



WICHE Cooperative for Educational Technologies



April 24, 2023

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW 2nd Floor
Washington, DC 20202

RE: Docket No.: ED-2023-OPE-0039; Intent to Establish a Negotiated Rulemaking Committee

Dear Secretary Cardona,

This comment is on behalf of the members of the WICHE Cooperative for Educational Technologies (WCET) and the State Authorization Network (SAN). As nationwide organizations housed within the Western Interstate Commission for Higher Education (WICHE), we are dedicated to serving our postsecondary institution members by providing guidance, support, and facilitation of member collaboration to understand and apply state and federal regulation requirements when serving students participating in digital learning. Our members, representing postsecondary institutions from throughout the United States as well as organizations, corporations, and state agencies, support the development of efficient and effective educational opportunities to advance learner access and success.

We appreciate this opportunity to provide public comment as the Department embarks on the development of one or more negotiated rulemaking committee(s) which may include a subcommittee to develop regulations on issues as provided in the Federal Register announcement. The negotiated rulemaking process is key to providing balanced and rational regulations when the expertise of affected stakeholders, including other members of the Triad, are appropriately acknowledged.

Our comments will first address matters of coordination and management of the rulemaking committee(s) and any corresponding subcommittee(s). We will also share comments addressing the following issues: Definition of Distance Education, Accreditation, Return to Title IV, State Authorization, and Third-Party Servicers.

WCET and SAN Comments are based upon three principles:

1. ***Additional consumer protections are needed, but they need to be targeted to the areas of risk.*** Some “protections” are overly broad with detrimental consequences.
2. ***All instructional modalities should be treated the same.*** In a post-pandemic world, courses fall along a spectrum of uses of technology, time, and space. Dichotomous “distance” and “in-person” categories no longer exist.
3. ***Provide clear and concise regulatory language.*** Clear language to ensure compliance that will better protect students and can be enforced by the Office of Federal Student Aid.

As the Department reviews the testimony from the recent public hearing and other public comments, we hope that the Department will give due consideration to the voices representing the wide variety of stakeholders. We are concerned about the accuracy of some comments and hope that the Department

will fact check the comments provided in the public hearing. These misstatements underscore our urging that the Department choose committee members with true experience to address these complex issues.

We look forward to the development of clear regulations that are narrowly tailored to address specifically identified concerns in a format that balances risk and regulatory complexity. Clear and narrowly tailored regulations that provide direction are important for the institutions to implement compliance strategies in order to offer protections for students and the integrity of Title IV programs.

Coordination and Management of the Rulemaking Committee

The Department's announcement of [Intent to Establish a Negotiated Rulemaking Committee](#) points to many complicated issues to be addressed. We strongly urge that the Department give serious consideration to nominees who have actual knowledge on these nuanced topics to accurately address the substance of the issues.

We highly encourage the Department to refrain from raising additional, highly nuanced topics to the agenda during the rulemaking committee meetings. For example, in the most recent rulemaking some of the components of the Program Participation Agreement issue could not have been predicted and should have been signaled that the Department would address them. Additionally, negotiators sought to add issues after the agenda had been set by the committee. To do so, especially after the committee is established, would decrease the effectiveness of the rulemaking committee by failing to ensure that necessary expertise is present to duly consider the proposed regulations.

Subcommittees Have Promise, But Need Improvement

Given the trends in recent years to bundle many complex issues into a rulemaking, the addition of subcommittees is a welcomed innovation that improves the process. The subcommittees allow for analysis and input on issues that require deep expertise and, often, encompass a multitude of points-of-view (e.g., consumer protection, community college, public university, private institution, state, accreditation, financial aid processing, and institutional business processes). One of the co-signers of this letter [served on the Distance Learning Subcommittee in 2019](#) and our recommendations are informed by that experience and from our observing subsequent rulemakings.

The subcommittees performed extensive and detailed work. Unfortunately, the results of their work were often minimized by the full committee.

In 2019, one person was chosen to serve on both the subcommittee and the main committee for the purpose of reporting out the recommendations. Much praise should be given to Jillian Klein, Strategic Education Inc., for serving that dual role for the Distance Learning Subcommittee in 2019. The problems that arose were:

- The reporting time about the subcommittee's recommendations was quite limited. Ms. Klein had to make choices on what to present given limited opportunity to present the recommendations.
- It is extremely difficult for one person to have deep expertise over the entire set of complex issues considered by the subcommittee.

- Since Ms. Klein represented a for-profit entity, her presentation sometimes seemed to be discounted by members of the main committee even if she faithfully represented the diverse opinions within the subcommittee.
- As a result, members of the main committee completely redid work that was carefully considered by the subcommittee. Unfortunately, they did not have the data nor the expertise of the subcommittee. For example, WCET staff have deep expertise with the definition of “distance education,” but in 2022 we had to write the Department to interpret the intended meaning of some language. We [thank the Department for their response](#), but some sections remain unclear in impact or intent.
- In the end, the diligent work of experts was devalued and sometimes wasted.

Subcommittees can be improved in the following ways:

- **Honor the Expertise Set of the Subcommittee.** In 2019, there were issues of accreditation and detailed financial aid processing that did not seem to fit the expertise of the Subcommittee members. There was only one accreditation agency representative on the Distance Learning Subcommittee and she shouldered an excessive burden. Issues presented by the Department should reflect the purpose of the subcommittee and the expertise of its members.
- **Greater Representation on the Main Committee.** The main committee would benefit from the participation of more than one presenter of the subcommittee’s recommendations, and they should represent diverse backgrounds. The practice of having one person serve on both committees should continue. We recommend adding that when it is time to present the subcommittee’s work, that person should be joined by two additional subcommittee members as chosen by that group. The additional subcommittee members participate only when their subcommittee’s issues are under consideration. We understand this will put more burden on the Department to more closely schedule when the subcommittee’s issues will be considered so that the additional representatives may participate. Even so, the additional expertise should be welcomed.
- **Honor Subcommittee Consensus.** Unlike the main committee, subcommittees were not required or urged to come to consensus. Votes were reported and there could be both a majority and minority position. Given the timing of the process, this practice should continue. However, if the Subcommittee comes to consensus on an issue, it should be more difficult for the main committee to overrule the experts convened specifically for that purpose. This will also have the added benefit of encouraging the subcommittee to negotiate more deeply and to come to consensus on the issues for which they were assembled to address. The pressure of consensus leads to innovative solutions. We propose a couple of options for honoring consensus including:
 - Changes by the main committee are sent back to the subcommittee for their approval.
 - Since the first option would be unwieldy, an alternative would be for the additional subcommittee representatives (as proposed above) to act on behalf of its members. For the sole purpose of the subcommittee issues for which there is subcommittee consensus, they must also agree to the changes along with all the members of the main committee.

Definition of Distance Education

Our members are keenly interested in discussions about the “distance education” definition whether as part of “clock hour” or credit courses. We provide questions and some recommendations below. We wonder what is intended by the wording in the announcement regarding “reporting for students who enroll primarily online.” There is considerable reporting now. We note that [the Department of Education currently has multiple definitions of “distance education.”](#) Additionally, given the growth of hybrid and hyflex courses, drawing the distinction among courses and sections is becoming increasingly difficult and less meaningful.

The “Distance Education” Definition for “Clock Hour” Courses

This issue has previously been the subject of rulemaking and it is not an easy one. It will require negotiators familiar with the various concerns or who has a network of institutions with practical experience with the compliance problems. Their expertise should be valued over those who have only a theoretical understanding of distance education.

In reviewing the existing [“Clock Hour” definition](#), several questions arise:

- What is “direct interaction”? Does that refer to with the faculty person, synchronous interaction, or both? A real-time requirement for interaction would eliminate asynchronous courses and that

Clock hour:

- (1) A period of time consisting of—
 - (i) A 50- to 60-minute class, lecture, or recitation in a 60-minute period;
 - (ii) A 50- to 60-minute faculty-supervised laboratory, shop training, or internship in a 60-minute period;
 - (iii) Sixty minutes of preparation in a correspondence course; or
 - (iv) In distance education, 50 to 60 minutes in a 60-minute period of attendance in—
 - (A) A synchronous or asynchronous class, lecture, or recitation where there is opportunity for direct interaction between the instructor and students; or
 - (B) An asynchronous learning activity involving academic engagement in which the student interacts with technology that can monitor and document the amount of time that the student participates in the activity.
- (2) A clock hour in a distance education program does not meet the requirements of this definition if it does not meet all accrediting agency and State requirements or if it exceeds an agency's or State's restrictions on the number of clock hours in a program that may be offered through distance education.
- (3) An institution must be capable of monitoring a student's attendance in 50 out of 60 minutes for each clock hour under this definition.

would be a disservice to students.

- For paragraph (1)(iv)(B) that the “student interacts with technology that can monitor and document the amount of time that the student participates in the activity”, what if the student masters the lesson in fewer minutes than anticipated? What is the student and instructor supposed to do? This commonly happens in in-person instruction, how do we mirror what happens there?
- The paragraph (2) that “A clock hour in a distance education program does not meet the requirements of this definition if it does not meet all accrediting agency and State requirements...” implies that not meeting those requirements is acceptable for an in-person program. Why would this limitation be only on distance education?
- For paragraph (3) that “An institution must be capable of monitoring a student's attendance in 50 out of 60 minutes for each clock hour under this definition”, most courses offered via distance education could offer very precise measures of student engagement. In-person courses might rely on taking attendance at the start but be less precise in monitoring the full 50-minute requirement. Should distance education courses be penalized because they have precise measures while in-person courses have highly subjective and unevenly enforced measures?

The “Distance Education” Definition for Credit Courses

The “distance education” definition ([34 CFR 600.2](#)) was greatly improved in the 2019 negotiated rulemaking. There are a few improvements shared below, that the Department should consider.

Distance education:

- (1) Education that uses one or more of the technologies listed in paragraphs (2)(i) through (iv) of this definition to deliver instruction to students who are separated from the instructor or instructors and to support regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.
- (2) The technologies that may be used to offer distance education include—
 - (i) The internet;
 - (ii) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;
 - (iii) Audio conference; or
 - (iv) Other media used in a course in conjunction with any of the technologies listed in paragraphs (2)(i) through (iii) of this definition.
- (3) For purposes of this definition, an instructor is an individual responsible for delivering course content and who meets the qualifications for instruction established by an institution's accrediting agency.
- (4) For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also includes at least two of the following—
 - (i) Providing direct instruction;
 - (ii) Assessing or providing feedback on a student's coursework;
 - (iii) Providing information or responding to questions about the content of a course or competency;
 - (iv) Facilitating a group discussion regarding the content of a course or competency; or
 - (v) Other instructional activities approved by the institution's or program's accrediting agency.
- (5) An institution ensures regular interaction between a student and an instructor or instructors by, prior to the student's completion of a course or competency—
 - (i) Providing the opportunity for substantive interactions with the student on a predictable and scheduled basis commensurate with the length of time and the amount of content in the course or competency; and
 - (ii) Monitoring the student's academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

- With the post-COVID growth of hybrid, hyflex, and other variations of courses using distance technologies, there is a question of when the Department will consider a course using a mix of distance and in-person techniques as being subject to the “distance education” regulations. We are worried that an institution will be surprised some day that many of its courses have unwittingly slipped into the more regulated category. Regarding the determination for accrediting purposes [the Department's response to our question on this topic said](#): “The Department leaves this determination up to the institution’s accrediting agency.” However, in institutional financial aid reviews, the Departmental “auditors “classify the courses. Will the Department now rely on determinations by the institution’s accrediting agency? It would be helpful to know who will make this determination and how for courses being reviewed for Title IV consideration.
- In WCET’s and SAN’s letter to the Department about “regular and substantive interaction,” we ask whether “direct instruction” can be synchronous, asynchronous, or both. [In the Department's response](#) you say: “When the Department uses the term ‘direct instruction,’ it means live, synchronous instruction where both the instructor and the student are online and in communication at the same time.” This should be included in the definition or in guidance as we have seen accrediting agencies and institutions that have used different interpretations. In a presentation in mid-April, almost all the attendees thought it should be both synchronous and asynchronous, so there is still confusion despite our publicizing your letter.
- Section (5) of the “distance education” definition outlines the requirements for the “regular” element of “regular and substantive interaction.” In 2019, the Distance Learning Subcommittee recommended that there be an “or” between the two listed criteria. We renew our call to return to an “or” rather than an “and.” The intent was to allow for non-standard instructional models, such as competency-based education.

Accreditation

As the Department of Education considers changes to accreditation regulations, we recommend that the rulemaking include the following considerations of accreditation review requirements for distance education programs.

Institutional Reviews Should Be Conducted Without Regard to Modality

Higher Learning Commission Policy
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- > All Assurance Reviews shall include attention to the institution’s responsibility for assuring the quality of its academic offerings, regardless of location, modality and involvement of third parties.

The Higher Learning Commission ([Policy INST.C.20.010](#)), the Middle States Commission on Higher Education ([Standard III](#)), and

[AACSB](#) have led the way in foregoing the use of separate guidelines in conducting accreditation reviews of institutions. This action was based on the belief that the quality of academics and student support services should be equal for all students regardless of the instructional modality used to educate them. We concur.

All three agencies made this decision as much as a decade ago. We submit that there has not been a negative impact on the quality of their oversight process.

Additionally, there have been great changes in the offerings of college and universities as a result of the COVID-19 pandemic. It is now quite common for institutions to offer

courses using a wide mixture of modalities: fully online, hybrid, hyflex, in-person with digital components, and fully in-person. The rules regarding accreditation reviews arose in a time when courses more clearly fell into either the distance education or in-person categories. The use of digital technologies now falls along a spectrum ([Johnson, Seaman, Poulin, 2022](#)) of their instructional use in a course and is increasingly difficult to divide into dichotomous categories. Accreditation review processes should be updated to reflect this new reality that will only become more entrenched in the coming years.

Middle States Commission on Higher Education (MSCHE)

The Middle States Commission on Higher Education (MSCHE) is an institutional accreditor recognized by the United States Department of Education (USDE) that serves as an independent voice in higher education. MSCHE establishes equitable standards for accreditation with member institutions that advance the impact of accreditation in the ever-changing landscape of higher education and promotes educational excellence through innovation across diverse institutions.

As an institutional accreditor, MSCHE requires evaluation of all aspects of the institution holistically, including modality of instruction, and everything done in the name of the institution, including all academic programs and services, fall within their scope of accreditation.

Revise the “In Whole or In Part” Threshold for Distance Education Accreditation Reviews

Prior to January 2021, the threshold for accreditation reviews was that programs should be subject to review once fifty percent or more of the program is offered at a distance. In January of 2021, the [Department of Education announced through guidance](#) that the threshold for reviews had been lowered to be if a program is “in whole or in part” offered at a distance. Ironically, while this decision resulted from a review of federal regulations to reduce bureaucracy, it has had the opposite effect. There are many questions about what “in whole or in part” means, such as:

- Was the intent that if an institution offered one distance education course that could be taken as part of a program, the institution would be subject to distance education review? That is a high bar for an institution to meet that is offering only a few such courses.
- Would courses offered in a hybrid or hyflex model cause the institution to be subject to distance education review?

Accrediting agencies seem to be implementing this requirement differently, such as performing one institutional review for the first program, some may be reviewing multiple programs, and some perform the institutional review and collect data on other programs. What is the standard? As an observation, with the increase of distance, hybrid, and hyflex courses in the post-COVID institution, almost every program is subject to review, thus making every institution subject to this review.

Our primary recommendation is to eliminate the distance education difference as suggested above and to conduct the oversight with regulations that are the same regardless of instructional modality. If the Department does not choose to follow that path, then it should return to the old fifty percent threshold. Additionally, it should be clarified if hybrid or hyflex course are included or excluded from the count in making the fifty percent determination.

R2T4 – “Last Day of Attendance” for Distance Education Courses

Distance education is treated differently than in-person education in Return To Title IV (R2T4) calculations. As mentioned above, courses no longer fit neatly into the dichotomous distance or in-

person categories. The current requirements for students who withdraw without proper notice is for the institution to provide evidence of the last instance of an “academically related activity” the student performed for the course. See the excerpt from the “[2022-2023 Federal Student Aid Handbook](#).” This is a much higher administrative bar than is expected of in-person courses. With the increase of distance, hybrid, hyflex courses in the post-COVID institution, it is unclear exactly what the dividing line is as to when a course crosses the threshold into being a distance education course. Our recommendation is to eliminate the distinction and to treat all courses the same.

Documenting attendance when students are enrolled in distance education courses

For distance education, documenting that a student has logged into an online class is not sufficient to demonstrate academic attendance by the student. A school must demonstrate that a student participated in class or was otherwise engaged in an academically related activity. Examples of acceptable evidence of academic attendance and attendance at an academically related activity in a distance education course/program include, but are not limited to:

- student submission of an academic assignment,
- student submission of an exam,
- documented student participation in an interactive tutorial, webinar or other interactive or computer-assisted instruction,
- a posting by the student showing the student’s participation in an online study group that is assigned by the institution,
- a posting by the student in a discussion forum showing the student’s participation in an online discussion about academic matters, and
- an email from the student or other documentation showing that the student-initiated contact with a faculty member to ask a question about the academic subject studied in the course.

Please note that only active participation by a student in an instructional activity related to the student’s course of study that meets the definition of “academic engagement” in 34 CFR 600.2 and takes place during a payment period or period of enrollment qualifies as attendance in an academically related activity. If a period of orientation takes place prior to the start of a course, it would not qualify as attendance in an academically related activity.

State Authorization

Regarding state authorization, we hope that the Department and the rulemaking committee will start with the foundational principle that it is the purview of the state to determine how activities related to education are overseen by the state. The original purpose of the federal regulation for state authorization released in 2010 was to rely on the actions of the state as one indicator in aid eligibility and not for the Department to instruct states on what they must do. *“If an institution is offering postsecondary education through distance or correspondence education to students in a State in which it is not physically located or in which it is otherwise subject to State jurisdiction as determined by the State, the institution must meet any State requirements for it to be legally offering distance or correspondence education in that State. An institution must be able to document to the Secretary the State’s approval upon request.”*

The Department must respect the states as the member of the triad charged with issuing approval to institutions that operate in the state and are the primary providers of consumer protection for citizens located within the state. Additionally, states choose to participate in interstate reciprocity agreements to address a variety of interstate issues. Collaboration within the triad, that includes honoring decisions made by states, is critical to coordinate the balance of responsibilities for oversight of higher education.

If the Department wishes to keep this higher bar for distance education, the regulations should be clearer as to the demarcation line for when a course crosses the threshold to be classified as distance education. It also would be helpful to hear any evidence that this higher threshold has made a difference in protecting Title IV funds.

Foundational Principles of State Authorization

Key elements of the foundational principles of state purview include the following:

- States make the decisions about oversight of institutions that have brick and mortar locations or that offer other activities to students located in their state. The modality is not the only factor for oversight. The states determine the level of oversight and which activities to oversee, in order to provide consumer protection. The activities that occur within the state that could be subject to oversight, in addition to the delivery of education, can include advertising, recruiting, faculty and staff employed in the state, and experiential learning (such as clinical placements and internships).
- States' laws and regulations vary widely regarding state "institution" authorization for oversight of colleges and universities that are domiciled in the state as well as over institutions offering distance education and other activities within the state.
 - Oversight of institutions domiciled in a state not only varies by state but can also vary by sector. Additionally, some states offer exemptions to authorization to domiciled institutions if they were chartered before a designated year such as institutions chartered before 1943 in Massachusetts.
 - Oversight of institutions located out-of-state with no physical location in a state but offer instruction or other activities in that state are also subject to varying state requirements in the state where the activity occurs. The state with the authority for oversight is the state where the activity takes place. Approximately half of the states do not have laws or regulations giving themselves processes to exert authority over out-of-state institutions or offer an exemption if the institution has no physical location in the state. Some states also vary in oversight by sector. For example, the state of California has no authority for oversight of out-of-state institutions serving students by distance education located in California if the institution is a public or private non-profit institution.
 - [94801.5.\(c\)\(1\) Out-of-State Institution Registration](#) – *"This section does not apply to a higher education institution that grants undergraduate degrees, graduate degrees, or both, and that is either formed as a nonprofit corporation and is accredited by an agency recognized by the United States Department of Education, or is a public institution of higher education."*
 - [BPPE Website for Out-of-State Institution Registration](#) The parameters of the oversight of the California Bureau for Private Postsecondary Education (BPPE) is described. last updated 3/9/2023.

Federal Regulations for State Authorization & Definition of State Authorization Reciprocity Agreement

Federal regulations addressing state authorization of distance education have fluctuated over the past thirteen years. Institutions have had a difficult time with the yo-yo result of released, vacated, paused, delayed, effective through court decision, and now currently effective regulation. Every iteration of [34 CFR 600.9\(c\)](#) has tied federal compliance to participate in Title IV HEA programs to the institution following the state's direction to comply with state requirements as provided by the state. As previously

mentioned, the original purpose of the federal regulation for state authorization was to rely on the actions of the state as one indicator in aid eligibility and not for the Department to instruct states on what they must do.

The current version of 34 CFR 600.9(c) provides two options to institutions to demonstrate state compliance. These options are both at the states' direction as the institution may show state to state approval or participation in a state authorization reciprocity agreement. States join reciprocity agreements at their own voluntary determination. Federal regulation names and defines this type of reciprocity agreement as a "*state authorization reciprocity agreement*".

The definition provided in 34 CFR 600.2 describes this reciprocity agreement as "*an agreement between two or more States that authorizes an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence courses to students located in other States covered by the agreement and cannot prohibit any member State of the agreement from enforcing its own general-purpose State laws and regulations outside of the State authorization of distance education.*" By definition, states voluntarily enter into "institution authorization" agreement, just as they have for many other interstate reciprocity agreements for other purposes.

*There is a common fallacy that states are "prohibited" from enforcing certain consumer protection laws. In reality 49 states, DC, Puerto Rico, and Virgin Islands **actively and thoughtfully chose (through legislation or administrative action) to participate in reciprocity with an alternative set of consumer protections specific to state authorization of institutions. This decision was not forced on them. It was voluntary.***

Changes to the definition of a state authorization reciprocity agreement in federal regulation that imposes specific state requirements undermines reciprocity as an agreement among states. States *actively chose* (through legislation or, in some states, administrative rule) to address institutional state authorization requirements for interstate distance education through the agreement. There is a question of authority for the Department to interfere with state decisions and state agreements.

Reciprocity Providing Uniform Oversight Nationwide

As previously mentioned, states vary in their individual oversight of out-of-state institutions which provides uneven protection to students nationwide. The existing state authorization reciprocity agreement named the State Authorization Reciprocity Agreements (SARA) was developed to provide a uniform structure for consistent oversight of institutions offering distance education related activities across state lines. Improvements to reciprocity currently being developed by all stakeholders to the reciprocity agreement as provided through SARA Policy will ensure continued uniformity of oversight and will protect all students in states that are members to the reciprocity agreement.

The Department and some consumer advocates have suggested implementation of individual state consumer protection laws will better protect students. In the last rulemaking, some negotiators proposed that any reciprocity agreement should be much more limited than one that is currently in place. Rather than covering a list of activities that an institution conducts in another state, reciprocity would be restricted to a uniform application for state authorization and having one standard fee for that

application. The result would be an agreement that would have very little value to states, to institutions, and to students. Technically, reciprocity would not be eliminated, but institutions and states would seriously reconsider remaining in such a limited agreement. It was unclear in the proposal as to which state requirements would be considered to be “student consumer protection” laws, as that determination could vary greatly across the nation. Under that proposal:

- States would need to administer institutions both through the reciprocity agreement and their own state-specific processes.
- Institutions would have state-to-state responsibilities that are only marginally relieved by having a standard application form.
- Students would have wildly varying protections depending on the state.

It is important to understand that policy developed to implement the reciprocity agreement was intended to impart complete state institutional approval to provide activities subject to the reciprocity agreement in the member states. The suggestion of enforcement of individual state consumer protection laws in addition to maintaining the reciprocity agreement for purposes of state institutional approval, would cause two tracks of authorization for the institution. Additionally, it would cause two tracks of oversight by the state. One track would be for purposes of the state enforcing reciprocity policies on institutions located in their state and a second to affirm that the out-of-state institutions are complying with state consumer protection laws for students located in their state.

Additionally, the one fee and one application notion appears tenuous at best. What would stop the states from imposing an additional fee and requiring an application to track institutions that serve students in their state and gain legal authority to enforce state consumer protection laws for state authorization?

The drawbacks of the proposal to limit reciprocity include:

- For **states**, they will assume oversight duties they are not currently conducted for thousands of institutions participating in reciprocity. [SHEEO has conducted studies](#) (Hall-Martin, 2021) that concluded that “these offices and agencies are understaffed, underfunded, and generally dependent on fees rather than state appropriations to operate.” The Department and the rulemaking committee must consider that limiting reciprocity and adding additional oversight requirements in each state will increase the demands of each state authorization agency that already are capacity-challenged.
 - Data addressing capacity demands can be found in the annual data collected from SARA Participating institutions. [SARA Data addressing 2021](#), indicates that approximately 2,300 SARA participating institutions served approximately 1.7 million students by interstate distance education. Specifically in the state of New York, approximately 1,300 out-of-state SARA participating institutions served approximately 71,478 students by interstate distance education to students located in New York. Limiting reciprocity would cause the New York State Education Department to be responsible to affirm that consumer protection laws are met by each of the 1,300 SARA participating institutions plus the institutions that it is already overseeing that do not participate in SARA.
- For **institutions**, the proposed state would still grant them “institutional approval” to serve students in each state participating in reciprocity. The institution will also need to:

- Supply additional information particular to each state and, perhaps, multiple agencies in each state. A fee may be necessary to be paid for such processing.
- Post bonds in some states. Some public institutions are prohibited from posting bonds in other states.
- Pay into a tuition recovery fund in each state that has that requirement.
- Submit data about its enrollments, faculty, and operations to each state that has that requirement.
- Offer a different tuition refund formula for each state that has that requirement.
- Participate in student complaint processes that differ by state.
- Comply with student notification requirements that differ by state.
- Be subject to other regulations that are particular to a state.
- For **students**, they will:
 - Need to pay the increased costs resulting from the administrative overhead necessary from the above requirements on institutions.
 - Be expected to navigate non-standard and conflicting requirements among states, as at this time it is unclear which consumer protections laws are applicable.
 - Be unable to enroll in institutions that decide to limit the states from which they accept students.
 - Find their ability to complete a program in question when they move from a state where the institution is approved to one where it is not approved.

Ultimately, the proponents of limiting reciprocity herald the ability of states to enforce greater protections. What is never said by them is that most of those protections are in place in only 5-10 states depending on the regulation they are citing. Meanwhile, more than half the states have few or no protections for students enrolled online from out-of-state institutions. Proponents for limiting reciprocity think that those states will improve on their own, but California has had a decade to add protections for its citizens enrolled in out-of-state public or private non-profit institutions and have not done so.

Reciprocity through SARA includes state institutional approval of out-of-state placements

The Department and rulemaking committee must be aware that reciprocity for state institutional approval through SARA includes serving students to participate in interstate field experiences, clinicals, internships and other learning placements. Again, we note that an ill-advised federal approach that affects reciprocity would also alter student choice for experiential learning stemming not only from distance education programs, but also from programs held face-to-face. While some of these placements are for purposes of meeting requirements for programs leading to a license, many do not. For purposes of programs leading to a license, a SARA participating institution obtains state institutional approval to offer the placement but separately determines if state program approval is required. [SARA Data from 2021](#) indicates that 315,504 students participated in a learning placement in a state different than where the institution was domiciled. Any changes to state reciprocity would impact over 300,000 students and potentially limit their ability to avail themselves of clinical placements, internships, student teaching opportunities, and experiential learning necessary to successfully complete their programs of study.

Federalization of Reciprocity Will Not Be Welcomed

The federalization of a reciprocity definition is highly questionable to withstand a court challenge, as states assert their rights. The National Council of State Legislatures testified in the Negotiated Rulemaking hearings in support of reciprocity. They can take a position only if 75% or more of their states agree. In these divided times, it is rare to see states come together, but they do in protecting their sovereignty and oversight over education.

For Improvements, Work Through Reciprocity Process

Finally, returning to a piecemeal, non-reciprocity approach to improve consumer protection simply leaves more students unprotected longer. A few states will have very strict rules. It will be a long process to improve protection on a state-by-state basis. There already is a reciprocity agreement. The states, through their regional compacts, NC-SARA Board, and NC-SARA staff are working on improving it. Adding protections to that agreement is the fastest way to improve protections for all students and to do so throughout most of the United States.

Third Party Servicers and Related Issues

Oversight of Online Program Managers (OPM)

It is clear that the newly released [third-party servicers guidance](#) was intended to capture information and direction to address the Department's concerns over its [2011 guidance](#) on incentive compensation for Online Program Managers (OPM). We concur that there is a need for additional regulations addressing OPMs. As [we addressed in our OPM public comments](#) this spring, we recommend that changes to the 2011 guidance preserve what works in fee-for-service OPM contracts and maintains a path for institutions that benefit from the investments inherent with incentive compensation. We fully support regulations that address actual abuses that have caused harm to students and misused Title IV funds. We urge a focus on regulations that address the greatest risks posed by OPMs.

We posit that regulations could be developed to address the actual intent of the 2011 guidance to address a truly "bundled" service. Perhaps the loophole could be closed through a graduated scale for incentive compensation that is related to what the contracted entity provides for a designated sets of enrollments. For this suggestion, recruitment payments would not be based on a charge for each additional student recruited. For example:

- Contract A: One institution has a contracted bundle for instructional design, content creation, and recruiting of a maximum of 500 students. (Note the recruiting limit has a ceiling and is not per student.)
- Contract B: Another institution has a contracted bundle for instructional design, content creation and recruiting a maximum of 2,000 students. (Again the recruiting limit has a ceiling.)

Under this scenario, the institution and the contractor should be prohibited from merely amending the contract to get around the recruiting ceiling.

We surmise that is what the Department had in mind with its bundled service exception. Whether it did or not, the Department should close the loophole and clarify what it meant in 2011.

In a survey of our members, we also heard about problems with OPM contracts. We recommend that institutions maintain more control of contracts, which could be regulated by restricting long-term contracts and promoting the ability to revise and rescind contracts.

Oversight of Other Contracted Entities

Regarding other contracted entities, the Department and rulemaking committee must consider narrowly tailoring the regulations for third-party servicers (TPS) to address specific concerns affecting student protection and the integrity of Title IV HEA programs. The recent guidance was read to be a massive expansion of the definition of a TPS over what is provided in statute and regulation. As we maintained in [our TPS public comment, we believe the result](#) lacks clarity for institution compliance. The [Department's blog post](#), that was used to delay the guidance, noted several functions for which the Department expressed were not intended to be a TPS. However, neither the language of the guidance nor the language of the blog post describes how the Department concluded that those functions were not a TPS as compared to other similar functions. We appreciate that the blog post indicates the anticipated rescission of the previous guidance banning non-US entities.

If regulations are not narrowly tailored, we see a broad definition of third-party servicers causing unintended consequences. We believe that without a narrowly tailored definition, institutions would be constrained when providing students with important support services and information such as mental health counseling. Additionally, there would be complications with services for collecting statistics to provide important notifications, as well as the use of learning management systems that facilitate efficient communication, organization, and content delivery to students.

Additionally, we are concerned about restrictions placed upon state agencies from leading institutions in a collaboration in the development of economical and effective educational opportunities to advance learner access and success. While the blog post indicated that course-sharing consortia and arrangements between Title IV-eligible institutions to share employees to teach courses or process financial aid are not a TPS, state agency consortia provide numerous other functions beyond sharing of employees and processing financial aid. We are unaware of any Title IV risk posed by these services in any state and recommend that the Department not treat state agencies as a TPS.

Conclusion

We have shared some very detailed information regarding some of the nuanced issues that the Department announced that it intends to address with this rulemaking. The detailed information that we shared only underscores our great concern that the committee and the subcommittees include members with great knowledge and experience with these issues.

Along with the nuanced information that we shared; our comment is motivated by the key principles that we previously shared. We urge the Department to focus its attention on the development of regulations that meet specific needs. Given the post-pandemic work, lessons learned in the last several years, and the spectrum of technology used for all courses, it is time that all modalities should be



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treated the same. Finally, we find the need to develop clear regulations for which the Office of Federal Student Aid (FSA) can clearly train and enforce, and institutions can clearly comply is critical to ensure new and revised regulations fulfill their intended purpose.

We thank the Department of Education for this opportunity to share our comments on behalf of the WCET and SAN members. WCET and SAN member institutions wish to provide quality learning opportunities, support students, and be in compliance with all Federal and State requirements when serving students.

WCET and SAN intend to provide communication, guidance, and support in this Department of Education regulatory process. We would be very pleased to offer further assistance to the Department of Education and to assist with communications to institutions.

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