



Misrepresentation

Primary Statute: HEA section 487(c)(3)

Primary Regulations: 34 CFR Subpart F, 668.71-668.74

Background

Institutions are not permitted under the Higher Education Act to engage in misrepresentations about the nature of their educational programs, their financial charges, or the employability of their graduates. Those restrictions are rooted in a long history of abuses, particularly by for-profit colleges. For instance, an investigation led by then-Senator Sam Nunn (D-Georgia) led to the publication of a [report](#) in 1990 on a long list of abusive practices seen in the higher education industry. The report included instances of lying about accreditation status, misrepresentations about the job placement rates of graduates, and defrauding prospective students.

Under the Higher Education Act, institutions found to have engaged in substantial misrepresentations may have their Title IV financial aid eligibility suspended until “the practices have been corrected.” The institutions may also face civil penalties of up to \$25,000 per misrepresentation, an amount that has been [inflation-adjusted](#) over time and now amounts to around \$59,000 per violation.

2010 Regulations

In 2009, the Department announced it was considering making changes to its regulatory definition of misrepresentations as part of a more general effort to strengthen program integrity. The Federal Trade Commission (FTC), which has oversight authority over for-profit colleges, has long regulated those institutions on matters related to misrepresentation, including a 1978 [regulation](#) governing unfair and deceptive acts and practices. In 2009, the FTC [issued](#) a request for public comment on updating its rules, and the Department of Education similarly [sought](#) to reconsider its own rules for misrepresentations to better align them with the FTC rules.

The Education Department regulations issued in 2010 defined misrepresentation as:

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 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 capacity, 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 endorsement or testimonial that a student gives either under duress or because the institution required the student to make such an endorsement or testimonial to participate in a program. (emphasis added)

The new rules clarified that it wasn't just misrepresentations from the institution itself that qualified under the definition, but that the institution was also responsible for the statements of its representatives and contractors. The rules further added that misrepresentations weren't just untrue statements made to students or prospective students, but also to any member of the public, or to any of the institutions' regulators -- an accrediting agency, a state, or the Department of Education itself.

The new rules made no changes to the definition of a substantial misrepresentation, left as one "on which the person to whom it was made **could reasonably be expected to rely, or has reasonably relied, to that person's detriment**" (emphasis added). In other words, a college made a misrepresentation if it lied to a prospective student; but it was considered a substantial misrepresentation if the student used that information to enroll to their ultimate harm.

2016 Borrower Defense Regulations

The misrepresentation rules took on even more importance in 2015, when the Department began to consider new regulations governing borrower defense. The "borrower defense to repayment" provision of the Higher Education Act was added to the statute in 1994. It directed the Education Secretary to develop regulations allowing students who were misled by their colleges to assert a "defense to repayment" and have their loans discharged. Those regulations said that borrowers could meet the standard if their institution engaged in an "act or omission" that would give rise to a cause of action in a court in the applicable state (such as falsifying job placement rates in violation of a state law on unfair or deceptive acts and practices). States' laws governing advertising and misrepresentations vary considerably, so the precise types of claims that would qualify depended on the state in question. The provision was rarely used, but provided borrowers of a few institutions access to forgiveness on their student loans.

In 2015, the numbers of borrower defense claims received by the Department increased exponentially after the collapse of Corinthian Colleges, which had engaged in widespread misrepresentations. With findings reached through a joint investigation between the Education Department and the California attorney general, it was clear that the school's misrepresentations would qualify some borrowers for a defense to repayment. However, as claims from Corinthian campuses in other states, and claims from other schools, began to roll in, it also became clear that the Department's state-by-state approval would be unsustainable. A state-based standard required that the Department be able to keep up with and understand every state's laws as it relates to colleges' actions, a burdensome and time-consuming process that left the federal government in an odd position of assessing state policies. It also meant assessing similar misrepresentations differently depending on the applicable state, which meant that students who experienced the same set of circumstances might qualify if they lived in one state and be ineligible if they lived in another, raising basic questions of fairness.

Instead, the Department began to pursue a new regulatory effort that established a federal basis for borrower defense, building on the foundation of the misrepresentation regulations. Borrowers could assert a defense to repayment on the basis of a substantial misrepresentation, a breach of contract, or a court judgment against a college. The [final regulations](#), issued in November 2016, added an element to the definition of misrepresentation that it “includes any statement that omits information in such a way as to make the statement false, erroneous, or misleading.”

2019 Borrower Defense Regulations

In 2017, the Education Department under Secretary DeVos launched another rulemaking process to rework the Obama Administration’s borrower defense regulations. Those rules, ultimately [published](#) in September 2019, reworked the requirements that borrower defense applicants must meet, such as requiring not just evidence that a misrepresentation was made, but that it was made knowingly or with “reckless disregard for the truth,” and asking borrowers to demonstrate financial harm beyond borrowing and repaying their student loan before they could qualify. However, it left the definition of a misrepresentation--and a substantial misrepresentation--itself intact.

What’s Next?

The Biden Administration took office in January 2021, and in March, the Department [announced](#) they would streamline loan forgiveness under borrower defense regulations by changing how relief is [calculated](#). These changes have led to approval of thousands of borrower defense claims, announced in [June](#) and [July](#). Furthermore, in May, the Department [announced](#) their intention to initiate a new rulemaking on a variety of higher education topics, including borrower defense to repayment. Public hearings were held in June 2021, with the [negotiated rulemaking committee](#) convening in October, November, and December. This memo will be updated with borrower defense-related changes once the committee finishes meeting and the Department publishes a proposed rule.

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