

Issue: Complaint Systems and Governance in State Authorization
Statutory Cites: Section 101(a) of the Higher Education Act of 1965, as amended (HEA)
Regulatory Cites: 34 CFR 600.2 and 600.9
Submitted by: Dr. Robert Anderson

1. Summary of Proposal:

In this proposal, we provide alternative language on the governance of State authorization reciprocity agreements and their complaint systems. We support the Department’s language on complaints with modest changes to better account for student mobility. On governance, we understand the Department’s concerns that the current governance of SARA, and NC-SARA’s role in the State-led policy process, could leave the appearance of potential conflicts-of-interest that subvert the will of the States. We are open to discussing potential approaches – consistent with the Department’s statutory authority to regulate State authorization reciprocity agreements – that address these concerns.¹

The governance of SARA is complex and distinct from NC-SARA’s governance. SARA is governed by participating States in partnership with the regional interstate higher education compacts² and coordinated and overseen by NC-SARA. NC-SARA is to maintain a limited role within the overall governance of SARA. Currently, NC-SARA plays a role in the SARA policy modification process of providing final approval of policies adopted by all four regions (with States voting through their regional compacts). The understanding and practice of SARA partners (including States, regional compacts, and NC-SARA) has been that NC-SARA’s position as the final vote on a policy proposal is not to function as a veto, but as final assurance that such changes are legally and fiscally supported. We recognize that this role causes concern because NC-SARA could, theoretically, subvert State intentions. We propose eliminating this role.

In sum, collectively the SARA partners share the Department’s stated goal, which we interpret as ensuring a State authorization reciprocity agreement is defined by States with NC-SARA playing a supporting role. We look forward to working with all of the constituencies represented on this negotiating committee to refine proposals and are open to modifications to the language proposed below. We believe this language, operating in the current SARA governance structure, will address the Department’s concerns.

2. State Authorization Reciprocity Agreements (600.2 and 600.9)

The proposed regulatory language attempts to do the following:

1. Ensure that States lead and control reciprocity agreements and are the final arbiters of substantive policies.

¹ We noted that during negotiators’ discussion, some commenters suggested a broad and nearly universal Departmental regulatory authority that goes beyond what is intended in the statute and supported by existing case law.

² The regional compacts are agencies or bodies corporate of their member states. Their boards are generally gubernatorially-appointed and they are firmly in state control. Negotiators can provide additional information if desired.

2. Ensure necessary information related to complaints is communicated to appropriate State entities and clarify any inconsistencies related to a student's location.

We also note that it may be appropriate to discuss moving most of the regulatory language from the Definitions section (600.2) to the State Authorization section (600.9) for clarity and consistency.

Proposed Regulatory Redline

§ 600.2 Definitions.

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 located in other States covered by the agreement. ~~and cannot prohibit any member State of the agreement from enforcing its own general-purpose State laws and regulations outside of the State authorization of distance education.~~

[NOTE: We propose moving all policy language to Section 600.9. Our response to the Department's proposal at 600.2(1-4) and the language struck above are included in 600.9(c)(3)(i & ii) below.]

§ 600.9 State Authorization.

c. (3) A State authorization reciprocity agreement must:

- (i) Adopt a State-led process through which participating States can propose, and collectively adopt, modify, or eliminate substantive policies of the agreement, including policies on State and institutional participation and the scope of reciprocity. Such a process, or State-adopted policy modifications thereof, cannot be overruled by any external entities that administer the agreement.
- (ii) Allow any member State of the agreement to enforce its own general-purpose State laws and regulations outside of the State authorization of distance education.
- (iii) Include a process for communicating information about complaints related to State authorization and the reciprocity agreement's policies to the State in which a student is located in accordance with (c)(2) (i-iii) of this section including time of the student's initial enrollment or if there has been a formal receipt of information from the student, in accordance with the institution's procedures, that the student's location has changed to another State.
- (iv) Permit the member States responsible for receiving and providing a final determination on a student complaint, as defined by the agreements' policies, to, at the State's discretion, accept, investigate, and/or resolve complaints about an institution without the student first going through the institution's own procedures for resolution of grievances under limited circumstances. Reasons for executing State discretion include, but are not limited to impracticability, impossibility, inaction by the institution, and possible harm to the student.
- (v) Ensure that complaints received by States about institutions subject to the State reciprocity agreement are communicated to the organization(s) that administer(s) the agreement. The organization(s) must make information received on complaints public at least annually, including but not limited to the number and type of complaints by institution that is subject to the State reciprocity agreement.

- (vi) Ensure that complaints alleging criminal offenses or violations of a State’s general purpose laws, including but not limited to fraud, misrepresentation, and harassment may be made directly to appropriate State agencies in the institution’s or student’s home State.

3. Rationale

Governance.

Our substantive proposals address the Department’s fundamental concern that “NC-SARA’s board...has veto power over any proposed changes to SARA policy – potentially further stifling States’ ability to improve consumer protections for SARA institutions.” While it is true that SARA policy changes must receive approval from States in all four regions and the NC-SARA Board, the intention was never that the NC-SARA board would use this as a veto and our proposed regulation would eliminate that possibility by removing the requirement that the board of NC-SARA approve changes.

We have concerns about the Department’s approach, including that it is overbroad, arbitrary, and would prevent numerous highly-qualified individuals who are obviously not beholden to institutions from serving in these important roles. Additionally, it would fail to address the Department’s central concern. We can conceive of numerous other governance arrangements that would be compliant with what has been proposed by the Department but would readily allow for the potential conflicts it has identified.

Our proposal would build on an existing State-led policy modification process that received praise from States, organizations represented on this Committee, and other SARA critics. The proposed language would prevent an entity administering the agreement from overruling the collective will of the member States.³

Complaints. The new language ensures that the complaint information is shared between appropriate States. When an institution has formally received information that a student has moved from the State in which they were located when first enrolled, the complaint information must be shared with the new State instead. The initial State no longer has jurisdiction to provide appropriate input or action for the resolution of the complaint. The proposed language mirrors that found in [34 CFR 600.9\(c\)\(2\)\(i-iii\) regarding student location](#).

State complaint processes, as required by 34 CFR 600.9(a), vary as to the process to accept complaints, with language ranging from “encouraging or recommending” that the student pursue the institution complaint process before contacting the State agency, to “exhausting” all institutional processes first and many policies in between.⁴ This proposed language honors those State differences by providing that a State authorization reciprocity agreement must offer states the discretion to accept the complaint without first seeking institutional resolution under circumstances that honor State laws and practices.

³ We also note that through this process, States, rather than NC-SARA or the Federal Government, can determine the extent of reciprocity, and specifically whether member states should be able to enforce their own education-specific authorization requirements on out-of-state institutions, as proposed by Negotiator Fast.

⁴ Negotiators will be happy to provide more detailed research on the range of policies if requested.

We also concur with the Department that reporting and making public the number and type of complaint is important, and with negotiators who raised concerns about complaints alleging criminal behavior.⁵

⁵ Current SARA policy allows student complaints alleging violations of general-purpose laws, which would include fraud, misrepresentation, and harassment, to be made directly to States and/or appropriate authorities without engaging the institutional complaint process.