CONTENTS

Action Item I: Approval of minutes from the meeting November 1, 2013 ............... 9

Action Item II: Update on progress of the SARA initiative ................................... 15

Action Item III: Finance report .............................................................................. 23

Action Item IV: Consideration of legal status for NC-SARA .............................. 25

Action Item V: Adoption of bylaws for NC-SARA ............................................. 33

Action Item VI: Election of officers and members of the executive committee ...... 43

Action Item VII: Additions and modifications to NC-SARA Policies and Standards...... 45
National Council for State Authorization Reciprocity Agreements (NC-SARA)
Board Meeting • Rosemont, IL • May 14, 2014

AGENDA

Welcome and introductions

Action Item I: Approval of minutes from the meeting November 1, 2013

Action Item II: Update on progress of the SARA initiative
   a) Marshall Hill, NC-SARA
   b) Christopher Rasmussen and Jennifer Parks, Midwestern Higher Education Compact (MHEC)
   c) Michael Thomas, New England Board of Higher Education (NEBHE)
   d) David Spence, Southern Regional Education Board (SREB)
   e) David Longanecker, Western Interstate Commission for Higher Education (WICHE)

Action Item III: Finance report

Action Item IV: Consideration of legal status for NC-SARA

Action Item V: Adoption of bylaws for NC-SARA

Action Item VI: Election of officers and members of the executive committee
   a) Report of the nominating committee
   b) Election of vice chair
   c) Election of treasurer
   d) Election of at-large members of the executive committee (four, if bylaws pass as presented)

Action Item VII: Additions and modifications to NC-SARA Policies and Standards
   a) Policy on data submission requirements for institutions participating in SARA
   b) Policy on complaint resolution reporting for states participating in SARA

Work plan moving forward
   a) Announcement of Gates Foundation grant to Presidents’ Forum and Council of State Governments to promote SARA

Questions, comments, reflections from council members

Comments from the audience

Adjourn
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NC-SARA AGENDA ITEM 5/14/2014

Action Item I: Approval of minutes from the meeting November 1, 2013

Action Item: ☑ Yes ☐ No

Background: n/a

Staff Recommendation: Approve the minutes.
MINUTES — NC-SARA Board Meeting
November 1, 2013
EducationCounsel • 101 Constitution Avenue, NW, Suite 900 • Washington, D.C. 20001

NOTICE OF MEETING
Notice of the time and place of the first meeting of the NC-SARA board was given to Board members, regional directors, Lumina Foundation, EducationCounsel, LLC, and other interested parties. An agenda is maintained in the NC-SARA offices at 3005 Center Green Drive, Suite 130, Boulder, CO 80301 and online at www.nc-sara.org

CALL TO ORDER AND INTRODUCTIONS
Chair Paul Lingenfelter called the meeting to order at 10:05 a.m.

Board Members Present
Barbara Ballard
Helena Stangle Bertram
Christopher Bustamante
Crady deGolian
Kathryn Dodge
Larry Isaak
Arthur Kirk, Jr.
David Longanecker
Teresa Lubbers
M. Peter McPherson
Patricia O’Brien
Pam Quinn
Paul Shiffman
Dave Spence
Michael Thomas
Leroy Wade
Belle Wheelan

Board Members Absent
Dianne Harrison
Terry Hartle
Eugene Ross

Council Staff Present
Marshall A. Hill
Michelle Perez-Robles

Regional Compact SARA Directors Present
Rhonda Epper (WICHE)
Mary Larson (SREB)
Jennifer Parks (MHEC)

WICHE Staff Present
Jere Mock

EducationCounsel Staff Present
Terri Taylor
Art Coleman

AGENDA ITEM I:
WELCOME AND INTRODUCTIONS

Chair Paul Lingenfelter welcomed all present and thanked the individuals and organizations that have invested their time, knowledge and efforts to resolving the challenging issues we are addressing. Board members introduced themselves and stated their reasons for participating in SARA.

Chair Lingenfelter acknowledged the leadership and contributions of Bruce Chaloux to the development of SARA. Bruce was a member of the Presidents’ Forum/Council of State Governments SARA drafting team, assisted in the SARA work of the regional compacts, and through his leadership of the Sloan Consortium supported the work of the National Commission on Regulation of Postsecondary Distance Education. He was to have been a member of NC-SARA. Chair Lingenfelter asked for a moment of silence in honor of Bruce, who recently passed away.
Chair Lingenfelter provided a brief description of the principles of SARA and acknowledged that the “authority” of NC-SARA arises from the willingness of all concerned to work together to develop an effective and efficient nationwide system to deal with the authorization of postsecondary distance education delivered across state lines. He stated that collaboration and consensus are essential to making this approach work.

**AGENDA ITEM II (ACTION ITEM)**
**CONFIRMATION OF PAUL LINGENFELTER AS CHAIR**

M. Peter McPherson moved to confirm the appointment of Paul Lingenfelter as Chair of NC-SARA for a term extending to January 1, 2016. David Longanecker seconded the motion. Lingenfelter left the room during the discussion and vote. The motion was approved with all members present voting “yes.”

**AGENDA ITEM III (ACTION ITEM)**
**CONFIRMATION OF MARSHALL A. HILL AS EXECUTIVE DIRECTOR**

Larry Isaak moved to confirm the appointment of Marshall Hill as Executive Director of NC-SARA. Belle Wheelan seconded the motion. Hill left the room during the discussion and vote. The motion was approved with all members present voting “yes.”

**AGENDA ITEM IV**
**SARA: BACKGROUND, OVERVIEW AND STATUS REPORT**

Marshall Hill addressed this agenda item. He reported that there is a great deal of institutional interest in SARA, that there remains a fair amount of misunderstanding of the details of the initiative, and that there has been almost no push back on the proposed fees that institutions will pay to join SARA. He is asked frequently about when states and institutions can join SARA, and he’s frequently asked how many states he expects will become members and how soon they will join. He answers those questions by saying that his hope is that 20-25 states will join by the end of 2014 and his expectation is that 40-45 will be SARA states by 2016. He reported that states will need assistance with the SARA process and that a conversation has been started with EducationCounsel and others about how best to provide that assistance.

He reported that the NC-SARA website should be up and running in one to two weeks and that it will contain a repository for foundational documents, information regarding SARA, and links to the regional compact websites. He called attention to two documents contained in the board members’ meeting packets: the map summarizing the staff’s estimates of state readiness to join SARA and an information sheet regarding SARA. He responded to Board members’ questions about SARA processes and the website.

David Longanecker reported that WICHE will provide IT staff for software development to do data collection. Hill reported that there are currently at least two “policy holes” that require attention: data collection and the reporting and resolution of complaints. Hill reported that he has asked the regional compacts to provide the names of two people from their regions who could assist with policy development around these issues.
AGENDA ITEM V (ACTION ITEM)
APPROVAL OF SARA DOCUMENTS FROM THE FOUR REGIONAL COMPACTS

Marshall Hill reported that he engaged Dr. Jim Mingle, former executive director of SHEEO, to review the SARA documents developed and approved by the four regional compacts. He asked Dr. Mingle to compare the documents for consistency among the four and for compliance with the recommendations of the final report of the national Commission on the Regulation of Postsecondary Distance Education. Hill requested that Mingle focus on governance issues and physical presence topics within the documents. Hill provided Mingle’s analysis to the regional compacts, resulting in subsequent modifications of the documents by the regional compacts to achieve the necessary consistency on key points. Hill reported that while the four documents contain some variance, they are now uniform and consistent in regard to the substantive structures, expectations, requirements, and mechanisms of SARA as contained in the final report and recommendations of the national Commission.

The board discussed the content of the documents at length, as well as the appropriateness of having NC-SARA “approve” them. Members commented that a nationwide system requires essentially consistent policies and standards across all regions and made the point that concerns about embracing consistency could be offset to some degree by reaffirming that participation in SARA is strictly voluntary for both states and institutions.

After considerable discussion, M. Peter McPherson moved to endorse the NC-SARA staff analysis and certify that the four regional SARA documents are consistent with one another in all substantive and material respects; are consistent with the principles and recommendations of the final report of the national Commission on the Regulation of Postsecondary Distance Education; and provide a basis for a nationwide reciprocity system for the approval of postsecondary distance education that crosses state lines. Kathryn Dodge seconded the motion. The motion passed with all members present voting “yes.”

AGENDA ITEM VI (ACTION ITEM)
APPROVAL OF SARA STANDARDS AND PROCEDURES

After extended discussion, M. Peter McPherson moved to approve “in principle” the proposed SARA Policies and Standards document with the understanding that the NC-SARA staff would work with the regional compacts to resolve any lingering concerns. David Longanecker seconded the motion. The motion passed with all members present voting “yes.”

AGENDA ITEM VII (ACTION ITEM)
DOCUMENTS FOR STATES TO USE IN APPLYING FOR MEMBERSHIP IN SARA

After extended discussion, M. Peter McPherson moved to endorse “in principle” the proposed documents with the understanding that the NC-SARA staff would work with the regional compacts to resolve any lingering concerns. Kathryn Dodge seconded the motion. The motion passed with all members present voting “yes.”
AGENDA ITEM VIII (ACTION ITEM)
DOCUMENTS FOR INSTITUTIONS TO USE IN APPLYING TO PARTICIPATE IN SARA

Paul Shiffman moved to endorse “in principle” the proposed documents with the understanding that the NC-SARA staff would work with the regional compacts to resolve any lingering concerns. Belle Wheelan seconded the motion. The motion passed with all members present voting “yes.”

AGENDA ITEM IX (ACTION ITEM)
APPROVAL OF INSTITUTIONAL FEES FOR PARTICIPATION IN SARA

Marshall Hill made the following recommendations in regard to fees that will be charged institutions that participate in SARA:

1. Set institutional fees for participation in SARA at the following levels:
   i. $2,000 per year for institutions with fewer than 2,500 FTE students, as per IPEDS;
   ii. $4,000 per year for institutions with 2,500-9,999 FTE students; and
   iii. $6,000 per year for institutions with 10,000 or more FTE students.
2. Institutional fees shall be due within 30 days of the institution being notified by their state of their approval to operate under SARA. Renewals will be scheduled monthly.
3. Institutions joining SARA prior to September 1, 2014 will receive 18 months’ SARA membership for their initial fee payment. Renewals will be at the regular 12 month rate.
4. NC-SARA will reconsider these fee levels by January 1, 2016 and make whatever adjustments are advisable.

Proposed fees were approved with all members present voting “yes.”

AGENDA ITEM X (ACTION ITEM)
BYLAWS FOR NC-SARA

To initiate discussion, Michael Thomas made a motion to approve the bylaws; Arthur Kirk seconded. Discussion was wide ranging, with particular attention to the composition, responsibilities, and authority of the executive committee. Rather than propose motions regarding the entire set of bylaws, as discussion proceeded members made motions on various topics: the number and composition of the executive committee, the number of meetings of the executive committee, ways to limit the authority of the committee, etc.

After extended discussion, Paul Lingenfelter suggested that all previous motions be withdrawn and that the bylaws be tabled to allow for further staff work and consideration at the next NC-SARA meeting. Teresa Lubbers made a motion to that effect; Belle Wheelan seconded the motion. The motion passed with all members present voting “yes.”
Members selected slips of paper indicating whether their term of service would be
two or three years; it was agreed that the staff would select for members not
attending the meeting. The results of this drawing resulted in the initial terms for
member ending as follows:

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Regional compact presidents have continuing membership in NC-SARA.

**AGENDA ITEM XI (ACTION ITEM)**

**NC-SARA POLICY STATEMENT ON THE ROLE OF ACCREDITATION IN SUPPORT OF SARA**

Teresa Lubbers moved to approve the document (with the elimination of the first
paragraph). Belle Wheelan seconded the motion. The motion passed with all
members present voting “yes.”

**AGENDA ITEM XII (ACTION ITEM)**

**ELECTION OF VICE CHAIR AND EXECUTIVE COMMITTEE FOR NC-SARA**

Item deferred.

**AGENDA ITEM XIII**

**TIMELINE MOVING FORWARD**

Paul Lingenfelter and Marshall Hill briefly discussed the timeline for future events in
the work of SARA. When asked how members could best describe SARA, Marshall Hill
suggested that SARA is “a consensus initiative of the higher education community,
implemented by the four regional education compacts.”

**AGENDA ITEM XIV**

**OTHER BUSINESS**

No discussion.

The meeting was adjourned at 2:30 p.m.
NC-SARA AGENDA ITEM
5/14/2014

Action Item II: Updates on progress of the SARA initiative

Action Item: ☑ Yes ☐ No

Background: The SARA initiative has made a great deal of progress since the first NC-SARA meeting on November 1, 2013. Marshall Hill will provide an overall assessment. Representatives of the regional compacts will focus more closely on developments within their regions.

- Marshall Hill, NC-SARA
- Christopher Rasmussen and Jennifer Parks, Midwestern Higher Education Compact (MHEC)
- Michael Thomas, New England Board of Higher Education (NEBHE)
- David Spence, Southern Regional Education Board (SREB)
- David Longanecker, Western Interstate Commission for Higher Education (WICHE)

Staff Recommendation: Accept and approve reports on progress of the SARA initiative.
<table>
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<tr>
<td>Texas</td>
<td>✓</td>
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<tr>
<td>Utah</td>
<td>✓</td>
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<tr>
<td>Vermont</td>
<td>✓</td>
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<tr>
<td>Virginia</td>
<td>✓</td>
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<tr>
<td>Virgin Islands</td>
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<tr>
<td>Washington</td>
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<tr>
<td>West Virginia</td>
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<td>✓</td>
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<tr>
<td>Wisconsin</td>
<td>✓</td>
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<tr>
<td>Wyoming</td>
<td>✓</td>
<td>✓</td>
<td></td>
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</tr>
</tbody>
</table>

n/a: Legislation not needed

Notes

May 5, 2014
### SARA Status for MHEC states

<table>
<thead>
<tr>
<th>State</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illinois</td>
<td>M-SARA staff anticipates receiving state application by October 1, 2014. Legal Authority: SB 3441. Bill still in session. The Illinois Board of Higher Education (IBHE) is the designated SARA portal agency.</td>
</tr>
<tr>
<td>Indiana</td>
<td>Approved as first SARA state and has had 8 institutions join. Legal Authority: IC 21-18.5-6-12(d) and IC 21-18-12.2-1. The Indiana Commission for Higher Education (ICHE) is the designated SARA portal agency.</td>
</tr>
<tr>
<td>Iowa</td>
<td>M-SARA staff anticipates receiving state application by November 1, 2014. Legal Authority: SB 2271. The Iowa College Student Aid Commission is the designated SARA portal agency.</td>
</tr>
<tr>
<td>Kansas</td>
<td>M-SARA staff anticipates receiving state application by July 1, 2014. Legal Authority: HB2544. The Kansas Board of Regents is the designated SARA portal agency.</td>
</tr>
<tr>
<td>Michigan</td>
<td>The governor of Michigan has established a study group to determine whether or not new legislation is necessary for Michigan to join M-SARA and have its Licensing and Regulation Authority become the Michigan Portal Agency. Michigan has a year round legislature, so there is hope that any needed new law or executive directive can be introduced and possibly passed in the Fall of 2014. That would put Michigan on track to submit an application to join M-SARA in early 2015.</td>
</tr>
<tr>
<td>Minnesota</td>
<td>M-SARA staff anticipates receiving state application by October 1, 2014. Legal Authority: HF 3231. SF 2856. Bills still in session. The Minnesota Office of Higher Education (MOHE) is the designated SARA portal agency.</td>
</tr>
<tr>
<td>Missouri</td>
<td>M-SARA staff anticipates receiving state application by September 1, 2014. Legal Authority: HB 13289. SB 699. Bill still in session. The Missouri Department of Higher Education (MDHE) will be the designated SARA portal agency.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>M-SARA staff anticipates receiving state application by July 1, 2014. Legal Authority: LB1069. Nebraska Coordinating Commission for Postsecondary Education (NCCPE) is the designated SARA portal agency.</td>
</tr>
</tbody>
</table>
### SARA Status for MHEC states

<table>
<thead>
<tr>
<th>State</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Dakota</td>
<td>Approved as second SARA state and has had 5 institutions join. Legal Authority: HB1103. The North Dakota University System (NDUS) is the designated SARA portal agency.</td>
</tr>
<tr>
<td>Ohio</td>
<td>M-SARA staff anticipates receiving state application by November 1, 2014. Legal Authority: HB484 (Section 3333.171). Bill still in session. The Ohio Board of Regents will be the designated SARA portal agency.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Joining W-SARA. Expected application date July, 2014.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>M-SARA staff met with all sector leaders in Wisconsin, which lacks a “natural” entity to take on the role of a Portal Agency. The leaders of the sectors, in addition to MHEC commissioners who are members of the Wisconsin legislature, hold regular meetings to discuss the possible creation of a new entity to become a Wisconsin Portal Agency. The earliest possible time for introduction of legislation that would create this entity, and enable Wisconsin to join M-SARA, would be in Spring 2015. As of yet, there is no way to project when WI might submit an application to join M-SARA.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Pennsylvania is not a member of any of the regional compacts and is trying to decide about both compact membership and SARA membership. These decisions are being discussed amidst a time of strict fiscal restraint and an upcoming election. The Office of Postsecondary/Higher Education hosted a meeting in January 2014 to which representatives from all sectors of higher education in the state were invited. Since then, the Office of Postsecondary/Higher Education has maintained a conversation with M-SARA staff about the evolving status of M-SARA and sought information about the work and cost necessary to set-up and run a portal agency. M-SARA is proposing to convene another cross-sector meeting in Pennsylvania in Summer 2014 to continue supporting Pennsylvania as it decides how to move forward.</td>
</tr>
</tbody>
</table>
SUMMARY

M-SARA has had a propitious first year. The first two states (IN, ND) and the first 13 institutions to join SARA have been MHEC states and institutions. An additional three states (IA, KS, NE) have passed legislation that will allow them to submit applications to M-SARA before the end of 2014. Yet another four states (IL, MO, MN, OH) have pending legislation that could well pass this spring and allow an additional four applications before the end of the year, for a possible total of nine member states by the end of 2014.

M-SARA has benefited from the fact that many of the nation’s early leaders in reciprocity are key regulators and educational leaders in many of our member states. Additionally, we are behooved by the fact that many of MHEC’s commissioners are educational leaders in their respective state legislatures and, therefore, are able and willing to help craft and sponsor SARA legislation in their states.

M-SARA has pursued a “high touch” approach to contacting and supporting our states, and this approach seems to have worked well. Besides a successful regional forum in January 2014, M-SARA staff has made numerous visits or electronic presentations to decision makers and institutional representatives in all but two of the MHEC states, with a new round of legislative support, portal agency support, and institutional recruitment visits and workshops scheduled for the summer and fall of 2014. Additionally, M-SARA staff have produced two webinars that have helped institutions understand SARA and its role in the state authorization process, with two more still to come this year that will deal with portal agency development and institutional application procedures. The last webinar in April 2014 reached over 500 participants located in all four regional compacts. Finally, M-SARA staff continue to work hard to make sure we have a presence and a voice at many of the key educational conferences and meetings around the nation. We are eager to help institutions understand the importance of good faith efforts at state authorization and, in doing so, help them see the value of SARA.

Finally, M-SARA staff have taken on two additional projects that help benefit all the regions and the national SARA organization. First, MHEC/M-SARA are working to develop a surety bond purchasing program that will help institutions and states manage the risk that comes with enrolling greater numbers of students on-line and across state lines. Second, M-SARA staff have launched the creation of an institutional database that allows us to model and understand better how the different educational demographics in each state will require different types and levels of work for the establishment of portal agencies and yield different revenue profiles and recruitment strategies.

In grant year two, our goal is to help solidify legislative and regulatory authority in our member states so that they can develop and run effective and efficient portal agencies. Key to this effort will be the recruitment of institutions and detailed support of their completion of their institutional applications. Likewise, we aim to launch the surety bond program by summer 2015, which also supports the work of the portal agencies and the institutions.
SARA Status for NEBHE states

<table>
<thead>
<tr>
<th>State</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>Legislation has been introduced in the 2014 legislative session. N-SARA anticipates state SARA application in 2015.</td>
</tr>
<tr>
<td>Maine</td>
<td>N-SARA anticipates proposed legislation in the 2015 legislative session. SARA has full support from Maine institutions.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Massachusetts’ higher education sectors have expressed interest in joining SARA. There are ongoing discussions with the Department of Education and all stakeholders.</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>New Hampshire has legal authority to enter into reciprocity agreements. N-SARA anticipates receiving state SARA application before 2015.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>N-SARA anticipates proposed legislation in the 2015 session. SARA has full support from Rhode Island institutions.</td>
</tr>
<tr>
<td>Vermont</td>
<td>Legislation has been introduced in the 2014 legislative session. N-SARA anticipates state SARA application in fall 2014.</td>
</tr>
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</table>

Non-Affiliated States

<table>
<thead>
<tr>
<th>State</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Jersey</td>
<td>New Jersey’s higher education sectors have expressed interest in joining SARA and have engaged in conversations with WICHE &amp; NEBHE.</td>
</tr>
<tr>
<td>New York</td>
<td>New York’s higher education sectors have expressed interest in joining SARA. There are ongoing discussions with the Department of Education and all stakeholders.</td>
</tr>
</tbody>
</table>

SARA Status for SREB states

Status report to be distributed at meeting.
### SARA Status for WICHE states

<table>
<thead>
<tr>
<th>State</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>W-SARA staff anticipates receiving state application by October 15, 2014. Legal Authority: Arizona Revised Statutes 15-1747. (2014). An “Interagency Governmental Agreement” is set forth in law that encompasses all sectors of postsecondary education in the state and will oversee the SARA activities in Arizona.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>W-SARA staff anticipates receiving state application in 2015. Legal Authority: Hawaii Revised Statutes 26-9, 446E-1.5 (2013). The legislation in 2013 created a new agency, the Department of Commerce and Consumer Affairs. This is likely to be the SARA portal agency when the state applies for membership in SARA.</td>
</tr>
<tr>
<td>Montana</td>
<td>W-SARA staff anticipates receiving state application by July 15, 2014. Legal Authority: Constitution of the State of Montana. The Montana University System will be the designated SARA portal agency.</td>
</tr>
<tr>
<td>Nevada</td>
<td>Scheduled for conditional WICHE approval May 13, 2014, pending final approval on May 14, 2014 of a MOU between the Nevada System of Higher Education and the Nevada Commission on Postsecondary Education.</td>
</tr>
</tbody>
</table>
## SARA Status for WICHE states

<table>
<thead>
<tr>
<th>State</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nevada, continued</td>
<td>Legal Authority: Nevada Revised Statutes: 341, 397.060 (2013). The Nevada System of Higher Education (NSHE) is the designated SARA portal agency.</td>
</tr>
<tr>
<td>New Mexico</td>
<td>W-SARA staff anticipates receiving state application in 2015. Legal Authority: Legislation was drafted in 2014, but not introduced in the short session. Will be introduced in the 2015 regular session. The New Mexico Higher Education Department is expected to be the designated SARA portal agency.</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Joined M-SARA in April 2014.</td>
</tr>
<tr>
<td>Oregon</td>
<td>W-SARA staff anticipates receiving state application by October 15, 2014. Legal Authority: Oregon Revised Statutes 351.735, 351.755, 351.758 and section 168a, chapter 768. (2014). The Oregon Higher Education Coordinating Commission is expected to be the designated SARA portal agency.</td>
</tr>
<tr>
<td>Pacific Territories</td>
<td>Expected application date: unknown</td>
</tr>
<tr>
<td>South Dakota</td>
<td>W-SARA staff anticipates receiving state application by July 15, 2014. Legal Authority: South Dakota Codified Laws Chapter 13-48. (2014). The South Dakota Board of Regents is likely to be the designated SARA portal agency.</td>
</tr>
</tbody>
</table>
NC-SARA AGENDA ITEM

5/14/2014

Action Item III: Finance Report

Action Item: ☑ Yes ☐ No

Background: The financial plan for the SARA initiative relies on implementation funding from foundations and a gradual transition to full reliance on the fees that will be paid by institutions participating in SARA.

Lumina Foundation, building on funding they previously provided to the Presidents’ Forum and the Council of State Governments for work supporting the development of SARA, has provided approximately $2.3 million to support implementation of the SARA initiative during the period July 1, 2013 to June 30, 2014. Those funds, provided to WICHE as the fiscal agent for the grant, support NC-SARA and the SARA-related work of the four regional compacts.

Because funding did not arrive until August of 2013, and SARA staff for the national and regional work needed to be identified and hired, not all of the first-year funds will be spent in that period. Lumina Foundation has approved the carrying forward of approximately $630,000 in unspent first-year funds to support the initiative from July 1, 2014 – June 30, 2015. A separate request has been submitted to Lumina for $720,000 in additional funding for that period.

In addition, WICHE, as fiscal agent for the grant funding of the SARA initiative, has submitted a request to the Bill and Melinda Gates Foundation. That request is for $200,000 for July 1, 2014 to June 30, 2015.

The projected budget for the SARA initiative for July 1, 2014 to June 30, 2015 is $2.15 million, including an anticipated $600,000 in institutional fees. By July 1, 2015 the operating expenses of the initiative are expected to be fully funded by the fees charged participating institutions.

David Longanecker and Marshall Hill will report on both the current and projected finances.

Staff Recommendation: Approve the report.

Funding for NC-SARA and for the four regional SARA's is secure for Fiscal Year 2014, with an anticipated surplus of $630,193 (see table 1), which will be applied to Fiscal Year 2015. Prospects for funding for the five entities for Fiscal Year 2015 are equally secure through the combination of $630,193 surplus funds carried over from FY 14, $721,641 in anticipated revenues from institutional fees, continued anticipated support of $720,600 from Lumina Foundation, and an anticipated new grant of $200,000 from the Bill and Melinda Gates Foundation (see tables 2 & 3).

Table 1

<table>
<thead>
<tr>
<th>Lumina FY 14 Budget</th>
<th>Estimated FY14 Expenditures</th>
<th>Estimated FY14 Surplus</th>
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</thead>
<tbody>
<tr>
<td>NC-SARA 868,012</td>
<td>616,815</td>
<td>251,197</td>
</tr>
<tr>
<td>M-SARA 344,200</td>
<td>273,149</td>
<td>71,051</td>
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<tr>
<td>N-SARA 319,100</td>
<td>294,569</td>
<td>24,531</td>
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<tr>
<td>S-SARA 358,700</td>
<td>187,367</td>
<td>171,333</td>
</tr>
<tr>
<td>W-SARA 389,347</td>
<td>277,266</td>
<td>112,081</td>
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<tr>
<td>TOTAL 2,279,359</td>
<td>1,649,166</td>
<td>630,193</td>
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Table 2

<table>
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<tr>
<th>Anticipated Expenditures – FY15</th>
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<tbody>
<tr>
<td>NC-SARA 764,604</td>
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<tr>
<td>M-SARA 377,499</td>
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<tr>
<td>N-SARA 325,161</td>
</tr>
<tr>
<td>S-SARA 354,946</td>
</tr>
<tr>
<td>W-SARA 414,329</td>
</tr>
<tr>
<td>TOTAL 2,272,246</td>
</tr>
</tbody>
</table>

Table 3

<table>
<thead>
<tr>
<th>Anticipated Revenues – FY15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Surplus 630,005</td>
</tr>
<tr>
<td>Institutional Fees 721,641</td>
</tr>
<tr>
<td>Lumina Support 720,600</td>
</tr>
<tr>
<td>Gates Support 200,000</td>
</tr>
<tr>
<td>TOTAL 2,272,246</td>
</tr>
</tbody>
</table>

Submitted by: David Longanecker, Western Interstate Commission for Higher Education (WICHE)
NC-SARA AGENDA ITEM 5/14/2014

Action Item IV: Consideration of legal status for NC-SARA

Action Item: ☑ Yes ☐ No

Background: The executive director of NC-SARA has engaged EducationCounsel, LLC, a Washington, DC based law firm, to provide advice and counsel on the question of appropriate legal status for NC-SARA. (EducationCounsel has been providing general legal services to NC-SARA and previously provided support for the National Commission on the Regulation of Postsecondary Distance Education.) EducationCounsel provided an initial analysis, which served as background for a subsequent conference call with EducationCounsel staff and Marshall Hill, Paul Lingenfelter, and David Longanecker.

The result of that work is the following recommendation from staff.

Background analysis from EducationCounsel is included with this agenda item. Representatives of the firm will be available to respond to questions.

Note: The bylaws under consideration in the next agenda item assume approval of this item, in that they include a description of the legal status of the organization as recommended here. The bylaws have been constructed to meet the particular requirements of the legal status recommended by the staff.

Staff Recommendation: Instruct the executive director to establish and operate NC-SARA under the provisions of 26 U.S.C Section 501(c)(3) and have the organization incorporated and operated under the Colorado Revised Nonprofit Corporation Act, Title 7, Articles 121-137 of the Colorado Revised Statutes.
To assist the National Council for State Authorization Reciprocity Agreements (NC-SARA) during its establishment, EducationCounsel was asked to provide information to support Executive Director Marshall Hill's recommendation that NC-SARA apply for federal tax-exempt status provided under the Internal Revenue Code §501(c)(3). This memo was developed in consultation with corporate colleagues from Nelson Mullins Riley & Scarborough (with which EducationCounsel is formally affiliated).

The purpose of this memo is to provide the leadership of NC-SARA with a general overview the process and the requirements relating to obtaining § 501(c)(3) tax-exempt status from the Internal Revenue Service (IRS) including the following:

- The basic requirements of 501(c)(3) tax status
- The advantages and benefits of 501(c)(3) tax status
- Some of the operational and other challenges that 501(c)(3) entities face including overview of limitations on lobbying that come with 501(c)(3) status,
- A summary of the information needed to submit a 501(c)(3) application
- A brief overview of certain of the other types of tax exempt entities under the Internal Revenue Code (§ 501(c)(4) status, affiliated 501(c)(3) and 501(c)(4) organizations, and § 501(c)(6) status (Please note that this overview is provided for informational purposes only.)
- A brief list of additional sources and recommended additional reading on this subject.

Based on our conversations and familiarity of the mission and purpose of NC-SARA, we understand that the charitable mission of NC-SARA be for the purpose of promoting national alignment on core elements and requirements for post-secondary distance education. To apply for any federal tax-exempt status, NC-SARA must be organized as a nonprofit corporation in its state of residence (likely Colorado, under the Colorado Nonprofit Corporation Act), using this mission to support its claim for nonprofit status. As a nonprofit corporation, NC-SARA will not have owners, meaning that no profits can or will be distributed to people or organizations outside of the nonprofit corporation.

It is important to note that non-profit status is not granted automatically by the IRS. Even a successful application can take several months to be processed; the overall time required largely depends on whether the application is accurate and complete upon its submission as well as the volume of other similar applications pending with the IRS when the application is submitted. All income of nonprofit corporations is taxable unless tax-exempt status is ultimately granted by the IRS after the application is submitted.
Applying for Internal Revenue Code § 501(c)(3) Status

An IRC § 501(c)(3) organization (501(c)(3) organization or charitable organization) must be organized exclusively for an "exempt purpose" expressly allowed by the IRC, including charitable and educational purposes. According to the National Center for Charitable Statistics, as of March 2013, nearly 1.5 million 501(c)(3) organizations exist in the United States.

Charitable organizations approved by the IRS conduct activities such as the advancement of education or science, relief of the poor or disadvantaged, and lessening the burdens of government. Educational organizations that have been approved for 501(c)(3) status include schools, organizations focused on public engagement, museums, and zoos. As reflected in its draft bylaws, NC-SARA’s mission – to support the establishment of an effective and efficient state-level reciprocity process that will allow students across the country to enjoy increased access to higher education opportunities and will reflect the core aims of efficiently ensuring quality programs and consumer protection in a rapidly changing education landscape – almost certainly qualifies as an exempt purpose under the Internal Revenue Code (the Code).

Every 501(c)(3) organization must be classified as a "public charity" or "private foundation." Though the default classification is private foundation, unless an exception applies, there are nearly ten times as many public charities as private foundations. The primary distinction between the two relates to the source of financial support: public charities receive funding from a broad base of supporters, while private foundations have limited sources of support. This distinction is important because it carries tax implications, including the level of deductibility of donors' contributions. As part of the 501(c)(3) application process, we will need to explore which of these two classifications best fits NC-SARA now and in its future.

Currently, NC-SARA is not organized as a separate corporation or other formal entity. When NC-SARA is formally incorporated, it is important to note that the IRS requires that an organization must file initial paperwork for tax exempt status with the IRS by the end of the 27th month after it was legally formed. When it approves an organization for tax-exempt status, the IRS will consider the organization to have been tax-exempt from the date of its initial formation. If, on the other hand, an organization files its initial paperwork after the 27th month after organization, absent the IRS granted a special exemption to this rule, the organization will be recognized as tax exempt from the date of its 501(c)(3) application.

Advantages of acquiring 501(c)(3) status

1. **Potential funding:** Some foundations and other funders exclusively fund 501(c)(3) organizations. Consequently, if NC-SARA does not apply for and receive 501(c)(3) status from the IRS, it may not be eligible for certain grants.

2. **The halo effect:** 501(c)(3) status can provide a "halo" effect for organizations, bolstering their reputation and confirming their charitable orientation. The general public tends to place more trust and have more confidence in 501(c)(3) organizations, due in part to the reassurance provided by IRS’s independent assessment and confirmation of its charitable objectives.
3. **Incentives to donors:** 501(c)(3) provides an incentive to prospective donors. Contributions to 501(c)(3) organizations are deductible as charitable contributions, which can increase potential donors' willingness to support the organization.

4. **Nontaxable income:** Like all federally approved tax-exempt organizations, the income of a 501(c)(3) organization is not taxable as long as the income does not result from business activities unrelated to its charitable purposes.

5. **Potential relief from other taxes:** Finally, 501(c)(3) status may result in other benefits, such as relief from income, sales, or property granted by state and local authorities.

**Challenges associated with 501(c)(3) status**

1. **High regulation:** A 501(c)(3) organization is highly regulated under the Code. A 501(c)(3) organization cannot be organized or operated for the benefit of private individuals, and it cannot expend money for non-charitable purposes. It must pay reasonable salaries consistent with fair market value, take great care in establishing and structuring formal affiliations with for-profit, and ensure that its assets be distributed to another 501(c)(3) organization or to a governmental entity in the event that it is dissolved.

2. **Significant IRS oversight:** A 501(c)(3) organization is also subject to significant oversight by the IRS. Responsibilities of the organization include:
   - Ensuring ongoing financial and non-financial recordkeeping, including a particularly careful record of the organization's sources of support.
   - Filing annual information returns to the IRS (unless an exception applies) OR annual electronic notice (for organizations with annual gross receipts of $50,000 or less). Failure to file a required annual return or notice for three years in a row will lead to automatic revocation of tax-exempt status.
   - Reporting annually $1,000 or more of gross income from an unrelated trade or business that does not carry out the organization's exempt purpose(s), other than providing financial support.
   - Making the organization's 501(c)(3) application, three years of annual returns, and unrelated business income tax returns available to the public (upon request and without charge other than reasonable copying costs). (The IRS also makes these documents available to the public.)
   - Meeting disclosure requirements to document charitable contributions.

3. **No participation in campaign activity:** A 501(c)(3) organization may not participate – directly or indirectly – in any campaign activity for or against political candidates for public office. Violating this rule can result in denial or revocation of 501(c)(3) status and an imposition of new excise taxes. Not all election-related activity is necessarily prohibited. For example, promoting voter participation and voter education, if carried out in a non-partisan manner that promotes no candidate and has no other bias, may be permissible.¹

4. **No attempts to "influence" legislation:** Finally – and, for NC-SARA's current purposes, perhaps most importantly – a 501(c)(3) organization may not attempt to "influence legislation" (i.e., take part in lobbying activities) as a substantial part of its activities. It is important to understand that, for purposes for acquiring and maintaining 501(c)(3) status, the only definition of lobbying that matters is that established by the IRS. Definitions established by individual states, federal election law, and other authorities state authorities have no bearing in this area.

The Code defines the lobbying as attempting to influence "action by Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment or similar procedure." The IRS considers an organization to have attempted to influence legislation if it contacts – or urges the public to contact – members or employees of a legislative body for the purpose of proposing, supporting, or opposing legislation, or if the organization advocates the adoption or rejection of legislation.²

501(c)(3) organizations may conduct educational meetings, prepare and distribute educational materials, or otherwise consider public policy issues in an educational matter without jeopardizing their exempt status. Nonpartisan analysis is generally not considered "influencing legislation" so long as (a) the material is available to the public, governmental bodies, officials, and employees, and (b) the material does not advocate the adoption or rejection of specific legislation. Appearances before a legislative committee or other body to discuss legislation and/or issues related to potential legislation do not generally constitute "influencing legislation" when the person making the appearance was invited to provide testimony by relevant officials.

Whether lobbying activities are considered a "substantial" part of a 501(c)(3) organization's activities is usually determined on a case-by-case basis, informed by facts and circumstances related to the organization's context. The IRS has not adopted a "safe harbor" percentage test for determining whether a substantial part of an organization's activities consist of lobbying. (In contrast, some courts have recognized that lobbying is considered insubstantial if it is 5% or less of an organization's activities, though others have rejected that approach.)

One exception to this case-by-case approach is that the IRS does allow some organizations to elect to be measured by an objective "expenditure test" instead of the subjective facts and circumstances test described above (although this exception has not been codified in any "safe harbor" provision). An organization will generally be eligible for this exception if the sources of its financial support are federal, state, and/or local governments; other 501(c)(3) organizations; and the general public.

Under this expenditure test (again, an exception to the "case by case" approach), the extent of an organization’s lobbying activity will not jeopardize its tax-exempt status, provided its expenditures do not normally exceed the limits described in the table below:

<table>
<thead>
<tr>
<th>Amount of exempt purpose expenditures</th>
<th>Lobbying nontaxable amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>≤ $500,000</td>
<td>20% of the exempt purpose expenditures</td>
</tr>
<tr>
<td>&gt;$500,00 but ≤ $1,000,000</td>
<td>$100,000 plus 15% of the excess of exempt purpose expenditures over $500,000</td>
</tr>
<tr>
<td>&gt; $1,000,000 but ≤ $1,500,000</td>
<td>$175,000 plus 10% of the excess of exempt purpose expenditures over $1,000,000</td>
</tr>
<tr>
<td>&gt;$1,500,000</td>
<td>$225,000 plus 5% of the exempt purpose expenditures over $1,500,000</td>
</tr>
</tbody>
</table>

5. **Limits on grassroots lobbying efforts**: There are also limits on a 501(c)(3) organization’s grassroots lobbying efforts – those efforts that attempt to influence legislation and the political process through indirect efforts such as media outreach, social media campaigns, and community organizing – to 25% of the Lobbying Non-taxable amount set forth in the above table. For example, if NC-SARA’s exempt purpose expenditures were $500,000, lobbying-related non-taxable expenditures could not exceed $100,000 and, of that $100,000, only $25,000 could go toward grassroots lobbying.

An organization that engages in lobbying activity that exceeds its limit in a particular year must pay an excise tax equal to 25% of the excess. An organization that exceeds its limit over a four year period may lose its tax-exempt status, making all of its income for that period subject to tax.

**Summary of Information needed to complete a 501(c)(3) application:**

The application for 501(c)(3) status requires the submission of the following information:

- Description of past, present, and planned activities of the organization.
- List of the names, titles, compensation amount, and mailing addresses of all officers, directors, trustees and five of the highest compensated employees and independent contractors who receive more than $50,000.
- Information on activities with any related parties to the organization or with officers, directors, trustees, or highly compensated employees.
- Information on any goods, services, and funds that the organization provides as part of its activities to individuals or other organizations.
- Three years of financial data (statement of revenues and expenses and balance sheets) – this can be projected data if in existence for less than 4 years.

**Note**: All organizations applying for any exempt status under Section 501(c) use the same Form 1024 application form from the IRS.

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3 Exempt purpose expenditures refer to the total amounts paid or incurred by the organization in a tax year to accomplish its exempt purposes.
Other options for tax-exempt status not recommended for NC-SARA

IRC § 501(c) also allows for other types of tax-exempt status for other types of organizations. None of these other statuses reflect the purpose and character of NC-SARA, and we do not recommend that NC-SARA pursue these options. A brief summary of each is provided for reference purposes only.

- **An IRC § 501(c)(4) social welfare organization** can only engage in activities that promote the common good and general welfare of the community, rather than a private or limited group. This is a very broad category of organizations — as the IRS notes, "Although the Service has been making an effort to refine and clarify this area, 501(c)(4) remains in some degree a catch-all for presumptively beneficial non-profit organizations that resist classification under the other exempting provisions of the Code. Unfortunately, this condition exists because 'social welfare' is inherently an abstruse concept that continues to defy precise definition."³⁴

There are three central differences between 501(c)(3) organizations and 501(c)(4) organizations:

- 501(c)(4) organizations may engage in unlimited lobbying, so long as the lobbying is consistent with the 501(c)(4) organization’s exempt social welfare purposes,
- 501(c)(4) organizations are not eligible to receive charitable contributions, and
- 501(c)(4) status does not convey the same "halo" effect as 501(c)(3) status.

These differences mean that a 501(c)(4) organization likely will not be eligible for as many grants as a 501(c)(3) organization and, even if eligible for grants, it may not be as attractive a grant recipient as a 501(c)(3) organization.

- **An IRC § 501(c)(3) organization may have a related 501(c)(4) lobbying organization.** Many high profile organizations (including the ACLU, NOW, NRA, and Sierra Club,) employ this structure, as do several national higher education organizations.

This structure requires careful management of money and staff flows (which may be out of reach of NC-SARA, at least for present purposes). The affiliated organizations can raise issues regarding whether the resources of the 501(c)(3) organization are used to subsidize lobbying activities of the 501(c)(4) organization, particularly in situations where the two organizations share staff, facilities, or other expenses or in which the two organizations conduct joint activities requiring an allocation of income and expenses. Any allocation of income or expenses between the two organizations must be carefully reviewed to ensure that the allocation method is appropriate and consistent with an allocation method that would be used by unrelated organizations. Additionally, the organizations must keep separate records (with appropriate record keeping and fair market value reimbursement for facilities and staff).

• An IRC § 501(c)(6) organization has a business, rather than charitable or educational, purpose (examples of such organizations include a local chambers of commerce, nonprofit business leagues, and the national sports organizations.)

Sources for Additional Information:

NC-SARA AGENDA ITEM 5/14/2014

Action Item V: Adoption of bylaws for NC-SARA

Action Item: ☑ Yes ☐ No

Background: An initial draft of bylaws was considered at the November 1, 2013 meeting of NC-SARA. After considerable discussion, that draft was referred back to the staff for additional work and consultation.

The bylaws now being considered incorporate the following significant changes from the earlier draft:

- Stipulate that officers serve terms of two years;
- Add a treasurer as an NC-SARA officer;
- Stipulate that regional compact presidents cannot serve as Chair, nor (this is the change) Vice Chair;
- Clarify that there are no terms of office for the presidents of the regional compacts (or their designees), nor a limitation on consecutive terms;
- Clarify that the Executive Committee is elected by the full membership of NC-SARA;
- Set the membership of the executive committee at seven individuals, including the three officers (Chair, Vice Chair, and Treasurer);
- Stipulate that two members of the executive committee shall be presidents of a regional compact;
- Add language about attendance at NC-SARA meetings, indicating that NC-SARA members may send non-voting representatives in their place;
- Stipulate that NC-SARA shall develop investment policies for its funds;
- Stipulate that NC-SARA shall (rather than “may”) purchase and maintain liability insurance (Article X, Section 2); and
- Correct minor punctuation or construction errors of the earlier draft.

Note: This draft incorporates a revised recommendation from EducationCounsel to remove as not needed some material contained in earlier versions, relating to lobbying and distribution of funding to other entities.

Staff Recommendation: Approve the bylaws.
National Council for State Authorization Reciprocity Agreements

BYLAWS
(Effective Date: __________)

ARTICLE I
NAME AND LOCATION, DESCRIPTION, AND PURPOSE

Section 1: Name and Location
The name of the organization is the National Council for State Authorization Reciprocity Agreements (NC-SARA). Its principal place of business shall be in Boulder, CO.

Section 2: Description
The National Council for State Authorization Reciprocity Agreements is an independent and autonomous organization operating as a coordinating and oversight body for the voluntary State Authorization Reciprocity Agreements among regional higher education compacts and their member states, districts, and U.S. territories. Participating regional compacts include: the Midwestern Higher Education Compact (MHEC), the New England Board of Higher Education (NEBHE), the Southern Regional Education Board (SREB), and the Western Interstate Commission for Higher Education (WICHE).

NC-SARA shall be a nonprofit organization (i) established and operated in accordance with the provisions of 26 U.S.C. Section 501(c)(3) (the "Internal Revenue Code") and accompanying regulations; and (ii) incorporated and operated under the Colorado Revised Nonprofit Corporation Act, Title 7, Articles 121 – 137 of the Colorado Revised Statutes. Its period of duration shall be perpetual unless terminated in accordance with Article VIII, below.

Section 3: Mission
The National Council for State Authorization Reciprocity Agreements is committed to supporting the establishment of an effective and efficient state-level reciprocity process that will allow students across the country to enjoy increased access to higher education opportunities and will reflect the core aims of efficiently ensuring quality programs and consumer protection in a rapidly changing education landscape.

NC-SARA shall achieve its mission by:

a. Promoting and advancing efforts to ensure inter-regional alignment on core elements and requirements of State Authorization Reciprocity Agreements (SARA), while also maintaining a limited role within the overall governance of SARA;

b. Representing the full spectrum of stakeholders in the higher education community, including all institutional sectors (including, but not limited to, large- and small-scale distance education providers), regional and national accreditation agencies, and state officials including state regulators, and state higher education executive officers.
c. Building public awareness of and support for SARA through regular communications to the field;
d. Serving as a forum for the higher education community at large to address concerns and questions as they arise.

Section 4: Purposes
The purposes for which NC-SARA is organized are exclusively charitable, scientific, literary, and educational within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986 (the "Code"), or the corresponding provision of any future United States Internal Revenue law. Notwithstanding any other provision of these bylaws, NC-SARA shall not carry on any activities not permitted to be carried on by an organization exempt from Federal income tax under Section 501(c)(3) of the Code or the corresponding provision of any future United States Internal Revenue law.

ARTICLE II
NC-SARA MEMBERSHIP

Section 1: NC-SARA Membership
NC-SARA shall be made up of an odd number (between 17 and 23) of individual National Council members. The duties and responsibilities of NC-SARA members are limited to those contained within these bylaws. Council members should come from the range of impacted groups to assure a wide range of support as the interstate reciprocity agreement is promoted and implemented, while also taking into consideration the need for those groups to have a permanent voice. Council members should be drawn from all institutional sectors (including large- and small-scale distance education providers), regional and national accreditation agencies, and state officials including state regulators, and state higher education executive officers.

a. Nomination and Election. NC-SARA shall fill vacant or soon-to-be-vacant positions regularly through a public nomination process. Prospective NC-SARA members may self-nominate or be nominated by others to serve. Council members shall be chosen through majority vote of NC-SARA through a selection process approved by a majority vote of all NC-SARA members.
b. Selection Criteria. Though the board shall represent a diverse set of perspectives and interests, membership shall not be driven by numerical representation or delegated interests. Instead, members shall be selected based on their knowledge of the field, ability to work across multiple perspectives, and commitment to the collaborative work and success of SARA and NC-SARA.
c. Regional Compact Presidents. The presidents of the four named regional compacts, as described in Article I, Section 2, of these bylaws, (or their designees) shall be voting members of NC-SARA, but shall not be eligible to serve as the NC-SARA Chair or Vice Chair. There shall be no term of office for the presidents of the regional compacts (or their designees), nor a limitation on consecutive terms.
d. Resignation. Any member may resign by written notice to the NC-SARA Executive Director and the NC-SARA Chair.
e. **Removal.** Any NC-SARA member who missed two consecutive NC-SARA meetings without advance notice or justification shall automatically lose his or her membership. Additionally, NC-SARA, at its discretion, may remove a member at any time for due cause by two-thirds vote of all NC-SARA members.

f. **Terms of Office.** Except as provided for in Article II, Section 1, c (above), the initial NC-SARA members shall be assigned two- and three-year terms randomly. All subsequent members of NC-SARA shall serve three-year terms and begin terms as a class. No member may serve more than three consecutive terms.

g. **Vacancies.** When a vacancy on NC-SARA exists midterm, this seat may be filled through a special nomination process determined by the Executive Director in consultation with the Executive Committee. Any NC-SARA member selected to fill a vacancy shall serve the remainder of the term for the vacant seat, but may continue to serve if elected through the general nomination and selection process.

h. **Compensation.** NC-SARA members shall not receive compensation for their service, but may be reimbursed reasonable travel costs associated with attendance at NC-SARA meetings and any Executive Committee, ad hoc committee, or task force meetings.

i. **Officers.** The Executive Committee will include at three officers: the Chair, Vice Chair, and Treasurer. Officers shall serve two-year terms and shall have the following duties:
   a. **The Chair.** The chair shall convene and preside over all meetings of the Executive Committee and all general NC-SARA meetings.
   b. **The Vice Chair.** The vice chair shall preside over meetings in the absence of or at the request of the chair.
   c. **The Treasurer.** The treasurer shall oversee the management and reporting of NC-SARA finances.

**Section 2: Executive Committee**
An Executive Committee shall provide support and guidance to the Executive Director on a regular basis.

a. **Executive Committee Action.** When matters require timely execution and, for practical reasons, cannot wait for a formal meeting of the full NC-SARA membership, the Executive Committee may act for and exercise all the powers of NC-SARA, except as such actions and powers are reserved to the members otherwise delegated in accordance with these bylaws. Such actions by the Executive Committee shall be promptly reported to the full membership.

b. **Membership.** The Executive Committee shall be elected by NC-SARA. There shall be seven members of the Executive Committee, all of whom shall be currently serving NC-SARA members and two of whom shall be the president of a participating regional compact, including any regional compact president who is elected to serve as Treasurer. All Executive Committee members shall serve a two-year term, with an option to serve an additional two-year term, with the approval of NC-SARA. The Chair, Vice Chair, and Treasurer of NC-SARA shall serve on the Executive Committee. The Chair and Vice-Chair of NC-SARA shall be Chair and Vice-Chair, respectively, of the Executive Committee. The Executive Committee shall also include the following non-voting individuals in its meetings:
i. **Executive Director.** The Executive Director (described in Article III, Section 2, below) shall serve on the Executive Committee, but shall not vote on any matters.

ii. **Past Chair.** The Chair from the previous term shall serve as confidant and advisor to the Chair, but shall not be required to attend Executive Committee meetings.

c. **Vacancies on the Executive Committee.** Vacancies on the Executive Committee shall be filled by vote of a majority of the remaining members of the Executive Committee. A person so elected shall serve until the next meeting of the membership of NC-SARA, at which time a special election shall be held to fill the vacancy for the remainder of the unexpired term.

### ARTICLE III

**Governance and Staff**

**Section 1: Governance**

NC-SARA shall have oversight over the general operation of NC-SARA and shall delegate responsibility as set forth in section 2 below. NC-SARA shall review and approve the annual budget of all NC-SARA activities.

**Section 2: Executive Director and Staff**

The NC-SARA Executive Director shall be the chief executive officer of SARA and be responsible for administering the work and budget of NC-SARA, pursuant to the decisions of the Executive Committee and the full NC-SARA body. The Executive Director shall be responsible for the records and accounts of NC-SARA and oversee the work of the other staff members. The Executive Director shall be nominated by the NC-SARA Executive Committee and confirmed by a majority vote of all NC-SARA members. The Executive Director shall attend all Executive Committee and general NC-SARA meetings, but shall not vote on any matters.

### ARTICLE IV

**NC-SARA Meetings**

**Section 1: NC-SARA Meetings**

a. **Semiannual Meetings.** The full NC-SARA body shall meet at least twice per year on a specific date, time, and location designated by the Executive Director. Members shall use these semiannual meetings to receive reports on the activities and budget of the organization, assess issues related to alignment among participating regional compacts, elect the members of the Executive Committee, and take other actions consistent with the mission of NC-SARA.

b. **Special Meetings.** Special meetings may be called by the Chair or a simple majority of the Executive Committee. A petition signed by one-third of the voting NC-SARA members may also call a special meeting.

**Section 2: Meeting Procedures**

a. **Notice of Meetings.** A notice shall be sent by the Executive Director to each NC-SARA member not less than one month prior to the meeting. Special meetings may be called with less than one month’s notice if necessary.
b. **Attendance.** All NC-SARA members are required to attend, either in person or virtually, all semiannual meetings. Members have the right to attend NC-SARA meetings by telephone, video-conference, or other technology that allows for remote access to meetings. If a member cannot attend, he or she shall give timely notice to the Executive Director. If a member cannot attend, he or she may send another person in his or her place, but such representatives shall not vote nor count toward a quorum.

c. **Quorum.** Those present at any properly announced meeting of the membership shall constitute a quorum.

d. **Rules of Procedure.** In the event a question of order or procedure shall arise which is not covered in these bylaws, Robert’s Rules of Order shall prevail.

e. **Voting.** All issues to be voted on shall be decided by a simple majority of those present at the meetings in which the vote takes place, except for matters requiring two-thirds vote as identified and described in these bylaws.

### Section 3: Action without a Meeting

a. **Types of Eligible NC-SARA Actions.** Upon the resolution of the Executive Committee, any action that may be taken by the members at a meeting of NC-SARA may be taken through a mail ballot that shall be provided to every NC-SARA member. To go into effect, any action taken through mail ballot shall require the affirmative vote of a majority of the members.

b. **Mail Ballot Definition.** For the purposes of this section, the term "mail ballot" shall be deemed to encompass the use of both traditional and electronic mail, provided such use shall have been authorized by the Executive Committee.

### ARTICLE V

**Committees, Task Forces, and Common Interest Groups**

Committees, task forces, and common interest groups may be appointed from time to time and report to the Executive Director, the Executive Committee, and/or NC-SARA, as appropriate.

### Section 1: Formation of Committees and Task Forces

NC-SARA may create and dissolve committees and task forces as needed to serve in an advisory capacity. The NC-SARA Chair, in consultation with the Executive Director, shall appoint all committee and task force chairs.

### Section 2: Duties of Committees and Task Forces

All approved committees and task forces shall provide an update on their activities at Executive Committee meetings, upon the Chair’s or the Executive Director’s request, and at meetings of the full NC-SARA membership until they complete their work or are dissolved. Any use of NC-SARA funds to support a committee or task force shall be approved by the Executive Director in consultation with the Executive Committee.
ARTICLE VI
NC-SARA PUBLIC COMMUNICATIONS

The Executive Director is the principal spokesperson for NC-SARA for statements concerning local, state, and national policy and other such matters related to the NC-SARA’s mission. Prior to making statements on matters for which NC-SARA has not taken an official position, the Executive Director shall make reasonable efforts to consult with the members of the Executive Committee and other NC-SARA members, as appropriate. The Executive Director shall share any statements made on behalf of NC-SARA in regular NC-SARA announcements.

Section 1: Written Communications
The Executive Director, in consultation with the Executive Committee and other NC-SARA members, as appropriate, may use written correspondence to voice a common concern, request clarification on a common topic, or state a consensus position on a topic or query of importance to NC-SARA. Any written communications must be shared with all NC-SARA members in a timely fashion.

Section 2: Presentations, including representation at external forums
In the course of carrying out his or her duties, the Executive Director may be asked to represent NC-SARA by giving a presentation or attending an external forum. A summary of these activities shall be shared with NC-SARA members in regular NC-SARA announcements.

ARTICLE VII
AMENDMENTS AND DISSOLUTION

Section 1: Amendments
NC-SARA may authorize, amend or restate operating guidelines, plans, practices and/or procedures from time to time in order to implement effectively its purposes, including any modifications to the bylaws that may be required under Colorado law. All amendments to these bylaws shall be approved by a simple majority vote of a quorum of NC-SARA members. Proposed amendments must be submitted to the NC-SARA Executive Director and sent out with regular NC-SARA announcements in advance of any vote.

Section 2: Dissolution
After discontinuance of business and payment of debts, any surplus funds shall be transferred as a gift and equitably divided among participating regional compacts.
ARTICLE VIII
FINANCES

Section 1: Fund Raising
NC-SARA shall raise funds by collection and receipt of gifts of money and property, grants, contributions, donations, bequests, receipts and fees for services so long as all such funds are accepted by the Executive Committee of NC-SARA.

Section 2: Funds Collected and Received
All funds collected and received by NC-SARA, together with the income therefrom, shall be held, retained, managed and conserved in a capital fund or funds and administered, used, and applied by the Executive Director in consultation with the Executive Committee in accordance with the mission purposes described in Article I of these bylaws. The Executive Committee may accept revenues and properties which are qualified, limited, or restricted in their use so long as such qualifications, conditions, limitations and/or restrictions shall not conflict with the mission and purposes of NC-SARA as described in Article I of these bylaws. Unless otherwise specifically required, such restricted revenues and/or property may be commingled with other funds of NC-SARA.

ARTICLE IX
APPLICATION AND USE OF FUNDS

Section 1: Management of Funds
Revenues received by NC-SARA shall be held in an account or accounts in the name of the NC-SARA in such location(s) as may be designated by the Executive Committee or the Chair of the Executive Committee. NC-SARA shall hold, manage, invest, and reinvest its funds in accordance with the investment policies to be developed and approved by NC-SARA and shall collect and receive the income therefrom. After deducting all necessary expenses incident to the operation and administration of NC-SARA, such funds shall be utilized in accordance with the mission and purposes set forth in these bylaws. The Executive Committee may establish a committee within itself for the purpose of supervising and managing investments. All such revenues received and held by NC-SARA shall be distributed to such persons and in such amounts as NC-SARA shall deem appropriate, in keeping with the purposes of NC-SARA.

Section 2: Autonomy of NC-SARA
NC-SARA shall be the sole entity or person responsible for the application and use of its assets, including payment of its expenses in accordance with such operating guidelines as may be established by the Executive Committee; and it shall operate as an independent and autonomous entity for the purposes of meeting its financial obligations.
Section 3: 501(c)(3) Status
Notwithstanding any other provision of these bylaws, no expenditure shall be made in any manner or for any purpose whatsoever (i) which may jeopardize the status of NC-SARA as an organization under Section 501(c)(3) of the Internal Revenue Code, and under the Colorado Revised Nonprofit Corporation Act, Title 7, Articles 121 – 137 of the Colorado Revised Statutes and accompanying regulations; or (ii) which may jeopardize the status of contributions or payments by any person insofar as concerns deductions which are allowed under the provisions of Sections 170, 2055, 2106 and 2522 of the Internal Revenue Code and accompanying regulations.

ARTICLE X
INDEMNIFICATION

Section 1: Authority
NC-SARA shall, to the fullest extent permitted by Colorado Revised Nonprofit Corporation Act, indemnify all persons whom it may indemnify pursuant thereto so long as such persons have conducted themselves in good faith and reasonably believed their conduct not to be opposed to NC-SARA’s best interests.

Section 2: Insurance
NC-SARA shall purchase and maintain insurance on behalf of any person who is or was a member, officer, employee, or agent of NC-SARA who, while a member, officer, employee, or agent of NC-SARA, is or was serving at the request of NC-SARA as a member, officer, partner, trustee, employee, or agent of another corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise against liability asserted against or incurred by him or her in that capacity or arising from his or her status as such, whether or not NC-SARA would have the power to indemnify him against the same liability under Article 129 of the Colorado Revised Nonprofit Corporation Act.

ARTICLE XI
REGULATION

The regulation of the business and conduct of the affairs of NC-SARA shall conform to federal and state income tax laws and any other applicable federal and state law, and such regulation shall be determined by these bylaws, as they may be amended from time to time. In the interpretation of these bylaws, wherever reference is made to the United States Code, the Internal Revenue Code, the Colorado Revised Statutes, or any other statute, or to any section thereof, such reference shall encompass any future amendments, supplements, or supersession by laws covering equivalent subject matter.
ARTICLE XII
WAIVER OF NOTICE

Except as otherwise provided by law, whenever any notice is required to be given to any NC-SARA member under the provisions of the Colorado Revised Statutes or under the provisions of the bylaws of NC-SARA, a waiver thereof in writing, signed by the person or persons entitled to such notice, whether before or after the time stated therein, and delivered to NC-SARA for inclusion or filing with the minutes or corporate records, shall be equivalent to the giving of such notice.

CERTIFICATION

These bylaws were approved at a meeting of the National Council for State Authorization Reciprocity Agreements by a two-thirds majority vote on May 14, 2014.

____________________________________  ____________________
Paul Lingenfelter, NC-SARA Chair  Date

4815-2173-4166, v. 3
NC-SARA AGENDA ITEM

Action Item VI: Election of officers and members of the executive committee

**Action Item:** ☑ Yes ☐ No

**Background:** At its November 1, 2013 meeting, NC-SARA elected Paul Lingenfelter to serve as Chair. Bylaws to be considered for adoption at this meeting call for two additional officers (Vice Chair and Treasurer) and four additional NC-SARA members who, with the officers, will comprise the Executive Committee.

In preparation for the election, Chair Lingenfelter contacted NC-SARA members to ask about their willingness, if selected, to serve as officers of NC-SARA or members of its executive committee. He also asked whether they wanted to recommend other particular NC-SARA members for those positions.

Using the responses he received, Chair Lingenfelter appointed a nominating committee and forwarded to them the results of the prior communications with NC-SARA members.

The nominating committee will report its nominations and recommendations. Chair Lingenfelter will conduct the election.

**Staff Recommendation:** None.
NC-SARA AGENDA ITEM

5/14/2014

Action Item VII: Additions and modifications to NC-SARA Policies and Standards

Action Item: ✔ Yes □ No

Background: NC-SARA is a young and still-developing initiative. This agenda item addresses two issues that have been previously discussed but not yet established in policy: a) the collection of data from institutions that participate in SARA, and b) the reporting of complaints lodged against SARA institutions for activities carried out under SARA provisions.

Data on cross-state delivery of postsecondary distance education is sorely lacking for an activity that has become a significant part of higher education delivery in our country. NC-SARA data collection is designed to improve that situation by building, over time, a picture of the extent to which SARA institutions are serving students who live in other states.

There is no consolidated information on student complaints about distance education providers. The staff is recommending a basic approach to the issue for SARA institutions that will focus on complaints that are not resolved at the institutional level.

To help form recommendations on these issues, the staff assembled an advisory committee, comprised of individuals recommended by the presidents of the four regional compacts. Staff added two local individuals with relevant expertise. A list of the names and affiliations of all those individuals is included with these materials. We thank them for their assistance.

The staff and members of the advisory committee have in various venues over the last few weeks circulated drafts and provided descriptions of these recommended policies. The draft policies have been posted on the NC-SARA website to solicit comment. Additional discussions with other constituencies will occur between the time of the writing of these materials and the date of the NC-SARA meeting.

Staff has consulted with EducationCounsel to ensure that the proposed NC-SARA data collection policies will protect student privacy and comply with requirements of the Family Educational Rights and Privacy Act (FERPA). Their opinion letter is included.

Staff Recommendation: Approve the attached policies on: a) data to be collected from institutions that participate in SARA; and b) the reporting of complaints lodged against SARA institutions for activities carried out under SARA provisions.
Data Submission Requirements for Institutions Participating in the State Authorization Reciprocity Agreements (SARA), for Consideration by the National Council for State Authorization Reciprocity Agreements at its May 14, 2014 Meeting

Institutions participating in the State Authorization Reciprocity Agreements (SARA) shall annually submit the following data to the National Council for State Authorization Reciprocity Agreements:

1. The number of students enrolled in the institution via distance education delivered outside the home state of the institution, reported by state, territory, or district in which the students reside.
2. A list of programs that a student may complete without on-campus attendance (using the U.S. Department of Education definition of a distance education program).

NC-SARA shall convene a technical advisory panel to help develop data submission protocols; that information will be made available to SARA institutions well before data submission is required. Data and information submitted through this process will be reported on the NC-SARA website. NC-SARA will not collect individually identifiable student data and will comply with the Family Educational Rights and Privacy Act (FERPA).

Beginning in 2016, institutions participating in SARA will be required to further disaggregate the above enrollment data by program of study.
Complaint Resolution Reporting for States Participating in the State Authorization Reciprocity Agreements (SARA), for Consideration by the National Council for State Authorization Reciprocity Agreements at its May 14, 2014 Meeting

States participating in the State Authorization Reciprocity Agreements shall report the following information to the National Council for State Authorization Reciprocity Agreements on a quarterly basis:

1. The number of complaints, by institution, appealed to the state’s SARA portal agency after the person making the complaint has completed the institution’s or governing board’s (if relevant) complaint resolution process;
2. The resolution of those complaints in the aggregate, by institution: number resolved in favor of the person making the complaint, number resolved in favor of the institution, number resolved by agreement, and number pending resolution.

NC-SARA shall form a technical advisory panel to determine the protocols of this reporting. NC-SARA shall advise participating SARA states of those provisions well before data submission is required. Data and information submitted through this process will be reported on the NC-SARA website. NC-SARA will not collect individually identifiable student data and will comply with the Family Educational Rights and Privacy Act (FERPA).
NC-SARA Data Committee
Participant List

Michael Ball
Associate Director
Washington Student Achievement Council

Beth Bean
Chief Research Officer
Colorado Department of Higher Education

Kris Biesinger
Senior Advisor
Southern Regional Education Board

Marianne Boeke
Senior Research Associate
National Center for Higher Education Management Systems

Monnica Chan
Director of Policy and Research
New England Board of Higher Education

Sandra Doran
Regional SARA Director
New England Board of Higher Education

Jennifer Parks
Regional SARA Director
Midwestern Higher Education Compact

Russell Poulin
Deputy Director, Research and Analysis
WICHE Cooperative for Educational Technologies

Ken Sauer
Senior Associate Commissioner for Research and Academic Affairs
Indiana Commission for Higher Education
May 5, 2014

Dr. Marshall Hill
Executive Director
National Council for State Authorization Reciprocity Agreements
3005 Center Green Drive, Suite 130
Boulder, Colorado 80301

Dear Dr. Hill:

In our role as counsel to the National Council for State Authorization Reciprocity Agreements (NC-SARA) and at your request, we are providing this opinion letter on the compliance of NC-SARA's plans for data collection with the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA), which addresses the privacy of student records maintained by or for schools (including institutions of postsecondary education) and school districts that are funded by programs of the U.S. Department of Education (USED).

We are of the opinion that the plans for data submission developed by NC-SARA comply with FERPA based upon and subject to the assumptions, qualifications, and limitations described in this letter. The letter provides background on NC-SARA's policy, relevant FERPA provisions, and applies FERPA to NC-SARA's policy for two central issues:

I. **NC-SARA's policy on the aggregate reporting of student enrollments** does not, in itself, generally trigger FERPA because this information does not ordinarily involve a disclosure of individual students' personally identifiable information, subject to the possible exception discussed below.

We have identified one potential exception to this general conclusion related to the possibility of very small cell sizes of information reported to NC-SARA that, when combined with other information available about the student, could allow a reasonable person in the school community to link the disclosed information to an individual student. If so, the reported information would be considered personally identifiable information and, consistent with FERPA, would need to be masked or suppressed. Although USED has not provided clear guidance on this issue, there is a good argument that the disclosure of enrollment data, even with small cell sizes, would not make the information linkable to an individual student by a reasonable person in the school community.

However, given the absence of authoritative precedents or guidance on this issue, we recommend that NC-SARA in its policy and in the form it uses to collect this information should indicate its belief that the requested data, even in
small cell sizes, generally would not be personally identifiable information, but caution that the postsecondary institution should apply its established policies for masking or suppressing small size data in reporting data to NC-SARA when both of the following circumstances apply: (1) if the postsecondary institution believes that the disclosure of this small cell size information, when linked to other information available in the school community, will enable reasonable persons in the school community who do not have knowledge of the specific circumstances to identify the student; and (2) if disclosure of the information is not covered by the institution's directory information policy, or -- if it is covered -- students have opted out of that policy.

II. **NC-SARA's policy on data needed by state agencies to resolve complaints**
also is consistent with FERPA because the complaint form students will use to register complaints with the relevant state agency relating to distance education programs in which the student has enrolled through SARA complies with FERPA requirements regarding consent to disclosure. First, the consent form embodied in the complaint will indicate the records that may be disclosed (records related to the student's complaint regarding his/her enrollment in distance education). Second, the form will describe the limited purpose for which the information may be used (i.e., only as necessary to resolve the complaint). Finally, the form will indicate to whom the disclosure may be made – namely, the state agency responsible for resolving the complaint. Students should be required to sign these consent forms in order for the cognizant state agency to obtain information relating to the student from the postsecondary institution in order to resolve the complaint.

The discussion which follows includes a complete review of each of these issues.

Before we turn to our analysis, a few disclaimers: The opinions in this letter are based on investigations of law that we have determined appropriate. We have also examined and, with your permission, we have relied upon and assumed the accuracy of the facts stated in this opinion letter. Except as expressly set forth in this opinion letter, we have not undertaken any independent investigation, examination, or inquiry to determine the existence or absence of any facts. No inference as to our knowledge of such facts should be drawn from the fact of our representation of NC-SARA.

In addition, we understand that this letter (or portions thereof) may be shared with counsel for state educational agencies or postsecondary educational institutions. As a consequence, and with your consent, we have not designated the contents of this letter as "privileged and confidential," subject to attorney-client/work product privileges. That said, we strongly recommend that NC-SARA advise participating state agencies and postsecondary institutions that even though this information is provided as a resource to them, they should rely on the advice of their counsel when making judgments regarding legal compliance issues discussed herein.
I. NC-SARA’S POLICY REGARDING SUBMISSION OF ENROLLMENT DATA

A. NC-SARA’s Policy

NC-SARA’s policy for data submission by institutions of postsecondary education participating in the State Authorization Agreements (SARA) will provide for annual submission to NC-SARA of data on the number of students who reside out-of-state and who are enrolled in the institution via distance education, by state (including the District of Columbia) or territory. Beginning in 2016, the data will be disaggregated by program of enrollment (for example, the report might indicate that there are five students enrolled in distance education physics programs from the State of Colorado).

NC-SARA’s policy will provide that postsecondary institutions should not submit personally identifiable information on students derived from those students’ education records. Further, this policy and forms for submission — while expressing NC-SARA’s view that the requested data, even in small cell sizes, generally would not be personally identifiable information — will also provide that an institution of postsecondary education should take steps consistent with its policies to mask or suppress small cell size data if the institution concludes that —

1. Submission to NC-SARA of the numbers of out-of-state distance education enrollees disaggregated by state or territory of residence and (beginning in 2016) by program in small cell sizes would, when linked with other available information within the school community, make students reasonably identifiable to reasonable persons within the school community who do not already have knowledge of the relevant circumstances; and
2. Such information is not releasable under the institution’s directory information policy, or based on student opt out from a directory information policy that permits release of the information.

B. FERPA Provisions Relating to the Collection of Enrollment Data

In addition to providing parents and eligible students the right to review and challenge the accuracy of their education records (20 U.S.C. §1232g(a)), FERPA prohibits educational agencies and institutions that are funded by USED from disclosing personally identifiable information from students’ education records without the consent of a parent or the eligible student, unless disclosure is authorized by FERPA. (FERPA includes a long list of authorized disclosures to specified organizations or persons for purposes specified in the law, such as for the evaluation or audit of federal- or state-supported education programs (Id., at 1232g(b)). The disclosure of aggregate or anonymous data that are not personally identifiable by an educational agency or institution does not implicate FERPA.

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1 EducationCounsel LLC is available to assist in the preparation of policies and forms referenced in this opinion letter and, at a minimum, should review those documents to ensure their consistency with this opinion letter. EducationCounsel has assisted with the development of a state policy guide to SARA implementation, which will also be revised, as warranted, to align with NC-SARA’s data policy and this opinion letter.

2 For information on these methods, see Federal Committee on Statistical Methodology’s Statistical Policy Working Paper 22, www.fcsm.gov/working-papers/wp22.html.

3 FERPA provides that the rights of parents under FERPA, including the right to consent to disclosure of personally identifiable information from a student’s education records, transfer from a parent to the student (referred to as “eligible student” in FERPA regulations) when the student turns 18 years old or is attending an institution of postsecondary education. 34 C.F.R. §§ 99.3; 99.30.
FERPA regulations define "personally identifiable information" as including but not limited to: the student's name; the name of the student's parent or other family members; the address of the student or student's family; a personal identifier, such as the student's social security number, or biometric record; other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; other information that, alone or in combination, is linked or linkable to a specific person that would allow a reasonable person in the school community, who does not have knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates (34 C.F.R. §99.3).

FERPA also permits postsecondary institutions to adopt a directory information policy that permits designated directory information to be disclosed. "Directory information" is defined in FERPA regulations as "information contained in a student's education record that would not generally be considered harmful or an invasion of privacy if disclosed." (Id.) The FERPA regulations provide that directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in official recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended. (Id.) The postsecondary institution must give public notice to students in attendance of (1) the types of information the institution has designated as directory information; and (2) the right of students to opt out of the designation of such information as directory information for that student (Id. at §99.37).

C. Application of FERPA Provisions to NC-SARA's Policy

A postsecondary institution's disclosure to NC-SARA of information on the numbers of students who reside out-of-state and are enrolled in distance education programs, disaggregated by state (including the District of Columbia) or territory of residence and – beginning in 2016 – by program of enrollment would not in itself generally involve a disclosure of personally identifiable information subject to FERPA.

However, there is an issue of whether the potentially very small cell sizes of this information reported to NC-SARA would, when combined with other information available about the student, allow a reasonable person in the school community to link the disclosed information to an individual student. If so, this information would constitute personally identifiable information subject to FERPA. For example, if a postsecondary institution in New York reported that it enrolls one distance education student who lives in Montana in its psychology program, would that reporting enable a reasonable person in the school community to identify the student? If so, the institution in New York would need to take steps to mask or suppress reporting for the Montana student, unless the institution has a directory information policy that permits the disclosure of information identifying its enrolled students, their residence, and academic program, and students have not opted out of such disclosures without their permission.
Unfortunately, there is not a clear answer to this issue, particularly because USED has not addressed what the "school community" means with reference to distance education or, to our knowledge, applied the applicable definition of personally identifiable information to distance education.

We believe there is a good argument that the disclosure of enrollment data, disaggregated as described above, would not make the information linkable to an individual student by a reasonable person in the school community. Interactions among students are likely to be limited in a distance education program, and it seems unlikely that persons in the school community would be able to identify the individual student based on the disclosure of this information, apart from employees who have specialized, personal knowledge of the students by virtue of their jobs. (Those with such specialized, personal knowledge would not bring the disclosure within the FERPA definition of personally identifiable information).

However, given the absence of authoritative precedents or guidance on this issue, we recommend that NC-SARA in its policy and in the form it uses to collect this information should – while indicating its belief that the requested data, even in small cell sizes, generally would not be personally identifiable information – caution that the postsecondary institution should apply its established policies for masking or suppressing small size data in reporting data to NC-SARA when both of the following circumstances apply:

1. If the postsecondary institution believes that the disclosure of this small cell size information, when linked to other information available in the school community, will enable reasonable persons in the school community who do not have knowledge of the specific circumstances to identify the student; and

2. If disclosure of the information is not covered by the institution’s directory information policy, or students have opted out of that policy.

We believe this approach is preferable to developing a uniform NC-SARA small cell size policy applicable to all participating postsecondary institutions. Most postsecondary institutions are not likely to view the requested enrollment information as linkable to an individual student and, therefore, as personally identifiable information that must be masked or suppressed. Indeed, it is possible that many postsecondary institutions would view such an effort by NC-SARA as unnecessary and a possible intrusion by NC-SARA. In addition, guidance from USED on these provisions suggests that a case by case judgment by the disclosing institution is appropriate for determinations that de-identified or aggregate data may be personally identifiable when linked to other information available in the school community.4

4 As stated in the preamble to the Department’s 2008 amendments to the FERPA regulations, "[I]t is not possible to prescribe or identify a single method to minimize the risk of disclosing personally identifiable information in redacted records or statistical information that will apply in every circumstance, including determining whether defining a minimum cell size is an appropriate means to protect the confidentiality of aggregated data and, if so, selection of an appropriate number. This is because determining whether a particular set of methods for de-identifying data and limiting disclosure risk is adequate cannot be made without examining the underlying data sets, other data that have been released, publicly available directories, and other data that are linked or linkable to the information in question. For these reasons, we are unable to provide examples of rules and policies that necessarily meet the de-identification requirements . . . The releasing party is responsible for conducting its own analysis and identifying the best methods to protect the confidentiality of information from education records it chooses to release." (73 Fed. Reg. 74835 (December 9, 2008))
Also, even if the data requested by NC-SARA were deemed to constitute personally identifiable information because it could be linked to other information to identify a student, such information would come within the definition of "directory information" under the FERPA statute and regulations. If the postsecondary institution has a directory information policy that permits the disclosure of information identifying students enrolled in specific programs of the institution — and if the student does not opt out of such disclosures — the reporting to NC-SARA of enrollment numbers by program and by the state or territory where the student resides would be permissible under FERPA without any masking or suppression of small cell size data.²

II. NC-SARA'S POLICY FOR THE COLLECTION OF INFORMATION BY STATE AGENCIES RELATING TO STUDENT COMPLAINTS

A. NC-SARA’s Policy

NC-SARA polices will provide for the resolution of student complaints regarding specified distance education issues by postsecondary institutions where they are enrolled, with an opportunity for students dissatisfied with institutional resolution of the complaint to file the complaint with the cognizant NC-SARA state agency. A complaint form that must be used in filing a complaint with the state agency will include language whereby the student consents to the disclosure by the institution of personally identifiable information regarding the student to the state agency as necessary to resolve the student’s complaint. NC-SARA’s policies do not provide for the submission of complaints to NC-SARA.

B. FERPA Provisions Relating to Data Needed to Resolve Complaints

Under 34 C.F.R. §99.30 of the FERPA regulations, except in those instances where disclosure is authorized without consent under §99.31 of the regulations, or in the case of directory information from which the parent or eligible student has opted out, the parent or eligible student must provide a signed and written consent before an educational agency or institution discloses personally identifiable information from the student’s education records. The written consent must: (1) Specify the records that may be disclosed; (2) State the purpose of the disclosure; and (3) Identify the party or class of parties to whom the disclosure may be made. Id. at §99.30(b). The "signed and dated written consent" may include a record and signature in electronic form that—(1) Identifies and authenticates a particular person as the source of the electronic consent; and (2) Indicates such person’s approval of the information contained in the electronic consent. Id. If requested by a parent or eligible student, the educational agency shall provide him or her with a copy of the records disclosed. Id. at § 99.30(c)(1).

² We also note that under FERPA, if an educational institution is found to have a policy or practice of making unauthorized disclosures, the institution must be given an opportunity to come into voluntary compliance before the Department takes any enforcement action (34 C.F.R. §99.66(c)), and the U.S. Supreme Court has held there is no right for a private party to sue for a FERPA violation. (Gonzaga University v. Doe, 536 U.S. 273 (2002))
C. Application of FERPA Provisions to NC-SARA’s Policy

The complaint form for students to register complaints with the cognizant state agency related to the distance education program in which the student is enrolled through SARA will include a written consent form consistent with the subject FERPA provisions. First, the form will indicate the records that may be disclosed (records related to the student’s complaint regarding his/her enrollment in distance education). Second, the form will describe the limited purpose for which the information may be used (i.e., only as necessary to resolve the complaint). Finally, the form will indicate to whom the disclosure may be made – namely, the state agency responsible for resolving the complaint. Students should be required to sign these consent forms in order for the cognizant state agency to obtain information relating to the student from the postsecondary institution in order to resolve the complaint. (34 C.F.R. §99.30(a) & (b)).

III. CONCLUSION

As indicated above, based on the foregoing analysis and subject to the assumptions, qualifications, and limitations set forth in this letter, we are of the opinion that the NC-SARA data plans, as described above, comply with FERPA.

This opinion is limited to and based upon plans described in this letter and FERPA, as currently written and interpreted in the regulations and published guidance of USED. Without limiting the generality of the foregoing:

1. We do not express any opinion concerning state or local law, or other laws, rules, or regulations generally applicable to the current or proposed conduct of business by NC-SARA (or as to consents, approvals, or other actions by federal or state regulatory authorities generally required for the conduct of such business);
2. We express no opinion as to the laws of any country (other than federal laws of the United States of America) as to the effect of such laws (whether limiting, prohibitive, or otherwise) on any of the rights or obligations of NC-SARA or of any other party to or beneficiary of SARA;
3. With the exception of FERPA, we have assumed, with your permission, that compliance with the above-described plans by each of the participating postsecondary institutions and state agencies and the performance of their obligations thereunder, will not violate any fundamental public policy under applicable law.
This opinion letter is limited to the matters stated, and no opinion is implied or may be inferred beyond the matters expressly stated herein. This letter has been delivered solely for the benefit of NC-SARA, including in its dealings with participating state agencies and postsecondary institutions. Beyond these purposes, this letter may not be relied upon by any other person or entity for any other purpose (nor may this letter be filed with a government agency, quoted, cited, or otherwise referred to, other than to provide this letter to current or prospective state agencies and postsecondary institutions participating in SARA) without our express written permission. The opinions expressed herein are expressions of our professional judgment and do not guarantee any particular result. This opinion letter is limited to the date hereof, and we expressly disclaim any responsibility or obligation to update the opinions provided herein for changes in law, facts, or other developments occurring after the date hereof.

Sincerely,

EDUCATIONCOUNSEL, LLC

By: Arthur L. Coleman
Managing Partner

By: Steven Y. Winnick
Of Counsel