Laurel Beeler
Magistrate Judge
U.S. District Court, Northern District of California
San Francisco Courthouse, Courtroom B – 15th Floor
450 Golden Gate Ave.
San Francisco, CA 94102

Diane Auer Jones
Under Secretary
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

May 6, 2019
Case No. 18-cv-05173
National Education Association, et al., v. Betsy DeVos, et al.,

Dear Judge Beeler and Ms. Auer Jones,

In response to the April 26, 2019 ruling on *National Education Association, et al. v. Betsy Devos, et al.* we respectfully request your review of the following concerns, especially the negative impact on students. Our membership organizations, the WICHE Cooperative for Educational Technologies (WCET) and the WCET State Authorization Network (SAN), represent more than 700 post-secondary institutions nationwide that wish to understand fully what is required of their institutions to correctly implement processes to meet regulations in order to participate in Title IV funding. It is our hope that by contacting the two of you simultaneously that we can explain the implementation dilemma for the institutions and seek a reasonable process to meet the goals of the ruling to protect students through compliance with effective regulations.

The 30-day vacatur of the delay of the regulations will cause most post-secondary institutions to be out of compliance as of the new effective date. The compliance concerns take three main forms:

- **time constraint issues**, as some state agencies take more than a year to navigate the compliance process,
- **specific language complexities** that will impede compliance, such as the complaint process requirement and confusion over location and residence, and
- **the internal management** required to organize across academic departments and administrative units to obtain compliance.

It is our goal to support compliance and to accurately communicate guidance to the institutions as to what is expected of them to comply. While the above bullets reference institution and state processes, the aim of our letter is to meet an end goal of benefitting students.

Time Constraint

We recognize from the language of the ruling that there is an awareness of the work of our organizations and the interactions our organizations have had with the Department of Education. Specifically, we noted the reference in the ruling to our August 1, 2017 letter submitted to the Department of Education in response to a request for comments seeking input on regulations that may be appropriated for repeal, replacement, or modification. In that letter, we indicated two specific issues in regard to the 2016 Federal Regulations for State Authorization[1] which are both listed in the ruling. First was our support for the philosophy of the regulations to best serve students. Second, we asked a specific request for clarification of the terms for implementation.

The court's April 26 ruling noted that WCET and SAN had requested a timeline to expect to receive a response to comments as we stated that the institutions will need time to implement a process to achieve compliance. No such timeline or guidance was received for institutions to know how to address the regulation confusion. Therefore, the assertion that the institutions had 17 months from December 2016 to May 2018 to implement the regulations is incorrect. The institutions were waiting for the Department but received no direction. WCET and SAN attempted to provide general guidance to manage the required elements of the regulations but were at a loss to know what the accurate interpretation of language of the regulations should be.

The issue of time to implement a process at the institutions was of significant importance. The list of disclosures required by 34 CFR 668.50 is comprehensive. Time and resources were needed across an institution to complete the required disclosures. For some professions, the process often involves much more than merely checking a website for requirements. In some cases, there is extensive back-and-forth between the institution and the agency to clarify the regulatory intent. For other state agencies, a lengthy approval process may be required that could take as much as a year or more. With ambiguous language, many institutions were concerned about embarking on an elaborate institution process only to find that their interpretation of the language was inaccurate, and a new process was required.

[1] Federal Register. (2016, December 19) *Program Integrity and Improvement.* Retrieved from https://www.govinfo.gov/content/pkg/FR-2016-12-19/pdf/2016-29444.pdf

Compliance Location

As shared in the August 2017 letter and referenced in the ruling, we sought guidance about whether the Department meant the student's state of residence or the state where the institution is subject to the State's jurisdiction. The foundation of the Federal regulations is tying the institution's state compliance to participation in Title IV programs. Therefore, we expressed confusion about the regulations' use of the word "residence." We expressed that a student's official state of residence for purpose of voting, paying taxes, or driver's license could be completely different than the state where the student is participating in the activity that could require oversight by the state higher education agency where the activity occurs.

In short, the jurisdiction of which state oversees an institution is determined by the location of the educational activity and not the student's "residence." A previous Dear Colleague letter[2] from the Department of Education cited location as the key and not residence. Since states use location and the Dear Colleague letter used location, institutions had long used the criterion. The result of this seemingly minor change in language was considerable confusion (among both institutional personnel and students) and upset of institutional processes.

Significant time was spent in recent Federal regulation negotiated rulemaking on this issue and it was resolved to use location in consensus language for a new regulation.

Meanwhile, regarding the delayed Federal regulation, the institutions are not sure which state (where the student is located or the residence) meets compliance. There has been no guidance. Some legal experts have shared that to ensure compliance the institution may need to meet requirements for the state that is indicated as the student's residence and the state where the student is located for the activity. This is a double workload and likely unintended by the Department. We had indicated in the August 2017 letter our concern that State regulators would be unable to oversee an institution if there is no nexus to the activity and institutions would have no way to comply with the regulation as currently written.

Additionally, a student will not be served well in regard to professional licensure notifications dependent on residence. A student could be provided information for the incorrect state and that student may rely to his detriment when pursuing a program leading to professional licensure or certification. Additionally, a student may be sent to complain to a state that has no jurisdiction over the activity in question.

[2] U.S. Department of Education. (2010-2015). Final Program Integrity regulations published on October 29, 2010. Subsequent "Dear Colleague" letters and guidance published from 2011 to 2015. https://www2.ed.gov/policy/highered/reg/hearulemaking/2009/sa.html

Lack of Complaint Process

The Court ruling shared that during the comment period for the 2016 proposed regulations, several commenters noted that some states lacked a process for reviewing complaints brought by students within the state against educational institutions located outside the state. The primary example is California, which continues to be without a process to manage complaints for out-of-state public or non-profit institutions serving students at a distance in the state. Those institutions are not under the jurisdiction of any California agency.

The ruling additionally provided the confirmation from the Department that the Rules prohibited the use of Title IV funding unless the states provide a complaint process directly or through a state authorization reciprocity agreement. Therefore, per 34 CFR 600.9(c)(2), all out-of-state public or non-profit institutions offering online courses and programs to students in the State of California will be out of compliance.

The data from the 2017-2018 NC-SARA Enrollments Report[3] indicates that 1,791 institutions participating in the SARA reciprocity agreement reported that 141,014 students were enrolled in Non-SARA states. At the time of the reporting, California was not a member of SARA and Massachusetts was a new member and categorized as a Non-SARA state. It is logical to assume that even with two states plus a few in U.S. territories and protectorates) sharing the total number of students reported as "non-SARA" (that the number of institutions serving students in California could be significant and those institutions will become non-compliant on the regulations' effective date. As a result of analyzing the NC-SARA enrollment numbers, we estimate that a significant number of students are located in California and enrolled in distance courses from out-of-state public and non-profit institutions. ***The troubling conclusion is that tens of thousands of students will suddenly become ineligible for federal financial aid as of the effective date of this ruling.***

Almost 2,000 institutions currently participate in SARA. However, there are institutions that choose not to participate in SARA in addition to all of the institutions in California, which is not a SARA member state. State membership to SARA requires a comprehensive state process for consumer protection in regard to SARA activities. Therefore, each SARA state has a process to manage SARA complaints. Most states have created a process to manage all complaints in the state whether SARA related or non-SARA related. A non-SARA participating institution must, per 34 CFR 600.9(c)(2), document that there is a State process for review and appropriate action on complaints. However, some states have only a SARA process for complaints. Therefore, non-SARA institutions would be out of compliance in what we estimate to be 7-10 states and territories that do not have a complaint process for non-SARA related institutions and activities. The lack of a complaint process will cause these institutions to be out of compliance on the regulations' effective date. ***Thousands more students will suddenly become ineligible for federal financial aid as of the effective date of this ruling.***

[3] NC-SARA. (2018, October 15). *NC-SARA 2018 Enrollment Report. Retrieved from https://www.nc-sara.org/files/docs/2018_EnrollmentDataReport%20101918_FINAL.pdf*

It is important to note that this non-compliance issue is due to lack of activity by the states and not by the institutions. Those institutions have minimal influence on legislatures in other states in encouraging them to implement complaint processes to protect students located within their borders.

State Authorization Reciprocity Agreement Definition

The 2016 delayed Federal Regulations included the definition of State Authorization Reciprocity Agreements as part of 34 CFR 600.2 (Definitions). The one aspect of the 2016 delayed regulations related to state authorization that was maintained in the consensus language of the 2019 rulemaking was the definition of State Authorization Reciprocity Agreements.

When this Federal regulation of the definition was first released in December 2016, there was great confusion about some aspects of the language. There was a question regarding enforceability of state laws that would contradict the reciprocity agreement. The concern is that the contradiction would undermine reciprocity by allowing states to individually apply additional requirements on institutions, even though they agreed not to do so.

The Department of Education Under Secretary of Education, Ted Mitchell, responded with a letter in support of reciprocity by stating: *"In other words, a distance education reciprocity agreement may require a State to meet requirements and terms of that agreement in order for the State to participate in that agreement."* Therefore, the intention of the Department in drafting the language was that states that agreed to join the reciprocity agreement are subject to the requirements and terms of that agreement. If there is a conflict between state laws and regulations with what it agreed to do as a member of the agreement, then institutions in that state can no longer be eligible for federal aid for distance students until the conflict is resolved.

During the 2019 Negotiated Rulemaking, the issue of this definition was discussed thoroughly. There was significant discussion about the fact that states voluntarily join the already existing reciprocity opportunity through NC-SARA. In most states, legislation was required which was then signed by the governor. States that voluntarily join have also voluntarily agreed to follow the processes and requirements as stated through the reciprocity agreement. A state that does not wish to follow the processes and requirements may choose to no longer participate in reciprocity.

The 2019 rulemaking chose to maintain this language for the consensus rules. The Department indicated that although the Ted Mitchell letter does not carry official weight (as might a Dear Colleague Letter), they intend to follow this interpretation. During a recent NASASPS conference of higher education regulators from each state, Principal Deputy Under Secretary, Diane Auer Jones, stated that the issue of reciprocity is up to the states and she did not see the federal government getting involved.

Since the release of the letter from Ted Mitchell early in 2017, there has been conflict in the higher education community about this definition. This conflict was highlighted in the recent rulemaking negotiations. Formal direction from the Department relative to the comments and intent of the Department is still needed to properly address this ambiguity and to avoid the confusion and possible harm resulting from federal regulations contradicting state intent.

Concern about Apathy to Compliance

Institutions have watched the preparation for Federal regulations for State Authorization go through many twists and turns over the last almost ten years. Many are very battle weary and wish to wait to comply until they receive genuine final direction of what is required. The stops and starts have caused some institutions to share with us that they are waiting to see what happens. An action that we do not encourage.

We maintain that the hard work of the negotiated rulemaking committee created language that finally gets to the goal of serving students with a workable and relatively clear process for institutions. Our membership is keenly aware that a process is in place to release proposed regulations that came out of consensus. They are prepared to follow those directions to be prepared for July 1, 2020. Causing the institutions to implement one set of regulations with specific requirements that are not all attainable only to then implement a different set of regulations thirteen months later would be more than can be expected of the institutions.

Possible Solutions

We recognized the important goals of Federal Regulations for State Authorization are to serve students and protect Title IV funds. Compliance to meet these goals is important and we wish to continue promoting that outcome.

In 2011, the Department delayed enforcement of the state authorization regulations until 2014 to allow institutions more time to comply. The Department could decide to take a similar action by delaying enforcement now, but we do not believe that would meet the spirit of the Court ruling nor would it best benefit students.

Alternatively, we believe that there must be a practical strategy. We wish to encourage some sort of coordination of a rolling compliance plan that could segue into the effective date of the new final regulations based on the consensus regulations that we anticipate becoming effective July 1, 2020. Some possible elements of that rolling compliance plan could include the following. As for dates suggested, we tried to pick a timeline that will press institutions, but will not be impossible for institutions to comply:

- For § 600.2 on the definition of a state authorization reciprocity agreement:
    - By the effective date of this ruling, the Department officially confirms the intent of the letter from former Under Secretary Ted Mitchell that a state's laws must not be in conflict with the requirements of an authorization agreement. If official action is not possible by that date, the Department should announce its intention while following the proper process to issue an official notice.
- For §600.9(c)(1) on demonstrating approval either directly by the state or through a reciprocity agreement:
    - By the effective date of this ruling, the Department officially declares that it will depend on student location as is the case in the rules that reached consensus in negotiations.
- For §600.9(c)(2) on documenting appropriate processes for actions on complaints:
    - The requirement to document a complaint process was not included in the rules that reached consensus in the negotiated rulemaking process as it was difficult to deal with states that had not complaint process. Even if the intent was to urge states to adopt a complaint process, most state legislative sessions have ended for the year and the necessary changes cannot be made. As a result, tens of thousands of students will immediately become ineligible for aid due to circumstance beyond the student's or institution's control. We recommend that the Department delay enforcement of this section until the new regulations are in effect for fear of harm to students.
    - The student disclosures section below includes a requirement that the institution notify the student of the complaint process, if there is one.
- For §600.50(a) on general information about student notifications, §600.50(b) on public disclosures, and §600.50(c) on individualized disclosures:
    - For sections (1) through (6) with several notification requirements, by August 1, 2019 institutions are to be in compliance.
    - For section (7)(i) on listing the actual state education requirements for a program leading to professional licensure, since this section is not included in the rules that reached consensus in negotiations, the institution will not need to list the actual educational requirements for each professional licensure program. The Department should delay enforcement of this one section until the new regulations are in place.
    - For sections (7)(ii) and (iii) on providing disclosures about meeting the educational requirements for a program leading to professional licensure, allow institutions until December 31, 2019 to demonstrate a "good faith" effort to provide these notifications. Departmental guidance can suggest that the format approved in the recent negotiated rulemakings would allow the institution to seamlessly meet both the current and coming rules.

- For section (c) on providing individualized disclosures for a program leading to professional licensure, by August 1, 2019 institutions are to be in compliance.

Thank you for your review of our concerns and possible solutions. Please know that WCET and SAN would be very pleased to assist the Court and the Department to message and support an orderly path to institutional compliance in the best interest of students.

Sincerely,

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