

MEMORANDUM

To: U.S. Department of Education and Negotiators

From: Adam Welle and Yael Shavit, State AG Negotiators

Date: March 16, 2022

Re: Proposed Regulations Concerning Certification Procedures and Application of State Laws

We are pleased to see that the Department of Education's most recent version of Issue Paper 6 concerning certification includes a basic requirement that programs comply with consumer-protection laws applicable to higher education in the states where students reside (to be promulgated as 34 C.F.R. § 668.14(b)(32)). While this type of requirement should not be controversial, we have received comments as negotiators opposing this proposed provision on the ground that it would be burdensome for schools to ensure compliance with the laws of states in which they are enrolling students. These comments have asserted that state reciprocity programs provide adequate consumer protections.

While we're troubled by several arguments opposing the Department's proposal, we wish to express before we begin discussion of Issue Paper 6 our strong disagreement with the notion that institutions soliciting enrollment online are subject to sufficient consumer protections under reciprocity arrangements. To detail our concerns, I attach an August 2021 letter submitted by a bipartisan group of 25 state attorneys general to the Board of Directors of the National Council for State Authorization Reciprocity Agreements. In that letter, the state attorneys general communicate our strong compliance concerns related to distance learning, the lack of standards under NC-SARA that would safeguard students from the elevated risk of fraud and mismanagement by online schools, and how NC-SARA's policy preventing application of education-specific laws in students' home states is detrimental to our ability to police against fraud. I draw particular attention to the section of our letter imploring NC-SARA to create an effective baseline of consumer protections to prevent our realized concern that institutions flock to low-regulation states in a "race to the bottom" for consumer protection.

As another large bipartisan group of state attorneys general highlighted in a letter just this week, which I have also attached, these issues remain unresolved. Indeed, attorneys general and consumer advocates have raised these concerns for years, but NC-SARA has declined to adopt meaningful standards that would prevent some of the worst abuses that have been seen in the for-profit industry in recent years. We encourage the negotiators and the Department to consider the concerns of the state attorneys general and to support the inclusion of the proposed regulation, which would preserve states' sovereign responsibility to protect their consumers while maintaining the states' prerogative to enter reciprocity arrangements.

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Sent via E-mail

National Council for State Authorization Reciprocity Agreements
Board of Directors
c/o Dr. Lori Williams
3005 Center Green Drive; Suite 130
Boulder, Colorado 80301

August 2, 2021

Re: State Attorneys General Policy Change Recommendations to Improve NC-SARA
Student Protections

Dear Dr. Williams and Members of the NC-SARA Board of Directors:

We, the Attorneys General of Maryland, Colorado, Connecticut, Delaware, the District of Columbia, Hawai'i, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Wisconsin, and Washington write to submit, at your invitation, recommended changes to NC-SARA's State Authorization Reciprocity Agreements Policy Manual to improve the consumer protections available to students attending NC-SARA participating institutions. We appreciate your commitment to continued dialogue with our offices and for joining the National Association of Attorneys General in hosting three meetings over the past few months with consumer protection attorneys from a large, bipartisan group of state Attorneys General offices. At those meetings, we outlined our experience enforcing our states' unfair and deceptive acts and practices laws and asked questions about the consumer protection policies that NC-SARA has in place for the over 3 million students enrolled exclusively in distance education courses at the 2,276 institutions permitted to participate in NC-SARA. In light of these discussions, we believe that NC-SARA should adopt various policy changes to ensure adequate protections for students and to better serve the interests of the member states and territories.

In recent years, our offices have investigated and brought enforcement actions against multiple schools that were engaged in deceptive or unlawful practices. These investigations revealed widespread abuses in the for-profit college sector, including at some schools participating in NC-SARA. In January 2019, for example, forty-nine Attorneys General settled a years-long investigation into Career Education Corporation (now called Perdoceo Education Corporation), which operates NC-SARA-participating schools American Intercontinental University and Colorado Technical University. Other examples are the Colorado Attorney General's Office's judgment against the Center for Excellence in Higher Education, which

operated Stevens-Henager College and Independence University, and the Kentucky Attorney General Office's case against American National University (formerly National College).

From our experiences investigating these and other schools, we know that deceptive and unlawful practices harm not only students, but also harm taxpayers who fund the expensive student loans that support such schools, impose burdens on state regulators, and drive students and revenue away from institutions that treat students fairly. The deceptive and illegal practices uncovered by our investigations also point to deeper administrative deficiencies that can cause the sudden and harmful school closures, as showcased by several recent collapses of large chains of schools. Cases against such institutions have been brought by bipartisan groups of Attorneys General, reflecting our offices' non-partisan mission to enforce state law and protect our states' residents from deceptive and abusive practices.

With these concerns in mind, we believe that NC-SARA's current policies do not adequately guard against the unique risks that arise from distance learning. For instance, NC-SARA's policy prohibiting member states from enforcing education-specific consumer protection laws against out-of-state NC-SARA participating schools undermines our Offices' and other state agencies' ability to protect students in our states. It also creates a two-tiered system of protection, in which students attending NC-SARA-participating schools receive the benefit of fewer consumer protection laws than students attending schools based in our state or attending schools that do not participate in NC-SARA. This incentivizes NC-SARA participating schools to locate in states with weaker education-specific consumer protection laws, such as financial protections in the event of unanticipated closure, to avoid having to comply with more student-protective laws. Our conversations with some of the representatives of state entities that enforce NC-SARA rules showed that they share this concern.

Your op-ed published in *Inside Higher Ed* asserts that states "must take ownership over creating effective systems and policies designed to assure distance education quality beyond the baseline standards imposed by NC-SARA,"¹ and many states have attempted to do so. NC-SARA policies were originally designed to ease the administrative burden of licensing and approval in the various states. Those policies, which may have been well-intentioned in their inception, are allowing schools to avoid complying with education-specific consumer protection laws in our states. We agree with your published statements that NC-SARA "should only serve to augment -- and never supersede or usurp -- states' ultimate authority to regulate and conduct strong oversight of higher education institutions."² However, as noted above, NC-SARA's policies do, in fact, usurp states' authority to protect students enrolled in online courses at participating schools based in other states. We also agree with NC-SARA leadership's comments during our calls that baseline standards should prevent a "race to the bottom" and with your mission to "assure students are well served in a rapidly changing education landscape."³ In practice, however, NC-SARA's current policies do not contain sufficient consumer protections

¹ *States and Quality Assurance in Online Education*, Inside Higher Ed, available at <https://www.insidehighered.com/views/2020/07/20/covid-surge-distance-learning-demands-renewed-focus-quality-assurance-opinion>

² *Id.*

³ *Mission and History*, NC-SARA, available at <https://nc-sara.org/mission-history>

to assure that students are well served, undermine states' ability to protect their residents, and create the race to the bottom that NC-SARA seeks to prevent.

The following constitutes a list of concerns and requested changes to the NC-SARA Policy Manual, which are necessary to align NC-SARA's policy with its stated goals of consumer protection.⁴

1. NC-SARA Should Implement Stronger Consumer Protection Rules.

- a) NC-SARA should allow member states to enforce education-specific consumer protection laws, which are necessary to protect students in our states.

Our most urgent concern with NC-SARA is that it prohibits member states from enforcing education-specific consumer protection laws against out-of-state schools offering distance education programs to residents of our states. This prohibition undermines states' ability to protect students from predatory conduct. For instance, NC-SARA policy appears to prohibit states from enforcing laws that require schools to make disclosures to students about important outcome metrics before enrolling them. This creates a two-tiered system, where only some students get the benefits of our state laws, undermining our ability to protect all our students.

Although we understand the rationale for streamlining state licensing processes for schools offering programs in multiple states, there is no legitimate rationale for shielding NC-SARA schools from substantive state consumer-protection laws in states where the school enrolls students. Sheltering schools in such a way runs contrary to NC-SARA's stated mission and does the millions of students attending NC-SARA participating institutions a disservice. NC-SARA should permit and encourage member states to enforce education-specific state consumer protection laws with respect to all schools enrolling residents of our states.

POLICY MANUAL CHANGE: Alter NC-SARA Policy Manual Section 2.5(1) to allow NC-SARA member states to enforce all education-specific consumer protection laws.

- b) NC-SARA should implement minimum consumer protection standards for participating schools.

NC-SARA has barely any minimum consumer-protection standards that apply to its participating schools. Without such standards, there are significant disparities between the requirements placed on participating schools, depending on the laws of the state in which they are physically located. NC-SARA should keep its promise in its annual report to "support[] quality assurance and consumer protections for students"⁵ by demanding that schools earn the benefit of participating in NC-SARA by meeting a set of specific consumer protection standards.

⁴ We were disappointed to learn that NC-SARA recently adopted a policy to vote on changes to the Policy Manual once a year instead of twice a year. This results in the delay of almost a year until the student protection recommendations in this letter could be adopted. We urge NC-SARA to consider these recommendations during its November 2021 Board meeting and adopt critical student protection measures as soon as possible.

⁵ NC-SARA 2021 Annual Report, at 8, available at https://nc-sara.org/sites/default/files/files/2021-07/NCSARA_AnnualReport.July2021.Final_.pdf

POLICY MANUAL CHANGE: Add the following concepts to the Policy Manual and require schools to attest that they comply with all consumer protection requirements to be eligible to participate in NC-SARA:

- *Prohibit specific unfair and deceptive conduct related to admissions and financial aid practices that we have identified in our cases against institutions of higher education or that are prohibited in state law.*
- *Require schools to provide all prospective students receiving any federal student aid with a personalized link to the Consumer Financial Protection Bureau’s “Your Financial Path to Graduation” tool after the student is sent an award letter.⁶*
- *Prohibit the withholding of a student’s transcript solely because of a debt or balance owed to the school.⁷*
- *Restrict the use of lead generators, which we have found to use unfair and deceptive marketing practices,⁸ by adopting minimum standards for their use.*
- *Impose specific requirements related to financial protections for all students in the event of an unanticipated closure.*
- *Require a minimum percent of total revenue be spent on student instruction.⁹*

c) NC-SARA should clarify and enforce its current rule prohibiting the use of mandatory arbitration clauses.

During our meetings with NC-SARA leadership, we learned that NC-SARA generally prohibits schools from using forced arbitration clauses in enrollment agreements to shield themselves from lawsuits filed by students in distance education programs. However, in separate conversations with some of NC-SARA’s state portal entities (“SPEs”) that enforce NC-SARA

⁶ See *Your Financial Path to Graduation*, CFPB, available at <https://www.consumerfinance.gov/paying-for-college/your-financial-path-to-graduation/>. Multiple recent bipartisan settlements used by our offices require the schools to send new students a personalized tool to explain the costs of higher education. See e.g., 49 AG settlement with Career Education Corporation, available at <https://www.marylandattorneygeneral.gov/press/2019/010319.pdf>; 40 AG settlement with Education Management Corporation, available at <https://www.iowaattorneygeneral.gov/newsroom/edmc-to-change-practices-forgive-loans-through-agreement-with-miller-and-state-attorneys-general>

⁷ Minnesota and California currently prohibit schools from withholding a student’s transcript because the student is in arrears or in default on any institutional loan issued by the school, and other state legislatures are considering similar measures. See M.S.A. § 136A.828 and M.S.A. § 136A.65; Cal. Civ. Code § 1788.93 and Cal Ed Code § 66022.

⁸ 20 states settled with a lead generator related to the deceptive use of GIBill.com that directed veterans only to for-profit institutions. *2.5 M Settlement over ‘GIBill.com’*, Inside Higher Ed., available at <https://www.insidehighered.com/news/2012/06/28/attorneys-general-announce-settlement-profit-college-marketer> Our settlements with Perdoceo Education Corporation and Education Management Corporation also contained terms limiting the use of lead generators by requiring minimum standards for their use.

⁹ NC-SARA touts on its website that it “[r]educes costs and bureaucracy for states and institutions” and claims in its recent annual report that it “helped participating postsecondary institutions save a total of \$402 million for initial authorization and approximately \$133 million annually.” During our meetings, NC-SARA leadership stated that schools pass this savings along to students, but no evidence has been presented to support this statement. Schools that have the privilege of participating in NC-SARA should be required to utilize the monetary savings realized from participation in a way that directly benefits students. One way this could be done is by setting a minimum amount of a school’s net tuition revenue per full-time student that must be spent on instruction. This concept is already law in Maine, which prohibits certain institutions from spending less than 50% of their total revenue on instruction and more than 15% of their revenue on advertising. See 20-A M.R.S.A. § 10706-A.

rules for schools based in their states, we learned that the policy prohibiting most claims from being forced to arbitration has not been clearly communicated to the SPEs and is not being universally implemented. This may be a result of the lack of clarity in the NC-SARA Policy Manual, which does not explain the areas where the use of forced arbitration is prohibited. As a result, students are likely unaware of or unable to exercise their right to litigate consumer protection, fraud, and breach of contract claims in court. In addition, many states are unaware that they should be enforcing the policy in this manner. NC-SARA should immediately inform the SPEs of the current interpretation of the policy, clarify the language in the Policy Manual, and provide examples of the types of claims that are not subject to mandatory arbitration clauses. The Policy Manual should also require schools that use forced arbitration clauses for its students who are not enrolled in a program whose state authorization is derived from the NC-SARA compact to disclose that NC-SARA policy prohibits the enforcement of such clauses for the types of claims listed in the policy.

POLICY MANUAL CHANGE: In section 4.4(g), include a non-exhaustive list of examples of the types of student claims that are related to NC-SARA policy for which forced arbitration clauses may not be enforced and require schools that utilize forced arbitration of issues unrelated to NC-SARA policy to include, immediately after the forced arbitration clause, the full language of section 4.4(g) with a clear disclosure of the types of claims that may not be forced to arbitration.

2. NC-SARA Should Improve Protections for Students Attending Institutions with Issues Related to Program Quality, Financial Stability, and Consumer Protection.

- a) NC-SARA should require participating schools to self-report investigations by government agencies to their NC-SARA home state.

Investigations by our offices or other government agencies are, in general, not publicly announced until they settle or result in litigation. If schools are not required to self-report government investigations, states will be unable to determine if they need to place conditions on the school's continued participation in NC-SARA to protect students. Furthermore, institutions that have engaged in misconduct sometimes abruptly close before a government investigation concludes and is made public. Prompt self-reporting to the SPE of an investigation is needed to allow states to protect students before it is too late.

POLICY MANUAL CHANGE: Delete the term "publicly announced" in section 3.2(a)(4) and require the institution to immediately self-report to its home state any investigation by a government agency related to the institution's academic quality, financial stability, or student consumer protection.

- b) NC-SARA should give SPEs authority to consider government action taken against a school's online program manager, corporate parent, or corporate affiliate.

Schools offering distance education courses often utilize an online program manager ("OPM") to perform a wide range of services, including marketing, admissions, and financial aid. Furthermore, institutions sometimes use complex corporate structures even when its schools

or branch campuses are run by the same parent company. NC-SARA's rules and student protections should be applied equally to all participating institutions, regardless of their corporate structure or whether they have a third-party that provides enrollment, financial aid, or other services to students. At present, NC-SARA's policies do not clearly specify that conduct by a school's corporate parent, affiliate, and student-serving service provider should be considered by the home state to ensure NC-SARA compliance. If an OPM, corporate parent, or corporate affiliate of an NC-SARA participating school has any issue related to program quality, financial stability, or consumer protection (e.g., it is being investigated, has been sued, has had a judgment entered against it, or has settled any consumer protection claims by a government agency), the school's home state should treat that issue in the same manner as if it arose through the conduct of the NC-SARA participating school.¹⁰ For instance, the judgment entered against Stevens-Henager College's corporate parent and corporate affiliates related to the Colorado Attorney General's Office's consumer protection claims should have provided a basis for the school's home state to take action to protect the thousands of students at that school and its branch campus of Independence University.

POLICY MANUAL CHANGE: The term "institution" should include the school's corporate parent(s), corporate affiliate(s), and third-parties providing services to students, such as online program managers.

- c) NC-SARA should give SPEs clear authority to place schools into provisional status after the resolution or settlement of government investigations or lawsuits.

Our offices frequently resolve investigations or litigation through settlements.¹¹ In that process, we often detail the conduct that gave rise to the action. The settlements often result in substantial monetary payments or debt cancellation, as well as requirements that schools reform their conduct. During our meetings, NC-SARA leadership indicated that SPEs may consider such settlements as a basis for placing an institution's participation with NC-SARA in provisional status. However, in separate conversations with SPEs, we learned that this policy interpretation has not been consistently communicated to them. Some SPEs believe that they lack the authority to utilize provisional status to protect students after an investigation has concluded. This is a result of the Policy Manual's narrow language regarding the instances when provisional status is permitted. NC-SARA should amend the Policy Manual to make it clear that SPEs may place schools on provisional status after a government agency's investigation has resolved with a settlement.

POLICY MANUAL CHANGE: In the last sentence of section 3.2(a)(6) add the term "or settlements, stipulated judgment, or other similar resolution" after the term "Lawsuits by" to make clear that a settlement with a government agency is also considered to have resulted from an investigation and can be a basis for provisional status.

¹⁰ Of particular concern are OPMs, such as Zovio, Inc., that are being investigated, sued, had judgments entered against them, or have settled consumer protection claims (e.g., admissions and financial aid misrepresentations) related to conduct that occurred when the company owned or operated an institution, and the OPM is now providing admissions and financial aid services to students at other institutions.

¹¹ Our settlements are often styled as Assurances of Voluntary Compliance, Assurances of Discontinuance, or Consent Judgments.

- d) The conclusion of a government agency’s investigation or litigation should not prohibit SPEs from protecting students using provisional status.

NC-SARA leadership told us that if the circumstances listed in section 3.2(a) concerning provisional status are no longer present, section 3.2(f) requires the school to be removed from provisional status, but a state could invoke section 3.2(g) to protect students even if a school is not on provisional status. Our conversations with SPEs indicate that this is another area where there is not a consistent understanding that the Policy Manual provides them with this authority. Instead, it appears that section 3.2(f) and (g) provide no discretion to take action to protect students unless the circumstances giving rise to provisional status are still occurring. SPEs should have the authority to keep schools on provisional status and impose conditions on continued participation to protect students after, for instance, a government investigation or litigation has concluded. NC-SARA should revise the Policy Manual to clearly provide this authority.

POLICY MANUAL CHANGE: Change the requirement in section 3.2(f) that the home state “shall” remove the Institution’s designation to “may” and clearly state that the home state may continue to utilize provisional status to place conditions on continued NC-SARA participation even after the school is no longer subject to the circumstances set forth in section 3.2(a). Also, in section 3.2(a)(5) delete the word “current.” Finally, in section 3.2(a)(4) and 3.2(a)(5), add the phrase “or was” after each occurrence of the word “is.”

- e) Loss of federal recognition by a school’s sole accreditor should trigger immediate protections for students, including provisional status.

NC-SARA policy does not require or even seem to allow states to immediately impose provisional status on a participating school when its accreditor loses federal recognition. This limits states’ ability to protect current and prospective students at such a school by imposing conditions on the continued participation in NC-SARA while it has leverage to do so. If the school is unable to obtain accreditation from a federally recognized accrediting agency after 18 months, its students will no longer be eligible for federal grants and loans and will likely close. NC-SARA should require any school to be put on provisional status with NC-SARA if its accreditor loses federal recognition. The case of ACICS brings this issue into focus for hundreds of current students. Approximately ten NC-SARA participating schools are accredited by ACICS, and the students at those schools deserve transparent, rapid, and effective action by their schools’ SPEs to ensure that they are protected if their schools are unable to find a new recognized accreditor within the time allotted by the Department of Education.

POLICY MANUAL CHANGE: Add language in section 3.2 requiring that the home state place a school on provisional status if its sole accreditor for any program loses federal recognition or if the school is otherwise placed on a Provisional Program Participating Agreement with the Department of Education. Also, the Policy Manual should list the conditions for continued participation in NC-SARA related to obtaining new accreditation that you expect SPEs to utilize.

- f) More specific guidance should be given to SPEs related to the conditions for continued NC-SARA participation that can or must be placed on schools that are on provisional status.

NC-SARA should set clear standards for the conditions that must be imposed on schools to continue to participate in NC-SARA while on provisional status to ensure that students are adequately protected, especially if a school is in any danger of closing. However, NC-SARA's Policy Manual provides few specifics on what conditions can and must be imposed for schools on provisional status, except for the option to limit a school's distance learning enrollments.¹² We are concerned that the lack of specificity in the Policy Manual leaves students without necessary protections and places SPEs in a difficult position. The Policy Manual should provide specific guidance to SPEs related to the conditions for continued NC-SARA participation that must be applied to schools on provisional status for issues of program quality, consumer protection, and particularly financial stability that might lead to an abrupt closure.¹³ We would be happy to work with you to create this list, but it should include, at a minimum, financial protections and fulsome disclosures for all current students, teach-out agreements with multiple quality institutions, and a metric for how to apply a range of limitation on new enrollments.

Stevens-Henager College provides a stark example of how NC-SARA's failure to set minimum standards for schools on provisional status results in students being left vulnerable to financial harm and exploitation during an abrupt closure. NC-SARA was aware that Stevens-Henager College lost its accreditation, suffered from financial instability, and notified employees about a mass layoff, all of which are the signs for a impending abrupt closure, which happened on August 1, 2021. However, no action was taken prior to the closure to require the school to obtain a bond or letter of credit to ensure full financial protection for students affected by the closure. No action was taken to require disclosure to students of all of their options, including a closed school discharge of federal loans, if a closure occurred. And no action was taken to ensure that students would not be subject to teach-out arrangements that, as the Department of Education has found, "make it appear that the students will only have the choice of transferring to [two] institutions in order to continue their education" and "which could position [the school]

¹² During our calls with NC-SARA leadership, SPEs told us that limitations on enrollment are disfavored because of the detrimental effects they could have on an institution's continued ability to operate, which could jeopardize the ability of currently enrolled students to complete their education. This approach appears to sacrifice the interests of prospective students who may unknowingly be enrolling at an institution that a state knows is problematic. NC-SARA should place a top priority on what steps are necessary to protect both current students (by demanding financial security such as a surety bond or letter of credit and by requiring teach-out agreements with quality institutions) and prospective students (by using some form of limitations on explosive growth) when an institution is on provisional status.

¹³ The Policy Manual requires schools to agree that, if the school closes, they will "provide a reasonable alternative for delivering instruction or reasonable financial compensation for the education the student did not receive." See section 3.1(b)(6). However, NC-SARA does not require a school to obtain a surety bond, letter of credit, or other financial protection or immediately set up teach-out agreements with quality institutions when it is clearly financially unstable or loses its accreditation. The result of this loophole is that Stevens-Henager College is unlikely to provide financial compensation to any students and, based on the Department of Education's July 29, 2021 letter referenced below, it does not appear willing to provide reasonable alternatives to its students that are communicated in an accurate and fair manner.

to profit from student transfers.”¹⁴ NC-SARA has the authority and the ability to require schools on provisional status to take immediate action to protect students. It is critical that such steps be taken to ensure that more students do not suffer the same fate as the thousands of students at Stevens-Henager College and its branch campus of Independence University.

POLICY MANUAL CHANGE: Add language to section 3.2(c) to list examples of additional oversight measures that may be used for a school on provisional status, including a requirement that the school provide the SPE with a bond, letter of credit, or other financial guarantee to protect all current students, disclosures to current and prospective students, and a range of limitations on new online student enrollments.

- g) NC-SARA’s website should disclose the reasons a school is on provisional status and the conditions placed upon the school.

NC-SARA posts on its website *whether* an institution is on provisional status, but it does not provide *why* the institution is on provisional status or what conditions are placed on the school’s continued participation in NC-SARA. Students, student advocates, and our offices would benefit from knowing the reason for the school being placed on provisional status, particularly knowing whether the institution is facing an investigation, prosecution, or federal administrative review related to its program quality, financial stability, or consumer protection status. To help protect consumers, NC-SARA should post detailed information on its website about the reason a school is on provisional status and any conditions related to that status.

POLICY MANUAL CHANGE: Alter section 3.2(b), to read, in full: “NC-SARA will provide indication of the institution’s provisional status on the NC-SARA website, including the applicable reason for which the school has been placed on provisional status.”

- h) NC-SARA should not arbitrarily limit the duration of provisional status.

It may be appropriate for an institution to remain in provisional status for more than one year or even for more than two years. However, NC-SARA policy limits provisional status to one year, with the possibility of a one-year extension with approval from the regional compact and from the NC-SARA president. Eliminating arbitrary limits on provisional status would ensure that student protections imposed in conjunction with provisional status remain in place as long as they are needed. For instance, Stevens-Henager College recently spent one year on provisional status but was removed from that status after the expiration of that year, despite the fact that the school had not resolved the accreditation issues that caused it to be placed on provisional status. A few months after Stevens-Henager College was taken off provisional status, its accreditor revoked the school’s accreditation. NC-SARA’s one year limitation on provisional status may have prevented the school’s home state from keeping necessary student protections in place. Ongoing government investigations, serious issues identified by a lawsuit or settlement

¹⁴ Michael Frola, Division Director, Department of Education, July 29, 2021 letter to Paul R. Gardner, Chief Executive Officer, Center for Excellence in Higher Education (CEHE), available at https://s3.documentcloud.org/documents/21030733/cehe-gardner-letter-7292021_redacted.pdf

with a government agency, or a school's need for additional time to find a new accreditor are all examples of circumstances where a limitation on provisional status may be problematic.

If NC-SARA enhances the policies related to provisional status to give clear guidance and set required conditions for continued participation, and makes these conditions public, then provisional status could provide significant protections to students. SPEs should not be prohibited from extending the duration of provisional status as long as they believe it is necessary to protect students at the school. Moreover, requiring a state to seek permission from NC-SARA's leadership in order to extend provisional status involves a non-state entity in a state decision, undermining states' authority to oversee the schools in their states.

POLICY MANUAL CHANGE: Delete section 3.2(d) and (e) and replace with the requirement that the SPE must re-evaluate every year whether the conditions for provisional status are met and whether provisional status and any oversight measures are necessary.

- i) NC-SARA should permit member states to take action to protect their residents from predatory institutions.

States should be permitted to protect their students from misconduct by schools operating in their states. When a school is on (or should be on) provisional status, then any state – not just the school's home state – should be allowed to take steps to protect their residents if the school's home state fails to take sufficient action. This affords states the opportunity to take additional, independent action should they deem a particular institution a danger to their residents, while also allowing for consistency by first giving the home state the chance to determine that the institution should be subject to certain conditions.

POLICY MANUAL CHANGE: Add a new subsection in section 3.2 that allows the SPE of any state to limit enrollment or place conditions on the continued enrollment of students from its state at a school where one of the factors for placing a school on provisional status has occurred.

- j) NC-SARA should clarify its policies related to removing and denying schools from participating in NC-SARA and set clearer student-focused eligibility standards.

NC-SARA's Policy Manual states that schools may be terminated from participation in NC-SARA or denied entry into NC-SARA if they fail to meet the eligibility requirements, but it does not clearly provide a basis for termination or denial for schools that are facing a program quality, financial stability, or consumer protection issue that would cause them to be placed on provisional status. In our meetings with NC-SARA leadership, we were told that states may deny a school's participation in NC-SARA or terminate a currently participating school for issues that could trigger provisional status. But this is another area where the narrow language in the Policy Manual leads some SPEs to believe that they are not permitted to deny participation in NC-SARA to any school that meets the eligibility criteria, even if, for example, it (or its online program manager) was currently being sued by an Attorney General's Office for unfair and deceptive trade practices. The Policy Manual should make clear that states have the authority to

terminate a school from participating in NC-SARA or deny a school's initial application to participate for any reason for which it could be placed on provisional status. Furthermore, NC-SARA should include in its initial eligibility criteria a prohibition on any school that is currently under investigation or being sued by a government agency for a consumer protection violation. This would protect students while that investigation or lawsuit is pending, provide greater consistency to SPEs, and set clear expectations for schools. Finally, the Policy Manual should clearly give SPEs the authority to remove a school from participating in NC-SARA either because it fails to comply with a condition placed on it while the school is in provisional status, or because the home state believes that no conditions would be suitable to sufficiently protect students, in which case, the school may be terminated from participation in NC-SARA without first being placed on provisional status.

POLICY MANUAL CHANGES: Add language in sections 3.2(g) and 3.1(b) that allows a home state to remove a school from NC-SARA or deny participation in NC-SARA for any of the bases for provisional status set forth in section 3.2(a).

Also, add as a criterion of initial eligibility in section 3.1(b) that a school may not be currently under investigation or the subject of litigation by a government agency related to program quality, financial stability, or consumer protection.

Also, add language in 3.2(g) to make clear that a state may remove the institution from NC-SARA participation for its failure to comply with the terms of provisional status or without placing the school on provisional status if the Home State believes that the school's conduct that could have triggered provisional status is of such an egregious nature that no conditions would be suitable to sufficiently protect students.

3. NC-SARA's Board Should Rectify its Lack of State Control, Dearth of Consumer Protection Members, and Failure to Transparently Lobby for Federal and State Policy.

a) Member States should control the NC-SARA Board.

NC-SARA's Board develops all of NC-SARA's policies, including setting basic consumer protection standards for NC-SARA schools. However, member states do not hold the majority of positions on the Board, and therefore lack control over the development of NC-SARA's policy. This likely contributes to NC-SARA's consumer protection shortcomings and creates a risk that member states' authority to police predatory schools could be further undermined by NC-SARA policy changes. To prevent this, NC-SARA should reserve the majority of the seats on its Board for member states so that NC-SARA's members, not regulated entities or other third-parties, set NC-SARA's policies.

POLICY MANUAL CHANGE: A majority of board member seats should be reserved for representatives of States.

- b) State consumer protection agencies should have a reserved seat on the NC-SARA Board.

The NC-SARA Board should include at least one representative from a state consumer protection agency, such as state Attorney General offices. In 2020, a group of state Attorneys General nominated a representative to the NC-SARA Board, but NC-SARA rejected the nomination. State Attorneys General offices would bring extensive expertise to assist NC-SARA in amplifying and supporting essential consumer protections for students, a goal which was stated in your recent annual report. Representation on the NC-SARA Board from our offices, as well as other consumer protection advocacy organizations, would help NC-SARA fulfill its consumer protection mission.

POLICY MANUAL CHANGE: At least one board seat should be reserved for a consumer protection attorney from an Attorney General's Office.

- c) NC-SARA should be transparent and permit stakeholder feedback when advocating or commenting about federal or state policy.

In 2019, Marshall Hill filed comments with the Department of Education on behalf of NC-SARA asking the Department to alter a proposed rule¹⁵ related to distance education and to allow NC-SARA to prohibit states from enforcing non-general purpose consumer protection laws. Although, for the reasons discussed above, we disagree with the substance of Mr. Hill's comments, we are also concerned about the process that NC-SARA used to determine whether and how to make this proposed policy change. To our knowledge, Mr. Hill did not send his letter to NC-SARA's state members or post the comment online with adequate time to permit feedback from member states and other stakeholders, nor did he present the comment and his rationale at an NC-SARA Board meeting, and a vote was not taken by NC-SARA's board members to approve the testimony before submission. We believe that NC-SARA should create a policy defining the process for approval of advocacy, testimony, or comments on federal and state regulations and legislation to ensure that member states and other stakeholders are able to give feedback or object.

POLICY MANUAL CHANGE: Before NC-SARA takes a position on any federal or state regulation or statute, it should create a process by which it distributes a draft to the NC-SARA Board and all state members and posts the draft on its website, invites comment from the Board, the states, and the public, and has a vote by its Board after the comments have been considered.

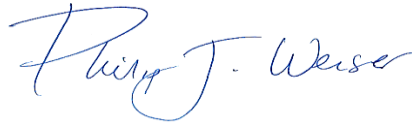
Thank you for your attention and your willingness to engage in a dialogue. We would welcome the opportunity to continue our conversation by further explaining the need for these policy changes and providing additional input on how they could be drafted, implemented, and enforced.

¹⁵ The proposed rule, which had been unanimously approved by a wide range of stakeholders, required NC-SARA to allow states to enforce all consumer protection laws.

Sincerely,



Brian E. Frosh
Maryland Attorney General



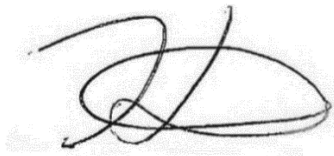
Philip J. Weiser
Colorado Attorney General



William Tong
Connecticut Attorney General



Kathleen Jennings
Delaware Attorney General



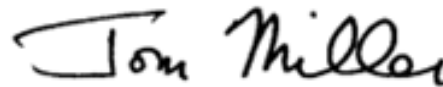
Karl A. Racine
District of Columbia Attorney General



Clare Connors
Hawai'i Attorney General



Kwame Raoul
Illinois Attorney General



Tom Miller
Iowa Attorney General



Aaron M. Frey
Maine Attorney General



Maura Healey
Massachusetts Attorney General



Dana Nessel
Michigan Attorney General



Keith Ellison
Minnesota Attorney General



Douglas J. Peterson
Nebraska Attorney General



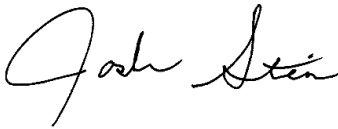
Aaron D. Ford
Nevada Attorney General



Hector Balderas
New Mexico Attorney General



Letitia James
New York Attorney General



Joshua H. Stein
North Carolina Attorney General



Ellen F. Rosenblum
Oregon Attorney General



Josh Shapiro
Pennsylvania Attorney General



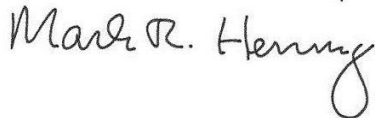
Peter Neronha
Rhode Island Attorney General



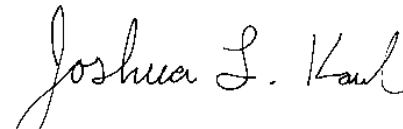
Herbert H. Slatery III
Tennessee Attorney General



Thomas J. Donovan, Jr.
Vermont Attorney General



Mark R. Herring
Virginia Attorney General



Joshua L. Kaul
Wisconsin Attorney General



Bob Ferguson
Washington State Attorney General

cc: Clare McCann, Office of the Undersecretary, United States Department of Education
Cynthia Jackson-Hammond, President, Council for Higher Education Accreditation
Robert E. Anderson, President, State Higher Education Executive Officers Association



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

March 15, 2022

Sent via E-mail

National Council for State Authorization Reciprocity Agreements
Board of Directors
c/o Dr. Lori Williams
3005 Center Green Drive; Suite 130
Boulder, Colorado 80301

Re: State Attorney General Recommendations Regarding NC-SARA Policy Modification Process

Dear Dr. Williams and Members of the NC-SARA Board of Directors:

We, the Attorneys General of Illinois, Colorado, Connecticut, Delaware, the District of Columbia, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Washington, as well as the Hawaii Office of Consumer Protection, write to submit recommendations and insight regarding NC-SARA's recent, proposed Policy Modification Process (the "Modification Process").¹ We appreciate NC-SARA's recognition of the importance of transparency and "collaborating with the full spectrum of stakeholders in the higher education community."² We strongly encourage NC-SARA to make the Modification Process as fair and transparent as possible and, therefore, write with some additional measures for your consideration.

As you know, on August 2, 2021, twenty-five attorney general offices submitted policy recommendations directly to NC-SARA after three meetings between NC-SARA staff and consumer protection attorneys from state attorneys general offices. See **Exhibit A**. These were significant policy modifications meant to better protect students and serve the interests of member states. Attorneys General are not alone in raising such consumer protection concerns: as The Institute for College Access & Success has noted, "NC-SARA has few substantive or proactive consumer protection requirements beyond those already required by federal regulations, and none of the requirements found in many state consumer protection laws."³ Our suggestions were

¹ *Draft Policy Modification Process*, NC-SARA, available at https://nc-sara.org/sites/default/files/files/2022-02/Draft_PolicyModificationProcess_Public%20Comment.pdf.

² *Mission and History*, NC-SARA, available at <https://nc-sara.org/mission-history>.

³ *Know the Facts: The Inaccuracies Surrounding NC-SARA*, The Institute for College Access & Success, Nov. 10 2021, available at: <https://ticas.org/wp-content/uploads/2021/11/Know-the-Facts.pdf>.

informed by years of investigation and enforcement actions against schools engaged in deceptive or unlawful practices, including schools participating in NC-SARA like Career Education Corporation (now called Perdoceo Education Corporation). We hope that NC-SARA has seriously considered these important changes that we believe help align its practices with its stated mission.⁴ However, to date, we have not received a formal response from NC-SARA to those suggestions. In the Meeting Summary of the Fall 2021 Board Meeting, NC-SARA indicates that the states' proposal was "tabled" and would be revisited after its policy modification proposal was planned and deliberated.⁵

As public agencies, we know well the importance of transparency. It is a fundamental principal of government that citizens have a right to be informed of public business. Many of our states require meetings of state agencies to be open and transparent.⁶ In Illinois, for instance, the Open Meetings Act declares "[i]t is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business."⁷ At the federal level, under the Administrative Procedures Act, the Department of Education similarly undergoes a public-facing notice and comment period when making education policy changes.⁸ NC-SARA, while a private, nonprofit organization,⁹ nevertheless makes policies that have a profound impact on the higher education field in each of our respective states and that impact the states' enforcement of their own laws. This outsized impact has only increased in recent years – the number of students nationwide enrolled exclusively in distance education nearly doubled from the fall of 2019 to the fall of 2020.¹⁰ In order to allow NC-SARA to better serve and inform the citizens of our states, we recommend NC-SARA take several steps to ensure fairness and transparency in its policy modification process.

I. NC-SARA Should Publish All Policy Proposals and Receive Public Comment Regarding Such Proposals

The Modification Process states that its guiding principles are "transparency; collaboration; consistency; and clear and open communication among regional compacts, states, institutions, NC-SARA, and other stakeholders." Modification Process, section b. The Modification Process also states that NC-SARA shall "maintain clarity and transparency regarding the status of such proposals throughout the entirety of the policy review cycle." *Id.* at section f(1)(ii). Under the proposed Modification Process, however, NC-SARA staff maintain an effective veto power over all proposals and the inherent ability to conceal any proposals not recommended for approval.

⁴ See *Mission and History*, supra note 2.

⁵ *Fall 2021 Board Meeting, Summary of Major Actions and Discussion*, NC-SARA, Oct. 29, 2021, available at https://nc-sara.org/sites/default/files/files/2021-11/Fall_2021_NC-SARA_Board_Meeting_Summary_Public%20Summary.11.30.21.FINAL_.pdf.

⁶ See, for example: Section 1-225, Conn. Gen. Stat.; District of Columbia Open Meetings Act, DC Code §§ 2-571, et seq.; Neb. Rev. Stat. § 84-1407 *et seq.*; N.J. Stat. Ann. § 10:4-6 to -21; Illinois Open Meetings Act, 5 ILCS 120/1; Maryland Open Meetings Act, Md. Code Ann., Gen'l Prov. §§ 3-101 to 3-501.

⁷ Illinois Open Meetings Act, 5 ILCS 120/1.

⁸ The APA requires agencies to provide "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

⁹ *About NC-SARA*, NC-SARA, available at <https://nc-sara.org/about-nc-sara>.

¹⁰ *Data Report Executive Summary*, NC-SARA, available at <https://nc-sara.org/2021-data-report-executive-summary>.

Upon receiving a proposed policy modification, NC-SARA, or the applicable regional compact, will review the proposal and either recommend it for approval or not recommend it for approval.¹¹ NC-SARA reviews the proposals on an inherently vague basis: “based on whether they are consistent with the purposes and governing principles of SARA.” Modification Process, section f(2)(iv). Only those proposals that NC-SARA staff approve will make their way to the NC-SARA Board for consideration. Further, only those proposals recommended for approval appear to be subject to the public comment period set forth in Section f(3)(ii) of the Modification Process. As such, policy proposals that NC-SARA staff do not recommend for approval appear to never again see the light of day – both the lack of recommendation and the reasons for that determination are left completely hidden.

Given that obscurity, we strongly recommend that NC-SARA provide a method for the publication of all proposals it receives – both those that NC-SARA staff recommend for approval and those that NC-SARA staff do not recommend for approval – including not just the proposals themselves but also the reasons for either recommending or not recommending those proposals. Further, we recommend NC-SARA adopt a method for receiving public comment on all such proposals, whether or not they are recommended for approval.

Such a system comports with NC-SARA’s mission and the guiding principles of the Modification Process. Further, this public comment system would benefit both NC-SARA and the public at large. First, by publishing NC-SARA’s recommendations and bases for those recommendations, stakeholders are better informed regarding NC-SARA’s concerns and policy objectives and, therefore, better able to provide better proposals to NC-SARA going forward. Further, such publication holds staff accountable for their recommendations and will help foster open and honest dialogue on all proposals.

Second, by accepting public comment regarding all policy recommendations received, NC-SARA will be able to better grapple with issues it may not have otherwise identified. For instance, a policy may be proposed that NC-SARA would have rejected, but if it receives numerous public comments supporting such a proposal, NC-SARA would undoubtedly be more likely to consider the proposal and potentially take it to the NC-SARA Board. By receiving a broad diversity of opinions, NC-SARA will be able to better adapt to the quickly-changing landscape of distance education and will be more accountable to the public. Stakeholders would also be able to provide additional input on any given proposal that could improve upon the proposed change, effectively saving NC-SARA staff time and effort.

II. NC-SARA Should Clarify the Information Provided to Stakeholders Under Section G

The Modification Process states that NC-SARA shall provide direct notices to those who submit policy proposals “that summarize any action taken in response to the proposed modification.” However, it is unclear what NC-SARA means by “action taken,” and whether such notices only are provided if a policy change is approved by the NC-SARA Board. We believe clarity on this point would help assure that NC-SARA provides such notices regarding a *lack* of action (i.e. proposals not approved by the Board or not recommended for approval by NC-SARA staff).

¹¹ See *Draft Policy Modification Process, Section f(2)*, *supra* note 1.

Moreover, we believe NC-SARA should clarify what information is included in such notices, including whether any justification for the actions taken will be included.

It is imperative that NC-SARA notify stakeholders regarding a lack of action. If NC-SARA adopts proposals, those modifications will be publicly available in the updated NC-SARA Policy Manual. However, if a proposal is not acted upon, stakeholders may sit in limbo as to whether their proposal is still under consideration or why NC-SARA took any steps that it did. NC-SARA should clarify what information will be provided in such notices and when, and we urge NC-SARA to provide detailed information regarding the bases for any action or inaction by staff and the Board.

III. NC-SARA Should Adopt Important Changes to its Board:

While the Modification Process does not touch specifically on the makeup or procedures of the NC-SARA Board, we believe important changes to the NC-SARA Board can impact the transparency and effectiveness of NC-SARA as well as impact the proposed Modification Process overall.

a. States Should Control the NC-SARA Board

As NC-SARA itself acknowledges, the *State Authorization and Reciprocity Agreement* is an “agreement among member states, districts and territories.”¹² The policies adopted by NC-SARA can often have greater impact on states than many of the policies adopted by our own state agencies. These policies can replace state laws, including those instituted to protect consumers. The NC-SARA Board, however, holds the ultimate power to adopt policies setting such basic consumer protection standards for NC-SARA schools. As the sole members of SARA, states are woefully underrepresented on NC-SARA’s Board.

We therefore resubmit the recommendation of our August 2, 2021 letter: member states should control NC-SARA’s Board. States have the clearest view of the consumer protection implications of NC-SARA policies and, therefore, are in the best position to control the impacts of those policies on important state laws. States’ enduring commitments to openness and transparency will also help address further policy concerns regarding NC-SARA proceedings and set a high standard for NC-SARA to conduct itself by.

b. NC-SARA Board Meetings Should Be Truly Public

Finally, we encourage NC-SARA to ensure its board meetings are completely public in practice instead of just in name only. In the higher education field, open meetings are the norm, and many states have open meeting requirements. Illinois law, for example, provides that “the actions of public bodies be taken openly and that their deliberations be conducted openly.”¹³ The Department of Education’s negotiated rulemakings are likewise open to the public.¹⁴ NC-SARA touts that its

¹² NC-SARA Homepage, NC-SARA, available at <https://nc-sara.org/>.

¹³ 5 ILCS 120/1.

¹⁴ See *The Negotiated Rulemaking Process for Title IV Regulations – Frequently Asked Questions*, Department of Education, available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html> (“Members of the public may observe meetings of the negotiating committee”).

meetings are public.¹⁵ However, despite this assertion, in reality these meetings are only partially in the public eye. As noted in the agenda to the Oct. 29, 2021 NC-SARA Board meeting, the Board meeting lasted 6 hours but only a single, 15-minute session was set aside as the “Public Portion of the Meeting.”¹⁶ Such deliberations are far from transparent.

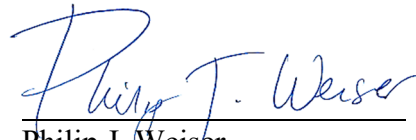
We believe that NC-SARA should conduct its own deliberations under the same principles of transparency as the Department of Education and our respective states, given the outsized impact its policies have on each of our states. Allowing full public view of such deliberations will allow stakeholders to better understand the actions taken – or not taken – by the NC-SARA Board and provide meaningful accountability for the Board members and NC-SARA staff.

Thank you for the opportunity to comment on NC-SARA’s policies and continue this important dialogue. We truly appreciate NC-SARA’s effort to provide additional transparency in its processes. We hope you will strongly consider the proposals contained here and raised in the states’ August 2, 2021 letter, and we look forward to hearing from you in detail regarding both.

Sincerely,



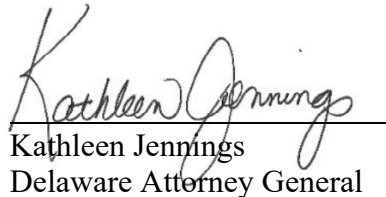
Kwame Raoul
Illinois Attorney General



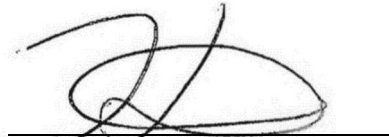
Philip J. Weiser
Colorado Attorney General




William Tong
Connecticut Attorney General



Kathleen Jennings
Delaware Attorney General



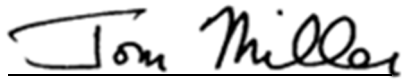
Karl A. Racine
District of Columbia Attorney General



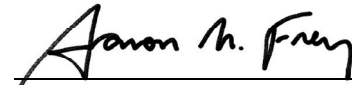
Stephen H. Levins
Executive Director, Hawaii Office of
Consumer Protection

¹⁵ See *Meetings*, NC-SARA, available at <https://www.nc-sara.org/news-events/meetings> (providing “upcoming and past public meeting notices.”).

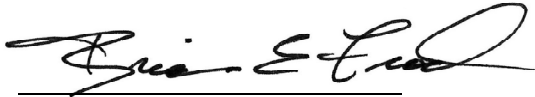
¹⁶ National Council for State Authorization Reciprocity Agreements Board Meeting: Fall 2021 Agenda, NC-SARA, Oct. 29, 2021, available at https://nc-sara.org/sites/default/files/files/2021-10/NC-SARA_Board_Meeting_Agenda_Fall_2021_Public_9.28.21.pdf.



Tom Miller
Iowa Attorney General



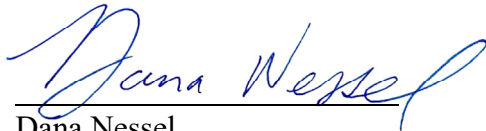
Aaron M. Frey
Maine Attorney General



Brian E. Frosh
Maryland Attorney General



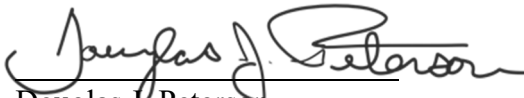
Maura Healey
Massachusetts Attorney General



Dana Nessel
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Keith Ellison
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Matthew J. Platkin
Acting Attorney General of New Jersey



Hector Balderas
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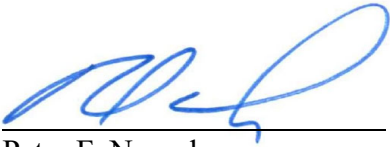
Josh Stein
North Carolina Attorney General



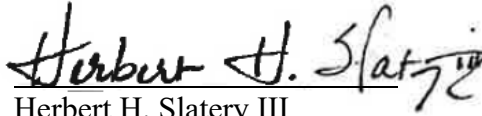
Ellen F. Rosenblum
Oregon Attorney General



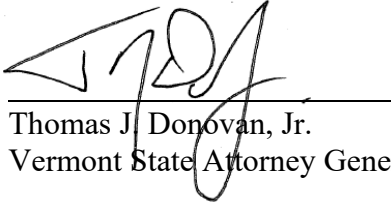
Josh Shapiro
Pennsylvania Attorney General



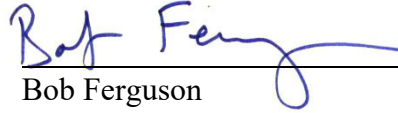
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