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August 23, 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:

I was a negotiator representing legal aid organizations at the negotiated rulemaking that included state authorization of distance education programs in 2014. I appreciate the opportunity to comment on the Department's proposed rule on this topic. I am encouraged that the Department's proposal would generally require all providers of distance education to obtain state authorization in each state where they enroll students. However, I am concerned that distance education students will lack important protections under the proposed rule, for the following reasons:

- The proposal would permit state authorization through the use of interstate reciprocity agreements that restrict participating states' authority to protect their own students, as well as 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' state.

As the Department notes, there has been significant growth in the number of students enrolling in out-of-state online programs, a majority of whom enroll in proprietary schools' online programs.[1] 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.[2]

State Authorization Reciprocity Agreements

State authorization reciprocity agreements raise significant consumer protection concerns because they create a two-tiered oversight system that results in weaker protections for students

[1] 81 Fed. Reg. 48607 (proposed July 25, 2016).
[2] *See* Iowa Attorney General, *Ashford University & Parent Company Bridgepoint Education Agree to $7.25 Million Payment and 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-majo/.

in distance education programs. Reciprocity agreements enable 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.

Although the proposed rule provides that a state authorization reciprocity agreement may not "prohibit a participating State from enforcing its own consumer protection laws,"[3] this arrangement would nonetheless enfeeble an already-weak system of protecting federal student loan borrowers. There are several ways that this provision exposes borrowers to school fraud.

First, the language limits states to enforcing their own consumer protection laws, but is silent as to the definition of "consumer protection laws." Schools may not interpret this language to subject them to state laws specific to higher education, or to proprietary schools, nor to other laws and regulations of general applicability.[4] Moreover, while the Department may find it appropriate to allow schools to fulfill their obligation to obtain state authorization via a reciprocity agreement, there is no reason that such an agreement should affect the enforceability of <u>any</u> state law other than those that prescribe the process for state authorization.

Second, the language of the proposed rule extends only as far as state enforcement of consumer protection laws. Certain states have been powerful protectors of the rights of students in their states,[5] but no public enforcement agent can or should be responsible for the redress of every legal wrong that takes place within its jurisdiction. The final rule must acknowledge students' private rights to enforce their states' laws. Imagine a student in Kentucky who enrolls in an online program offered by a school in Oregon. If the school lied to the student about the cost of the program, under the proposed language, she would not have a right to seek recourse under the laws of Kentucky, the state where she lives. Assuming a small number of Kentucky students are enrolled in this program, the state cannot be expected to take enforcement action against the Oregon school. Moreover, no legal aid program—nor likely most private attorneys—in Kentucky will be able to advise her on Oregon law. And the residency requirements of most legal aid providers would disqualify her from receiving services from Oregon legal aid providers. Although public enforcement of the law is a crucially important component of a well-functioning consumer protection system, it is not a panacea, and the rule must leave a path for private enforcement of the law in the student's home state.

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[3] 81 Fed. Reg. 48616 (to be codified at 34 C.F.R. § 600.2).
[4] *See, e.g.*, 940 CODE MASS. REGS. 31 (for-profit schools); S.B. 0427, 2016 Reg. Sess. (Md. 2016).
[5] For example, over the past several years the Massachusetts Attorney General has obtained judgments or settlements against ACI, Kaplan Career Institute, Lincoln Tech, Sullivan & Cogliano, and Salter College. She has initiated ongoing litigation against Corinthian and ITT Tech. *See* Office of Attorney General Maura Healey, Consumer Information: For-Profit Schools, http://www.mass.gov/ago/consumer-resources/consumer-information/schools-and-education/for-profit-schools/.

Third, the only state authorization reciprocity agreement that currently exists, operating nationally as NC-SARA, requires as a condition of membership in a regional compact that each member state agree not to impose "fees or other requirements" on out-of-state institutions providing distance education programs in that member state.[6] This provision conflicts with the proposed definition of a state authorization reciprocity agreement even in that definition's current insufficient form.

These conditions leave students in out-of-state online programs much more vulnerable than otherwise-similarly-situated students in in-state online programs. I urge the Department to preserve states' and students' authority to apply their own laws, including consumer protection laws *and* other relevant laws, regardless of whether a school has become authorized through the operation of a reciprocity agreement.

Programmatic Accreditation and Disclosures

I am deeply concerned that the Department's proposal relies solely 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 do not meet the requirements 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 as part of the enrollment process if the school has determined 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 requirements in a student's home state for professional certification or licensure – a requirement that was considered by the Department in an earlier draft of the rule.[7] Moreover, the proposal does not require the school to determine whether it meets requirements in an applicant's state before permitting the applicant to enroll. As compared to potential students, schools have an enormous advantage in making such a determination. The burden should rest with the school offering a program to determine the crucial fact of its compliance with a state's licensure or certification requirements, and schools should be required to make such a determination before permitting students to enroll.

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. These disclosures are unlikely to be effective in preventing

[6] NC-SARA, Unified State Authorization Reciprocity Agreement § 5.1.7 (Dec. 1, 2015), http://www.nc-sara.org/files/docs/UNIFIED_SARA_AGREEMENT_2015-FINAL_Approved_120115.pdf.

[7] Meeting 3, Issue Paper 2 (April 2014), p. 4 (Proposed 34 C.F.R. § 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.").

the kinds of deceptive practices that have led to widespread student harm, followed by after-the-fact enforcement actions and Department rulemakings to clean up such abuses.[8]

For these reasons, I ask the Department to revise the proposed rule to ensure that both states and students can enforce borrowers' legal rights; to require schools to determine whether programs meet licensure and certification requirements in students' home states before permitting students to enroll; and to require schools to ensure that, when a program does not meet a state's licensure or certification requirements, schools only permit students in that state to enroll when they have an informed and clearly articulated reason.

Thank you for your consideration of these comments. If you have any questions, please contact me at tomerrill@law.harvard.edu or (617) 390-2576.

Sincerely,

Toby Merrill
Director, Project on Predatory Student Lending
Legal Services Center of Harvard Law School

[8] A recent study found that 543 of 543 undergraduates who participated in an experimental survey agreed to terms of service that included contractual assignment of the students' first-born child to the service provider, and only nine of the students expressed any concern about the clause. *See* Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet* (July 7, 2016). Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757465.