

The Honorable John B. King, Jr.  
Secretary of Education  
Office of the Secretary  
United States Department of Education  
400 Maryland Avenue S.W., Room 7W301  
Washington, DC 20202

August 24, 2016

Docket ID: ED-2016-OPE-0050

Dear Secretary King:

The signatories of this letter represent a variety of organizations deeply involved with and committed for decades to offering quality postsecondary distance education. The partnership behind this letter includes: six non-profit organizations with a collective total of more than 1,000 institutions innovating in offering distance education, the leading organization in higher education information technology (more than 2,000 institutions), the national organization of financial aid professionals (approximately 3,000 institutions), and one of the premier providers of educational technologies and services. Beyond institutions, our memberships include other non-profit organizations, state agencies, accreditors, and corporations. All of the partners are interested in the development and delivery of high-quality distance education programs.

Collectively, we are commenting on the [Department of Education's most recent proposed regulations on "state authorization of postsecondary distance education, foreign locations"](#) which were released on July 22, 2016.<sup>1</sup>

We are pleased to see that the Department has returned to the original 2010 regulatory intent to assure that institutions offering distance and correspondence education in other states are following the existing laws of each state in which they enroll students. We recognize the need for regulations that provide a clear benefit to students and improve transparency in communicating with students. Additionally, we support the role that each state has in protecting consumers who enroll in distance courses within their jurisdiction. We believe that reciprocity agreements play an important role in expanding student protections, assuring the offering of high quality distance education programs, and assisting institutions in navigating the myriad of disparate state regulations. In this letter we would like to comment on three areas that we believe still need clarification and one area where we believe institutions and states will need additional time to comply.

We take no position on the requirements for on-ground foreign locations.

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<sup>1</sup> <http://www2.ed.gov/documents/press-releases/07222016-state-authorization-nprm.pdf>

### ***Recommendation 1: Reciprocity and Consumer Protection***

We applaud the Department's on-going support of reciprocity as a means for institutions to obtain state authorization for distance education programs offered to students in other states. Reciprocity currently plays a critical role in expanding student protections, assuring quality and access to distance education programs. More than 1,000 institutions from 41 states and the District of Columbia have joined the State Authorization Reciprocity Agreement (SARA) in just two-and-a-half years with additional states slated to join in the next several months.

However, the Department's proposed definition of "state authorization reciprocity agreement" could inadvertently endanger the largest reciprocity agreement, SARA. The new definition indicates that agreements the Department will recognize as complying with the regulations may not "prohibit a participating State from enforcing its own consumer protection laws." What constitutes a "consumer protection law," however, may be the subject of undue confusion if left undefined. For example, SARA proactively supports state enforcement of general-purpose consumer protection laws as follows:

*"...SARA member states continue to have authority to enforce all their general-purpose laws against non-domestic institutions (including SARA participating institutions) providing distance education in the state, including, but not limited to, those laws related to consumer protection and fraudulent activities."*

The agreement defines "general-purpose law" as: "one that applies to all entities doing business in the state, not just institutions of higher education." This ensures that distance education providers operating in a given state under SARA must still comply with the consumer protection standards any other business must meet and that are commonly enforced by the offices of Attorneys General. It also ensures that a given state may not undercut the foundation of the reciprocity to which it has agreed by recasting authorization requirements focused solely on institutions of higher education as "consumer protection laws."

We believe the balance struck in SARA on this issue presents a good model for the rules the Department has proposed. We encourage the Department to clarify that the term "consumer protection laws" in the regulatory definition of reciprocity agreements refers specifically to a state's general-purpose fraud, misrepresentation, and abuse laws that apply to all entities doing business in a state. This clarification is needed to establish the Department's intent from a compliance standpoint, and the Department should make clear its intent in the regulatory language itself and in the preamble to the rule when issuing the final regulation.

SARA already allows states to enforce their general purpose consumer protection laws on any SARA institution serving students in their state. Leaving “consumer protection laws” ambiguous creates the potential for confusion that could fundamentally undermine the concept of state authorization reciprocity and generate substantial burdens on students, states, and institutions that it seems highly unlikely the Department would intentionally impose. Defining “consumer protection laws” (as we propose) would reflect the Department’s intent to maintain its support of reciprocity agreements as a viable path to compliance, while ensuring student access to necessary and appropriate consumer protections. We thus urge the Department to strongly consider our request.

### ***Recommendation 2: State Complaint Processes***

We agree with the Department’s goal of assuring that every student has access to a robust complaint process. However, the Department’s proposed regulations require the institution to “document” the state’s complaint process. Despite years of urging from the Department, there may still be states that lack an adequate process, but it is not known which ones the Department considers to be inadequate for purposes of the federal rules. The Department’s proposed regulations would thus place institutions in the position of:

- Assuming they and the Department will agree on which states lack sufficient complaint procedures;
- Lobbying for changes in the complaint practices of states in which the institutions are not domiciled; and
- Hoping that they are lobbying for changes that meet Departmental requirements.

We firmly believe that such efforts will have little, if any, effect. The public and private non-profit institutions of one state are unlikely to have any influence upon the legislators of other states.

We encourage the Department to work with the National Association of State Administrators and Supervisors of Private Schools (NASASPS, the professional organization for state regulators) representatives from other state organizations (e.g., National Governors Association, National Association of Attorneys General, and/or State Higher Education Executive Officers), and representatives from the signatories to this letter to develop a strategy to more quickly expand access to robust student complaint processes. We also suggest that the Department publicly identify the states that it has determined lack complaint processes sufficient to meet the federal regulations and allow a long lead time before enforcing this requirement so relevant states can develop and implement appropriate solutions in consultation with the stakeholders mentioned.

Additionally, we recommend allowing institutions to use their home state's complaint processes for students in states lacking adequate complaint procedures. This recommendation represents a temporary approach as the efforts to raise state awareness of this issue bear fruit and it could be phased out at the same time as the moratorium on enforcement expires. In the interim, this is the fastest route to assuring that the affected students have adequate protection while waiting for their home state to implement a compliant complaint process.

### ***Recommendation 3: Student Notifications***

We applaud the Department's efforts to promote transparency and assure that students are provided with all of the information necessary to make informed decisions about their academic programs. In fact, in a 2014 letter to the Department several of the signatories of this letter (Sloan-C now OLC, UPCEA, and WCET) urged the Department to require institutions to notify students about licensure programs.

However, we believe that the Department has substantially underestimated the amount of time and resources both institutions and state licensure bodies will have to expend to fulfill these provisions. For institutions compliance will involve significant research, application processes, coordination within the program and institution, and numerous interactions with the staff of licensure bodies. Furthermore, state licensure and certification bodies are unlikely to be staffed and resourced to manage a large, sudden, and unexpected influx of institutional requests. For example, shortly after the Department issued its initial regulations in 2010, states were inundated with approval inquiries and applications from institutions. The high number of requests coupled with the small number of staff most state higher education agencies had to handle them resulted in a backlog that sometimes took years to clear. Given that most state licensure bodies have fewer resources to handle these requests (and most are not even aware of the proposed regulations since they sit outside of the higher education space), we can anticipate that institutions will encounter even greater delays trying to comply with the proposed regulations. Therefore, we urge the Department to delay enforcement of the licensure notifications for at least three years after enacting the regulations while institutions and licensure bodies work together to determine institutional authorizations.

While we support the Department's proposal to assure that students are aware of any "adverse actions" initiated against an institution, we have two concerns. First, we believe that the Department should clarify this proposed regulation. The term "adverse actions" is defined by the Department (602.3) for accrediting agencies, but is not defined for states. Furthermore, the terms for the actual actions differ in meaning across accrediting agencies and states. Clarification of what is included in "adverse actions" is needed to assure that institutions are able to effectively inform students.

Second, the regulation requires institutions to disclose “initiated” actions which might take years to resolve and result in no action being “taken.” This raises questions of due process for the institution. We recommend that “initiated” actions be reported to any reciprocity agreement management, but that only actions “taken” against an institution be disclosed to students.

***We are Committed to Offering Assistance***

Our organizations and members are committed to improving and expanding distance education as well as assuring that it remains an affordable, accessible, high-quality, high-integrity option for students. On behalf of our organizations, we are committed to informing the development of effective, practical rules and would welcome the opportunity to speak with you and other members of the Department regarding this letter. Please let us know how we can provide assistance as you finalize these important regulations.

**Submitted on behalf of these organizations:**



**Blackboard**

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<sup>2</sup> Please note that EDUCAUSE is also supporting comments on this notice from the American Council on Education and other higher education associations in relation to resolving inconsistent references to “courses” versus “programs” in the proposed rules and concerns about proposed requirements for foreign government authorization of international locations and/or branch campuses.