

Brian Hebert, Executive Director  
California Law Revision Commission  
c/o UC Davis School of Law  
400 Mrak Hall Drive  
Davis, California 95616

November 12, 2020

Subject: Interstate Distance Education and Potential State Solutions

Dear Executive Director Hebert:

The Institute for College Access & Success (TICAS) is a trusted source of research, design, and advocacy for student-centered public policies that promote affordability, accountability, and equity in higher education. We have been working on the issue of distance education in California and with respect to federal policy for several years. We write to offer our expertise and assistance as needed should you undertake to explore how California can best facilitate interstate oversight of distance education without compromising consumer protection authority or enforcement.

Although online education has become a central feature of American higher education, especially now, the challenges in assessing academic rigor and student outcomes can be even greater in online programs than in traditional programs. As the request from the Association of Independent California Colleges and Universities (AICCU) indicated, distance education is a complex issue, and one not limited to the pandemic. We share AICCU's desire to prevent unnecessary regulatory burdens for quality institutions. However, although online education has promise, it also has perils. Fueled by the availability of federal financial aid, the rapid growth of online education illustrates the need for policymakers to oversee these programs carefully.

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 the National Council of State Authorization Reciprocity Agreements (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, including California. While we have offered many recommendations for how NC-SARA could be strengthened to facilitate the provision of quality online educational opportunities across state lines while supporting robust oversight structures to ensure consumer protection,<sup>1</sup> joining the agreement as it

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<sup>1</sup> See "Going the Distance Consumer Protection for Students Who Attend College Online" (2018). The Institute for College Access and Success (TICAS). Available at: [https://ticas.org/files/pub\\_files/going\\_the\\_distance.pdf](https://ticas.org/files/pub_files/going_the_distance.pdf).  
"Oversight of Out-of-state Online Colleges: California's Students Need More Protection, Not Less" (2018). TICAS. Available at: [https://ticas.org/wp-content/uploads/legacy-files/pub\\_files/nc-sara\\_ca.pdf](https://ticas.org/wp-content/uploads/legacy-files/pub_files/nc-sara_ca.pdf).

stands today would lower protections for Californians and undermine the state’s authority and autonomy to protect its residents at a vulnerable time.<sup>2</sup>

As the October Commission staff memorandum correctly summarized, NC-SARA “sets a regulatory ceiling, above which member states cannot go. In other words, member states appear to cede their regulatory control to an external policy-making body.”<sup>3</sup> As the subsequent November Commission staff memorandum noted, it is not clear that objections to joining NC-SARA on the basis of ceding consumer protection standards can be resolved.

The lack of sufficiently high consumer protection standards is one reason why California has thus far declined to join NC-SARA. NC-SARA provides member states with next to no discretion in determining which schools may join. Further, with very few exceptions, participating schools can enroll students nationally, without limit and without concern for other states’ views.<sup>4</sup> In contrast, California law allows the state to prohibit schools, irrespective of where they are located, from enrolling Californians if the school is believed to be a risk.<sup>5</sup> Another example of how California’s standards differ from NC-SARA’s is related to student relief, standards that California has strengthened given its unique history with for-profit college abuses. California requires that out-of-state for-profit colleges pay into its Student Tuition Recovery Fund for the Californians they enroll,<sup>6</sup> but NC-SARA includes no comparable protection. As a result, Californians have greater access to financial relief if their college or even their program closes than do students from other states. Were the state to join NC-SARA, Californians would lose these protections, as the state’s more protective higher education rules would be superseded by NC-SARA’s comparatively lax ones.

Despite some common misunderstandings, the reality is that the terms of the NC-SARA agreement do not permit states to strengthen standards that apply to all schools operating in their states. For example, when Maryland lawmakers sought to close the well-known “90/10 loophole” in federal law for colleges operating in Maryland – a law (Senate Bill 294) later passed unanimously by the state legislature – NC-SARA expressed “concerns” and signaled that enforcing the law against NC-SARA participating schools based in other states could be grounds

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<sup>2</sup> For more on how the COVID-19 recession, on the heels of federal deregulation by the Trump Administration, may lead to surges in for-profit college enrollment and put students at greater risk, see: “As the coronavirus speeds colleges’ move online, what happens to oversight?” (April 14, 2020). The Hechinger Report. Available at: <https://hechingerreport.org/opinion-as-coronavirus-speeds-colleges-move-online-what-happens-to-oversight/>. “The Risk to Students in the Wake of COVID-19 and Red Flags that Authorizers Should Watch For” (July 7, 2020). TICAS and Student Defense. Available at: <https://ticas.org/wp-content/uploads/2020/07/Letter-to-States-on-For-Profits.pdf>.

<sup>3</sup> “New Topics and Priorities: Suggestion Submitted by the Association of Independent California Colleges and Universities” (Oct. 9, 2020). California Law Revision Commission (CLRC). Available at: <http://www.clrc.ca.gov/pub/2020/MM20-52s1.pdf>.

<sup>4</sup> NC-SARA Manual (2020), at 19. National Council for State Authorization Reciprocity Agreements.

<sup>5</sup> Assembly Bill 1344 (2019). California State Legislature. Available at: [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201920200AB1344](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1344).

<sup>6</sup> California Department of Consumer Affairs. “Order of Adoption.” Available at: [https://www.bppe.ca.gov/forms\\_pubs/order\\_adoption.pdf](https://www.bppe.ca.gov/forms_pubs/order_adoption.pdf).

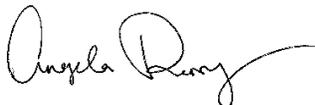
for Maryland's NC-SARA membership to be revoked.<sup>7</sup> In response, the Maryland Higher Education Commission sent a letter to NC-SARA, reassuring the organization that "the Commission has no intention of enforcing the prohibition in Senate Bill 294 against NC-SARA participating institutions." (See letter attached.) Indeed, while the bill's passage has been cited by proponents of California joining the agreement as an example of states' continued ability to regulate higher education institutions even within NC-SARA, the example is instead a cautionary tale that underscores the limits placed on states by NC-SARA membership and the resulting political forces that contribute to a regulatory chilling effect at the state level.

For these reasons, should the Commission move forward with the request to examine this issue, we support the proposal in the October staff memorandum to study the issue of interstate reciprocity broadly, rather than limit your consideration to NC-SARA.<sup>8</sup> California is well positioned to lead the charge for stronger standards for online colleges, both within California and in partnership with other states. We would be happy to offer our assistance and look forward to the opportunity to work with the Commission further as you consider this issue.

Sincerely,



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**The Institute for College Access and Success**



Angela Perry  
Senior Policy Analyst  
**The Institute for College Access and Success**

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<sup>7</sup> "A New State Bill Could Challenge Key Interstate Distance Learning Pact" (March 4, 2020). Education Dive. Available at: <https://www.educationdive.com/news/a-new-state-bill-could-challenge-key-interstate-distance-learning-pact/573513/>.

<sup>8</sup> "Interstate Reciprocity for Higher Education Distance Learning" (November 5, 2020). CLRC. Available at: <http://www.clrc.ca.gov/pub/2020/MM20-60.pdf>.