From:	Carolyn Fast, Negotiator for Consumer Advocates/Civil Rights (Primary) Barmak Nassarian, Negotiator for U.S. Military Service Members, Veterans, or Groups Representing Them (Primary)
To:	Department of Education and Negotiation Committee Members
Date:	January 18, 2024
Re:	Revised and Expanded Proposals on State Authorization Reciprocity Agreements

I. Proposal on Enforcement of State Consumer Protection laws:[1]

600.2 Definitions

State authorization reciprocity agreement: An agreement between two or more States that ~~authorizes~~ waives State requirements and fees related to obtaining initial or renewed State authorization for an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence course to student located in other States covered by the agreement and cannot prohibit any member State of the agreement from enforcing its own general-purpose or education-specific State laws and regulations outside of the State authorization of distance education.

Rationale:

The proposed change to add "**or education-specific**" would ensure that States maintain authority to enforce State education-related consumer protection laws, at their discretion, regardless of whether they choose to enter into a reciprocity agreement with other States to streamline initial/renewed authorization. This is not a new idea, rather, it is a return to the reciprocity definition that was made part of the Department's final rule during the Obama-Biden administration (defining a reciprocity agreement as one that "does not prohibit any State in the agreement from enforcing its own standards and regulations, whether general or specifically directed at all or a subgroup of educational institutions").[2] The proposed change would enable States with strong consumer protection laws to retain their authority to enforce these State consumer protection laws to protect online students in their State who are enrolled in SARA-participating schools that are located in other states.

Currently, SARA permits member States to enforce laws of general application, such as laws prohibiting fraud and deceptive practices that apply to all types of businesses, but requires as a condition of joining the agreement that member States waive enforcement of all other State consumer protection laws that apply to educational institutions, such as refund and cancellation rights, disclosure requirements, outcome requirements, requirements related to debt collection, prohibitions on transcript withholding, laws related to protection in the event of precipitous closure, laws providing students with a private right of action for

[1] Note that throughout, the red text is the Department of Education's proposed language, and blue text is our suggested language.
[2] See 81 Fed. Reg. 92262, available at https://www.govinfo.gov/content/pkg/FR-2016-12-19/pdf/2016-29444.pdf.

State law violations, laws related to specific types of misleading marketing of educational institutions, and others, with respect to students in the State that are enrolled at SARA schools located out of state. This leaves some online students vulnerable to predatory conduct.

The above proposal would also add the phrase **"waives State requirements and fees related to obtaining initial or renewed State authorization**" to the definition of a reciprocity agreement. This addition would clarify that the reciprocity agreement specifically waives the State requirements and fees for initial or renewed State authorization.

II. Proposal on Governing Body Composition:

600.2 Definitions
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If a State authorization reciprocity agreement is administered by an organization, the governing body of such organization must consist solely of representatives from States~~, including~~ regulatory bodies, enforcement agencies, and attorneys general offices~~, and licensing bodies~~. A State authorization reciprocity agreement may also appoint an advisory board that includes~~, and~~ members of the general public. Public members must be separate from and independent of States, institutions, and accrediting agencies, and must not be:

(1) current or former employee of, member of the governing board, owner, or shareholder of, or consultant to, an institution or program that is subject to the State authorization reciprocity agreement;
(2) a current or former member of any trade association or membership organization related to, affiliated with, or associated with an institution or program that is subject to the State authorization reciprocity agreement;
(3) A current or former employee of or consultant to an accrediting agency that accredits an institution or program that is subject to the State authorization reciprocity agreement; or
(4) A current or former employee of a member of the program integrity triad other than States, including the Department of Education and accrediting agencies.

Rationale:

This proposal addresses a current flaw in SARA, the State Authorization Reciprocity Agreement: SARA currently delegates decision-making power to the NC-SARA Governing Board, giving the Board power to veto any proposal to strengthen consumer protection standards or make any other policy changes related to State or institutional eligibility requirements. However, there are no guidelines in place to ensure that the Board is composed of representatives of the member States. The Board is currently composed not solely of representatives of member States, but also representatives of regulated institutions and other individuals who may have conflicts of interest. The Board also includes other individuals who do not represent a State and are thus not accountable to any State lawmakers, officials, or to State voters.

Reciprocity agreements are agreements between States wherein States agree to establish joint standards for regulated institutions. Such decisions about standards for regulated institutions are appropriately reserved to representatives of State regulatory and enforcement agencies, who are accountable to State lawmakers, State officials, and/or State voters. Accordingly, members of the public should not be given authority to set standards for regulated institutions or to set requirements for State or institutional membership in a reciprocity agreement. Members of the public may have valuable information or perspectives to share in a nonbinding capacity via membership on an advisory board.

III. Proposal on Delegating Authority to Non-State Actors:

Note: Relevant language for this proposal appears highlighted below.

600.2 Definitions

State authorization reciprocity agreement: State authorization reciprocity agreement: An agreement between two or more States that ~~authorizes~~ waives State requirements and fees related to obtaining initial or renewed State authorization for an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence course to student located in other States covered by the agreement and cannot-

(a) prohibit any member State of the agreement from enforcing its own general-purpose or education-specific State laws and regulations outside of the State authorization of distance education, or

(b) delegate the authority to set standards or make determinations related to eligibility for State or institutional participation in the agreement to any individual who is not a representative of a member State regulatory or law enforcement agency or to any entity that is not exclusively composed of representatives from member State regulatory or law enforcement agencies.

Rationale:

This proposal would prohibit reciprocity agreements from delegating decision-making authority to any individual who is not a representative of a State regulatory or enforcement agency or to any entity that is not composed of representatives from such agencies. Even beyond ensuring the governing board is composed only of state officials/representatives, this would further ensure decision-making is reserved for such representatives. The broader prohibition is necessary because otherwise, reciprocity agreements could invest decision-making authority in an individual or a group (other than the governing board) that is not composed of state representatives. For example, current SARA policy provides limited decision-making power not only to the Board, but also, separately, to the NC-SARA President, who is not required to be a representative of a member State. Specifically, the NC-SARA President has authority under the SARA Policy Manual to overrule a member State's decision to extend "provisional status" (*i.e.*, probationary status) to an institution beyond a certain specified time-period. See SARA Policy Manual, 23.1 § 3.2(d)(4). Providing a non-state entity with veto power over a member State's decision-making or otherwise delegating standard-setting or decision-making authority to an entity or individual that is not a representative of a member State agency is problematic because it potentially constrains States' power to act on behalf of students in their states. Accordingly, reciprocity agreements should be prohibited from delegating authority over regulatory decisions to non-State actors.

IV. Proposal on Reciprocity Agreement's Consumer Complaint Process:

600.2 Definitions

Note: Relevant language for this proposal appears highlighted below.

State authorization reciprocity agreement: An agreement between two or more States that ~~authorizes~~ waives State requirements and fees related to obtaining initial or renewed State authorization for an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence course to student located in other States covered by the agreement and cannot prohibit any member State of the agreement from enforcing its own general-purpose or education-specific State laws and regulations outside of the State authorization of distance education.

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A State authorization reciprocity agreement must permit member States to, at the State's discretion, accept, investigate, and/or resolve complaints about an institution of higher education that have not yet been submitted to and/or resolved by the institution of higher education.

Rationale:

Consumer complaints are a crucial mechanism for alerting regulators about problems at regulated institutions. However, under the largest current reciprocity agreement, States are sometimes precluded from access to this information. Currently, the SARA Policy Manual requires that students first submit a complaint to their school and exhaust all remedies with their school before the student is even permitted to submit a SARA complaint[3] to a SARA state portal entity for investigation. As a result, it is not clear that State regulatory agencies in SARA member States have discretion to accept, investigate, and/or resolve a SARA complaint before the student has exhausted remedies through the school's complaint process. This exhaustion requirement hampers regulators' ability to timely obtain critical information about what is happening at regulated schools. The exhaustion requirement also creates an added hurdle for students.

The exhaustion requirement may play a role in the extremely low number of SARA complaints reported for SARA institutions. For example, in Arizona, where the SARA website shows that there are over 300,000 online students enrolled in SARA schools,[4] SARA's website reports that there have been zero SARA consumer complaints from SARA students at Arizona schools in 2023.[5] State reciprocity agreements must not prevent States from - at the State's discretion - accepting, investigating, and/or resolving consumer complaints without first requiring the student to exhaust remedies at the school.

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[3] Pursuant to the SARA Policy Manual, a "SARA complaint" is a complaint "resulting from distance education courses, activities and operations provided by SARA-participating institutions to students in other SARA states." See SARA Policy Manual 23.1 § 4.1.

[4] See NC-SARA Data Dashboard, https://www.nc-sara.org/data-dashboards.

[5] See NC-SARA Complaint Reports Dashboard, https://nc-sara.org/complaint-reports-dashboard.

V. Proposal to Require Direct State Authorization for Institutions with a Substantial State Presence:

600.2 Definitions

Note: Relevant language for this proposal appears highlighted below.

State authorization reciprocity agreement: An agreement between two or more States that ~~authorizes~~ waives State requirements and fees related to obtaining initial or renewed State authorization for an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence course to student located in other States covered by the agreement and cannot prohibit any member State of the agreement from enforcing its own general-purpose or education-specific State laws and regulations outside of the State authorization of distance education.

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A State authorization reciprocity agreement must require, as a condition of participation, that institutions begin the process of, and obtain within one year, direct authorization from any participating State where they enroll more than 1,000 students.

Rationale:

This proposed requirement would ensure that institutions with a major presence in a State do not use reciprocity agreements as a backdoor to circumvent direct and substantive State oversight. This would also levels the playing field for in-state/out-of-state institutions when out-of-state institutions have more than an incidental presence in a State. It would also provide significant revenues to authorizers in States where institutions have a major online presence to ensure that States have the resources to discharge their oversight duties for schools that have a major online presence in the State.

VI. Proposal to Require Assessment of Institutional Fees Sufficient to Support Enforcement of

600.2 Definitions

Note: Relevant language for this proposal appears highlighted below.

State authorization reciprocity agreement: An agreement between two or more States that ~~authorizes~~ waives State requirements and fees related to obtaining initial or renewed State authorization for an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence course to student located in other States covered by the agreement and cannot prohibit any member State of the agreement from enforcing its own general-purpose or education-specific State laws and regulations outside of the State authorization of distance education.

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A State authorization reciprocity agreement must require assessment of fees from participating institutions that generate revenues in an amount sufficient to permit competent enforcement of its own requirements by appropriate authorities in participating States that are charged with authorization and enforcement of applicable requirements for distance-delivered offerings across State lines.

Rationale:

This proposal is intended to ensure that reciprocity requirements and the State agencies charged with enforcing such agreements' standards have sufficient resources to carry out this enforcement function, including resources for both the administering of the agreement and for enforcement by whichever State is charged pursuant to the agreement with the added responsibility for oversight of out-of-state enrollments for institutions based in that State.

VII. Proposal to Prevent Nationwide Exemptions from Authorization/Oversight Requirements:

600.2 Definitions

Note: Relevant language for this proposal appears highlighted below.

State authorization reciprocity agreement: An agreement between two or more States that ~~authorizes~~ waives State requirements and fees related to obtaining initial or renewed State authorization for an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence course to student located in other States covered by the agreement and cannot prohibit any member State of the agreement from enforcing its own general-purpose or education-specific State laws and regulations outside of the State authorization of distance education.

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A State authorization reciprocity agreement must require institutions that are exempt from State authorization and/or State oversight in their home State to comply with home-State requirements that would otherwise apply to them when operating in other participating States through the reciprocity agreement.

Rationale:

This proposal is intended to prevent State authorization/oversight exemptions from becoming national authorization/oversight exemptions pursuant to reciprocity agreements. Constitutional, legal, or historical reasons may factor into a State's decision not to require affirmative authorization of some institutions. Those same circumstances may also explain the decisions of some States to exempt some institutions from other compliance or oversight requirements within those States. These State decisions, however, should not be nationalized through reciprocity agreements, primarily because the local conditions that may justify them in the home state may not--and ordinarily would not--obtain in other states.