

Docket ID ED–2015–OPE–0103

Testimony of National Association of Student Financial Aid Administrators on Borrower Defenses

September 10, 2015

The Department proposes four aspects of borrower defenses for consideration in negotiated rulemaking. We are not suggesting any additional issues to negotiate in these sessions. We have encouraged the Department for some time to limit negotiated rulemaking sessions to a reasonable amount of material, and we believe this is a step in that direction.

The first proposed issue involves procedures to establish a defense to repayment.

In principle, we agree that if the Department of Education has found a school to be in violation of misrepresentation or consumer disclosure rules on a broad scale, and that violation affected students' decisions to enroll in a program from which they are unlikely to benefit in a substantial way, defenses to repayment can be treated together and alike. That is, similar claims could be treated together and alike, as suggested by Special Master Joseph Smith. We would expect that across-the-board approvals of defenses to repayment, however, would follow a final finding based on clear evidence of systemic fraudulent practices, after due process opportunities have been afforded to the school.

Similar findings by a state licensing agency or accrediting agency should trigger immediate forbearance on student loans pending an inquiry by the Department to determine whether findings rise to the federal level of severity to constitute across-the-board defenses to repayment.

Loans for any student who files a "defense to repayment" claim should also automatically enter forbearance. However, where there has been no finding of fraud or misrepresentation by some oversight agency, and no such investigation is underway, a rigorous standard of proof of the claim should be imposed. Claims from multiple borrowers should trigger a priority inquiry into the school's practices.

Current regulations allow a borrower to assert a defense against repayment "in any proceeding to collect on a Direct Loan," such as salary or tax refund offsets and wage garnishment. Borrower defenses should be allowed before such collections efforts are required.

The second proposed issue concerns identification of acts or omissions that constitute defenses to repayment.

The regulations center borrower defenses on school acts or omissions that “would give rise to a cause of action against the school under applicable State law.” To comply with this language in the recent Corinthian Colleges case, the Department resorted to a state law concerning unfair competition. This seems somewhat haphazard; since the HEA does not contain the same language regarding state law, we wonder why the regulation is constructed in this way.

Discharge of a borrower’s loans is an extraordinary step, and should be reserved for violations involving fraud or substantial misrepresentation that induce an individual to enroll in a program that would afford him or her little benefit. Fraudulent information that significantly inflates student outcomes is a valid reason to consider discharge when program graduates cannot actually obtain gainful employment relevant to the program of study.

Certain other problems may be more student-specific. For example, failure to reveal significant conditions of employment in the field of study may give cause for redress for some students, but not necessarily for students unaffected by that condition who obtain satisfactory employment. The Department should consider whether harm to the borrower should be assessed before determining discharge eligibility.

Misrepresentation of other aspects of the institution may warrant sanctions against the school, but if it does not affect the quality of the program or employability of graduates, repayment of loans should be unaffected.

The third proposed topic is the determination of institutional liability.

Fraudulent acts and misrepresentation by institutions is rare, but any school participating in the student aid programs that deliberately misleads individuals to enroll on a widespread basis, or fosters a culture of deception or pressure that achieves enrollment by any means possible, should hold liability both to the students and taxpayers. Any student who is harmed by a school’s or employee’s actions should have access to redress, and the school, as a steward of public funds, bears responsibility to account for losses to public funds.

A key question is whether the school should continue to operate. The Department has options for emergency actions against schools that should be closed down or denied participation in Title IV programs. If the school’s violations do not constitute reason for emergency actions or severe sanctions, imposition of fines and liabilities that are beyond the school’s financial capacity to pay may actually harm enrolled students who may benefit from unaffected academic programs or who attend locations that did not participate in deceptive practices.

Even if the Department intends the school to close or to cease participating in Title IV programs, an orderly process that provides teach-out arrangements for current students rather than precipitous closure should take priority over seeing how high a fine a school can bear.

The fourth proposed issue is the effect of borrower defenses on institutional capability assessments.

Administrative capability is a condition of participation in the federal student aid programs. A school that fosters a culture of deception, or that is so poorly administered as to not have control over its employees' fraudulent actions on a widespread scale, probably has serious capability issues that need to be addressed. School closure or denial of student access to Title IV funds is a step that should be imposed very carefully, however, and not as the automatic result of an isolated claim against the school that does not indicate systemic fraud. We believe there is room to explore in this negotiation minimum requirements or benchmarks developed out of the profession to help determine administrative capability and ensure a financial aid office is appropriately staffed and trained.

Thank you for this opportunity to comment.