BOARD OF HIGHER EDUCATION

REQUEST FOR COMMITTEE AND BOARD ACTION

COMMITTEE: Academic Affairs **NO**.: AAC 14-64

COMMITTEE DATE: June 10, 2014

BOARD DATE: June 17, 2014

ACCEPTANCE OF THE REPORT FROM THE TASK FORCE ON FOR-PROFIT INSTITUTIONS AND ONLINE DELIVERY

MOVED: The Board of Higher Education (BHE) accepts the following two reports issued by the BHE 's Task Force on For-Profit Institutions and Online Delivery:

1) *Interim Report of the Task Force on For-Profit Institutions and Online Delivery on Possible Options for Regulatory Reform*; and

2) *The Role of the Massachusetts Board of Higher Education in the Development of Online Education,* by Colin S. Diver.

The BHE expresses its appreciation to Colin Diver and the members of the Task Force for their work.

The BHE calls upon the Commissioner to prepare and submit to the Academic Affairs Committee (AAC) proposed plans which address the Task Force's recommendations and advise on next steps. The Commissioner's proposed plans should be submitted to the AAC in the Fall of 2014.

Authority: M.G.L. c. 15A §§ 6 and 9; M.G.L. c. 69 §§ 30-31C

Contact: Dr. Carlos Santiago, Senior Deputy Commissioner for Academic Affairs; and Constantia T. Papanikolaou, General Counsel

Background

In December 2012, the Board of Higher Education (BHE) established the Task Force on For-Profit Institutions and Online Delivery. The Task Force's charge, as amended, falls into two broad categories:

- explore and make recommendations to address jurisdictional and consumer protection issues posed by the rise of the online delivery of educational materials, and by the for-profit industry; and

- explore and make recommendations on whether the Commonwealth should have a system-level strategy on online delivery with regard to the Commonwealth's system of public higher education.[1]

The Task Force bifurcated its work on the two issues, and created two separate reports to address each issue. Both reports are attached (*See* Attachments A and B).

The Task Force met several times to explore these issues. The Task Force's work included the following tasks: analyzing current Department procedures and interpretations of relevant policy; surveying other states' practices and experiences; reviewing relevant literature; consulting with other state oversight agencies, such as representatives of the Massachusetts Attorney General's Office (AGO) and the Division of Professional Licensure (DPL); surveying representatives of public higher education institutions on current online strategies; analyzing and providing commentary on the State Authorization Reciprocity Agreement (SARA); and staying abreast of federal regulatory developments concerning online and for-profit education.

Both reports are submitted to the BHE in accordance with the Task Force's charge, along with the recommendation that the Commissioner prepare and submit to the Academic Affairs Committee (AAC) by the Fall of 2014 proposed plans on how to address the options and recommendations contained in the Task Force's reports.

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[1] The second charge was added in June 2013, and included a phased approach. Phase I asked the Task force to consult widely with public institutions and other stakeholders to identify and understand the issues, and to recommend whether a statewide strategy was advisable. If so, then the BHE would consider initiating Phase II to address questions identified in Phase I, again working closely with public institutions, including interested presidents, chief academic officers, union leaders and others. The attached report (Attachment B) addresses Phase I.

Massachusetts Department of Higher Education

Background Briefing:

Task Force on For-Profit Institutions and Online Delivery – Regulatory and Consumer Protection Issues
June 2014

Status

The Task Force was established in December 2013 to explore and make recommendations to address jurisdictional and consumer protection issues posed by the rise of online delivery of educational materials, and by the proliferation of the for-profit industry which operates predominately, though not exclusively, through online programming. [1]

The Task Force has provided the AAC with periodic updates of its work, though no formal committee or board action has been taken. At the June 2014 AAC and BHE meetings, the Task Force is presenting interim report recommendations for acceptance, with the expectation that the Department will present the AAC with an action plan in the fall of 2014.

Context

The BHE is legislatively charged, in its broadest sense, with regulating and approving postsecondary education offered within its borders. Historically, the BHE has defined the scope of its regulatory authority by looking at whether an institution is "physically present" within the Commonwealth – such as operating a brick-and-mortar institution, or offering clinical programs – or is otherwise "doing business" within the Commonwealth. The proliferation of online (distance) education programs, which are designed to de-emphasize the role of "place" in learning, complicates the BHE's historical place-based jurisdictional approach.

At the same time, student enrollment in for-profit institutions is growing. While for-profit institutions have long been a part of the higher education landscape, online instructional delivery has allowed the for-profit sector to rapidly grow and transform to include a number of large, predominantly online, corporate entities spanning multiple states. Growing student enrollment in for-profit, online institutions, coupled with increases in federal and state financial expenditures, and increases in student borrowing and debt has called for a new round of scrutiny of both state and federal regulatory oversight.

As outlined in its report, the Task Force recommends that the BHE adjusts its approach to the regulation of online providers, and identifies three potential options to pursue, which include developing new regulations, joining the national state reciprocity agreement movement, and/or pursuing an alternate reciprocity framework with willing states. While all three options warrant further consideration as discussions at the national level continue to unfold, at this juncture, the

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[1] In June 2013 the Task Force's charge was amended to include exploration of whether the Commonwealth should have a system-level strategy on online delivery with regard to the Commonwealth's system of public higher education; this supplemental charge is addressed in a separate briefing document.

Task Force recommends that the BHE proceed to develop new regulations which address existing gaps in regulatory oversight over out-of-state, online providers. The Task Force also recommends exploring alternative reciprocity arrangements with willing states to further define states' respective roles in authorizing higher education institutions that offer programs in multiple states. Finally, the Task Force recommends aligning the BHE regulations with recent regulations proposed by the AGO, DPL, and the U.S. Department of Education to ensure that for-profit institutions under the BHE's jurisdiction are subject to appropriate consumer protection requirements, such as mandatory data disclosure requirements, and adequate refund policies.

Key Issues

National landscape: The U.S. DOE is currently engaged in negotiated rulemaking sessions to define, through regulation, its Title IV requirement that all institutions providing distance education must be "authorized" by every state in which they enroll a single resident as a student as a condition of accessing Title IV funding. The outcome of those sessions, which is expected this summer, will inform the BHE's jurisdictional work in this area and the Commissioner's anticipated recommendations this Fall.

SARA discussions: DHE staff, along with staff from the Connecticut Office of Higher Education, are continuing their discussions with representatives from the New England Board of Higher Education (NEBHE) regarding the content of NEBHE's proposed regional version of the State Authorization Reciprocity Agreement (SARA). The outcome of these discussions, which include concerns regarding the lack of minimal consumer protection standards in the proposed agreement, will be determinative as to whether Massachusetts and Connecticut will recommend signing the NEBHE SARA document.

Next Steps

The Task Force suggests that the Commissioner and Department staff prepare a work plan based on the options and recommendations outlined in the report, and present the work plan to the AAC in the Fall of 2014.

Authority

M.G.L. c. 15A, §§ 6 and 9; M.G.L. c. 15A §§ 30-31

BHE By-Laws, Article II

Staff Contact

Constantia Papanikolaou, General Counsel
617-994-6947 | cpapanikolaou@bhe.mass.edu

Carlos Santiago, Senior Deputy Commissioner for Academic Affairs
617-994-6909 | csantiago@bhe.mass.edu

Massachusetts Department of Higher Education

One Ashburton Place, Room 1401   TEL (617) 994-6950   Richard M. Freeland, *Commissioner*

Boston, MA 02108-1696   FAX (617) 727-0955   Charles F. Desmond, *Chairman*

WEB www.mass.edu   *Massachusetts Board of Higher Education*

Charge: BHE Task Force on For-Profit Institutions and Online Delivery
December 2012

Problem Statement

Growing student enrollment in for-profit institutions coupled with increases in federal and state financial aid expenditures, call for a new round of scrutiny over for profit institutions' practices and policies, including the quality of the products they offer, and how authorizing states, such as the Commonwealth, oversee and regulate the for profit industry. While for-profits enroll approximately 12 percent of all post-secondary students and represent 24 percent of federal loan dollars, for-profit institutions represent 43 percent of all federal student loan defaults. Education Trust reports the following outcomes in its recent report "Subprime Opportunity: The Unfilled Process of For-Profit Colleges and Universities:" [1]

- For-profits offering bachelor's degrees in 2008 graduated, on average, just 22 percent of their first-time, full-time students seeking these degrees—compared with 55 percent of such students who earn a bachelor's at public institutions and 65 percent who do so at private nonprofits.

- Median debt of bachelor's degree recipients from for-profits in 2007-08 stood at $31,190, almost twice that of comparable graduates of private nonprofits ($17,040) and more than three and a half times that of graduates of public colleges ($7,960).

A closely related issue is online education. Designed to address the changing needs and evolving demographics of students, including adult learners, for-profit institutions expand access to higher education opportunities-- often through flexible delivery models such as year-round enrollment, convenient locations and online options. Online education—often used by for profit institutions, but certainly others— is challenging state regulators and authorizing agencies across the country to review their approaches, which were primarily designed to address the "brick and mortar" delivery model of higher education.

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[1] http://www.edtrust.org/sites/edtrust.org/files/publications/files/Subprime_report_1.pdf

New federal financial aid regulations require that institutions seek the authority of every state in which they enroll students. For online institutions, this could result in a burdensome process where one institution must seek approval for the same program from several different state approving agencies. States will also face substantial new expectations, with the potential of thousands of institutions requesting approval from all states, possibly exceeding the state approving agency's management capacity. As a result, states are reviewing their regulations and there are calls to streamline the state approval process for online programs (for example, through a national interstate reciprocity agreement).

CHARGE

To address these issues, a BHE Task Force will be formed and charged with exploring: 1) the issues and challenges presented by the for-profit industry, within the context of the BHE's consumer protection role, and 2) jurisdictional issues posed by the online education delivery model offered by out-of-state institutions, based on the BHE's current statutory and regulatory framework.

The Task Force will develop and present recommendations to the BHE on how to strengthen the BHE's existing policies, procedures and regulations in this regard. The Task Force shall report back its findings and recommendations to the BHE by June of 2013.

The Task Force will pursue a balanced approach which seeks to address any gaps or ambiguities in the BHE's consumer protection function and jurisdictional oversight function, while acknowledging the value that for profit institutions and online programs have added and have the potential to add to the higher education landscape, including, but not limited to their potential to expand access to quality programs through non-traditional delivery models.

MEMBERSHIP

BHE membership
- David Barron, Chair
- Fernando Reimers

DHE staff
- Aundrea Kelly, Deputy Commissioner for P-16 Policy and Collaborative Initiatives
- Dena Papanikolaou, General Counsel
- Shelley Tinkham, Assistant Commissioner for Academic, K-16 & Veterans Policy

Massachusetts Department of Higher Education

One Ashburton Place, Room 1401   TEL (617) 994-6950   Richard M. Freeland, *Commissioner*
Boston, MA 02108-1696   FAX (617) 727-0955   Charles F. Desmond, *Chairman*
                                  WEB www.mass.edu   *Massachusetts Board of Higher Education*

MEMORANDUM

TO: Task Force on For-Profit Institution Oversight and Online Delivery

FROM: Dena Papanikolaou, General Counsel

DATE: April 8, 2013

SUBJECT: **Jurisdiction-- Overview and Options**

I.   Issue

The BHE is legislatively charged, in its broadest sense, with regulating and approving postsecondary education offered within its borders. Historically, the DHE has defined the scope of its regulatory authority by looking at whether an institution is "physically present" within the Commonwealth, or is otherwise "doing business" within the Commonwealth. The proliferation of distance education programs, which are designed to de-emphasize the role of "place" in learning, complicates the DHE's historical "place-based" jurisdictional approach of physical presence. The DHE is seeking a rational, balanced approach to defining jurisdiction for state approval purposes, within the context of strengthening its consumer protection role.

II.   Current Law on BHE/ DHE jurisdiction:

A.   BHE's Statutory Authority/ Responsibility:

Background:

The Commonwealth's current statutory structure recognizes that education, including private higher education, is a vital public service for the common good, and as such the Commonwealth has the right and responsibility to regulate this public commodity. Typically, a license (or other type of authorization) is required to offer services to the public within the state of Massachusetts, and the license can be withdrawn for cause. The underlying purpose is to protect the

public from those who are not what they claim to be. Licenses or other types of authorizations are provided by authorized state agencies that assure that the public welfare has been considered.

a. **For private, independent institutions, M.G.L. c. 69, § 31A (Awarding of Degrees; Necessity of Authorization) applies**: *"No educational institution chartered, located, offering courses, <u>or otherwise doing business</u>* within the commonwealth, shall *award degrees within the commonwealth* unless authorized to do so by the commonwealth; *nor shall any educational institution chartered, incorporated or organized in another state <u>conduct within the commonwealth any courses</u> available to residents of the commonwealth leading to the award of a degree,* unless such educational institution has received the approval of the commonwealth for such courses. The board of higher education shall be responsible for the implementation of the provisions of this section."

   i. **Other noteworthy statutory sections:**
      1. **M.G.L. c. 69, § 30:** Requires the BHE to investigate all applications filed with the Sec. of State's office for incorporation of an entity seeking to grant degrees, or call itself a "college, junior college or university" in MA. In conducting such investigations, the BHE must look at all "material facts" including the institution's proposed "faculty, equipment, courses of study, financial organization, and leadership" and items listed **in M.G.L. c. 69, § 31** (attached as Attachment A).

b. **Public institutions are governed by separate statutory section, M.G.L. c. § 9, Powers and Duties of Council:** "The council [the BHE] shall have the following duties and powers:— (a) confer upon the boards of trustees [of public institutions] the power to offer degree programs after taking into account, among other things, the need, resources and mission of the institution. The council shall confer the authority to award degrees to persons who have satisfactorily completed degree requirements; (b) in addition to the degrees authorized to be awarded under clause (a), the council may approve the awarding of certain other degrees and may define and authorize new functions or new programs, or consolidate, discontinue or transfer existing functions, educational activities and programs. The council shall act in writing on requests for program approval from boards of trustees within six months of said request, or said program shall be considered approved....."

B. **BHE's Regulatory Authority/ Responsibility: 610 CMR 2.0 Degree-Granting Regulations for Independent Institutions of Higher Education**

a. **610 CMR 2.02 Purpose:** "610 CMR 2.00 is promulgated to establish procedures and criteria for decisions by the Board of Higher Education affecting the authority of independent educational institutions subject to the jurisdiction of the Board to grant degrees, to conduct credit-bearing courses within the Commonwealth, and to use the terms "junior college," "college," or "university" as part of their names. The regulations adopted and implemented by the Board for the establishment and operation of independent colleges and universities are designed to assure prospective students and other interested parties that the institutions licensed meet minimal levels of quality consistent with current professional judgment."

b. **610 CMR 2.03 Scope and Application:** "610 CMR 2.00 applies to existing independent institutions of higher education that have been authorized to grant degrees by the Board of Higher Education or by predecessor boards pursuant to M.G.L. c. 69, § 30 *et seq.* and to any independent institution of higher education seeking a name change to include college or university or to expand degree-granting authority. 610 CMR 2.00 shall apply....

> ...[to] (4) Actions by the Board implementing the requirement of M.G.L. c. 69, § 31A that no educational institution chartered, located, offering courses, or otherwise doing business within the Commonwealth may award degrees within the Commonwealth unless authorized to do so by the Commonwealth; nor shall any educational institution chartered, incorporated, or organized in another state conduct within the Commonwealth any courses available to residents of the Commonwealth leading to the award of a degree unless the educational institution has received the approval of the Commonwealth for such courses."

III. DHE's current policy "interpretation" of 610 CMR 2.03

When asked whether a particular out of state institution needs to be licensed the DHE responds by stating that we need to look at the "constellation of facts" regarding the programs and services being offered, and how Massachusetts consumers are affected, for example:

The general policy of the Massachusetts Board of Higher Education (MBHE) is to require an institution to be licensed if an education institution chartered, incorporated, or organized in another state, conducts within the Commonwealth any courses available to residents of the Commonwealth leading to the award of a degree. Please refer to the Massachusetts Degree Granting Regulations for Independent Institutions of Higher Education (610 CMR 2.00) for specific information: http://www.mass.edu/forinstitutions/academic/documents/610CMR.pdf.

Out-of-state institutions seeking to enroll Massachusetts residents in online programs may fall under the purview of the Board. The most salient issues in regards to degree granting authority

of out-of-state institutions seeking to enroll Massachusetts residents in on line programs and courses are outlined below:

- **On the ground curricular requirements of online programs and courses:** Online programs and courses that require the following activities conducted within Massachusetts: internships, externships, clinicals, mentorships, shadowing experience, student teaching experiences, etc. are subject to Board approval.

- **Advertising:** Systematic and targeted advertising may trigger the need for approval. The determination in regards to advertising and the need for approval depends on the institution's effort to serve the education market in Massachusetts and how Massachusetts consumers would be affected.

Assuming that no systematic and targeted advertising activity is taking place, purely (100%) distance education programs and courses delivered wholly on line by out-of-state institutions (without the incorporation of the on-the-ground activities described above as part of the curriculum) are not subject to MBHE approval.

Questions and options intended to help define jurisdiction over out-of-state institutions for approval v. for a registration/ disclosure requirement

Elements of BHE statute
1. Institutions chartered in MA
2. Institutions located in MA
   - E.g., Brick and Mortars

3. Institutions offering courses
4. Institutions otherwise doing business
5. Out of state institutions organized in another state cannot conduct any courses within the commonwealth leading to an award of a degree without DHE approval.
   - What does it mean to conduct a course within the Commonwealth?

Options
I.   Defining jurisdiction based on physical presence,

- Occupying a physical location for instructional purposes

- The maintenance of an administrative office to facilitate the instruction in the state.

- Experiential learning opportunities (clinical, practicums, other on the ground activity)

   o   If so, does one student enrolled in a clinical program subject the out-of-state institution to MA jurisdiction? How about 24? 100? (see Stony Brook, Cuhahoga, etc. Examples)

II.   Defining jurisdiction based on whether an institution operates or "does business" in MA.

   What does it mean to operate or "do business" in MA?
- Occupying a physical location for instructional purposes

- The maintenance of an administrative office to facilitate the instruction in the state.

- Offering one online course accessible to any MA resident

- Offering one classroom based course

- Offering any experiential learning opportunities (clinical, practicums, other on the ground activity)

- Enrolling one MA student in one online course

- Targeted advertising, recruitment or marketing activities.

III.   Defining jurisdiction based the characteristics of the out-of-state institution:
- 100% distance learning—institution with no "brick and mortar" physical presence anywhere

- Hybrid program

- Institution with a physical presence in a bordering state (NH, RI, NY)

- Does it matter if it is a bordering state? (FL, CA)

- For profit v. non-profit (e.g., U Phoenix v. Georgetown online program); note, our statute currently does not distinguish between the two

- Institution with a rooted history (e.g., in existence without complaints for 10 years, nationally accredited and state authorized) v. new, start up

- Just Offering courses

- Offering any course for credit towards a degree

- Offering degrees

III.   Defining scope of regulatory authority based on the number of MA consumers impacted?

- If so, what is the threshold cut off? 10? 25? 100?

STATE OF CONNECTICUT
Office of Higher Education

MASSACHUSETTS
Department of
Higher Education

January 13, 2014

Michael K. Thomas, President and CEO
New England Board of Higher Education
45 Temple Place
Boston, MA 02111

Dear Dr. Thomas:

After discussions with you and your staff and other interested parties regarding the State Authorization Reciprocity Agreement (SARA), Connecticut's Office of Higher Education and the Massachusetts Department of Higher Education, the state agencies vested with the authority to enter into the agreement, have identified multiple issues with the agreement, some of them listed below. Our respective agencies are dedicated to promoting the highest standards for academic quality and ensuring consumer protection for all students in the state. Institutions in both states adhere to some of the most rigorous standards in the nation and, as a consequence, enjoy a reputation for academic excellence that serves to attract the best and brightest students, faculty, and researchers to our states. The economies and cultures of both states have reaped the benefits. Any proposal that compromises the academic quality of instruction or limits student protections, regardless of the conveniences it may offer to certain institutions, is simply bad public policy.

Our overriding concern is that SARA will reduce the quality standards of the programs that currently fall under our jurisdiction. Reciprocity, per se, is not an ill-conceived approach and one that we would generally support were it not for the lack of quality standards and consumer protection safeguards.

Outlined below are some of our concerns, which broadly fall within three areas: academic quality, the definition of physical presence, and the role of the state.

1. Quality
   - According to section 6.3 of the agreement, accreditation by an accreditation agency that is federally recognized to accredit distance education programs serves as the primary means of quality assurance. This may be problematic for three reasons: 1) The mission and standards of federally recognized national and regional accrediting bodies are vastly different and do not provide for the same level of quality assurance; 2) such agencies generally accredit institutions, not programs, which will not be reviewed for adherence to academic standards and licensing or certification requirements; and 3) although quality assurance depends upon the timely submission of adverse actions regarding distance education by recognized accrediting bodies, such accrediting bodies are under no obligation to do so and, in some cases, cannot do so without violating their own policies on public disclosure.

- According to section 7.3 of the agreement, independent institutions demonstrate fiscal integrity to the state authorizing agencies by meeting or surpassing minimum thresholds on federal financial responsibility scores. Federal financial responsibility scores, however, are not made available until many months and sometimes years have passed since the submission of the audited reports. Such unpredictable and lengthy delays in reporting may raise serious questions about the reliance upon those scores as a single measure of institutional solvency and financial health.

2. Physical Presence

- According to section 2.4.1 of the NE-SARA agreement, a participating state must adopt a definition of physical presence that permits "short courses" and other on-ground instruction consisting of up to 25 percent of a given course. Such activities constitute instruction that occurs in the presence of both the instructor and student and, therefore, would serve as physical presence triggers for state regulation and represent doing business in our respective states. These activities do not take place online or via distance; they represent traditional brick-and-mortar instruction. Moreover, the distinctions made for exemption seem arbitrary and provide unnecessary loopholes for institutions to offer on-ground instruction without state oversight. Our states cannot agree to waive their obligations to students paying for on-ground instruction within our states.
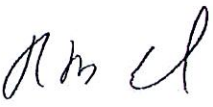
3. State Role

- According to section 4.1.4 of the agreement, a state agency must be empowered to investigate and resolve complaints that may originate outside of the state. Our states do not have such authority, nor can they cede authority to another state that seeks to extend its jurisdiction into our respective states.
- The added responsibilities of the state authorizing agencies are significant and recurring. According to section 4.1.7 the agreement, the resources required to support such additional activities cannot come from fees obtained from institutions that are based in participating states. Our states cannot relinquish their ability to obtain the funds needed to fulfill their contractual obligations nor can they fairly place that financial burden on the in-state schools, not all of which will participate.

It is our hope that we can continue to work together to resolve all of the issues presented by the SARA agreement while upholding the high academic standards and student protection measures expected by the citizens of our states.

Sincerely,

Jane A. Ciarleglio
Executive Director

Richard M. Freeland
Commissioner

c: Timothy J. Donovan, Chancellor, Vermont State College
Clark Greene, Interim Commissioner, Rhode Island Office of Higher Education
Todd Leach, Chancellor, University System of New Hampshire
James H. Page, Chancellor, University of Maine System

New England Board of Higher Education

45 Temple Place, Boston, Massachusetts 02111-1305 ◦ Phone 617.357.9620 ◦ Fax 617.338.1577 ◦ www.nebhe.org

March 25, 2014

Ms. Jane A. Ciarleglio
Executive Director
Connecticut Office of Higher Education

Dr. Richard M. Freeland
Commissioner
Massachusetts Department of Higher Education

Dear Colleagues:

We write in response to your letter of January 13, 2014, which outlined your concerns with the State Authorization Reciprocity Agreements (SARA) that are being implemented throughout the country by the existing regional education compacts and coordinated by the National Council for State Authorization Reciprocity Agreements (NC-SARA).

We appreciate your interest in the possibilities that reciprocity affords and your efforts to specifically articulate areas of concern. We understand and agree with your goals of supporting quality higher education offerings and providing responsible consumer protection for students who enroll in postsecondary distance education.

In sum, we assert that the development, adoption and effective implementation of SARA will result in a notable increase in both the quality assurance and consumer protection related to online learning in the U.S. in a number of key ways:

- Providing consistent definitions and measures of online learning, physical presence, institutional quality, financial sustainability and high-quality consumer protection practices—all of which now vary significantly across states;

- Providing annual in-state review of all participating institutions according to nationally determined standards;

- Providing participating state authorizers with direct access to an out-of-state institution's home-state authorizer, strengthening and expediting the resolution of consumer complaints; and

- Providing a national coordinating body to proactively address emerging needs and issues related to the authorization of high-quality distance education.

As you know, many states, including Massachusetts and Connecticut, undertake limited review and oversight of institutions deemed to *not* have a physical presence in the state. Under SARA, however, such institutions will undergo an annual home-state review. We recognize that widespread adoption of these provisions will require accommodation and change by all participating states. Yet, we are confident that this review will result in a notable overall increase in quality assurance and consumer protection.

The following includes our responses to your analysis of the SARA agreement and specific areas of concern that you outlined.

1. Quality Assurance

The overall goal of SARA Is to strengthen the quality of distance education to support increases in postsecondary attainment. The current system by which institutions offering distance education must navigate the standards and approval requirements of up to 54 states and territories is cumbersome, inefficient, expensive and ineffective in providing adequate oversight and consumer protection.

Specifically:

- SARA calls for increased review by participating states of the offerings its institutions provide to students in other states. This involves home-state authorizers annually approving in-state institutions for participation and resolving any complaints that arise from the activities of those institutions in other SARA states. Under SARA, that latter role puts in place agreed-upon responsibilities that have not existed until the creation of SARA. Thus, SARA states will be formal partners in responding to complaints—notably expanding consumer protection and accelerating complaint resolution.

- Appropriate institutional accreditation plays a key role in SARA. Institutions that participate in the initiative must be U.S. degree-granting institutions (offering an associate degree or higher), and be accredited by an accrediting body recognized by the U.S. Secretary of Education.

- While there are differences between regional and so-called "national" accrediting bodies, entities of both types are recognized by the Secretary of Education only after having gone through the same approval and review processes of the Department of Education, being evaluated against the same set of rules, and being recommended for recognition by the Secretary's National Advisory Committee on Institutional Quality and Integrity (NACIQI). We will continue to work with the accreditation community to enlist their best efforts and partnership in the SARA initiative. SARA will rely upon and benefit from their work.

- SARA requires that either the chief executive officer or the chief academic officer of every participating institution stipulate that their institution currently meets and will continue to meet the *Interregional Guidelines for the Evaluation of Distance Education Programs (Online Learning)* adopted by the Council of Regional Accrediting Commissions (C-RAC).

- Both regionally and nationally accredited institutions will be required to certify compliance with those guidelines. An institution that violates these guidelines will be subject to actions by the home-state SARA authorizing entity and potentially not allowed to participate in SARA. Likewise, a state that fails to act responsibly in the face of violations of these guidelines will be removed from participation in SARA by its regional compact.

- SARA will be working with the U.S. Department of Education, as well as national and regional accreditors, to ensure that notices related to adverse actions are made available to participating SARA states.

Your letter notes concerns about the timeliness of federal financial responsibility scores—an additional aspect of SARA's overall approach to improved quality assurance. Specifically:

- SARA relies on the U.S. Department of Education's institutional financial responsibility composite scores. Having the SARA initiative develop its own expectations could be useful, but only as a non-federal, voluntary initiative.

- Additionally, SARA relies upon the legal authority and the auditing ability of the U.S. Department of Education to assess institutional finances. While the department's system is certainly imperfect, it appears to us to be the best approach available.

- Recognizing the legitimacy of some criticisms of the U.S. Department of Education's approach and timeliness, SARA has recommended to the department that it undertake a thorough review of its current approach as soon as possible.

- At present, such a specific demonstration of financial responsibility is not commonly required for the authorization of institutions that do not have a physical presence, this SARA requirement, will result in an increase in quality assurance.

Your letter also addresses the role of individual program review as a means for quality assurance. In response, we note that:

- While program-level review is indeed critical to academic quality assurance, accrediting bodies, institutional and state governing and coordinating entities generally have requirements for academic program review. Duplicating those efforts for distance education offerings—either at the state's designated SARA entity (on the "sending" side) or by an agency in the state in which the distance education student is located (the "receiving" side)—was simply not an approach that gained the support of either states or institutions during the development of SARA.

- Although some state authorization agencies now perform program reviews, they are not commonly required of institutions that do not establish a physical presence.

- States participating in SARA can carry out any kind of review and approval process they wish to in regard to most on-the-ground offerings proposed to be offered in their state. When an institution does not qualify for, or participate in, SARA—or has a physical presence—it is fully subject to existing authorization policies in both its home state and in the states in which it delivers distance education.

- SARA does not supersede any requirements of professional licensure boards. In terms of compliance with licensure requirements, institutions participating in SARA that offer programs leading to professional licensure must inform students how the programs relate to licensure requirements. Further, institutions must obtain all necessary approvals from professional licensure entities in the states in which they deliver programs.

2. Physical Presence

The definition of "physical presence" is one of the greatest impediments to uniformity and consistency in state authorization—as well as a challenge to establishing reciprocity. A review of state policies on physical presence reveals their great variety. Moreover, many have not kept pace with hybrid and other emerging forms of distance education.

SARA has tried to strike a reasonable balance and compromise, focusing on key elements. Specifically:

- While the vast majority of activities carried out under SARA will be online, some fall under the broader description of distance education, which has always been the initiative's focus. Distance education includes two-way interactive video, correspondence courses, and a variety of activities, some long standing and some yet to emerge.

- Ancillary learning activities that support high-quality distance education need to be covered by SARA, as well. Specifically, SARA makes limited provisions for portions of standard-length courses (two meetings, not to exceed a total of six hours—revised and shortened from the earlier proposed 25% allowance) short courses (used by some institutions for competency-based work, internships, fieldwork and so forth) and clinical placements.

- The rational is that such activities are primarily designed to increase program quality and improve student learning and completion in distance education. If institutions abuse these provisions and attempt to use the short course allowance to establish an ongoing presence without going through state review and approval, any state in which that abuse takes place can file a complaint with the SARA entity that approved the offending institution as a way to eliminate the abuse.

- NC-SARA, the regional compacts and participating states will monitor institutional behavior to ensure that such intentional and quality-oriented provisions are not used as loopholes to get around SARA's core intent.

- We recognize that some states, including Massachusetts and Connecticut, would need to revise their physical presence standards for the purposes of SARA. We contend, however, in terms of the overall quality assurance and consumer protection the initiative can provide, that the benefits of multistate reciprocity will outweigh perceived costs.

- Further, we believe that SARA provides a much-needed nationwide (but not federal) platform on which states can work as partners to address institutional actions and student complaints—as well as to address issues that will emerge as distance-education technologies and models evolve. The participation of Connecticut and Massachusetts in such processes would be important and valuable.

3. State Role

Lastly, nothing in SARA limits or compromises the ability of any state or its authorized entities (including attorneys general) to take action against an institution that it views as violating a state's general laws of consumer protection. Notable efforts have gone into recent revisions of the consumer protection section of the SARA agreement to clarify these matters. Moreover:

- We acknowledge that states' laws and regulatory authorities vary greatly, illustrating the pressing need for SARA. Rather than ceding authority, however, states that choose to participate in SARA are following a tradition and practice of coming together to agree on common approaches and reciprocal solutions to shared problems. The best evidence for that practice is contained in a database maintained by the Council of State Governments in its National Center for Interstate Compacts (http://apps.csg.org/ncic/Default.aspx). According to that resource, Connecticut participates in 29 interstate compacts and Massachusetts, 26.

- While SARA is not technically a "compact," it operates through existing compacts and is equivalent in intent and similar in construction. As states can choose which interstate compacts

they join, they certainly can choose whether they will join SARA. Above all, SARA is a voluntary agreement for both states and institutions.

- As of this writing, nine states have passed legislation enabling their state to participate in SARA, similar bills are pending in 11 other states, and five states have determined that they can participate in SARA without statutory change (see http://nc-sara.org/content/sara-state-status).

While understanding fully that you and other duly designated officials in Connecticut and Massachusetts must do what they deem best for their states and students, we hope that additional consideration will be given to participation in SARA.

We welcome the opportunity to meet in person and further respond to your concerns. In the meantime, thank you for your consideration and please do not hesitate to contact us with additional thoughts or questions.

Sincerely,

Michael K. Thomas
President and CEO
New England Board of Higher Education

Marshall A. Hill
Executive Director
National Council for State
Authorization Reciprocity Agreements

c: Timothy J. Donovan, Chancellor, Vermont State College
Clark Greene, Interim Commissioner, Rhode Island Office of Higher Education
Todd Leach, Chancellor, University System of New Hampshire
James H. Page, Chancellor, University of Maine System

Memo

To: Whitney Barkley, Toby Merrill, Chris Lindstrom, Suzanne Martindale, and Max Love

From: Robyn Smith, NCLC

CC: Persis Yu and Deanne Loonin, NCLC

Date: March 19, 2014

Re: State Authorization of Distance Education Programs

Background

For Title IV eligibility, the Higher Education Act requires that institutions "in any State" be legally authorized by that state to provide postsecondary education.[1] The Department's regulations further provide that institutions must be legally authorized "in the State in which the institution is physically located . . . ."[2] Specifically, a school 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."[3] In addition, the school must either (1) be established by name (through a charter, statute, constitutional provision, or other action) and authorized to operate postsecondary programs or (2) be licensed or approved by the state to operate postsecondary programs (and may not be exempt from licensure or approval requirements based upon accreditation).[4]

For schools in the latter category, schools must show that the state:

> took an active role in approving or licensing the institution. . . . A State approval or licensing process where an institution simply pays a fee to the State and receives an approval or license to operate as a business without an additional process to evaluate the institution to offer educational programs beyond secondary education would . . . not suffice.[5]

In addition, under these rules a state may not approve or license a school solely based on its accreditation. Instead, the state must evaluate the institution on some other basis such as its

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[1] 20 U.S.C. § 1001(a)(2).

[2] 34 C.F.R. §§ 600.4(a)(3), 600.5(a)(4); and 600.6(a)(3).

[3] 34 C.F.R. § 600.9(a)(1).

[4] 34 C.F.R. §§ 600.9(a)(1)(i) and (ii).

[5] U.S. Dep't of Educ., State Authorization Regulations, Dear Colleague GEN-13-20 (Aug. 9, 2013).

operating history with the accreditor, which could include reviewing the audited financial statements submitted to and complaint history with the accreditor.[6]

The regulations lack a similar regulation for distance education. A federal district court invalidated the applicable regulation, 34 C.F.R. § 600.9(c).[7] The remainder of this memo evaluates existing state authorization reciprocity agreements regarding distance education, as well as potential state authorization regulations for distance education in light of these agreements and the requirements for brick-and-mortar schools.

State Authorization Reciprocity Agreements

Schools claim that it is burdensome to obtain authorization in every state where they offer distance education programs. In order to allow schools to "easily operate distance education programs," four regional higher education compacts have drafted state authorization reciprocity agreements (SARAs).[8] These are agreements among member states providing that a determination that an accredited, degree-granting school meets SARA standards by the home state (the state where the school holds its legal domicile) must be accepted by host states (states where the school does not have a physical presence as defined by SARA) as sufficient for state authorization.[9] SARAs contain uniform minimum standards for disclosures, educational quality, and financial responsibility, which only the home state may enforce.[10]

How it Works:

- To participate, the state legislature must authorize a state oversight agency to sign onto the regional SARA.[11]
- The state must agree to comply with SARA for all accredited, degree-granting schools (cannot leave some segment of schools out, for example for-profit schools).[12]
- The state must therefore use SARA's definition of physical presence for determining whether an out-of-state school providing on-line programs is covered by SARA.[13]
- The state must designate one "portal agency" responsible for (1) determining whether the institution meets SARA standards and is eligible to participate in SARA; (2) serving as the

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[6] *Id.*

[7] *Career College Ass'n v. Duncan*, 796 F. Supp. 2d 108 (D.D.C. 2011).

[8] Commission on the Regulation of Postsecondary Distance Education, "Advancing Access Through Regulatory Reform: Findings, Principles, and Recommendations for the State Authorization Reciprocity Agreement" at 3 (April 2013); National Council for State Authorization Reciprocity Agreements (NC-SARA), "Frequently Asked Questions About SARA" at 1 (Mar. 10, 2014). The four compacts are the New England Board of Higher Education, Midwestern Higher Education Compact, Southern Regional Education Board, and Western Interstate Commission for Higher Education.

[9] NC-SARA, "Frequently Asked Questions about SARA" at 1 (Mar. 10, 2014); SARA-PS 1(2), (13), (14).

[10] NC-SARA, "Frequently Asked Questions about SARA" at 1 (Mar. 10, 2014).

[11] SARA-PS 2(1)(b).

[12] SARA-PS 2(5)(b).

[13] SARA-PS 5.

contact with other states; and (3) serving as the initial contact point for student complaints from other states.[14]

- The portal agency, or some combination of state agencies, must have the authority to investigate and resolve complaints regarding all covered schools.[15] The portal agency must hear appeals of any decisions made by other agencies that are investigating and resolving complaints.[16]
- If the home state determines that a school meets the standards of SARA and is therefore eligible to operate under SARA, member host states must authorize that school to offer distance education in-state, unless the school has a physical presence in the host state.
  - Note, however, that SARA purports to allow home state SARA-approval to be sufficient to allow the school to offer on-line courses at military bases to federal employees and family members, even if the host state is not a SARA-signatory.[17]
- For private schools, the home state must accept a federal financial responsibility rating of 1.5 (or 1.0 with justification) as sufficient financial stability to qualify for participation SARA.[18] Home states may require a higher rating.[19]
- Consumer protection provisions are limited to the following:
  - Schools must be "held accountable for" and "attest[] to the veracity and adequacy of . . . recruitment material, marketing efforts, and other institutional disclosures," including job placement and salary information to the extent they are provided.[20]
  - Schools much provide information about accreditation, refund policies, tuition and fees, admissions requirements, and whether programs meet professional licensing requirements.[21]
  - School must abide by the standard practices described in the Interregional Guidelines for the Evaluation of Distance Education Programs (Online Learning) (hereinafter "Interregional Guidelines").[22] These are general educational quality standards for on-line programs regarding faculty, curricula, evaluation, etc.[23]
  - For unanticipated school closures, the regional SARAs only require that member states have at least one policy that: (1) assures that students receive the education contracted for (such as a teach-out); or (2) provides "reasonable financial compensation" for the

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[14] SARA-PS 2(5)(e).

[15] SARA-PS 2(5)(d) and (e).

[16] SARA-PS 4(2)(c).

[17] SARA-PS 3(9), 5(2)(c).

[18] SARA-PS 2(5)(c).

[19] Id.

[20] See Midwestern State Authorization Reciprocity Agreement (M-SARA) at 11-12 (Nov. 2013).

[21] See, e.g., M-SARA at 12.

[22] See, e.g., M-SARA at 9.

[23] See Middle States Commission on Higher Education, "Distance Education Programs: Interregional Guidelines for the Evaluation of Distance Education (Online Learning)" (Feb. 2011)).

> education the students did not receive (such as through "tuition assurance funds [or] surety bonds, . . . or other practices deemed sufficient to protect consumers").[24]

- The home state (through its portal agency) may remove any school from participation in SARA if that school violates SARA standards.[25] (This would be a revocation of state authorization for the host state.) The home state must annually review the school to determine whether it is complying with SARA.[26]
- A state may withdraw from the SARA with 90 days written notice. Schools would have at most 6 months to continue operation under SARA authority.[27]

<u>Key Problems with SARA</u>:

- <u>Accreditation in Lieu of State Standards</u>: The home state must accept institutional accreditation as sufficient initial evidence of academic quality for approving schools' participation in SARA.[28] However, there are many reasons that states should not rely entirely on accreditation agencies for institutional authorization, particularly with respect to for-profit schools.
- <u>Treatment of Public, Private Non-Profit and Private For-Profit Schools as If They are the Same</u>: The enormous amount of historical evidence demonstrates that deceptive practices have been widespread in the for-profit educational industry, while they have been rare in the public and non-profit educational sectors. Unlike public and private non-profit schools, for-profit schools owe their highest fiduciary duty to earning profits for owners or shareholders. Because of this fiduciary duty, many for-profit schools focus on student enrollment numbers rather than on delivering high quality educational programs, which leads too many schools to engage in deceptive high pressure sales techniques while neglecting their educational mission. Thus, while SARA, as drafted, may be appropriate for public and most private non-profit institutions, for-profit schools should be treated differently. Otherwise, students (and taxpayers) are at great risk of being harmed by unscrupulous schools.
- <u>Waiver of State Consumer Protection Laws</u>: To be eligible to become a member, a state must "waive" its distance education oversight laws with respect to covered schools.[29] The state only retains the ability to use general criminal or consumer protection laws (such as Unfair and Deceptive Acts and Practices ("UDAP") statutes).[30]
- <u>Lack of Consumer Protections in SARA</u>: Host states cannot provide SARA-school students with ANY of the following protections, and it is unclear whether a home state may enact provisions

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[24] *See, e.g.,* M-SARA at p. 15.

[25] SARA-PS 3(3).

[26] *See, e.g.,* M-SARA at p. 7.

[27] SARA-PS 2(2).

[28] SARA-PS 2(5)(a).

[29] NC-SARA, "Frequently Asked Questions about SARA" at 2 (Mar. 10, 2014); SARA-PS 2(5)(g) ("The state agrees that it will not impose on an institution operating under SARA from another state any requirements, standards, fees or procedures other than those set forth in SARA policies and rules.")

[30] SARA-PS 2(5)(g).

that are more comprehensive or stricter than SARA for on-line programs offered in host states. This means that non-SARA school students and SARA school students in host states will have different rights and protections. Even if host states can enact stricter protections, there is a high likelihood that many for-profit schools will move their legal domicile to the state with the most lenient consumer protection laws. For example, a for-profit school recently obtained approval to operate under South Dakota's lenient oversight laws after Virginia had revoked its approval to operate.[31]

o Student Recovery Funds/Bond Provisions: It is up to the home state to provide for teach-outs or for "reasonable financial compensation" for the education not received when a school closes. This means that host state students are only entitled to what the home state provides, whereas other host state students who attend non-SARA programs are entitled to whatever their state provides, which in many cases is more complete relief. For example, in California, closed school students are entitled to a full tuition refund in the event a school closes and is unable to arrange a teach-out. Students who obtain a judgment against a school that they are unable to collect are also entitled to payment of that judgment from the student recovery fund.[32]

o Refunds and Cancellation Provisions: Host states cannot enact refund or cancellation provisions applicable to SARA-school students. It is unclear whether the home state has any right to provide refund and cancellation rights beyond what is required in SARA. (Although there are refund rights for Title IV funds if a student withdraws before he/she completes 60% of his/her program, there are no such rights for private loans unless provided by state law).

o Enrollment Agreements, Disclosures, Language Provisions, Private Rights of Action, Prohibitions Against Deceptive Practices: These and many other typical consumer provisions in state oversight schemes are not included in SARA. Although the SARA Standards and Policies states that the portal agency of the home state must investigate and resolve allegations of "dishonest and fraudulent activity by a provider, including the provision of false or misleading information," there is no such catch-all provision or any such language in any SARA agreement.[33] The consumer protections include only those listed above.

- Programs that Lead to Licensure: SARA allows schools to offer programs that lead to a licensed profession (nursing, teaching, psychology, etc.) to students in host states even when the programs do not qualify students for licensure in that state. SARA only requires that schools disclose that the program does not meet state licensure requirements.[34]

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[31] Dirk Lammers, "Troubled Virginia University's Website Removes References to South Dakota Campus," The Republic (Mar. 6, 2014).

[32] See Cal. Code of Regs. tit. 5, § 76020.

[33] SARA-PS 4.

[34] SARA-PS 3(5).

- Inadequate Student Complaint Procedures:
  - Host state student must first try to resolve a complaint with the school through its internal grievance procedure.[35] Only after going through this procedure may a student then submit a complaint to the home state portal agency.[36] Yet, there are many reasons why students at for-profit schools should have the right to go straight to a state agency with a complaint.
  - The home state is required to investigate and resolve complaints regarding dishonest or fraudulent activities (as defined by SARA) or failure to comply with Interregional Guidelines. Complaints involving grades or student conduct are "governed entirely by institutional policy and the laws of the SARA institution's home state."[37]
  - The host state may also work to resolve the complaint, "preferably through the state's SARA portal agency."[38] However, the home state's portal agency must make the final decision.[39]
  - Therefore, if a host state agency is aware of a school's systemic and widespread deceptive practices or SARA violations and cannot convince its state attorney general to take action under a UDAP statute, it has no authority to take action against a school – it must rely on the home state agency to do so. The host state would have to withdraw from SARA in order for its oversight agency to take action (which would then end up in the revocation of the host state approvals for other SARA-schools).
- Broad Definition of Physical Presence: Physical presence is not triggered for purposes of SARA if the school provides for the following in a host state. There are legitimate reasons that each of these could be considered as sufficient to constitute a physical presence in host states.
  - Short course or seminar of 20 classroom hours or less.[40]
  - Instructor and students physically meet together in one term for six hours or less.[41]
  - Field experiences (such as placing students in externships) as long as they place fewer than 10 students who are physically present simultaneously at a single site and does not involve a multi-year contract.[42] Many for-profit school students experience problems with their field experiences at physical locations in their state.
  - Interstate recruiting, including college fairs and recruitment for distance education programs.[43] The latter is particularly troubling – SARA-schools could hire and pay unlicensed recruiters in a host state to target and recruit students outside of one-day

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[35] SARA-PS 4(2)(a).

[36] SARA-PS 4(2)(c).

[37] SARA-PS 4(2)(b), (c).

[38] SARA-PS 4(2)(d).

[39] SARA-PS 4(2)(c).

[40] SARA-PS 3(7), 5(1)(b).

[41] SARA-PS 3(7), 5(1)(b).

[42] SARA-PS 5(2)(i).

[43] NC-SARA, "Frequently Asked Questions About SARA" at 9 (Mar. 10, 2014).

fairs. This could return us to the days of independent agents recruiting people off the street through deceptive representations – a practice many states successfully put a stop to by enacting independent agent/recruiter licensing laws and requirements.

- Although the Commission that negotiated SARA and its policies and standards did not include all stakeholders – consumers, students, and law enforcement representatives or advocates were not included in the negotiations.[44] In addition, none of the regional compact boards, commissions or SARA steering committee members include student, consumer, or law enforcement representatives, nor does the National Council for State Authorization Reciprocity Agreements.[45]

How State Reciprocity Should Work to Provide Adequate Student and Taxpayer Protection

Although this section does not suggest proposals for the federal regulation, it highlights how SARA could be drafted to allow member states to retain the authority to enact stricter consumer protections and to take action against distance education schools that violate SARA or its consumer protection laws. As set forth above, SARA is not currently balanced between consumer, state and school interests, but is weighted heavily in favor of deregulation and restricting state power to both ensure that its citizens' educational investments pay off and protect them from deceptive practices. Here are some ways SARA could be redrafted to address this imbalance:

- The host state should retain the authority to enact or apply existing stricter consumer protections to distance education programs, including prohibitions targeted to unfair and deceptive business practices, disclosure requirements, student cancellation and refund rights, student tuition recovery fund provisions, and requirements for enrollment agreements and other important documents.
- The host state should retain the jurisdiction to limit or deny approval, or take any other appropriate action, in the event it determines that the school has failed to meet the minimum SARA standards, its own minimum standards, or violated any state law or regulation.
- The host state should retain the responsibility for accepting, investigating and acting on complaints from host state students (up to and including revoking a school's state authorization), and the school should be required to cooperate with any investigation.
- The host state should retain the right to impose its own record retention requirements, require the school to provide annual data regarding host state students, and to inspect documents, conduct announced or unannounced site visits, speak with students and employees, and require the school to comply with any other informational requests or audits.
- The host state should retain the right to require that the school notify it in whatever

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[44] Commission on the Regulation of Postsecondary Distance Education, "Advancing Access Through Regulatory Reform: Findings, Principles, and Recommendations for the State Authorization Reciprocity Agreement (SARA)" at 32-33 (April 2013).

[45] The members of each board, steering committee, council and commission are identified on each organization's website.

circumstances it deems necessary, for example if ownership or control changes, an accrediting agency proposes to take an adverse action, a law enforcement agency starts an investigation or takes an action, etc.

- The host state should have the authority to charge the school adequate fees to fully fund its investigative oversight.
- If the host state has higher minimum standards and/or more active approval/re-approval processes, the host state should retain the authority to review the school for compliance with those higher standards and/or use its more active processes to ensure that a school meets the SARA or its standards. For example, if the home state simply accepts accreditation as sufficient for approval and the host state requires a more in-depth review to ensure that the school satisfies the standards, such as through document review or site visits, the host state should be able to visit the physical location of the campus, request that the school submit information, and take other actions it deems necessary to grant approval through SARA.

Proposals re State Authorization

The following is the proposal from Russ Poulin, which makes only minor revisions to the previous 34 C.F.R. § 600.9(c):

> "If an institution is offering postsecondary education through distance or correspondence education to students in a State in which it is not physically located ~~or~~*and* in which it is ~~otherwise~~ subject to State jurisdiction as determined by the State, the institution must meet any State requirements for it to be legally offering postsecondary distance or correspondence education in that State. An institution must be able to document to the Secretary the State's approval*s or exemptions* upon request."

This provision would allow distance education programs to receive state authorization and federal funding even if (1) no state has an active role in determining whether a school meets minimum standards before granting approval; and (2) no state has any obligation to accept, investigate and act on students complaints. It would also allow state authorization through SARA even though the host state would not be permitted to protect its own students by enacting or enforcing consumer protections that are stricter than SARA's weak provisions.

- There are no state complaint requirements in the above proposed rule. Thus, distance education programs could be legally authorized for Title IV purposes even if the home state does not review or act on student complaints. Although the 4 SARAs currently provide for a weak home state complaint process, these provisions could be removed at a future date.
- SARA currently requires coverage and initial authorization as long as a school is accredited by a Department-approved accreditation agency. This is essentially automatic approval via

accreditation. Distant education schools could therefore operate in states without any active evaluation by those states. This is not consistent with the triad model of school oversight and there are numerous and documented reasons that approval should not be left entirely to accrediting agencies.[46]

- SARA's minimal "consumer protection" provisions simply require certain accurate disclosures, placing the risk of avoiding schools that engage in deceptive practices or provide substandard educations on the people who are least able to protect themselves. Worse, SARA would prevent states that have strong consumer protection standards for brick-and-mortar students from covering distance education students or from enacting stronger protections for distance education students. These students are equally deserving of protection – the investment they make in their educations will be just as costly as it is for the brick-and-mortar students, and distance education students are likely more vulnerable to fraud because of the nature of the on-line education. SARA's lack of consumer protections will harm students and ultimately impact taxpayers as well. Thus, any federal rule should not recognize state authorization for distance education programs through a reciprocity agreement if that agreement requires the member states to waive and/or refrain from enacting stricter consumer protections. It should do the opposite – require that to the extent a state authorizes distance education, those students should be covered by the same consumer protections as brick-and-mortar students.

Finally, SARA as drafted would only allow schools to participate if they apply SARA to all school sectors – which means the states would not have the discretion to decide where to target their limited oversight resources, for example to the for-profit school sector which has a long history of engaging in deceptive practices due in large part to its unique legal duty to generate profits. Such strong-arm authorization provisions should not be permitted by a federal regulation.

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[46] *See, e.g.*, U.S. Senate, Health, Education, Labor & Pensions Comm., "For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success," S. Rpt. 112-37 at 122-29 (July 30, 2012) (the report concluded that accrediting agencies' "structures and processes expose them to manipulation by institutions that are "more concerned with their bottom line than academic quality and improvement.").

M E M O R A N D U M

TO: Academic Affairs Committee, Board of Higher Education
            Richard M. Freeland, Commissioner

FROM: Task Force on For-Profit Institutions and Online Delivery

DATE: May 30, 2014

SUBJECT: Interim Report of the Task Force on For-Profit Institutions and Online
            Delivery to the Academic Affairs Committee on Possible Options for
            Regulatory Reform

In the fall of 2012, the Massachusetts Board of Higher Education (the Board), established the Task Force on For-Profit Institutions and Online Delivery (the Task Force). The Board charged the Task Force with exploring "the issues and challenges presented by the for-profit industry, within the context of the Board's consumer protection role, and 2) jurisdictional issues posed by the online education delivery model offered by out-of state institutions, based on the Board's current statutory and regulatory framework."[1] This interim report identifies options– and describes the background that provides the context for evaluating those options– for how the Board and the Department should proceed. It also sketches out the rudiments of an approach to regulatory revisions that the Task Force presently favors.

The need to reconsider the existing regulatory approach in this area stems from the rise of online higher education providers, many of which are for-profit institutions.[2] Online (or distance) education offers many opportunities. At the same time, this shift in the higher education landscape has given rise to new, and much discussed, consumer protection concerns. These institutions also now directly serve thousands – at a minimum – of Massachusetts residents who enroll in programs and courses provided by these institutions of higher education and the trend lines suggest the number will grow over time.

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[1] Mass. Bd. Higher Educ., "Task Force on For-Profit Institutions and Online Delivery Charge," (Attachment A).

[2] Educ. Trust, "Subprime Opportunity: The Unfulfilled Promise of For-Profit Colleges and Universities," [hereinafter "Subprime Opportunity"] available at: http://www.edtrust.org/sites/edtrust.org/files/publications/files/Subprime_report_1.pdf (last accessed April 2, 2014), at 3 & 6.

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This change in who provides higher education to our students challenges the traditional regulatory framework in Massachusetts, which, like many other states, has long based its oversight jurisdiction on a higher education institution's "brick-and-mortar" physical presence in the state. In addition, Massachusetts, like other states, lacks the resources (given current staffing of the Department of Higher Education (DHE)) to oversee out-of-state on line providers in the same manner it oversees more traditional in-state providers, especially if the pace of online higher education growth persists. Finally, potential action by the United States Department of Education (DOE) provides another reason for the Board and DHE, like other state higher education regulatory bodies, to reconsider the existing regulatory framework as it applies to online higher education institutions. The Department of Education (DOE) initially issued a rule that would have limited Title IV funding to schools that, if providing distance education, were "authorized" by every state in which they enrolled a single resident as a student. [3] In 2011 a federal judge struck down that rule, on procedural grounds, but a negotiated rulemaking is currently in process.[4] The DOE's new proposed rule would again require distance education providers that seek Title IV funding to be authorized in each state from which students are enrolled.[5]

At present, the DHE and the Board exercise no jurisdiction over out-of-state on-line education providers, whether for-profit, not-for-profit, or public, except in limited circumstances. The Board's authorizing statute extends its jurisdiction to any school "doing business within the Commonwealth" or "conduct[ing] within the Commonwealth any course . . . leading to a degree."[6] Board regulations echo the statutory language.[7] The Board has generally interpreted its jurisdiction to extend only to those institutions with a physical presence in Massachusetts, reaching online programs only if they have some physical presence such as a main administrative office, or offer an on- the-ground curricular requirement, (or systematically target Massachusetts residents with advertising).[8] In practice, out of state online course providers have been subject to the Board's program approval process only when they offer an on-the-ground clinicals here, an activity we do not wish to discourage but that the current regulatory framework uses as the trigger for exercising oversight.

Assuming that the Board believes, as the Task Force does, that the Board needs to adjust its approach to the regulation of on-line providers, there are three potential options to pursue that the Task Force has identified: (ii) proceed to develop new regulations for higher education institutions that operate on line and enroll Massachusetts residents in their courses even if those institutions lack a physical presence in the state; (ii) join the New England-State Authorization and Reciprocity Agreement (SARA); or (iii) pursue an alternate reciprocity framework with willing states.

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[3] U.S. Dep't of Educ., "Program Integrity and Improvement Issues," available at: http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/pii2-issue2-redline.pdf (last accessed April 2, 2014).

[4] U.S. Dep't of Educ., "Negotiated Rulemaking 2013-14: Program Integrity and Improvement," available at: http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/programintegrity.html (last accessed April 2, 2014).

[5] *Career Colls. Ass'n v. Duncan,* 596 F.Supp.2d 108, 134 (D.D.C. 2011), *affirmed in relevant part by, Ass'n of Private Sector Colls. and Univs. v. Duncan*, 681 F.3d 427, 462-63 (D.C. Cir. 2012).

[6] MASS. GEN. LAWS ch. 69 § 31A.

[7] 610 MASS. CODE REGS. § 2.03(4).

[8] Task Force Memorandum, April 8, 2013 (Attachment A).

Each potential path forward would require a very significant commitment of time and resources. As the Task Force has seen in its recent dealings with stakeholders in drafting a revised program approval policy, these matters of revising the existing regulatory framework are very challenging, given the legitimate and serious concerns on all sides and the importance of protecting consumers while treating regulated entities equitably. Therefore, it is important that the Board prioritize the potential approaches to pursue so that the Board and the Department may efficiently allocate resources going forward.

Of course, there is no need to make an exclusive choice. The Board could proceed to develop its own proposed regulations while simultaneously pursuing participation either in SARA or some alternative reciprocity framework. But before devoting the time that would be necessarily involved in developing fully worked out proposed actions concerning any one of these paths – let alone all of them simultaneously – the Task Force recommends the Commissioner prepare a plan, based on the options and recommendations outlined in this report, and seek guidance from the Academic Affairs Committee on how best to proceed. After more than a year of study and assessment, it is clear to the Task Force that, in the absence of that guidance, it is not possible to make progress on this difficult issue.

Our present recommendation is simply stated. The Task Force recommends that, notwithstanding the benefits of reciprocity, it makes sense to begin the intensive work of developing a proposed regulatory revision to address out of state on-line providers, using the approach developed by Maryland's higher education department as a template. That approach is described further below.

The interim report proceeds by briefly describing the Task Force's understanding of the need to reconsider and reform the state's existing regulatory approach.   It then briefly sketches the three possible pathways for reform. It concludes by offering a brief assessment of the pluses and minuses of pursuing these various approaches, either individually or in combination, and explaining the reasons for our recommended approach.

I. The Nature of the Problem

The Task Force does believe the regulatory status quo is problematic. The track records regarding graduation rates and student debt loads of out-of-state on-line, for-profit providers is concerning. That counsels in favor of ensuring that such providers, insofar as they are becoming substantial providers of higher education to our residents, are visible to the Board and DHE and are subject to adequate oversight in order to protect our residents and ensure they are receiving quality educational services.

At the same time, there is also a risk that, in the absence of some reform of our existing regulations concerning such providers, we will not be able to satisfy federal regulations that may require distance education providers to show they are "authorized" in each state in which they enroll residents in order to receive Title IV funding. While it is not clear how these regulations will apply in a state that does not regulate distance education, as Massachusetts does not currently, we risk limiting the options of our residents if online education providers refuse to enroll them for risk of losing Title IV funding.

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Relatedly, the oversight of out-of-state providers that now occurs follows from a trigger that seems poorly chosen. The state presently requires full program approval whenever an out of state provider requires some "on the ground" activity, such clinical component to a course and that clinical component takes places within Massachusetts. The effect of this being the sole trigger for oversight is to impose regulatory costs on those out of state providers who make the sensible pedagogical decision to ensure that a course or program is not entirely online.

Finally, and at the most basic level, whatever one's evaluation of the relative benefits of the rise of on-line higher education (whether provided by for-profit institutions or not), there is the simple fact that the Board is tasked with protecting Massachusetts consumers of higher education. As increasing numbers seek out distance education, more Massachusetts residents will be taking courses that are currently entirely unregulated by the Board. While some may point out that the Board does not protect residents who cross state lines to go to a college in Connecticut or New Hampshire, the Task Force believes that Massachusetts residents taking online courses in Massachusetts, who have not clearly opted out of the Commonwealth's protection by crossing state lines, should be protected by the Commonwealth, much as residents who order physical goods online rightly expect the state to protect their interests as consumers.

II. Three Options to Pursue

Given the limitations of the current regulatory status quo, the Task Force does believe that the existing regulatory framework, and in particular the understandings of "doing business" that it reflects, should be reconsidered and adjusted. Determining the best means of bringing about that reform, however, is not easy. In our work so far, the Task Force has identified three main options to pursue, each of which is fleshed out more fully in the following sections.

A. Revising the Board's Current Regulations

If the Board were to revise its own regulations, outside the context of a larger reciprocity agreement, there are three areas the Task Force has identified for the Board focus on in order to address the issues raised by online, out-of-state providers serving Massachusetts residents: (i) clarifying the scope of the Board's jurisdiction over on-line providers by revising the definition of "doing business" in the Commonwealth; (ii) creating a registration-based regulatory framework for online providers that do not maintain a physical presence in Massachusetts; and (iii) instituting new regulations for for-profits within the Commonwealth that are aimed at addressing the potential for abuses that may uniquely at risk of arising in that industry.   We discuss each of these areas in turn.

1. Defining "Doing Business" for Purposes of Jurisdiction.   Currently, all institutions under the Board's jurisdiction are subject to program approval, and by statute, the Board's jurisdiction extends to all schools "chartered," "located," "offering courses," or "otherwise doing business in the Commonwealth."[9] While the statute by its

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[9] MASS. GEN. LAWS ch. 69 § 31A.

own terms encompasses schools chartered in Massachusetts or with a primary campus in Massachusetts, the exact contours of jurisdiction are determined by the Board's interpretation of "doing business." This phrase has not been defined in regulation but rather has been interpreted on an as applied basis, with jurisdiction generally being triggered by a physical presence in Massachusetts or advertising targeted at Massachusetts residents.[10]

The current approach can lead to perverse outcomes for online providers. For example, a course that would not otherwise fall under the Board's jurisdiction would immediately become subject to full program approval if students are allowed to complete an on-the-ground clinical component here. A new definition of doing business should avoid such disincentives to the use of experiential learning approaches.

This point aside, a regulatory definition of "doing business" will require careful tailoring to avoid over- or under- inclusion of online providers. Including all such organizations would clearly overwhelm the Board's oversight capacity. Another option would be to define "doing business" so as to exclude all, or most, purely distance education providers and use the term instead as one of the triggers for full-program approval (along with "chartered," "located" and "offering courses").[11] Then, to the extent the Board wished to regulate purely distance educators, regulations could define "conducting courses," to cover just that group. [12] This may be the preferable course because it gives content to the second clause of the first sentence of the statutory provision and recognizes the linguistic distinction that the legislature drew between "offering courses" and "doing business" on one hand, which require "authorization," and "conducting courses" on the other, which requires "approval."[13] Additionally, this approach would give the Board a statutory justification for treating a class of entities under its jurisdiction disparately, "authorizing" some and "approving" others.[14]

There are several options for "doing business" triggers. As under the current interpretation, schools with any physical location in the state for instruction should be considered to be doing business in the Commonwealth, as should any incorporated in the Commonwealth. Another would adopt the current rule regarding advertising targeted at Massachusetts residents.[15] Others might include offering of courses that are tailored for Massachusetts residents, issuing certifications for Massachusetts occupational requirements, or having recruiting personnel present in the Commonwealth for more than a certain number of days per year.

A "doing business" characterization might also be triggered once a certain number of Massachusetts residents is enrolled by an institution, regardless of other factors. Such limits would inevitably be somewhat arbitrary, difficult to enforce (especially in the context of distance education), and easy to game by enrolling

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[10] Task Force Memo, April 8, 2013 (Attachment A).

[11] MASS. GEN. LAWS ch. 69 § 31A.

[12] *Id.*

[13] That clause reads: "nor shall any educational institution chartered, incorporated or organized in another state conduct within the commonwealth any courses available to residents of the commonwealth leading to the award of a degree, unless such educational institution has received the approval of the commonwealth for such courses." *Id.*

[14] *See id.*

[15] Task Force Memo, April 8, 2013, (Attachment A).

Massachusetts residents right up to the limit, thus producing what amounts to strange inequalities in Board protection between Massachusetts residents. Nonetheless, there is a case that providers with a very substantial student base in the state should be subject to full Board oversight.

2. Registration of Distance Education Providers. As noted, subjecting all distance education providers who enroll a Massachusetts resident to program approval is probably impossible given the Board's resources, even if it were an advisable policy, which it may not be. However, a system that requires registration of such providers may be a good alternative.

Such a system could be based on Maryland's approach. Maryland's general higher education regulations do not directly govern purely distance education,[16] but a statute requires distance education providers to register within three months of enrolling their first Maryland student,[17] and the registration must be renewed annually.[18] Institutions that register are subject to a number of requirements, including that they be accredited by a Department of Education approved accreditation body[19] and comply with Maryland's refund policy.[20] Furthermore they must comply with Maryland's "Principles of Good Practice" for distance education, which sets basic requirements of qualified faculty, adequate information on the program to be provided to students, a commitment to student support, and ongoing evaluation of the program.[21]

A framework such as this would effectively give automatic authorization to distance education providers who meet certain requirements. These requirements could be purely formal, substantive, disclosure based, or a combination. At the least burdensome, a regulation could simply require all distance education providers to notify the Board before enrolling a Massachusetts resident. This would allow the Board to gather information about the prevalence of distance education in the Commonwealth (which it currently lacks), and to exert jurisdiction over distance education providers while more thought is devoted to whether and how to regulate them.

A more robust framework might require providers seeking to register to certify to the Board that a given set of requirements are met. This would then allow the Attorney General's office or consumers to sue institutions in the event that an institution misleads the Board. The Board should then keep a list of registered institutions on its website with a clear explanation of the differences between registered distance education providers and schools that have gone through the entire program approval process.

Such a system could also require certain disclosures, and/or compliance with substantive regulations. Disclosure based requirements could include useful statistics like: student loan default rates, average debt to post-education income (or discretionary income) ratios, job placement rates (both total and field specific), graduation/completion rates and times, and starting salary averages and ranges. However, the Board would

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[16] MD. CODE REGS. §§ 13B.02.01.02 & 13B.02.01.03(12)(c).

[17] MD. CODE EDUC., § 11-202.2.

[18] MD. CODE REGS. § 13B.05.01.09.

[19] *Id.* § 13B.05.01.05.

[20] *Id.* § 13B.05.01.06(a)(5)(e); the refund policy is outlined at *id.* § 13B.05.01.10.

[21] *Id.* § 13B.02.03.22(c).

have to consider the practicalities and costs that attempting to obtain accurate information on these points may involve for the educators.

Further along the spectrum, substantive requirements could demand that providers meet certain thresholds for some or all of those same statistics (subject to the same data gathering concerns). They could also include a cooling-off period, during which time students could cancel enrollment contracts without recourse, or a refund policy for students who fail to complete the program.[22]

Additionally, the Board might want to scrutinize for-profit distance education providers more closely than other providers. In that case, using a more robust framework, with substantive requirements, could be used for the former category and a more streamlined one for the later.

It is not clear what the Board would have to do to ensure registered providers also be considered "authorized" under the proposed DOE regulations limiting Title IV funding qualification to providers meeting that threshold in each state in which they have students.[23] Because the proposed regulations say the providers must be "authorized by name,"[24] and in the non-distance education context this requires state action, [25] the Board may have to officially recognize each registered distance education provider in order for them to be eligible for Title IV funding under this scheme.

3. Regulations to Address Issues of For-Profit Institutions. The Board could also enact new regulations regarding for-profit schools that fall under the Board's traditional jurisdiction and program approval. Both the AGO[26] and the DOE[27] are in the process of regulating in the sector. Notably, the abusive recruiting tactics that are a source of concern in the for-profit industry[28] are being addressed by the AGO regulations.[29] However, should those regulations fail to be enacted for any reason, the Board could consider similar ones. The Board might also consider some regulations that were not included in the AGO's proposal, but that address similar problems. One such regulation would be a five day cooling-off period, during which time a student could cancel an

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[22] Some possibilities for refund policy specifics are discussed in Nat'l Consumer L. Ctr., "State Inaction: Gaps in State Oversight of For-Profit Education," Dec. 2011, available at:
http://www.nclc.org/images/pdf/pr-reports/state-inaction-for-profit-higher-edu.pdf (last accessed March 30, 2014), [hereinafter "State Inaction,"] at 17-18.

[23] U.S. Dep't of Ed., "Program Integrity and Improvement Issues," available at:
http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/pii2-issue2-redline.pdf (last accessed April 2, 2014).

[24] *Id.*

[25] U.S. Dep't of Ed., Dear Colleague Letter Gen-11-05, (Mar. 17, 2011), available at:
http://ifap.ed.gov/dpcletters/attachments/GEN1105.pdf (last accessed April 3, 2014), at 4.

[26] 940 Mass. Code Regs. §31.00 *et seq, "*For-Profit and Occupational Schools (Proposed)," available at:
http://www.mass.gov/ago/government-resources/ags-regulations/940-cmr-31-00/940-cmr-31-00.html
(last accessed April 2, 2014).

[27] Program Integrity: Gainful Employment, 79 Fed. Reg. 16426 (proposed March 25, 2014) (to be codified at 34 C.F.R. §§ 600 & 668).

[28] State Inaction, *supra n. 40,* at 9; Subprime Opportunity, *supra n. 2,* at 1-2.

[29] 940 Mass. Code Regs. §31.00 *et seq,* For-Profit and Occupational Schools (Proposed), available at:
http://www.mass.gov/ago/government-resources/ags-regulations/940-cmr-31-00/940-cmr-31-00.html
(last accessed April 2, 2014).

enrollment contract without recourse and without being liable for any debt.[30] Another might set specific requirements for refund policies, which under current regulation must simply be "fair and equitable."[31] The Board could also consider a bonding/surety requirement to ensure that for-profit schools will be able to pay any refunds due.[32] These are all ideas that the National Consumer Law Center has suggested and a handful of other states have implemented.[33]

Regulation of these institutions might also involve mandatory disclosure of many of the same statistics outlined above regarding distance educators.[34] Among the states that specifically regulate for-profit schools, disclosure is the most commonly used tool. Popular topics include: graduation/completion rates, job placement rates, licensing examination pass rates, salary and wage information, loan default rates, and the number and nature of student complaints. [35] Of course, the same constraint on program level statistics will be present. Also, some of these disclosures will be required anyway if the AGO regulations pass in their current forms,[36] and are required by current DOE regulation of for-profits that accept Title IV funding.[37]

Yet another approach would be to prevent state financial aid from going to for-profits, or at least those that fail to meet certain performance benchmarks. This is the approach taken by the pending DOE regulations for Title IV funds, [38] which set benchmarks for for-profits based on debt-to-earnings and discretionary debt-to-earnings ratios as well as loan-default-rates that for-profits must meet in order to be eligible for Title IV funding.[39] Similar benchmarks could be used as minimum standards to maintain authorization to operate as well.

B. The SARA Process

Rather than Massachusetts attempting to craft new regulations to address, as a single state, the regulatory challenges presented by on-line providers that are not

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[30] Such a cooling off period is already required for occupational schools under the jurisdiction of the Division of Professional Licensure. MASS. GEN. LAWS ch. 255 § 13k.

[31] 610 MASS. CODE REGS. § 2.07(3)(e).

[32] This too is already in place for occupational schools. MASS. GEN. LAWS ch. 112 §263(g).

[33] State Inaction, *supra n. 40,* at 16-18.

[34] *See supra* § II(a)(ii).

[35] State Inaction, *supra n. 40,* at 14-15.

[36] The AGO regulations will require disclosure of the following: cost of program; graduation rate; graduation time; loan debt; loan default rate. 940 MASS. CODE REGS. § 31.05. They would require disclosure of placement rates and employment statistics only for occupational programs that accept state or federal financing of student enrolment. *Id.*

[37] 34 C.F.R. § 668.6 (The DOE regulations that are in effect already require for-profits to disclose what occupation the program prepares students for; on-time graduation rate; tuition and fees; placement rate and median debt load.).

[38] Program Integrity: Gainful Employment, 79 Fed. Reg. 16426 (proposed March 25, 2014) (to be codified at 34 C.F.R. §§ 600 & 668).

[39] A program becomes ineligible if more than 30% of its students default for 3 consecutive years; or if, for 2 of every 3 consecutive years, the student debt-to-earnings ratio is greater than 12% and the discretionary debt-to-earnings ratio is greater than 30%; or, if for 4 consecutive years, the debt-to-earnings ratio is between 8% and 12% or the discretionary debt-to-earnings ratio is between 20% and 30%. *Id.*

physically located in Massachusetts, the state could itself seek to enter into a broad reciprocity agreement.   The idea behind such a reciprocity approach is that each state effectively agrees to be responsible for the institutions physically located in its state, and to agree, reciprocally, to accept as sufficient the regulatory review of out-of-state providers that is supplied by the state in which that provider is physically present.

The leading reciprocity proposal at present is SARA, an interstate reciprocity agreement that would apply to all online education providers, whether for-profit or not. Under this framework, any institution authorized by a SARA state could offer online education to residents of any other SARA state.[40]   The agreement is aimed at addressing the perceived problem of the patchwork of state regulation of higher education, which makes providing distance education across state lines difficult and expensive.[41]   It is promoted as lowering the costs of regulatory compliance for institutions, increasing online options for students, reducing the institutional burdens on state regulators, and insuring a nationwide baseline of consumer-protection.[42]

However, the DHE has already expressed great concerns about the content of SARA in a joint letter, authored with the Connecticut Office of Higher Education, to the New England Board of Higher Education.[43]   Of most concern to the Task Force, SARA would bind the Commonwealth's hands and prevent regulation of out-of-state distance education beyond the minimal consumer protection standards of the agreement. The only substantive quality standard enforced by SARA is accreditation,[44] which the Task Force believes is inadequate. Massachusetts would thus be forced to authorize any distance learning program from a regionally accredited school that had been authorized in another SARA state.[45]   While SARA does require member states impose some limitations on recruiting practices, its consumer protection measures are minimal; they aim primarily at preventing truly false advertising, and do not address any of the abusive recruiting tactics that some states have outlawed. [46]

Objections to SARA are diverse; it has no refund policy requirement, other than that any refund policies be disclosed;[47] it would require Massachusetts to change it's "doing business" interpretation to exclude programs that conduct courses of up to 20 classroom hours in person as part of a full term course,[48] which would be a major change from current Board policy;[49] and it has weak student complaint provisions.[50]

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[40] New England Bd. of Higher Educ., "New England-State Authorization and Reciprocity Agreement," [hereinafter "SARA"] available at:
http://www.nebhe.org/info/pdf/sara/NEW_ENGLAND_STATE_AUTHORIZATION_RECIPROCITY_AGREEME NT_11-26-13.pdf (last accessed March 31, 2014), § 1.1.
[41] *Id.*
[42] *Id.*
[43] Conn. Office of Higher Educ. & Mass. Bd. of Higher Educ., Joint Letter to New England Board of Higher Education, (January 31, 2014), [hereinafter "SARA letter"], (Attachment B). NEBHE's response is attached as well. NEBHE Letter to Conn. Office of Higher Educ. & Mass. Bd. of Higher Educ., March 25, 2014, (Attachment C).
[44] SARA, *supra n. 58,* at § 6.3.
[45] *Id.*
[46] *Id.* § 7.2.1.
[47] *Id.*
[48] *Id.* app. 1.
[49] *See* Task Force Memorandum, April 8, 2013, (Attachment A).

Most troublingly, SARA prevents states from providing any additional consumer protection measures to its citizens enrolled in SARA institutions.[51]

The Board would likely need additional statutory authority in order to agree to such an interstate compact.   Regardless, the Task Force feels that it is inadvisable for the Board to assign away authority to regulate an industry that is growing and changing as quickly as online education.

C. An Alternate Reciprocity Agreement

Although the Task Force sees great virtues in a reciprocity approach, any reciprocity agreement would have to address the Board's criticisms of SARA.[52]   The agreement would have to be among states that have similar standards for authorizing schools and would have to embody at least some of those standards in the agreement itself.   If such an agreement was joined by a few states with large populations (particularly New York and California), distance education institutions would have an incentive to meet the higher standards to become authorized in a member state, or to lobby their own states to raise standards and join, in order to access a large pool of potential students.   Additionally, some of the suggestions the National Consumer Law Center has for improving SARA could be incorporated into a new agreement, most importantly leaving states free to add consumer protection regulations over time.[53]

While the Board would likely have primary responsibility to negotiate any such agreement, it would probably need statutory authorization to enter into it.   If this is the preferred course of action, it might be more useful to first negotiate the content of such an agreement and then enact that by statute or regulation, rather than regulating initially within Massachusetts.   However, such an agreement could take years to reach, and the Board may feel that regulations need to be passed sooner.   Notably, the proposed DOE regulations limiting Title IV funding to those distance education providers who have been authorized in every state in which they enroll a resident, specifically envisions such reciprocity agreements as a way to satisfy the requirement.[54]

III. Considerations in Assessing the Various Options

At this point the SARA process seems stalled, and so, too, does Massachusetts' efforts to move it in directions that would be most likely to lead to the state's participation. The organizers of SARA have not indicated an interest in making the kinds of changes to the proposed agreement that would address the concerns of the Board and regulatory agencies in other states that share them, especially as many other states have already passed or introduced enabling legislation enter SARA.[55]   Given this state

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[50] Nat'l Consumer L. Ctr., Letter Regarding State Authorization of Distance Education Programs, March 19, 2014, at 6 (Attachment E).

[51] *Id.* at 5.

[52] *See* SARA Letter, *supra n. 58*.

[53] *See* Nat'l Consumer L. Ctr., Letter Regarding State Authorization of Distance Education Programs, (March 19, 2014), at 7-8 (Attachment E).

[54] U.S. Dep't of Ed., "Program Integrity and Improvement Issues," available at: http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/pii2-issue2-redline.pdf (last accessed April 2, 2014).

[55] NEBHE Letter, *supra n. 61*, at 5.

of affairs, it appears that for the foreseeable future, the most viable pathway to reform would involve adopting Massachusetts specific regulations and/or seeking to develop and enter into an alternative reciprocity arrangement.

If the state were to pursue regulatory revision on its own, the most viable approach the Task Force has thus far identified would be to formulate a registration based system for online education. Such a system would appear to be very useful for beginning to gather data on distance education in Massachusetts as well as for exerting jurisdiction over such activity. However, a registration system for online education providers will not itself provide robust program oversight. Additional regulations for for-profit institutions that operate as out-of-state online providers could supplement that general registration system, and they could also benefit those who attend the nine for-profits already in Massachusetts, and any that may be founded in the future. Finally, further specifying and revising the Board's current interpretation of its own jurisdiction is advisable for the sake of clarity and consistency, as well as eliminating disincentives for placing clinical students in Massachusetts. It appears the Board can probably draft and implement such regulations on its own, without seeking additional statutory authority.

An alternative reciprocity agreement would potentially provide the most robust consumer protection to Massachusetts residents. It would allow in-depth scrutiny of online programs by dividing responsibility between the authorizing authorities of different states. Furthermore, a widely agreed to reciprocity agreement could set the stage for higher standards throughout the country. However, this processes will be long: the Board would have to seek statutory authorization to enter into reciprocity agreements; the willingness of other states to enter such an agreement would have to be determined; the details of the agreement would need to be negotiated; and finally the terms of the agreement would have to be enacted in regulation. And, of course, to the extent this alternate reciprocity agreement is less than nationwide, as seems inevitable given SARA, it would potentially exclude providers that our residents might wishes to take courses from. In consequence, some independent, Massachusetts based regulatory reform would appear to be necessary as a supplement to any reciprocity agreement that does not encompass every state. All of this suggests that the Task Force should move forward in developing its own proposed revision of it regulations, while seeing how the SARA process develops and exploring the possibility of developing an alternative to it.

Massachusetts Department of Higher Education

Background Briefing:

Task Force on For-Profit Institutions and Online Delivery – Possible System Role in Online Education

June 2014

Status

A report entitled, "The Role of the Massachusetts Board of Higher Education in the Development of Online Education," was commissioned by the BHE's Task Force on For-Profit Institutions and Online Delivery and prepared by Colin Diver. He began the project last summer/fall and completed his work this spring. A survey was distributed to campus representatives, identified by the CAOs, on December 20, 2013 and the responses were received in January 2014. The Task Force on For-Profit Institutions and Online Delivery and the full Academic Affairs Committee of the Board of Higher Education have been briefed on this work but have taken no specific action.

Context

Online learning (delivery) is now a commonly accepted staple of higher education pedagogy and all public institutions are using this technology-enhanced form of teaching, largely in a hybrid context. Most institutions have developed fully online courses as opposed to fully online degree or certificate programs but it is only a matter of time before we see the emergence of fully online programs in the majority of our public institutions. The marketplace is quite fluid at this point in time as the expansion of online courses and programs is driven predominantly by the for-profit and independent sectors.

Background

Mr. Diver was tasked with the following:

- Survey the work of our campuses in the area of online learning.
- Summarize the most salient trends in online learning and speak with practitioners and specialists in this area.
- Make recommendations regarding a possible System role for bringing cohesion, alignment, and best practices to the community colleges and state universities in the area of online education.

Information gathering and Analysis – Summer 2014: Mr. Diver met with several institutions from a number of institutions and industry experts to learn about the online learning community and existing practices. DHE staff requested that Chief Academic Officers identify campus representatives that could speak authoritatively about online learning at their institutions. A survey was sent to this group to get a clearer picture of trends and developments in online education at the state institutions of higher education

Presentation – Winter 2014/2015: Mr. Diver initially presented his report to the Task Force in December and provided a revised version in February. The Task Force discussed his report and planned for ways to incorporate the recommendations into their work.

Key Issues for BHE Consideration

The online space will only grow to encompass more courses and new certificates and full-blown programs in the public institutions. UMass Online provides a good example of where other public institutions should be heading. The crucial question is "How can the BHE assist in this effort, if at all?" While Mr. Diver's report does not specifically prescribe a direction to move in, he does list a number of possible initiatives that are worth taking up in the next phase of this initiative. He clearly sees a 'system' role in this endeavor. As such, his recommendation for a next step is to "…convene a commission to identify concrete actions to promote and facilitate the development of online education in the Commonwealth." His suggestion is that this commission should consider adopting some of the eight action steps presented in the report.

Next Steps

Before proceeding with the approach recommended in the Diver Report, it would be useful to circulate this report to the group of campus representatives and others that provided input. It would also be beneficial include members of the Board of Higher Education in this preliminary discussion. To date, the report has not been circulated to our campuses. Thus, these multiple perspectives will help us better identify the composition and membership of the committee and its charge.

A third recommendation is that the Board acknowledge Mr. Diver's work in the area of online learning. He fully addressed the issues we requested of him, on a pro bono basis. The Task Force is grateful for his work in this area.

Authority

M.G.L. c.15A, §§ 6 and 9; M.G.L. c. 69, § 30-31C

BHE By-Laws, Article II

Staff Contact

Carlos Santiago, Senior Deputy Commissioner for Academic Affairs
617-994-6909 | csantiago@bhe.mass.edu

Constantia Papanikolaou, General Counsel
617-994-6947 | cpapanikolaou@bhe.mass.edu

Massachusetts Department of Higher Education

One Ashburton Place, Room 1401   TEL (617) 994-6950   Richard M. Freeland, *Commissioner*
Boston, MA 02108-1696   FAX (617) 727-0955   Charles F. Desmond, *Chairman*
WEB www.mass.edu   *Massachusetts Board of Higher Education*

M E M O R A N D U M

TO: **Academic Affairs Committee, Board of Higher Education**
              Richard M. Freeland, Commissioner

FROM: **Task Force on For-Profit Institutions and Online Delivery**

DATE: **May 30, 2014**

SUBJECT: **Report from Dr. Colin Diver to the Task Force on For-Profit**
              Institutions and Online Delivery

_____

Attached is the report that was commissioned by the BHE's Task Force on For Profit
Institutions and Online Delivery (Learning) and prepared by Dr. Colin Diver. He began
the project last summer/fall and completed his work this spring. A survey was distributed
to campus representatives, identified by the CAOs, on December 20, 2013 and the
responses were received in January 2014. The Online Learning Task Force and the full
Academic Affairs Committee of the Board of Higher Education have been briefed on this
work but have taken no specific action.

Dr. Diver was tasked with the following:

- Survey the work of our campuses in the area of online learning.
- Summarize the most salient trends in online learning and speak with practitioners
  and specialists in this area.
- Make recommendations regarding a possible System role for bringing cohesion,
  alignment, and best practices to the community colleges and state universities in
  the area of online education.

Online learning is now a commonly accepted staple of higher education pedagogy and
all public institutions are using this technology-enhanced form of teaching, largely in a
hybrid context. Most institutions have developed fully online courses as opposed to fully
online degree or certificate programs but it is only a matter of time before we see the
emergence of fully online programs in the majority of our public institutions. The
marketplace is quite fluid at this point in time as the expansion of online courses and
programs is driven predominantly by the for-profit and independent sectors.

The online space will only grow to encompass more courses and new certificates and
full-blown programs in the public institutions. UMass Online provides a good example of
where other public institutions should be heading. The crucial question is "How can the
BHE assist in this effort, if at all?" While Dr. Diver's report does not specifically prescribe
a direction to move in, he does list a number of possible initiatives that are worth taking
up in the next phase of this initiative. He clearly sees a 'system' role in this endeavor. His
recommendations include the possibility of (1) creating a unified web portal for all MA

system online courses leading to a virtual "Online State U; (2) serving as an information clearinghouse; and (3) providing support for course design, instructor training, and student support. He also recommends, as a next step, convening a "…commission to identify concrete actions to promote and facilitate the development of online education in the Commonwealth." His suggestion is that this commission should consider adopting some of the eight action steps presented in the report.

Before proceeding with the approach recommended in the Diver Report, the Task Force believes it would be useful to circulate this report to the group of campus representatives and others that provided input. Members of the Board of Higher Education should also be included in this preliminary discussion. To date, the report has not been circulated to our campuses. Thus, these multiple perspectives will help us better identify the composition and membership of the committee and its charge.

Finally, the Task Force would like to acknowledge Dr. Diver's work in the area of online learning. He fully addressed the issues we requested of him, on a pro bono basis. We am grateful for his work in this area.

**The Role of the Massachusetts Board of Higher Education
in the Development of Online Education**

**A Report to the MBHE Online Task Force, by Colin S. Diver
March 5, 2014**

Introduction

Online education (hereafter, "OL") is a form of education distinguished from other forms of education (often described as "in-class" or "face-to-face" – hereafter, "F2F") by the heavy use of the Internet and computer devices to transmit and manipulate information. Like F2F, OL embraces a wide array of pedagogies, tools, methods, content areas, and technologies. There are many plausible ways to capture this diversity. A 2013 Babson-Sloan Consortium report, *Changing Course: Ten Years of Tracking Online Education in the United States,* offers a taxonomy of courses based on the percentage of course content communicated via the internet: 1. traditional (0%); 2. web facilitated (1-29%); 3. blended/hybrid (30-79%); and 4. online (80-100%).

My research suggested to me that most OL programs fall loosely within one (or more) of three categories: academic, vocational, or enrichment. Academic programs are most common, and involve the use of OL as a pedagogy to provide for-credit education to students enrolled in fairly conventional degree programs. Most academic OL is provided by regular faculty (both full-time and adjunct) in traditionally organized educational institutions. UMassOnline would be a leading example. Vocational programs are focused on providing fairly specific job-related skills, and are often operated in conjunction with employers whose workforce requires those skills. Many vocational programs are offered by conventional educational institutions such as community colleges. Others are offered by newer institutions that disaggregate the instruction function into multiple specialties (course design, lecturing, tutoring, coaching, student evaluation and feedback, etc.). Examples would be Southern New Hampshire University's College for America, Colorado State's Global Campus, and most for-profit universities. Enrichment programs are forms of adult education for typically well-educated audiences. Whether intended to be so or not, most MOOC courses offered on platforms such as edX and Coursera to date have fallen into this category.

However defined or categorized, OL is spreading like wildfire. *Changing Course* estimates that roughly 6.7 million college-level students (32% of the total) are now taking at least one online course. Most of the growth of OL – like any other large-scale pedagogical development -- is driven by the initiative of individual instructors seeking to improve or expand what they teach. But a growing part is driven by central authorities – including provosts and presidents, public system executives and boards, and even governors and legislatures. The primary question that this report poses is whether the central authority in Massachusetts (the Board of Higher Education and the Commissioner of Higher Education, collectively referred to as "MBHE" in this report) should join the ranks of central authorities pushing or channeling the expansion of OL in the MA public system. I approach an answer to this question in four steps, asking: 1. To what extent is OL a solution to the unmet educational needs of MA citizens? 2. To what extent should the need for OL in MA be met by the public sector (as opposed to private

non-for-profits or for-profits)? 3. To what extent are the MA state institutions already providing online instruction? And 4. What role, if any, should the MBHE play to encourage the public system to enhance their offerings of online education?

Sources on which research for this report is based include: a (very selective) survey of (the voluminous) recent literature on online education in higher education (see bibliography in Appendix A); a series of in-person interviews undertaken during the latter half of calendar year 2013 (see Appendix B), and responses to a questionnaire (see Appendix C) sent by Carlos Santiago, Senior Deputy Commissioner for Academic Affairs to representatives of 11 Massachusetts state universities and community colleges (see Appendix D). My special thanks to Amy Girardi of Jobs for the Future, for her very capable research assistance, as well as to Commissioner Richard Freeland and his staff, David Barron, Nancy Hoffman, and other members of the Task Force and the Board. The observations in this report are mine alone.

A. To what extent is OL a solution to the unmet educational needs of MA citizens?

There are, presumably, many MA residents who would benefit from some form of post-secondary education, but are restricted in their choice of F2F options by considerations of geography/distance, time, cost, and convenience. As a result they either forego postsecondary education altogether or settle for programs that, in terms of content, quality, cost, or convenience, do not optimally meet their needs. OL holds out the promise of responding to these problems by literally bringing educational programs of the requisite content and quality to the student, at times convenient to the student, and at an affordable cost.

1. **Quality**: OL might make it possible for some students to experience higher quality educational programming than the best F2F alternative available to them. Improved quality could conceivably come from such features as: a. presentation of material remotely by "star" faculty instructors; b. use of more engaging multi-media, interactive materials than are typically used in F2F; c. improved course design, based on the lessons of learning analytics, as interpreted and applied by learning specialists; or d. "mass customization," through the use of adaptive learning algorithms.

   These are some of the tantalizing promises of the MOOCs: "Take a computer science course taught by an MIT professor, engineered by a team of learning specialists, constantly improved thanks to inputs from big-data analytics. Oh, and it's free!"

   The reality is mixed.

   a. Judged by inputs (the resumes of their faculty, production values, amounts invested on course design per course -- variously estimated to range from $100,000 to $500,000), MOOCs are very high quality, but we have little hard evidence to date of their learning outcomes. We do know that completion rates are very low. For example, a recent UPenn study found a 4% completion rate for MOOCs offered by Penn through Coursera in the past two years. We also know that MOOCs appeal overwhelmingly to an already highly educated audience.

Compared to MOOCs, the vast majority of OL courses are produced on the cheap. A 2013 report by the Community College Research Center at Columbia Teachers College described the OL courses offered at community colleges in Virginia and Washington as "haphazard."

b. With regard to learning outcomes, there is a small but growing body of evidence on the quality of OL courses vis-à-vis their F2F counterparts. *Changing Course* reports that a solid majority of chief academic officers surveyed over the past ten years (up to 77% in the latest survey) believe that learning outcomes from OL are equal or superior to those of F2F programs. Not surprisingly, CAOs at institutions that utilize OL have more favorable views of OL than CAOs at institutions that don't. A 2010 US Department of Education report, summarizing the results of 50 research studies conducted between 1996 and 2008, concludes that: "Students in online conditions performed modestly better, on average, than those learning the same material through traditional face-to-face instruction." The positive effect of OL on learning outcomes did not seem to vary among types of courses (by undergraduate vs. graduate, or by field), and was enhanced if there was a significant element of human interaction ("blended learning"). The DOE report cautioned, however, that some of the differences might be explained by variations in time spent on learning exercises by participants in the two types of courses.

There is, however, other evidence that OL is less successful than F2F, especially among less educationally well prepared learners. The CCRC study of VA and WA community colleges found that OL courses, compared to equivalent F2F courses, were associated with higher rates of student withdrawal and failure and increased racial achievement gaps. And a recent collaboration between San Jose State University and Udacity for provision of gateway math courses ended badly, with a higher percentage of students failing the MOOC courses.

2. **Cost:** Compared to F2F, OL should inherently cost students less, at least to the extent that they can save travel expenses, keep jobs, live at home, etc. What is less obvious is whether OL can reduce price (tuition) (holding quality constant). The jury is still out on this. Tuitions charged by OL providers are all over the lot, ranging from zero (for many MOOCs, at least during the initial "loss-leader" start-up phase), to relatively cheap (for example, SNHU offers a complete BA at just under $40,000; CSU Global Campus OL tuition is half the F2F tuition), to relatively expensive (for example, some UMassOnline graduate courses charge tuitions higher than for comparable F2F courses). According to Richard Garrett at Eduventures, most traditional university-based OL courses carry the same tuition as F2F courses. The low-tuition programs are either the adult enrichment programs (most MOOCs) or the vocational programs operated by entities outside of the traditional faculty-centric academic model.

Over the long haul, of course, in order to reduce tuition, OL must be cheaper to produce than F2F (again, holding quality constant). There is some evidence that this is happening. For example, a Sloan Consortium report lists several studies documenting cost savings from various OL programs, ranging from $31 to $105 per student. The sources of OL cost savings are likely to come from one or more

of three factors: economies of scale, substitution of lower-paid labor, or automation.

    a. Economies of scale: The theory of MOOCs is that the large up-front course design costs can be amortized over large numbers of students, thus yielding a low cost per student. This may work well in contexts in which standardization of course content is possible (for example, tens of thousands of unique students taking exactly the same calculus course). It remains to be seen if standardization can be applied in other contexts. It also remains to be seen whether great course design is enough to assure desired learning outcomes without relatively expensive investments in ongoing student support services (advising, tutoring, coaching, etc.), which would drive up the per-student cost.

    b. Labor substitution: Institutions like SNHU, CSU Global Campus, and the U of Phoenix have reduced the cost function by replacing traditional full-time professional faculty with a variety of other (and generally lower-paid) labor inputs, including course designers, coaches, adjunct faculty, and even peer graders. Most academic OL programs have avoided doing this out of concern for preserving educational quality, faculty morale, and labor peace, with the result that their production costs are probably comparable to the cost of F2F.

    c. Automation: For some education reformers, the Holy Grail is a computerized algorithm that tracks how a student is engaging with the course material and adapts to that student's unique learning style to provide the right kinds of exercises and feedback for optimal learning. Most of the current work on adaptive learning is being done by for-profit companies such as Pearson and in fields such as high school-level mathematics, where economies of scale justify the huge up-front design costs. Whether and to what extent smart machines can take over the instructional functions of smart (and more expensive) humans remains to be seen.

3. **Revenue Generation:** One of the motivations for many OL programs is to generate extra profits for the institution. This is presumably the one and only goal of the dozens of for-profit universities that have crowded into the online space. This can benefit students, and help meet their unmet educational needs, to the extent that the for-profit university provides courses that are more accessible, higher quality, and/or lower-priced than the alternatives. But the profit motive is hardly limited to the corporations. It has avowedly been the motivation for many public and not-for-profit institutions, such as UMass. Programs like UMassOnline are able to generate profits because the online environment effectively enlarges the "lecture hall" in which existing faculty members ply their trade. The cost per course may be the same as that of a F2F course, but the enrollment is much higher, thus driving down the cost of production per student. So long as the market permits the institution to charge tuition above its production cost, the courses generate profits that can then be plowed back into the institution. Particularly during a period of public defunding, such revenue sources have been invaluable in maintaining institutional quality.

B. What role should MA public institutions play in offering OL to meet the unmet educational needs of MA citizens?

There is no shortage of OL opportunities available to MA citizens. According to Richard Garrett of Eduventures, "supply has caught up with demand." By definition, OL eliminates geographical barriers. The entire world of OL education is available to anyone with a computer and Internet access. If, for example, you do a Google search for "online degree programs in web design," up pop URLs for hundreds of programs offered by a bewildering array of public, private not-for-profit, and private for-profit universities, plus numerous websites purporting to compare, rank, and rate such programs. In such an overcrowded marketplace, what role if any should the state institutions play?

The answer must be that MA state institutions can provide OL at either higher quality or lower cost (or both) than the best of the myriad other OL offerings available in the marketplace. There are several reasons why this might be the case. First, MA state institutions are generally governed by demanding standards of quality to which not all (or perhaps even many) outside institutions are held. Second, MA state institutions fill a number of distinctive needs and serve a number of functions that could equip them to offer superior OL programs. Given their structure and local roots, they understand the needs of MA citizens better than private or out-of-state institutions. Their close relationships with in-state employers enable them better to understand the employers' workforce training needs. Their relationships with local organizations enable them to structure more meaningful internships, externships, and field research opportunities to supplement and reinforce OL instruction. OL can be viewed as an additional pedagogical tool to help the public institutions fulfill those functions more effectively (i.e., by increasing access to, reducing the cost of, and improving the quality of programs that they already offer or decide to offer in the future).

In addition, the nature of the OL marketplace arguably creates the possibility that the state could perform two special roles: coordination and branding. Coordination means giving consumers a roadmap to negotiate the state's multiple offerings and making it possible for students to mix and match courses from multiple institutions within the system. In effect, the state would provide at least a virtual – and perhaps a real -- integration of all of its separate programs into one enormous marketplace. Branding means placing the state's imprimatur on the OL courses it offers so as to provide consumers greater assurance of quality control than the barebones accreditation process can provide. The power of the UMass brand has been an essential ingredient in the success of UMassOnline. If the state system as a whole can establish an equally compelling brand, it would provide a justification for uniting all of the MA institutions' OL courses under one rubric.

C. To What Extent Are MA State Institutions Already Using OL to Meet the Educational Needs of the Commonwealth's Citizens?

Collectively, the 29 MA public institutions are already making extensive use of OL technology and techniques to serve the educational needs of their students, but the extent and intensity of that usage varies widely from institution to institution. By far the most fully developed OL operation is UMassOnline. From its founding in 2001, it has grown rapidly, to the point that today it offers approximately 120 OL programs, serving 58,000 students, and generating $78 million in revenue. According to Jack Wilson,

President of UMass at the time of its founding, UMassOnline was designed to fit "seamlessly" into the academic offerings of the UMass system. Although the programs were targeted at an older student body – aged 25-45, mostly employed students – the admission process for students was the same as for more "traditional" students. Each of the university's five campuses retained full academic control over the OL programs offered. The courses were designed and taught by regular UMass faculty. The campuses set the tuition for the courses. Administratively, however, UMassOnline was established as a fiscally distinct unit from the rest of the university, so as to avoid state budgetary restrictions on the use of appropriated funds for continuing education. UMassOnline collects tuition from participating students and remits 92% of collected revenue to the campuses, retaining 8% of revenues for the central services it provides, which include such things as managing a centralized web portal of OL courses, license and vendor management, and information sharing. In addition to serving as the central OL platform for the five U Mass campuses, UMassOnline serves, on a contract basis, as a platform for OL programs offered by several other public and private institutions, and has the capacity to serve in that role for many more institutions.

Among the state universities and community colleges, the use of OL is much less well coordinated and generally less well developed. There is a centralized MCO web portal that lists OL courses offered at the institutions, but the portal is not nearly as well publicized or easily navigable as the UMassOnline portal. Among the six community colleges represented in our survey results, the numbers of OL degree programs and certificate programs offered ranged from zero to 21, and the number of OL courses offered on an annual basis ranged up to over 500. Among the five state university respondents, the number of degree/certificate programs ranged from zero to 9, and the number of courses ranged from a few up to over 400. All of the respondents had at least some staff devoted to providing training, instructional design, and technical support. All reported heavy reliance on outside vendors to provide support services. By far the most common learning management system was Blackboard, with Moodle mentioned several times. Several schools used Quality Matters for training and course design. In all cases, however, responsibility for instruction – including course design, instruction, and student assessment -- rested on the regular full-time or adjunct faculty.

D. What role might the MBHE play in the evolution of OL in the MA public system?

The Board already exercises various oversight and policy-setting functions that apply as much to OL programs offered by MA institutions as to their F2F programs. Should the Board do more? The answer may very well be "no." Viewing OL as just education by another means, one could reasonably take the view that the development of OL, just like other aspects of educational content and delivery, should be driven from the individual instructor and department and campus. Here, as elsewhere, central authorities should defer to the educators.

On the other hand, one could make the case that OL is different from other aspects of educational practice, precisely because it involves such a potentially radical reordering of the educational production process. It is, or has the potential to be, truly "disruptive" of the prevailing paradigm (to invoke Clayton Christensen's widely cited theory of change). The features that cause OL to have this quality include:

1. Unbundling of functions: OL, like other manifestations of the info-tech age, accelerates the decomposition of information processing into component parts. A

previously integrated function like "instruction" gives way to a disaggregated, but coordinated sequence of functions (course design – itself a cluster of functions – coaching, tutoring, evaluation, etc.), each performed by a specialist (and some by a machine). The process of designing, structuring, and managing OL instruction is itself a high level function that individual faculty, departments, and even institutions may not have the capacity to handle.

2. Rapidity and scope of change: The technology of education is changing much more rapidly than at any time in recent history. OL both permits and encourages more wide-ranging experiments in instruction and more rapid dissemination of the results of those experiments. OL has spawned the emergence of a bewildering and ever-changing array of service providers, touting products like learning management systems, adaptive learning systems, predictive analytics, and the like.

3. Learning theory: OL is beginning to generate data that enable researchers to analyze the learning process in previously unimagined ways. The technology makes it possible to measure inputs into the learning process, such as individual computer key strokes and amount of time spent on individual web pages, and the large scale of some OL courses create opportunities for statistically significant correlation studies. As results from OL learning studies pour forth, it will be harder to justify teaching "by feel," the old-fashioned way.

4. Mobile learners, lifelong learners: The info-tech age has also changed learners. Increasingly they want education in smaller, more intense doses, delivered where they live or work or play, at times that suit their schedules, and at stages of their lives when they sense a need or opportunity to move upward or laterally or diagonally. What they want and need is not a period of residency, but a competency; not a degree, but badges.

Many state systems have responded to these realities by creating various institutional arrangements for coordinating and centralizing OL programs. A 2013 report of the New America Foundation, entitled "State U Online," describes many of these efforts. It outlines a series of five sequential "collaborative practices" that a central state system could adopt to create a virtual online university while preserving the institutional identity of its component parts, and provides illustrations of each practice from among the various states. An excerpt from the report appears in Appendix E. The list of possible centralized functions that follows is based loosely on the report, but expands upon it.

1. Unified web portal for all MA system OL courses: In order to meet the needs of the modern learner, as described above, the MBHE might consider creating a unified directory of all OL courses and programs offered at all of the MA institutions. A single portal could enable potential students more easily to identify and compare programs in a field of interest. It might also help the state to develop and market a "MassEdOnline" brand that implicitly certifies a level of quality, comparability, and, ultimately, transferability among offerings.

2. Information clearinghouse: Research for this report has driven home to its author the sheer complexity and rapidity of change in the field of online education. Busy faculty and administrators at individual institutions must find it extremely challenging to access relevant information and apply it to their instructional

programs. Although there are consulting firms, such as Eduventures, that provide such services, the state system could conceivably benefit from having a central in-house repository of expertise and information about current developments, research, best-practices, and the like.

3. Support for course design: The rather meager research on learning outcomes from OL reinforces the intuition that OL courses must be very carefully designed to take advantage of the promise of computer-based learning and to overcome its alienating limitations. Effective course design and course delivery require multiple kinds of expertise and resources that are beyond the capacity of individual instructors or departments or even schools. A central resource could work with faculty from multiple institutions to design effective courses, much the way platforms like edX and Coursera work with faculty from partner institutions.

4. Instructor training: Related to the issue of course design is the issue of instructor training. Teaching effectively in the OL environment is fundamentally different from F2F teaching. Instructors need training and professional development in order to maximize their effectiveness.

5. Student support services: Research on outcomes demonstrates that OL courses are much more likely to be successful if students have multiple opportunities for interaction, repeated reminders and encouragement, easy access to tutorial help, and human contact. It may be that a central facility can provide valuable consulting to individual campuses or instructors on how to provide these things, or even can provide these services more effectively on a centralized basis.

6. Subsidization of promising experiments: Developing effective OL courses requires a nontrivial upfront investment of resources. The same is true, in spades, of developing a truly effective OL program. A central authority could serve as a kind of "venture capitalist" to seed the development of promising programs, premised on the assumption that successful programs would then be self-sustaining.

7. A virtual "Online State U": The unified web portal discussed in step 1 above would very likely heighten expectations that the courses listed on that portal could be transferable toward a degree or certificate from the student's home institution. By making all, or most, OL courses offered anywhere in the system freely transferable, the state would be creating a virtual online university encompassing the entire MA system.

8. A real "Online State U": The most radical form of centralization would be the creation of a new state institution of higher education uniquely and fully devoted to providing state-of-the-art OL education. The justification for taking such a step would be to break free of the constraints of the existing institutional structures, work rules, and fiscal arrangements, so that the state could create a counterpart of, say, Southern New Hampshire University or the University of Phoenix. Such an institution would have the freedom to experiment with wholly new ways of providing instruction, including unbundling of traditional instructional functions into component parts, drawing on the widest possible array of skills and expertise.

Receptivity to any of these steps will undoubtedly vary rather widely from institution to institution and indeed from person to person within each institution. UMassOnline is sufficiently well established and well resourced, that it would probably find few if of these options attractive. Within the five-campus UMass system, it has already accomplished most of these goals. The state universities and community colleges, on the other hand, are much more likely to embrace at least some of these initiatives. Respondents to the survey generally indicated greatest support (not surprisingly) for additional funding of OL experiments, as well as for improved transferability of course credits and an improved central web portal. Their level of interest in the other options varied, with some skepticism about central instructional design and support services. By and large, the institutional respondents felt that these services were already available through a combination of in-house staff and external vendors. A number of respondents noted, however, that they could use help with centralized purchasing of services and expert advice on the quality of services offered by such vendors. Throughout the responses one senses a strong concern to preserve institutional autonomy and distinctiveness, even while respondents often conceded (in effect) that economies of scale made it hard for them to take full advantage of the opportunities that OL presents. Of course I have no illusion that the eighth step would be very popular with many of the existing institutions or their staffs, but I think it is important to list it as one end of the logical continuum of alternatives.

Conclusion

It appears that, notwithstanding the overblown hyperbole associated with the emergence of MOOCs, OL educational technology will continue to spread and to disrupt the historic "production function" of higher education. If that prediction is correct, one can make a strong theoretical case for greater centralization of planning, support, and even management of OL education in a public system such as the Commonwealth's. UMassOnline has paved the way among the five otherwise quite autonomous campuses of the U Mass system, and could serve as a model – or perhaps even a platform – for a similar process of coordination among the state universities and community colleges. Responses to our survey indicate a reasonably high level of interest in moving in that direction, subject to some rather predictable caveats.

As an appropriate next step, then, I recommend that the MBHE convene a commission to identify concrete actions to promote and facilitate the development of OL education in the Commonwealth. The commission should be charged to consider the actions outlined in the preceding section of this report, make recommendations regarding which of those actions seem both desirable and feasible, and formulate an action plan for their adoption. Such a commission should be composed of representatives of the following constituencies and organizations: the state universities, the community colleges, UMassOnline, the faculty, the Commissioner's office, and the private sector OL education industry. Clearly such a Commission would require strong staff support. I should imagine that the office of the Commissioner might be able to identify sources of foundation funding for such a commission if funding from state appropriations is not available.

Appendix A

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Appendix B

In-Person Interviews

John Cunningham, Director, UMassOnline, Sept. 11, 2013.

Richard Garrett, VP Eduventures, Oct. 17, 2013.

Huntington Lambert, Dean for Continuing Education, Harvard University, former head of Colorado State University Global Campus, Sept. 13, 2013.

Paul LeBlanc, President, Southern New Hampshire University, Oct. 21, 2013.

Rebecca Peterson and Lee Rubenstein, edX, Sep. 12, 2013.

Peter Stokes, Vice President, Northeastern University, former VP of Eduventures, Oct. 11, 2013.

Paul Toner, President, Mass. Teachers Association, member MBHE, Dec. 9, 2013.

Jack Wilson, former President of UMass, Sept. 4, 2013

Appendix C

Survey Sent to Representatives of Community Colleges and State Universities

December 20, 2013

Dear Colleagues,

I call your attention to the email (below) that I sent to the Chief Academic Officers in June. In that email I asked the CAOs to provide me with a list of names of individuals on their campuses that are knowledgeable about where your institution might be heading in the use of online pedagogy. Your name was provided as someone with real expertise in this area.

You should know that the Massachusetts Board of Higher Education's (BHE) Task Force on For-Profit Institution Oversight and Online Learning has been meeting regularly to discuss and debate whether the BHE should play a role in assisting the campuses in the development and expansion of online learning. To that end, we have asked Mr. Colin Diver to assemble information and provide advice to the BHE on this matter. We are seeking to get a clearer picture of trends and developments in online education at the state institutions of higher education.

For purposes of this survey we include in the terms "online education" and "online courses" both "pure online" courses (those in which all or nearly all of the content is delivered online and there are few, if any, face-to-face meetings), and "blended online" courses (those in which a majority of course content is delivered online, at least some of which is then discussed in face-to-face or in-class meetings).

1. Please briefly describe existing online programs at your institution, including: a) online degree programs; and b) online courses.

2. Are the online courses taught by the same faculty, or the same type of faculty, that teach face-to-face courses, or are the online courses taught in a different manner?

3. What special support or training do instructors receive to help them develop and teach online courses?

4. Does your institution partner with any outside providers of services -- such as course design, course content, technical support, learning management systems, learning analytics, etc. -- to help your institution to deliver online education?

5. What do you see as the major barriers to your institution's making more effective use of online technology to deliver high-quality educational programs?

6. Do you see any possible role for the BHE in encouraging or supporting online education at your institution? In particular, could the BHE be helpful in providing, or supporting the provision of, any of the following:

       -- A unified web portal for potential students to learn about or to enroll in all online programs and courses offered by state institutions of higher education;
       -- A centralized information clearinghouse on best practices in, recent

developments in, and/or research findings about online education;

-- A centralized resource to assist instructors with course design, technical support, instructor training, or student support services (such as advising, coaching, or tutoring);

-- A source of financial support for promising experiments in online programming;

-- Creation of a virtual "MassOnline University" by reducing or eliminating barriers to transferring credits from online courses offered at any Massachusetts public institution toward a degree from any one of those institutions.

7. Do you have any other thoughts or recommendations to help guide the BHE's thinking about the evolution of online education in the coming years?

We would appreciate a response to these questions by Monday, January 20th. Please direct your responses to me. We will follow up with a series of individual phone calls to explore more detailed aspects of your responses.

I very much appreciate your cooperation in this matter.

Have a wonderful holiday.

Warm regards,

Carlos

Carlos E. Santiago, Ph.D.
Senior Deputy Commissioner for Academic Affairs Massachusetts Department of Higher Education One Ashburton Place, Room 1401 Boston, MA 02108-1696
(617) 994-6923
(617) 875-8955

Appendix D

Responses to Survey

- Bunker Hill Community College: Bill Sakamoto, Associate Vice President of Academic Affairs and Enrollment Services, Dean of BHCC Online and Weekend College
- Bridgewater State University: Pamela Witcher, Associate Provost for Faculty Affairs
- Cape Cod Community College: William Berry, Professor of Languages and Literature
- Fitchburg State University: Director of Distance Learning
- Framingham State University: Scott Greenberg, Associate Vice President for Academic Affairs and Dean of Continuing Education
- Massachusetts Bay Community College, Lynn Hunter, Assistant Provost, eLearning
- Massachusetts Maritime Academy: Capt. Brad Lima, Chief Academic Officer
- Massasoit Community College: April Hill, Coordinator of Instructional Design
- Middlesex Community College: Clean Andreadis, Associate Provost for Instruction and Assessment
- Northern Essex Community College: Melba Acevedo, Director of the Center for Instructional Technology; and Ethel Schuster, Computer Science Faculty Member
- Quinsigamond Community College: Pat Schmohl, Dean of Distance Learning and Professional Development
- Westfield State University: Kimberly Tobin, Dean of Graduate and Continuing Education, and Tom Raffensberger

Appendix E

Excerpt from Rachel Fishman, State U Online (New America Foundation and Education Sector 2013, p. 9)

Step One: Clearinghouse

State institutions collaborate to provide a clearinghouse of courses and degrees that students can easily search. Students should be able to use one search portal to find the online courses and degree programs offered at just about every public postsecondary institution within the state system. Once the student decides on a course or program, however, she proceeds to apply and enroll through the individual institution that offers that course or degree program. In this step, transfer between courses and programs among the colleges and universities is not seamless, meaning credits may not easily transfer.

Featured Profile: University of Wisconsin System's eCampus. Additional profile available in Appendix A: Montana University System Online

Step Two: Shared Contracts

In addition to having a clearinghouse, state institutions join together to purchase shared contracts for resources like a Learning Management System (LMS), or faculty development resources like Quality Matters. Many of these contracts can be expensive for an individual institution to purchase, so by participating in cost-sharing agreements, institutions are able to save money. For a student, this might mean that the LMS he uses at his two-year campus is the same used at the four- year institution where he will eventually transfer. But once again, even though it may reduce his learning curve for online education, it doesn't necessarily ensure easy transfer of his credits.

Featured Profile: Minnesota State Colleges and Universities' Minnesota Online

Step Three: Shared Student Services

These state systems provide a variety of online student-support services at all institutions within the system. No matter where the student is enrolled, she can receive services like advising and e-tutoring at one central online location. This helps institutions provide more centralized and targeted support to meet the needs of online students.
Featured Profile: Florida Virtual Campus. Additional profile available in Appendix A: University of North Carolina Online

Step Four: Shared and Articulated Credentials

This step includes state systems that have managed to create fully articulated efforts that include easy transfer of credit among institutions and shared credentialing. A student enrolled in this type of online system would enroll in a "home" campus but would be able to take courses from any institution in the system. The courses would transfer back to the student's home institution with no extra paperwork burden for the student and no loss of credit. The student's transcript would reflect the credits as if they were all

taken at one institution, even though she may have taken courses throughout the system.

Featured Profile: Georgia's ONmyLINE. Additional profiles available in Appendix A: Kentucky's Learn on Demand, Tennessee's Regents Online Campus Collaborative

Step Five: Shared Credentials Beyond State Borders

In this step, systems create collaborative interinstitutional and interstate efforts that take all the components of previous steps, and allow students to move freely beyond state borders. For instance, a student enrolled in an online program would be able to enroll at a "home" institution within their state, pay the in-state rate, take classes anywhere within the consortium of states or institutions, and "transfer" those courses back to the home institution.

Featured Profile: Great Plains IDEA