

From WCET *Frontiers* blog on August 25, 2023:

Proposed Federal Rules Affecting Programs Leading to a License & State Authorization Reciprocity Need a Delayed Effective Date

States and Institutions Need More Time

We have had more time to consider the U.S. Department of Education's proposed regulations on [programs leading to professional licensure](#) and [state authorization reciprocity](#). The Department might release final rules that are close to what they proposed. This gave us a bit of déjà vu back to similar rules released in 2010 with a quick timeline. A delay in enforcement was needed then. We recommend a similar extended time will be needed for state agencies, SARA, and institutions to understand and implement new requirements.

This will not be easy. The bottom line: States and institutions will need more time. If not, students will get lost in the confusion.

While we wait to learn of the U.S. Department of Education's (ED) plan for the [Proposed Regulations](#) that they released in May, stakeholders must start to consider what they need to change. If the Department releases the regulations as final by November 1, 2023, they will be eligible to become effective as early as July 1, 2024.

If the November 1 deadline is met, institutions that offer programs leading to a license and/or offer distance education-related activities across state lines will have new additional responsibilities. Institutions would be required to have processes in place to review and address widely varying state laws and regulations, that are overseen by state agencies and state licensing boards that were

In Brief –

The Department's proposed regulations on state authorization reciprocity and programs leading to licensure were not among the issues identified for the 2021-2022 rulemaking, scant or no research and analysis was presented in the May Notice of Proposed Rulemaking, and the impact on mobile students was not considered.

We fear the Department will implement some form of it anyway.

States and institutions will be unprepared. Students will suffer. To properly implement these regulations, we urge ED to delay the effective date of those portions of the final regulations until July 1, 2026.

not sufficiently included in the rulemaking process. Many of those state agencies will not be prepared to quickly implement the new requirements.

We concur with ED that student consumer protection and protecting the integrity of Higher Education Act (HEA) Federal Financial Aid is extremely important. We also agree that improvements in those protections are needed.

Even with our agreement, we have great concern that the rush to address these specific issues, which arose within a subsection of a regulation, does not fully consider the impact on all stakeholders including students, state licensing boards, and state agencies. States will need time to contemplate their role, abilities, and processes to affirm and enforce institutional policies for institutions to properly comply with new Federal regulations.

Our request: If ED chooses to move forward on the regulations within the “Certification Procedures” issue affecting programs leading to a license and reciprocity, we strenuously urge ED to delay the effective date of that portion of final regulations until July 1, 2026.

Quick Review of Federal Rulemaking Process

Executive agencies and departments use the federal rulemaking process governed by the [Administrative Procedure Act \(APA\)](#) (5 U.S.C. Chapter 5) to develop regulations to implement federal law. The process was developed to ensure transparency through public notice and create the opportunity input through public comment. The rulemaking discussed in this post began with the May 26, 2021 Federal Register announcement of the notice of ED’s [intention to establish negotiated rulemaking committees](#). The announcement indicated the 14 issues ED wished to develop and any current regulations it wished to amend. Certification Procedures was a listed issue, but there was no indication that state authorization, reciprocity, or programs leading to a license would be addressed in this rulemaking. Those issues were introduced after the agenda had been set and were barely discussed.

ED held two negotiated rulemaking committees splitting the various issues previously listed. Those committees met in Fall 2021 and Winter 2022. All but five of the issues have already moved from the proposed rule stage to being released as final regulations. The remaining five issues (including the ones that are the subject of this post) were released as proposed rules on May 19, 2023, with the public comment period closing on June 20, 2023. There were 7,583 public comments submitted for which ED must review and respond to prepare the final rules.

To bring specific focus to proposed regulations affecting state authorization, reciprocity, and programs leading to a license that was largely overlooked by the media, SAN and WCET submitted two public comments. The first public comment addressed the regulation subsection [affecting programs leading to a license](#). The second public

comment addressed the regulation subsection [affecting state authorization and reciprocity](#).

By “Master Calendar” rules governing such actions, rules released by November 1 of one year become effective on July 1 of the following year. We have not heard that ED plans to do anything but meet that deadline. ED may release final regulations with some changes to the proposed language, but we anticipate that the essence of their recommendations will remain.

Our Recommendation to the U.S. Department of Education

If ED moves forward with these regulations to meet the November 1, 2023, deadline, **we request a delay of the effective date until July 1, 2026**, for 34 CFR 668.14(b)(32)(ii)(iii) & 34 CFR 668.43(a)(5)(v) and 34 CFR 668.43(c). The last regulation was included for ED to remember to harmonize the individualized notifications with the public notifications.

Because compliance with these regulations is so intrinsically intertwined with state oversight, we believe that it is imperative that states and institutions be given time to accomplish the following process steps and ED collaboration to address compliance requirements:

- Give time to inform state licensing boards, preferably by ED, and allow them to determine how they will respond to institutions.
- Give time for State institutional authorizing agencies to determine their requirements and make public their requirements for out-of-state institutions.
- Give time for institutions to determine their processes **after** determination by states boards and agencies to address their response to the regulations.
- Give time for institutions to complete research for professional licensure which is very complicated and time-consuming and cannot be completed in advance of accepting students for programs for FY25.
- Give time so that students will be afforded with the best information about how the emerging state and federal rules will affect them.

States need time to conduct their own administrative process for any new state rules resulting from ED's regulations.

Institutions need time to understand and implement those rules.

Therefore, we request a delay of the effective date of ED's new rules until July 1, 2026.

Given state administrative rules processes and the need for institutions to conduct additional research and inquiries with states, setting July 1, 2024 as a deadline would be unworkable.

When looking at history, ED may wish to consider that this situation looks very similar to the release of the Program Integrity Regulations that included State Authorization 34 CFR 600.9(a)&(b) that was [ultimately delayed until July 1, 2015](#). You will recall that the original effective date was July 1, 2011, but states did not all have a process to review and appropriately act on complaints concerning the institution including enforcing applicable state laws. Time was needed for states to develop those structures. Similarly, today, states will need to make decisions and implementation strategies to then inform institutions about state consumer protection laws in each state. There will also be the need to engage state licensing boards in conversations to address transparency of state educational prerequisites.

Implications on States and Students Should the NPRM Language Regarding Programs Leading to a License and Affecting Reciprocity Become Final as Written

State Agencies

Federal compliance is inextricably tied to actions of the states, and, for institutions to then implement compliance strategies. Higher education agencies and state licensing boards will be holding the keys as to whether an institution can determine if it “satisfies” state educational prerequisites for a license and “complies” with state consumer protection laws related to closure, recruitment, and misrepresentation.

We hope that ED will review and consider the implications and less than ideal implementation strategies as shared by organizations representing state oversight:

- **SHEEO Report August 2023:** *A Dream Derailed? College Closures Research and Policy Implications, Report Three- Investigating the Causal Effects of College Closures of Student Protection Authorization Policies on Student Outcomes After College Closure*
 - The report includes the following statement on page 6: *“The association between student protection authorization policies and enrollment after closure is mixed. Tuition recovery and surety bond policies tend to have no positive correlation with enrollment and are, in fact, associated with low reenrollment rates among students who experienced a closure (treatment students). Student records and teach-out plan policies have a strong positive correlation with reenrollment that lessens over time.”*
 - The State Authorization Longitudinal Dataset used to determine the states with consumer protection laws underscores the wide variation of state laws. It should be noted that the dataset does not include whether the state has the authority to enforce its state consumer protection law on out-of-state postsecondary institutions that do not have a physical presence in the state.
- **NASASPS Public Comment to the May 2023 NPRM** The National Association of State Administrators and Supervisors of Private Schools (NASASPS) is a national organization of state regulators.
 - NASASPS President, Cathie Maeyart, on behalf of NASASPS indicates that it is “critical” that the proposed regulation that requires institutions to comply with state consumer protection laws related to closure, recruitment, and misrepresentation where the student is located be by self-certification for the following three reasons:
 - State bandwidth for regulators to respond to institutions’ questions and limited authority to provide compliance verification.
 - Wide state variation of regulations state to state and may depend on the type of institution.
 - Any required documentation to affirm compliance by the institution would mean multiple regulatory agencies within a state may need to be consulted.
- **NASDTEC Comment Provided by Jimmy Adams, Executive Director, August 2023.** The National Association of State Directors of Teacher Education and Certification (NASDTEC) is a national organization of state departments of education and professional standards boards:

When considering the proposed rule changes by the USDOE, state Departments of Education and Standards Boards or Commissions (Licensing Agencies), foresee numerous requests from Educator Preparation Providers (EPP) asking for specific requirements for teacher licensure in each state. While that may seem like a simple request, states have multiple licenses with varying and different requirements. These differences occur in how each state defines the three components of a license: 1) content; 2) grade range; and 3) student population (exceptional and general).

Licensing Agencies have processes by which they approve EPPs to operate within their individual states, ensuring that educator licensing requirements are met. These approvals require multiple documents to be submitted by the EPP, reviewed by Licensing Agency staff, and ultimately approved by a Board. The amount of work required to ensure an EPP meets the licensing requirements and continues to meet them, is extensive. If these proposed changes are put into place that work has the potential of exponential growth. Educator Preparation Providers (EPP) will want to know if their multiple programs meet academic and other requirements for their students who are ultimately licensed in another state, essentially requiring approval of all the EPPs' teaching programs. Licensing agencies have neither the staff nor the budget to meet the amount of work these proposed changes will require.

If the proposed changes are intended to identify poor actors in the realm of licensure preparation, then the proposed changes seem to be punishing the large number of institutions who do the right thing every year without mishap and licensing boards/commissions who should have input on these changes.

This will also be an added burden on the EPP, who would have to maintain accurate and annually updated licensing information for all students who plan to teach in another state. This will be a strain on each EPPs staffing and budget. One EPP pointed out that the primary duties of these staff potentially "include: 1) institutional recommendation/verification letter responsibilities; 2) policy investigations of all 50 states plus territories; 3) publishing and updating this information annually; 4) communicating with all 50 states plus territories to ensure published information accuracy; 5) communicating with students, internal policymakers, national associations; and 6) overseeing a data systems to organize this information." That may sound like an exacerbated interpretation of responsibilities to a person outside of licensing, but I am not sure it is that far from the truth.

Most states already have policies in place that allow a person trained in another state to obtain a license by qualifying or receiving a license in the state in which they were prepared.

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institutions who do the right thing every year without mishap and licensing boards/commissions who should have input on these changes.

The state higher education agencies will have to consider the following:

1. Do state higher education agencies have the capacity to enforce and affirm compliance with designated laws related to closure and recruitment? (States can already enforce state laws on misrepresentation – [SARA Policy Section 4.4\(e\)](#)).
 - What do state higher education agencies do without capacity to address all out-of-state institutions serving students by distance education in their state? (ex. Texas currently oversees 135 SARA participating institutions. According to NC-SARA data about interstate enrollments, the new proposed regulations could increase state oversight to 1,493 out-of-state institutions that serve students located in Texas).
 - What do institutions do about states without capacity?
2. How will the state higher education agencies determine applicable laws related to closure and recruitment?
3. How will states observe the federal regulation when the state expressly limits the authority of oversight of out-of-state institutions to certain sectors or bases authority on the institution maintaining a physical presence?
4. How will states acknowledge the federal regulation if they choose not to enforce state laws on institutions that participate in reciprocity?
5. Does the state need to make changes to its state laws and regulations and how much time will that process take?

The state licensing boards will have to consider the following:

1. Does the state licensing board have an interest in affirming satisfaction with education prerequisites? What if they don't wish to?
2. Do state licensing boards have the capacity to affirm satisfaction with educational prerequisites?
 - What do state licensing boards do if they lack capacity?
 - What do institutions do about states without capacity?

Students

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We are concerned that the guardrails ED intends to create to protect students are ultimately going to have unintended consequences of creating additional barriers for students.

1. These barriers will inhibit students' ability to choose institutions and programs thus putting limitations on career options.
2. Students could find themselves unable to afford to enroll in a professional licensure program because the institution does not meet requirements where the student is located. This is especially frustrating when a student plans to move to a state after completion of the program to seek employment based upon workforce needs or lives near a state line and will cross state lines to work in another state.
3. Ultimately, we are concerned that the students will be caught up in the confusion as states and institutions figure out how to implement and comply with this regulation.

Conclusion and Recommendation for Institutions

WCET and SAN hope that ED will give serious consideration to the points that we have raised. We especially hope that ED recognizes the important interactive relationship with states that these regulations hold.

For further context to understand the specifics of these issues we offer the following resources:

- [ED's New Proposed Regulations: Part 1, State Authorization Reciprocity](#); WCET Frontiers; 5/24/23.
- [ED's New Proposed Regulations: Part 2, Changes for Programs leading to Professional Licensure](#); WCET Frontiers; 5/25/23.
- [SAN & WCET Public Comment NPRM 2023 \(Reciprocity Impact\) \(PDF\)](#); June 13, 2023.
- [SAN & WCET NPRM 2023 Public Comment \(Programs Leading to License\) \(PDF\)](#); June 8, 2023.

Meanwhile, we urge institutions not to be complacent. Consider planning now for changes that include the following and are ultimately best practices regardless of the ultimate decision of ED:

- Clearly document your institutional process for determination of student location as directed by currently effective regulation 34 CFR 600.9(c)(2) that became effective July 1, 2020.
- Create good tracking mechanisms to know where your out-of-state students are located whether participating in an online course or experiential learning (internships & clinicals).
- Continue to pursue clarifications of state educational prerequisites where your students are located.
- Communicate clearly with state licensing boards in your home states to share the need for access to well-defined and specified educational requirements in the state which if done by all institutions will ultimately encourage state licensing boards nationwide to be more transparent, thus benefiting everyone nationally.

You can also review all documentation on the rulemaking process via the SAN website. From the [home page of the SAN website](#), navigate under Quick Links to access links to pages dedicated to rulemaking information.

Continue to look to SAN and WCET as we follow this and other ED activities and announcements. We will continue to update you as things develop!

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<https://wcet.wiche.edu/frontiers/2023/08/25/proposed-fed-rules-affecting-license-state-auth-reciprocity-need-delayed/>