

August 24, 2016

John B. King, Jr., Secretary
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

RE: Program Integrity and Improvement [Docket ID: ED-2016-OPE-0050]

Dear Secretary King:

The undersigned negotiators from the 2014 Program Integrity and Improvement committee, representing the interests of students, legal aid and consumer advocacy organizations, appreciate the opportunity to comment on the Department's proposed rule regarding state authorization of postsecondary distance education programs.

We are encouraged that the Department's proposal would generally require all providers of distance education to obtain state authorization in each state where they intend to enroll students. However, we have concerns that distance education students could still be subject to weaker protections under the proposed rule, for the following reasons:

- The proposal would permit state authorization through the use of interstate reciprocity agreements that could restrict a state's authority to protect its own students and students' ability to protect themselves, and
- The proposal would permit providers to enroll students in professional certificate or licensing programs that lack the required accreditation for students to practice the profession in the students' home state.

General Comments

With more than 2.8 million postsecondary education students enrolled in online-only programs,¹ the Department must take seriously the issue of quality in online education programs with greater urgency than ever before. As the Department acknowledges in its notice of proposed rulemaking, there has been significant growth in the number of

¹ I. ELAINE ALLEN ET AL., ONLINE REPORT CARD: TRACKING ONLINE EDUCATION IN THE UNITED STATES 4 (2016), available at <http://onlinelearningsurvey.com/reports/online-report-card.pdf>.

² Program Integrity and Improvement; Proposed Rule, 81 Fed. Reg. 48598, 48607 (proposed July 25, 2016).

³ ROBYN SMITH, NAT'L CONSUMER LAW CTR., ENSURING EDUCATIONAL INTEGRITY: 10 STEPS TO IMPROVE STATE OVERSIGHT OF FOR-PROFIT SCHOOLS 18 (2014), available at <http://www.nclc.org/images/pdf/pr-reports/for-profit-report.pdf>.

⁴ Press Release, Iowa Dep't of Justice, Office of the Attorney General, Ashford University and Parent Company Bridgepoint Education Agree to \$7.25 Million Payment Major Changes After Miller Alleges Consumer Fraud (May 16, 2014), <https://www.iowaattorneygeneral.gov/newsroom/ashford-university-and->

students enrolling in out-of-state online programs, a majority of whom enroll in proprietary schools' online programs.²

Despite this trend, online-only education has been completely unregulated in all but nine states.³ Unfortunately, increasing complaints about fraud at some institutions indicate that the need for state oversight is overwhelming. Online programs offered by for-profit schools are too often purveyors of fraud and debt rather than knowledge and skills. For example, in 2014, Ashford and its parent company Bridgepoint Education, Inc. paid \$7.25 million to Iowa for misleading online recruiting practices, including deceiving prospective students by leading them to believe that online education degrees would allow them to become classroom teachers.⁴

However, in July 2016, Ashford announced that they were currently educating more than 48,000 students online.⁵ Ashford is not alone in doing active business despite being under investigation. The University of Phoenix,⁶ Kaplan⁷ and Ashworth⁸ – all of which have been the focus of complaints by state and federal agencies – also continue to have robust distance education programs and are actively enrolling students.

It is crucial that states conduct an active review of schools seeking authorization to operate in their jurisdiction, to prevent schools with poor track records from putting students into debt for questionable programs. However, the Department's proposal largely sanctions the use of reciprocity agreements as a means of enabling schools to quickly obtain authorization in multiple states at once. The state reciprocity agreements envisioned by the rule, as currently proposed, do not necessarily prevent even schools under active federal or state investigation from participating in the compact.⁹ Without proper oversight of these schools, the Department, states, students and taxpayers will continue to watch as education dollars are wasted and abused.

² Program Integrity and Improvement; Proposed Rule, 81 Fed. Reg. 48598, 48607 (proposed July 25, 2016).

³ ROBYN SMITH, NAT'L CONSUMER LAW CTR., ENSURING EDUCATIONAL INTEGRITY: 10 STEPS TO IMPROVE STATE OVERSIGHT OF FOR-PROFIT SCHOOLS 18 (2014), available at <http://www.nclc.org/images/pdf/pr-reports/for-profit-report.pdf>.

⁴ Press Release, Iowa Dep't of Justice, Office of the Attorney General, Ashford University and Parent Company Bridgepoint Education Agree to \$7.25 Million Payment Major Changes After Miller Alleges Consumer Fraud (May 16, 2014), <https://www.iowaattorneygeneral.gov/newsroom/ashford-university-and-parent-company-bridgepoint-education-agree-to-7-25-million-payment-and-major/>.

⁵ Press Release, Bridgepoint Educ., Bridgepoint Education Reports Second Quarter 2016 Results (Aug. 2, 2016), <http://www.prnewswire.com/news-releases/bridgepoint-education-reports-second-quarter-2016-results-300307777.html>.

⁶ Apollo Educ. Group, Inc., Current Report (Form 8-K), at 2 (Aug. 7, 2015).

⁷ Press Release, North Carolina Dep't of Justice, Office of the Attorney General, Unlicensed Medical Institute Shut Down for Offering Faulty Classes (Oct. 9, 2015), <http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/Unlicensed-medical-institute-shut-down-for-offerin.aspx>.

⁸ Press Release, Fed. Trade Comm'n, Ashworth College Settles FTC Charges It Mised Students About Career Training, Credit Transfers (May 26, 2015), <http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/Unlicensed-medical-institute-shut-down-for-offerin.aspx>.

⁹ Nat'l Council for State Authorization Reciprocity Agreements (NC-SARA), SARA Policies and Standards 6 (2016), available at <http://www.nc-sara.org/content/sara-policies-and-standards>.

As discussed further below, we urge the Department to strengthen the proposed rule by ensuring that states can enforce their own laws to protect distance education students living in their jurisdiction, whether or not they join a reciprocity agreement with other states.

State Authorization Reciprocity Agreements

As negotiators expressed throughout the rulemaking sessions, state authorization reciprocity agreements raise significant consumer protection concerns. Absent clear and final authority for a student's home state to enforce its applicable laws, such agreements could create a two-tiered oversight system that results in weaker protections for students taking distance education courses.

Because a reciprocity agreement enables schools to earn regulatory approval in one state, and then enroll students in any other member state, the compact creates an incentive for schools to find the state with the lowest bar to initial entry – thereby encouraging a race to the bottom that could put students in harm's way, taking on debt for questionable programs.

Many states have high standards for consumer protection, as well as other laws of general applicability aimed at protecting their residents. By joining a reciprocity agreement, however, those states would largely cede authority to a private third-party entity to approve institutions of higher education offering distance education programs. Even if a state's general consumer protection laws remain applicable, a reciprocity agreement could otherwise require schools to comply only with the laws of the school's home state – laws which could be comparatively much weaker than the laws where a student resides.

We urge the Department to preserve states' authority to apply their own laws – including general consumer protection laws, consumer protection laws specific to higher education, *and* other relevant laws of general applicability – to all distance education providers offering programs to their residents.

The only state authorization reciprocity agreement that currently exists, known as SARA, generally requires members to waive important higher education protections for students attending schools located in other SARA states.

At present, a group of accreditors operating under the name NC-SARA is advocating around the country for states to adopt its State Authorization Reciprocity Agreement, commonly known as SARA. In its current iteration, SARA is a reciprocity agreement that functions via member states. Once a state is approved to join SARA, a process that usually requires legislative approval, institutions that are operating under the compact are able to enroll students in their distance education programs.¹⁰ During the rulemaking sessions, negotiators raised concerns regarding the following provisions of the SARA compact:

¹⁰ NC-SARA, Basic questions about SARA, <http://www.nc-sara.org/content/basic-questions-about-sara>.

- States that join SARA give up the right to regulate non-profit and for-profit distance education programs differently, despite documented abuses by for-profit colleges.¹¹
- Institutions that participate in SARA are approved for participation by their home state, and states that join SARA must accept that approval – regardless of the effectiveness of the home state’s oversight.
- Students wishing to bring a complaint against an institution operating under SARA must do so in the home state of that institution, effectively ceding the authority and oversight of their home state and placing too great of a burden on the complaining student.¹²

Although many states have joined SARA already, it is important for the Department to set clear ground rules for how any reciprocity agreement must function in order to protect students and taxpayers, not just streamline the process for distance education providers.

States that join reciprocity agreements could lose the right to regulate non-profit and for-profit distance education programs differently, despite documented abuses by for-profit colleges.

Although the Department’s proposal would require SARA, or any similar agreement, to preserve a state’s ability to apply and enforce its own “consumer protection” laws, it would nonetheless permit reciprocity agreements that preempt other state laws, including those regulating the for-profit college sector. This discrepancy is already having a negative impact on states that have attempted to pass new legislation aimed at reining in the abuses of the for-profit college industry since joining SARA.

For example, last year, the State of Maryland passed a bill prohibiting for-profit colleges and career schools from enrolling students if, upon graduation, the student would not be eligible for licensure in their field.¹³ Maryland’s state legislature decided to pursue this legislation after a lengthy 2015 report by the Maryland Consumer Rights Coalition documented widespread abuses by for-profit colleges.¹⁴

However, because the state also adopted SARA, these reforms are not applicable to out-of-state for-profit distance education providers. This both undermines Maryland’s authority by substituting the judgment of the compact’s authors for their own, and creates two separate classes of protection regarding for-profit college students in the state – one for those who attend brick and mortar schools, and can therefore be assured that their programs are properly accredited, and one for distance education students, who do not have the same protections.

¹¹ NC-SARA, *supra* note 9, at 4.

¹² *Id.* at 9.

¹³ S.B. 0427, 2016 Reg. Sess. (Md. 2016).

¹⁴ MARCELINE WHITE & RENEE BROWN, MARYLAND CONSUMER RIGHTS COALITION, MAKING THE GRADE? AN ANALYSIS OF FOR-PROFIT AND CAREER SCHOOLS IN MARYLAND 2-4 (2015), available at <http://www.abell.org/sites/default/files/files/ed-forprofitschools815.pdf>.

Institutions that participate in reciprocity agreements are approved for participation by their home state, and other states must accept that approval – regardless of the effectiveness of the home state’s oversight.

We are also concerned that the Department’s proposal would sanction reciprocity agreements that require member states to accept all institutions operating under the agreement into their state, even if that state’s licensing scheme would not have allowed a particular school or sector to operate there. States that are concerned about specific institutions should not be forced to allow them to enroll students, even if the institution has been approved to participate in the compact.

For example, the University of Phoenix is a participant in the SARA compact through its home state of Arizona. Despite investigations by state attorneys general,¹⁵ the Securities and Exchange Commission,¹⁶ and the Federal Trade Commission,¹⁷ as well as negative actions by the Department of Defense,¹⁸ the institution is still approved to enroll distance education students in any SARA member state – even if that state has documented abuses by the institution.

State approval boards and regulatory schemes are not identical from state to state, and the standards that SARA members agree to follow (outlined by the SARA Standards and Procedures document and those adopted by the Council of Regional Accrediting Commissions (C-RAC))¹⁹ are insufficient for evaluating the integrity of a program. States should be encouraged to regulate above that floor and, more importantly, should be able to reject institutions that do not meet their higher standards.

Instead of accepting all institutions participating in the compact, states should be able to approve only one institutional sector for distance education – or withdraw approval, on a case-by-case basis, for schools they believe will not provide quality services to students in their state. The final rule should permit states to have the final say regarding which institutions or institution types are enrolling their students, without having to withdraw from a reciprocity agreement altogether simply because they seek to withdraw approval for particular schools.

The Department’s proposal would allow reciprocity agreements to determine the final forum for resolving complaints, effectively ceding the authority and oversight of a student’s home state and placing too great of a burden on the complaining student.²⁰

Under the Department’s proposal, complaints from students against their institution

¹⁵ Apollo Educ. Group, Inc., Current Report (Form 8-K), at 2 (Aug. 7, 2015).

¹⁶ Apollo Educ. Group, Inc., Current Report (Form 8-K), at 2 (Apr. 19, 2012).

¹⁷ Apollo Educ. Group, Inc., Current Report (Form 8-K), at 2 (July 29, 2015)

¹⁸ Apollo Educ. Group, Inc., Current Report (Form 8-K), at 2 (Oct. 7, 2015).

¹⁹ NC-SARA, *supra* note 9, at 4.

²⁰ *Id.* at 9.

would initially be filed with the institution itself. If the complaint could not be resolved at the institutional level, the student would then be able to make a complaint to the portal agency in the institution's home state – and the agreement could dictate that the school's home state has final authority to resolve complaints.

Reciprocity agreements require a delicate balancing of institutional efficiency and the right of students to fully and fairly pursue a claim against an institution that has defrauded, misled or otherwise wronged them. Unfortunately, the complaint process proposed here would tip the balance too far in the favor of efficiency.

A student seeking resolution of a complaint is not likely to have the institutional knowledge or resources to pursue that complaint out of their home state. The requirement is not only overly burdensome to students; it's reminiscent of arbitration agreements that force the plaintiffs to travel to the preferred forum of the defendant. Unlike those students who ostensibly "agree" to arbitration in their enrollment agreements, however, students attending a participating SARA institution did not agree – even nominally – to the complaint process outlined in the compact.

States must not only be able to enforce their state laws; they must also be responsible for the students and taxpayers who live, work, and attend school in their states. That responsibility must include handling complaints about the institutions of postsecondary education they have authorized to operate – whether that authorization is via a reciprocity agreement or not.

The final rule should ensure that a student's home state has final authority over resolving complaints. Furthermore, students should not have to file a complaint with the school first – they should be allowed to go directly to their relevant state agency to file a complaint against a school.

Accreditation and Disclosures

We have grave concerns that the Department's proposal relies on school-provided disclosures to protect students seeking to enroll in programs intended to provide prerequisite training for occupations that require a certificate or license, but which do not meet the programmatic accreditation standards of the student's state. The proposal requires distance education providers to disclose whether such programs meet the relevant requirements in a student's home state only if the school has made such a determination, and requires that the school obtain "acknowledgement" from the student during the enrollment process that the program will not meet the requirements for certification or licensure in that state. However, the proposal does not require distance education providers to ensure educational quality by actually *meeting* the relevant standards in a student's home state for professional certification or licensure.

Moreover, the proposal does not even require the school to *make a determination* as to whether it meets the requirements in an applicant's state before proceeding with enrollment. As compared to its potential students, schools have an enormous advantage in

making such a determination. The burden should rest with the school to determine the crucial fact of its compliance with a state’s licensure or certification requirements.

As we have seen in multiple contexts, schools may pressure students to sign up for programs while burying important information, such as mandatory arbitration clauses or waivers, into the fine print of an enrollment contract. The proposed disclosures are unlikely to be effective in preventing the kinds of deceptive practices that have led to widespread student harm, followed by enforcement actions and Department rulemakings after the fact to clean up such abuses. Instead of simply allowing schools to provide disclosures, the Department can and should prohibit institutions from enrolling students in states where graduates would not be eligible for licensure or certification.

However, if the Department chooses to allow students to enroll in distance education programs that are not properly accredited, the Department should at least require that schools make determinations regarding programmatic accreditation all states where they operate before enrolling students into programs in those states. The rule should also require schools to obtain a handwritten note from all students prior to enrollment explaining, in their own words, their reasons for proceeding despite acknowledging that the program lacks proper accreditation. The Department considered requiring schools to obtain a “written acknowledgment” from each student prior to enrollment in an earlier draft of the proposal – and it did not exempt schools from making determinations as to whether the programs meet the relevant requirements, as the proposed rule does here.²¹

Conclusion

Students enrolled at distance education programs need fair treatment from their schools, and proper oversight from state and federal government, in order to realize the opportunities they seek through postsecondary education. It is crucial that the Department set ground rules to promote the best interests of students, not simply to ease friction in the authorization process for schools.

We appreciate the opportunity to share our views, and look forward to working with the Department as it finalizes the rule.

²¹ See U.S. Dep’t of Educ., Negotiated Rulemaking 2013-2014, Program Integrity and Improvement, Meeting 3, Issue Paper #2 – State Authorization Distance Education 4 (2014), *available at* <http://www2.ed.gov/policy/highered/reg/heardulemaking/2012/programintegrity.html> (proposed 34 C.F.R. section 600.9(d): “Notwithstanding paragraphs (a), (b) and (c) of this section, an institution is not considered to be legally authorized for purposes of institutional eligibility for funding under the HEA with respect to programs offered in a State if graduates from those programs are not eligible to receive certification or sit for the licensure or certification examinations necessary for the graduates to obtain employment in the State in the occupation for which the program is intended, unless the institution obtains written acknowledgement from each student before enrollment that graduation from the program will not enable the student to obtain employment in that State.”).

Sincerely,

Whitney Barkley

Christine Lindstrom

Suzanne Martindale