the criteria for state membership established in the SARA agreement. By submitting the application, Massachusetts would be agreeing to the terms in the SARA agreement, as interpreted by the MOU between the AGO and the DHE, and the NEBHE letter, as detailed above.

Prior to submitting the application, the DHE would need to establish protocols and procedures, including setting fees and determining any additional requirements, for Massachusetts-based institutions of higher education to apply to the DHE for approval as SARA institutions. The DHE would need to promulgate regulations in order to charge fees and establish its procedures, which would need to be done through the Secretary of the Commonwealth's regulatory process.⁴

Once the regulations are in place, an application would be submitted. The application would be reviewed by a NEBHE evaluator, who must find that Massachusetts agrees to or meets all of the requirements set forth in the SARA agreement. If the evaluator finds that the state meets all required standards, the regional SARA director would then recommend approval of Massachusetts' membership to the NEBHE's Regional Steering Committee. The NEBHE Steering Committee then would need to find that Massachusetts agrees to or meets all of the requirements set forth in the SARA Agreement. If the Steering Committee so finds, the Committee Chair would then recommend approval of Massachusetts' membership to the NEBHE Executive Committee. Upon the NEBHE Executive Committee's acceptance of the recommendations, Massachusetts would be approved as a member state of SARA.

In addition, the DHE will need to ensure that the appropriate resources, including staffing and IT resources, are in place in order to responsibly and effectively take on this additional function, which includes managing complaints for out-of-state students participating in online programs offered by Massachusetts-based institutions. DHE staff have been conducting research by interviewing other states about their processes to join SARA, and it is not out of the ordinary for states with robust state oversight of higher education to take some time (anywhere between 5 months (Pennsylvania) to 16 months (New York)) to ensure that the structure is in place for a clear and effective

⁴ These regulations would be separate from the DHE's existing degree-granting regulations, 610 CMR 2.00; however, the DHE also anticipates revising 610 CMR 2.00 in FY18, to close jurisdictional loopholes and ensure consistency with SARA-related definitions and processes.

implementation of reciprocity before beginning to accept institutional applications.

At this time, we anticipate that, if the BHE approves entering SARA, and if NEBHE accepts MA's application, the DHE would be able to begin accepting institutional applications in the summer of 2018. A very preliminary, draft timeline is attached. (See Attachment D). However, please note that the attached timeline is predicated on many contingencies, including: 1) NEBHE and NC-SARA accepting the BHE's application; 2) ensuring that the necessary staffing and IT resources are timely secured and in place before implementing this new function; 3) finalizing regulations and resolving any issues that may arise through the regulatory public comment process; and 4) engaging the Department of Professional Licensure to review and address any jurisdictional issues involving the oversight of non-degree programs that may be offered by BHE-approved institutions through SARA.