

Issue Paper 1
Session 1: January 12 – 14, 2016

Issue: Whether to establish a new standard for the purpose of determining whether a borrower can establish a defense to repayment on a loan based on an act or omission of a school.

Statutory cite: 455(h) of the Higher Education Act of 1965, as amended

Regulatory cite: 34 C.F.R. 685.206(c), 682.209(g)

Summary of issue:

The current defense to repayment (DTR) regulation requires a borrower to establish the existence of an “act or omission” by an institution that would give rise to a cause of action against the school under “applicable state law” to demonstrate a defense to repayment. The regulation reads, in part:

In any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law. 34 CFR § 685.206(c)(1).

The HEA gives the Secretary authority to issue regulations in this area. The statute reads, in full:

Notwithstanding any other provision of State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan. HEA § 455(h), 20 U.S.C. § 1087e(h).

In 1995, the Department of Education (Department) issued a Notice of Interpretation providing guidelines on the borrower defense process. The guidelines indicated that the Department will acknowledge a DTR only if the cause of action directly relates to the loan or to the school’s provision of educational services for which the loan was provided. 60 Fed. Reg. 37768 (Jul. 21, 1995).

The current borrower defense regulation in place is wholly dependent on state law; relief depends on whether a school’s actions would give rise to a state law cause of action. This creates variation and complexity in application of the regulation for borrowers and the Department. Some state laws offer strong protections to borrowers, while others offer very little protection. At a minimum, the current regulation may provide uneven relief to students affected by the same institutional practices in different states - since relief is dependent on the protections available under the state’s law that is applicable to each borrower’s claim.

A key goal of these negotiations is to establish a standard for DTR claims that will allow for a more uniform treatment of borrowers.

Some public commenters have advocated the adoption of a standard similar to that in 12 U.S.C. 5531 and 5536, which protects against “unfair, deceptive, or abusive acts and practices”¹ (also known as “UDAAPs”) and is used by the Consumer Financial Protection Bureau (CFPB) and/or in 15 U.S.C. 45, which protects against “unfair or deceptive acts or practices” (“UDAPs”) and is used by the Federal Trade Commission (FTC). However, the Federal UDAAP or UDAP laws are government agency enforcement tools, and were not necessarily designed to be a standard against which an individual seeks relief from the government.

Questions for consideration by the committee include:

1. Is the current standard based on applicable State law sufficient for borrower defense claims? Why or why not?
2. If a revised standard is established, should state law remain as an alternate path to relief? What should the scope of available relief under state law be? Should the Department consider limiting State law claims to those in which the borrower won his or her legal case against the school in a court?
3. How should a borrower’s injury and the amount of his or her loss for which relief is given be identified and measured?
4. If a revised standard is established, how should that standard be articulated? Some examples for discussion: the Department’s regulations at 34 CFR Part 668, subpart F²; breach of contract, the unfair practices standards used by the FTC and the CFPB; or some different standard.
5. Whether under a new standard or a standard based on causes of action under a State’s (or States’) laws, how should the new regulations limit claims based on an institution’s failure to comply with the HEA or a regulatory requirement that may not cause harm or injury to the borrower (i.e. failure to respond to an IPEDS survey)?
6. If a new standard is established, should it be applied only prospectively to new loans, or should it also apply retroactively?

¹ http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf

² <http://www.ecfr.gov/cgi-bin/text-idx?SID=5b3bb1e1ceaff5fdc8d06986d41a08de&mc=true&node=sp34.3.668.f&rgn=div6>