

October 5, 2018

Diane Auer Jones
Principal Deputy Under Secretary, Delegated to Perform the Duties of Under Secretary and Assistant Secretary
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Dear Ms. Jones:

On July 11, 2018, the American Council on Education (ACE) and the National Association of Student Financial Aid Administrators (NASFAA) sent a joint letter to the Secretary regarding the Department of Education's obligation to reimburse cancellation costs to eligible institutions of higher education participating in the Federal Perkins Loan Program.

As noted in our earlier letter, the Higher Education Act requires participating schools to cancel or discharge portions of Perkins student loans based on the borrower's post-graduate employment in statutorily defined eligible public service occupations such as teaching, law enforcement, or military service. The Act further mandates that the "Secretary shall pay to each institution for each fiscal year an amount equal to the aggregate of the amounts of loans from its student loan fund which are canceled. . ."

Unfortunately, since Fiscal Year 2010, the Department has not reimbursed those cancellation costs. While the stated reason for the failure to make required payments has been a lack of funds appropriated by Congress for that purpose, the agency has consistently acknowledged that its obligation to do so continues to exist. Indeed, the Department has issued statements recognizing its obligation as far back as 2010. In the meantime, some institutions have already spent more than \$3 million of their own money meeting the federal requirement to cancel Perkins Loans.

Federal law is explicit regarding the Department's obligations in this matter. The failure of Congress to appropriate funds to enable an agency to satisfy a mandatory statutory obligation does not allow an agency to avoid meeting their obligations under the law. As a result, courts proceeding under authority of the Tucker Act (28 U.S.C. 1491) have consistently found that statutory obligations are not dependent on Congressional appropriations. *See, e.g., Molina Healthcare of California, Inc. v. United States* (2017); *New York Airways, Inc. v. United States* (1966); *Ralston v. United States* (1940). Most recently, this principle was reiterated in the Federal Circuit decision *Moda Health Plan, Inc. v. United States* (Fed. Cir. June 14, 2018) which notes that a mandatory Government funding obligation exists "independent of any budgetary authority and independent of a sufficient appropriation to meet the obligation". It appears from the opinion in that case that the Government did not oppose the principle stated above by the Court.

Furthermore, *The Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019* signed into law by the President on September 27, 2018 underscores this obligation:

“Funds appropriated in this Act under the heading “Student Aid Administration” may be available for payments for student loan servicing to an institution of higher education that services outstanding Federal Perkins Loans under part E of title IV of the Higher Education Act of 1965.” (sec. 308 of H.R. 6157)

This language gives the Department the flexibility to use appropriated funds to reimburse institutions for cancellations without a specific appropriation for this purpose. Since Department’s only rationale for not reimbursing institutions was due to the lack of appropriations for this purpose, this language makes it clear that such a rationale no longer exists. In light of these facts, ACE and NASFAA respectfully ask the Department to meet its obligations to eligible institutions of higher education and reimburse them for the full amount of their cancellation costs under the Perkins Act.

Federal case law, recent Congressional action and Department of Education statements all make clear that this is an issue that needs to be addressed immediately. The matter is increasingly urgent as the Department has announced that it will release guidance on the return of Perkins Loan funds in December of this year. We strongly believe that this matter needs clarification before that occurs.

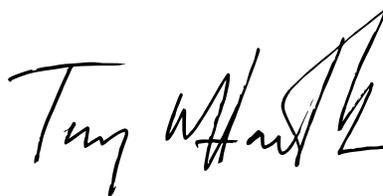
We realize that issues of this type not something the Department regularly encounters. Nonetheless, it is clear that relevant federal caselaw is applicable to the Perkins Loan program and we ask that the Department publicly announce its intention to fully reimburse institutions for the cancellation costs they have incurred. Failing that, and understanding that providing comprehensive guidance to institutions on how the new authority provided to them under H.R. 6157 may take some time to prepare, ACE and NASFAA urge the Department to, at a minimum, delay requiring institutions participating in the Perkins Program to return these funds until such time as the issue of the unreimbursed cancellation costs is resolved. Such a delay could avoid the administrative difficulties of multiple exchanges of payments between these institutions and the Department.

Thank you for your consideration and prompt reply.

Sincerely,



Justin Draeger,
President, NASFAA



Terry Hartle,
Senior Vice President, Division of
Government and Public Affairs, ACE