

Memorandum: Impact of Proposed Regulations on the Existence of SARA

Issues: Application of Education-Specific Laws and Governance in Session 2 State Authorization Proposal

Submitted by: Dr. Robert Anderson

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Summary of Argument: We believe that the U.S. Department of Education’s (ED) proposed changes to § 600.9(a)(1)(i) and § 600.9(d)(2) will effectively make state authorization reciprocity unworkable and will cause NC-SARA, or any other organization representing a state authorization reciprocity agreement, to no longer be able to facilitate reciprocity for state authorization purposes. Proposed language including “education specific laws” would lead to the deconstruction of SARA; we urge ED to reconsider these two proposals ahead of the third negotiated rulemaking session.

Should ED or any of the negotiators have clarifying questions, we invite you to reach out to Dr. Robert Anderson.

Issue 1: The inclusion of “or education-specific” in § 600.9(a)(1)(i) (see language proposed by ED below, with the specific reference in bold red text):

- (1) An institution described under §§ 600.4, 600.5, and 600.6 is legally authorized by a State if the State:
 - (i) Ensures the institution complies with any applicable State authorization or licensure requirements, except as described in subsection (3) of this section, and continues to meet a State’s general-purpose **or education-specific** laws and regulations; and...

The argument has been made by ED and some negotiators that the addition of “education-specific laws” ensures that states have authority to enforce state education-related consumer protection laws that impact institutions and students attending such institutions. These arguments stipulate that states should maintain the ability to enforce such laws, at their discretion, even while participating in a reciprocity agreement. These arguments do not acknowledge that a reciprocity agreement, of any type, cannot operate without all parties following the same requirements. Nor do these arguments acknowledge that states have already rejected this policy approach through the SARA policy modification process.

The very nature of a reciprocity agreement would be inoperable if institutions must meet education laws that are specific to each state in the reciprocity agreement. That would mean that an institution would have to meet requirements outside of the reciprocity agreement, undermining the very concept of such an agreement. We fail to see how different states enforcing different requirements would work within the concept of a reciprocity agreement. Collectively, we agree with ED’s vision to set high standards to protect students; however, under a reciprocity agreement, these standards must be set in a manner that establishes the same playing field for all institutions in member states.

In 2013, higher education stakeholders – including state regulators and education leaders, accreditors, ED, and institutions – joined together to establish the State Authorization Reciprocity Agreements (SARA) to improve student protections for those states that did not regulate out-of-state distance education and to align regulations around distance education programs. NC-SARA and the regional compact partners support this agreement by ensuring alignment on core elements and requirements of SARA, and by supporting quality assurance and consumer protections for students. The enforcement of state education-specific laws outside of the reciprocity agreement would effectively end this work. This would lead to:

- Impediments to students’ access to distance education programs;
- Eliminating or diminishing consumer protections for students in many states;
- Increased cost and bureaucracy for states and institutions; and,
- Weakened coordination between states.

In many states, SARA raises the floor of authorization. In fact, 21 states do not regulate out-of-state institutions that offer exclusively distance education in their state but have no physical presence. Additionally, one-third of states do not require accreditation for degree granting institutions. SARA requires accreditation and state authorization in the home state and ensures a level of oversight to SARA-participating institutions that would not otherwise be present.

Nothing in SARA prevents SARA state members from implementing their general-purpose consumer protection laws. SARA does not prohibit any state attorney general or other agency from investigating or acting against an institution committing fraud, misrepresentations, or engaging in deceptive behavior.

Issue 2: The requirement in § 600.9(d) that governing bodies of a reciprocity agreement must consist solely of representatives from state regulatory bodies, enforcement agencies, and attorneys general offices (see language proposed by ED below, with the specific reference in bold red text):

- (2) If administered by an organization, the governing body of such organization must consist **solely of representatives from State regulatory bodies, enforcement agencies, and attorneys general offices.**

The argument has been made by ED and some negotiators that only a governing body of state employees can have the best interests of students in mind, and that a board with membership beyond state employees is essentially conflicted. This argument has been made with respect to the current NC-SARA Board. We strongly disagree with this position. We believe diversity of board membership improves the operation and governance of SARA. Including experts from a variety of different backgrounds within the higher education community ensures that the full range of counsel is provided to SARA members. As outlined in the NC-SARA bylaws, board members come “from the range of impacted groups to assure a wide range of support as the interstate reciprocity agreements are promoted and implemented.” Additionally, NC-SARA, like ED, prioritizes board ethics. For this purpose, NC-SARA’s bylaws already require board members “to review, disclose, and sign a Code of Conduct and Conflicts of Interest Policy annually.”

Additionally, the current NC-SARA Board has taken the position to not vote on the policies put forth by the SARA Regional Steering Committees through their regional compacts. ED accepted our proposal to enshrine this concept in regulation. Such a policy, which makes clear the state-driven role in determining policy impacting reciprocity, should eliminate the need to dictate determine the specific make-up of any governing body overseeing a state reciprocity agreement.

ED's proposal, if untouched, would prevent numerous highly qualified individuals from serving in these important roles. With the NC-SARA Board's membership representing most of the country, SARA has been able to identify areas of consensus and agreement for policy change. Switching to a state-only board could magnify political differences and negatively impact the strong work of the agreement. We also expect this regulatory change to result in each state wanting their own seat (or two) on the NC-SARA Board, making the board too large to function.