

June 8, 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)(ii) addressing programs leading to a license or certification

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)(ii), addressing programs leading to a license or certification and its corresponding notifications found in 34 CFR 688.43. We appreciate this opportunity to provide public comment regarding the May 19, 2023, Notice of Proposed Rulemaking. This comment will include recommendations, description of our constituency, analysis supporting our recommendations, and a request for responses to clarifying questions to proposed language.

### ***Recommendations***

1. We urge the U.S. Department of Education to withdraw proposed subsection 34 CFR 668.14(b)(32)(ii) in favor of continued institution implementation and Department enforcement of the currently effective regulations directing institutions to offer public notifications addressing all states regardless of student location and individualized notifications to prospective and enrolled students as provided in [34 CFR 668.43\(a\)\(5\)\(v\)](#) and [34 CFR 668.43\(c\)](#).
  - a. The Department should review and research the impact of this notification process that became effective July 1, 2020, and accumulate data to determine the true extent of the problem for which a more stringent regulation should be based.
  - b. The Department should take the time to meet with representatives of state licensing boards and educators to determine the process for state program oversight by professions in the various states to determine an achievable means to address student protection that aligns with state licensing board oversight for the many professions.
2. In the alternative, we urge the U.S. Department of Education to revisit a proposal provided by negotiators representing consumer protection groups during the March 2022 Rulemaking Committee Meeting plus harmonized notifications.

- a. Proposed Language for 34 CFR 668.14(b)(32) [presented to the negotiated rulemaking during March 2022](#) committee meeting:
  - (ii) *Assess and satisfy the applicable educational prerequisites for professional licensure or certification requirements in the State, if such prerequisites are available or can be obtained from the State,*
  - (iii) *Institutions may make case-by-case exceptions to enroll students in a program that fails to meet the requirements of (i) and/or (ii) by obtaining the prior signed written consent of each student who opts to knowingly enroll in such programs and states their reason for their decision.*
- b. Maintain proposed Public Notifications provided in the NPRM to be found in 34 CFR 668.43(a)(5)(v).
- c. Harmonize related Individualized Notifications found in 34 CFR 668.43(c) with the proposed Public Notifications provided in the NPRM.
  - (i) Amend individualized notifications to “prospective students prior to enrollment in the program” as this requirement does not harmonize with proposed language in 34 CFR 668.14(b)(32) directing determinations to be “at time of initial enrollment”.
  - (ii) Maintain individualized notifications to enrolled students if the institution makes a determination that the curriculum does not meet state educational requirements where the student is located - 14 calendar days of that determination to notify the students where they are located.

### ***Description of our constituency***

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 a need to collaborate with state entities, such as state licensing boards, as partners to develop protections addressing programs leading to a state professional license or certification.

WCET and SAN Comments are based upon three principles:

1. ***State processes for oversight of licensed professions varies widely.*** It is important for the Department to obtain input from a wide range of state licensing boards for the many

professions to understand the different models used for state oversight process and approvals, if any, and the varied pathways to a license outside of meeting state educational prerequisites at time of enrollment.

2. ***Student choice must be considered and balanced when developing additional protections.*** The mobility of students and the development of opportunities for education for license professions by distance education is increasing.
3. ***Provide clear and concise regulatory language.*** Clear language to ensure compliance that harmonizes all sections of regulations addressing licensed professions will better protect students and can be better enforced by the Office of Federal Student Aid.

We look forward to the development of clear regulations that are narrowly and concretely 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.

## ***Analysis Supporting our Recommendations***

### **Federal Regulation Rulemaking Review for Programs Leading to a Professional License**

State oversight varies widely by profession and state, but states have developed and maintain their own laws and regulations to protect the public and maintain the integrity of the licensed professions and occupations. Institutions are expected to follow all state requirements, as applicable, in the states where the student is located.

During the [2014 Department of Education Negotiated Rulemaking](#), the issue of Federal regulations for consumer protection for students enrolled in programs leading to a license was first addressed. The rulemaking committee did not reach consensus. Because the rulemaking committee did not reach consensus, the Department wrote the rules and released [final regulations in December 2016](#). Among the regulations were required notifications for professional licensure programs completed solely through distance education, excluding internships and clinicals.

The effective date of these regulations was eventually delayed, then subject to a lawsuit, became effective for thirteen months, and then replaced in July 2020 with the current regulations for notifications. Despite the many detours to implementing these regulations, an important thing to note is that these 2016 regulations required public and individualized disclosures. Additionally, an important aspect that WCET and SAN greatly supported was that the institution was to obtain a written acknowledgement if the student received an individualized disclosure that the institution did not meet or had not made a determination whether the curriculum meets the prerequisites in the state of the student's residence. That affirmative acknowledgement by the student created an action-based step beyond the usual distribution of a notification hidden in a sea of other notifications.

Please note that it was the Department that used the term "residence" rather than "location." For determining jurisdiction, states use the concept of "location" to determine clearly which state's laws are applicable in each case. The terminology issue was corrected in the 2019 rulemaking.

The currently effective Federal regulations, which came from consensus during the [2019 Department of Education Negotiated Rulemaking](#), expanded the notification requirement beyond “solely through distance education” to include all modalities, including in-person. The [public notifications](#) were also expanded to address all states and territories regardless of whether the institution was serving students in any additional states and territories.

For each state and territory, the institution is currently expected to provide public notifications to indicate whether the institution curriculum “meets,” “does not meet,” or “has made no determination” related to the state educational requirements to obtain a license. Additionally, the institution must provide [individualized notifications](#) to prospective and enrolled students under the prescribed circumstances. The regulations to provide these notifications became effective July 1, 2020. Unfortunately, the consumer protection afforded by a written acknowledgement from a student was not maintained.

Most recently, the Winter 2022 [Institutional and Programmatic Eligibility Committee](#) did not come to consensus on the issue of Certification Procedures. Only two of the seven issues brought to the committee reached consensus. There was concern raised by the rulemaking committee that several of the issues should have been the subject of individual rulemaking committees.

It should be noted that the subject of Professional Licensure was not addressed in the [request for nominations for negotiators](#). It was not until the release of the [Department’s issue paper #6](#), in January 2022, for purposes of committee discussion, did anyone know this subject was to be addressed. It was abundantly clear that the negotiators did not have experience with the complex nuances of state oversight for licensed professions. Little time was devoted to this topic, only short anecdotal discussion of the problem was provided, and no outside experts were invited to address the subject.

We are concerned that this subject has been given limited exposure and discussion as it is within a subsection of a regulation that is one of five issues that are part of this current NPRM which includes the large issue, Gainful Employment. This limited exposure has caused key stakeholders to have insufficient opportunity to adequately review and assess the impact of this subsection on state professional regulatory agencies, institutions, and students as future licensed practitioners.

### **Reflections on the Department’s Reasoning for the NPRM Proposed Language**

The Department shared on page 3 and on page 17 of the [unofficial version](#) of the announcement that the development of new regulations addressing Certification Procedures is to create a more rigorous process for certifying institutions to participate in Title IV HEA programs. The increased rigor is to protect the integrity of Title IV HEA programs and protect students from predatory and abusive behavior.

The announcement includes a quick summary of the proposed regulation subsection, 34 CFR 668.14(b)(32), on page 127. The summary indicates the following: *“Amend § 668.14(b)(32) to require all programs that prepare students for occupations requiring programmatic accreditation or State licensure*

to meet those requirements and comply with all State consumer protection laws.” This language provides a concise statement to indicate institutions must determine if the program:

- Is programmatically accredited, if required.
- Satisfies all educational prerequisites for a professional license where the student is located.
- Follows all consumer protection laws related to closure, recruitment, and misrepresentation.

We were very interested in reviewing the Department’s reasoning and concerns provided in the NPRM announcement related to institutions satisfying state educational prerequisites for a professional license at time of initial enrollment. However, we found less development of rationale of this subject as compared to almost any other subject and issue in this proposed rule package. The NPRM announcement, on page 496, indicates the reasoning of this proposed language is that the Department is aware that institutions are enrolling students in programs that do not meet the educational requirements for a state license. The result, the Department shares, is that students are often left with difficulty finding employment and owing student loans for credentials that do not qualify them to work in the occupation for which they were educated.

We agree that institutions should be following state requirements, **when applicable**. Neither during rulemaking nor in the NPRM announcement analysis has there been any specific examples or data addressing specific professions or other metric to know the extent of student harm due to the institutions’ failures to meet applicable state requirements. We agree with the premise that no students should be harmed, but policy path to treating common vs. rare infractions could differ greatly when weighed with the impact of any regulations on state professional licensing agencies, institutions, and students.

Additionally, we are unclear about further analysis of this regulation subsection by the Department as described on page 780, which indicates the following: *“On the first point, proposed § 668.14(b)(32) would make it harder for institutions to offer programs that lead to licensure or certification whose length far exceeds what is required to obtain the approvals necessary to work in that field in a student’s State.”* The explanation continues to address overly long programs. We believe the Department may have conflated this issue with a previous subsection 668.14(b)(26) about the length of gainful employment programs leading to a license or certification.

A continuation of this possible conflation is found on page 784 when the Department indicates, *“The proposed changes in § 668.14(b)(32) would provide benefits to students by reducing the likelihood of them paying more for education and training programs that artificially extend their program length beyond what is needed to earn the licensure or certification for which they are being prepared.”* The proposed language of 668.14(b)(32) indicates meeting state educational prerequisites. We are not clear why the Department referenced “program length” as this analysis by the Department does not seem to address satisfying state educational prerequisites as proposed in 34 CFR 668.14(b)(32)(ii).

As is found in other sections of the proposed rulemaking, we expected to see a clear evidenced-based problem statement.

Regarding required notifications for students entering programs leading to a license or certificate, we found no analysis addressing the language in the proposed regulation amendment to the public notifications in 34 CFR 668.43(a)(5)(v). Neither did we find any new proposed language nor analysis to consider the harmonization of current individualized notifications in 34 CFR 668.43(c).

### **Our Specific Concerns with the Proposed Language**

#### **1. Institution must determine that the program satisfies educational prerequisites where the student is located at time of enrollment.**

During rulemaking in Winter 2022, the Department's proposed language indicated that the institution must "ensure" that each program "satisfies." This new proposal replaces the word "ensure" with "determine." Several negotiators expressed concern about the compliance parameters and legal weight of the word "ensure". We strongly believe that the word "determine" is no less of a legal burden than "ensure."

In order for the institution to "determine" that the program "satisfies" educational prerequisites with any sort of legal certainty, we believe that the institution will need to seek affirmation from state licensing boards in each state that the institution is serving a student. We have learned through speaking with various national organizations of state licensing boards that professions and states vary widely. Examples of problems encountered for some professions in some states:

- Some do not have an approval process for an out-of-state institution's program to affirm satisfaction of educational requirements.
- Some do not have the legal authority to issue a statement that an institution meets requirements.
- Some have the requirements and the legal authority, but do not have the staff to handle the requests.
- Some professions have alternative pathways to a license that are not fully encapsulated in the notion of meeting the educational prerequisites. That is, the student may still qualify even if attending programs that do not meet those requirements.

While some professions may provide access to state requirements, many state licensing boards for various professions do not currently have the capacity to assist institutions in determining if the programs meet the state educational prerequisites. There are enough cases where the ability to "determine" whether the program "satisfies" threshold cannot be met and the proposed language has no alternative for those instances.

During rulemaking in Winter 2022, we provided a public comment during week one. We asked the Department if they had met with state licensing boards to learn of the process and structure for approvals for programs. We then offered to make some connections between Department staff and licensing board organizations or state agencies.

We also wonder about the Department's view if the student changes location. It appears from the language of this proposed regulation that the responsibility to satisfy educational prerequisites is only based upon the location of the student at time of enrollment. Does this mean that the program is still

eligible for Title IV aid if the student is no longer located in a state where the institution has determined that it satisfied educational prerequisites?

**2. Public Notifications must include a list of all states where the institution is aware that the program does and does not meet such requirements.**

This proposed language appears to lessen the institution's public notifications to only the states where the institution has actual knowledge. This is different than the current regulations requiring institutions to address all states.

We wonder why the public notifications are necessary if the institution must determine that the program satisfies educational requirements in the state where the student is located at time of enrollment? There is no rationale offered for this amended language in the proposed regulations announcement.

We also wonder why during rulemaking and in this announcement why there was no proposed amendment to the individualized notifications in order to harmonize them with the proposed language for public notifications and proposed requirements to be added to the Program Participation Agreement (PPA).

**Analysis Supporting Recommendation #1**

We would like to see the U.S. Department of Education engage with entities that coordinate with or oversee professional licensing boards to better inform them of concerns and requirements and to seek collaboration with state licensure boards to ultimately better serve the education and training of future licensed practitioners. We have communicated with the National Council State Boards of Nursing (NCSBN) and the National Association of State Directors of Teacher Education and Certification (NASDTEC). Both organizations expressed concern about the potential impact on state licensing boards, lack of consideration of the variety of pathways, professional licensure reciprocity and compact options available to practitioners, as well as the additional barriers to licensure that the proposed regulations could create.

**Analysis Supporting Recommendation #2**

We maintain that an institution must follow all state laws and regulations in a state where the institution's activities occur. If program approval is required in a state, we have always directed the institutions to obtain program approval in addition to state authorization of the institution to serve the students in a state. However, we are aware that not all states and professions maintain an approval process for the educational programs of out-of-state institutions. Although the state may have specific educational prerequisites for a license, the states themselves do not all have an approval mechanism to provide any legal certainty that a program satisfies educational prerequisites.

Additionally, we believe that there are reasonable motivations for a student to participate in a program from a state that does not satisfy all of the state educational prerequisites where the student is located at time of enrollment, for example, a:

- Student may be located temporarily in a state attempting to pursue education while in the state (e.g., active-duty military, military dependent, living across state lines),
- Student may wish to obtain the education from a specific institution due to its strong reputation,
- Student may wish to make the determination of location for employment based upon workforce needs after completion of the program,
- Student may wish to obtain the first license in the state where the institution is located and then transfer the license through professional license compact and professional license reciprocity options,
- Student may be aware that they can receive a provisional license in the state and the student is given a set amount of time to complete the remaining state specific courses (e.g., a teacher may gain a provisional license in some states and begin teaching with the expectation that they will take a state history or culture course in the first few years of employment).

During negotiations, the Department rejected the proposal provided by negotiators without the benefit of discussion. The Department's negotiator suggested that the language would create a loophole for institutions. We disagree as the negotiator's proposal allowed for an exception only after "*obtaining the prior signed written consent of each student who opts to knowingly enroll in such programs and states their reason for their decision.*" The written statement provides clear, auditable evidence as to why an exception was made. If an institution misuses this provision, then it should be subject to financial aid sanctions or be subject to charges of misrepresentation.

The rationale of this recommendation was to provide some flexibility when there is not an approval process in a state as not to limit students' choices due to varied state oversight mechanisms. Additionally, the recommendation intended to revive the former requirement of a written acknowledgement by a student for instances of reasonable motivations to participate in a program even if the program does not satisfy educational prerequisites.

### ***Clarifying Questions Related to Proposed Language***

In deciphering the meaning and impact of the regulatory professional licensure language for the PPA and public notifications as proposed by the Department, several questions about intent and implementation arose. If the Department moves forward with the proposal, institutional personnel will need answers to these questions to comply:

1. If the PPA indicates that for purposes of program eligibility the institution's responsibility is specified at "time of initial enrollment", does the program remain eligible for Title IV if the student moves to a state where the program does not meet prerequisites?
2. If the PPA indicates that for purposes of program eligibility the institution's responsibility is specified at "time of initial enrollment", if this proposed regulation becomes final and effective, would the requirement only address incoming students or would the institution be obligated to



apply the requirement retroactively to students who are already admitted to the program before the regulation became effective?

3. What is the Department's recommendation if there is the impossibility of the institution obtaining affirmation or some sort of a process to determine that the program meets state educational prerequisites in a state?
4. How does the Department reconcile the limitation on institutions and ultimately students from meeting state educational prerequisites for Teacher Preparation Programs that often include only a course or two in the program addressing state specific history or culture even though, there is a pathway to licensure through NASDTEC state reciprocal agreements and the new Teacher Education Compact for license mobility?
5. If the language in the PPA proposes that program eligibility is contingent upon the institution's program meeting state educational prerequisites where the student is located, why is there a need for notifications?
6. Does the proposed language indicating an amendment to language for public notifications to be lists of all states where the institution "is aware" mean that the institution may not be ultimately addressing each state as is currently required in Federal regulation 34 CFR 668.43(a)(5)(v)?
7. How does the Department intend to harmonize the proposed new language in the PPA identifying program eligibility to be "at initial time of enrollment" to the language in 34 CFR 668.43(c) indicating notifications to prospective students "prior to enrollment in the program" which could include prospective face-to-face students who will ultimately be located at the institution where the program meets state educational pre-requisites at time of initial enrollment?

## **Conclusion**

We have shared some very detailed information regarding some of the nuanced and complex 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 when the Department chose to propose a new regulation limiting student access to programs. Additionally, we believe that key stakeholders in the licensing community must be invited to collaborate with the Department to more effectively address protections for future licensed practitioners.

Along with the detailed information provided above, our comment is motivated by the key principles that we previously shared. We urge the Department to seriously consider our recommendation to withdraw this subsection in order to develop more information about the issues at hand while simultaneously focusing on enforcement of currently effective regulations to provide notifications.

If the Department is determined to move forward with language to be held within the Program Participation Agreement (PPA) we urge a review of the language proposed by consumer protection



WICHE Cooperative for Educational Technologies



STATE AUTHORIZATION NETWORK  
a division of WCET

negotiators during rulemaking in Winter 2022 to offer opportunities for exceptions for students' well-reasoned motivations and coordination with state licensing boards oversight mechanisms.

Finally, we 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 as this subject within the Certification Procedures.

issue is beyond typical training for administration of the 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 professional licensure organizations/agencies and to institutions.

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