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U.S. Department of Education
400 Maryland Avenue SW Rm 6E231
Washington, DC 20202

August 1, 2017
Docket ID: ED2017-OS-0074

Dear Ms. Malawer,

Pursuant to the June 22, 2017, Department of Education's request for comments seeking input on regulations that may be appropriate for repeal, replacement, or modification, please accept the following comments for your review from the WICHE Cooperative for Educational Technologies (WCET) and the WCET State Authorization Network (SAN). These member organizations are dedicated to serving their member institutions by providing research, participation in the legislative process, guidance, and facilitation of member collaboration to understand and apply State and Federal regulation requirements for the institutions' out-of-State activities.

WCET represents more than 370 institutions, systems, and higher education organizations in their creation of tools and implementation of technology for distance education. SAN represents more than 650 institutions interested in navigating the State and Federal regulatory nuances of compliance management for their institutions.

The WCET Director, Policy & Analysis, Russ Poulin and his colleagues; Leah Matthews, DEAC Executive Director; and Marshall Hill, NC-SARA Executive Director, all served on the Department's 2014 Negotiated Rulemaking Committee. Poulin and Hill represented the distance education community and Matthews represented accrediting agencies. They provided their expertise, direction, and support for a well-crafted regulation to require evidence of State authorization compliance in the locations where students are enrolled or receive services provided by institutions that participate in title IV funding.

Our organizations wish to address the December 19, 2016 amendments[1] to the State authorization sections of the Institutional Eligibility regulations and amendments to the Student Assistance General Provisions regulations, including the required institutional disclosures for distance education and correspondence courses. Our organizations support the intent of these regulations to tie title IV funding to the requirement that institutions verify that they are following applicable laws in the states where the institutions are serving students.

[1] http://bit.ly/2sVXOfi

Additionally, we support the intent of the regulations to require important general disclosures as well as individualized disclosures to the students.

Our comments relate to two issues. First, we wish to advise that elimination of the State Authorization Federal regulations will not eliminate State requirements for out-of-State institutions to submit to an authorization process administered by the States where students are enrolled or receive services provided by such institutions. Additionally, requirements for approval by State professional licensure boards for institutions offering courses and activities intended to qualify students for professional licensure or certification will also remain in effect in each State. Second, should the regulations stand as issued, we wish to obtain clarification of terms important for the implementation of the regulations.

Issue #1 – Eliminating the Federal regulation does not relieve institutions from complying with State mandated rules

Contrary to popular belief, eliminating the Federal regulation will not relieve institutions of any compliance responsibilities. States currently maintain their own compliance requirements for institutions that offer services to students in their States. Those regulations have long been in place and will remain despite any removal of the Federal State authorization of distance education regulation.

The Senate-sponsored 2015 report Recalibrating Regulation of Colleges and Universities: Report of the Task force on Federal Regulation of Higher Education[2] makes this same unfortunate error in its analysis. The Report erroneously states that "many States now regard Federal title IV State authorization requirements as a revenue generator," without citing any proof. Our direct experience in working with State regulators is quite the contrary. While a small number of States have always had high fees, many States do not even charge fees large enough to cover the costs of funding compliance staff. While the Report cites the high cost of compliance, removal of the Federal requirement will not relieve institutions of one dime of associated State-mandated compliance costs.

The 2010 version of 34 CFR 600.9 (c) for State authorization of distance education served to highlight that each State has its own regulatory process for compliance. These States vary in aspects of the application process, fees, renewal requirements, and definition of activities that are regulated. Additionally, failure to comply with State regulations can rise to a violation of federal law for Misrepresentation per 34 CFR 668.71-668.75.

[2] https://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf

The State Authorization Reciprocity Agreement (SARA) created an avenue for participating institutions to follow one set of requirements for compliance in all SARA member States. This agreement allows institutions to conduct distance education related and limited additional activities as uniformly defined by the SARA agreement. As a result, SARA's consumer protections are extended to students of more than 1,500 institutions participating in the agreement. These institutions have seen costs stabilize due to a uniform annual fee to participate in SARA. The growth of SARA has greatly reduced the compliance costs cited in the Senate's Report.

In addition to providing a single set of requirements for State authorization compliance, SARA requires the institutions participating in SARA to provide notification and disclosures related to programs leading to professional licensure and certification. Elimination of the new Federal notification and disclosures requirements will not eliminate SARA institutions' commitments to comply with SARA requirements to provide students with notice related to programs leading to professional licensure or certification in the States where the institution serves those students. Again, failure to provide notification could also, in some circumstances, rise to the level of Misrepresentation per 34 CFR 668.81-668.75 or run afoul of similar State-based rules.

In conclusion, as part of its responsibility to distribute and oversee title IV funds, it seems reasonable that the Department of Education expect institutions disbursing aid to follow the laws and regulations in each state in which it serves those students. We recommend that these basic tenets of the regulation remain, but it could be simplified from its most current form.

Issue #2 – Clarification of terms for implementation of current regulations

The current Federal regulation of State authorization for distance education was released in December 2016 and is scheduled to go into effect on July 1, 2018. If the Department plans to move ahead with the regulation, additional guidance is needed to assist institutions in properly complying.

- Will the Department enforce the regulation on July 1, 2018?

The Department of Education recently delayed enforcement and/or compliance requirements on the Gainful Employment, Borrower Defense, and Cash Management regulations. The first two were delayed only days before the implementation date and Cash Management was delayed a few days after its effective date. Institutions spend considerable time in compliance activities and wish to be clear regarding what is expected of them. Our member institutions would enjoy receiving early notification about whether the Department will enforce, further interpret/clarify, delay, or redevelop this regulation well in advance of the July 1, 2018 deadline.

- Compliance location? Where student resides or state where institution is subject to that State's jurisdiction?

These are two very separate issues for which we would appreciate guidance.

State regulations are focused on oversight of institutions for activities provided in the State. Consequently, to be compliant in each State and therefore offer verification to the Department, the institution must follow the compliance process required for the activity occurring in a particular State REGARDLESS of the official residency (where the student votes or pays taxes) of the student.

For example, the student could be located in North Carolina to participate in an internship, the internship could be offered through an institution located in Virginia, but the student could be a resident of New Jersey. North Carolina regulations require that the Virginia institution receive North Carolina's approval prior to providing this activity for the student. However, the way the regulations read, it appears that the Department is suggesting that the Virginia institution seek an approval from the student's State of residence, which in this case is New Jersey. Clarification is needed.

The use of the term "reside" conflicts with State requirements for location of activity and adds a level of confusion to the institutions' compliance implementation. Additionally, State regulators would say that they have no jurisdiction over institutions that educate their own residents who receive instruction at institutions located outside their State. Those regulators would be unable to oversee such an institution and institutions would have no way to comply with the regulation, as currently written. This is a major flaw in the current language.

We would be grateful for guidance. We highly recommend that the Department abandon its new definitions of "reside" and return to the word "located" that was used in the drafts during the 2014 Negotiated Rulemaking process.

- State authorization reciprocity agreement definition – institutions are considered to meet State requirements…. subject to any limitation in that agreement and any additional requirements for that State.

Please advise under what circumstances that the State laws or regulations could be in conflict with the reciprocity agreement. The "State authorization reciprocity agreement" definition added to the regulations released in December 2016 could be read to allow each State to be able to enforce whatever regulations it wishes, even if is a member of a reciprocity agreement and agreed to the provisions of the agreement when it joined. This would negate the enforceability of *any* reciprocity agreement. It, essentially, negates the possibility of any form of reciprocity. That would be highly unfortunate considering that almost every state has changed its rules so that it could join SARA.

Prior to joining the State Authorization Reciprocity Agreement (SARA), each state voluntarily agrees to follow the policies, standards, and conflict resolution processes of SARA, instead of maintaining each State's varying State statutes and regulations on these issues. The conflicts suggested in the language are resolved before the state joins. The concern is the ineffectiveness

and inability to enforce the reciprocity agreement if the State's statutes and regulations preempt the reciprocity agreement.

On January 18, 2017, Under Secretary Ted Mitchell, prior to leaving office, provided guidance in the form of a letter to Marshall Hill (Executive Director, NC-SARA) and Russ Poulin (Director, Policy & Analysis, WCET)[3]. The letter was described in the January 19, 2017, *Frontiers* Blog post, Education Department confirms Reciprocity Definition Clarification[4] by Russ Poulin. In his letter, Under Secretary Mitchell indicates the language was intended to address *unresolved* conflict between the terms of the reciprocity agreement and existing State statutes and regulations. We would appreciate your formal confirmation of that position.

- Complaint processes

Please address the ability for an out-of-State public or non-profit institution to be in authorization compliance for activities which it provides in California. That State does not regulate out-of-State public or non-profit institution serving students within its borders. Additionally, there is no complaint process provided by any agency in California for out-of-State public or non-profit institutions serving students located within their borders. As the regulation currently reads, those students would not be eligible for title IV aid after July 1, 2018. We doubt that is the Department's intent. Is there a way for the Department to work with California on a compromise, as it did in resolving the issue of having a complaint process for the State authorization regulation for in-state non-profit institutions? This same issue may arise with other States, but most of them at least have complaint processes for SARA member institutions. California has not yet joined SARA.

- Solely distance education

Please advise how institutions should address "hybrid" programs, in which some of the coursework is provided at a distance and some face-to-face in other states. Currently the regulatory language indicates that certain public disclosures are required if an institution offers "an educational program that is provided or can be completed solely through distance education or correspondence courses, excluding internships and practicums…..". This language does not appear to include hybrid programs that involve online instruction, but also includes on-ground activity that may go well beyond the exclusions for "internships and practicums."

A simple fix for this would be for the Department to abandon its focus on "distance education" as the trigger for authorization. If done correctly, authorization should be focused completely on three geographic distinctions: activities that occur within the institution's State, activities that happen in other States, and activities that happen in other countries. The Department currently has regulations on in-State and foreign authorizations, but uses distance education as an awkward surrogate for activities that happen in other states. This requires much more in the

[3] http://wcet.wiche.edu/sites/default/files/Ted-Mitchell-Reciprocity-Response.pdf
[4] https://wcetfrontiers.org/2017/01/19/ed-confirms-reciprocity-definition/

way of definitions or explanations than are logically necessary. Since State rules are based on geography, the federal rules should follow their lead.

- Disclosures and written acknowledgments

Questions related to public disclosures:

1. "Adverse actions" is a common term for accrediting agencies, but much less so for State regulatory bodies. What is considered an "adverse action" that is required to be reported?
2. Please clarify whether the disclosure of an "adverse action" includes all adverse actions when they are initiated, or only those actions "taken" against an institution? There is variance among the accrediting agencies as to when an action is publicly disclosed. Some agencies might post an inquiry for additional information as an action while others might not. What is considered an "adverse action?"

Questions related to individualized disclosures:

1. How does the Department define a "prospective" student for the purposes of this regulation?
2. When a student at an institution may not apply for a program until achieving a certain grade point average after completing a required set of courses and credits, when does the Department consider that student a prospective student for purposes of individualized disclosures?
3. What form does the Department deem sufficient for the required acknowledgement from the prospective student?

Recommendation for Future Action

We encourage the Department to strongly consider maintaining State authorization of distance education regulations. Requiring State compliance to participate in title IV funding will not require additional labor by the institutions, as they are legally mandated to follow the rules and laws of each state in which they enroll students. Additionally, our organizations believe that licensure-related notifications and disclosures support students' abilities to achieve their academic and career goals. Institutions should be required to dutifully notify enrolled and prospective students participating in educational programs completed solely through distance education or correspondence of all factors relevant to their pursuit of their academic and career goals. These Federal regulations will increase the level of consumer protection to ensure students are not exposed to unscrupulous actions that could impair the student's investment in higher education.

- Proof of State Authorization provides transparency.

In addition to the states' legal requirements for authorization, the ability to tie title IV funds to authorization provides transparency to students about the use of their funding and the ability to participate and complete the academic program that they choose. Students benefit from the clarity due to a federal directive for the institution to supply proof of the completion of state mandated compliance requirements in the states where students are enrolled or receiving services. The federal rule need be little more than the assurance that the Department will seek proof that the institution is following state laws. States have the obligation to oversee higher education within their borders. Put the emphasis on state oversight.

- Notifications and Disclosures lessens ambiguity for students.

Institutions are far more able than students to access information from state licensure boards about acceptable pre-requisites for programs leading to professional licensure and certification. Students encounter unfamiliar language and have difficulty understanding whether and/or how they may pursue their desired academic program in their state if the institution does not provide reasonable notice. Institutional notifications and disclosure eliminates or at least minimizes the ambiguity.

We appreciate that the Department provided us with this opportunity to seek answers to our questions and provide our opinions about the benefits of the Federal regulation for State authorization of distance education and the related requirements for notifications and disclosures to students. We request that the Department indicate a timeline to expect to receive a response to comments. Please note that compliance requirements for the federal state authorization regulations will require time to implement a process to achieve compliance by July 1, 2018. Your response and direction will be very important. WCET and SAN intend to provide the members of our organizations guidance and support as these regulations are implemented. We would be very pleased to offer further assistance to the Department and to assist with communication to institutions.

Sincerely,

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In Support

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DEAC
DISTANCE EDUCATION ACCREDITING COMMISSION