WICHE Cooperative for Educational Technologies

STATE AUTHORIZATION NETWORK
a division of WCET

June 13, 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-0089; Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB): Comment Addressing 34 CFR 668.14(b)(32)(iii)

Dear Secretary Cardona,

On behalf of the members of the WICHE Cooperative for Educational Technologies (WCET) and the State Authorization Network (SAN) we are providing a public comment focused on the Certification Procedures issue subsection 34 CFR 668.14(b)(32)(iii), addressing compliance with State consumer protection laws related to closure, recruitment and misrepresentations. We appreciate this opportunity to provide public comment regarding the May 19, 2023, Notice of Proposed Rulemaking. This comment includes:

- An outline of our recommendations;
- A description of the WCET and SAN constituencies;
- The principles we used in constructing this comment;
- The proposed language aimed at reciprocity agreements;
- Our concerns about the proposed language;
- Additional background on our recommendation; and
- Clarifying questions to the proposed language.

Our Recommendations

1. ***Withdraw the Proposal and Rely on the Department's Upcoming Negotiated Rulemaking.*** We urge the U.S. Department of Education to withdraw proposed subsection 34 CFR 668.14(b)(32)(iii). The issues of state authorization and State laws specific to educational institutions were raised late in the 2022 negotiated rulemaking process and were discussed very briefly. This complex topic deserves full consideration with a more complete slate of negotiators knowledgeable of the issues and impact of proposed actions.

2. ***Support a Process to Protect ALL Students.*** The Department's proposal would provide the proposed protections to students in only a handful of states. It would be hard work, but the Department should partner with SARA to implement protections that cover students throughout the Agreement's 49 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

3. ***As a Last Resort: Narrow and Sharply Define the Language.*** We question if the U.S Department of Education has the legal ability to direct state oversight of higher education. But, the Department may wish to move forward with some version of the current proposal. The existing language leaves much to interpretation in both intent and implementation. If the Department moves forward, we recommend changing the wording to focus on a limited set of narrowly targeted and well-defined consumer protections. The language should address problems commonly witnessed in both in-person and distance education in a clear and concise way.

The WCET & SAN Constituencies

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 support the consumer protection goals of the Department. We concur that it is very important to provide safeguards for students and protect the integrity of Title IV HEA programs. However, we do believe that in some circumstances there may be other ways to address the development of safeguards. This is especially true when there is an opportunity to collaborate with the entity that facilitates a reciprocity agreement. It is critical to engage state representation that can provide uniform consumer protections nationwide and not just consumer protections for a few states that have legal authority to enforce state consumer protection laws over out-of-state institutions.

The Principles We Used in Constructing this Comment

WCET and SAN comments are based upon three principles:

1. ***Additional consumer protections are needed, but there is a mechanism in place to develop uniform protections in all states except California.*** SARA, for which all but California is a member, has a process to annually review and develop protections through input by any member of the public.

2. ***States vary widely in their oversight of out-of-state institutions.*** Requiring compliance with state specific consumer protection laws addressing closure, recruitment and misrepresentation will vary widely across each state causing confusion and inconsistent protections for students nationwide.

3. ***Provide clear and concise regulatory language.*** Clear language will ensure institutional compliance, better protect students, and can be more readily enforced by the Office of Federal Student Aid. 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.

Proposed Language Aimed at Reciprocity Agreements

The Department proposes to add the following language to the Program Participation Agreement, which outlines provisions to which institutions must agree to be eligible to disburse Federal financial aid:

"(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 institution"

Among those conversant in higher education regulatory language for institutions that cross state lines, the purpose, intent, and scope are unclear. Based upon the negotiations that led to this language, our assumption is that the goal is to assure that institutions are following what is envisioned as a narrow set of laws that are specific to colleges and universities whether they are participating in a state authorization reciprocity agreement or not.

Our Concerns About the Proposed Language

The Department of Education Cannot Usurp States

The proposal is a backdoor way to change an agreement that is the purview of the states.

In testimony on April 11 during the Department's Public Hearings on Negotiated Rulemaking, a representative of the National Council of State Legislators spoke to the issue of state authorization being raised for the proposed Fall 2023 rulemaking. He raised that they could take a position only if three-quarters of their members approve the stance to be taken. On reciprocity, he appeared with that super-majority backing of state legislatures. He reminded the Department that reciprocity and state authorization are state issues and that the Department should defer to state leadership. It is rare to get so many states to agree on any issue. They agree the Department should tread lightly.

The Language is Based Upon Misconceptions of SARA and the Applicability of State Laws

While there could be multiple agreements for state authorization reciprocity, currently the sole player for institutional reciprocity is the State Authorization Reciprocity Agreement (SARA). By joining SARA, its members (49 states, the District of Columbia, Puerto Rico, and the Virgin Islands) have voluntarily

agreed to a standard set of regulatory requirements and to acknowledge the institutional recognition granted by another member. That recognition is limited to conducting distance education and additional enumerated activities (e.g., marketing, limited in-person instruction, practical experiences, in-person short courses) in member states.

The following statement is made by the Department as one of its reasons for the proposed rule.

"We are concerned about past situations in which States have raised concerns about institutions that are physically located outside of its borders and taking advantage of students while the State is limited in its ability to apply its own consumer protection laws in these areas to protect its residents. That can hamper State efforts to try and step in and help students if there is evidence that an out-of-State school is taking advantage of students. It can also minimize the ability of students to access tuition recovery funds to repay any tuition paid out of pocket."

No examples or statistics are provided as to the scope of the problem cited. The sources of the concerns are not cited. Neither is there analysis on the number of states that currently have tuition recovery funds.

Misconception #1: "…the States have raised concerns."
For 41 of the 52 member states and territories, the path to becoming a member of SARA required a bill to be passed by the legislature and signed by the governor. It is a voluntary process that required much thought and work in each state. The assertions that any of these governmental entities was "forced" into the agreement or "prohibited" from acting is simply disingenuous. Through the voices of the legislature or the administrative agencies appointed by the legislature, the SARA member states have demonstrated their commitment to this alternative form of institutional oversight. While the Department cites that "States have raised concerns," those are individuals who are speaking for themselves or their offices, but not officially for the State as a whole. That's an important distinction.

We assume that the concerns they are addressing are those raised in the August 2021 letter submitted by about two dozen State Attorneys General and by several higher education consumer protection groups. Oddly, less than half of the states with signatories to that letter maintain state requirements for an institution to contribute to a tuition recovery fund or surety bond. Additionally, it appears that only 4 of those states hold an enforceable requirement that is not either sector specific, or exempted, waived, or inapplicable for an out-of-state institution without physical presence.

But, the Attorneys General do not necessarily speak for the State as a whole. As stated above, the National Council of State Legislators testified that at least three-quarters of the states support reciprocity. The Department should weigh heavily the input from other state leadership and think more broadly than one office in a state.

Misconception #2: "…the State is limited in its ability to apply its own consumer protection laws..."
For out-of-state institutions operating in a SARA member state, territory, or the District, those governments have agreed that they will follow SARA policies in recognizing and overseeing those colleges and universities. By doing so, they have directed that SARA policies are to be the legal authority in recognizing and overseeing out-of-state colleges and universities participating in the agreement. If

there is any "limit" in the ability of a state to apply its own laws, that is a limit that it voluntarily placed on itself. If there is any "two-tiered" system, it is self-imposed.

The state where the student is located may also enforce other rules not specific to institutional authorization as covered by the SARA agreement. Examples of other regulations that states are enforcing on SARA-participating institutions include: meeting requirements for offering professional licensure programs, observing standards for practical experiences, following workers compensation laws, and enforcing of "general-purpose" laws. Those "general-purpose" laws include those that any business would need to follow, such as conducting fraud or misrepresentation. The inclusion of "misrepresentation" in the proposed language is confusing as states currently have that right through their ability to enforce general-purpose laws, such as fraud and misrepresentation.

This concept of allowing states to enforce their "general-purpose" laws is actually included in the Department of Education's definition (Chapter 34, § 600.2) of a "state authorization reciprocity agreement":

"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."

Likely Different Interpretations of "Closure, Recruitment and Misrepresentation"

We believe the phrase "closure, recruitment, and misrepresentation" is far too broad. Those words leave too much to interpretation. And unevenness in interpretation by states will undermine reciprocity and leave students with uneven protection.

Who is expected to interpret these terms for the purpose of compliance? Is it the Department or left to the State to decide which laws are consumer protection laws?

- If it is the Department, clear guidance and examples are needed to assist institutional personnel in compliance.
- If interpretation is left to each State, we are concerned that this will leave an uneven patchwork of protections. For some SARA member states the number of laws that could be considered being related to "closure, recruitment, or misrepresentation" could be substantial. For other SARA states it could be very minimal.

We urge the Department to consider that requirements should be as common as possible across all states to assure consistent protections regardless of the location of the student.

For example, "state consumer protection" laws for "closure" could include tuition recovery funds, surety bonds, catastrophic event plans, teach-out processes, records retention, and more. Recruitment could include marketing, advertising, high pressure recruiting, incentive compensation, requirements to register recruiters, and more.

The Likely Impact on State Regulatory Agencies, Institutions, and Students

The uncertainty will have a negative impact on:

- State regulatory agencies. They will need to answer questions and provide additional services to hundreds (thousands?) of additional institutions. Many of those agencies are not staffed for an increased workload. During a recent NC-SARA webinar, one regulator said that is would force his state to come up with a "partial application form" as they would need to begin tracking institutions who might fall under some state regulations. This large impact on state regulatory agencies has been a recurring theme in state authorization and professional licensure requirements placed on institutions. The fiscal burden on those agencies of additional Federal requirements has almost never been considered, reviewed, or calculated. The 2021 SARA Data Reporting Dashboards indicates that 2,150 public and private non-private institutions participated in SARA nationwide. Each of these institutions will be communicating with each of the state's regulatory agencies to seek assurance of the institution's determination that it is complying with the designated state consumer protection laws where their students are located.
- Institutions. Institutions would incur increased administrative costs as they would need to track differing rules by each state. Colleges and universities would also need to pay into tuition recovery funds and meet bonding requirements in several states. A quick review shows that about 5 states have tuition recovery funds applicable to all institutions and about 10-12 more have such funds applicable to specific higher education sectors, such as non-degree, for-profit, correspondence, and trade/technical schools. If implemented, institutions would need to contribute to the fund in each of those states in which it wishes to recruit or enroll students. The increased workload and costs could result in institutions withdrawing from serving students in some states, limiting student choice. For-profit and large non-profit institutions would not be affected as they could absorb the costs. We do not think the intent of this proposal was to benefit for-profit, former for-profit, and large intuitions, but that would be the result.
- Students. Students could face some complexities if they move from state-to-state. For example, if the student begins a program in one state and moves to another from which the institution has decided to withdraw, the student could be greatly disadvantaged or forced to find another institution where they can complete their program. Outside of reciprocity, some state regulators could provide exceptions for a small number of students, but state laws or regulations in other states do not allow for that administrative discretion. Additionally, students may incur an additional price of attendance if institutions pass along the increased overall administrative and state-specific costs.

If the true target is "for-profit" and institutions that recently transitioned from being "for-profit," that is a small minority of SARA participating institutions. The impact will mostly fall on state agencies as well as public and non-profit institutions.

We also believe that leaving the terms broadly or undefined could lead to some unexpected outcomes in some states. First, it is rarely stated that some forms of "protection" are actually "protectionism"

serving as methods for eliminating out-of-state competition. Additionally, given the current political climate, the term "recruitment" could be weaponized. For example, one state may introduce a rule disallowing any mention of diversity, equity, and inclusion by institutions serving its citizens. Another state may require culturally-sensitive content and the use of chosen pronouns by faculty. We do not wish to explore the culture or moral underpinnings of those suggestions, but states are in very different places on these matters.

Technical Issues in Language Conflicting with Other Regulatory Sections

There are two technical issues in which this proposed new requirement is in conflict with other state authorization regulations from the Department:

- The proposed requirement conflicts with regulatory definition of "state authorization reciprocity agreement" (Chapter 34, § 600.2) and Chapter 34, § 600.9(c)(1)(ii) both addressing reciprocity indicating that the institution is "subject to any limitations in that agreement and to any additional requirements of that State **not relating to State authorization of distance education" (**emphasis added in bold**).**
- The proposed "at the time of enrollment" language conflicts with the Department's regulatory section on state authorization (Chapter 34, § 600.9(c)(2)(iii)). In that section, institutions also must act if "the student's location has changed to another State."

If the Department persists in some form of its proposed language, it should also address and harmonize these conflicts.

Additional Background on Our Recommendations

Recommendation 1: Withdraw the Proposal and Rely on the Department's Upcoming Negotiated Rulemaking.

This topic was not raised in the 2023 rulemaking process until Session 2 of negotiations. The Department discouraged negotiators from introducing additional topics once the agenda was set in week one. As a result, discussion of negotiator-proposed "Certification Procedures" language around state-specific regulations was extremely brief. Given the Department's stated disdain in Session 2 for adding "new" language around transcript withholding and state authorization, it was a surprise when those issues appeared in the Department's proposed language for Session 3. It is our assertion that there was not significant notice nor were there an adequate number of negotiators knowledgeable on this topic. This was made worse by the brief time allotted to discussion of this proposal on the final day of Session 3.

As a result, the current Notice of Proposed Rulemaking is noticeably lacking in the definition of the problem that is trying to be solved, research on the scope of that problem, and economic impact on institutions and states of the proposed language.

State authorization issues are quite complex and nuanced. By law, the Department cannot force states (or the interstate agreements created by those states) into any action. The Department has announced

that state authorization will be an issue for the upcoming negotiated rulemaking. The Department should postpone any activity until a full discussion with negotiators selected for the purpose is held.

Recommendation 2: Support a Process to Protect ALL Students.

A major problem with the Department's proposal is that consumer protection will be dependent on the state in which the student is located. The critics of SARA often condemn it as creating a two-tiered set of student protections. First of all, states already have multiple tiers of protection (e.g,, institution type, date founded, religious mission). We also fail to see how the resulting 52-tiered (the 49 states plus 3 other governmental entities that are SARA members) set of consumer protections that would result from the proposal is a better option.

Additionally, the actual benefits provided by existing state tuition reimbursement programs are variable. The Institute for College Access & Success (TICAS) is a consumer advocacy group) that reviewed California's Student Tuition Recovery Fund (STRF). They found that: *"Unfortunately, thus far STRF has only provided financial relief to a relatively small number of students affected by school failure. While STRF has the potential to be a critical resource for California students harmed by failing schools, it is clear that improvements to visibility and accessibility to students are needed in order to accomplish that goal."*

Therefore, we challenge the Department to work with SARA (the regional compacts and NC-SARA), consumer protection groups, and us (SAN and WCET) in creating a national review to plan how reciprocity can best include a program for tuition recovery fund or an institutional surety bond. Note this would not be a federal program, but one that would be part of a state-to-state agreement with broad coverage among the member states.

Simply put, ALL STUDENTS SHOULD HAVE EQUAL PROTECTION. What the Department proposes falls far short of the grand vision of protecting all students

Before the Department's recommendation was made, we commented on a proposal from several of the consumer protection organizations for "Protecting Students from Abrupt Closures" as part of the SARA Policy Modification process. The consumer protection groups proposed a single tuition recovery fund to be operated by SARA. The proposal suggested collection of 0.25% of all institutional income from SARA enrollments. Some state-based tuition recovery funds collect a much higher rate of tuition and fees for students enrolled in that state.

In our response, we concurred that they are on the right track, but observed that "what they proposed is far from a complete, implementable proposal." We raised a host of legal and operational questions that need to be considered in implementing either a single tuition recovery fund or surety bonding requirement. Even though details need to be addressed, we believe this idea is promising. Alternatively, SARA could require its member states to meet minimum requirements for a tuition recovery fund or surety bond.

We urge the Department to work with the consumer protection groups who made that proposal, the regional compacts, NC-SARA, SAN, and WCET to create a closure safety net that will catch any student in any of the reciprocity states.

Recommendation 3: As a Last Resort: Narrow and Sharply Define the Language. We firmly stand by Recommendation 1 to defer action to the upcoming rulemaking committee. Additionally, we strongly maintain, as addressed in Recommendation 2, that the Department should support the process in place that provides protections to all students in each state that is a member to the reciprocity agreement. We severely question if the Department has the legal authority to regulate states on how they are expected to oversee higher education institutions. As the Department indicates in the Fall 2022 Agenda Agency Preambles, the following direction should be followed, "*ED will regulate only if absolutely necessary and then in the most flexible, most equitable, and least burdensome way possible."* We believe there are sufficient opportunities for addressing compliance needs without the release of this regulation.

However, we understand that the Department is undoubtedly feeling political pressure to act on this issue and may be inclined to maintain some of the proposed wording. In that spirit, we offer this recommendation.

In the reasoning for their proposed language, the Department focuses on "tuition recovery funds" in which institutions pay a portion of their income to cover losses to students at institutions that close. If the proposal is implemented in the future, institutions would have to contribute to the fund in each of the states with recovery funds.

We propose that the Department limit the language to two issues that seem to concern them: tuition recovery funds and aggressive student recruiting, which is addressed elsewhere in the NPRM:

"…(iii) Complies with all general-purpose State laws and regulations outside of the State authorization and complies with all State consumer protection laws related to institutional participation in a tuition recovery fund and the prohibition of aggressive student recruiting."

This proposal would address the protection of students and Federal student aid as outlined in the reasoning for the Department's proposed language. It would also add to the Department's increased attention to aggressive student recruiting that is introduced elsewhere in the NPRM.

Clarifying Questions Related to Proposed Language

We also have a few questions about the proposed language if implemented as currently stated:

1. If the PPA indicates that for purposes of program eligibility the institution's responsibility is specified at "time of initial enrollment," what are the responsibilities if the student changes location?
2. How does the Department intend to reconcile the inconsistencies in proposed language with the current regulations defining a state authorization reciprocity agreement?
3. How does the Department intend to be aware of, train, and enforce compliance with meeting varied state consumer protection laws related to closure, recruitment and misrepresentation?
4. What is considered evident of compliance that the institution has Determined that it Complies with these state consumer protection laws?

Conclusion

We have shared some very detailed information regarding some of the nuanced concerns specific to a subsection of a regulation within only one of five issues in this NPRM. The detailed information that we shared only underscores our great concern that this subject was not fully developed to provide a new regulation requiring additional compliance requirements outside of a state developed reciprocity agreement. Additionally, we believe that key stakeholders in the community facilitating reciprocity can more effectively address uniform student protections for students participating in interstate distance education nationwide.

We again assert our hope the Department, in addressing final regulations, will develop clear language that will also harmonize all related regulations and consider the ability for understanding by the Office of Federal Student Aid (FSA) in order clearly train and enforce on this issue as the subject is beyond typical training on the processing and administration of Federal aid. We also desire precise language so that institutions can clearly comply 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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