

## **An Advisory by the Arts Accrediting Associations on Misrepresentation**

### **The Issue**

In October 2010, the United States Department of Education (USDE) finalized a number of higher education regulations that went into effect on July 1, 2011. One set of regulations is concerned with misrepresentation. Federal penalties for institutional noncompliance with these regulations could be severe, including possible loss of institutional eligibility to participate in federal student loan and grant programs in numerous categories.

The arts accrediting associations strongly urge each arts executive to read the complete text of these regulations, found within the [Code of Federal Regulation \(CFR\), Title 34, Part 668, Subpart F](#), and to consider their applications in local situations with regard to all degrees or programs administered or planned, particularly the ways these degrees and programs are presented and promoted in institutional publications and policies, and for the ways institutions prepare faculty and others to represent such programs.

### **Supplementary Guidance from USDE**

In August 2011, the U.S. Department of Education posted a set of questions and answers related to the program integrity regulations on its website. This website is updated from time to time and therefore should be reviewed on an ongoing basis. Please click [here](#) to view USDE's Q&A on misrepresentation.

### **The Locus of Concern**

Institutions, accreditors, and governmental agencies have a long history of working to prevent misrepresentation, and that work continues. These present regulations are consistent with past principles and efforts in many respects. However, the new regulations also expand definitions concerning misrepresentation to an unprecedented extent in federal law and regulation.

For example, the institution is responsible not only for any misrepresentation it makes, but also for any misrepresentation about itself made by any other entity or individual that is employed by or otherwise represents the institution, or with which the institution has a contractual agreement to provide educational services.

To quote from the regulations, misrepresentation is “Any false, erroneous or misleading statement an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary.”

Initially, in the October 2010 program integrity regulations, USDE expanded its definition of a misleading statement to include “any statement that has the likelihood or tendency to deceive or confuse”; however, a federal court struck down this component of the definition in its decision in June 2012. (For more information on the court case, please see the section “Judicial Challenge” below.)

As these regulations illustrate – both those that stand and those that were thrown out by the court – the jeopardy and liability for institutions is expanded.

Though clarified by the June 2012 court decision, the relationship between misunderstanding and misrepresentation needs attention at the local level. Each institution is responsible for the communications of individuals over whom it has no real control.

Beyond definitions, the regulations address institutional misrepresentation in four specific areas: the nature of an educational program, the nature of financial charges, the employability of graduates, and relationships with the Department of Education.

The arts accrediting associations strongly encourage each arts executive to read these regulations carefully, and consider their implications for the way the institution is structuring and presenting programs of study, and the achievements of specific programs or the institution as a whole.

### **Judicial Challenge**

On June 5, 2012, the U.S. Court of Appeals for the District of Columbia issued an [opinion](#) regarding certain program integrity regulations that were the subject of a lawsuit against USDE brought by the Association of Private Sector Colleges and Universities (APSCU).

The Court agreed with USDE in many respects; however, with regard to the federal regulations on misrepresentation, the Court “vacated[d] (declared impermissible) § 668.71(c) insofar as it defines misrepresentation to include true and nondeceitful statements that have only the tendency or likelihood to confuse.”

As the Higher Education Act speaks only to “substantial misrepresentation,” the Court determined that “‘substantial misrepresentation’ unambiguously means something more than a statement that is merely confusing.”

Appropriately, the ruling does not vacate portions of the regulations addressing statements that are false, misleading, or deceitful.

This ruling provides a critically important legal clarification and prohibits continuation of regulatory conditions that place institutions in jeopardy for true or nondeceitful statements that in some cases may be misunderstood or deemed confusing by individuals or groups.

However, the ruling does not change the obligation of institutions and programs to meet requirements of the arts accrediting associations, other accrediting agencies, and other federal regulations regarding issues of public information and misrepresentation.

### **Baseline Recommendations**

The arts accrediting associations offer information about the misrepresentation issue to inform, provide advice, and point to resources. Recognizing that this area is extremely complex, the associations recommend that each arts executive begin considering local situations by reviewing the following points:

1. The standards of the arts accrediting associations provide consensus-based information regarding the structure and titling of degree programs. The formulation of new curricular programs and revisions or assessments of continuing programs need to be and remain consistent with these standards. The standards in Section III of the *Handbook* address degrees combining disciplines, standards based on electronic media, distance learning, and experimental programs. These and all accreditation standards of the arts accrediting associations are the result of an affirmative vote by accredited member institutions. They

are consensus-based and thus meet any reasonable test of common practice or standard procedure.

2. The accreditation standards of the arts accrediting associations require title/content consistency. This consistency includes the appropriate degree title for the structure of any degree. It also includes appropriate titles for majors and any minors, areas of emphasis, concentrations, and so forth. For example, a liberal arts degree may not be titled or promoted as a professional degree, and a field may not be designated as a major unless the degree or program contains a significant number of published requirements in that field.
3. Institutions planning to offer new arts/design or arts-/design-related programs need to ensure that the appropriate arts accrediting association has granted Plan Approval prior to the enrollment of students and publication. Otherwise, the institution can be construed to be indicating by default through the symbol provided by its membership in a particular arts accrediting association that the new program is included in its accreditation, when in fact the program has not been reviewed. Given the text of the new regulations, it is especially important that no institution place itself in such a position. The same principle applies to substantive changes to current programs, as defined in the Rules of Practice and Procedure of each of the arts accrediting associations.
4. Institutions are under various pressures to consolidate degrees and programs that in their original designation clearly meet title/content consistency expectations. In some cases these consolidations result in degree titles that do not fully or accurately represent the program's content and purpose. Programs in fields and specializations with a long academic history need to be titled consistently with other programs of that type. Programs addressing new fields and specializations need to be titled on the basis of content requirements. They must maintain consistency between title and content, lest the institution become vulnerable under these regulations as well as under accreditation requirements.
5. Program descriptions need to be reviewed for complete accuracy, especially with regard to preparation for future employment. It is possible to be proud of graduates' achievements without implying that current students will achieve in the same ways or at the same levels as any or all previous graduates.
6. It is important to make distinctions between the educational content provided by a program and what any particular individual might do following completion. A liberal arts program remains a liberal arts program by structure and content irrespective of the future professional careers of specific graduates. The same is true for professional undergraduate programs and various types of graduate programs.
7. It is important to make clear to students and parents that the offering of a curriculum oriented to preparation in a specific field or specialization is not the offering of a contract to provide a specific career result, or indeed any specific individual future result. It may be advisable to emphasize the importance of individual effort to gain competence, especially to dispel the notion that the institution has total responsibility for "delivering" an educational product irrespective of what the student does. Clarity about the critical role each student plays is his or her own education and career-building seems increasingly important given the text of these regulations and the prevailing education-as-commodity mindset.
8. Care is needed to ensure that promotional materials advertising alumni accomplishments do not create misleading correlations between the level and nature of competencies that were required for the degrees that alumni hold, and the level, natures, and content fields of their post-graduation achievements.

9. Review or consider ways to ensure that institutional representatives communicate accurately. After studying the regulations and consulting with colleagues as appropriate, work with faculty, alumni, students, and other interested parties to ensure accuracy, consistency, and clarity of message.
10. If educational delivery relationships exist with other institutions or entities, consider how the institution might work to minimize the danger of misrepresentation about the institution or program on its part.
11. Review the content of all published materials and websites in light of these regulations.
12. Work with others on campus to address the issues raised by these regulations, and especially the breadth of the definitions. These regulations should have been shared by USDE with a responsible party at each institution. As appropriate to the structure of the institution, the arts accrediting associations recommend careful attention by legal counsel and guidance from a legal perspective on specific courses of action, giving special attention to the definitions section. It is critical to avoid inadvertently placing an institution in jeopardy.
13. Consider how the institution will document statements, actions, and instructions to personnel, especially if charged with misrepresentation.
14. It is important for arts-accredited member units to take care of their own business with regard to these regulations, of course working within any requirements and guidelines set by their institution. It would be unwise to assume that someone else will take care of this issue for the programs administered by arts executives. Charges regarding misrepresentation can come from anywhere, at any time. It is critically important that the college, school, or department not be the source of funding jeopardy for the entire institution.
15. Use the resources of the arts accrediting associations, particularly the accreditation standards and guidelines published in the *Handbook* of each association. Read the next section on the relationship of accreditation to these USDE regulations. As always, please contact the National Office staff if you have specific questions.

### **The Accreditation Relationship**

The following points are important in understanding the relationship between these federal regulations and the accreditation granted by NASAD, NASD, NASM, and NAST.

1. Each of the four arts accrediting associations has standards and other documents that address directly or are associated with issues of information accuracy and clarity. The Association and its members are expected to remain in compliance with these standards, codes, and rules as they evolve due to action by the membership. This advisory is not a substitute for any *Handbook* text.
2. USDE has regulations regarding misrepresentation that went into effect on July 1, 2011. Institutions and their programs are expected to remain in compliance with these regulations as long as they are in effect. This advisory is not a substitute for the USDE regulations text.
3. The arts accrediting associations and USDE are separate entities connected in certain specific ways under provisions of federal law. In this instance and on this topic, there is no legal linkage between arts accreditation standards for institutions and USDE regulations for institutions participating in federal grant programs. However, conditions may occur where the review or action of one entity may come to the attention of the other.

4. Misrepresentation to an accrediting agency is considered noncompliance by USDE ([see 34 CFR, Part 668.71\(c\)](#)).
5. The arts accrediting associations are not the source of compliance information or the compliance evaluator or adjudicator for these USDE regulations. USDE will fulfill those responsibilities itself.
6. Compliance with the requirements of the arts accrediting associations regarding public information does not provide automatic certification of compliance with USDE regulations on misrepresentation, nor does compliance with USDE regulations provide automatic certification of compliance with the requirements of the arts accrediting associations.
7. Action on compliance with arts/design accreditation standards is derived primarily from documentation produced in an accreditation-related review. Action on USDE compliance is likely to be derived in large part from proceedings initiated by USDE in response to individual complaints to USDE about misrepresentation in specific institutions or programs.
8. The arts accrediting associations are bringing this matter to the attention of arts executives because of the potential financial and reputational damage that a finding of USDE non-compliance on misrepresentation can do to the immediate and long-term future of an institution and program. Long-term security and viability are of primary concern as institutions hold important responsibilities for students and for the future of the field. Additionally, the Commission's ability to project viability is a condition of accreditation.

## **Conclusion**

The National Office of the arts accrediting associations will continue to monitor this issue. Guidance on the regulations should be sought directly from USDE staff. For assistance in interpreting accreditation standards, please contact the National Office for Arts Accreditation.