

the institute for
college
access & success

National Council for State Authorization Reciprocity Agreements
President/CEO and Board of Directors, Regional Steering Committees, and Regional Compacts
3005 Center Green Drive
Boulder, Colorado 80301

March 15, 2022

Re: Proposed NC-SARA Policy Modification Process

Dear President Williams, Members of the Board, Regional Steering Committees, and Regional Compacts:

The Institute for College Access & Success (TICAS) seeks to ensure that higher education students have access to high quality educational programs that do not leave them with worthless degrees and unaffordable debt, whether they enroll in brick-and-mortar programs or in online education programs. We have called numerous times for improved consumer protections regarding online distance education, and have recommended that decision-making authority be vested in state regulators and law enforcement; that the board be reconfigured to be more representative of stakeholders, including state regulators, attorneys general, and student advocates; and that NC-SARA take steps to increase transparency. TICAS appreciates that some of these issues are mentioned in the recent Policy Modification Process proposal.

Unfortunately, however, we believe that NC-SARA's decision-making process has structural and substantive deficiencies that are not addressed by these proposals, and, in some cases, exacerbated by the proposals. These deficiencies will require significant policy modifications and restructuring efforts, primarily focused on student needs and interests. Below we have detailed several areas in which the proposal is insufficient or needs improvement:

I. The proposed Policy Modification Process creates obstacles which will likely prevent policy changes from being approved.

Federal regulatory agencies are required to comply with the Administrative Procedures Act (APA),¹ and every state has a version of the APA that governs the practices of state regulatory entities.² These laws were designed to ensure public transparency about state agency organization, procedures, and rules; to allow for public participation in the rulemaking process; and to establish uniform standards for the conduct of formal rulemaking and adjudication. Under these provisions, regulatory agencies are required to hold notice and comment periods, which provide stakeholders and the public to make recommendations and propose amendments to draft regulatory language. Regulatory agencies must consider the public comments, and draft language is then modified based on the comments received, and rationales are released publicly regarding all proposals prior to adoption.

¹ P.L.79-404 60 Stat. 237 (1946).

² Susan Webb Yackee (2019). "The Politics of Rulemaking in the United States". Annual Review of Political Science. Available at: <https://www.annualreviews.org/doi/abs/10.1146/annurev-polisci-050817-092302>.

While we appreciate that the process in the proposed Policy Modification Process requires a public comment period, the proposal's design is flawed and does not require NC-SARA to consider comments received. Instead, NC-SARA would simply make the comments publicly available and summarize them, meaning that proposals will not benefit from the public feedback received. Because there will be no opportunity to improve policy proposals, the proposal creates a significant risk that policy proposals will be rejected without consideration by the board. Further, the proposed process requires unanimous approval by all four compacts before policy proposals are eligible for consideration, which seems likely to result in very few proposals moving forward. This structure locks in problematic policies, with limited scope for improvement or innovation. It gives any of the four regional compacts the authority to veto any proposed policy, preventing it from ever being raised for consideration by the board.

TICAS is concerned that this proposed system would result in a stymied, slow-moving, and ineffective decision-making process which would make it virtually impossible to address any of the real and substantial policy issues that face NC-SARA. We therefore recommend that the proposed Policy Modification Process be redesigned to allow for real feedback and opportunities for proposals to be modified based on public feedback, and with a priority on facilitating the consideration and approval of policy changes.

II. The NC-SARA governance structure must be revised to ensure that representatives of state regulators and law enforcement are the primary decision- and policymakers.

The proposed Policy Modification Process fails to address NC-SARA's imbalanced governance, and instead the proposed process undermines the intention of the state authorization rule by further divesting power from states and granting it to the Regional Compacts and the NC-SARA board. The program integrity triad was designed to create an overlapping system of higher education oversight, with different roles for each participant. Within the triad, states have the primary responsibility for consumer protection, and the state authorization rule specifically requires that institutions comply with state laws and receive authorization to operate in all states, including institutions operating online across state borders.

The current governance structure for NC-SARA has several fatal flaws which undermine the consumer protection intention of the state authorization rule, most notably the lack of representation and authority granted to states. The state authorization rule defines a reciprocity agreement as "an agreement between two or more states."³ However, the foundation of NC-SARA is not "an agreement between two or more states," and is instead created by a series of agreements between individual states, the regional compacts, and NC-SARA. NC-SARA "exists to coordinate the SARA work of the regional compacts,"⁴ leaving the compacts to assume the role of middle managers, collecting sizable fees in return for the responsibility of managing the agreements and acting as a buffer between states and NC-SARA. At no point in this structure do two states enter into an agreement with one another. Not only does this structure fail to meet the requirement established in the state authorization rule for an "agreement between two or more states," but it also results in stripping states of decision-making authority over the agreement.

³ 34 CFR § 600.2 - State authorization.

⁴ "Unified State Authorization Reciprocity Agreement" (Dec. 1, 2015). NC-SARA. Available at: https://nc-sara.org/sites/default/files/files/2019-07/UNIFIED_SARA_AGREEMENT_2015-FINAL_Approved_120115.pdf.

Given their role within the triad and their state authorization responsibilities, states should be the primary decision makers regarding any state authorization-related policies. Member states, not regulated entities or other third parties, should have direct control over changes in NC-SARA's policies. However, the proposed Policy Modification Process instead gives final decision-making authority to the regional compacts and the board, where the majority of the seats are held by regulated entities and other third-parties, relegating member states to an advisory role. Moreover the proposal states that regional compacts' approval processes will be based on "their respective bylaws and other internal processes," allowing compacts to determine their own process for considering state input. The proposal also requires unanimous compact approval for any policy proposal to move forward, while states have no formal role in the decision-making process.

Even with the proposed policy modification process, NC-SARA's current governance structure inherently removes decision-making authority almost entirely from the entities charged with the responsibility of state authorization – state governments – and results in an overall reduction in state autonomy and authority. The board currently has more seats filled by college and university representatives than by representatives of state regulators, giving the regulated entities themselves a larger role than states in crafting and approving new regulations.⁵ Additionally, the Regional Compacts each hold a position on the board, giving them even more power and influence over the governance of the agreement.

Further, the NC-SARA board lacks consumer protection expertise: There are no attorneys general or student advocates on the board. TICAS has previously recommended that, at a minimum, NC-SARA create four additional board positions; two for state attorneys general, and two for consumer and student advocates and representatives. This inclusion would bring fresh perspectives to the board, bring crucial expertise regarding consumer and student protection and law enforcement in higher education, and ensure that law enforcement and student-focused voices are part of the discussion. Our proposal was unfortunately rejected by NC-SARA leadership, as were several highly qualified applicants. Given the profoundly unbalanced nature of NC-SARA's system of governance, we believe modifications are needed to its governance which are much more extensive than those included in the proposed Policy Modification Process.

TICAS therefore recommends that (1) the regional compacts be removed from NC-SARA's governance structure, (2) that the reciprocity agreement be redrafted, in collaboration with consumer and student advocates and state attorneys general, with student needs as the primary focus, and (3) that member states hold the majority of seats on the governing board, including state attorneys general and regulators. Ultimately, as long as the Regional Compacts and NC-SARA board as it currently stands remain the final decision-makers, the NC-SARA agreement will continue to undermine the intention of the state authorization rule.

III. NC-SARA should comply with the same level of transparency required of other public regulatory agencies.

⁵ "NC-SARA Board Members." NC-SARA. Available at: <https://nc-sara.org/national-council-board>. (Representatives of institutions hold 9 positions, current/retired state regulators hold 5, and the compacts hold 4.)

As discussed above, so-called “Sunshine Laws” ensure public transparency into state and federal regulatory agencies. Provisions of the APA and its state counterparts mandate that meetings, records, votes, deliberations, and other official actions be available for public observation, participation, and inspection. Further, regulatory agencies are also subject to the Freedom of Information Act (FOIA) or state Public Records Acts (PRA) that require making documentation available for public review upon request.

NC-SARA leadership has at times referred to the organization as a “pseudo-regulatory agency,” recognizing that it plays a substantively similar role to other regulatory agencies within the higher education triad. TICAS appreciates that the proposed Policy Modification Process includes several public facing procedures, including a public comment period for approved policy proposals. However, the Policy Modification Process falls far short of the necessary levels of transparency essential to promote ethical standards, prevent fraud and corruption, and engender greater public trust. Given the NC-SARA’s recognition of its public regulatory function, the organization should voluntarily adopt the same procedure and disclosure policies that apply to all other higher education regulatory agencies.

Unfortunately, the proposed Policy Modification Process mandates that policy proposals be “recommended for approval” by the regional compacts and/or NC-SARA in order to be made public and eligible for public comment. It also appears that the basis for review doesn’t include consumer protection or consistency with the intent of the state authorization rule, and proposals can be rejected without any public explanation or justification. The proposal is silent regarding public deliberations, open meetings, and public record requests. We therefore recommend that NC-SARA revise the Policy Modification Process to adopt transparency requirements that are substantively similar to other higher education regulatory agencies, including a fully open and transparent rulemaking process at each stage of the process, making all initial proposals received and all recommendations regarding whether to approve certain proposals public; an open records policy; and open meetings with the opportunity for public comment.

IV. The proposed Policy Modification Process must be modified to prioritize student protection.

NC-SARA’s role affords it important opportunities to protect students from being harmed, and the policies created by NC-SARA have nationwide impact on students. However, TICAS was disappointed to see that the proposed Policy Modification Process is far more focused on achieving consensus between the regional compacts, and does not ensure students are protected from predatory institutions. For example, part (a) of the proposed process mentions “the many additional stakeholders” seemingly as an afterthought, and without any specific mention of consumer protection or the role of states in setting state authorization policy. Given the heightened risk to students, increased exponentially by the distance and anonymity of online programs, it is imperative that protecting students from harm be one of the foremost considerations for NC-SARA’s Policy Modification Process.

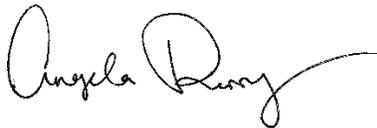
As NC-SARA has pointed out, the higher education regulatory landscape is somewhat of a patchwork. Some states have robust oversight and consumer protections and others have weaker regimes. Unfortunately, NC-SARA policy acts to create downward pressure on states that might otherwise create stronger consumer protections. By design, NC-SARA only allows states to craft protections for schools

headquartered within their borders. Thus, a state seeking to implement stronger standards creates a competitive disadvantage for its in-state institutions, subjecting them to higher standards than those faced by institutions operating online from out-of-state. Moreover, if states do try to raise standards, there are no safeguards in NC-SARA policy to prevent predatory institutions from evading the oversight by simply moving their headquarters to a state with lower standards and continuing to enroll students online. Thus, NC-SARA actually exacerbates and solidifies the state-level patchwork, and disincentivizes states from creating and maintaining tougher consumer protection standards.

We believe that all policy decisions should prioritize student protection above all other considerations, and therefore recommend that much stronger language be included in the proposal regarding the need to ensure that any policy change undertaken should benefit students. We also recommend that the “other guiding principles” section of the proposal should include language regarding the need to ensure strong consumer protections for students and emphasizing that an institution’s participation in NC-SARA is a privilege, not a right.

TICAS appreciates the opportunity to offer these comments. We would welcome opportunities to discuss the above recommendations at your convenience.

Sincerely,

A handwritten signature in black ink that reads "Angela Perry". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Angela Perry
Director of Policy & Advocacy
The Institute for College Access & Success