



June 13, 2023

U.S. Department of Education
Office of Postsecondary Education
Lyndon Baines Johnson (LBJ) Building
400 Maryland Ave. S.W.
Washington, DC 20202

Submitted electronically.

Dear Department of Education Office of Postsecondary Education:

Thank you for the opportunity to comment on the U.S. Department of Education's (ED) notice of draft regulations posted on May 19, 2023. On behalf of the State Authorization Reciprocity Agreements (SARA) community, I am writing to extend our appreciation for ED's intended focus on consumer protections for all students. As evidenced by our own existing SARA policies as well as the new SARA Policy Modification Process that is underway, the SARA community of volunteer states, territories, districts, and institutions shares this value.

We have significant concerns, however, about the draft language that could impact SARA (embedded in the section on Certification Procedures) should this regulation become final. This language is inherently vague and imprecise and could result in dismantling reciprocity as reflected in the State Authorization Reciprocity Agreements (SARA).

Our specific concern is in regard to [§668.14\(b\)\(32\)\(iii\)](#).

(32) In each State in which the institution is located or in which students enrolled by the institution are located, as determined at the time of initial enrollment in accordance with 34 CFR 600.9(c)(2), the institution must determine that each program eligible for title IV, HEA program funds

(iii) Complies with all State consumer protection laws related to closure, recruitment, and misrepresentations, including both generally applicable State laws and those specific to educational institutions;

We request that you not move forward with the draft regulation. Should an upcoming negotiated rulemaking session include state authorization impacting distance education reciprocity, please invite state and SARA representatives to discuss the potential impacts of any proposed changes. This would

help ensure that the appropriate level of expertise and experience is duly considered when framing federal requirements that have significant state implications. Furthermore, the first round of the new SARA Policy Modification Process, which is addressing many topics including student consumer protections through SARA, will be concluding at the end of October 2023. At that time, experts from the SARA community, ED, and other interested parties in consumer protection could convene to determine what, if any, additional consumer protections should be in place to strike the appropriate balance between preserving the benefits of reciprocity and improving student consumer protections.

An Overview of State Authorization Reciprocity Agreements (SARA)

The National Council for State Authorization Reciprocity Agreements (NC-SARA) is a private nonprofit organization that, along with four regional compacts, supports states' implementation of SARA. SARA - and its set of policies for interstate postsecondary distance education - was agreed upon by 52 member states, districts, and territories (referred to as "states" in the remainder of this letter). SARA serves to:

- Provide a set of uniform policies for student consumer protections that otherwise would vary state by state.
- Ensure valuable oversight of, and increase students' access to, interstate distance education and out-of-state experiential learning opportunities.
- Improve strategic coordination and communication between and among SARA member states.

SARA was established in 2013. As of June 2023, more than 2,400 degree-granting, accredited institutions are reviewed by SARA-member states on an annual basis against eleven consumer protection requirements. These approved participating institutions represent more than 75 percent of eligible U.S. postsecondary institutions that offer distance education, serving millions of students annually.

Potential Impact of Draft Regulations on Institutions, States, and Students

Should this draft regulatory language cited above become final, there could be significant consequences to the efficacy of state authorization reciprocity. We could very likely see a return to the confusing and complex patchwork of state authorization distance education regulations that existed before SARA, along with significant challenges for state and institution compliance.

Under this draft language, institutions could be subject not only to SARA Policy requirements, but also to any state-specific requirements for recruiting, closure, and misrepresentation unique to each of the states in which they serve students. State requirements in these areas vary significantly. Furthermore, at any time, states may change their requirements – or increase or decrease stringency – thus making compliance even less attainable. The draft language could have the effect of institutions needing to implement myriad individual state laws, thus eroding reciprocity and any national consistent level of stringency in regard to student consumer protections.

Let me share some examples in each of the three areas cited in the draft regulation to further illuminate our concerns about returning to the patchwork of state regulations that existed before SARA:

- In regard to recruiting, in most states, recruiting includes advertising; therefore, institutions would need to comply with different advertising requirements depending on the states in which they wish to advertise. The use of billboards or internet ads, for example, may be subject to more

(or fewer) prescriptive rules depending on the state. Furthermore, some states have very specific requirements regarding recruiting practices, which may extend well-beyond distance education. For example, in some states, recruiters need to be licensed by the state for any recruiting-related activity, such as athletics.

- In regard to closure, some states have very prescriptive teach-out requirements, and others do not. For example, some states require that contracts with teach-out institutions be signed far in advance of an institution's closure; other states require student tracking and records management in particular ways. States also have different requirements regarding surety bonds; currently, over 50% of SARA member states have varied requirements for surety bonds to support students in the case of institutional closure.
- In regard to misrepresentations, states handle fraudulent practices in vastly different ways. For example, some sectors (e.g., for profits) are treated differently than others depending on the state. Furthermore, states' Attorneys General (AG) are already authorized to act upon misrepresentation claims against institutions – whether the institution participates in SARA or not – and each AG office may employ a different process for attending to such concerns.

While institutions could be confused and hampered by the variety of state requirements should this regulation become final, SARA-member states could be required to shoulder the increased compliance requirements that could be placed on them. Given the scale of out-of-state distance education that exists in 2023, compliance in such a patchwork environment would be extremely challenging for states. States first authorize institutions in their “home state,” and then if these institutions demonstrate meeting the SARA requirements, the home state may approve the institution to participate in SARA. However, if this draft language moves forward, each state may also need to manage compliance for any out-of-state institutions serving students in their state in the three areas of recruiting, closure, and misrepresentations. Because of the sheer number of institutions serving students in multiple states (more than 2,400 institutions participate in SARA), compliance could become nearly impossible.

Here is one example to illustrate the scale of the compliance challenge that this draft language could introduce. While this example is not intended to address Colorado's requirements, it does demonstrate the massive capacity increase that could be required for states to manage institutions' compliance. Colorado is the “home state” to 42 Colorado-based institutions that are approved by Colorado to participate in SARA. 1,166 institutions from other states, through SARA, also serve students in Colorado. These 1,166 institutions are annually approved to participate in SARA by each of their home states. Under the draft regulation, however, Colorado may need to manage the SARA compliance of not only their 42 in-state institutions, but also the additional 1,166 institutions that serve students in Colorado based on Colorado's unique requirements for recruiting, closure, and misrepresentations. In a nutshell, Colorado could move from needing to provide oversight of 42 SARA-participating institutions to more than 1,200. (This would be in addition to the regular state authorization activities that are not related to SARA.) Multiply this scenario by 52 states that are members of SARA, and while the numbers and regulations vary, it becomes clear that states may not be able to or may not choose to manage the potential volume possibly required under these draft regulations.

Ultimately, this draft language could represent a dismantling of state authorization reciprocity and may thus negatively impact student access to quality interstate distance education. Furthermore, because each

state has vastly different requirements regarding closure, recruiting, and misrepresentations, students may still not be provided with equal protection across the country.

Infringement on States' Role in the Triad and Flawed Negotiated Rulemaking Process

In addition to our concerns about the potential consequences of this draft language on reciprocity and the realistic compliance on the part of institutions and states, as well as the possible impact on student access to interstate distance education, I would like to share two additional and significant concerns of the SARA community.

First, the draft certification language represents a notable infringement on states' role in the triad. State authorization is a state responsibility; SARA member states voluntarily joined the State Authorization Reciprocity Agreements to ensure consistency in oversight of institutions across member states. The draft language raises significant concerns about ED supplanting states' authority.

Second, the problematic negotiated rulemaking process of spring 2022 remains a concern. This draft regulation was born out of a negotiated rulemaking process that did not include state authorization experts and was embedded within Certification Procedures instead of state authorization.

- This placement of language about state authorization reciprocity is problematic in that the federal regulations concerning state authorization are in a separate section (600.9), which was not discussed in the 2022 negotiated rulemaking session.
- The negotiated rulemaking session in 2022 did not allow sufficient time for research and impact analysis, or for thoughtful discussion and deliberation inclusive of constituents that could be impacted by such a regulatory change.
- The negotiated rulemaking session did not include state authorization experts who could speak about the potential consequences and practical impact of the draft language. The committee lacked proper representation of negotiators able to fully reflect the expertise and experience of the SARA community and directly affected parties.

SARA's Commitment to Increasing Student Consumer Protections

While we appreciate ED's attempts to create more stringent conditions by which institutions would be certified, let us assure you that the SARA community is well-positioned for, and committed to, inclusive and collaborative continuous improvement. To improve state reciprocity, including protections for students, the new SARA Policy Modification Process, with a focus on broad stakeholder engagement and enhanced transparency, is well-underway; the first round of proposed policy changes to SARA will be on the docket for the Fall 2023 NC-SARA Board Meeting. Every individual and organization that has chosen to participate in the SARA Policy Modification Process has a seat at the table – including multiple opportunities for participation in public forums and public comments.

Again, we request that you not move forward with the draft regulation. Should an upcoming negotiated rulemaking session include state authorization impacting distance education reciprocity, please invite state and SARA representatives to discuss the potential impacts of any proposed changes. This would help ensure that the appropriate level of expertise and experience is duly considered when framing federal requirements that have significant state implications.

Thank you for the opportunity to comment on these draft regulations. The SARA community wishes to assure you that we are committed to ED's emphasis on student consumer protections, and we wish to

express our sincere intention to continue to work collaboratively with all stakeholders toward common sense, common ground approaches to ensure equal consumer protections for today's distance education learners.

Sincerely,

Marianne Boeke

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