August 24, 2016

The Honorable John B. King, Jr.
Secretary of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue SW
Washington, DC 20202

Re: Notice of Proposed Rulemaking, 81 Fed. Reg. 48,598 (July 25, 2016)
RIN 1840-AD20; Docket ID ED-2016-OPE-0050
Comments on proposed amendments to 34 C.F.R. § 600, § 668

Dear Secretary King:

Thank you for the opportunity to comment on the Department of Education's proposed rule on state authorization. Our comments discuss the need to ensure the ability of states to adequately protect consumers enrolled in distance learning programs both within and beyond interstate reciprocity agreements, as well as the processes through which schools should be required to disclose pertinent information to students. As such, we recommend changes to achieve the following objectives. (Specific regulatory language is attached.)

1. **Ensuring applicability of state laws**

   For colleges, the primary benefit of a reciprocity agreement is that by going through their home state's approval process they are automatically okayed to enroll students in other states, avoiding the need to await approval through multiple state processes. While it is appropriate for states to recognize each other's approval processes, reciprocity should not become a stalking horse to exempt online colleges from state consumer protection laws that apply to brick-and-mortar colleges. By ensuring that states in a reciprocity agreement are not prevented from applying their consumer protections to online colleges, the NPRM makes the right distinction. We recommend clarifying that distinction by defining "consumer protection laws" and adding "laws of general application."

   In the absence of a reciprocity agreement, the NPRM is clear that students, to be eligible for Title IV aid for an out-of-state online school, must be able to seek and receive action on their complaints from the authorizing agency in their state of residence. We support this requirement. However, complaint-handling is inadequate if the state does not have the ability to enforce its decisions. We recommend language clarifying that the state's process must be able to ultimately lead to denying the institution's authority to enroll residents of that state.

   Whether an institution is covered by a reciprocity agreement or not, the Department has an interest in ensuring that all students on Title IV aid are subject to robust state

oversight. Online programs are particularly vulnerable to abuse. When oversight is inadequate, students who are victimized will seek redress through defense-to-repayment on federal loans, creating additional liability for the federal government. State consumer protections can prevent many of the abuses in the first place.

2. **Preventing a race to the bottom**

   While reciprocity agreements reduce burdens for both institutions and states, they can also lead to a race to the bottom as online institutions relocate or curry favor with home-state regulators, leading to inadequate oversight. Meanwhile, other states are stuck because they are unable to prevent a problem college from enrolling their state residents due to the reciprocity agreement. While the state can threaten to withdraw from reciprocity altogether, the threat will ring hollow because its own institutions, which benefit from the reciprocity, will vigorously oppose it. The state is trapped: a predatory college is enrolling state residents and the school's home-state regulator is not addressing the problem, but the distant state is prohibited from acting due to the reciprocity agreement. To prevent this problem, reciprocity agreements must include a process that allows a state to withdraw approval of an out-of-state institution on a one-by-one basis, with notice to that institution. This change actually reduces the chances that a state will need to use that authority, strengthening the reciprocity agreement by making a race to the bottom less likely.

3. **Recognizing that for-profit colleges pose greater hazards**

   State and federal laws treat for-profit entities very differently from nonprofit and public entities. While the governing boards of for-profit entities may spend their revenue virtually without restriction, including taking the money for themselves, the corporate structure of public and other nonprofit entities is designed to provide built-in protections against self-interest. The structural difference results in contrasting behavior by colleges, with for-profit colleges far more likely to engage in predatory practices. Some states may not wish to adopt reciprocity that recognizes the approval of for-profit colleges by other states. For-profit college lobbyists, however, have insisted that reciprocity agreements adopt the fiction that for-profit institutions are the same as nonprofit and public institutions. States should not be forced by a reciprocity agreement to accept all of a state's approvals without regard to sector. We are recommending a provision that would require reciprocity agreements to allow states to adopt reciprocity for public and nonprofit colleges without automatic inclusion of for-profit companies.

4. **Improving the effectiveness of disclosures**

   Too often, problems that have been identified by states and accrediting agencies are not known to the colleges' students or to consumers considering enrolling at the colleges. We support the NPRM's attempt to address this information gap by requiring disclosure of adverse actions by states and accrediting agencies. Disclosure, however, is frequently

not effective because of the method or timing of delivery, the use of jargon or legalistic language, or an overwhelming amount of information.[i] For the purpose of disclosure to be achieved, the Department needs to take steps to refine the quantity and quality of the communications. To improve the effectiveness of the disclosures, therefore, we recommend the Department provide additional sub-regulatory guidance regarding the method of delivery of the disclosures, recognizing that different types of adverse actions will likely call for different levels of disclosure.

5. **Creating a presumption against programs that fail to meet occupational licensing requirements**

   The NPRM also uses disclosure in its attempt to address situations in which a college's program does not satisfy the occupational licensing or prerequisites in the state where the student lives. In these situations, disclosure is not an adequate or appropriate solution. The regulation should generally *prohibit* using Title IV funds for programs that do not meet state requirements for the occupation, allowing for exceptions only when a consumer has provided the specific, personal reason he or she is seeking to enroll in a program that does not qualify them for the occupation in the state where they live (for example, an intention to relocate).

Thank you for the care and attention you have shown in developing these proposed regulations.

Sincerely,

American Federation of Teachers
Center for Responsible Lending
Center for Public Interest Law, University of San Diego
Children's Advocacy Institute
Consumer Action
Consumers Union
East Bay Community Law Center
Faculty Forward Network
Generation Progress
Higher Ed, Not Debt
The Institute for College Access and Success
League of United Latin American Citizens
Legal Services –NYC
MFY Legal Services, Inc.
National Consumers League
New York Public Interest Research Group
Project on Predatory Student Lending, Legal Services Center of Harvard Law School
Public Counsel
Public Law Center
Service Employees International Union

United States Public Interest Research Group
Veterans Education Success
Veterans Legal Clinic, University of San Diego
VetJobs
Western New York Law Center

David Halperin, Attorney & Counselor
Robert Shireman, The Century Foundation
Margaret Mattes, The Century Foundation

Attachment: Recommended changes in regulatory language

Recommended changes in regulation

Changes are from the NPRM language: additions are underlined, deletions are stricken out.

Amend § 600.2 **[See Objectives 1, 2, & 3]**

"State authorization reciprocity agreement. An agreement between two or more States that authorizes an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence courses to students in other States covered by the agreement and which does not prohibit a participating State from enforcing its own (a) does not require a state to waive its laws of general application or its consumer protection laws; (b) allows a State to participate in the reciprocity agreement only with respect to public and nonprofit institutions; and (c) allows a State to take an appropriate action regarding an institution, notwithstanding the institution's approval under the reciprocity agreement."

***"Consumer protection laws*. State laws specifically applicable to institutions of higher education regarding disclosures, the contents of any documents provided to students, prohibited practices, refunds, cancellation rights, student protection funds or bonds, and private causes of action."**

Laws of general application. State laws, other than consumer protection laws, with which an institution must comply in order to offer a program in a State, regardless of whether it is covered by a state authorization reciprocity agreement.

Appropriate action regarding an institution's approval. Includes any action for violation of the State's laws of general application or consumer protection laws pursuant to the State's laws. "*Appropriate action on complaints*. Procedures responsive to complaints filed by the state's residents, by an agency with the authority to limit or suspend an institution's authorization to enroll residents of the state."

Delete § 668.50 (b)(7) and (c)(1)(i) and (c)(2) [See Objective 4]

Add § 600.9(c)(3) [just before 600.9(d)] [See Objective 5]

"(3) If an institution described under paragraph (a)(1) of this section offers postsecondary education through distance education or correspondence courses, its programs must meet the applicable educational prerequisites for professional licensure or certification for the occupation for which the program prepares students to enter, in the student's state of residence, unless prior to enrollment the student affirmatively states in writing, in his or her own words, that he or she knows that the program does not meet the state requirements, and explains the reason he or she is seeking to enroll in the program."

Add *§* 668.50(d) [See Objective 4]

"(d) Adverse action disclosures. Disclosures regarding adverse actions initiated by a State or accrediting agency shall be prominent, clear and concise, and in a format developed by the Secretary. The Secretary shall ensure that the disclosures are readable at a 6th grade level."

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[i] Jesse Eisinger, "The Trouble With Disclosure: It Doesn't Work," Propublica, February 11, 2015, https://www.propublica.org/thetrade/item/the-trouble-with-disclosure-it-doesnt-work. See also Yannis Bakos, Florencia Marotta-Wurgler and David R. Trossen, "Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts" (2014), *New York University Law and Economics Working Papers*, Paper 195, http://lsr.nellco.org/nyu_lewp/195.