

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 was concerned with misrepresentation. Aspects of misrepresentation were subsequently amended in final rules which went into effect in October of 2018 (after a delay of the original effective date of July 1, 2017) and on July 1, 2020, and July 1, 2023.

While some finer details regarding the definition of misrepresentation have been further refined in this sequence of final rules, a principle consistent to all is that federal penalties for institutional noncompliance with these regulations could be severe. These penalties now include possible loss of institutional eligibility to participate in federal student loan and grant programs in numerous categories and potential liability on the part of the institution to the Secretary for losses to the Secretary arising from borrower defense to repayment claims.

The arts accrediting associations strongly urge each arts executive to read the complete text of these regulations, found within the [Code of Federal Regulations \(CFR\), 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 the ways institutions prepare faculty and other institutional employees 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. A misleading statement includes any statement that has the likelihood or tendency to mislead under the circumstances. A misleading statement may be included in the institution's marketing materials, website, or any

other communication to students or prospective students. A statement is any communication made in writing, visually, orally, or through other means. Misrepresentation includes any statement that omits information in such a way as to make the statement false, erroneous, or misleading. Misrepresentation includes the dissemination of a student endorsement or testimonial that a student gives either under duress or because the institution required such an endorsement or testimonial to participate in a program. Misrepresentation also includes the omission of facts as defined under § 668.75.”

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: 1) the nature of an educational program or institution, 2) the nature of financial charges or financial assistance, 3) the employability of graduates, and 4) omissions of fact. These regulations further specify for each specific area what conditions constitute misrepresentation. Again, institutions are advised to review in detail the complete text of these regulations, found within the [Code of Federal Regulations \(CFR\), Title 34, Part 668, Subpart F](#). A non-exhaustive list of conditions follows:

Nature of educational program or institution (34 CFR 668.72): includes, but is not limited to false, erroneous, or misleading statements concerning:

- The particular type(s), specific source(s), nature and extent of its institutional, programmatic, or specialized accreditation.
- Whether successful completion of a course of instruction qualifies a student to receive, to apply to take, or to take the examination required to receive a local, State, or Federal license, or a nongovernmental certification required as a precondition for employment.
- Specialized, programmatic, or institutional certifications, accreditation, or approvals that were not actually obtained, or that the institution fails to remove from marketing materials, websites, or other communications to students within a reasonable period of time after such certifications or approvals are revoked or withdrawn.

Nature of financial charges or financial assistance (34 CFR 668.73): includes but is not limited to false, erroneous, or misleading statements concerning:

- Offers of scholarships to pay all or part of a course charge.
- The cost of a program and the institution’s refund policy if the student does not complete the program.
- The availability, amount, or nature of any financial assistance available to students from the institution or any other entity, including any government agency, to pay the costs of attendance at the institution, including part-time employment, housing, and transportation assistance.

Employability of graduates (34 CFR 668.74): includes but is not limited to false, erroneous, or misleading statements concerning:

- The institution’s intentions to maintain a placement service for graduates or to otherwise assist its graduates to obtain employment, including any requirements to receive such assistance.
- Government job market statistics in relation to the potential placement of its graduates.
- Actual licensure passage rates if they are materially lower than those included in the institution’s marketing materials, website, or other communications made to the student or prospective student.
- Actual employment rates if they are materially lower than those included in the institution’s marketing materials, website, or other communications made to the student or prospective student.
- Inflation of rates disclosed to students by counting individuals as employed who: are not bona fide employees, such as individuals placed on an internship, externship, or in employment subsidized by the institution; were employed in the field prior to graduation; or excluding students from employment rate calculations due to assessments of employability or difficulty with placement.

Omission of fact (34 CFR 668.75): is a misrepresentation if a reasonable person would have considered the omitted information in making a decision to enroll or continue attendance at the institution. An omission of fact includes, but is not limited to, the concealment, suppression, or absence of material information or statement concerning:

- The entity that is actually providing the education instruction, or implementing the institution’s recruitment, admissions, or enrollment process.
- The availability of enrollment openings in the student’s desired program.
- The factors that would prevent an applicant from meeting the legal or other requirements to be employed, licensed, or certified in the field for which the training is provided because the academic, professional, or occupational degree or credential that the institution will confer upon the completion of the course of study has not been authorized by the appropriate State educational or licensure agency, or requires specialized accreditation that the institution does not have.

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, published materials regarding the institution and its programs, and the achievements of specific programs or the institution as a whole.

Substantial Misrepresentation and Penalties

The Higher Education Act speaks only to “substantial misrepresentation” which is defined in regulations as “any misrepresentation, including omission of facts as defined under § 668.75, on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person’s detriment.” The selected list of conditions noted above, and those outlined in the full text found within the [Code of Federal Regulations \(CFR\), Title 34, Part 668, Subpart F](#), could be considered substantial misrepresentation under certain circumstances based on the definition of substantial misrepresentation cited above. As mentioned at the onset of this advisory, the penalties for engaging in substantial misrepresentation are severe. To quote from the regulations:

“If the Secretary determines that an eligible institution has engaged in substantial misrepresentation, the Secretary may-

- (1) Revoke the eligible institution’s program participation agreement, if the institution is provisionally certified under § 668.13(c);
- (2) Impose limitations on the institution’s participation in the title IV, HEA programs, if the institution is provisionally certified under § 668.13(c);
- (3) Deny participation applications made on behalf of the institution; or
- (4) Initiate a proceeding against the eligible institution under subpart G of this part.”

34 CFR 668, Subpart G outlines fine, limitation, suspension and termination proceedings that may be initiated against an institution if the Secretary determines that the institution has engaged in substantial misrepresentation.

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:

- I. 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 and/or potential promises of 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. Published materials, advertising, and recruitment practices need to be reviewed to ensure that all applicable licensure requirements and their relationship to any program(s) offered by the institution are described accurately in written and spoken word. Advertising programs either by description or title as leading to licensure or qualifying a student to sit for licensure when in fact they do not could be problematic under these regulations.
7. 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.
8. 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 in their own education and career-building seems increasingly important given the text of these regulations and the prevailing education-as-commodity mindset.

9. 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.
10. 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.
11. If educational delivery relationships exist with other institutions or entities, consider how the institution might work to minimize the danger of misrepresentation about a specific party or institution offering specific aspects of the program.
12. Review the content of all published materials and websites in light of these regulations.
13. 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.
14. Consider how the institution will document statements, actions, and instructions to personnel, especially if charged with misrepresentation.
15. It is important for arts-accredited institutions and their arts units to take care of their own business with regard to these regulations, of course working within any requirements and guidelines set by their institutions. 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.
16. 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.

- I. 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, and have subsequently been amended as described above. 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.