



Postsecondary Equity & Economics Research Project

A joint initiative of
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Examining the States' Role in Protecting Online College Students from Predatory Practices

PART I: Background and history of the states' higher education oversight role in the federal regulatory triad

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The views expressed in this paper are solely those of the authors.

I. INTRODUCTION

Higher education oversight and accountability is premised on the Higher Education Act (HEA)'s so-called oversight "triad," whereby the U.S. Department of Education, state licensing authorities, and private accrediting agencies play distinct roles overseeing institutions of higher education and gatekeeping federal student aid.³ Historically, accrediting agencies have been tasked with providing educational quality assurance, the Department with administration of the federal student aid system, and the states with consumer protection.⁴ Much has been written generally about the triad, its shortcomings and strengths, but less is known about the states as student consumer protectors.⁵

As online education (also referred to as "distance education" in this paper) has grown exponentially over the last several years, so too has policymakers' focus on the states' role. According to data collected by the Department, in the fall of 2021, some 4.4 million students, or 28 percent of all undergraduate students, took distance education courses exclusively—a 13 percent increase from pre-pandemic times in 2019.⁶ Of the undergraduate students, 1.0 million (23 percent) were enrolled in institutions in a different state.⁷ Since 2011, HEA Title IV institutions offering education "to students in a State in which [they are] not physically located . . . must meet any State requirements for [them] to be legally offering postsecondary distance or correspondence education in that state."⁸

The Department's regulations permit institutions offering distance education across state lines to satisfy the HEA's state authorization requirement without obtaining approval from each state in which they offered education *if* those states participate in a "state authorization reciprocity agreement." The scope of the Unified State Authorization Reciprocity Agreement (SARA), the current—and only—state authorization reciprocity agreement, has become a touchpoint for debate because it prohibits state members from enforcing their higher education-specific consumer protection laws against out-of-state member institutions, even when they enroll the state's residents. Thus, SARA creates a two-tiered system whereby, in many states, residents who attend schools with a physical presence in the state receive more protection than those residents who attend out-of-state online schools.⁹

In this paper, we provide background on the states' role as student consumer protector and a brief history of the federal government's fraught efforts to regulate state authorization for distance education. We call on policymakers to keep in mind the states' role as student consumer protector in state authorization and reciprocity rulemaking, particularly with respect to distance education.

*Updated version, first posted January 2024.

II. HISTORY OF THE STATES' ROLE IN THE TRIAD

Under the reserve clause of the Constitution, the primary responsibility for education rests not with the federal government but with the states.¹⁰ States began crafting oversight of postsecondary education with the founding of the first public colleges and universities in the 1700s and early 1800s¹¹—a role that evolved significantly after Congress created the first federal-state partnership through the 1941 Servicemen's Readjustment Act (GI Bill). Relying on the states' established oversight of public and private institutions established by charter, incorporation or licensure, Congress directed the Veterans Administration to coordinate with “the appropriate agency of each State” to identify institutions “qualified and equipped to furnish education or training.”¹²

Neither the states, nor the federal government, were prepared for what came next. The GI Bill provided financial assistance for tuition, books, supplies, counseling and a living allowance, which led to an explosion of for-profit schools angling to benefit from the stream of federal money. A House select committee found that a staggering 2,000 for-profit schools opened within 18 months of the enactment of the GI Bill,¹³ and concluded that many of these fly-by-night schools offered “training of doubtful quality.”¹⁴ The Government Accountability Office (GAO) found that new proprietary schools were using “promotional plans and extensive advertising campaigns, which were often misleading and laden with extravagant, unjustifiable claims.”¹⁵

It was clear more oversight was needed, particularly over the burgeoning private for-profit school sector.¹⁶ In 1952, lawmakers amended the GI Bill to reign-in schools' misuse of veterans' benefit funds and assigned much of the new approval and supervision requirements to the states.¹⁷ Under the Veterans Readjustment Assistance Act of 1952, Congress requested the governor of each state to create a “State approving agency” to determine approval of courses and training for purposes of the GI Bill.¹⁸ Congress also directed the VA and the states to exchange information pertaining to the activities of educational institutions and to enforce approval standards to prevent “fraudulent and other criminal activity,” noting “the cooperation of the Administrator and the State approving agencies is essential.”¹⁹ Specifically, states were tasked with ensuring institutions kept adequate records to show progress of each eligible veteran and that course credit had been given by the institution for previous training.²⁰ In addition, the State could require a lengthy application for approval, in which schools could demonstrate that they met certain criteria, such as showing the institution is “financially sound,” “does not utilize advertising of any type which is erroneous or misleading,” “does not exceed its enrollment limitations as established by the State approving agency,” and that its “administrators, directors owners, and instructors are of good reputation and character.”²¹ Lawmakers' efforts to protect the integrity of the GI Bill program—and protect veterans—was largely successful; reports of abuses by for-profit schools shrunk after the passage of the 1952 law.²²

Under the 1952 GI Bill, Congress allowed state approving agencies to rely on private, nongovernmental accreditation agencies to assess the quality of education or training offered by the participating institutions— thus introducing the concept of what would later be called the higher education oversight triad.²³

Congress turned to the states again a decade later when it authorized federal student aid programs under the Higher Education Act of 1965.²⁴ The HEA, which was “[s]oundly based on this concept of State-Federal cooperation,” adopted the regulatory “triad,” featured in the 1952 GI Bill.²⁵ In order for an institution to participate in the federal student aid program, the Department must certify that the school is accredited and “legally authorized” by a state to provide a “program of [postsecondary] education” in that state.²⁶ It would take nearly 40 years for the Department to flesh out in regulation what, exactly, states were expected to do in the state authorization role. In the interim, the triad's efficacy was tested.

Although Congress did not initially extend student loan eligibility under the HEA to students attending for-profit institutions, it did so seven years later under the 1972 Education Amendments.²⁷ After the HEA opened the door to proprietary institutions, enrollments at for-profit schools swelled and bad actors stormed in (again).²⁸ A 1976 study commissioned by the Department to define and measure student consumer harm found that the most common abusive practices suffered by students at this time included “inequitable refund policies,” “misleading recruiting and admissions practices,” “untrue or

misleading advertising,” and “lack of necessary disclosure in written documents.”²⁹ All sectors were included in the study, yet it was the abuses that occurred in proprietary occupational training schools that received the most attention.³⁰

The triad established under the HEA came under fire for not doing enough to prevent the rampant misconduct.³¹ The Department’s 1976 study credited the states’ “more concerted effort to regulate post-secondary vocational education than was heretofore known or acknowledged,” noting that “[o]ne salient advantage in using State agencies, when they are efficient and effective, is that they generally can provide closer surveillance and oversight, and can react more quickly, than can a regional or national organization or agency.”³² But it also noted a lack of consistent state laws and understaffed state agencies contributing to the triad’s poor oversight.³³ In 1973, model state legislation was introduced that included a state-level complaint review process, and requirements for institutions to provide prospective students with a catalog or brochure describing the programs offered, program objectives, length of program, tuition and other charges, cancellation and refund policies and “other facts in order to obtain state authorization to operate.”³⁴ Several states, such as Tennessee, North Carolina and Montana adopted such provisions.³⁵

States also began passing laws more focused on policing for-profit colleges, including through the creation of licensure and oversight commissions and regulations to better protect students. For example, in 1978 the Massachusetts Attorney General created regulations “designed to protect Massachusetts consumers seeking to enroll in any course of instruction or educational service offered by certain private business, vocational, career schools.”³⁶ That same year, California created the first Student Tuition Recovery Fund (“STRF”),³⁷ which was later expanded under the Maxine Waters School Reform and Student Protection Act of 1989.³⁸ In 1981, the Colorado legislature passed the Private Occupational Education Act for “the general improvement of the educational programs available to the residents of the state of Colorado . . . to prevent misrepresentation, fraud, and collusion in offering such educational programs to the public [and] . . . to eliminate those practices relative to such programs which are incompatible with the public interest. . . .”³⁹

III. CONGRESS FURTHER DEFINES THE STATES’ CONSUMER PROTECTION ROLE

Through a Senate subcommittee investigation, and the resulting reauthorization of the HEA in 1992, Congress further defined the triad, including the state role. Leading up to reauthorization, in 1989 the Senate Permanent Subcommittee on the Investigations of the Committee on Government Affairs began an 18-month investigation into the cause of a spike in federal student loan defaults.⁴⁰ The Subcommittee determined that the increase was caused by the “complete breakdown in effective regulation and oversight,” which had opened the door for “major fraud and abuse . . . , particularly at proprietary schools.”⁴¹ The investigative hearings included testimony from Subcommittee Counsel Kim Wherry, who explained that even though the states don’t have a financial interest in the federal student aid program, they do have an interest in protecting their “citizens that are being harmed.”⁴² In comparing the State’s role to that of accreditors, one state board of education witnesses explained “if you look at the . . . law . . . in most . . . States, you will find that the law was written to provide . . . basic consumer protection. It does not really speak to the question of quality of program. It speaks to full disclosure of students about what the school is all about, the kinds of jobs they might secure, truthfulness. . . .”⁴³ In its final investigative report, the Subcommittee recommended requiring schools to publicly disclose information to “be used by prospective students to make informed decisions about where to enroll.”⁴⁴ The Subcommittee called on the Department to assist the states in their role by “recommending uniform minimum licensing requirements” that address “recruitment, advertising, admissions . . . completion and placement data.”⁴⁵

In subsequent hearings to reauthorize the HEA, the Senate Committee on Labor and Human Resources in 1991 echoed the Subcommittee’s concern about “lax” gatekeeping of Title IV programs, but contended the triad concept was a “sound one” as it divides responsibility on the basis of the strengths that the Department, the States and accreditors each bring to the process, specifying again that the states are “primarily responsible for consumer protection functions.”⁴⁶ The Senate Committee called for “tough standards for institutional eligibility as promulgated and enforced by the ‘triad,’” with the “States to protect the student consumer.”⁴⁷ Proposed amendments to the HEA established “minimum federal standards for state licensure” of Title

IV institutions set in the areas of “consumer protection” and “consumer information” and touched on areas such as refund policies, prompt investigation of student complaints, and standards for advertising.⁴⁸

Similarly, the House Committee on Education and Labor noted in a 1992 hearing to reauthorize the HEA that many states had already initiated regulatory reform to improve the licensing of postsecondary institutions that are recipients of state aid. The House Committee supported the HEA amendments that strengthened the “traditional state role of serving as a consumer protection advocate for students.”⁴⁹

Based on these findings, in 1992 Congress reauthorized and amended the HEA to include Subpart 1 of Title IV, Part H (20 U.S.C. § 1099a). Part H requires the states to provide the Secretary with various information about the licensing and authorization process used by the state, if the state has revoked the authority of an institution to operate, and if the state has evidence that an institution has committed fraud related to Title IV programs or substantially violated a Title IV provision.⁵⁰ The Higher Education Amendments of 1992 also substantially expanded—and funded—state oversight through the creation of State Postsecondary Recognition Entities (SPREs), which were tasked with identifying higher risk institutions based on certain criteria, such as cohort default rates, and reviewing those institutions against more than a dozen standards including completion rates, employment outcomes, refund policies, advertising and student and recruitment practices, complaint process, and graduate licensure pass rate.⁵¹ Later, in 1995 amid measures to cut federal spending, the SPREs were killed and states were each left to formulate and fund their respective higher education approval and oversight.⁵²

The addition of Part H to Title IV was considered to be one of the “major components...to ensure integrity and accountability in the Federal student financial assistance programs.”⁵³

IV. HOW THE DEPARTMENT REGULATES STATE OVERSIGHT OF DISTANCE EDUCATION

For more than 40 years, federal regulations were silent on what the HEA’s “legally authorized by a state” (20 U.S.C. § 1001(a) (2)) meant in terms of Title IV eligibility. The Department started a rulemaking process in 2009 with the expectation that the states should take “an active role in approving an institution and monitoring complaints . . . and responding appropriately.”⁵⁴ The Department recognized that the states’ role in the triad was to protect students and taxpayers from fraud, and pointed to the movement of substandard institutions and diploma mills from state to state in response to changing state-level requirements.⁵⁵ The Department issued final rules in 2010, providing that an institution is legally authorized by a state for the purposes of Title IV eligibility if the state has a “process to review and appropriately act on complaints concerning the institution including enforcing State laws.”⁵⁶

The Department also addressed online programs operated by out-of-state schools. State laws often restricted oversight to schools with a physical in-state presence. As a result, out-of-state schools that lacked a physical in-state presence, but offered online programs, were not subject to any state authorization or oversight and were often not covered by state laws.⁵⁷ Concerned about the lack of state oversight of such schools, the Department created a final rule requiring that any school offering education “to students in a State in which it is not physically located . . . must meet any State requirements for it to be legally offering postsecondary distance or correspondence education in that State.”⁵⁸ Implementation of this provision was delayed by a legal challenge.⁵⁹

In 2016, the Department revised and issued new state authorization regulations. The 2016 rule allowed institutions offering distance education across state lines to satisfy the state authorization requirement without obtaining approval from each state in which they offered education, but lacked a physical presence, if those states participate in a “state authorization reciprocity agreement.”⁶⁰ The Department then defined a reciprocity agreement in 34 C.F.R. § 600.2 as an agreement “between two or more states that authorizes an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education . . . to students residing in other States covered by the agreement” as long as the agreement did not prohibit states from enforcing their own “statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions.”⁶¹ Under such an agreement, an institution located and authorized

in one participating state could provide distance education programs in other participating states where it lacked a physical presence without having to obtain separate authorizations from each of those states. In this case, however, the institution would still be subject to each state's consumer protection laws specifically directed at institutions of higher education.

During the 2016 rulemaking, the Department had initially proposed language that no state would be prohibited from enforcing its "consumer protection laws," which triggered institutions to raise concerns about complying with additional state requirements besides the conditions required under a reciprocity agreement.⁶² Commenters asked the Department to clarify that the definition prohibited waiver of a state's "general consumer protection laws," meaning the ones that applied to all entities, which would allow a reciprocity agreement to require states to waive their higher education specific consumer protection laws.⁶³ The Department declined this request, reasoning that such decisions to exempt schools from higher education specific consumer protection laws were best left to each individual state to such an agreement.⁶⁴

However, in 2019, under a new administration, the Department reversed its position and agreed to carve out state higher education specific consumer protection laws.⁶⁵ The Department removed the requirement that a reciprocity agreement may not prohibit states from enforcing their higher education specific consumer protection laws, without any discussion regarding the purpose of the state authorization requirement of the HEA.⁶⁶ It left only the provision requiring that such agreements may not prohibit states from enforcing "general-purpose State laws and regulations."⁶⁷ The Department expressed concern about a state advantaging its own public institutions and applying additional or alternate state authorization requirements to out-of-state institutions.⁶⁸

V. THE CURRENT STATE RECIPROCITY AGREEMENT FOR DISTANCE EDUCATION

At the time of the 2016 and 2019 rulemakings, a reciprocity agreement already existed, and effectively ended up the winner in the debate over defining reciprocity. That agreement, the Unified State Authorization Reciprocity Agreement (SARA), is currently the sole reciprocity agreement available to states.⁶⁹ As of December 2023, 49 states (all but California), the District of Columbia, Puerto Rico and the U.S. Virgin Islands are members. SARA is administered by a nonprofit organization, the National Council for State Authorization Reciprocity (NC-SARA). The decision regarding which states may join SARA and its requirements are determined by four non-profit organizations that administer regional higher education compacts: the New England Board of Higher Education (NEBHE), the Midwestern Higher Education Compact (MHEC), the Southern Regional Education Board (SREB), and the Western Interstate Commission for Higher Education (WICHE).⁷⁰ These compacts were each formed by a specific geographic region of states.⁷¹ The member states are represented by individuals, often appointed by each state's governor, to collaborate on higher education initiatives.⁷² The individuals are typically people who work for higher education institutions, public higher education systems, nonprofit organizations involved in higher education, state legislators, industry, and others.⁷³ The compacts are not state regulators that must answer to legislators or voters in carrying out a statutory oversight scheme, nor do they have experience promulgating, investigating or enforcing consumer protection requirements aimed at protecting the public, students and taxpayers from deceptive, unfair or abusive practices most commonly engaged in by for-profit businesses.⁷⁴

To implement the agreement, NC-SARA and the regional compacts developed the SARA Policy Manual, which specifies the policies and procedure for member states and institutions.⁷⁵ SARA operates in the following manner: An institution applies for membership in the state where it has its legal domicile, defined as the state ("Home State") in which the institution's main campus holds its institutional accreditation and, if applicable, its federal OPEID number.⁷⁶ Upon approval by that state, the institution becomes authorized to offer online educational programs in any other SARA member state ("Distant State") without having to apply for authorization from that state. SARA places all regulatory authority over a member institution in the hands of the institution's Home State, which is limited to applying the standards and requirements of SARA to protect out-of-state students.⁷⁷ Moreover, while SARA allows distant states to enforce general-purpose laws against SARA institutions, it specifically prohibits them from enforcing higher-education specific consumer protection laws as we discuss in our companion paper.⁷⁸

Except for its financial responsibility standard, which only applies to private institutions,⁷⁹ SARA’s policies make no distinction between public, private nonprofit, and private for-profit institutions, despite the fact that many states (and the federal government) regulate the for-profit sector differently due to risks inherent in for-profit education. In addition, Distant States are only allowed to enforce “general-purpose laws” against SARA institutions.⁸⁰ The SARA Policy Manual defines general-purpose laws as those which apply to all entities of any type doing business in the state, such as laws that prohibit unfair and deceptive acts and practices, false advertising, and breach of contract.⁸¹ SARA policy prohibits states from enforcing consumer protection laws that are only applicable to higher education institutions, even if those institutions are harming students within their borders.⁸² Although NC-SARA provides a set of policies to guide states and institutions in its Policy Manual, it includes few of the substantive consumer protection requirements found in many state higher education specific consumer protection laws.⁸³

VI. DISTANCE EDUCATION STUDENTS FACE FINANCIAL RISK ACROSS ALL HIGHER EDUCATION SECTORS

Although for-profit institutions were the early adopters of distance education,⁸⁴ all sectors—private for-profit, private nonprofit, and public—eventually embraced it. According to data collected by the Department, some of the biggest providers of exclusively online education are *non-profit* institutions, such as Western Governors University and Southern New Hampshire University.⁸⁵

Despite the ubiquity of distance education across sectors, it is the for-profit sector that wields significant influence. Many traditional non-profit and public schools hire for-profit online program managers to run their exclusively online programs of study.⁸⁶ In other instances, traditional non-profits and publics have acquired entire for-profit, fully online institutions as a turn-key approach to expanding their distance education presence. In 2018, for example, Purdue University, a top public research institution, acquired for-profit Kaplan University and created Purdue Global, becoming one of the “largest online degree-granting systems in higher education.”⁸⁷ Following suit, two years later the University of Arizona acquired for-profit and fully-online Ashford University.⁸⁸ In 2023, noting the “demand for online programs” continuing to grow, the University of Idaho proposed to create a non-profit entity to acquire for-profit online chain University of Phoenix.⁸⁹

These arrangements with for-profit institutions don’t come without risk to students. As discussed in our companion paper, the risk of fraud and low-quality education is highest when the profit motive is involved. Research shows that four-year degree online programs in all higher education sectors have lower completion and student loan repayment rates.⁹⁰ Many of the approved borrower defense claims based on deceptive school behavior are tied to fully online for-profit institutions.⁹¹ With respect to Kaplan, Ashford and University of Phoenix, all three for-profit institutions were the subject of numerous government investigations and settlements for deceiving and harming their own students.⁹² It’s worth noting that Kaplan was—and continues to be under its new arrangement—a SARA participating school.⁹³

VII. CONCLUSION

Even on the triad’s worst days leading up to the 1992 HEA reauthorization, Congress called the concept a “sound one” as it divides responsibility on the basis of the strengths that the Department, the states and accreditors each bring to the process, specifying repeatedly that the states are “primarily responsible for consumer protection functions.”⁹⁴ Through rulemaking the Department has an opportunity to consider and potentially strengthen oversight of distance education institutions that pose the greatest risk to students and taxpayers.

ENDNOTES

- 1 Libby Webster is Senior Counsel at National Student Legal Defense Network (Student Defense), a non-profit, non-partisan organization that uses research, litigation, and advocacy to promote accountability in higher education. Libby also co-directs the Postsecondary Equity & Economics Research (PEER) Project, which is a joint initiative on accountability between academics at George Washington University and Columbia University and policy experts and attorneys at Student Defense. Prior to joining Student Defense, Libby served for 15 years as a Senior Assistant Attorney General in Consumer Protection at the Colorado Attorney General's Office. In that role, she litigated numerous law enforcement actions under state consumer protection laws against a variety of industries, including for-profit colleges. In 2017, Libby led Colorado's team in a four-week bench trial against Center for Excellence in Higher Education (CEHE) for engaging in deceptive trade practices. The case resulted in findings of widespread deceptive conduct, and ultimately led to CEHE shuttering its schools. Libby also worked closely with other state and federal partners to investigate predatory colleges on a national scale, obtaining roughly \$600 million in student relief.
- 2 Robyn Smith is Of Counsel with the National Consumer Law Center and is also a senior attorney at a public interest organization in Los Angeles, California, where she has focused exclusively on financial aid and higher education policies impacting low-income students. In this work, Robyn has provided legal assistance to hundreds of financially-distressed student loan borrowers and has worked on state and federal policies to strengthen oversight of higher education institutions. Ms. Smith is a co-author of the National Consumer Law Center's *Student Loan Law* legal treatise, the leading student loan law treatise in the country. Ms. Smith previously worked for the California Attorney General's office, where she investigated and prosecuted businesses engaged in deceptive practices, including higher education institutions, and worked on state higher education policy. She received her J.D. from University of Southern California in 1992.
- 3 See Secretary's Procedures and Criteria for Recognition of Accrediting Agencies, 59 Fed. Reg. 22,250-01 (April 29, 1994) ("Thus, the HEA provides the framework for a shared responsibility among accrediting agencies, States, and the Federal government to ensure that the 'gate' to Title IV, HEA programs is opened only to those institutions that provide students with quality education or training worth the time, energy, and money they invest in it. The three 'gatekeepers' sharing this responsibility have traditionally been referred to as 'the triad.'").
- 4 *The Triad: Promoting a System of Shared Responsibility. Issues for Reauthorization of the Higher Education Act Before the S. Comm. on Health, Educ., Lab., & Pensions*, 113th Cong. 2 (2013) (opening statement of Sen. Tom Harkin, Chairman, S. Comm. on Health, Educ., Lab., & Pensions).
- 5 See, e.g., Clare McCann & Amy Laitinen, *New America, The Bermuda Triad: Where Accountability Goes to Die* 5-6 (Nov. 2019) (discussing the triad), https://d1y8sb8igg2f8e.cloudfront.net/documents/The_Bermuda_Triad_2019-11-20_022701.pdf.
- 6 See Nat'l Center for Educ. Stats., *Undergraduate Enrollment Fall 2021*, at Figure 6 (May 2023), <https://nces.ed.gov/programs/coe/indicator/cha#fn6> (last visited Sept. 19, 2023).
- 7 See *id.*
- 8 34 C.F.R. § 600.9(c) (2011).
- 9 Some states have strong higher education specific consumer protection laws that apply to the riskiest sectors of postsecondary institutions, while others have weaker laws. As we describe in Part II of this series, SARA's consumer protections are akin to the weakest state higher education consumer protection laws, lacking most of the consumer protections that are typically included in state laws. Robyn Smith & Libby Webster, Postsecondary Equity & Economics Research Project, *Examining the States' Role in Protecting Online College Students from Predatory Practices – Part II* (Jan. 2024), available at*
- 10 The federal government played little to no role in education, largely because the Constitution did not delegate such authority to it. See, U.S. Const., 10th Am. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." David Tandberg, Ellie Bruecker & Dustin D. Weeden, State Higher Education Executive Officers Association (SHEEO), *Improving State Authorization: The State Role in Ensuring Quality and Consumer Protection in Higher Education* 7 (July 2019), https://sheeo.org/wp-content/uploads/2019/07/SHEEO_StateAuth.pdf.
- 11 See Tandberg, Bruecker & Weeden, *supra* note 10, at 7.
- 12 See Servicemen's Readjustment Act of 1944, Pub. L. No. 346, ch. 268, 58 Stat. 284, 289 (June 22, 1944) ("GI Bill"). The VA was authorized to enter into agreements with state departments and agencies in order to administer education benefits. 58 Stat. at 289-290.
- 13 David Whitman, *The Profits of Failure* at 158 (2021).
- 14 *Id.*
- 15 *Id.* at 159-160. Indeed, several government entities launched investigations and found that many of the operators of the programs and schools created after the GI Bill was enacted had no educational background and experience, charged unreasonable and excessive fees, faked attendance records and offered training with little potential for jobs. See also Antoinette Flores, Center for American Progress, *Hooked on Accreditation: A Historical Perspective* (Dec. 14, 2015), <https://www.americanprogress.org/article/hooked-on-accreditation-a-historical-perspective/>.
- 16 The VA discovered that "veterans were wasting their GI Bill funds and other benefits at accredited schools that often failed to provide adequate education." See *Abuses in Federal Student Aid Programs*, 101st Cong. 14 (1990) (testimony of Kim Wherry, Counsel, Permanent Subcommittee on Investigations), <https://files.eric.ed.gov/fulltext/ED334956.pdf>.
- 17 Veterans Readjustment Assistance Act, Pub. L. No. 550, §§ 241-243, 66 Stat. 663, 671-672 (July 16, 1952) ("1952 GI Bill").
- 18 *Id.* at § 241.
- 19 *Id.* at § 243.
- 20 *Id.* at § 253.
- 21 *Id.* at §§ 253-254.
- 22 Whitman, *supra* note 13, at 166. The state/federal model envisioned in 1952 evolved and still largely relies on the states. For example, today the VA is specifically charged with utilizing the services of a state approving agency for conducting a "risk-based survey" and "other such

oversight purposes as the Secretary, in consultation with the State approving agencies, considers appropriate without regard to whether the Secretary or the agency approved the courses offered in the State concerned.” 38 U.S.C. § 3673(d). Under this authority, the Secretary has promulgated regulations that specify Secretary-state approving agency cooperation (38 C.F.R. § 21.4151), address course and licensing and certification test approval (*id.* at § 21.4250), and explain the evaluation of state approval agency performance (*id.* at § 21.7200).

23 See 1952 GI Bill, *supra* note 17, at 675.

24 Pub. L. No. 89-329, 79 Stat. 1220 (1965).

25 *Hearing on S. 600 Before the Subcomm. on Educ. of the S. Comm. on Lab. & Pub. Welfare*, 89th Cong. 1004 (1965) (statement of Gov. Richard J. Hughes, Gov. of N.J.); HEA §§ 101 and 102, codified at 20 U.S.C. §§ 1001, 1002; 34 C.F.R. §§ 600.4, 600.5, 600.6.

26 HEA § 101, 20 U.S.C. § 1001.

27 1972 Education Amendments, Pub. L. No. 92-318, § 417, 86 Stat. 235, 258 (1972).

28 See Whitman, *supra* note 13, at 174.

29 Steven Jung et al., *Improving the Consumer Protection Function in Postsecondary Education*, Final Technical Report AIR-52800-10/76-FR, American Institutes for Research 8-10 (Oct. 1976).

30 *Id.* at 8.

31 For example, in 1972 the Federal Interagency Committee on Education (FICE) created the Subcommittee on Educational Consumer Protection to examine the “major problems and issues confronting the educational consumer.” The Subcommittee noted in a 1975 report a grim situation for the “educational consumer” where “[s]afeguards against outright fraud and abuse are weak. Few agencies have systematic procedures for handling complaints from students and parents, or for redressing valid claims.” Office of the Assistant Secretary of Educ., U.S. Dep’t of Health, Education and Welfare, *Toward a Federal Strategy for Protection of the Consumer of Education*, Report of the Subcommittee on Educational Consumer Protection, at iv and 1 (July 1975), <https://files.eric.ed.gov/fulltext/ED115173.pdf>.

32 Steven Jung et al., *supra* note 29, at 26.

33 *Id.* at 9.

34 *Id.* at 19, 29.

35 *Id.* at 29.

36 See 940 Mass. Code Regs. § 31.01. Many years later, the Massachusetts legislature created oversight by the Division of Professional Licensure in 2012. See Mass. Gen. Laws ch. 112, § 263, added by 2012 Mass. Acts 106 (eff. Aug. 1, 2012). Licensure regulations were put into place in 2014. See 230 Mass Code Regs. § 13.01 (regulations added Feb. 28, 2014).

37 1978 Cal. Stat. 3039.

38 2005 Cal. Educ. Code § 94850-82.

39 Colo. Rev. Stat. § 23-2-101.

40 See Permanent Subcomm. on Investigations of the S. Comm. on Gov’t Affs., *Abuses in Federal Student Aid Programs*, S. Rep. No. 102-58, at 1 (1991).

41 *Id.* at 11. See also, *Abuses in Federal Student Aid Programs*, 101st Cong. 20 (1990) (testimony of Kim Wherry, Counsel, Permanent Subcommittee on Investigations). Kim Wherry, Counsel, Permanent Subcommittee on Investigations, testified that “We found that serious shortcomings in the current oversight system, specifically the licensing, accreditation and certification processes, have encouraged unscrupulous school owners to take advantage of the availability of Title IV funds, because they know that the system is not set up to detect or catch fraud and abuse.”

42 See *Abuses in Federal Student Aid Programs*, 101st Cong. 20 (1990) (testimony of Kim Wherry, Counsel, Permanent Subcommittee on Investigations).

43 *Id.* at 115.

44 See Permanent Subcomm. on Investigations of the S. Comm. on Gov’t Affs., *Abuses in Federal Student Aid Programs*, *supra* note 40 at 4.

45 *Id.* at 35-36.

46 See Comm. on Lab. and Hum. Res., *Reauthorizing the Higher Education Act of 1965*, S. Rep. No. 102-204, at 4, 44 (1991).

47 *Id.* at 4.

48 *Id.* at 44, 118.

49 Comm. on Educ. and Lab., *Higher Education Amendments of 1992*, H.R. Rep. No. 102-447, at 86 (1992).

50 See 20 U.S.C. § 1099a.

51 See Pub. L. No. 102-325, 106 Stat. 526 §§ 494B, 494C (July 23, 1992).

52 See McCann & Laitinen, *supra* note 5.

53 See Comm. on Educ. and Lab., *Higher Education Amendments of 1992*, *supra* note 49, at 85.

54 75 Fed. Reg. 34,806, 34,813 (June 18, 2010).

55 See *id.*

56 34 C.F.R. § 600.9(a).

57 See McCann & Laitinen, *supra* note 5.

58 34 C.F.R. § 600.9(c) (2011).

59 A court struck down the 2011 version of 600.9(c) after a higher education industry group challenged it, alleging the Department failed to give

- adequate notice during rulemaking. See *Career Coll. Ass'n v. Duncan*, 796 F. Supp. 2d 108, 133–35 (D.D.C. 2011), *aff'd in part, rev'd in part sub nom. Assoc. of Private Sector Colls. and Univs. v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012).
- 60 34 C.F.R. § 600.9(c).
- 61 81 Fed. Reg. 92232, 92234 and 92262 (Dec. 19, 2016); 34 C.F.R. § 600.2 (July 1, 2015 – May 25, 2019).
- 62 81 Fed. Reg. 92,232, 92,234.
- 63 *Id.*
- 64 *Id.*
- 65 84 Fed. Reg. 58,834, 58,842 (Nov. 1, 2019)(Final 2019 Rule), 34 C.F.R. § 600.2 (eff. July 1, 2020).
- 66 34 C.F.R. § 600.2.
- 67 *Id.*
- 68 84 Fed. Reg. 58,834, *supra* note 66, at 58,842.
- 69 Unified State Authorization Reciprocity Agreement (Dec. 1, 2015), https://nc-sara.org/sites/default/files/files/2019-07/UNIFIED_SARA_AGREEMENT_2015-FINAL_Approved_120115.pdf.
- 70 See Nat'l Council for State Authorization Reciprocity Agreements, SARA Policy Manual at ¶ 1.37 (Ver. 22.1, June 27, 2022), https://nc-sara.org/sites/default/files/files/2022-08/SARA_Policy_Manual_22-1_6-27-2022.pdf.
- 71 See Nat'l Council for State Authorization Reciprocity Agreements, Regional Education Compacts, *available at* <https://nc-sara.org/regional-education-compacts>.
- 72 See *id.*
- 73 See <https://www.mhec.org/about/commissioners> (MHEC Commissioners), <https://nebhe.org/about/board/> (NEBHE Board of Delegates), <https://www.sreb.org/about-board> (SREB Board), and <https://www.wiche.edu/about/wiche-commission/#all-commissioners> (WICHE Commissioners).
- 74 See <https://www.mhec.org/about/commissioners> (MHEC Commissioners), <https://nebhe.org/about/board/> (NEBHE Board of Delegates), <https://www.sreb.org/about-board> (SREB Board), and <https://www.wiche.edu/about/wiche-commission/#all-commissioners> (WICHE Commissioners). The individuals are appointed by governors of the member states.
- 75 Nat'l Council for State Authorization Reciprocity Agreements, SARA Policy Manual (Ver. 22.1, June 27, 2022), *available at* https://nc-sara.org/sites/default/files/files/2022-08/SARA_Policy_Manual_22-1_6-27-2022.pdf.
- 76 *Id.* at ¶¶ 1.24, 3.1(f).
- 77 See *id.* at ¶¶ 2.5(k), (l).
- 78 See Smith & Webster, *supra* note 9.
- 79 *Id.* at ¶¶ 2.5(b), 3.2, 3.3, 3.8(c), 4.7.
- 80 *Id.* at ¶ 2.5(l)
- 81 *Id.* at 41, note 8.
- 82 *Id.* at ¶ 2.5(k).
- 83 See Smith & Webster, *supra* note 9.
- 84 See David Whitman, *The Cautionary Tale of Correspondence Schools*, New America (Dec. 2018), https://d1y8sb8igg2f8e.cloudfront.net/documents/The_Cautionary_Tale_of_Correspondence_Schools_2018-12-10_132917.pdf. See also Stephanie Riegg Cellini, *The alarming rise in for-profit college enrollment*, Brookings.Edu, (Nov. 2, 2020), <https://www.brookings.edu/articles/the-alarming-rise-in-for-profit-college-enrollment/>.
- 85 See Nat'l Center for Education Statistics, “Table 9. Unduplicated headcount enrollment at Title IV institutions by control of institution, student level, level of institution, distance education status of student: United States, 2021–22,” (last visited on Dec. 22, 2023), https://nces.ed.gov/ipeds/search?query=&query2=&resultType=all&page=1&sortBy=date_desc&overlayTableId=35953. See also Doug Lederman, *The Biggest Movers Online*, Inside Higher Ed (Dec. 16, 2019), <https://www.insidehighered.com/digital-learning/article/2019/12/17/colleges-and-universities-most-online-students-2018>. Yet students who attend four-year for-profit institutions are far more likely to attend exclusively online than students attending four-year public colleges. Pre-Pandemic, 72% of students in four-year for-profits were attending exclusively online, compared to just 12% of students in four-year public colleges. See Cellini, *supra* note 81.
- 86 U.S. Government Accountability Office (GAO) reported in 2022 that at least 550 colleges—most of which are nonprofit and public—contract with for-profit online program managers to support at least 2,900 education programs. U.S. Gov't Accountability Off., GAO-22-104463, *Higher Education: Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers* (April 2022), <https://www.gao.gov/products/gao-21-89>.
- 87 Press Release, Purdue University, Transaction complete for Purdue Global (March 23, 2018), <https://www.purdue.edu/newsroom/releases/2018/Q1/transaction-complete-for-purdue-global.html>. See also Hallie Busta, *How Purdue Global is expanding Purdue U's access to adult learners*, Higher EdDive (Jan. 9, 2019), <https://www.highereddive.com/news/how-purdue-global-is-expanding-purdue-us-access-to-adult-learners/545554/>.
- 88 Lindsay McKenzie, *University of Arizona's Big Online Push*, Inside Higher Ed (Aug. 3, 2020), <https://www.insidehighered.com/news/2020/08/04/university-arizona-acquires-ashford-university#>.

- 89 Press Release, Nat'l Student Legal Defense Network, Students File Lawsuit Against USC and 2U for Deceptive Enrollment Scheme, (Dec. 20, 2022), <https://www.defendstudents.org/news/students-file-lawsuit-against-usc-and-2u-for-deceptive-enrollment-scheme>; Press Release, University of Idaho, U of I Given Go Ahead to Create Not-For-Profit to Acquire Online University (May 18, 2023), <https://www.uidaho.edu/news/news-articles/news-releases/2023/051823-affiliation>; *University of Phoenix Affiliation FAQ*, UNIVERSITY OF IDAHO, (last visited Feb. 12, 2024), <https://www.uidaho.edu/president/university-of-phoenix-affiliation>.
- 90 Laura T. Hamilton, Amber Villalobos, Christian Michael & Charlie Eaton, The Century Foundation, How Online College Hurts More Than It Helps (June 8, 2022), <https://tcf.org/content/commentary/how-online-college-hurts-more-than-it-helps/>.
- 91 For example, the Department of Education recently cancelled millions of dollars in loans for students who attended for-profit online programs based on evidence that the school recruited students using misleading advertising. U.S. Dep't of Educ., Biden-Harris Administration Approves \$37 Million in Borrower Defense Discharges for Over 1,200 Students Who Attended University of Phoenix (Sept. 20, 2023), <https://www.ed.gov/news/press-releases/biden-harris-administration-approves-37-million-borrower-defense-discharges-over-1200-students-who-attended-university-phoenix>.
- 92 See, *Purdue Global/Kaplan - Recent Actions and Concerns*, Veterans Education Success (last visited Sept. 1, 2023), <https://vetsedsuccess.org/purdue-global-kaplan-recent-actions-and-concerns/>. See also, *University of Phoenix - Recent Actions and Concerns*, Veterans Education Success, (last visited Jan. 8, 2024), <https://vetsedsuccess.org/university-of-phoenix-recent-actions-and-concerns/>; see, Press Release, State of California Department of Justice, Attorney General Bonta: Ashford University Must Pay \$22 Million in Penalties for Defrauding California Students (March 7, 2022), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-ashford-university-must-pay-22-million-penalties>.
- 93 See NC-SARA, SARA-Participating Institution Directory (last visited Jan. 8, 2024), <https://nc-sara.org/directory>. To be a SARA participating school, the school must be located in a SARA member state, be a degree-granting institution, institutionally accredited by a recognized accrediting agency and otherwise meet the institutional eligibility requirements detailed in the SARA Policy Manual, Sec. 3.1. See NC-SARA, Eligibility for Participation (last visited Jan. 16, 2024): <https://www.nc-sara.org/eligibility-participation>.
- 94 See Comm. on Lab. and Hum. Res., Reauthorizing the Higher Education Act of 1965, *supra* note 46, at 4, 44.