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OFFICE OF THE ATTORNEY GENERAL

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DIVISION OF ECONOMIC JUSTICE
CONSUMER FRAUDS & PROTECTION BUREAU

June 11, 2018

The Honorable Elisabeth DeVos
Secretary
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Docket ID ED-2018-OPE-0041

Dear Secretary DeVos:

We, the undersigned Attorneys General of New York, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Oregon, Rhode Island, Virginia, and Washington write to oppose the U.S. Department of Education's ("Department") proposed rulemaking to delay and replace the final Program Integrity and Improvement Rule (the "Program Integrity Rule" or the "Rule"). The Rule would bolster states' ability to protect students enrolled in online programs in our states by requiring schools that offer online programs in multiple states to obtain authorization to operate in each state where such programs are offered, to the extent that such authorization is required under state law. The Rule would also increase the transparency and accountability of such distance education programs by requiring schools to provide crucial disclosures to prospective and enrolled students. Delay of the Rule will significantly harm students by depriving them of the critical consumer protections provided by the Rule. In addition, the Department's decision to replace the Rule opens the door to a process that could lead to adoption of a much weaker rule. This would be a serious disservice to students. Moreover, the Department has failed to establish that delay and replacement of the Rule is warranted.

The number of students enrolled in distance education has increased every year for the last fourteen years.[1] In 2016, over 3 million students were enrolled in exclusively distance education programs.[2] More than 40% of students enrolled in distance education courses are studying at out-of-state institutions.[3] While distance education provides many benefits to

[1] *See* Julie E. Seaman et al., *Grade Increase: Tracking Distance Education in the United States*, ONLINE LEARNING SURVEY 3, http://onlinelearningsurvey.com/reports/gradeincrease.pdf.
[2] *See id.*
[3] *See Pearson's Distance Education Enrollment Report 2017*, https://www.onlinelearningsurvey.com/reports/digtiallearningcompassenrollment2017info.pdf

students, it can also carry risks for students and challenges for regulators. In many states, students enrolled in distance education programs offered by out-of-state schools are ineligible for state-level consumer protections, such as state tuition-reimbursement funds and state disclosure and refund requirements. State regulators face challenges in identifying which out-of-state schools are offering distance education programs to students in their state and in obtaining sufficient information to evaluate the quality of such programs and to determine whether schools offering the programs are complying with applicable law.

State oversight is especially important for one sector of the distance education industry -- for-profit schools. At for-profit schools, the majority of students are enrolled in at least some distance education courses.[4] Investigations and enforcement actions by state attorneys general against for-profit schools have revealed widespread misconduct by for-profit schools, including schools that provide distance education in multiple states.[5] This misconduct has included misrepresenting graduates' employment and salary outcomes; misrepresenting accreditation status; offering predatory student loans; and misrepresenting that programs qualify graduates to earn professional licensure in the state where the program is offered. The long list of state attorney general enforcement actions against for-profit schools demonstrates that state oversight is critical to ensure that students are protected from harm. In addition, the Department's continuing efforts to dismantle existing consumer protections for students, such as the Department's actions to delay and replace the Gainful Employment Rule and the Borrower Defense Rule, have left students more vulnerable to schools' misconduct and have made state oversight of distance education even more important.

A. Delay of the Rule Will Significantly Harm Students

The Program Integrity Rule was finalized after a robust and thorough negotiated rulemaking. Numerous stakeholders, including state attorneys general, participated in this rulemaking process. The Rule, which was slated to go into effect on July 1, 2018, would bolster state-level oversight of distance education by requiring schools that offer distance education programs in multiple states to obtain authorization to operate in each state where such programs are offered, to the extent that authorization is required under state law. Pursuant to the Rule, a distance education program offered in a state where the school has not met state requirements would not be eligible for Title IV financial aid for students enrolled in that state. The provision would strengthen states' oversight capacity by ensuring that states that sought to regulate distance education would be able to identify and regulate schools offering distance education in their state. Delaying the Rule will permit schools to use federal funds for programs that operate outside of the oversight of state regulators.

The Program Integrity Rule would also bolster state oversight and strengthen protections for students by spurring critical changes to state authorization reciprocity agreements. The

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[4] *See id.*

[5] These include actions against: American Career Institute; Ashford University/Bridgepoint Education, Inc.; Corinthian Colleges, Inc.; Career Education Corporation; Education Management Corporation; Daymar College; DeVry University; ITT Tech; American National University of Kentucky; and Westwood Colleges, among others.

Program Integrity Rule would permit schools offering distance education in states where the school is not physically located to obtain state authorization in those states through membership in a state authorization reciprocity agreement. However, the Rule was purposefully crafted to permit schools to obtain authorization through such an agreement only where the agreement permits member states to enforce both general consumer protection and education-specific state laws against out-of-state schools. The current, national state authorization reciprocity agreement, "SARA", does not permit states to enforce education-specific state laws against out-of-state SARA member schools.[6] Accordingly, the Rule would require SARA to revise applicable policies to permit states to enforce education-specific state laws against out-of-state member schools. This would ensure that distance education students have the same access to information about programs and to refunds and other state-level protections as students enrolled at traditional brick-and-mortar schools. This would also expand states' ability to bring enforcement actions against predatory for-profit schools offering online programs in their states and would increase states' ability to adopt state laws that protect their consumers.

The Program Integrity Rule would provide many additional benefits to students that should not be delayed. It would require schools that offer distance education programs in multiple states to provide crucial disclosures to prospective students, including a disclosure alerting students if a school determines that a particular program does not satisfy state requirements for obtaining professional licensure in the students' state. The Rule would require schools to disclose information on how to submit a consumer complaint to appropriate state authorities in each state in which the program's students reside. The Rule would also require schools to disclose adverse actions by state entities or accrediting agencies related to the distance education programs. The Rule would also require schools offering distance education to disclose any applicable state refund policies for the return of unearned tuition and fees. The delay of the Rule will deprive prospective students of critical information that would help them choose appropriate programs and exercise their rights under state laws.

B. The Department has Failed to Establish that Delay and Replacement of the Rule is Warranted

The Department has failed to establish that delay and replacement of the Rule is warranted. In the May 25, 2018 Notice of Proposed Rulemaking, the Department states that the last-minute proposal to delay and replace the Rule was prompted by the Department's receipt of two letters from groups representing regulated parties in February 2018. While we disagree with the letter-writers' claims that the Rule requires additional clarification, we also note that the limited concerns raised by regulated parties that are described in the Department's May 25, 2018 Notice of Proposed Rulemaking would be adequately addressed through the issuance of explanatory guidance, rather than wholesale delay and replacement of the Rule. Moreover,

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[6] Note that Massachusetts is joining SARA with a special state-specific arrangement that will permit Massachusetts to enforce certain state regulations governing for-profit schools with respect to out-of-state SARA member schools. *See Memorandum of Understanding Between the Office of the Attorney General and the Department of Higher Education*, MASS 2 (2017), http://www.mass.edu/bhe/lib/documents/AAC/AAC18-10b_Attachment%20B%20AGO%20DHE%20MOU.pdf.

although the Rule was published in December 2016, the Department waited until May 25, 2018, just five weeks before the Rule was to go into effect, to announce a proposed delay and replacement of the Rule, providing only fifteen days for comments. The fifteen-day comment period fails to provide interested parties with adequate time to address the proposed delay and replacement.

In the Notice of Proposed Rulemaking, the Department cites a letter from the American Council on Education that expressed concern that as a result of the Rule's requirements, students who are residents of certain states that do not currently have complaint processes in place for all out-of-state schools, including California, may be ineligible for federal financial aid to attend online programs offered by out-of-state schools.

The Department cites this concern as a justification for its decision to delay and replace the Rule. However, this concern does not warrant such an overly broad response. First, this issue was explicitly raised, considered, and responded to by the Department in the notice and comment process for the Rule. The Department notes in the preamble to the Rule that "a few commenters asked that the regulation include compliance for their students from States such as California that reportedly lack oversight for their out-of-State student complaints," and that "[s]ome commenters recommended allowing institutions to use their home State's complaint processes for students in States lacking adequate complaint procedures."[7] The Department responded to these comments in the preamble, reaffirming that under the Department's final Rule, "if a State does not provide a complaint process as described in a State where an institution's enrolled students reside, the institution would not be able to disburse Federal student aid to students in that State."[8] Since the issue was raised, considered, and responded to during the notice and comment rulemaking proceeding issuance of the Rule, the Department cannot rely on regulated parties' citation of this issue in their February 2018 letters as a "new" issue that would require a last-minute delay of the Rule, or that would require a second negotiated rulemaking to address. Second, even if this concern had been raised for the first time in February 2018, it does not justify the delay and replacement of the entire Rule. Rather, this concern could be addressed through delay and replacement of the specific provision that requires schools to disclose a state's complaint process, rather than the entire Rule.

The Department's May 25 Notice of Proposed Rulemaking also cites a second letter received by the Department from groups representing regulated parties as grounds for the Department's proposal to delay and replace the Rule. The second letter expressed that schools need additional information from the Department to better understand how to comply with the Rule.[9] While we do not believe that the Rule requires additional clarification, any request for additional information could be satisfied through issuance of guidance, rather than wholesale delay and replacement of the Rule.

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[7] 81 Fed. Reg. 92232, 92238 (Dec. 19, 2016) (codified at 34 C.F.R. pts. 600 & 668).
[8] *Id.*
[9] *See* Letter from Russell Poulin et al., to Frank Brogan, Acting Assistant Secretary of Postsecondary Education, U.S. Dep't. of Educ. (Feb. 7 2018), https://wcet.wiche.edu/sites/default/files/WCET-SARA-DEAC-Letter-2-7-18_0.pdf.

The second letter also expressed concern that the way the term "resident" is described in the preamble of the Rule may "conflict with State laws and common practice among students for establishing residency." To the contrary, the definition does not conflict with state law, but rather, is grounded in state law definitions of residency. Indeed, the preamble of the Rule states that: "[f]or 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 laws*."[10]

The May 25 Notice of Proposed Rulemaking asserts that issuance of guidance would be insufficient because the Department now believes that there is a need for a more precise definition of residence in the Rule because states may define residency in different ways for different purposes. This issue was not raised by any of the regulated parties in their letters to the Department, and the Department does not indicate why it waited until immediately before the Rule was to go into effect before raising this concern as the basis for a last-minute delay and replacement of the Rule. Furthermore, the Department has cited no new facts or changed circumstances that justify its deviation from its previous position. Moreover, the Department could adequately address this concern through guidance explaining how schools should handle questions that might arise in connection with state law definitions of residency.

The Department also attempts to justify its proposal to delay and replace the Rule by noting that the letter-writers requested clarification of the format for the Rule's required disclosures. The Department's decision to delay and replace the disclosure requirements is not a rational or proportional response to a request for more information about the format of the disclosures. To the extent that any additional clarification about disclosure formatting is necessary, the Department could provide such clarification by issuing guidance.

In sum, nothing in the Department's proposal justifies either delaying implementation of the Rule or opening the door to a full-blown reconsideration of the protections that have already been thoroughly vetted. For all of the reasons discussed herein, we call on the Department to reconsider its decision to delay and replace these crucial protections for students.

Sincerely,

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New York Attorney General

George Jepsen
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[10] 81 Fed. Reg. 92232, 92236 (Dec. 19, 2016) (emphasis added).

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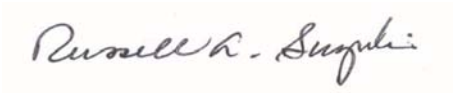

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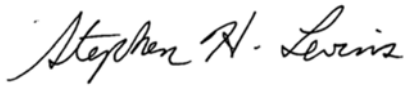

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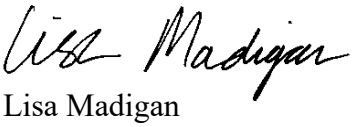

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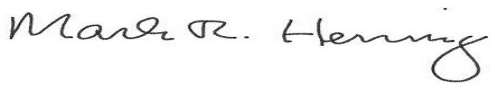

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