

STATE-FEDERAL PARTNERSHIPS IN POSTSECONDARY EDUCATION

ENHANCING STATE AUTHORIZATION: THE NEED FOR ACTION BY STATES AS STEWARDS OF HIGHER EDUCATION PERFORMANCE



EDUCATION
COMMISSION
OF THE STATES

Thomas Harnisch, Barmak Nassirian,
Amber Saddler and Art Coleman

DECEMBER 2016



ABOUT THE AUTHOR



Thomas Harnisch is the director of state relations and policy analysis at the American Association of State Colleges and Universities (AASCU). His responsibilities include research, policy analysis and communication to the AASCU membership and other external stakeholder groups. His research interests include state higher education finance, access, affordability and other state-related higher education topics. He is staff liaison to the AASCU Policies and Purposes Committee and helps craft the AASCU Public Policy Agenda and plans the Higher Education Government Relations Conference. Prior to joining AASCU in 2007, Tom was a graduate assistant at the Midwestern Higher Education Compact in Minnesota. He earned a bachelor's degree from the University of Wisconsin-Madison, a master's degree from the University of Minnesota-Twin Cities and a doctorate from The George Washington University.



Barmak Nassirian is director of federal relations and policy analysis at the American Association of State Colleges and Universities (AASCU). In this role, he coordinates federal relations and legislative, regulatory and public policy at the federal level. Nassirian has been involved in higher education policy for more than 25 years, and has worked on a broad range of issues including access and opportunity, higher education finance, tax policy, enrollment management, quality assurance and educational privacy.

ABOUT THE AUTHOR



Amber Saddler is a policy assistant at EducationCounsel LLC where she works on a range of K-12 and higher education policy issues to help improve equity and education outcomes for all students. Prior to joining EducationCounsel, she worked directly with students at various points along the education pipeline as an AmeriCorps member, college access program coordinator and investigator for attorneys working within the juvenile justice system at the DC Public Defender Service. Her professional interests include the intersections of educational opportunity, law and income inequality. She is a 2012 graduate of Amherst College.



Art Coleman is a managing partner and co-founder of EducationCounsel LLC. His policy, strategy and legal counsel for clients and colleagues centers on progressive systems change and reform issues, including on issues of accountability and accreditation—with underlying attention to the needs of underserved students. He was a principal author of the 2013 report of the Commission on the Regulation of Postsecondary Distance Education that led to the establishment of the National Council for State Authorization Reciprocity Agreements. Mr. Coleman served as Deputy Assistant Secretary of the U.S. Department of Education’s Office for Civil Rights during the Clinton Administration. He is a 1984 honors graduate of Duke University School of Law and a 1981 Phi Beta Kappa and honors graduate of the University of Virginia. Mr. Coleman is a past Chairman of the Board of Directors of the Institute for Higher Education Policy.

© 2016 by the Education Commission of the States. All rights reserved. Education Commission of the States encourages its readers to share our information with others. To request permission to reprint or excerpt some of our material, please contact us at (303) 299.3609 or e-mail askinner@ecs.org.

FOLLOW US



EXECUTIVE SUMMARY

In this paper, we examine the higher education regulatory triad (consisting of states, accrediting agencies, and the federal government) and its role in guaranteeing institutional quality for the millions of students receiving billions of dollars in federal student aid, paying particular attention to the state's role in authorizing institutions of higher education as the sector expands dramatically beyond the scope of the triad as originally envisioned. The paper first parses the relationship between state authorization and non-governmental accreditation processes, and the various state approaches to the authorization role and function. The paper then explores the history and evolution of the state role in the establishment of institutions of higher education and their oversight, including attempts at reforming the regulatory framework as the sector grew to include more institutions with new missions and methods of delivery, and became the recipient of greater student and taxpayer investment. The paper concludes by articulating the need for enhanced state authorization standards in this new era of educational growth and offers a series of policy recommendations and questions for state and federal lawmakers to consider as we near a potential reauthorization of the Higher Education Act. The paper proposes that:

- Each state government adopt a baseline set of institutional authorization standards;
- State authorization processes include elements of continuous review for all authorized institutions;
- State authorization agencies differentiate institutions by various student outcomes metrics and focus their limited capacity and resources on those institutions most at risk of failure;
- States develop coordinated approaches to authorization and a unified vision for education, across agencies;
- States ensure authorization agencies have sufficient autonomy to prevent conflicts of interest and regulatory capture by the institutions they review;
- State and federal governments coordinate to ensure authorization agencies are appropriately funded and staffed with necessary expertise;
- States ensure the enforcement and implementation of sound authorization policies that already exist; and
- States and the federal government support the development of a larger research agenda on state authorization.



TABLE OF CONTENTS

Introduction	2
What is State Authorization Really?	5
The History of State Authorization	7
State Authorization for a New Era	9
Steps Toward Enhanced State Authorization	10
Conclusion	14
Endnotes	15

INTRODUCTION

Rising tuition prices, mounting student debt, growing dissatisfaction with institutional performance and value, and charges of waste, fraud and abuse – exemplified by high-profile collapses of institutions within the for-profit industry – have led to a renewed sense of urgency for more accountability in higher education. In anticipation of the reauthorization of the Higher Education Act, lawmakers on Capitol Hill have introduced a number of measures aimed at boosting institutional oversight and program integrity. At the same time, higher education’s decentralized regulatory “triad” consisting of states, accrediting agencies and the federal government, is under greater scrutiny for structural weaknesses. This is well-timed since better upfront gatekeeping; attention to clearer, more meaningful outcome metrics; better transparency in decision-making; and enhanced efficiencies may produce systemically better results for students and taxpayers who collectively invest billions annually in federal financial aid.

Most of the current policy conversations around accountability have focused on reforming accreditation and strengthening federal requirements for participation in Title IV financial aid programs.¹ While raising an important set of issues, the policy community has largely overlooked the state role in higher education oversight; to most policymakers, the many functions and actors that compose the state role remain an enigma, if they even know this responsibility exists at all.

The parties of the gatekeeping triad who serve as stewards of taxpayer funds, assure the legitimacy and integrity of institutions of higher education, and protect students include states, accrediting agencies and the federal government. The triad is enshrined in the Higher Education Act as the eligibility pathway for institutions seeking access to federal student aid programs.² At some point in their formation and operation, institutions of higher education participating in the federal aid program must obtain approval by members of the triad based on corporate structure, fiscal soundness, and educational quality and outcomes.

The roles and functions of each member are distinct, but related – sometimes overlapping at the margins. States recognize and authorize institutions to operate and protect consumers from waste, fraud and abuse. Non-governmental accrediting bodies recognized by the secretary of education examine various facets of institutional quality. The federal government certifies that institutions meet the various administrative and financial criteria articulated in the law to participate in the federal student aid programs.³ This distributed approach to higher education accountability is designed to keep governmental intrusion in higher education to a minimum and maintain a proper division of powers between the states, the institutions and the federal government. However, the triad has been plagued with criticism for decades for failing to improve institutional outcomes, for overlap and confusion among the actors, and for allowing waste, fraud and abuse by some institutional participants in the higher education community.

The three actors in the triad – as gatekeepers of institutional eligibility for federal financial aid – are often discussed as co-equal to one another; however, there is an often-neglected temporal sequence to their application. State authorization serves as the fundamental formative act in the creation of postsecondary institutions and as the primary gatekeeper. To grant a degree legally, an institution of higher education must be authorized by a governmental entity; beyond a few cases of service academies chartered by the federal government and tribal charters granted to a relatively small number of institutions, state governments authorize the vast majority of institutions of higher education.⁴ States have been authorizing institutions operating within their borders for centuries and this responsibility remains firmly ensconced in the American higher education tradition. Accreditors do not have the power to authorize institutions of higher education to operate and state authorization is required for accreditation. State authorization can come in the form of a state charter, authorization from the state for nonpublic institutions or through a religious exemption.⁵

Despite state authorization's priority in time and notably longer history in practice, there is no definition or core concept that reflects federal policy parameters associated with state authorization. To qualify for federal financial aid, institutions simply need to be authorized within the state in which they are domiciled.⁶ This has led to a wide variety of state approaches to authorization with different actors and processes fulfilling this function in each state.⁷ Some states have proven to be active and thorough in fulfilling this responsibility, while others have taken a passive approach with few requirements demanded of institutions. States also face the challenge (and occasional conflict) of maintaining the jobs and economic development provided by institutions of higher education, while

also upholding quality assurance standards and removing authorization from poor-performing institutions or those that engage in consumer abuse.⁸

Limited attention and lack of comprehensive action regarding the meaning of state authorization has produced a number of suboptimal consequences. First, confusion among stakeholders is pervasive, since neither students, accrediting bodies, nor the federal government can easily or consistently articulate what specific assurances state authorization related to any institution of higher education provides. Second, the absence of even a baseline framework regarding this key element of state due diligence has, ironically, created internal pressures for the states to be less demanding rather than more, thus creating a race to the bottom instead of a race to the top. The absence of a federal mandate for state authorization has caused some states to require little more than basic incorporation for purposes of authorizing home-state businesses to operate as colleges and universities. Finally, the absence of clarity and coherence invites poor outcomes because there are inadequate means and insufficient transparency for holding states accountable for outcomes brought about by their authorized entities as fiduciaries of their taxpaying public.

THE UNDEFINED STATE ROLE IN AUTHORIZING INSTITUTIONS OF HIGHER EDUCATION IS A PRODUCT OF A BYGONE AND SIMPLER ERA IN AMERICAN HIGHER EDUCATION.



The undefined state role in authorizing institutions of higher education is a product of a bygone and simpler era in American higher education. State governments authorized the vast majority of recognizable “traditional” colleges and universities decades ago in circumstances that were markedly different and arguably necessitated far less due diligence on the part of the states. Beyond dissatisfaction with institutional performance and questions over outright fraud and abuse, the growing number of higher education institutions, dramatic increase in private and public investment in postsecondary education, and urgency to boost the number of individuals with high-quality postsecondary credentials requires a reexamination of state authorization. The status quo is no longer tenable – particularly given the current complex and rapidly changing higher education landscape.

In the half-century since the advent of the Higher Education Act, and particularly as the federal investment in financing higher education has grown, the fundamental purpose of state authorization – the vesting of power in an entity to confer educational credentials – has been significantly eclipsed by the function assigned to it as a way station along the path to eligibility for federal dollars. Before the federal government dominated the higher education financing scene, the states had to take full responsibility for the legitimacy, conduct and impact of institutions they authorized. State authorization was the only public validation entities received before claiming collegiate status. As the federal role and investment have grown, that function, which was previously singularly performed by the states, is now subsumed in the nebulous architecture of the triad, which, in its ill-defined division of responsibilities, may induce each actor to assume that critical functions are someone else’s responsibility. In other words, because everyone is in charge, no one is in charge.

**THE STATUS QUO IS NO LONGER
TENABLE – PARTICULARLY GIVEN
THE CURRENT COMPLEX AND
RAPIDLY CHANGING HIGHER
EDUCATION LANDSCAPE.**

Through an exploration of the various state approaches to authorization and the history of that function, this paper aims to clarify the state’s role within the triad and in providing institutional oversight; and will also propose policy recommendations and questions that might bolster the state’s role and, thus, student outcomes.

WHAT IS STATE AUTHORIZATION, REALLY?

While states play many roles related to higher education - establishing and supporting state institutions, administering state financial aid programs, and promoting student access and success - perhaps one of the most important and overlooked functions of state government in higher education is authorization. State authorization is intended to be a meaningful marker of institutional legitimacy. While some may mistake this for the related concept of institutional integrity, there is a significant difference between the two. Institutional integrity is properly understood to be within the purview of accrediting agencies. It is the responsibility of accreditors to make judgments related to the adequacy of curriculum, instruction and assessment. Non-governmental accreditation is the means by which the academic integrity of institutions can be assured without governmental officials directly exercising that judgment.

But what, then, is authorization? And what constitutes the minimal due diligence that a state must conduct to assure reliant third-parties that an institution is legitimate even before it has been accredited or certified to participate in federal aid programs? Unfortunately, there is no identifiable baseline, and procedures and actors involved in state authorization vary among and within states.⁹ Authorization is usually required if an institution has a “physical presence” in the state, a definition that can be triggered based on a range of activities, such as employing faculty or advertising to students.¹⁰

For some states, simple incorporation has been deemed sufficient to declare an institution as legitimate. For others, there is a comprehensive authorization and renewal process that evaluates a wide array of inputs and outcomes. However, the lack of a clear consensus as to minimum state authorization requirements creates intellectual, legal and operational problems for accreditors who must take the next step in examining institutions seeking access to federal financial aid.

In the case of some states, accreditors can rely on significant prior state findings of “material legitimacy,” such as verified financial, administrative and organizational attributes of authorized entities that provide ample evidence of their configuration as teaching and learning venues. In such cases, accreditation can focus on evaluating a school’s intangible attributes. For example, whether an entity has the expected internal resources to deliver educational services - the classroom and course-inventories, the number of faculty, and the general material and human resources necessary to perform as a school - would be a function that states could perform. Conversely, accreditors would evaluate with faculty qualifications, course content and whether an entity adequately meets minimum academic criteria.

It is important to note that initial state authorization is the same for all applicants, regardless of whether, once authorized, institutions later seek and receive additional approvals for Title IV purposes. Beyond federal financial aid considerations, therefore, the

significant number of institutions that choose to continue without accreditation will have been vetted and would only be overseen by the state. Such state authorized, but unaccredited institutions represent an often-overlooked but important segment of American higher education. The number of these institutions is often underestimated – recent research suggests that there is more than double the number of institutions in the for-profit sector if official statistics included those not participating in the federal Title IV programs.¹¹ For students attending these institutions, it is imperative that the state – their only regulator and quality assurance overseer – have robust safeguards in place to ensure that they are receiving a quality education, as protections offered by accreditation and federal oversight are unavailable.

The base of scholarly literature on the state authorization function remains scant with two recent exceptions. Basing their findings off a state authorization survey conducted by the State Higher Education Executive Officers (SHEEO), Kelly, James, and Columbus found wide variation among states in their authorization processes. The boards overseeing state authorization are usually subject to membership quotas based on state law, and the staff of these boards remains a powerful force in the decision-making process. The inputs required from the state, according to the authors, include a list of faculty qualifications, facilities, and equipment and library resources. In addition, authorizers in many states sought information on course content, academic program information and credit- or clock-hour requirements for degree and certificate programs. Consumer protections, such as refund policies, surety bonds and complaint processes were also common. The states also required outcomes for renewal, but

their interviews suggest that states do not rely on these data for renewal. The authors concluded by calling for a risk-based approach to oversight and moving away from an input-based system.¹²

Taylor, Coleman, Little, and Saddler also explored the state role in oversight. They found each state to have a unique “quality assurance ecosystem” made up of a core group of actors, such as higher education officials and state higher education agencies; key influencers, such as the governor, legislators and the attorney general; in-state partners, which include the state chamber of commerce and in-state businesses; and out-of-state partners, which include regional compacts and national membership organizations. However, these actors often do not work in a coordinated manner within the state; and, as they suggest, generalizing a broad national baseline of authorization procedures presents significant challenges given the many differences among states.¹³

THE HISTORY OF STATE AUTHORIZATION

Institutions of higher education – public and private – have been intertwined with state and colonial governments since even before the founding of the nation. The Massachusetts Bay Colony authorized and financed Harvard University. The English Crown granted charters to other early institutions such as the College of William & Mary and Dartmouth College. Even the U.S. Supreme Court, when deciding that New Hampshire lacked the power to convert Dartmouth College into a public institution, agreed that states have the power to establish public institutions and influence private institutions when they benefit from state funds.¹⁴ There remain few court cases related to the state’s power to authorize institutions, but there is enough case law to establish a clear state authority to authorize colleges and universities within its borders.¹⁵

During the 19th century, spurred by the nation’s growth, industrialization, and mechanization of the agricultural revolution, and expedited by Morrill Land-Grant Acts, most state governments authorized or chartered institutions of higher education, but did little more on the regulatory front.¹⁶ The creation of a constellation of normal schools for teacher training and later junior colleges would continue the tradition of state authorization with minimal subsequent intrusion. State leaders continued to defer decisions to campus leaders and governing bodies. Public institutions were overseen by state appointees, making further intrusion unnecessary.¹⁷ In addition, most early private independent institutions were affiliated with various religious groups or were founded and supported by large philanthropic donations, and were viewed as sufficiently accountable because of their charitable nature.

The emergence of the G.I. Bill and attendant concerns about fraudulent use of federal funds led the federal government to require institutions seeking to participate in the Korean G.I. Bill in 1952 to be accredited by a nationally recognized accreditor.¹⁸ Lawmakers later codified this regulatory framework into the Higher Education Act, a framework that exists to this day.

Despite the centrality of the state role, the function and its meaning remained undefined and amorphous in subsequent decades. Continued existence of degree mills and weak institutions on the higher education scene led to model legislation to bolster the state role created by the Education Commission of the States in 1973.¹⁹ Despite this, the substantive state role continued to recede in efficacy and importance throughout the 1980s, with both the federal government and the states themselves increasingly relying on accreditors for operational legitimacy of institutions. By this period, the triad was viewed as “more rhetoric (and finger pointing) than reality” and required reform, including greater consistency in the state role.²⁰

The concerns about waste, fraud and abuse (particularly in the for-profit sector) in the years leading up to the 1992 reauthorization of the Higher Education Act led Congress to revisit the state role in oversight.²¹ The 1992 reauthorization required each state to create a State Postsecondary Review Entity (SPRE) in a mutual state-federal effort to combat fraud stemming from the for-profit sector. Under the original SPRE concept, the U.S. Department of Education would create agreements with the states for approving education programs, state agencies would create authorization plans, and the federal government would help states pay for the additional oversight.²²

However, the SPRE bill was amended in the legislative process and extended to all institutions and gave state governments – and through them, the federal government – more tremendous power and reach into the internal affairs of all institutions, including the right to regulate academic affairs traditionally left to the faculty and to accreditors. This led to a strong pushback from many in higher education with the strongest objections coming from the private, not-for-profit sector. In response to these objections, Congress pulled all funding for SPRE implementation in early 1995. SPRE’s failings have been attributed to a poor cultural fit for enhanced regulation in some states, a lack of state capacity to implement the law and confusion and overlap in responsibilities among members of the triad.²³ With SPRE eliminated, many states reverted back to their previous undefined roles for authorization, and poor or non-existent authorization standards continued to allow sub-par and predatory institutions to operate.²⁴

Beyond SPRE, the second national spotlight on state authorization came through the ongoing regulatory effort undertaken by the U.S. Department of Education beginning in 2010. The proposed regulation initially sought to ensure that institutions offering distance-delivered programs in other states had the proper approval in each state in which they enrolled students. The department was concerned that online programs would subvert traditional state oversight structures based on physical location. For distance education providers operating in multiple states, the proposal negated the very promise of the internet, which enabled institutions to reach a nationwide – if not worldwide – student body at lower costs than setting up a physical footprint elsewhere. While the proposed regulatory effort was suspended while the department attempted to produce a workable policy,

it did lead to the emergence of a novel approach to multi-state authorization of institutions through interstate reciprocity agreements, known as the State Authorization Reciprocity Agreement (SARA).²⁵

State Authorization Reciprocity Agreement (SARA)

In 2013, state higher education officers (SHEEOs), state regulators, and other stakeholders implemented the State Authorization Reciprocity Agreement (SARA). SARA functions as a state-level reciprocity process that creates a common baseline of quality and integrity standards for all participating states and institutions. As of fall 2016, 42 states and more than 1,000 institutions are participating in SARA.

Unlike SPRE, however, the recent regulatory effort did not involve a substantive mandate or actual guidance to states on how to authorize institutions, outside of a draft requiring “active” reviews by the states and forbidding states from replacing state authorization with another leg of the triad. While the revised regulation has yet to be fully adopted, it does little more than restate existing law requiring state authorization. It does include, however, requirements for state processes for resolving student complaints regarding distance education, some minimal disclosure requirements to prospective students in distance education programs, and recognizes SARA while allowing each state to enforce its own consumer protection laws.²⁶

STATE AUTHORIZATION FOR A NEW ERA

Obvious challenges notwithstanding, the variable role and meaning of state authorization are no longer adequate or sustainable for today's higher education environment. The bygone era in which a vague and undefined state authorization process was tolerable is different from the current condition in four main substantial ways. First, states bore a far greater share of costs at public institutions than they do today, and the federal government could assume that states would have to do right by federal dollars and student interests because so much of their own money was at stake. Second, private, not-for-profit institutions served far fewer students and were significantly backed by philanthropic and religious communities, helping validate the legitimacy of these institutions. Third, the for-profit college sector was far smaller and concentrated on professions licensed by the state. Students at these institutions did not have access to public subsidies, leaving them to commit to significant out of pocket costs for their education. Lastly, as postsecondary education and training have become more indispensable and as the student population has grown thanks to large amounts of federal assistance, the voluntary conventions that assured quality and integrity have gradually given way to commercialization, thus creating incentives to maximize revenues at the expense of quality and credible outcomes. In sum, the original decision to rely on the regulatory framework that pre-dated the introduction and growth of federal aid programs did not anticipate how the massive infusion of federal money would change the behavior of both regulators and regulated entities as the breadth of institutions and providers of higher education expanded.

While the last several years have exposed fundamental weaknesses in state authorization, it has also demonstrated the capacity and appetite for greater institutional oversight responsibility held by some actors within the state quality assurance ecosystem. Throughout the last decades, state attorneys general have filed an array of lawsuits alleging consumer fraud and abuse, almost exclusively in the for-profit college sector. Currently, 37 state attorneys general are collaborating in a multi-state investigation of for-profit colleges.²⁷ The institutions under investigation have been granted authorization to operate in their respective states.

IN SUM, THE ORIGINAL DECISION TO RELY ON THE REGULATORY FRAMEWORK THAT PRE-DATED THE INTRODUCTION AND GROWTH OF FEDERAL AID PROGRAMS DID NOT ANTICIPATE HOW THE MASSIVE INFUSION OF FEDERAL MONEY WOULD CHANGE THE BEHAVIOR OF BOTH REGULATORS AND REGULATED ENTITIES AS THE BREADTH OF INSTITUTIONS AND PROVIDERS OF HIGHER EDUCATION EXPANDED.

Re-balancing the shared responsibility for accountability in higher education should be a bipartisan undertaking with interests at stake for Democrats and Republicans alike. Improving state authorization empowers states to have their own processes for determining the legitimacy of institutions and allows for further deregulation at the federal level. If the state role in authorization is inefficient or ineffective, it simply cedes more control over higher education to the federal government or nongovernmental accrediting bodies.

STEPS TOWARD ENHANCED STATE AUTHORIZATION

Defining and strengthening state authorization standards and improving the administrative and organizational processes to implement them should be a collaborative national effort with the states playing the primary role. Because such an initiative would require significant resources and an upfront investment of time and effort, the federal government should serve as the convener and the facilitator for a sustained conversation on the topic. The federal government has a stake in having more meaningful and reliable state authorization processes, as it would improve institutional accountability and consumer protection while also providing an opportunity to reduce ineffective compliance requirements on accrediting bodies and institutions and distributing some of the oversight burdens currently placed solely on the Department of Education. Without attempting to specify the details of the issues that the states would need to address, the following items provide a framework for further discussion and resolution.

ESTABLISH UPFRONT DUE-DILIGENCE STANDARDS

State governments need to give substantive meaning to their authorization processes through the adoption of a baseline of common standards. The national organizations representing the states with a focus on education policy would be candidates for a national convening to develop consensus-based standards for voluntary adoption. These would articulate the subset of essential due-diligence procedures that participating states would undertake in authorizing new institutions

of higher education. The effort would resemble existing examples of standard-setting on complex and technical topics that the states or other public authorities regulate. Just as there are national model codes for construction, fire prevention and electrical systems, a model set of authorization standards could be developed collaboratively by the states.

Defining the upfront criteria for evaluation of entities seeking authorized institutional status will prove both challenging and impactful because current state practices vary greatly. The goal should be to raise weak or non-existent standards, while allowing states with robust authorization practices to retain their more demanding criteria and practices.

In terms of substance, authorization practices of some states include well-settled requirements addressing virtually every aspect of institutional activities, including minimum academic standards related to faculty qualifications, program length, and academic credit requirements for various credential levels. Such a prescriptive upfront approach makes sense, since at the point when they first seek state authorization, applicants have no performance record for the state to use as evidence of their capacity to carry out their mission. Thus, despite the long tradition of academic noninterference with academic affairs of established institutions of higher education, some measure of state involvement with academic attributes of the entities they oversee is inevitable.

REQUIRE CONTINUING OVERSIGHT AND DELEGATION OF DUTIES

Clearly, the state authorization process should be most comprehensive for entities seeking institutional status for the first time.²⁸ This, as has been pointed out, is the stage where few other quality assurance or regulatory mechanisms have reviewed the entity, where little by way of data or track record tends to be available, and where the state must single-handedly make a determination of legitimacy. But even the most robust upfront vetting process must be paired with a regime of continuing, and appropriate, oversight to ensure that institutional performance does satisfy the states' baseline requirements. It would do little good to create the best one-time authorization process if institutions were then free to deviate from state standards once authorized.

The continuing authorization oversight regime, while absolutely necessary as a permanent component of proper state authorization, need not be as comprehensive or expansive as the initial review. A subset of state standards may be delegated to other members of the triad for institutions that do go on to be accredited and certified.

A significant component of the initial original set of academic standards, for example, may later be waived for institutions that obtain and maintain full accreditation. Likewise, while the states should factor in administrative and financial requirements at the time of initial authorization, some of these may later be waived for institutions that obtain federal certification. However, the states should continue to play an oversight role in connection with governance and management issues, institutional business practices, including the monitoring of their financial viability, advertising and recruitment activities, private student financing practices, and other operational facets that interface with the public.

While some duties can and should principally reside with other actors in the triad, state authorization should not be completely outsourced to accrediting agencies and the federal government. Such a complete delegation of authority would essentially render state authorization meaningless and non-additive. Standards related to consumer protection, tuition recovery funds, arrangements for permanent preservation of student records, and basic operational safeguards have generally been the domain of the states and should remain so.

A promising direction for further exploration of an appropriate upfront state role would involve the examination of programs where the states already play an important normative role through their professional and vocational licensure function. To the extent that the states already set and enforce licensure criteria, it would be both more reasonable and more efficient for them to ensure the commensurability of institutional programmatic offerings to such standards.

FOCUS ON HIGH-RISK AND UNACCREDITED INSTITUTIONS

A consensus set of minimum state authorization standards would also ideally provide for the use of publicly available and state-level data-reporting requirements to enable the creation of a common matrix of "institutional vital signs," a set of quantitative metrics that would allow regulators to focus their limited resources on institutions that pose the greatest risk to students and other stakeholders. Items such as default rates, graduation rates, recorded consumer complaints, and certain financial indicators could quickly direct more expansive and more comprehensive oversight to venues where that might be needed more urgently.

In general, the presence of two upfront criteria – significant public funding and significant public control on institutional governance – should lessen

the need for extensive due diligence on the subset of institutions that satisfy both of these. By no means should public institutions be exempt from state authorization, but given the substantially lower risk and the significant control the states already exert at most public institutions, the need for yet another oversight mechanism should only arise in extreme cases when public institutions trigger extraordinary alarms.

Unaccredited institutions are also vitally important for the state to regulate. The growth and dominance of Title IV participating postsecondary institutions has so dominated current thinking about state authorization that policymakers often assume a rapid progression through state authorization to accreditation and federal certification. A large number of credential-granting institutions, however, choose to operate with nothing more than state authorization, and a number of these may even access public subsidies through other agencies.²⁹ State authorization serves as the only mechanism of establishing legitimacy and assuring quality for such institutions.

DEVELOP A COORDINATED STATE APPROACH TO AUTHORIZATION

Beyond setting authorization standards, the states should also articulate the internal administrative configuration that could adequately address the multiple goals of state authorization, and better satisfy the sometimes competing interests at stake in authorization decisions. Distinctions between higher education and vocational training, for example, are already acknowledged in some states in the separate state agencies assigned the function of recognizing different types of institutions. With regard to consumer protection, however, states generally do not formally engage their chief protection unit – their attorneys

general – in the authorization process. The state authorization units vary greatly in terms of their historical genesis, powers, resources and authority over the diverse institutions they authorize. These disparities, and the gaps in expertise on various critical aspects of providers' proposed or actual delivery models, can best be addressed through a coordinated administrative approach to the state authorization function. This includes coordinating all of the appropriate state agencies – for example, attorneys general, state credit regulators, professional licensing units, department of labor (for placement rate purposes) – in the initial and continuing authorization of postsecondary institutions.

PREVENT CONFLICT OF INTEREST AND REGULATORY CAPTURE

An often overlooked aspect of the configuration of state authorizing entities is the perennial risk of regulatory capture, the tendency of regulated entities to seek de facto control of their regulators. While close consultation and cooperation with institutions and entities seeking recognition is appropriate and necessary, there have been cases where institutional inputs appear to have exceeded the arm's-length relationship that a regulatory body should maintain from the subjects of its authority. State authorizing bodies can only perform their function if they are independent of the entities they regulate, and the states should ensure that all authorizing bodies operate with sufficient autonomy and that all individuals – including any board members where applicable – are subject to robust conflict-of-interest rules. A corollary – and significant – benefit of ensuring sufficient regulatory independence from incumbent interests is the prevention of artificial barriers to entry for innovative providers.

ENSURE APPROPRIATE FUNDING AND REGULATORY EXPERTISE

Equally as important as the administrative structure is the challenge of properly funding the state authorization function. For decades, higher education was a top funding priority for states; however, increasing demands from a wide array of other social services have resulted in many state agencies and regulatory bodies having to do more with less.³⁰ To help remedy this dearth of available funding, state authorizers could be funded from general revenues in state budgets, by application and licensure fees, or alternatively, the federal government could assume some of the cost in recognition of the value-added role federal law assigns to state authorization within the triad.

State-only funding models have failed to provide adequate resources for effective authorization and oversight. Anemic funding of regulators has also been a fairly consistent – and successful – priority for institutions seeking to create as weak an oversight regime as possible. Not only have some states failed to properly fund their authorizers, some have actually siphoned application fees for other uses, effectively using an intentionally lax authorization process as a revenue generator. It is critical that state authorizing bodies be provided resources proportionate to the volume of business they are tasked with regulating, that guidelines be provided for what the appropriate financial ratios – resources of regulators as a percentage of volume of cash-flows they oversee – for adequate oversight might be, and that authorizers have access to the types of legal, financial and data expertise they need to be effective.

A hybrid option – a combination of general revenues, institutional fees, and federal support – would be particularly attractive because it would create a more sustainable funding model for appropriate allocation of costs to all the parties involved. Federal payments for authorized institutions that participate in federal aid programs would be particularly important because they would create positive incentives and resources for the states to perform the institutional quality assurance function expected of them in federal law. A federal incentive system would also provide the mechanism for a more widespread adoption of consensus standards by all states.

FOSTER AND PROMOTE A CULTURE OF COMPETENT ENFORCEMENT

A pervasive problem with complex regulatory constructs is the adoption of sound policies on paper that are not fully implemented or enforced on the ground. Certain state functions, either because of their simple clarity or because of their serious consequences, are performed consistently well across the nation. In advancing more robust authorization, with attention to performance outcomes over time, the states should pay as much attention to actual implementation as they do to articulating and embracing ideals. It is fair to say that a number of states have policies already in effect that, if enforced, could prevent many of the problems – ranging from waste and inefficiency to predatory institutional conduct – that afflict the higher education landscape around the margins.

BUILD A RESEARCH AGENDA ON STATE AUTHORIZATION

While the effort to promulgate and adopt effective state authorization practice is inherently political, state authorization also suffers a dearth of substance because policy development around the state role came to an abrupt end in the aftermath of SPRE's repeal. While SPREs were conceptually and practically an overreach, their demise resulted in the reduction of state role to custom, habit and tradition. More data and research are needed for a proper understanding of where the state function can add value and promote desirable outcomes. Potential topics of research include the following:

- Better definition of entry qualifications for collegiate and vocational programs in order to better define postsecondary activities.
- More detailed analysis of practices and variances among the states with regard to academic and programmatic requirements under current law.
- Case studies of state practices, particularly with regard to internal administrative configuration and enforcement.
- Labor market studies and mechanisms of linking education and training to specific economic development needs of various states. Studies of failures in state planning would be as useful as studies of success stories.
- Because judging the quality of long-term services is much more challenging for consumers than judging the quality of tangible goods, studies into the extent to which the state can help consumers make education decisions with long-term impact, and into the kinds of data needed to accomplish that task, would be particularly helpful.
- A taxonomy of technical expertise the states would need to authorize and oversee the variety of institutions they encounter.
- Cost and resource studies into various facets of the list of potential topics that the states would need to address.



CONCLUSION

The effort to improve institutional oversight and outcomes through stronger and better defined state authorization standards will require significant attention by state actors in collaboration with members of the triad in the months and years to come – with the prospect of further federal action on these issues.

To curb the growing number of headlines announcing institutional bankruptcies and student defaults – all of

which negatively impact taxpayer and student return on investment – it is imperative that states collectively begin anew the exploration of what “authorization” can and should represent in a 21st century educational environment, where meaningful performance by all institutions is essential for student success and our nation’s fiscal vitality.

ENDNOTES

- ¹For example, EducationCounsel, Outcomes-Focused, Differentiated Accreditation: A Framework for Policy and Practice Reform (EducationCounsel, 2016), <http://educationcounsel.com/?publication=framework-risk-informed-differentiated-accreditation> (accessed October 2016).
- ²Higher Education Act (HEA) of 1965, 20 U.S.C. § 1001.
- ³Teresa E. Taylor, Arthur L. Coleman, Bethany M. Little, and Amber N. Saddler, Getting Our House in Order: Clarifying the Role of the States in Higher Education Quality Assurance (EducationCounsel, 2016), <http://educationcounsel.com/?publication=getting-house-order-clarifying-role-state-higher-education-quality-assurance> (accessed October 3, 2016).
- ⁴Alan L. Contreras, “The legal basis for degree-granting authority in the United States,” (2009), <http://www.sheeo.org/sites/default/files/publications/Contreras2009-10-LegalDegreeGranting.pdf> (accessed October 3, 2016).
- ⁵Paul E. Lingenfelter, “Testimony of the History and Current Effectiveness of the Higher Education ‘Triad’” at Senate HELP Committee Hearing on The Triad: Promoting a System of Shared Responsibility. Issues for Reauthorization of the Higher Education Act (2013), <http://www.help.senate.gov/imo/media/doc/Lingenfelter.pdf> (accessed October 3, 2016).
- ⁶Ibid.
- ⁷Andrew P. Kelly, Kevin J. James, and Rooney Columbus, Inputs, Outcomes, Quality Assurance: A Closer Look at State Oversight of Higher Education (American Enterprise Institute, 2015), <https://www.aei.org/wp-content/uploads/2015/08/Inputs-Outcomes-Quality-Assurance.pdf> (accessed October 3, 2016).
- ⁸Ibid.; Taylor, Coleman, Little, and Saddler, 2016.
- ⁹Ibid.
- ¹⁰Ibid.; Kelly, James, and Columbus, 2015.
- ¹¹Judith Scott-Clayton, “The Hidden Majority of For-Profit Colleges,” The New York Times, February 24, 2012, <http://economix.blogs.nytimes.com/2012/02/24/the-hidden-majority-of-for-profit-colleges/> (accessed October 3, 2016).
- ¹²Ibid., Kelly, James, and Columbus, 2015.
- ¹³Ibid. Taylor, Coleman, Little, and Saddler, 2016.
- ¹⁴Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).
- ¹⁵Contreras, 2009.
- ¹⁶Louis W. Bender, “States and Accreditation,” Understanding Accreditation, Jossey-Bass, 1983.
- ¹⁷The logic of the state exempting public institutions that meet these dual criteria – public funding and public governance – from further authorization requirements retains some of its appeal and is worth re-examining under a more substantive state authorization framework.
- ¹⁸Richard Millard, “Postsecondary Education and ‘The Best Interests of the People of the States,’” The Journal of Higher Education, 50(2), (1979): 121-131.
- ¹⁹Ibid.

²⁰ Ibid.; Bender, 1983.

²¹ These concerns were illustrated in a series of hearings held by Sen. Sam Nunn (D-GA) in 1990 to investigate claims of fraud and abuse by the for-profit sector.

²² Terese Rainwater, “The Rise and Fall of SPRE: A Look at Failed Efforts to Regulate Postsecondary Education in the 1990s,” American Academic (2006) http://co.aft.org/files/article_assets/462D6042-CAA9-E7BB-509EA8C793E87C8D.pdf (accessed October 3, 2016).

²³ Ibid.

²⁴ Alan Contreras, an administrator with the Oregon Office of Degree Authorization, called out the “Seven Sorry Sisters” in 2005, a collection of seven states with state-approved low-quality institutions. In Wyoming, for example, Contreras noted that the state considered degree mills to be a source of economic development. He concluded, “Fewer than a dozen states have truly solid standards, most are mediocre and several, including the Seven Sorry Sisters, are quite poor.” Alan Contreras, “Why States Shouldn’t Accredite,” Inside Higher Ed, August 30, 2005, <https://www.insidehighered.com/views/2005/08/30/why-states-shouldnt-accredit> (accessed October 3, 2016).

²⁵ National Council for State Authorization Reciprocity Agreements, <http://www.nc-sara.org/> (accessed October 3, 2016).

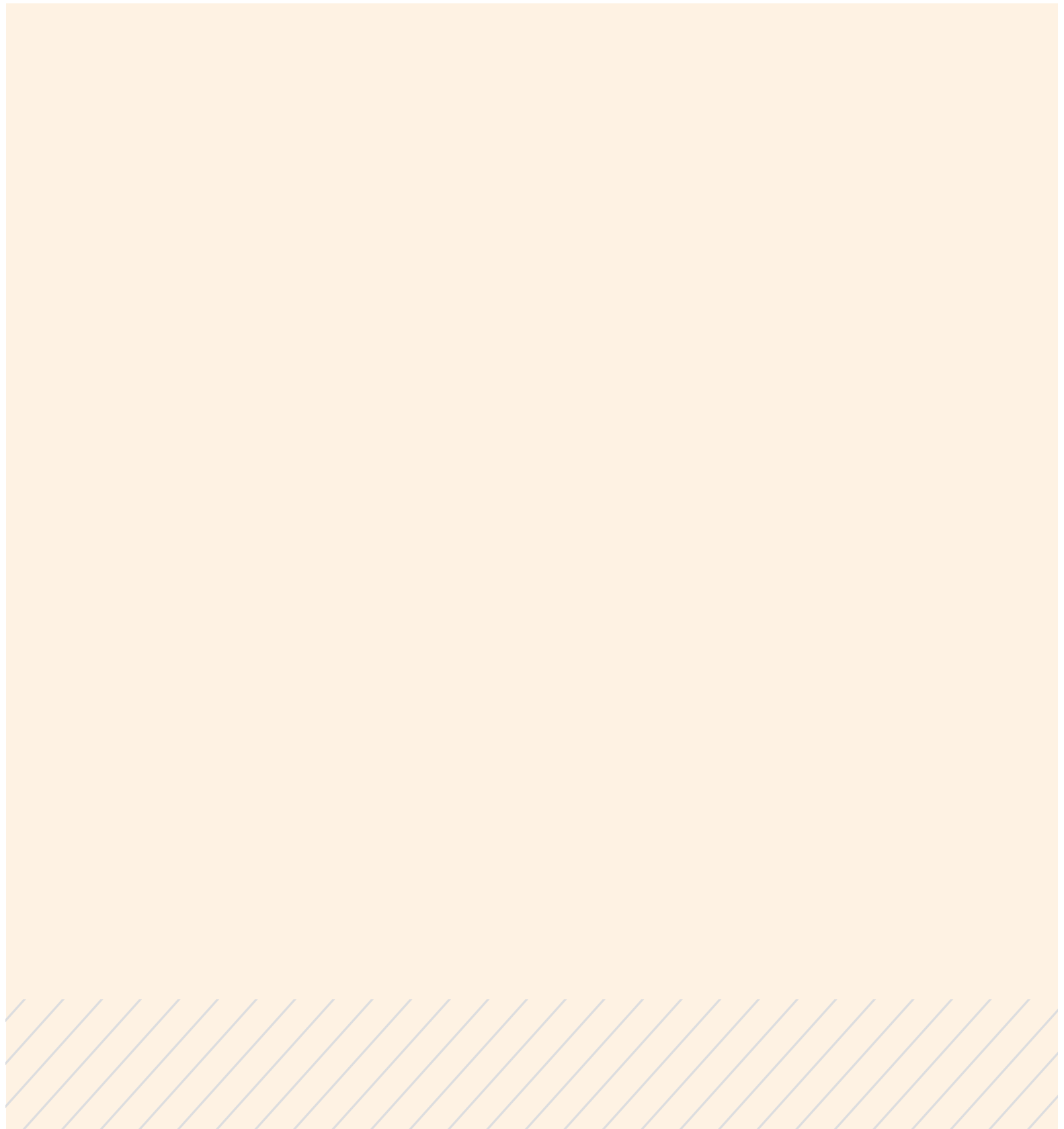
²⁶ “Education Department Proposes Rule on State Authorization of Postsecondary distance Education, Foreign Locations,” U.S. Department of Education, <http://www.ed.gov/news/press-releases/education-department-proposes-rule-state-authorization-postsecondary-distance-education-foreign-locations> (accessed October 3, 2016).

²⁷ David Halperin, “Law Enforcement Investigations and Actions Regarding For-Profit Colleges,” Republic Report, 2014, <https://www.republicreport.org/2014/law-enforcement-for-profit-colleges/>.

²⁸ Comprehensive reviews would apply as well to any institutions that trigger risk-based early warning alarms due to evidence of potential problems.

²⁹ The DoD MyCAA program for military spouses, for example.

³⁰ Ibid.; Taylor, Coleman, Little, and Saddler, 2016.





ABOUT THE INITIATIVE

Education Commission of the States coordinated the creation and dissemination of a series of policy briefs focused on the interaction between state- and federal-level policies pertaining to higher education. The briefs are composed by a diverse collection of education policy and thought leaders representing state and federal perspectives. The goal of this collection of briefs is to highlight how federal and state higher education policies can provide a cohesive policy playbook to support student success and the progression toward meeting aggressive attainment goals.

The brief production process began in late-summer 2016 with authors beginning the writing process. Dissemination of the briefs was provided through informal policy briefings with state and federal audiences through fall 2016 and the public release in December 2016. Topics explored in the briefs include, but are not limited to, financial aid, data policies, funding, the “triad” and workforce needs.

Education Commission of the States would like to thank the two core funders for this initiative, the Bill and Melinda Gates Foundation and Lumina Foundation, for their support of this paper series and the ongoing work with federal and state higher education policies. Both foundations understand the necessity of marrying federal and state higher education policies to better serve students and citizens. Education Commission of the States would also like to thank the brief authors for their hard work and dedication to this important topic.



**EDUCATION
COMMISSION**
OF THE STATES

© 2016 by the Education Commission of the States. All rights reserved. Education Commission of the States encourages its readers to share our information with others.

To request permission to reprint or excerpt some of our material, please contact us at (303) 299.3609 or e-mail askinner@ecs.org.

FOLLOW US

