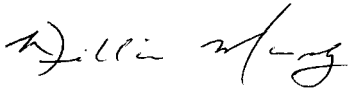






**TO:** The Honorable the Members of the Board of Regents

**FROM:** William P. Murphy 

**SUBJECT:** Proposed Amendment of Part 49 of the Commissioner's Regulations Relating to the Authorization of New York Higher Education Institutions to Participate in the State Authorization Reciprocity Agreement (SARA) and the Approval of Out-of-State Institutions to Provide Distance Education to New York Residents

**DATE:** September 3, 2020

**AUTHORIZATION(S):**  

## SUMMARY

### Issue for Discussion

Should the Board of Regents amend Part 49 of the Commissioner's Regulations relating to the authorization of New York higher education institutions to participate in the State Authorization Reciprocity Agreement (SARA) and the approval of out-of-state institutions to provide distance education to New York residents?

### Reason(s) for Consideration

Review of Policy.

### Proposed Handling

The proposed amendment will be presented to the Full Board for discussion at is September 2020 meeting. A copy of the proposed amendment is attached.

### Procedural History

During the first half of 2015, the Board of Regents discussed the possibility of joining SARA, and the Department drafted legislation which would provide the Commissioner with the authority to join SARA on behalf of New York State, provide the Department the authority to collect fees from New York State institutions that want to participate in SARA and from out-of-state institutions that do not participate in SARA but who want to offer distance education in New York State.

On August 13, 2015, the Governor signed into law Chapter 220 of the Laws of 2015 which enacted a new Education Law §210-c to give the Commissioner the authority to enter into SARA, subject to an appropriation, and provided the Department with the authority to collect fees from NYS and out-of-state institutions of higher education to cover the administrative costs of this work.

At the April 2016 Board of Regents meeting, the proposed SARA regulations were discussed in the Higher Education Committee. A Notice of Proposed Rule Making was published in the State Register on May 4, 2016.

At the September 2016 Board of Regents meeting, the Higher Education Committee discussed the proposed regulations and the overall assessment of public comment, and voted to adopt regulations to authorize New York State institutions to participate in SARA for postsecondary distance education, and for the approval of out-of-state institutions to provide distance education to New York State residents. The Higher Education Committee directed the Department to evaluate the implementation of SARA and report back to the committee in one year.

At the January 2018 Board of Regents meeting, the Higher Education Committee received an update from the Department on the status of New York State's participation in SARA and the regulation of interstate distance education.

### **Background Information**

Since the September 2016 promulgation of Part 49 of the Regulations of the Commissioner, 130 New York institutions currently participate in the reciprocity agreement. During the 2018-2019 academic year, 36,164 out-of-state distance education students enrolled at New York SARA institutions. Additionally, 47,934 New York students enrolled at out-of-state SARA institutions.

The Department has also approved 38 out-of-state non-SARA institutions to offer distance education in New York State. Of those 38 approvals, 24 are currently active. A number of institutions, particularly in Florida and Massachusetts, chose not to apply for renewal of authorization after their states joined SARA.

The Department proposes several technical amendments to Part 49. The reasons for these amendments include changes to national SARA policy and federal regulations, correcting and clarifying language, and aligning the regulation with its intent.

### **Summary of changes to Subpart 49-1**

- 49-1.1 (h): NC-SARA, the national SARA governing body, has changed the title of its governing document from *SARA Policies and Standards* to *State Authorization Reciprocity Agreements Manual*. The proposed amendments reference the updated document.

- 49-1.2 (g): Due to changes in federal regulations, NC-SARA recently changed its policy on disclosures related to programs leading to professional licensure. The proposed amendments bring the regulation into alignment with current SARA policy.
- 49-1.2 (n): The proposed amendments include a requirement for institutions that wish to participate in SARA to provide the institution's and SARA's complaint policies to all students taking courses under SARA. This is in alignment with NC-SARA policy.
- 49-1.3 (b)(2), 49-1.4 (b), and 49-1.5: The regulation does not currently specify a timeframe for an appeal when the department denies an application (initial or renewal) or when the department revokes approval. The proposed amendments specify a 10-day window for institutions to appeal such decisions. This aligns with the timeframe for out-of-state institutions to appeal a denial under Subpart 49-2, subsection (b)(2) and proposed amendments to Subpart 49-2.
- Additional minor corrections and clarifications were made throughout.

#### Summary of changes to Subpart 49-2

- Throughout: References to "New York State residents" have been updated to "individuals located in New York State" to align with federal regulations related to state authorization of distance education.
- 49-2.1 (a) and 49-2.2 (e): Subpart 49-2 applies to degree-granting institutions in states other than New York or in U.S. Territories. The proposed amendments add "U.S. territories" to two sections where this phrase was inadvertently left out.
- 49-2.2 (d): In order to align Part 49 with Section 3.56 of the Rules of the Board of Regents (Permission to Operate with a Physical Presence), added the underlined phrase to the definition of Distance Education: credit-bearing post-secondary instruction offered by any means where the student and faculty member are in separate physical locations, and the student is not required to report to a specific location for synchronous instruction. It includes, but is not limited to, online, interactive video or correspondence courses or programs. It does not include interstate distance education activity.
- 49-2.2 (h): Added the definition of Financial Responsibility Index Score: a numeric score calculated by the department for nonpublic institutions of higher education using United States Department of Education methodology as described in federal regulation 34 CFR § 668.172. The financial responsibility index score is calculated at the highest level of ownership.
- 49-2.3 (c): Removed a reference to USDE calculated score and replaced it with new definition of Financial Responsibility Index Score in 49-2.2 (h).

- 49-2.3 (n): Removed this paragraph referencing a potential waiver of the requirements listed in 49-2.3. The current regulation requires that, in order to be authorized to provide postsecondary distance education in NYS, a non-SARA institution possess a financial responsibility index score from the U.S. Department of Education that is 1.5 or above. The original intent of the waiver was to provide a mechanism for institutions that don't participate in Title IV to seek authorization, as such institutions typically do not have a financial responsibility index score from the U.S. Department of Education. The proposed changes to 49-2.2 (h) and 49-2.3 (c) give non-Title IV institutions the ability to seek authorization because it has been clarified that the financial responsibility score is calculated by NYSED using federal methodology, as opposed to an official score calculated by the U.S. Department of Education. This clarification makes the waiver provision unnecessary.
- 49-2.4 (b)(2), 49-2.5 (b), and 49-2.6 (a): An institution whose *initial application* for approval under Part 49-2 is denied may appeal the Department's decision within 10 days. The regulation does not currently specify a timeframe for an appeal of a denial of a *renewal application* or for an appeal of a *revocation of authorization*. The proposed amendments will align these three sections of the regulation by specifying a 10-day appeal window for all three situations.
- Additional nonsubstantive, technical corrections and clarifications were made throughout.

### **Related Regents Items**

[January 2018:](http://www.regents.nysed.gov/common/regents/files/118hed3.pdf) (http://www.regents.nysed.gov/common/regents/files/118hed3.pdf)

[September 2016:](http://www.regents.nysed.gov/common/regents/files/916hea1.pdf) (http://www.regents.nysed.gov/common/regents/files/916hea1.pdf)

[April 2016:](http://www.regents.nysed.gov/common/regents/files/416hed2.pdf) (http://www.regents.nysed.gov/common/regents/files/416hed2.pdf)

[April 2015:](#)

(http://www.regents.nysed.gov/common/regents/files/meetings/Apr%202015/415hed1.pdf)

[February 2015:](http://www.regents.nysed.gov/common/regents/files/215hea2Revised.pdf) (http://www.regents.nysed.gov/common/regents/files/215hea2Revised.pdf)

[January 2015:](#)

(http://www.regents.nysed.gov/common/regents/files/meetings/Jan%202015/115hed3.pdf)

### **Timetable for Implementation**

It is anticipated that the proposed amendment will be presented for adoption at the December 14, 2020 Regents meeting after publication of a Notice of Proposed Rule Making in the State Register and expiration of the 45-day public comment period prescribed in the State Administrative Procedure Act. If adopted at the December 2020 meeting, the proposed amendment will become effective on December 30, 2020.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 210, 210-c, 212 of the Education Law and section 97-III of the State Finance Law.

1. Part 49 of the Regulations of the Commissioner of Education is amended to read as follows:

Subpart 49-1

Approval of New York State Degree-Granting Institutions to Operate Under a State Authorization Reciprocity Agreement (SARA).

Section 49-1.1. Definitions.

For purposes of this Subpart:

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ....

(h) SARA policies and standards means the SARA [Policies and Standards February 17, 2016] Manual as adopted by National Council of State Authorization Reciprocity Agreements, 3005 Center Green Drive, Suite 130 Boulder, Colorado 80301 – Available at the Office of Counsel, New York State Education Department, State Education Building, Room 148, 89 Washington Avenue, Albany, New York, 12234.

Section 49-1.2. Institutional Eligibility Requirements. To be eligible for approval to operate under SARA an institution shall:

(a) ...;

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) agree to [notify in writing all students in a course or program that customarily leads to professional licensure or certification, or which a student could reasonably believe leads to such licensure or certification, whether or not the course or program meets requirements for licensure or certification in the state where the student resides. If an institution does not know whether the course or program meets licensure requirements in the student's state of residence, the institution may meet this requirement by informing the student in writing and providing the student the contact information for the appropriate state licensing board(s)] satisfy all federal requirements for disclosures regarding professional licensure programs under 34 CFR§ 668.43, regardless of whether the institution participates in Title IV programs;

(h) agree, in cases where the institution is unable, after all reasonable efforts, to determine whether a program will meet state professional licensure requirements, to provide the student or applicant with current contact information for any applicable licensing boards, and advise the student or applicant to determine whether the program meets requirements for licensure in the state where the student is located;

[(h)](i) agree, in cases where the institution cannot fully deliver the instruction for which a student has contracted, to provide a reasonable alternative for delivering the instruction or reasonable financial compensation for the education they did not receive;

[(i)](j) agree to provide any data requested by the department, to the extent permitted by applicable law, to assist the department in resolving any complaints arising from its students and to abide by decisions of the department, in order for the department to effectively monitor any activities under the agreement;

[(j)](k) upon application submission, pay to the department any state fees for application review and SARA participation as prescribed in section 49-1.7 of this Subpart;

[(k)](l) pay an annual SARA participation fee to the National Council for SARA (NC-SARA), as required by the SARA policies and standards; [and]

[(l)](m) report any other information required by SARA and/or this [section.] Subpart; and

(n) agree to provide the institution's and SARA's complaint resolution policies and procedures to all students taking courses under SARA policies.

### Section 49-1.3. Initial Application for Approval to Operate Under SARA.

(a) ...

(b) All complete applications will be reviewed by the department to determine whether the institution meets the eligibility requirements set forth in this [section] Subpart. Following the department's review of an institution's application for approval, the department shall take one of the following actions:

(1) Approval. The department shall approve all institutions that meet the requirements set forth in this [section] Subpart. The term of approval shall be one year from

the date of notification of approval and may be renewed annually thereafter based on a renewal application. An extension of such term may be granted at the discretion of the Commissioner.

(2) Disapproval. The department shall disapprove all institutions that do not meet the requirements set forth in this [section] Subpart. If an institution's application for participation in SARA is disapproved, the department will provide the institution with a written reason for such disapproval. [The] Within 10 days of the date of the written notification of disapproval, the institution may appeal [any] such disapproval to the Commissioner or his/her designee in a [timeframe and] manner prescribed by the Commissioner[, and submit additional information in support of its position]. An institution that has been disapproved[, ] may reapply to the [Department] department no earlier than 180 days from the date of disapproval.

(3) ...

#### Section 49-1.4. Application for Renewal of Approval to Operate Under SARA.

(a) An institution may apply to the department for renewal of its approval to operate under SARA on a form and in a timeframe prescribed by the Commissioner, with the required fees as prescribed in section 49-1.7 of this [section] Subpart no later than 60 days prior to the expiration of its existing term of approval. An extension of the submission period for renewal of approval may be granted at the discretion of the Commissioner.

(b) The department shall review all properly submitted renewal applications, and any other relevant data in the department's possession related to the institution's compliance with the SARA policies and standards. Following such review, the department will make a determination consistent with the options and procedures identified in section 49-1.3(b) of this Subpart. [The] Within 10 days of the date of the written notification of disapproval, the



institution may appeal such disapproval to the Commissioner or his/her designee in a [timeframe and] manner prescribed by the Commissioner [Department, and submit additional information in support of its position].

(c) [Institutions that do] An institution that does not apply for renewal before expiration of its approval [are] is no longer approved to operate under SARA.

(d) [Institutions] An institution no longer approved to operate under SARA may reapply to the [Department] department no earlier than 180 days from the date of disapproval or non-renewal.

#### Section 49-1.5. Loss of Eligibility and Removal.

The department may remove an institution from approval to operate under SARA, based on a finding that the institution is no longer eligible or is out of compliance with SARA policies and standards. [The] Within 10 days of the date of the written notification of disapproval, the institution may appeal [a] such disapproval to the Commissioner or his/her designee in a [timeframe and] manner prescribed by the Commissioner[, and submit additional information in support of its position]. An institution that is removed from eligibility during an approval period shall receive no fee refund, except as otherwise provided in section 49-1.7 of this Subpart.

Section 49-1.6. Complaints. Complaints against New York State institutions operating under SARA shall follow the following procedures:

(a) ...

(b)...

(c) ...

(d) ...

(e) ...

Section 49-1.7. Fee Schedule.

(a) New York State institutions seeking approval to operate under SARA shall be subject to the following annual fees to obtain and/or maintain state participation in SARA:

Institution's total full-time equivalent (FTE) enrollment as shown in the Federal Integrated Postsecondary Education Data System (IPEDS)	Total Annual Fee
Under 2,500 FTE enrollment	\$5,000
2,500 – 9,999 FTE enrollment	\$7,000
10,000 or more FTE enrollment	\$9,000

(b) ...

(c) If the department determines that an institution's application is disapproved; the institution will be refunded its annual fee, less \$2,000, which represents the costs to the [Department] department for application review.

(d) In addition to the fees prescribed in (a) of this section, institutions that have been approved by the [Department] department to participate in SARA shall be subject to the annual fees required by the SARA policies and standards, which shall be made payable to the National Council for SARA.

(e) ...

## Subpart 49-2

### Approval of Out-of-State Post-Secondary Institutions to Offer Distance Education to Individuals Located in New York State [Residents]

#### Section 49-2.1 Approval of the Department.

(a) Any institution legally domiciled in a State other than New York State or a United States Territory that seeks to offer any educational credit-bearing post-secondary instruction, courses, or degree programs through distance education to individuals located in New York State [residents] shall obtain approval to operate in this State from the Department. This includes institutions that are operating in New York State under section 3.56 of the Rules of the Board of Regents (permission to operate) that seek to offer distance education programs in this State.

(1) Post-secondary institutions that enrolled individuals located in New York State [residents] in its distance education programs on or before of the effective date of this Subpart, shall have six months from the effective date of this Subpart to seek and obtain department approval to continue to operate such programs to individuals located in New York State [residents]. An extension of the six-month time period may be granted in limited circumstances, at the discretion of the Commissioner.

(2) All institutions with individuals located in New York State [residents] enrolled in its distance education programs on or before the effective date of this Subpart, that have not received department approval by the expiration of the time period in paragraph (1) of this subdivision, must cease enrolling new students, and shall phase-out instruction for students who are currently enrolled in such programs until such students have completed the distance education program in which they are enrolled on the effective date of this section.

(b) Exemption. Any institution that is identified by a member state as participating in SARA is exempt from the application procedures and fees identified in this Part[,] and are instead subject to the SARA policies and standards.

#### Section 49-2.2. Definitions.

For purposes of this Subpart only:

(a) ...

(b) *Approved* or *Approval* means approval of an institution to offer its distance education programs to individuals located in New York State [residents].

(c) *Complaint* means a formal assertion in writing that the terms of approval are being violated by a person, institution, state, agency or other organization or entity operating under [the terms of this agreement] this Subpart.

(d) *Distance education* means credit-bearing post-secondary instruction offered by any means where the student and faculty member are in separate physical locations and the student is not required to report to a specific location for synchronous instruction. It includes, but is not limited to, online, interactive video or correspondence courses or programs. It does not include intrastate distance education activity.

(e) *Institution* means a degree-granting postsecondary entity legally domiciled in a state other than New York State or a United State Territory.

(f) *Interregional Guidelines for the Evaluation of Distance Education* means the guidelines developed by the Council of Regional Accrediting Commissions (C-RAC) in February 2011, and any amendments thereto, published by the Middle States Commission on Higher Education, 3624 Market Street, Philadelphia, PA 19104 - Available at the Office

of Counsel, New York State Education Department, State Education Building, Room 148, 89 Washington Avenue, Albany, New York 12234.

(g) *Legal domicile or legally domiciled* means the state or United States territory in which the institution's principal campus holds its institutional accreditation and, if applicable, its primary federal Office of Postsecondary Education Identifier (OPEID) number.

(h) *Financial responsibility index score* means a numeric score calculated by the department for nonpublic institutions of higher education using United States Department of Education methodology as described in federal regulation 34 CFR § 668.172. The financial responsibility index score is calculated at the highest level of ownership.

Section 49-2.3. Institutional Eligibility. An institution applying to the Department for approval to offer credit-bearing post-secondary courses or degree programs to individuals located in New York State [residents] through distance education pursuant to this Subpart must:

(a) ...

(b) ...

(c) possess a financial responsibility index score as defined in section 49-2.2(h) of this Subpart [from the U.S. Department of Education] that is 1.5 or above;

(d) agree to abide by the Interregional Guidelines for the Evaluation of Distance Education as defined in section 49-2.2(f) of this Subpart;

(e) agree to be responsible for the actions of any third-party providers used by the institution to offer distance education to individuals located in New York State [residents];

(f) ...

(g) ...

(h) ...

(i) agree to notify in writing all applicants and students in a course or program that customarily leads to professional licensure or certification, or which a student could reasonably believe leads to such licensure or certification, that the institution [outside of New York State] is not able to recommend graduates for licensure or certification in New York State[,] and does not know whether the course or program meets licensure requirements in New York State, and also agree to provide the student the contact information for the appropriate state licensing or certification board(s);

(j) ...

(k) ...

(l) ...

(m) agree to cease and desist all operations, including offering any distance education programs to individuals located in New York State [residents], upon notification from the department that the institution has lost its eligibility to offer such programs under this Subpart.

[(n) Waiver. The Commissioner, at her/his sole discretion, may waive one or more eligibility requirements identified in this section, provided that the institution can establish, in the determination of the Commissioner, that it has met the substantial equivalent of a requirement under this Subpart.]

#### Section 49-2.4. Initial Application for Approval to Offer Distance Education.

(a) ...

(b) All properly submitted applications will be reviewed by the department to determine whether an institution meets the eligibility requirements set forth in this section. Following the department's review of an institution's application for approval, the department shall take one of the following actions:

(1) Approval. The department shall approve all institutions that meet the requirements set forth in this section. The term of approval shall be one year from the date of notification of approval[,] and may be renewed annually thereafter based on a renewal application. An extension of such term may be granted at the discretion of the Commissioner.

(2) Disapproval. The department shall disapprove all institutions that do not meet all of the requirements set forth in this section. If an institution's application to offer distance education in this State is disapproved, the department will provide the institution with a written reason for disapproval. Within 10 days of the date of the written notification of disapproval, the institution may appeal a disapproval to the Commissioner or his/her designee in a [timeframe and] manner prescribed by the Commissioner[, and submit additional information in support of its position].

An institution that has been disapproved, may reapply to the Department no earlier than 180 days from the date of disapproval.

#### Section 49-2.5. Renewal Application.

(a) ...

(b) The department shall review all properly submitted renewal applications, and any other relevant data in the department's possession related to the institution's compliance with eligibility requirements and other indicators of good standing. Following

such review, the department will make a determination on the renewal application consistent with the options in section 49-2.3(b) of this Subpart. [The] Within 10 days of the date of a written notification of disapproval, the institution may appeal a disapproval to the Commissioner or his/her designee in a [timeframe and] manner prescribed by the Commissioner[, and submit additional information in support of its position].

(c) [Institutions] An institution that [do] does not apply for renewal before the expiration of its approval period [are] is no longer approved to operate distance education programs in this State.

#### Section 49-2.6. Loss of Eligibility and Revocation.

(a) The department may revoke an institution's approval authority under this Subpart, based on a finding that the institution no longer meets the requirements of this Subpart and/or based on any one or number of complaints received, including but not limited to complaints related to consumer protection, that raise a substantial question as to the institution's ability to offer distance education programs to individuals located in New York State [residents]. [The] Within 10 days of the date of the written notification of disapproval, the institution may appeal [a] such disapproval to the Commissioner or his/her designee in a [timeframe and] manner prescribed by the Commissioner[, and submit additional information in support of its position]. An institution that has had its approval revoked during an approval period receives no fee refund, except as otherwise provided for in section 49-2.7 of this Subpart.



Section 49-2.7. Complaints. Complaints relating to an institution that has been approved by the Department to offer distance education to individuals located in New York

[residents] shall follow the following procedures:

(a) ...

(b) ...

(c) ...

(d) ...

Section 49-2.8. Fee Schedule.

(a) Institutions seeking approval from the Department to offer distance education to individuals located in New York State [residents] under this Subpart shall be subject to the following state fees:

Application Review Fees	Annual Approval Fee	Total Annual Fee
\$7,000	\$10,000	\$17,000

(b) ...

(c) ...