

# Misrepresentation Regulations

## **APSCU Program Integrity Series**

Presented by:

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# Statutory Authority

- (3) (A) **Upon determination**, after reasonable notice and opportunity for a hearing, **that an eligible institution has engaged in substantial misrepresentation** of the nature of its educational program, its financial charges, or the employability of its graduates, **the Secretary may suspend or terminate the eligibility status for any or all programs under this title** of any otherwise eligible institution, in accordance with procedures specified in paragraph (1)(D)\* of this subsection, **until the Secretary finds that such practices have been corrected.**  
(B) (i) **Upon determination**, after reasonable notice and opportunity for a hearing, **that an eligible institution—**  
\*\*\*
- (II) **has engaged in substantial misrepresentation** of the nature of its educational program, its financial charges, and the employability of its graduates,  
**the Secretary may impose a civil penalty upon such institution of not to exceed \$ 25,000 for each violation or misrepresentation.**
- 20 U.S.C. 1094(c)(3)(A)&(B).
- \*Reference to 20 U.S.C. 1094(c)(1)(D) is apparently reference to provision now found at 20 U.S.C. 1094(c)(1)(F) referring to limitation, suspension, and termination procedures.



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# Summary of Regulation

- Expands definition of a “misrepresentation.”
- Maintains current definition of “substantial misrepresentation.”
- Expands penalties for “**substantial** misrepresentation” regarding:
  - Nature of educational program;
  - Financial charges; or
  - Employability of graduates.
- Eliminates provision permitting ED to withhold penalties for *de minimus* infractions.



# Penalties for Substantial Misrepresentation

- Fine, limitation or termination of participation of an institution in the Title IV programs under Subpart G procedures (fine can amount up to \$27,500 ***per misrepresentation***);
- Revocation of PPA of a provisionally certified institution under limited due process of 34 C.F.R. 668.13(d);
- Denial of application to participate in the Title IV programs.



# Expanded Definition of *Misrepresentation*

- 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 enrolled at the institution, to any prospective student or any member of the public, or to an accrediting agency, to a State agency, to the family of an enrolled or prospective student, or to the Secretary. A misleading statement Misrepresentation includes any statement that has the likelihood or tendency to deceive or confuse. A statement is any communication made in writing, visually, orally, or through other means. Misrepresentation includes the dissemination of a student endorsements or and testimonials that a student are gives under duress or because the institution required the student to make such an endorsement or testimonial to participate in the program.



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# Elements of a Misrepresentation

- Statement that is *false, erroneous or misleading* statement
- Made by:
  - Eligible institution,
  - *Representative of eligible institution, or*
  - *Ineligible institution, organization, or person with whom the eligible has agreement to:*
    - *Provide educational programs, or*
    - *Provide marketing, advertising, recruiting or admissions services*
- Made directly or indirectly to:
  - A student
  - Prospective student,
  - *Any member of the public,*
  - *An accrediting agency,*
  - *A State agency, or*
  - *The Secretary.*



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*\*New provisions in red*

# Substantial Misrepresentation

## (Definition Unchanged)

- Any misrepresentation on which the person to whom it was made:
  - Relied to that person's detriment OR
  - Could reasonably be expected to detrimentally rely



# Differences Between Common Law Misrepresentation and ED Regulation

## Common Law

- False Statement
- Material
- Speaker knew of falsity or recklessly made statement
- Actual reasonable reliance
- To detriment of person who actually relied

## ED Regulation

- False *or has likelihood to deceive or confuse*
- *Any covered matter*
- *Even innocent mistake may be covered*
- Actual reasonable reliance *or could reasonably be expected to rely*
- To detriment of person who actually relied *or could reasonably be expected to rely to person's detriment*



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# Detailed Differences: False Statement

## Common Law

- Statement must be untrue.

## ED Regulation

- Sufficient if statement has likelihood or tendency to deceive or confuse



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# Detailed Differences: Materiality/Reliance

## Common Law

- False statement must be about relevant fact that is instrumental in inducing detrimental action.
- Actual reasonable reliance

## ED Regulation

- No materiality requirement; “any” misrepresentation considered “substantial” if person actually relied on it *or reasonably could be expected to rely on it to his or her detriment.*



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# Detailed Differences: Detriment

## Common Law

- Actual financial damage required

## ED Regulation

- Theoretically possible detrimental reliance sufficient.



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# Detailed Differences: Intentionality/Recklessness

## Common Law

- Speaker knew of falsity or recklessly made statement

## ED Regulation

- Even innocent mistake may be considered misrepresentation



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# Imputation of Liability for Substantial Misrepresentations of Third Parties

## Common Law

- Substantial misrepresentations made by third parties (agents) imputable to institutions (principals) only if the statement was:

- Authorized
- Apparently authorized
- Within the power of the agent to make for the principal

## ED Regulation

- No regard for authority or power of third party to make statement.
- Misrepresentations made by third parties imputable to institution if third party is:
  - A “representative” of institution;
  - A person on entity with whom institution has “agreement” to provide:
    - Educational programs;
    - Marketing;
    - Advertising;
    - Recruiting or admission services.



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# Covered Scope of Subject Matter of Misrepresentation

- Only covers misrepresentations regarding:
  - Nature of educational program
  - Nature of financial charges
  - Employability of graduates

34 C.F.R. 668.71(b) & (c).



# Nature of Educational Program

- Nature of accreditation
- Transferability of credits to or from other institution;
- Whether successful completion of course qualifies student:
  - For acceptance to labor union;
  - Governmental licensure exam or nongovernmental certification required as precondition for employment or to perform certain functions in States in which program is offered, or
  - To meet additional conditions that institution knows or should know are generally needed to secure employment in occupation
- Requirements for successfully completing course of study including grounds for terminating enrollment;
- Whether courses are recommended or have been the subject of unsolicited testimonials or endorsements;
- Availability, frequency, and appropriateness of courses and programs to employment objectives;
- Nature, age, and availability of training devices or equipment;
- Availability of part-time employment or other forms of financial assistance;
- Nature and availability of any tutorial or other supplementary assistance provided to students before, during or after course completion;
- Nature or extent of any prerequisites for enrollment in any course;
- Subject matter, content of course of study, or any other fact related to the credential awarded upon completion of course of study;
- Whether academic, professional, or occupational degree that institution will confer has been authorized by appropriate State agency (**affirmative disclosure in promotional materials may be required**); and
- Matters required to be disclosed under 34 C.F.R. 668.42 & 668.43 (**new disclosure requirements effective 7/1/11!**)

34 C.F.R. 668.72



# Nature of Financial Charges

- Offers of scholarships;
- Whether particular charge is customary charge;
- Cost of program and institution' s refund policy;
- Availability or nature of financial assistance offered including duty to repay loans regardless of whether student completes program or obtains employment;
- Student's right to reject any particular type of financial aid or other assistance or whether student must apply for particular type of financial aid such as institutional financing.

34 C.F.R. 668.73



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# Employability of Graduates

- Institution's relationship with any organization, employment agency, or other agency providing authorized training leading directly to employment;
- Institution's plans to maintain placement services for graduates or otherwise assist in obtaining employment;
- Institution's knowledge about current or likely future conditions, compensation, or employment opportunities in industry;
- Whether employment is being offered by institution or that talent hunt/contest is being conducted;
- Government job statistics in relation to potential placement;
- Other requirements generally needed to be employed, such as commercial driving licenses, license to carry firearms, and **failing to disclose** factors that would prevent applicant from qualifying for such requirements, such as existing prior criminal record or preexisting medical conditions. (**Affirmative disclosure may be required**).

34 C.F.R. 668.75



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# Relationship with U.S. Department of Education

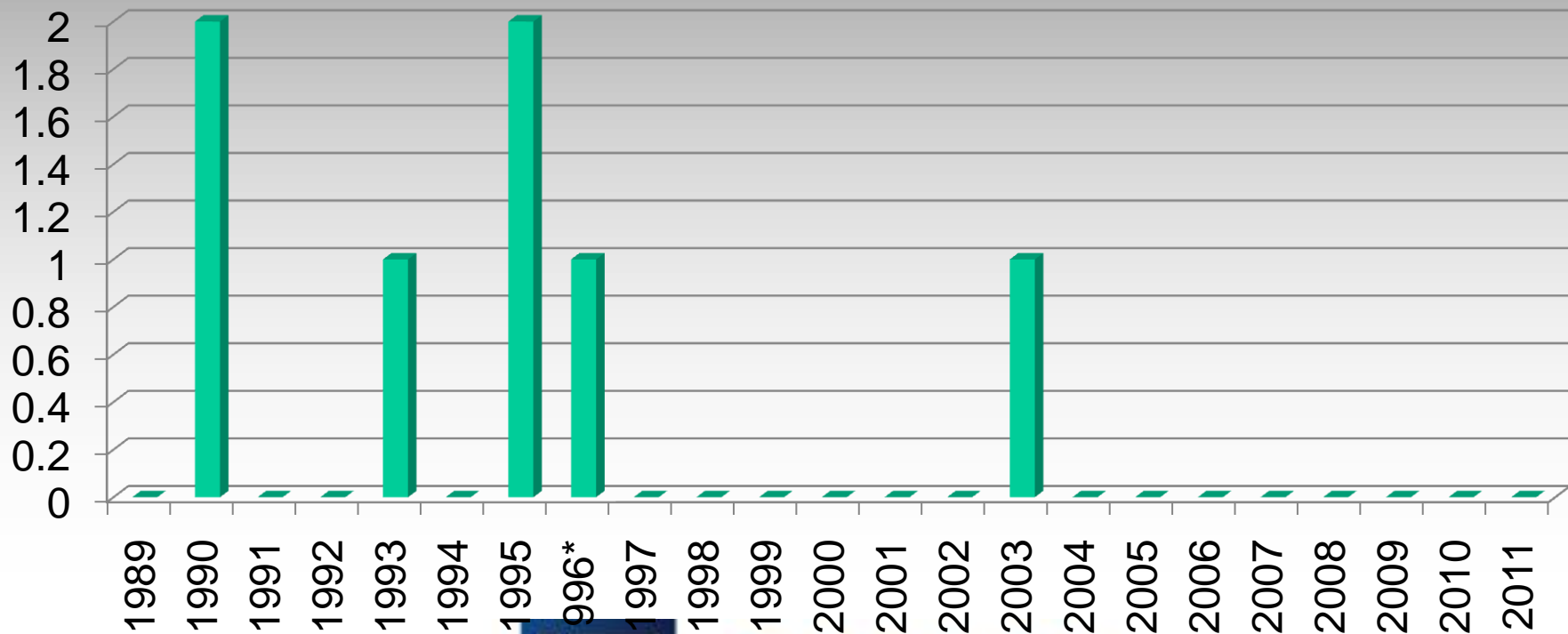
Institution, representative, or person with whom institution has agreement may not describe institution's participation in Title IV programs in manner that suggests approval or endorsement by U.S. Department of Education of quality of programs.

34 C.F.R. 668.75



# ED Record of Enforcement of Misrepresentation Regulation

**Number of Misrepresentation Termination/Fine Actions Instituted by ED (6 Total)**



\*This fine action is for 1 of 2 schools that were issued termination notice in 1995



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# Expect Continued Increased Scrutiny



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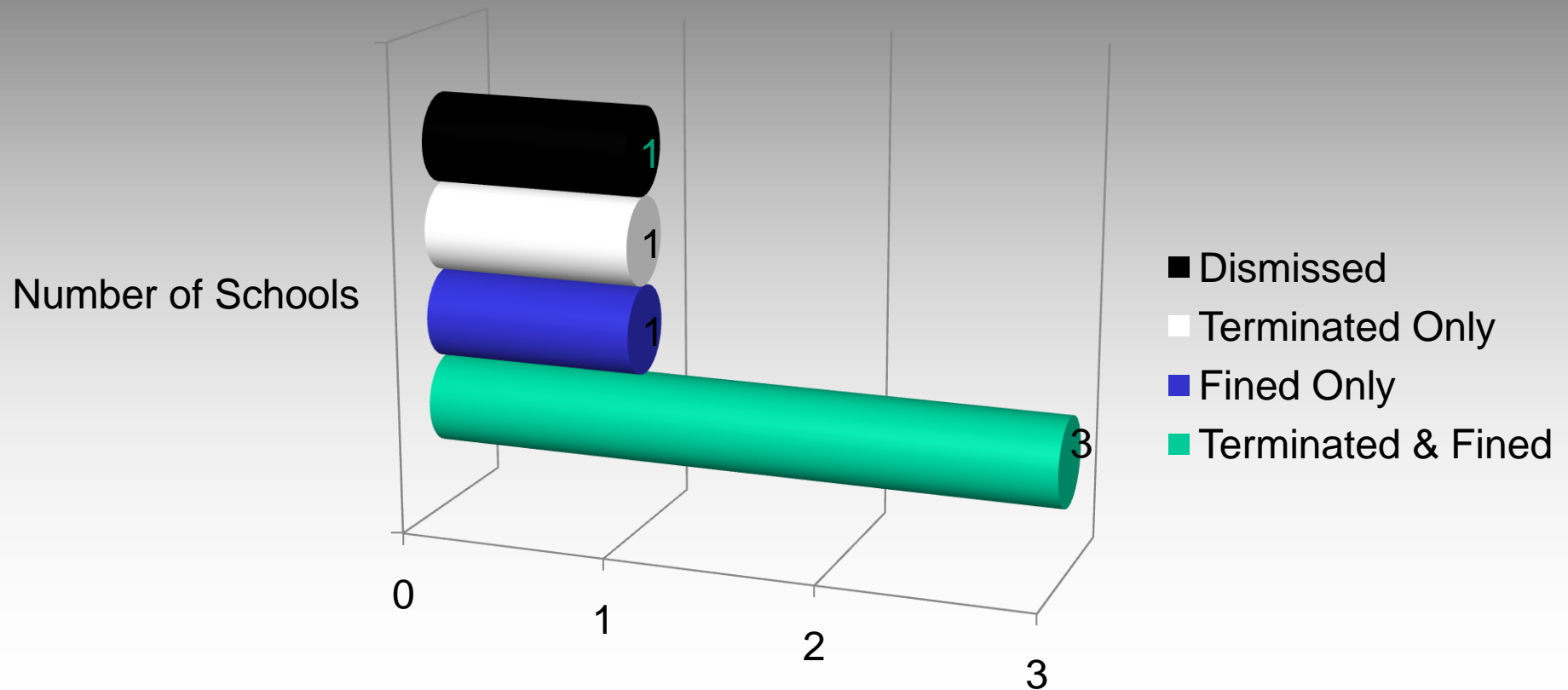
### Interviews

Michael Clifford, Mark DeFusco, Barmak Nassirian, Jeff Silber, Gail Mellow, Daniel Golden, Brian Mueller

### Responses from the Colleges

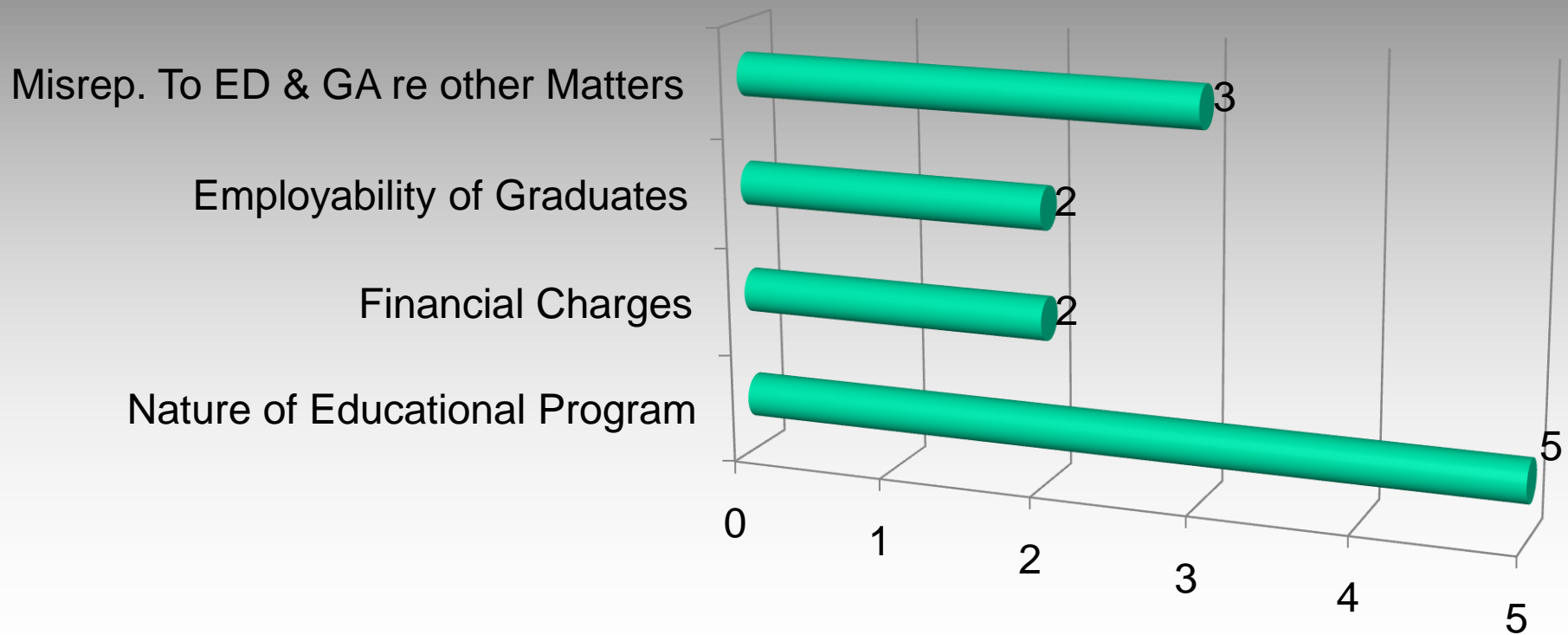
...and other interesting readings and links

# Disposition of Cases for 6 Schools Cited for Misrepresentation



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# Types of Misrepresentation Claims Brought By ED



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# Exposure to Other Actions for Misrepresentations



# Other Title IV Regulations

- **34 C.F.R. 668.24**: Duty to maintain accurate Title IV records
- **34 C.F.R. 668.82**: Duty to act as fiduciary with highest standard of care in administering Title IV programs
- **34 C.F.R. 668.16**: Duty to Capably Administer Title IV programs (adequate checks and balances to prevent fraud)



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# State and Federal Statutory Actions

- **False Claims Act**: Fines, Treble Damages, Attorneys Fees (e.g., 2009 \$78.5 million settlement)
- **State Deceptive Trade Practices Laws**: Injunctive Action, Fines, Treble Damages, Attorneys Fees, Criminal Liability (e.g., 2007 \$6.5 million settlement, restitution, and closure of programs in CA)
- **State Education Codes**: Loss of Licensure, Fines, Injunctions, Criminal Liability
- **Criminal Fraud Laws**: Fines, Criminal Liability



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# Common Law Actions

- Misrepresentation
- Action to Rescind Contract for Fraud in Inducement



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# So What to Do?



*By failing to prepare  
You are preparing to fail.*

Ben Franklin



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# Consider Scripted Answers to Hot Button Issues

- **Review:**
  - All topics expressly covered in regulations (34 C.F.R. 668.72-668.75).
  - All disclosures required by 34 C.F.R. 668.42 and 668.43
  - All new gainful employment disclosures to students under 34 C.F.R. 668.6(b).
- **Consider:**
  - Scripted answer for each topic and/or
  - Provide detailed training on appropriate answers to each topic.



# Review all Promotional Materials/Advertising

- All written advertisements (websites, brochures, newspaper/magazine ads, billboards, buses, etc.)
- Television and radio advertisements
- Posters
- Start inserting dates on printed materials to track dissemination dates.



# Review Admission Office Practices

- Review recruitment training materials
- Train admission representatives on parameters of new misrepresentation regulations
- Consider Creating Admissions Office Best Practices
- Consider Secret Shoppers
- Regularly review admission rep e-mail correspondence
- Review scripted information used by recruiters
- Examine culture of admissions office:
  - Does Admissions feel its mission is in conflict with Academics Office or Compliance Office or vice versa?
  - Who are the “stars” of the Admissions Office?
  - What is the completion/graduation rate for the students recruited by the “stars”?



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# Review all Third Party Contracts for Providing Programs, Marketing, Advertising, Recruitment, and Admissions

- For contracts that are set to expire soon, attempt to negotiate new protective provisions.
- For contracts that will not expire in the near future, attempt to re-negotiate terms



# Kinds of Contract Provisions to Consider Negotiating

- Require pre-approval for all information disseminated to prospective students, the public, or enforcement and licensing agencies.
- Requiring the use of institution-approved scripts by call centers
- Indemnification clause requiring parties to compensate each other for financial liability to the other as a result of actions of each under contract
- Requiring contractor to obtain minimum amount of errors & omissions insurance coverage.





# Kinds of Contract Provisions to Consider Negotiating (Continued)

- Requiring mandatory compliance training
- Requiring compliance with the law
- Requiring record retention regarding services rendered to institution
- Providing that vendor is independent contractor and not employee or partner



# Consider Adopting Uniform Disclosures

**“Information Required to Be Disclosed Under  
the Higher Education Act of 1965:  
Suggestions for Dissemination.”**

**Report of the National Postsecondary  
Education Cooperative**

*<http://counsel.cua.edu/res/docs/npec-heoa-disclosures-revised-11-29-09.pdf>*



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# Draft New Disclosures Required under New Misrepresentation Regulations

- New disclosures required under:
  - 34 C.F.R. 668.72(n) (regarding whether credential to be conferred has been authorized by appropriate State educational agency)
  - 34 C.F.R. 668.74 (f) (duty to disclose factors that would prevent an applicant from qualifying for employment such as prior criminal record and pre-existing medical condition).



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Yolanda R. Gallegos has been representing private sector colleges and universities across the nation for well over 20 years. She established her firm, Gallegos Legal Group, in 1998 in Albuquerque, New Mexico. Yolanda focuses her practice on federal and state regulatory matters unique to the postsecondary sector, such as issues related to participation in the federal student aid programs, accreditation, and state licensing. She has successfully defended dozens of institutions in program reviews and audits before the U.S. Department of Education.



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# Disclaimer

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