



The Honorable Arne Duncan
Secretary of Education
Office of the Secretary
United States Department of Education
400 Maryland Avenue S.W., Room 7W301
Washington, DC 20202

June 13, 2014

Dear Secretary Duncan:

The member institutions of our three organizations are leaders in the practice of providing quality postsecondary distance education to students throughout the nation and the world. Our organizations represent the vast majority of institutions that are passionate about distance education across the country and across all higher education sectors.

For the first time our organizations are joining with one voice to express our concern over the [Department of Education's "state authorization for distance education" proposal](#)⁽¹⁾ that was recently rejected by most of the members of the Program Integrity and Improvement Negotiated Rulemaking Committee. Our comments are focused on the final draft proposal presented to the Committee. We believe the final draft represents the most current thinking of Department staff as they construct a regulation for public comment.

We are eager to promote policies and practices that protect consumers and improve the educational experience of the distance learner. Unfortunately, the final draft regulation would achieve neither of those goals.

The impact of the proposed regulations would be large-scale disruption, confusion, and higher costs for students in the short-term. In addition, there would be no long-term benefits for students. This letter briefly outlines our concerns and provides recommendations that achieve the Department's goals without disrupting students enrolling in distance education programs across state lines.



Guiding Principles

In forming our position, we agreed on the following guiding principles regarding state authorization and distance education. We recognize:

- The need for regulations that provide a clear benefit to students. We oppose regulations that do not benefit students;
- Through current law, each state has a role in protecting consumers who enroll in distance courses within their jurisdiction; and
- The [U.S. Court of Appeals has affirmed](#)⁽²⁾ the Department's authority to use state authorization as a criterion for offering federal financial aid to students in a state.

Our Concern with the Negotiated Rulemaking Final Draft

During the Negotiated Rulemaking Committee meetings, the Department pushed for an “active review” of institutions by the state. Our first objection is that states already allocate their limited oversight budgets through strategies based upon their experience. Institutions with specific “risk” characteristics (such as having a “physical presence” within a state or representing a specific higher education sector) are subject to a more extensive review than those that are considered less risky. The Department's proposal would eliminate each state's ability to exempt a subset of institutions from its authorization review process. This would circumvent local judgment and add review costs. Added costs to the institutions would ultimately be borne by students.

Second, when pressed to define an “active review,” the Department provided a short list of criteria that states could use in the review, such as submitting a fiscal statement or a list of programs to be offered in the state. While it may sound simple to add a few review criteria, state regulators cannot act arbitrarily. Their authorization actions must be based on state laws and regulations. Therefore, state laws would need to be changed and the state regulators would need to add staff to conduct the necessary reviews. Our analysis estimates that 45 states would need to make these changes. This is a large amount of activity and added costs for what appears to be a “ cursory” review. These reviews will likely not change a decision regarding an institution's eligibility in a state. There is no benefit for the student.

Finally, the necessary legislative action will be a hard sell in the many states that are trying to streamline regulations and reduce the number of state employees. Out-of-state institutions will be forced to lobby state legislatures to adopt processes that comply with the federal



regulations so that they may be eligible to offer financial aid to students in that state. This will not be a high priority for many legislators, and in some states, legislators may decide to protect their in-state institutions from out-of-state competitors simply through inaction in adopting regulations that comply. Students could be harmed by that outcome.

While states will be working on coming into compliance, institutions and their students will be placed in an uncomfortable limbo. They will be forced to wait and see if they can continue to operate in states where their students currently can be enrolled.

Additional details regarding our concerns about the Department's final draft of the proposed regulation can be found at the [WCET Frontiers blog](#).⁽³⁾

Our Recommendations

There were several proposals developed by the Negotiated Rulemaking Committee that we support. As the Department issues regulatory language for public comment, we recommend:

Recommendation 1: Return to the 2010 Language. We recognize the affirmation by the U.S. Court of Appeals that the Department can use state authorization as a criterion for offering federal financial aid. As a basis for any future regulation, the Department should return to the state authorization language released in October 2010 that required an institution to “meet any State requirements for it to be legally offering postsecondary distance or correspondence education in that State. An institution must be able to document to the Secretary the State's approval upon request.” This language leaves regulatory decisions to the prerogative of each state. If there are problems with regulations in some states, we suggest working with NASASPS (the state regulator organization) to develop “best practices” that could be adopted by those states. Trying to influence state practices by adding compliance requirements on out-of-state institutions will not achieve the desired (and seemingly amorphous) goal of improving state practice.

Recommendation 2: Recognize Reciprocity. We recommend that the Department retain the provision that recognizes reciprocity as a means to authorization. Through reciprocity, one state recognizes the authorization actions of another state participating in a reciprocal agreement. In the final draft presented to the Negotiated Rulemaking Committee, state participation in a reciprocal agreement was listed as the only other method of authorizing



institutions beyond direct state action. The current reciprocity agreements are actually implementing the “active review” that the Department cited as being lacking in several states.

Recommendation 3: Require Institutions to Notify Students about Licensure Programs. The Department should retain the proposed provision requiring institutions to notify students in licensure programs whether their program meets the educational requirements for licensure within their field. If not, a student may still enroll by signing a waiver. This section provides the greatest promise for actually protecting students. While it creates more work for institutions, it also provides them with the benefit of helping institutions protect themselves in legal actions by students.

Recommendation 4: Exempt Military, Military Families, and the Veterans Administration Facilities. The Department should retain the proposed provision that exempts active military and their families. As a result of conversations with representatives of the Veterans Administration (VA), we suggest extending this exemption to those engaged in training rotations at VA facilities. The VA typically has 700 Psychology students per year enrolled in internships or other practical programs that cross state lines. The Psychology program is only one of several on-site educational experiences that are affected by state authorization.

Recommendation 5: Create Real Minimums for Authorization in a State. We recommend that the Department revise and retain the provision regarding a “de minimis” number of 30 students per year in a state before the Department's regulation would be enforced. As currently written, if a state has stricter requirements then the 30 student threshold is negated. Essentially, it is an exception that would never apply. We recommend addressing that problem and implementing a 30 student minimum for the purpose of federal compliance.

Recommendation 6: Work with the States. If implemented, recommendations 4 and 5 would put these federal exemptions out of sync with authorization laws in several states. For example, a military student could be exempt according to the federal regulation, but still be subject to authorization rule in the state that the student is stationed. We recommend working with the states to bring those recommendations in sync.

Recommendation 7: Allow Possible Grace Period if an Institution Loses Authorization. If an institution loses its authorization in a state, the final draft of the regulation requires such institutions to immediately notify students and to stop dispensing aid. There are rare cases in which the loss of authorization is due to a technical glitch or an unreasonable action (or



inaction) by a state. In such cases, to protect both students and the institution, the Department should reserve the right to allow a grace period of sufficient time to remedy the problem.

Recommendation 8: Ensure Students are Covered by Consumer Protection Laws. During the Negotiated Rulemaking Committee meetings, members of the Department expressed concern that some states that exempt institutions from review also exempt those institutions from their consumer protection laws. Therefore, a student would not have access to a complaint process or other remedies. While we do not believe that is still the case in any state, the Department should identify any states that lack appropriate complaint processes. Otherwise, we would support additional language that assures students will have access to the appropriate protections. The Department should also clarify (as it did in the 2010 rulemaking) that a state may assign the complaint process to another agency, not just the authorizing agency. This is currently the practice in several states.

The remaining language in the Department's final draft Negotiated Rulemaking proposal either repeats requirements that are found elsewhere in regulations or are simply unnecessary.

Going Beyond Compliance

In taking a broader view of what activities might help students, some members of the Negotiated Rulemaking Committee suggested that three databases be created:

- National Database for Institutional Authorization. Each state would report the names of all institutions that are currently authorized.
- National Database for Licensure Authorization. Each state agency for each licensure program would report the programs that meet the educational requirements for certification or sitting for an exam in their state.
- National Database for Complaints. NASASPS (the state regulator organization) leadership suggested that a national database of student complaints be created.

We support the proposed databases. The first two databases would provide an unbiased source of information about authorization and help to circumvent institutional “gaming” of their status in their notifications to students. The complaint database would help to inform consumers of the nature of problems and the identity of institutions that are causing those problems.



The members of our respective organizations are committed to improving and expanding distance education and to keeping quality, accessible options affordable for students. The proposed regulations would lead to additional costs and confusion for students, potentially making higher education unattainable for those who distance education serves best.

As leaders of our organizations, we are committed to providing any assistance in addressing the state authorization regulations, and we would welcome the opportunity to speak with you and other members of the Department regarding this letter. Please let us know how we can provide assistance as you finalize these critical regulations.

Kathleen S. Ives
Acting Chief Executive Officer and Executive Director
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A handwritten signature in blue ink that reads "Russell Poulin".

Russell Poulin
Interim Co-Executive Director
WCET - WICHE Cooperative for Educational Technologies

Additional Supporters:

Leah Matthews, Executive Director, Distance Education and Training Council

Marshall Hill, Executive Director, National Council for State Authorization Reciprocity Agreements

Ed Klonoski, Board Chair, Presidents' Forum (National Forum for Alternative Paths to Learning)

John G. Flores, Executive Director, United States Distance Learning Association

cc: Ted Mitchell, Under Secretary of Education, U.S. Department of Education

The Sloan Consortium (Sloan-C) is the leading professional organization devoted to advancing quality online learning by providing professional development, instruction, best practice publications and guidance to educators, online learning professionals and organizations around the world. <http://www.sloanconsortium.org>

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WCET is the leading national organization devoted to advancing technology enhanced higher education working at the intersection of practice, policy and technology. WCET's mission is to accelerate the adoption of effective practices and policies, advancing excellence in technology-enhanced teaching and learning in higher education. <http://wcet.wiche.edu>

Footnotes:

- (1) <http://www2.ed.gov/policy/highered/reg/hearulemaking/2014/pii4-stateauth-distd-051214.doc>
- (2) <http://wcetblog.wordpress.com/2012/06/05/state-authorization-appeal/>
- (3) <http://wcetblog.wordpress.com/2014/05/29/state-auth-nereg-what-happened/>

Press EMBARGO to June 16, 2014