

Division of Government & Public Affairs

## **Summary of U.S. District Court for the District of Columbia's Ruling on *Association of Private Sector Colleges and Universities v. Arne Duncan***

As reported earlier this week, on July 12 a federal district court in the District of Columbia struck down a section of the U.S. Department of Education's (ED) new state authorization regulation, but let stand the remainder of the state authorization regulation as well as ED's amended incentive payment and misrepresentation regulations. The section that was invalidated required an institution to obtain state authorization to offer distance or correspondence education in every state in which the institution has students enrolled in such programs, if the state requires authorization. The state authorization, incentive payment, and misrepresentation regulations apply to institutions that participate in the federal student financial aid programs and became effective July 1, 2011. Below we provide additional details on the decision and preliminary thoughts about its implications.

**The court's decision.** The plaintiff, the Association of Private Sector Colleges and Universities (APSCU), broadly claimed that the incentive payment, misrepresentation, and state authorization regulations, as amended, were arbitrary, capricious, and contrary to law under the Administrative Procedure Act (APA), unconstitutional, and otherwise beyond the scope of ED's statutory rulemaking authority. In contrast to APSCU's wide-ranging claims, the court issued a narrow opinion that focused mainly on whether ED articulated an adequate rationale and facts in support of the policy choices it made, as required under the APA, and whether it otherwise complied with the APA's procedural requirements. The court declined to take up APSCU's most provocative argument—that ED had no authority to issue the regulations. Indeed, the court struck down the distance education provision only because of a procedural error, namely ED's failure to give adequate notice and time for comment on the rule. Several times the court's opinion notes that APSCU's claims seemed to be more in the nature of policy disagreements with ED than legal claims.

The decision upheld the bulk of the challenged regulations. On incentive payment, the court ruled that ED has authority to regulate incentive payments to senior management and salary adjustments that are based in part on success in securing enrollments. It also found that ED sufficiently supported its decision to eliminate the prior regulation's 12 "safe harbors", citing to evidence in the administrative record that many institutions, particularly for-profit institutions, abused the safe harbors. On misrepresentation, the court rejected APSCU's argument that ED had too broadly defined "substantial misrepresentation" to include certain unintentional and immaterial statements. It also declined APSCU's invitation to strike down the misrepresentation regulations as impermissible restrictions on the First Amendment rights of colleges and universities.

As for state authorization, while the court vacated the distance education provision, it dismissed APSCU's claims that two other sections of the state authorization regulations were unlawful: (a) The requirement that states have a process for resolving complaints about postsecondary institutions and (b) the requirement that colleges and universities be authorized by name as educational institutions by an appropriate state entity.

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APSCU argued that these provisions would impermissibly compel states to establish entirely new complaint and authorization procedures. The court declined to take up these arguments, reasoning that the states—not APSCU—would have standing to challenge the new requirements.

**Implications of the decision.** The decision by no means satisfies institutional concerns on the distance-education provision. Prospects seem dim, as well, for court-ordered relief any time soon on the incentive payment and misrepresentation regulations or on the non-distance-education aspects of the state authorization regulation.

The court's decision does not mean that state authorization requirements for distance education programs have gone away. The regulation that the court struck down required institutions to obtain state authorization for distance education programs in order to award federal student financial aid to students in such programs. States continue to have rules regarding authorization of institutions that operate in state or offer distance education to state residents regardless of whether students are receiving federal student financial aid. The ruling in no way affects the ability of states to enforce those rules or to pursue development of such rules.

The vacated regulation or a variant could be put into effect at a future point, such as if ED wins an appeal or conducts a procedurally valid rulemaking process on the regulation. ED has 60 calendar days to file an appeal. ED would have to complete negotiated rulemaking and propose rules by November 1, 2011 to have regulations take effect on July 1, 2012. APSCU also has 60 calendar days to file an appeal. Meanwhile, institutions that receive federal student aid must comply with the incentive pay and misrepresentation regulations and the bulk of the state authorization regulations. ED and APSCU are considering their respective procedural options.

