

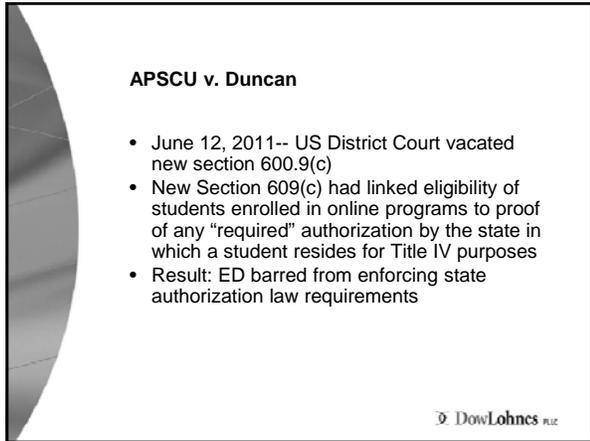
Update on Federal Regulation of State Authorization

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NASASPS Annual Conference
April 24, 2012

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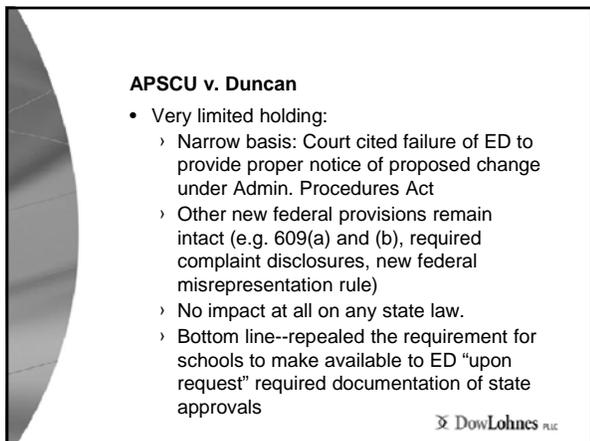
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APSCU v. Duncan

- June 12, 2011-- US District Court vacated new section 600.9(c)
- New Section 609(c) had linked eligibility of students enrolled in online programs to proof of any "required" authorization by the state in which a student resides for Title IV purposes
- Result: ED barred from enforcing state authorization law requirements

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APSCU v. Duncan

- Very limited holding:
 - › Narrow basis: Court cited failure of ED to provide proper notice of proposed change under Admin. Procedures Act
 - › Other new federal provisions remain intact (e.g. 609(a) and (b), required complaint disclosures, new federal misrepresentation rule)
 - › No impact at all on any state law.
 - › Bottom line--repealed the requirement for schools to make available to ED "upon request" required documentation of state approvals

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Decision Created Three Options for Department (Non-Exclusive)

- **Appeal the decision.** This holding could have possible implications for future rulemakings by all administrative agencies.
- **Change the interpretation of the remaining rules regarding state authorization.** Interpret the unaffected portions of existing regulations more expansively in terms of the definition of a "physical location" within a state ("site" v. "presence")
- **Start over.** "Cure" by re-issuing the rule. If a new rule goes through the notice and comment process, the procedural defect noted in the decision would be cured (possibly within former "good faith" time-frame)



Option 1--The Appeal

- July 18, 2011--APSCU appeals (incentive compensation and misrep. issues)
- September 8, 2011—ED/Justice Dept. cross-appeals (state authorization issue)
- February 21, 2012--Oral argument in DC Circuit court
- Oral argument record suggests lower court ruling will be upheld
- Final ruling expected second half of 2012



Option 2--Reinterpretation

- State authorization is "on the list" in recent program reviews
- Too soon to tell if a new, sub-regulatory approach (beyond demonstrating authorization for actual physical locations)



Option 3—Replacement Rule

- No indication from ED whether a new rule will be issued
- House passed legislation in February 2012 that would repeal state authorization and credit hour rules ("Foxyx bill")
- Not expected to pass Senate but gained strong support across higher ed
- A "shot across the bow" (as to Option 3)
- State issue could re-emerge in Higher Ed Act re-authorization process



Federal Regulation of States After APSCU v. Duncan

- Most Likely Outcome—what we have now
- The "status quo" means responsibility for authorization of online learning remains with the states
- Absent reciprocity, institutions must obtain authorization where required and monitor rapid changes in state law
- But some new federal requirements also apply...



Remaining Aspects of New Rules

- Section 609 (a)—states must have adequate complaint process or request extension until July 1, 2013, explaining compliance plan
- States that may not be compliant—Hawaii, South Dakota, Guam, New Mexico, possibly CA
- ED guidance--Schools should have documentation of all state extension requests



Complaint Process

- Section 668.43(b)--Schools must disclose to students the complaint agency in any state where students reside.
- Usually posted on website



Federal Misrepresentation Rule

- Section 668.71--Exceptionally broad new rules ban “substantial misrepresentation”
 - › “Substantial misrepresentation” includes virtually *any* false or even confusing statement, even if inadvertent, if someone relies on it “to their detriment”
- There is no “materiality” standard or requirement of bad intent
- Sanctions include possible loss of Title IV!
- Challenged in *APSCU v. Duncan*



Federal Misrepresentation Rule

- “Substantial misrepresentation” includes failure to disclose whether “the course of study has been authorized by the appropriate state educational agency”
- New language refers to specialized approvals (e.g. Board of Nursing), but schools must be very careful in their disclosure of state authorization
- Sample: “*Institution is currently authorized or licensed to operate in: [List States]. Institution will monitor developments in state laws in each state in which it enrolls students and, if authorization or licensure is or becomes necessary, will obtain additional approvals.*”



Questions?

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