



**State Authorization and Distance Education
NAICU Background Information
UPDATED – December 2, 2014**

Overview

The Department of Education’s program integrity regulations related to state authorization of distance education have been a source of concern and confusion since they were first issued in October 2010. This remains the case—even though the regulations were struck down on procedural grounds by a federal appeals court in June 2012 and are no longer in effect.

Earlier this year, the Department began a new attempt to develop federal regulations in this area. A negotiated rulemaking committee appointed to consider the issue concluded its work in May 2014 without reaching agreement. Had the negotiators agreed upon a set of proposals, the Department would have published them as proposed regulations. Because they did not, Education Department officials are not bound to any of the decisions of the group. The next step in the process will be publication of proposed regulations for public comment. At this point, it is not clear when that might occur.

The upshot is that there is no current threat of a *federal* penalty for violating state distance education requirements; however, *state* laws and regulations remain in force. In fact, a significant byproduct of the Department of Education’s regulatory efforts has been an increased awareness of the variety of ways in which states regulate distance education and an increased interest in enforcement of these state requirements. Previously, many institutions had given little attention to state requirements related to their distance education offerings.

The confusing array of state requirements has also sparked interest in the development of reciprocity agreements among states. Most notably, work on a State Authorization Reciprocity Agreement (SARA) is well underway. Until the Department of Education issues a new set of proposed regulations, SARA is likely to be the focus of distance education discussions.

This Document

This background paper is intended to address the following questions:

- What’s happening with the State Authorization Reciprocity Agreement (SARA)?
- What were the major concerns with proposals put forward by the Department of Education during the 2014 negotiated rulemaking process?
- What is the current role of the Department of Education?
- What resources are available to assist institutions in identifying current state requirements and obtaining information about reciprocity activities?

What's Happening with the State Authorization Reciprocity Agreement (SARA)?

A Brief History –

Over the past few years, several organizations worked on the development of a multi-state distance education reciprocity agreement, widely known as the State Authorization Reciprocity Agreement—or SARA.

The initial version was developed by the Presidents' Forum and the Council of State Governments and distributed for public comment in May 2012. The four regional interstate compacts—led by the Western Interstate Commission for Higher Education (WICHE)—held related reciprocity discussions and developed a proposal known as WICHE-SARA. The most important distinction between the two was the governance structure. SARA established a national governance structure, while WICHE-SARA worked through the existing regional structures, with a small national coordinating board.

In April 2013, the Commission on Regulation of Postsecondary Distance Education, headed by former Education Secretary Richard Riley, built upon the previous SARA and WICHE-SARA work.¹ Its final report, *Advancing Access through Regulatory Reform*, serves as the framework for the development of SARA.

General Framework—

Individual states are able to choose whether or not to join the agreement. A state choosing to participate becomes the “*home state*” for institutions domiciled there and assumes responsibility for approving those institutions. The approved institutions can then offer distance education in all other states that are parties to the agreement without being subject to further requirements—unless the institution has a “physical presence” in another state or states.

A key component of the proposed agreement is that “*physical presence*” would be defined as ongoing occupation of a physical location for instruction or administration in a state. Currently, individual states include a wide variety and scope of activities within their definitions of “physical presence.” For example, some states regulate out-of-state institutions that advertise in the state—while advertising does not trigger regulatory action in other states. The current patchwork of requirements makes compliance with applicable state laws difficult and confusing.

Conceptually, if all states participated in such a reciprocity agreement, an institution would need approval only by its “home” state. So, institutions offering only purely online services would be subject to the regulations of just one state. If an institution has a physical presence in more than one state, those other states may regulate the in-state activity of that institution.

¹ In general NAICU believes that this report is a positive step toward addressing a burdensome regulatory situation. At the same time, we are concerned about a recommendation that relied on the Department's flawed financial responsibility composite scores as a means for determining whether or not an institution is eligible to participate in a reciprocity agreement. For additional detail, see [April 12, 2013 Washington Update article](#).

A few specifics—

Institutions need to be mindful that SARA does not address issues related to state licensure requirements. As noted on the NC-SARA site, “SARA does not deal with professional licensing board approval for programs leading to state licensing in fields such as nursing, teacher education, psychology, etc. We acknowledge the seriousness, pervasiveness and complexity of that issue, but, for now, SARA provides no solution. That is an additional challenge that will require future attention. Waiting to roll out SARA until we had that issue resolved could, in our view, delay SARA implementation by several years.”

Institutions should also be aware that special conditions are placed on “*supervised field experiences*.” Such activities would not trigger physical presence in a state only if: fewer than ten students from each institution are physically present at the same time at a single field site and they do not involve a multi-year contract between a sending institution and a field site.

Institutions will pay an annual fee to NC-SARA, ranging from \$2,000 to \$6,000—depending on full-time equivalent enrollments. States may also charge fees to in-state institutions that wish to participate.

A 21-member National Council for State Authorization Reciprocity Agreements (NC-SARA) guides SARA activities. Arthur Kirk, president of Saint Leo University, who served as the NAICU representative on the Commission on the Regulation of Postsecondary Distance Education, is a member of the national board.

Current Activities—

Each of the four regional compacts has established a SARA entity to deal with the states in its region, and each has developed its own reciprocity agreement document. There are slight variations among the four regional documents, but all are consistent with national policies and standards. The regional SARA entities have sponsored outreach efforts, including webinars and regional meetings. Each of the regional compact websites includes dedicated space to SARA activities and documents.

States (New York, New Jersey, Pennsylvania, District of Columbia) that do not belong to a regional compact will be able to pay a fee to join a compact solely for purposes of participating in SARA, should they choose to do that.

Thus far, seventeen states have been approved for participation in SARA. These include: Alaska, Arizona, Colorado, Idaho, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Virginia, Washington, and West Virginia. Approximately a dozen other states have either enacted legislation that would permit their participation or have determined that additional state legislation would not be needed for participation.

What were the major concerns with proposals put forward by the Department of Education in the 2014 negotiated rulemaking?

Complexity: The Department’s [final proposal](#) was significantly more expansive than what was included in the original two-sentence [regulation](#) that was struck down in court in June 2012. In addition, the proposal introduced a completely new requirement (applicable to both distance and on-the-ground programs) that an institution assure that an occupation-related program meets all requirements for graduates to receive certification or sit for licensure or certification exams, unless the institution obtains written acknowledgement that a student understands the program will not fulfill the necessary requirements or that other requirements (if applicable) must be fulfilled to obtain certification or sit for exams.

Regulation of States via Requirements on Institutions: The original regulation was intended to assure that institutions were in compliance with applicable state laws with respect to distance education. The new proposal, on the other hand, would have vastly expanded the reach of the federal government in this area by requiring all states to establish an “active process” to examine an institution and its programs. Currently, approximately 45 states offer exemptions from regulation for certain institutions based on things such as accreditation or years in operation. They would no longer be able to offer this or any other exemption from regulation if the Department’s proposal were to go into effect.

Second-Guessing Complaint Resolution Decisions: The proposal would also have created difficulties for SARA, in that it would need to revise its procedures for handling student complaints in order to comply with the proposed federal requirement that both the home state and the state in which a student is receiving on-line education be responsible for resolving any complaints. Currently, SARA assigns responsibility for complaint resolution to the “home state” of the institution participating in the agreement.

More detailed analyses of the proposal may be found in a letter sent by Sloan-C, UPCEA, and WCET to Education Secretary Duncan on June 13, 2014. ([Click to view letter.](#))

What is the current role of the Department of Education?

Regulations: The Department can issue new proposed regulations at any time, but does not have immediate plans to do so. Even if new regulations dealing with state authorization of distance education were issued in 2015, they could not take effect prior to July 1, 2016.

Student Disclosures: Student disclosure requirements were included in a different section of the regulations, and they remain in force. These regulations [34 CFR §668.43(b)] require an institution offering distance education programs to out-of-state students to provide those students (and prospective students) with contact information for filing complaints with *any* relevant State official or entity that would appropriately handle complaints from those students—*whether or not the state in which a student resides otherwise regulates out-of-state distance education providers.*

What Resources Are Available to Assist Institutions?

- **National Council for State Authorization Reciprocity Agreements:** The NC-SARA site is the most comprehensive source of information about distance education reciprocity agreements. Among the things that are posted:

ABOUT button includes: list of SARA “Key Attributes”; explanation of issues that SARA does not address (i.e. professional licensure); and what constitutes “physical presence” for SARA purposes.

FAQs button lays out Q&A’s very well.

DOCUMENTS button includes SARA Policy & Standards, each of the 4 Regional SARA documents, and a PowerPoint covering general SARA information.

EVENTS button provides information about meetings and webinars sponsored by both the national and the regional SARA groups.

STATES button provides specific information about each SARA member state, including a list of approved institutions in the state and contact information for the state portal agency.

- **Regional Compacts –**

Western Interstate Commission for Higher Education: This site provides detailed information about SARA activities in the region—including links to background documents, event information, and state legislation.

Midwestern Higher Education Compact: This site provides background information and documents, including links to state legislative updates.

New England Board of Higher Education: This site includes background information, including links to several recent webinars.

South Regional Education Board: This site provides general background information about SARA and SARA contacts in each state. Another SREB site provides links to SARA-related documents, including the institutional application form.

- **State Higher Education Executive Officers (SHEEO).** The SHEEO website) has a large collection of documents related to state requirements and reciprocity efforts. This site includes links to a number of other useful information, including:
 - ✓ **State Survey Information** including a 921-page compendium of state laws and regulatory practices related to distance education (last updated in May 2013) and information about student complaint processes.
 - ✓ **Background Documents** from the Department of Education and several other organizations about the state authorization regulation.