

August 24, 2016

Sophia McArdle
U.S. Department of Education
400 Maryland Ave, S.W.
Room 6W256
Washington, DC 20202

Scott Filter
U.S. Department of Education
400 Maryland Ave, S.W.
Room 6W253
Washington, DC 20202

Dear Ms. McArdle and Mr. Filter:

On behalf of the higher education associations listed below, I write to offer comments on the Notice of Proposed Rulemaking (NPRM) regarding state authorization for institutions of higher education that offer distance education and state authorization for foreign locations of domestic institutions that was published in the Federal Register on July 25, 2016 (Docket ID ED-2016-OPE-0050).

It is critical that meaningful oversight of institutions is in place to guarantee that both federal funds and students' interests are protected. The NPRM addresses a number of concerns our members had with the initial program integrity NPRM, and seeks to better inform current and prospective students about the programs in which they enroll. In particular, we appreciate the Department's recognition of state authorization reciprocity agreements as a means to accomplish that function for more than 1,000 institutions located in more than 40 states, although many institutions are located in non-SARA states and will therefore still need to go through a separate process. We offer our comments in order to both clarify and improve the NPRM as proposed. Ultimately, we would like to work with the Department to ensure that this regulation presents a streamlined system that maximizes accountability and educational capacity, while minimizing unnecessary burdens for students and institutions. We do have strong concerns with some of the requirements relating to foreign locations of domestic institutions.

There are a number of areas in which the NPRM should be improved by adding specificity or amending a proposal. These include: the confusion that arises from instances in the NPRM that do not appropriately distinguish between educational "programs" and "courses" that are offered via distance by domestic institutions; how authorization to operate additional locations and branch campuses physically located in foreign countries is handled; the disclosure of information related to "adverse actions" by accrediting agencies and states; and the feasibility of, and related burden associated with, institutional disclosures regarding state complaint processes and professional licensure requirements. Each of these is discussed below.

The NPRM aims to clarify the criteria for Title IV eligibility of domestic institutions offering distance education. Title IV eligibility is determined at the programmatic level

and not at the level of individual courses. Indeed, the Department recognizes this at times throughout the NPRM by referring to postsecondary educational programs provided through distance education or correspondence courses. In other parts of the NPRM though, the Department states that an institution that “offers postsecondary education through distance education or correspondence courses to students in a State in which it is not physically located” is required to obtain state authorization in order to have institutional Title IV eligibility within that state.

This language would be problematic for institutions that are likely to interpret it to mean that they need state authorization if they offer individual courses via distance that are outside a program, such as extension courses, free online courses or continuing professional education courses, as well as courses that are not part of a Title IV-eligible program. Additionally, institutions are likely to interpret the NPRM to require state authorization if they provide distance education courses as part of a Title IV-eligible program. For example, consider a residential student who returns home to a different state for the summer, and takes an on-line course that is part of his or her residential program. The NPRM suggests that the institution would need state authorization from the student’s home state. It is likely that the Department’s intent in the NPRM is consistent with a focus on the programmatic level. To correct this, the Department should amend language regarding eligibility to explicitly reference postsecondary educational programs, and not courses, throughout the NPRM and make absolutely clear that non-Title IV eligible offerings are not under the scope of the proposed regulations.

We are also concerned with the requirements for obtaining documentation of an institution’s authorization to operate a physical location in a foreign country from an “appropriate government authority.” While this might seem a sensible requirement on its face, in practice it would leave institutions in a likely impossible position of attempting to determine the appropriate authority amidst multiple levels of government, often in countries in which there is no formal governmental process for oversight of foreign or private institutions. It is also possible that foreign governments may see United States-required authorization as a revenue source and charge institutions significant sums of money for their required approval. Foreign governments would have significant leverage to demand such sums from institutions.

The additional requirement that an institution’s documentation of their authorization to operate must also include a statement by the foreign government that the government “does not object to those activities” raises additional problems. It is easy to imagine circumstances in which a domestic institution may be operating abroad in full compliance with all relevant laws and regulations, but the government may object to how specific topics are taught. For example, foreign governments may condition approval based on changes in curriculum, such as revising history to be more favorable to that country. With the other provisions that require notification to, and approval of, foreign additional locations and branch campuses by relevant accreditation agencies and state governments, this requirement is unnecessary to protect student interests and

is likely to cause significant problems for institutions operating abroad. We would ask that you remove this provision from the NPRM.

There are a number of additional concerns related to new requirements on institutions related to the disclosure of information. As proposed, new §668.50(b)(4) and §668.50(b)(5) would require an institution to disclose any adverse actions a State entity or an accrediting agency has initiated related to the institution's distance education programs or correspondence courses for a five calendar year period prior to the year in which the institution makes the disclosure.

While we appreciate the intent of the disclosure, we have serious concerns about the practicality of the proposal—particularly related to state actions. While “adverse action” is a term of art with an understood meaning among accrediting agencies, it has no common meaning among state agencies, and should not be used in this context. As currently drafted, the language is so broad as to potentially include any action by a state, even if it has no impact on a student's educational experience. Further, relying on a patchwork of State policies and precedents could lead to significant confusion among institutions and states related to regulatory compliance. As a result, students may be provided with inconsistent or contradictory information based on evolving definitions and legal interpretations. To correct this, the Department should provide a clear, concise and specific definition of the narrow range of actions taken by state agencies that would merit disclosure by an institution, targeting those disclosures to actions regarding findings of fraud or consumer abuse.

Finally, while it is sensible that students be informed of available avenues within a state to address legitimate complaints regarding possible institutional malfeasance, the system proposed for doing so in the NPRM is likely to lead to greater confusion for students and institutions. As currently proposed, institutions participating in reciprocity agreements would need to identify the appropriate entity for handling complaints within the state in which they're physically located. Institutions without existing reciprocity agreements (or serving out-of-state students residing in states not covered by reciprocity agreements) would need to inform students of the appropriate entity to address student complaints within that student's state of residence. It is also unclear what an institution's obligations are if a state lacks an appropriate complaint process, and whether that precludes an institution's ability to enroll students from that state. We would propose that a simpler solution would be for the Department to maintain a list of acceptable state complaint processes and for institutions to make that list available to out-of-state students. A similar approach would also improve the disclosure requirements for state standards for professional licensure, with the added benefit that a centralized source of information would ensure consistency and accuracy in disclosures for all students and more comprehensive information on professional requirements for any student who may wish to work in a state different from the one where he or she is attending school.

Thank you for the opportunity to comment on this NPRM. We appreciate your attention to our concerns.

Sincerely,



Molly Corbett Broad
President

MCB/ldw

On behalf of:

American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Council for Christian Colleges and Universities
Council for Higher Education Accreditation
EDUCAUSE
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
UNCF