

Jean-Didier Gaina
U.S. Department of Education
400 Maryland Avenue S.W.
Mail Stop 294-20
Washington, D.C. 20202-6110

June 11, 2018

Re: Request for comments on proposed delay of the 2016 Program Integrity and Improvement – State Authorization Rule

Docket ID ED–2018–OPE–0041

Dear Jean-Didier Gaina,

We write on behalf of the National Student Legal Defense Network (“NSLDN”) in response to the proposed delay¹ of the 2016 Program Integrity and Improvement – State Authorization Rule (hereinafter “Rule”).² NSLDN is a non-partisan, non-profit organization that works, through litigation and advocacy, to advance students’ rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility. NSLDN appreciates the opportunity to comment on this proposed delay.

Because the Rule includes several important provisions to strengthen state oversight of distance education programs as well as provide students with access to critical information as they consider enrolling, it is necessary to protect the growing number of student loan borrowers who enroll in out-of-state online programs, especially at for-profit institutions. For that reason, NSLDN strongly opposes the Department’s proposal to delay the effectiveness of the Rule.

1. The 2016 State Authorization Rule Strengthens State Oversight of Distance Education Programs

The Rule requires that an institution offering distance education obtain authorization from each state in which the institution enrolls a student who receives federal student aid, if such authorization is required by that state. Alternatively, the Rule allows an institution to enter into a state authorization reciprocity agreement in order to offer distance education programs in states in which an institution does not maintain a physical location. Finally, the Rule requires any institution that offers distance education programs to document the state process for resolving student complaints in every state in which an enrolled student resides. Because the Rule creates a system for enhanced

¹ 83 Fed. Reg. 24,250 (May 25, 2018). This Rule creates new requirements for online and distance education programs, adding to the regulatory scheme already in place for brick-and-mortar schools. *See* Program Integrity Issues, 75 Fed. Reg. 66,832 (Oct. 29, 2010).

² 81 Fed. Reg. 92,232 (Dec. 19, 2016).

oversight of distance education and online programs, NSLDN opposes delaying these important provisions.

Of particular importance here, the Rule resolves a major issue with state reciprocity agreements. At the time the 2016 regulations were finalized, as well as today, the only state authorization reciprocity agreement to exist—known nationally as NC-SARA—exempted online colleges from state higher education consumer protection laws that apply to schools with a physical presence. This exemption has led to a two-tiered oversight system where students who enroll in distance education programs receive less state protection from predatory practices than their peers who attend brick-and-mortar schools. For example, students who choose to attend online programs authorized through NC-SARA can no longer benefit from the protection of state laws and regulations such as refund requirements, cancellation requirements, mandated disclosures, prohibited practices, student protection funds or bonds to reimburse students for economic losses caused by school closures, private rights of action, requirements regarding the content of key documents such as enrollment agreements and course catalogs, and student complaint procedures. In practice, this means that a student who lives in Delaware and enrolls in an online program offered by an institution physically located in Colorado cannot seek recourse against the institution using Delaware’s higher education consumer protection laws. Similarly, the state of Delaware cannot enforce its own higher education consumer protection laws against that Colorado-based institution, ceding their enforcement authority to Colorado or, if Colorado fails to take action, to NC-SARA.

The 2016 definition of a “state authorization reciprocity agreement,” however, altered NC-SARA’s prior emphasis on deregulation in the online education field. The Rule defines a “state authorization reciprocity agreement” as one between two or more states “that authorizes an institution located and legally authorized in a [s]tate covered by the agreement to provide . . . distance education . . . to students residing in other [s]tates covered by the agreement.”³ More importantly, the definition clarifies that a state authorization reciprocity agreement cannot “prohibit any [s]tate . . . from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions.”⁴ In other words, online programs offered through NC-SARA would no longer be exempt from state higher education consumer protection laws under the Rule. Likewise, states would no longer be prohibited from enforcing their own laws, allowing the student who lives in Delaware to seek help and assistance from her home state. These changes are crucial for protecting online students from abusive practices in the forty-eight states and one U.S. territory that currently participate in NC-SARA.⁵

In addition, the Rule requires institutions that offer online programs to document the complaint process in each state where an enrolled student resides. Making sure that students know where to turn for help is vital, given the number of abuses that have occurred in this sector. In fact, there is no question that robust complaint processes can provide vital information to state law enforcement. For example, following an investigation into complaints filed by online students, the California Attorney General initiated a lawsuit against Ashford University in 2017 alleging that the school

³ 81 Fed. Reg. at 92,233.

⁴ *Id.*

⁵ “SARA States and Institutions,” NC-SARA, <http://nc-sara.org/sara-states-institutions>.

“illegally misled students about their educational prospects and unfairly saddled them with debt.”⁶ By that time, Ashford had built an online empire, at one point enrolling over 80,000 students nationwide.⁷ The California Attorney General accused Ashford of making a wide variety of false and misleading statements to convince prospective students to enroll, misleading investors and the public in its filing with the Securities and Exchange Commission, and engaging in aggressive and illegal tactics to collect unpaid student debts.⁸ The lawsuit seeks restitution for California’s students, as well as civil penalties and a permanent injunction prohibiting Ashford from engaging in similar misconduct in the future.⁹ Had Ashford University’s online students who resided in California not known about their ability to complain about the school’s conduct, or not known which state entity to send their complaints, it would have been much more difficult for California to investigate and pursue justice on behalf of its students.

Given the more balanced “state authorization reciprocity agreement” definition that increases states’ ability to protect their students as well as the increase in accountability for online programs through the state complaint processes, NSLDN recommends that the Department of Education implement the important state authorization rule as planned on July 1, 2018.

2. The State Authorization Rule Provides Students with Access to Critical Information to Inform their Enrollment Decisions

In addition to increasing state oversight of distance education programs, the Rule ensures that students make informed enrollment decisions. The Rule requires institutions that offer distance education programs to provide both public and individualized disclosures to students.

First, the Rule requires online programs to disclose publicly: (1) whether the institution is authorized to provide the distance education program by the state where the enrolled student resides—or, alternatively, whether the institution’s program is authorized through a state authorization reciprocity agreement—and an explanation of the consequences, including the possibility of losing eligibility for federal student aid, if a student moves to a new state where the distance education program is not authorized, or in the case of a Gainful Employment program, where the program does not meet licensure or certification requirements of the state; (2) a description of the state complaint process or the process for submitting complaints established by SARA, including contact information for appropriate state agencies where the student resides and where the institution’s main campus is located; (3) a list of any adverse actions that a state or accrediting agency has initiated against the distance education program or the institution as a whole in the last five years; (4) an explanation of the refund policies of the state where the enrolled student resides; and (5) the educational prerequisites for professional licensure or certification for the occupation which the

⁶ Press Release, State of California Dep’t of Justice Office of the Attorney General, Attorney General Xavier Becerra Sues For-Profit Ashford University for Defrauding and Deceiving Students (Nov. 29, 2017), <https://oag.ca.gov/news/press-releases/attorney-general-xavier-becerra-sues-profit-ashford-university-defrauding-and>.

⁷ *Id.*

⁸ *Id.*

⁹ Ashley A. Smith, “Calif. Attorney General Sues For-Profit Ashford,” *Inside Higher Ed* (Nov. 30, 2017), <https://www.insidehighered.com/quicktakes/2017/11/30/calif-attorney-general-sues-profit-ashford>.

program prepares students to enter in the state where, *inter alia*, the enrolled student resides, and, if the institution makes a determination with respect to certification or licensure prerequisites, whether the program does or does not satisfy the applicable requirement or, if the institution has not made a determination for any state, a statement to that effect. These disclosures would help prospective and enrolled students evaluate the legitimacy of both the online program and the institution that offers it, preventing students from wasting time and money on programs that will not help them further their careers.

Second, the Rule requires distance education programs to make the following individualized disclosures to students: (1) prior to enrollment, any determination by the institution that the program does not meet licensure or certification requirements in the state where the student resides; (2) to all prospective and enrolled students, any adverse action by a state or accrediting agency related to the online program within thirty days of the institution learning about that action; and (3) also to all prospective and enrolled students, any determination that the program ceases to meet licensure or certification requirements of a state within fourteen days of that determination. This information would ultimately help students to assess the value of any potential degree by clarifying whether they will be able to find a job in their chosen field where they currently live.

Disclosures have limitations, of course, but their fundamental purpose is to increase information and, therefore, the quality of student enrollment decisions. Despite proposing to delay the effectiveness of the Rule, the Department agrees with this sentiment, conceding that “*the delay of the disclosures related to the complaints resolution process could make it harder for students to access available consumer protections. Some students may be aware of Federal Student Aid’s Ombudsman Group, State Attorneys General offices, or other resources for potential assistance, but the disclosure would help affected students be aware of these options.*”¹⁰ Because, as the Department acknowledges, delaying the effectiveness of the disclosure requirement will “make it harder for students to access available consumer protections,”¹¹ NSLDN strenuously opposes delaying the effective date of this Rule.¹²

3. The Department has not Provided Adequate Justification for Delaying the 2016 State Authorization Rule

- a. The comment period for the proposed delay is too short and does not permit a meaningful opportunity to comment*

¹⁰ 83 Fed. Reg. at 24,253 (emphasis added).

¹¹ *Id.*

¹² Disclosure requirements also aid regulators and civil law enforcement agencies. Numerous consumer protection government enforcement actions have been based on substantial misrepresentations made by institutions in required disclosures. Indeed, public disclosure may have other benefits. For example, as one commentator noted, “[c]onsider the detailed prospectuses that come from stocks and mutual funds. Very few individual investors read them, but they and other filings required by the Securities and Exchange Commission have resulted in a relatively clean system for the sale of company stock to the public. Investment scams are rare because company information is secured by the media, by institutional investors and their analysis, and by watch-dog groups, essentially serving as monitors on behalf of all potential investors.” Robert Shireman, “Perils in the Provisions of Trust Goods: Consumer Protection and the Public Interest in Higher Education,” *Center for American Progress*, 2 (May 2014), available at <https://cdn.americanprogress.org/wp-content/uploads/2014/05/ConsumerProtection.pdf>.

The Department’s proposal states that the reason for the short comment period is that the Rule is scheduled to take effect on July 1, 2018 and “a longer comment period would not allow sufficient time for the Department to review and respond to comments, and publish a final rule.”¹³ The Department’s purported basis for this delay includes “concerns recently raised by regulated parties.”¹⁴ However, the “recently raised” concerns arose from letters dated February 6 and 7, 2018.¹⁵ Even if the letters were a proper “catalyst” for delay, the Department has provided no explanation for why it waited more than three months after receiving these letters before publishing its notice of proposed rulemaking.

Moreover, the extremely short 15-day comment period—which included a federal holiday (Memorial Day, May 28, 2018) and six weekend days—does not permit us to meaningfully comment on this delay. The Department seems to acknowledge this fact itself, noting that proposed rules are typically open for comment for thirty to sixty days.¹⁶ Fifteen days is simply not enough time to prepare meaningful comments. The Department should permit the Rule to go into effect.

b. The Department has prejudged the outcome of this rulemaking

The comment period closes on June 11, 2018, which leaves only nineteen days for the Department to review comments and write a final rule. This timeframe is too short to meaningfully take into account comments that run contrary to the Department’s conclusions. The Department further assumes that it will implement the rule as proposed, stating “a final rule delaying the effective date must be published prior to [July 1, 2018]. A longer comment period would not allow sufficient time for the Department to review and respond to comments, and publish a final rule.”¹⁷

c. The Department provided an incomplete record

The Department relied on two letters as its basis for delaying the Rule. It provided a citation to the letter from the American Council on Education (“ACE”). But it also relied on a letter from Western Interstate Commission for Higher Education (“WICHE”) Cooperative for Educational Technologies, the National Council for State Authorization Reciprocity, and the Distance Education Accrediting Commission dated February 7, 2018. The Department did not provide a link to this second letter, nor was it included in the rulemaking docket on regulations.gov. Because the Department has not put out for comment the second letter it relied upon, the Department has made it difficult for commenters to meaningfully comment, as they do not understand the full basis for the Department’s reasoning.

d. The Department has not provided a sufficient basis for delay

¹³ 83 Fed. Reg. 24,250.

¹⁴ *Id.*

¹⁵ As discussed below, these issues were previously raised both in the 2016 rulemaking and to the Department in August and October 2017.

¹⁶ 83 Fed. Reg. at 24,252.

¹⁷ 83 Fed. Reg. at 24,250.

As a sole substantive basis for the delay, the Department has cited fears of “widespread concern and confusion” that it believes exist “in the higher education community.” The source of this statement appears to be the two letters, referenced above, rather than concerns raised directly by any regulated entity. Nor has the Department referenced receipt of any concerns from students—a constituency that the Department notes is likely to suffer from the delay. The Department’s substantive basis for the delay is simply insufficient.

As noted above, the Department relied on the ACE and WICHE letters as its basis for delaying the Rule. These letters do not provide a sufficient basis for delay, however. The ACE letter focuses not on the definition of “residency,” but on the separate issue of whether certain states have complaint processes for out-of-state institutions, which entities are required to disclose under the Rule. This issue could easily be clarified with sub-regulatory guidance. In particular, ACE, individual institutions, or the Department could reach out to California with respect to its complaint system. Moreover, ACE sought only clarification, but not delay, of the Rule.

What we believe to be the WICHE letter (which, as noted above, was not put out for public comment) in no way necessitates delay of the Rule. It further raises the issue of determining a student’s “residency,” noting only that “[a]nother area of concern is that issue [sic] is that the regulation defines ‘residence’ in a way that conflicts with state laws and common practice.”¹⁸ The letter’s authors appear to misunderstand the Rule, which, as noted above, provides that “a student is considered to reside in a State if the student meets the requirements for residency under that State’s law.”¹⁹ The Rule further provides that “[i]n general, when determining the State in which a student resides, an institution may rely on a student’s self-determination unless the institution has information that conflicts with that determination.”²⁰ To the extent that further clarification is needed, the Department could provide guidance in the form of a Dear Colleague Letter.

Finally, the Department has inconsistently described the effect that this delay will have on students. Although the Department states that “[w]e believe that delaying the final regulations would benefit students,”²¹ the Department has also boldly conceded that:

1. “As a result of the proposed delay, students might not receive disclosures of adverse actions taken against a particular institution or program.”²²
2. “Students also may not receive other information about an institution, such as information about refund policies or whether a program meets certain State licensure requirements. Increased access to such information could help students identify programs that offer credentials that potential employers recognize and value, so delaying the requirement to provide these disclosures require students to obtain this information

¹⁸ Letter from WICHE Cooperative for Educ. Tech., Distance Educ. Accrediting Comm’n, & Nat’l Council for State Authorization Reciprocity Agreements, to Frank Brogan, Acting Asst. Sec’y of Postsecondary Educ., U.S. Dep’t of Educ. (Feb. 7, 2018), *available at* https://wcet.wiche.edu/sites/default/files/WCET-SARA-DEAC-Letter-2-7-18_0.pdf.

¹⁹ 81 Fed. Reg. at 92,236.

²⁰ *Id.*

²¹ 83 Fed. Reg. 24,250-51.

²² *Id.* at 24,252.

from another source or may lead students to choose sub-optimal programs for their preferred courses of study.”²³

3. As noted above, “the delay of the disclosures related to the complaints resolution process could make it harder for students to access available consumer protections. Some students may be aware of Federal Student Aid’s Ombudsman Group, State Attorneys General offices, or other resources for potential assistance, but the disclosure would help affected students be aware of these options.”²⁴

The Department’s discussion also ignores its cost-benefit analysis from the Rule. In 2016, the Department noted that students would benefit from the Rule as the result of increased transparency, the ability to identify programs that “offer credentials that potential employers recognize and value,” the ability to make “better choice of program” because of the disclosures on licensure and certification in their state, the ability to know how to submit complaints and access available consumer protections, and the ability to understand the consequences of relocation.²⁵ The Department also previously stated that institutions would benefit from increased clarity “concerning the requirements and process for State authorization of distance education.”²⁶

e. The Department has not established “good cause” to waive negotiated rulemaking

As the Department acknowledges, all of the rules it promulgates must first go through the negotiated rulemaking process,²⁷ which can take over twelve months to complete, with negotiations being held over a three-month period.²⁸ The statute provides only a very narrow exception to this requirement, which is known as the “good cause” standard under the Administrative Procedure Act (“APA”). The Department now invokes this exception, claiming that the “catalysts” for the delay were the February 6 and 7, 2018 letters, combined with an inability to engage in negotiated rulemaking prior to the July 1, 2018 implementation deadline. These justifications are wholly inadequate. The final Rule was published on December 19, 2016, giving the Department seventeen months to perform its statutory obligation for negotiated rulemaking. As discussed below, the Department grappled with the issues raised in the letters during the 2016 rulemaking. The Department also heard about those very same issues in both August and October 2017.²⁹ Thus, the

²³ *Id.* at 24,253.

²⁴ *Id.*

²⁵ 81 Fed. Reg. at 92,232, 92,255.

²⁶ *Id.*

²⁷ 20 U.S.C. § 1098a.

²⁸ The Negotiated Rulemaking Act requires 30 days’ notice for the submission of comments and applications for membership on the negotiated rulemaking panel. 5 U.S.C. § 564(c). The Department typically holds between three and four negotiation sessions. However, where the only topic would have been delay, the Department could have held only one negotiation session, allowing the Department to proceed on an abbreviated timeline, while still fulfilling their obligations under the APA.

²⁹ Transcript of Public Hearing, Comment by Cheryl Dowd, WCET State Authorization Network, Regulatory Reform—Post Secondary Education, to U.S. Dep’t of Educ. (Oct. 4, 2017), *available at* <https://www2.ed.gov/policy/highered/reg/reform/2017/washingtondchearingtranscript.pdf> (“Second question is about compliance location. When one reads the regulation, it’s hard to determine what is the exact requirement by the regulation. There is language in regard to the use of the word reside.”); Comment by WCET and SAN (Aug. 1, 2017) to Dep’t of Educ. in response to Evaluation of Existing Regulations, 82 Fed. Reg. 28,431 (June 22, 2017), *available at*

Department had already been put on notice about any possible confusion. To the extent that the Department had concerns about certain aspects of the rule, the Department could have initiated a negotiated rulemaking on the delay much earlier. Having created the appearance of a need for speed through its own actions, the Department cannot now claim that it would not be “practicable” to comply with its statutory obligations. Its dilatory actions are insufficient for invoking the “good cause” standard under the APA.

The Department has also announced that it is reconsidering the 2016 rule more broadly. The Department states that it would be “confusing and counterproductive” for the 2016 rule to go into effect while it reconsiders the rule. However, it is, in fact, more “confusing and counterproductive” to delay the rule at the eleventh hour, failing to follow the statutorily-required procedures, after schools and borrowers have been preparing for the rule’s implementation. (In fact, only one of the so-called “catalyst” letters even requested a delay; the other sought additional implementation guidance only.) In addition, the Department claims it has “good cause” to waive negotiated rulemaking on the delay because it will complete a new negotiated rulemaking on the substance of the rule in time for a July 1, 2020 effective date. This conflates the Department’s obligations. It *must* do negotiated rulemaking on the delay but *must also* engage in negotiated rulemaking on any future changes to the substance of the rule. One is not a substitute for the other. More importantly, the Department’s desire to make substantive changes does not relieve the Department of its obligations on the delay under the APA.

4. If the Department Believes the Rule Needs Clarity, the Department Could Issue Appropriate Guidance, Rather Than Delaying the Rule

To the extent that the Department believes that additional clarity is needed, it could provide such clarity through guidance. No delay is needed.

- a. To the extent the Department believes additional guidance is needed, it could provide guidance resolving any perceived uncertainty regarding a student’s “residency”*

During the negotiated rulemaking process for the Rule, a few commenters expressed concern over how to define a student’s “residency” for the purpose of complying.³⁰ The Department responded to these concerns by clarifying that “[t]he student’s State of legal residence is the residency or domicile of a student’s true, fixed, and permanent home.”³¹ The Department further provided that a student’s residence is “usually where their domicile is located.”³² Additionally, the Department stated:

<https://www.regulations.gov/document?D=ED-2017-OS-0074-0073> (requesting clarification on term “reside” and complaint processes, particularly the eligibility of California students). We note that the Department spent significant time during 2017 on regulatory review and deregulatory reform. The Department could have analyzed these issues in August or October 2017 when they were raised and had sufficient time to comply with its statutory obligations if it truly believed delay was necessary.

³⁰ The Department extensively addressed comments on what would happen if a student relocated, 81 Fed. Reg. at 92,236, and provided clarification on the phrase “where a student resides,” *id.* at 92,249-50.

³¹ 81 Fed. Reg. at 92,250.

³² *Id.*

For the purposes of this rulemaking, a student is considered to reside in a State if the student meets the requirements for residency under that State's law. In general, when determining the State in which a student resides, an institution may rely on a student's self-determination unless the institution has information that conflicts with that determination.³³

Yet, the Department now states, without explanation or support, that residency "issues are more complex than we understood when we considered them in 2016."³⁴ That is simply not the case. Even if it were true, it would still be improper for the Department to base any delay on concerns it already considered as part of the negotiated rulemaking process.

In addition, the Department unjustifiably claims that the proposed delay will benefit students because it will potentially increase the number of online courses offered by institutions this summer. The Department asserts that many students who choose to take online classes during the summer change their residency by moving back to their parents' homes. Given the alleged uncertainty around determining a student's "residency," the Department's argument goes, institutions "may be hesitant" to offer online classes, forcing some students to forgo additional credits paid for via federal student aid. Interestingly, the Department provides no data to back up this claim. Neither of the letters cited by the Department suggest institutions are "hesitating" due to regulatory uncertainty. The Department's concern is therefore speculative and hypothetical, which cannot form the basis for reasoned decision-making.

b. To the extent the Department believes additional guidance is needed, it could provide guidance on the format for disclosures

The WICHE letter requests clarification on the required format of the Rule's disclosures. The Department typically provides guidance regarding the format for disclosures through its IFAP website. It could do so for the disclosures required in this Rule too.

c. To the extent the Department believes additional clarity is needed, it could provide guidance on the complaint system

The ACE letter sought guidance on the eligibility of students to enroll in online programs in states that do not have a complaint process for out-of-state institutions, such as California. The Department could provide guidance on the Rule's requirement that a state have a process in place to "review and [take] appropriate action on complaints."³⁵ The Department could also conduct outreach with states that appear not to have complaint processes in place to confirm whether or not that is actually the case, resolving any uncertainty about California.

* * *

For all of the reasons stated above, NSLDN strongly opposes delaying the 2016 Rule. Thank you in advance for your attention to these important issues facing student loan borrowers.

³³ 81 Fed. Reg. at 92,236.

³⁴ 83 Fed. Reg. at 24,251.

³⁵ 34 C.F.R. § 600.9(c)(2).

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Sincerely,

Robyn K. Bitner, Counsel
Martha U. Fulford, Senior Counsel