Distance Education – Common Compliance Risks and Practical Considerations

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Evolution of Distance Learning

- Internet-based distance learning dates back to the 1990’s
- Millions of Americans were taking online courses long before the advent of the MOOCs, which grabbed headlines but are now in transition
- Growth and innovation once came from for-profits but now growth of distance learning is facilitated by new business models.
- Joint ventures between universities and non-academic partners (e.g. 2U, Pearson/eCollege, Academic Partnerships, Blackboard, etc.) are the real driver of growth and quality in online degree programs.
- Also, non-traditional degree pathways are seen as path to affordability (e.g. StraighterLine, MOOCS).
- Trends in online learning shape, and are shaped by, the regulatory environment; and that process is ongoing…. 
Distance Education--Outsourcing

- Rise of distance learning parallels a disaggregation trend (aka “outsourcing”) in all higher education
- This means many new contractual arrangements for:
  - Technical platforms (for hosting and distributing courses);
  - Marketing and recruitment (including internet “lead” generators);
  - Course development/licensing deals;
  - Student services – Career Counseling/Internship Placement/Clinical Rotations;
  - Financial Aid administration;
  - International student enrollments;
  - Consortia, formal or informal.

Increased Regulatory Scrutiny

- **Dept. of Education** – Program Integrity Rule changes (2010)—incentive compensation, misrep., written arrangements rule, third party servicers, etc.
  - ED, especially OIG, historically suspicious of distance learning partly due to fraud concerns (led to 2008 HEOA changes)
  - Cautious moves by ED toward credit for experience (competency-based)
- **Accreditors** – Under pressure from feds; getting stricter on oversight, especially of jv’s and outsourcing
- **States** – Also under pressure from feds; stricter oversight of licensing requirements for online programs; AG’s launch ongoing assault on for-profits.
Institutions may not provide:

1. "commission, bonus, or other incentive payment;
2. based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid;
3. to any person or entity who is engaged in any student recruitment or admission activity, or in making decisions regarding the award of Title IV HEA program funds."

Under ED’s revised Program Integrity Rules:

- Prior “Safe Harbors” all eliminated, and scope expanded
- “Revenue sharing” of tuition in exchange for recruiting and admissions services prohibited except in narrow circumstances
- Ban applies to higher level employees/managers with “responsibility for” recruitment or admission of students

#1 – Incentive Compensation: What is permissible?

- Rule covers recruiting and FA activities only
- ED distinguishes between “recruiting” (covered) and “marketing” activities (not covered) (See charts DCL Gen 11-05 (March 17, 2011))
- Lead Gen–Payment for student contact information based on number of “clicks” is permissible;
  - Except where vendor is also engaged in recruiting activities or if based on number of students who apply or enroll.
Most Important Title IV Issues

#1 – Incentive Compensation: What is permissible?

- "Bundled Services Rule" - Tuition sharing arrangements are permissible only if:
  - The third-party provides a range of “bundled services.”
  - The institution pays the third party an amount for all bundled services that are provided collectively
  - The third party does not make any incentive payments to its “covered employees”
  - Recruiting and other services are provided by a party that is un-affiliated with the party served, or with another educational institution
  - See DCL Gen 11-05 (March 17, 2011)

Most Important Title IV Issues

#2—Misrepresentation

- “Misrepresentation” is defined as any false, erroneous, or misleading statement (including statements that “have the likelihood or tendency to deceive”) made by any employee or agent of the institution to any third party if the third party relies on the statement to their detriment.
- Rule prohibits an institution from engaging in “substantial misrepresentation” regarding broad subject areas:
  1. the nature of the school’s education programs;
  2. the school’s financial charges; and
  3. the employability of the school’s graduates.
Most Important Title IV Issues

#2—Misrepresentation

- Expansion of the rule survived *APSCU v. Duncan* (June 2012).
- The new version of the rule creates strict liability; intent to issue a deceitful or misleading statement is not required.
  - “[W]e think that allowing the Secretary to sanction schools for making substantial, negligent or inadvertent, false statements is consistent with the HEA’s goals.” *APSCU v. Duncan* at 453.
- The new version expands the rule’s scope to cover statements made by *any* of an institution’s representatives including agents, employees, and subcontractors made directly or indirectly to *essentially any* third party, including state agencies, government officials, accreditors, and the public.

Most Important Title IV Issues

#3—Written Arrangements Rules

- Arrangements between two Title IV eligible institutions
  - Written arrangements between multiple eligible institutions are generally permissible. Applies to consortiums of Title IV-eligible institutions.
- Arrangements between an eligible institution and an ineligible institution or an eligible institution and a foreign institution
  - The ineligible institution may provide only 25% or less of program; or
  - The ineligible institution may provide more than 25% but less than 50% of program if: (1) the eligible institution’s accreditor has specifically determined that arrangement meets accreditor’s standards for contracting out educational services; and (2) the institutions are not commonly owned or controlled.
  - Prior misconduct disqualifies the ineligible institution from providing *any portion* of the eligible institution’s program under a written arrangement. See 34 CFR 668.5(c)(1)
Most Important Title IV Issues

#3—Written Arrangements Rules: The New WASC Standards

- Likely to become de facto test of permitted outsourcing
- Starting Premise: An accredited institution bears final responsibility for ensuring the quality and integrity of all activities conducted in its name
- Institutional Responsibilities – Cannot be Outsourced
  - Setting admissions criteria and making admissions decisions
  - Selecting and approving faculty
  - Awarding credit for prior or experiential learning
  - Reviewing and approving course content and curriculum
  - Assessing student learning
- Appropriate Services to Outsource
  - Technology services
  - Auxiliary services not related to the award of credit (food, financial aid processing, advising)
  - Advertising and recruiting (institution remains responsible for accuracy of marketing)
  - Faculty adoption of textbooks/published materials

Most Important Title IV Issues

#3—Written Arrangements Rules

- WASC standards also outline best practices in agreements - Schools must do their due diligence!
  - Evaluate the unaccredited entity
  - Include affected faculty and staff in the planning
  - Secure senior administration support for the agreement
  - Assign responsibility for monitoring the agreements and evaluating the efficacy and quality of program
  - Establish channels for modification to any agreement, including renewal
  - Identify how student achievement and learning outcomes can be tracked through the resources
Most Important Title IV Issues

#4—Third-Party Servicers (of Financial Aid)

- A third-party servicer is a person or entity that enters into a contract with an eligible institution to administer “any” aspect of the institution’s participation in any Title IV, HEA program.
- The regulations impose specific contractual undertakings when a third-party service arrangement is created; mandated provisions must be incorporated directly in contract!
- NB: A third-party servicer must agree to be jointly and severally liable with the institution
- An institution may enter into a third-party servicer agreement with an entity only if the servicer has a clean record with the Department
- Information on third-party services must be reported on the institution’s E-App within 10 days
- Third party servicer is subject to separate Department audit

Most Important Title IV Issues

#4—Third-Party Servicers (of Financial Aid)

- Typical covered activities per T4 regs
  - Awarding and disbursing funds
  - Processing Title IV applications and supporting documentation
  - Counseling on loan default prevention
  - Loans servicing and collection
  - Financial aid consulting, staffing, and management
  - Preparing required reports and disclosures
- Activities traditionally not considered the administration of Title IV
  - Providing software
  - Financial and compliance auditing
  - Mailing or warehousing records
  - Publishing ability to benefit tests
Most Important Title IV Issues

#4—Third-Party Servicers (of Financial Aid?)

- Department issued further guidance (DCL GEN-15-01, January 9, 2015) that “clarified” what constitutes a third-party servicer activity
- At first glance, new DCL appeared to mainly re-state existing regs
- More recently ED sent a questionnaire suggesting its new “servicer” definition is much broader than just T4 processing:
  - Title IV student “counseling”
  - Default prevention services
  - Financial aid consulting
  - Hosting data portals/platforms for T4 data
  - Credit balances delivery (debit cards)
  - Consumer disclosures

Who are possible new Servicers?

- Software vendors, banks, CDR firms, FA consultants, companies providing “bundled services”
- ED “task force” says will issue another DCL “soon”
- Great example of ED’s expanding regulatory reach…
Oversight by Accreditors

- Accreditors required by law to address quality of institution's distance education in the same way as other programs.
- Accreditors also required to meet various other federal requirements, which they then impose on institutions (e.g. must verify identity of students).
- Cardinal rule—“Core” academics may not be outsourced (Ivy Bridge case).
- Accreditors will hold institution responsible for any outsourced function—can't shift accreditation risk to vendors.

Ripple Effects of “Program Integrity Rules”

- Greater scrutiny of JV’s and “substantive change” applications (typically includes first online programs).
- Return of NACIQI (Department-sponsored oversight).
- Example: revised HLC “Assumed Practices” (Standards) echoes fed misrep rules.
- Common “whipping boy” for Congress and “reformers.”
State Authorization

- State authorization is a condition to Title IV eligibility: very important!
- Traditionally, Department only required state authorization by the state in which an institution was physically located
- Department’s 2010 “distance education rule” would have required proof of required approvals for distance learning programs
- This rule, 34 CFR 600.9(c), vacated by APSCU v. Duncan in 2012.

State Authorization

- **Remember**: Underlying state law requirements were unaffected by recent court decisions
- Most states require licensure only where “physical presence” (facilities, clinical training, recruiting, employees)
- Minority of states require authorization for purely online programs, even without a presence (i.e. based on student’s domicile)
- Department has “paused” new distance education rule … for now.

- Schools must still disclose the complaint agency in all states where students reside (34 CFR 668.43(b))
- Must also make all state approval documents available “on request” to students (and ED)
- Misrep rule specifically references state authorization or accreditation of a program. 34 CFR 668.72
- Programs leading to professional licensure may require multiple agency approvals (e.g. nursing) and any necessary approvals must be disclosed for “gainful employment” programs.

SARA – Reciprocity

- State Authorization Reciprocity Agreement (SARA) in effect and gaining momentum; currently 21 approved states are members.
- “Home” state maintains jurisdiction
  - Set of common state standards, including definition of “physical presence”
  - Managed by regional compact organizations (e.g., WICHE) and a national board
  - Institutions approved in member states are eligible to offer online programs in all other SARA-member states without obtaining authorization (as long as the institution does not operate a campus or administrative office in a state)
- Eases burden, but not a complete fix:
  - Unlikely all states will adopt reciprocity
  - Degree-granting institutions only
  - Does not apply to professional licensure approvals
Other Issues to Remember...

- FERPA, Privacy, and Information Security
- Intellectual Property and Course Content Licensing (e.g. copyright)
- Consumer protection laws ("Do Not Call," CFPB etc.)

How is Compliance Assessed?

- Annual Title IV Compliance Audits
- Program Reviews
- OIG Audits
- Student Complaints
- Qui tam or "whistleblower" actions filed under the federal False Claims Act
Penalties and Liabilities

- Fines and repayment of Title IV funds
- Accreditation/State Agency Actions
- Student Suits
- Qui tam litigation--very expensive to defend even when frivolous, may lead to substantial judgments or settlements (treble damages);
- Negative publicity

Contracts – Allocating Risk with Vendors

- Incentive Compensation
- Misrepresentation
- State Authorization
- Written Arrangements/Servicers
Best Practices – Allocating Risk with Vendors

Incentive Compensation

► Commandment #1: Thou Shalt Certify Compliance with the ICR (and then Comply with It).
  ► Understand a “bundled service” provider’s methods for complying with the ICR
  ► Make sure that lead gen companies are being paid for leads, not for enrollments (or started applications, etc.)

Best Practices – Allocating Risk with Vendors

Misrepresentation

► Commandment #2: Thou Shalt Certify Compliance with the Misrepresentation Rule.
► Commandment #3: Thou Shalt Ensure that the University ALWAYS has Final Approval Rights.
  ► Written Marketing Materials
    ► Prohibit modifications of previously approved marketing materials
  ► Call Scripts
Commandment #4: Thou Shalt Have a Clear Strategy for State Authorizations.

University is ultimately responsible; what role will your provider play?

Centralize state authorizations ASAP

- Danger of individual schools handling
  - Tracking approval status
  - Duplicative application work
  - Renewals looking for institutional data
  - Track student enrollment by state
  - Strategy for changes in state law

Commandment #4: Thou Shalt Have a Clear Strategy for State Authorizations.

Understand the impact of:

- Clinical components
- Professional licensures
- Marketing/faculty
Commandment #5: Thou Shalt Respect in Every Way that the Rights of the University are Superior to All Other Rights.
  - Reasonableness standards

Commandment #6: Thou Shalt Secure Favorable Termination Rights.
  - Immediately upon breach
  - 24 (or 48 or 72) hours notice termination for convenience

Commandment #7: Thou Shalt Indemnify for Breach & Limitations on Liability Shalt Not Apply to Approvals, Use of Marks or Compliance.
  - Liquidated damages?
  - Insurance

Commandment #8: Thou Shalt Not Assign.
  - Possibly on notice and favorable termination right
Ongoing Contract Management and Compliance – Practical Tips

Vendors (Lead Gen)

- Commandment #9: Thou Shalt Not Subcontract.
  - Fully disclose partner websites
  - Goal is complete transparency
- Commandment #10: Thou Shalt Be Subject to Audit.

To Colleges & Universities:

- Bonus Commandment: Treat Your Bundled Service Provider Like the Subservient Partner That They Are.
Ongoing Contract Management and Compliance – Practical Tips

Third Party Servicers (of Financial Aid)

▶ Consider whether the rule is applicable to the services being contracted (in flux);
▶ Consider revising the arrangement if the rule may be triggered.
▶ Consider a specific disclaimer that the agreement is not intended to be a third party servicer arrangement
▶ If you have a third-party servicer arrangement, make sure the vendor has the necessary assets to sustain a Department finding and require insurance (joint and several liability)!

Ongoing Contract Management and Compliance – Practical Tips

▶ Seek an appropriate warranty as to eligibility (e.g., not a disqualified entity or person)
▶ Include required ED certifications and undertakings from the rules in directly into contract (e.g. will not violate incentive comp rule)
▶ Do not list a financial aid service company as a “third-party servicer” without careful consideration of latest ED guidance
Tips for Written Arrangements

- Include contract provisions that expressly identify the portion of the educational program each institution will provide.
- Include prohibitions on expanding the “services” provided without prior authorization; cover things like internships, labs, clinical rotations, independent study, and testing services.
- Seek an appropriate warranty as to Title IV eligibility, accreditation, and state authorization.
- Due your diligence on accreditation standards
- The Title IV eligible institution should only deal with a reputable vendor – the institution remains responsible to its accreditor for all activities within the scope of accreditation!

Appendix--Sample Clauses

- Commandment 1
  - Subcontractor shall compensate its employees, representatives and/or subcontractors engaged in the recruitment of leads pursuant to this agreement only in accordance with the provisions of 34 C.F.R. § 668.14(b)(22), commonly referred to as the Incentive Compensation Rule.

- Commandment 2
  - Subcontractor will not make any false, erroneous, or misleading statements concerning any program or any program school, including but not limited to false, erroneous or misleading statements about the nature of the available educational courses, financial charges for the program, or the employability of graduates of the program. All statements made shall be in accordance with the provisions of 34 C.F.R. § 668.71, commonly referred to as the Misrepresentation Rule.
Appendix--Sample Clauses

- **Commandment 3**
  - Company shall provide creative, product descriptions, service marks, images, trademarks, copyrighted materials, Company and/or school logos, slogans, templates, content, offer copy and/or other product or service attributes or items (collectively, "Creative") that will assist Subcontractor in carrying out its obligations under this Agreement. Company hereby grants to Subcontractor a non-exclusive, limited, revocable license to market, display, perform, copy, transmit and promote Creative solely in connection and consistent with its obligations hereunder. Subcontractor's use, copying, redistribution and/or publication of any part of Company's Creative, other than as contemplated under this Agreement, is strictly prohibited. Subcontractor shall use the Creative and any other content previously approved by Company only as approved by Company in each and every instance. Subcontractor shall not modify the Creative or any other content previously approved by Company or use the Creative or any other content previously approved by Company in any way other than as previously approved by Company except upon having obtained Company's advance, written approval (which Company may grant or withhold in 2U's sole and exclusive discretion) in each instance, provided that the foregoing shall not apply to modifications relating solely to formatting, pagination, correction of typos and similar such edits. Subcontractor may submit any content (whether or not containing the Creative) it wishes to use as part of its performance of services hereunder for written approval by Company, which Company may provide or withhold in its sole and exclusive discretion.

Appendix--Sample Clauses

- **Commandment 8**
  - Subcontractor shall not sell, transfer, or assign this agreement or the rights or obligations hereunder, other than to a parent or wholly-owned subsidiary, without the prior written consent of Company. Subject to the foregoing, this agreement will be fully binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and permitted assigns.
Appendix--Sample Clauses

Commandment 10

Subcontractor shall (a) permit Company’s authorized representatives and auditors access to the Subcontractor’s premises and appropriate Subcontractor personnel, and (b) provide Company with access to or copies of: (i) applicable Subcontractor records, including campaign metrics, scripts, recordings and quality assurance scores, as reasonably requested by Company and/or its representatives; (ii) Subcontractor’s compliance policies and procedures applicable to Subcontractor’s operations related to its services and obligations pursuant to this Agreement; and (iii) any other records required to be delivered by Subcontractor pursuant to this Agreement, in each case in order for Company to conduct due diligence on, audit, inspect or otherwise examine Subcontractor’s operations, computer systems, practices and controls relating to its performance hereunder and/or to its compliance with the terms hereof. Company agrees that any audits hereunder will be completed at Subcontractor’s facilities upon reasonable advance notice during regular business hours.

Questions?

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