Daniel C. Silverman
Richmond, VA
August 8, 2017

Ms. Hilary Malawer
Office of the General Counsel
United States Department of Education
400 Maryland Avenue SW., Room 6E231
Washington, DC 20202

Ms. Malawer:

I am writing to to provide an evaluation of existing regulations in response to the Department of Education's request published on June 22, 2017 in the Federal Register (82 FR 28431). The Docket ID ED-2017-OS-0074.

I write as an individual who has worked as compliance officer at several universities since my graduation from law school in 2009. My views do not represent those of my employer, whose identity remains anonymous in this document.

I appreciate the broad call for comments; I limit mine to the subject of state authorization and the regulations discussed in 81 FR in 92262 on December 19, 2016.[1]

I. **Reciprocity agreements are essential.**

My first comment addresses the relationship between reciprocity agreements and the enforcement of general rules and statutes. 34 CFR 600.2, in its definition of "state authorization reciprocity agreement, states that

> An agreement between two or more States that authorizes an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence courses to students residing in other States covered by the agreement and does not prohibit any State in the agreement from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions.

The scope of "its own statutes and regulations" needs to be clarified because there is a risk that this portion of the definition will undermine the utility of state authorization reciprocity agreements. Let's take NC-SARA, for example, and let's suppose that all 50 states join. Reciprocity is achieved. But then let's say that 50 states enact and enforce their own "statutes and regulations" such as consumer protection laws. We're now back to 50 states and 50 sets of

[1] All citations in this letter refer to the CFR as amended by 81 FR 92262.

rules. Reciprocity would no longer have a practical effect. Do you think that is a possibility? Furthermore, the phrase “directed at all or a subgroup of educational institutions” invites states to pass legislation restricting their education market to out-of-state institutions. Such legislation would crush state authorization reciprocity agreements.

I recommend clarification on the scope of “its own statutes and regulations” and “directed at all or a subgroup of education institutions” in this set of regulations. (A reference to former Under Secretary Ted Mitchell’s letter of January 18, 2017 to Russ Poulin and Marshall Hill, which tried to clarify this definition, would be especially helpful.) The scope needs to be narrow enough so that it does not undermine the utility of reciprocity.

II. Do these proposed regulations apply to physical presence triggers other than distance education?

34 CFR 600.2 refers to distance education and correspondence courses. Does this mean that the physical presence triggers that state authorization administrators spend so much time monitoring are no longer relevant according to the federal rules? In other words, for the purpose of these federal regulations, would institutions be able to narrow focus on to where its distance education students are, and not worry about where face-to-face students do summer internships? Is ED aware of these other physical presence triggers, such as state in which instructor is teaching?

So many courses are now hybrids of distance and face-to-face. How doe they fit in the regulatory scheme? For example, instead of meeting Monday Wednesday and Friday from 2-3 in the afternoon, a course might meet only on Mondays and spend the rest of the “class time” doing online work. Or what about programs that require a visit or two to campus during each semester but are otherwise taught at a distance? What about degree-granting programs that allow students to mix and match between distance and face to face courses throughout the duration of the program? Although it is essential to provide clarification on these terms for the purpose of understanding how to comply, it is also worth mentioning that using seat time to measure credits at all is an outdated idea. Some form of competence-based assessment makes more sense.

Similar questions arise in analyzing the phrase “solely distance education” in 34 CFR 668.50. Would a university be required to advise its face-to-face students on the licensing implications of completing field placements in every state?

III. Disclosure requirements are counterproductive to student success.

The disclosure requirements of 34 CFR 668.50 et alia would have the opposite of their intended effect. It is vital that prospective and current students understand whether a given program is authorized to operate or prepares students for licensure. However, institutional compliance with the relevant portions of these proposed regulations will create statements consisting of long and

tortured legalese. Students will not read or understand them. The advisors and admissions officers probably will not, either. Exploitive institutions will continue to harm students by hiding behind the letter of the law with regard to these disclosure policies while acting in contradiction of their spirit. These policies will not actually prevent unscrupulous administrators from harming students.

Conscientious administrators at ethical institutions, on the other hand, who currently work flexibly and tirelessly on behalf of students in the areas of licensing and authorization will instead be forced to spend hours crafting unintelligible policies. Once crafted, the policies are likely to shift the mindset of an administrator from creative advocate to bureaucrat trying to avoid a sanction.

I learned from a colleague at one of my university's professional schools about an interaction she had with a student interested in practicing in Texas. The licensing board for that student's profession in Texas had different field placement requirements than Virginia's board. This adminstrator engaged in written and verbal advocacy on the student's behalf, and the Texas board made a favorable decision for the student.

The disclosure policies described in the proposed rules discourage this sort of personalized effort on behalf of students. Instead, the proposed rules are are likely to create one-size-fits all policies, because few administrators will want want to risk Title IV funds by deviating from standard disclosure language. Lengthy disclosures full of legalese also discourage anyone from diving into the unique facts in a given situation, and solving the problem with creativity.

Suggestion: require institutions to prove that they are addressing licensing and authorization concerns with their prospective and current students, but do not mandate the method. Professional ethics, disposition toward serving students, and the diversity of choice in higher education are sufficient motivations for institutions to do good work in this area.

Thanks in advance for your time and consideration of this commentary.

Sincerely,

Daniel C. Silverman
(as an individual human)