



Docket ID number ED-2018-OPE-0076

Jean-Didier Giana
U.S. Department of Education
400 Maryland Ave, SW., Stop 294-20
Washington, DC 20202

July 3, 2019

Dear Mr. Giana,

The WCET/State Authorization Network (SAN) is dedicated to serving their member institutions and organizations by providing guidance, support, and facilitation of member collaboration to understand and apply state and federal regulation requirements for the institutions' out of state activities. SAN was developed eight years ago by the WICHE Cooperative for Educational Technologies (WCET). Although SAN works collaboratively with WCET, SAN is a separate membership option for WCET members that currently serves more than 700 institutions nationwide. We are grateful for the opportunity to comment and seek guidance on proposed regulations related to state authorization of postsecondary distance education and professional licensure disclosures that were part of the recently released proposed regulations by the Department of Education.

We were very pleased that the 2019 Negotiated Rulemaking Committee, made up of key stakeholders, came to consensus on the issues presented. We believe that the subcommittees served to provide a foundation on the issues for which the main committee thoughtfully considered and developed the language found in the proposed regulations. Our comments will focus on additional guidance needed for the definition of state authorization reciprocity agreements, state authorization of postsecondary distance education, and professional licensure disclosures. Additionally, we seek direction for institutions on the implementation of the regulations that were subject to vacatur of the delay by the U.S. District Court as they relate to implementation of these proposed regulations.

1. **§600.2 Definitions.** *State authorization reciprocity agreement*

We appreciate that the proposed regulations include the definition of a state authorization reciprocity agreement. We also appreciate that the Proposed Regulations allow an institution to demonstrate compliance with state authorization regulations by participation in a state authorization reciprocity agreement. We continue to seek guidance from the department on this definition.

The definition that appears in 600.2 could undermine reciprocity and contradict the Department's stated goal of protecting institutions from "numerous sets of varying requirements established by individual States". The negotiators forwarded language that first appeared in rules proposed in December 2016. According to 600.2, a state authorization reciprocity agreement must not "prohibit any State in the agreement from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions". One view of this statement could indicate that



if a reciprocity agreement is subject to additional requirements by the state, then the practical benefits of reciprocity to institutions is at risk. Students benefit from reciprocity agreements because they provide consistent standards for oversight and increased educational choice. Rather than acting on their own, states work in concert to address problems faced by students.

WCET and SAN, as well as other commenters, have been seeking clarification on the intent of this definition since the original version of this language was released in 2016. On January 18, 2017, by enclosed letter, former Under Secretary of the U.S. Department of Education, Ted Mitchell, addressed questions raised by our organization and the National Council of State Authorization Reciprocity Agreements. Mitchell supported reciprocity by writing the following: “In other words, a distance education reciprocity agreement may require a State to meet requirements and terms of that agreement in order for the State to participate in that agreement.”¹ During rulemaking this year, the Department indicated that it supported Ted Mitchell’s reasoning.

We therefore urge the Department to use the Preamble to the Final Rules as its forum to reaffirm its support of reciprocity agreements, either using Mr. Mitchell’s language or in other clear terms.

2. §600.9 (c) State Authorization.

As a general matter, we have always supported a Federal Regulation that ties institutional participation in Title IV financial aid to compliance with state law. We support the Department’s “proposal to remove the concept of ‘residence’ from the regulations under §600.9(c) and replace it with ‘location’”. This framework matches the approach that the states take.

We appreciate that the Proposed Regulations require an institution to maintain consistent policies for determining the location of the student. This becomes increasingly important to manage program approval in a state where the program leads to professional licensure. We are pleased to see this requirement is consistent with determining location for the proposed regulation for professional licensure disclosures found at 668.43.

We seek clarification regarding how the institution determines “time of enrollment” for determining location. Is it when the student registers for classes? Is it when the student begins classes? The question arises as the student may complete the required institutional documentation while located in one state but intends to take face to face classes in the home state of the institution – where the institution activity will occur and is subject to state oversight.

Additionally, we seek clarification about when an institution revises its information on the student’s location and what constitutes a “formal receipt of information”. Per 600.9(c)(1)(ii)(C), does the student have to make a specific affirmative declaration of change of location, or can the change be part of an institution’s processes such as documentation for clinical placement affiliation agreements, internship

¹ <https://wcet.wiche.edu/sites/default/files/Ted-Mitchell-Reciprocity-Response.pdf>



location documents, or academic session registration? Do each of these documents constitute “information?” What is “formal receipt?”

We are concerned that an institution that follows a minimum review of location that is revised only through student declaration of a change of location may fall short of compliance for state regulations and SARA requirements for failing to follow the location of the student. Creating a methodical mechanism to ensure a change of location notice is especially important for a student enrolled in a program leading to professional licensure or certification as state regulations may require oversight of the program and/or require different educational prerequisites. SARA reporting requirements require annual monitoring of student location for online learning and field placements.

3. §668.43 Institutional information. Professional Licensure Disclosures (a)(5)(v) and (c)

We were very pleased with this revision to the 2016 Federal regulation relating to distance education disclosures. The 2016 Federal regulation 34 CFR 668.50 causes institutions great confusion when developing a process for compliance. We agree with the Department that disclosures are necessary regardless of modality to protect the student as a consumer.

The Department noted that removal of 668.50 eliminated duplicity of regulations, as the majority of the disclosures from 668.50 are located elsewhere in the Code of Federal Regulations. We agree, and we were pleased for the addition of Professional Licensure Disclosures to 668.43. We have always maintained that if the institution wishes to expand its programs beyond their state that it should take the responsibility to inform the student about the ability to obtain a license or certification where the student is located.

Location

We are pleased that the proposed regulation for determination of location for professional licensure disclosures is consistent with 600.9(c). However, we have the same two concerns in regard to location as it relates to implementation of the direct disclosures. First, per 668.43(c) what is the exact time and location intended for the “student’s enrollment in the program”? If a student participating in a program at the home campus of the institution enrolls in a program leading to professional licensure, when is the student considered enrolled? Is it when the student completes the registration process? Is it when the student begins the activity of the program? Is the intention of the regulation to ensure that the institution meets the educational requirements for licensure or certification for the student where the student is participating in the program?

Second, per 668.43(c)(3)(ii)(C), the same questions arise about “formal receipt of information from the student” as arose from the implementation of 600.9(c)(1)(ii)(C). Does the student have to make a specific affirmative declaration of change of location, or can the change be part of an institution’s processes such as documentation for clinical placement affiliation agreements, internship location



documents, or academic session registration? Do each of these documents constitute “information?” What is “formal receipt?”

Institutional Burden

Although this proposed regulation solves many of the concerns raised from the currently effective 2016 Federal regulation, 668.50, we continue to find that the Department greatly underestimates the time and resources needed for the institution to do the research to provide professional licensure disclosures. To indicate that the responsibility of professional licensure disclosures imposes a minimal burden on institutions is patently false. The state professional boards for most professions provide information and guidance focused directly to the prospective licensee, not the institution wishing to assess educational prerequisites. The Regulatory Impact Analysis provided in the Departments’ proposed regulations announcement presumes that one hour – per program – per state is all that is needed to complete the research. This estimation is very low and does not consider ability to find the appropriate regulations, complexity of the regulations, and ability to manage any requirements for approval by the institution as may be indicated by a state. By analogy, this is much like the state authorization compliance per state compliance dilemma, but increased by likely more than 50 professional board agencies per state. This underestimation is compounded by the work that must be accomplished by the institutions due to the recent vacatur of the delay of the effective date of the 2016 Federal regulations causing the previous disclosure format to be currently required.

Disclosures

Direction from the Department is needed to understand and implement what is required for professional licensure disclosures given the currently effective 668.50 and then to transition to new requirements as will likely be required by proposed regulation 668.43(a)(5)(v) and 668.43(c). The currently effective regulations vary in terms of the state for which the institution must provide information as well as the information that is to be provided. Institutions do not know whether to develop a process to meet the currently ambiguous and inefficient disclosure scheme for which they are unsure of compliance requirements as directed in the 2016 regulations or begin work to develop processes to meet the proposed regulations that will be more useful for students. Creation of two different process in a twelve-month span without the requested direction for the 2016 regulation is more than can be expected of the institutions to support the students. What should the institution do to sufficiently supply students the appropriate information about educational requirements for programs leading to professional licensure and certification while remaining compliant with Federal regulations? The spirit of the U.S. District Court ruling to provide consumer protection processes through disclosure cannot be accomplished without guidance from the Department.



4. Currently effective 2016 Federal Regulations that are no longer delayed due to vacatur of the delay by the U.S. District Court.

Since the release in July 2016 of proposed Federal regulations for state authorization of distance education and distance education disclosures, both WCET and SAN, as well as others, have sought guidance from the Department about the definition of state authorization reciprocity agreements, compliance by residence vs. location, institution's responsibility in the event of the failure of a state to have a complaint process, and the process for providing disclosures. Institutions wish to be compliant. However, ambiguity of language and confusion of compliance format have plagued institutions from developing processes for compliance and thus not provided student protections for which the Federal regulations intended.

The finding of an institution's failure to meet compliance requirements for the purposes of participating in Title IV programs is now a reality due to the 2016 Federal Regulations being currently effective as a result of the vacatur of the delay of those regulations. No longer can the institution wait for direction from the Department to learn of compliance requirements. The Department expressed that the delay of the regulations was due to the Department's realization of confusion in the language of the regulations and therefore delayed the effective date for the purposes of review and revision. With the U.S. District Court ruling vacating the delay, the institutions have been left with no direction for current implementation of those regulations and yet must begin to prepare for a new set of regulations per these proposed regulations. A lack of compliance direction from the Department causes the institutions to feel vulnerable to liability. We continue to seek direction from the Department about required compliance.

We thank the Department for this opportunity to seek guidance and share our comments on behalf of the SAN members. SAN member institutions wish to provide quality learning opportunities, support students, and be in compliance with Federal and State requirements.

SAN intends to provide guidance and support for the implementation of final regulations as provided by the Department. We would be very pleased to offer further assistance to the Department and to assist with communications to institutions.

Sincerely,

Cheryl Dowd
Director
WCET State Authorization Network
3035 Center Green Drive
Boulder, CO 80301
cdowd@wiche.edu
303.541.0210

Dan Silverman
Assistant Director
WCET State Authorization Network
3035 Center Green Drive
Boulder, CO 80301
dsilverman@wiche.edu
303.541.0285

Enclosure: Ted Mitchell Letter, January 18, 2017