

National Council for State Authorization Reciprocity Agreements
President/CEO and Board of Directors
3005 Center Green Drive
Suite 130
Boulder, Colorado 80301

September 11, 2020

Re: Proposed NC-SARA Manual Modification Comments

Dear President Williams and Members of the Board:

Our organizations have a shared goal of ensuring that higher education students are protected from predatory schools and have access to high quality education that does not leave them with unaffordable debt, no matter whether they enroll in brick-and-mortar programs or in online education. We appreciate the consideration the Board gave to our previous comments, and hope to be a resource to the National Council for State Authorization Reciprocity Agreements (NC-SARA) leadership in this time of great uncertainty and unprecedented online enrollment.

We also appreciate the opportunity to comment on the proposed modifications to be discussed at the October Board meeting, and note that in the future, a longer comment period will help NC-SARA achieve its goal of greater engagement from key stakeholders. In addition to commenting on several of NC-SARA's proposed changes, we also reiterate some recommendations shared previously. We also reiterate our offer to discuss these recommendations further with NC-SARA staff or board members at their convenience, and our request that the Board meeting discussion allow for public participation.

Recommendations on NC-SARA Proposed Manual Changes

I. Policy Change Modification A – Provisional Status

Institutional applications to participate in NC-SARA require that school leaders agree to a list of requirements that institutions “must meet.” The proposed change to Section 3.2 would allow state portal entities to consider placing an institution on provisional status if the institution has failed to comply with the requirements to which it previously agreed. This change is framed as providing states “greater leverage to put institutions on provisional status,” though it is unclear from the document how states currently handle schools found to be non-compliant with application requirements and therefore whether this change would actually serve to strengthen or weaken existing NC-SARA requirements. Does a portal entity normally rescind an institution's NC-SARA approval once it discovers non-compliance? If so, would this change weaken standards, such that portal entities can allow institutions to continue on provisional status even when there are serious non-compliance issues that put students at risk? Or alternatively, do portal entities believe they have no authority under current NC-SARA rules to address

institutional non-compliance, such that the proposed change would strengthen states' enforcement powers by newly granting them such authority?

While we fully agree that portal entities should be monitoring institutional compliance with NC-SARA requirements, consequences for not adhering to them must not be subject to state discretion. Institutions that fail to meet NC-SARA requirements are not eligible for NC-SARA membership, whether full or provisional in status. Given the lack of clarity on these issues currently, we agree that some policy modification may be warranted. However, any clarification should underscore the importance and universality of these eligibility requirements. Leaving the question of consequence up to the discretion of the state would allow for variable enforcement, potentially incentivizing predatory institutions to forum-shop for states with lax oversight, and would ultimately undermine the meaning and utility of the requirements themselves.

Simply adding a summary sentence as recommended in the meeting materials would likely cause confusion, and encourage variable enforcement at the state level. Further, as our previous comments pointed out, because lack of compliance with regulations is an important way regulators can identify problems at an institution, any breach of NC-SARA policies should be sufficient to trigger a provisional status review at a minimum. We recommend that NC-SARA staff and the Board work with states to articulate which policy violations trigger a provisional status review, and which result in an immediate removal from NC-SARA participation. Further, we believe that this list should not only include the application requirements referenced in the proposed modification, but also any additional red flags that may indicate that a school poses a risk to students, including an investigation by law enforcement in other states. Specifically listing out the policy violations and red flags that trigger an institution's review or removal will provide more clarity to all stakeholders and encourage a consistent pattern of enforcement across all states.

It is critical that NC-SARA ensure that states are performing meaningful oversight of the institutions within their borders and that the provisional status review process yields meaningful results. Yet as the May 2020 NC-SARA Board meeting materials verified, portal entities do not consistently subject schools on provisional status to additional oversight. Therefore, NC-SARA should additionally work with states to determine a uniform set of monitoring requirements as well as a common set of restrictions that institutions on provisional status will be subject to. This will provide states with the confidence that problematic schools outside their borders are being monitored and that sufficient safeguards are in place. NC-SARA must also take responsibility for monitoring states' compliance with this process, along with other membership requirements.

II. Proposed Clarification Modification E - Discontinued Programs

This change proposes to add to the NC-SARA manual the established requirement that the institution agree to either "provide a reasonable alternative" for delivering instruction or "reasonable financial compensation for the education the student did not receive" when it discontinues a program before students are able to complete it. We agree that students harmed by program terminations should be fully compensated for their loss and/or are offered a teach-out in the same or comparable program at a fully compliant institution, and appreciate NC-SARA's attention to ensuring that application requirements are reflected appropriately in the manual. The

language as proposed, however, lacks sufficient detail to ensure students would be adequately protected if faced with program discontinuance, and we urge NC-SARA to use this opportunity to clarify the requirements.

First, the term “reasonable alternative for delivering the instruction” should be clarified to require institutions to arrange for a teach-out in the *same or comparable* program. This tracks the language of federal law applicable to teach-outs for closed schools and is therefore a concept with which both accreditors and institutions are already familiar.¹ Institutions should not be considered in compliance with this provision if they offer “alternatives” that are not the same or comparable to the program in which the student was enrolled.

Second, this provision should be clarified to allow for teach-outs only at institutions that are fully in compliance with federal law, state law, and NC-SARA policy, as well as in good standing with an institutional accreditor and any relevant programmatic accreditors. Students already harmed by the discontinuance of their program should not be at risk of being offered substandard educations by institutions that are not fully in compliance with state and federal laws.

Third, while the current application language and proposed manual revision refer to requirements for institutions to provide an alternative option for completing their program or financial compensation, it does not make clear whether the student or the institution decides which route to pursue. The manual revision should clarify that the choice to pursue financial relief or an alternative program is one for the student to make, not the institution. Students who have already been harmed by a school’s program termination should have the option to evaluate the quality of the teach-out program, the institution offering the teach-out, the cost of the new program (beyond the term already paid for), and other factors important to their significant investment. Students should not be forced to accept a teach-out, but should have the power to decide their future themselves.

Finally, the term “reasonable financial compensation for the education the student did not receive” is unclear. We recommend requiring the school to provide a refund of all amounts paid by the student to the institution. When a program is discontinued, the institution has breached its contract with the student. If a student does not enroll in a teach-out, the institution should therefore refund all amounts it received under the contract so that a harmed student can decide whether to re-enroll in another program or to forego a higher education altogether.

We recommend the following revision to address the above:

Section 3(b)(6)

The institution agrees that, in cases where the institution cannot fully deliver the instruction for which a student has contracted, it will offer the student the option of (1) a teach-out in the same or a comparable program at an institution that is in good standing with its institutional and programmatic accreditors, is unconditionally approved by the student’s home state and NC-SARA, is not on

¹ See 34 CFR §685.214. (Federal closed school discharges of federal student loans may be available to students who “did not complete the program of study or a comparable program through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school.”)

any type of monitoring status or required to provide any letter of credit by the Department of Education, and is not under government investigation for any federal or state law financial aid or consumer protection violations; or (2) a full refund of all amounts paid by or on behalf of the student or the institution.

II. Proposed Clarification Modification F – Mandatory Arbitration

In our previous comment, we raised a concern about mandatory arbitration agreements, which limit students' legal recourse if they believe they were wronged by the school. We appreciate that the NC-SARA staff considered our comments, and has included a proposed clarification citing our comments as the inspiration. Unfortunately, the proposed solution does not address the issues we raised.

Mandatory arbitration clauses are not commonly used in enrollment agreements of public and nonprofit colleges, which compose the vast majority of NC-SARA membership. However, they are widely used by for-profit schools to limit students' recourse if they have been harmed by their school, including some of the largest institutions within NC-SARA.² Although the NC-SARA manual states that "mandatory arbitration agreements do not pertain to SARA policy issues," and the proposed clarification would remove the word "issues," neither this change nor the manual limits institutions from enforcing these predatory agreements against students on other issues. As an independent organization - rather than a state compact - NC-SARA could legally prohibit mandatory arbitration clauses outright for member institutions without violating the Federal Arbitration Act, leveraging its unique position to raise consumer protection standards in online education.

Because NC-SARA prohibits states from enforcing state higher education laws aimed at protecting students, and also precludes students' states from investigating and acting on the complaints of their residents or taking action against a school for violating NC-SARA policies, it is especially important that students are protected from predatory mechanisms such as these. Our recommendation is that NC-SARA take steps to ensure that students are able to protect themselves and seek restitution when they are harmed, including by seeking redress in a court of law. By prohibiting arbitration clauses, abusive and low quality predatory schools will be less able to use NC-SARA as a shield to accountability.

We therefore urge the Board to instead prohibit institutions operating within NC-SARA from including mandatory arbitration agreements in their enrollment agreements, rather than simply limiting their applicability to NC-SARA policies. The combination of loosened federal regulation and an economic downturn triggered a boom in for-profit college enrollment after the Great Recession. The current economic crisis is likely to lead to another enrollment boom, and with the for-profit college sector now predominantly online and enrolling students from states outside of the institution's state, the risks to students are now greater. Implementing strengthened NC-SARA policies now could lessen the risks to students should a new enrollment boom occur.

² National Council for State Authorization Reciprocity Agreements (NC-SARA) (March 17, 2020). "Proposed SARA Manual Changes for the May 2020 Board Meeting." Available at: <https://zoom.us/rec/play/upEvdroqWo3GoCRtgSDV6UvW47rLPms23QcrPUPzkvmVCZVOwGhMrtDa-PKQK5Me29LAn7mt-DUTfO-?continueMode=true>.

Rather than the adopting the change proposed in the Board meeting materials, addressing our concerns could be accomplished by first adding a prohibition on enforcing mandatory arbitration clauses to NC-SARA application requirements, and second by revising the manual as follows:

Section 4.4(g)

SARA participating institutions are prohibited from enforcing mandatory arbitration clauses in enrollment agreements. Disputes between students and Institutions on SARA-related matters are intended to be resolved by the Institution's State Portal Entity or through other means. A student may, however, bring to the Institution Home State SARA Portal Entity any issue that potentially involves a violation of SARA policies, and participation in SARA in no way limits students' ability to seek legal recourse. Institutions that choose to operate under SARA accept a student's right to bring complaints about violation of SARA policies through the SARA process or under other means.

Other Urgent Recommendations for NC-SARA Given COVID-19 Crisis

As colleges across the country transition to remote learning, the role of NC-SARA is of increasing importance. Reciprocity agreements can be important tools in streamlining oversight and promoting quality educational opportunity, but only so far as the specific terms of the agreement are sufficiently robust. In the case of NC-SARA, its terms represent a net increase in the regulation of distance education in some states, but they also undermine safeguards and consumer protections in others.

We raised several concerns in our previous comment relevant to the unprecedented and uncertain times we find ourselves in, and we would like to raise those issues again for your consideration:

- **Deficiencies in State Portal Entity Capacity.** NC-SARA's theory of action rests on member states fulfilling all of the agreement's requirements and performing sufficient state oversight so that other states can trust in the quality of each others' institutions. Yet NC-SARA has acknowledged that state Portal Entity capacity varies widely, with some states so severely understaffed and underresourced that they are unable to perform the monitoring and oversight functions required of them under NC-SARA.
- **Higher Standards for Stronger Consumer Protection.** The establishment of higher standards for NC-SARA membership than those required under other regulatory schemes would set NC-SARA schools apart and help facilitate student access to the highest quality and value in online education.
- **Lack of Complaint Transparency.** NC-SARA policies require students to exhaust complaint procedures at their institution before they are permitted to raise their complaint to the state level,³ a process requirement that undoubtedly has a dampening effect on complaint submission given administrative burden as well as concerns about school

³ NC-SARA (June 30, 2020). "State Authorization Reciprocity Agreements Manual, Version 20.2," P. 30. Available at: https://www.nc-sara.org/sites/default/files/files/2020-07/SARA_Manual_20.2_Final_7.13.20.pdf.

retaliation.⁴ Although we understand that NC-SARA is taking steps to improve the complaint reporting on their website, it is necessary for NC-SARA to develop a complaint process that works well for students, requires collaboration among states, and assists in identifying problematic patterns of institutional behavior.

- **Oversight of Branch Campuses.** NC-SARA staff has provided assurances that the Portal Entities are in communication with each other regularly, and that they are able to express concerns and collaborate on responses in that way,⁵ but in the interests of consumer protection and transparency those communication and collaboration processes should be formalized.
- **Attorney General and Consumer Advocate Membership on Board of Directors.** We appreciate that following our previous comments, NC-SARA announced that there would be two openings on the Board. We urge the Board to choose a representative of a state attorney general and a consumer advocate to fill those positions, and to make those appointments as soon as possible.

We sincerely appreciate the opportunity to offer these comments, and our organizations would welcome opportunities to discuss these recommendations at your convenience.

Sincerely,



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⁴ See Department of Consumer Affairs (April 19, 2016). "Decision after Opportunity to be Heard." Available at: https://www.bppe.ca.gov/enforcement/actions/ncic_decision.pdf. ("NCIC threatened to sue or dismiss students who complained or did not give the school a good review to BPPE.")

⁵ National Council for State Authorization Reciprocity Agreements (NC-SARA) (March 17, 2020). "Proposed SARA Manual Changes for the May 2020 Board Meeting." Available at: <https://zoom.us/rec/play/upEvdroqWo3GoCRtgSDV6UvW47rLPms23QcrPUPzkvmVCZVOwGhMrtDa-PKQK5Me29LAn7mt-DUTfo-?continueMode=true>.