Federal Register

Friday
July 21, 1995

Part V

Department of Education

Office of Postsecondary Education; Notice

DEPARTMENT OF EDUCATION

Office of Postsecondary Education

AGENCY: Department of Education.

ACTION: Notice of the results of the first meeting of the Borrower Defenses Regulations Negotiated Rulemaking Advisory Committee for the William D. Ford Federal Direct Loan (Direct Loan) Program, the Federal Family Education Loan (FFEL) Program, and the Federal Perkins Loan (Perkins) Program regulations and notice of cancellation of all future scheduled meetings; Notice of Interpretation.

SUMMARY: This notice reports the results of the April meeting of the Borrower Defenses Regulations Negotiated Rulemaking Advisory Committee and cancels all future scheduled meetings. Further, this notice explains the Department of Education's (Department's) interpretation of certain Direct Loan Program regulations relating to borrower defenses, which became effective July 1, 1995. Finally, this notice contains information about administrative procedures the Department will implement regarding borrower defenses.

FOR FURTHER INFORMATION CONTACT: Nicki Meoli, Program Specialist, Policy Development Division, Office of Postsecondary Education, U.S. Department of Education, Room 3053, ROB–3, 600 Independence Avenue, SW., Washington, DC 20202–5400. Telephone: (202) 708–9406. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: On August 18, 1994, the Department published a Notice of Proposed Rulemaking (NPRM) for the Direct Loan Program. (59 FR 42646) That NPRM included a proposed rule that described certain defenses a Direct Loan borrower could raise against repayment of the loan. (§ 685.206(c), 59 FR 42663–42664, August 18, 1994) The preamble to the proposed rule stated that the Secretary intended that the rule would be effective for the 1995–1996 academic year only and that the Secretary would work with interested parties to develop regulations for borrower defenses that would apply to both the Direct Loan and the FFEL Programs. The new rule would be effective beginning with the 1996–1997 academic year. (59 FR 42649, August 18, 1994)

After considering public comments received on the proposed rule, the Secretary decided to issue a final rule for the Direct Loan Program including the rule on borrower defenses that was included in the NPRM. In publishing the final rule for the Direct Loan Program, the Secretary noted that some of the commenters on the NPRM supported the Secretary's announcement that he intended to work with interested parties to develop regulations for borrower defenses that would apply to both the Direct Loan and the FFEL Programs. (59 FR 61664 and 61671, December 1, 1994) These commenters urged the Secretary to structure the discussions under the negotiated rulemaking process and identified particular representatives for the process.

In keeping with his commitment, on April 25, 1995, the Secretary convened the Borrower Defenses Regulations Negotiated Rulemaking Advisory Committee (Committee). The Department retained the services of a professional mediator to serve as a neutral convener and facilitator for the negotiated rulemaking. The Committee represented all affected parties, including representatives of institutions of higher education, higher education organizations, student loan lenders, guaranty agencies, loan servicers, legal aid organizations, students, and the Department. Establishment of the Committee was consistent with the Notice of Intent published by the Department on February 28, 1995. (60 FR 11004)

The ultimate goal of the negotiated rulemaking was to reach consensus among all committee members through discussion and negotiation among all interested and affected parties, including the Department.

The issues the Department presented for negotiation included a determination of which acts or omissions of an institution of higher education a borrower could assert as defenses to a demand for repayment of a loan made under the Direct Loan, FFEL, and Perkins Programs, and the consequences of such defenses for the institution, the Secretary, and, under the FFEL Program, for the lender and the guaranty agency.

The Committee consisted of the following organizations (some organizations with similar interests participated as a coalition):

American Association of Community Colleges
American Association of Cosmetology Schools
American Association of State Colleges and Universities
American Council on Education
Career College Association
Coalition of Higher Education Assistance Organizations
Coalition of private non-profit multi-State guaranty agencies
Consumer Bankers Association
Education Finance Council
Federation of Associations of Schools of Health Professions
Hispanic Association of Colleges and Universities
Legal Services Team
National Association of College and University Business Officers
National Association of Graduate-Professional Students
National Association of Independent Colleges and Universities
National Association of State Universities and Land Grant Colleges
National Association of Student Financial Aid Administrators
National Association for Equal Opportunity in Higher Education
National Council of Higher Education Loan Programs
Student Loan Marketing Association
United Negro College Fund
U.S. Department of Education
United States Student Association

Committee Recommendation

The Committee was originally scheduled to meet for three sessions during the months of April, May, and June, 1995. However, during the first session, the Department was informed that the non-Federal negotiators had all agreed to recommend to the Department that no changes be made to existing regulations. The non-Federal negotiators thanked the Department for initiating the negotiated rulemaking process that many of them had requested to address the borrower defenses issues. However, they indicated that, after further consideration, they had concluded that they would not recommend further regulatory action on this issue at this time. In particular, the non-Federal negotiators recommended that the Department not pursue an attempt to draft consistent regulatory provisions governing borrower defenses in the Direct Loan, FFEL, and Perkins Programs, and the consequences of such defenses for the institution, the Secretary, and, under the FFEL Program, for the lender and the guaranty agency. Rather, the non-Federal negotiators on the Committee told the Department that they were satisfied that the current regulations adequately address the issue of borrower defenses and that no further regulatory action is needed.

The Secretary has considered carefully the recommendation of the non-Federal negotiators on the Committee and has decided not to make any regulatory changes on the issue of

borrower defenses at this time. The Department is committed to regulating only when absolutely necessary, and then in the most flexible, most equitable, least burdensome way possible. Further, the Department will not regulate if a problem can be solved adequately without regulating. In this instance, the Secretary believes that borrower defenses issues, in particular issues related to the consequences of such defenses, can be adequately addressed by clarifying current regulations and by administrative processes. Therefore, the full Committee has reached consensus that no additional regulations are needed at this time, and this negotiated rulemaking process is concluded. In this notice, the Secretary provides some interpretive and administrative information regarding borrower defenses.

Notice of Meeting Cancellation

Further meetings of the Committee are cancelled.

Clarification of Direct Loan Program Provisions

During consideration of the issues to be discussed at the negotiated rulemaking sessions on borrower defenses, it became apparent to the Department that there was some confusion among negotiators and members of the public regarding the meaning of 34 CFR 685.206(c), which addresses borrower defenses in the Direct Loan Program. In light of that confusion, the Secretary is issuing this interpretation to ensure that program participants and the public generally understand the Secretary's intent in issuing the regulations.

Section 685.206(c) provides that a borrower may assert, in certain specified proceedings, as a defense against repayment of a Direct Loan, 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. In proposing this rule initially, the Secretary stated that the rule was intended to allow a Direct Loan borrower to request that the Secretary ''exercise his long-standing authority to relieve the borrower of his or her obligation to repay a loan on the basis of an act or omission of the borrower's school.'' (59 FR 42649, August 18, 1994) In publishing the final regulations, the Secretary noted that the proposed regulations reflect that an ''act or omission of the school may, under certain circumstances, be a defense against collection of a loan.'' (59 FR 61671, December 1, 1994) The Secretary also noted that the reference to ''applicable State law'' was an acceptable interim standard until common regulations could be developed for the FFEL and Direct Loan Programs. (59 FR 61671, December 1, 1994)

The regulatory reference to acts or omissions of a school that ''would give rise to a cause of action against the school under applicable State law'' has been misunderstood by some members of the public. Some individuals have suggested that any act or omission of a school or its employees that could be the basis for a cause of action by the student against the school could be considered a borrower defense. For example, some participants suggested that a school's negligent failure to wipe up water in the school's hallway that results in an injury to a borrower who slips and falls on that surface could be considered a cause of action that could be a defense against repayment of the loan. The Secretary did not intend for the regulations to include such claims.

The Secretary's statements in the preamble to the proposed rule and the final rule were intended to reflect the limited scope of the regulatory reference to a cause of action under applicable State law that could also be asserted as a defense to collection of a loan. The regulation does not provide a private right of action for a borrower and is not intended to create new Federal rights in this area. The Secretary's view is that claims of defenses by Direct Loan borrowers based on State laws should be recognized by the Department only if the school's act or omission has a clear, direct relationship to the loan.

The Secretary is issuing this interpretation to clarify that his intent in adopting 34 CFR 685.206(c) remains consistent with the statements in the preambles to the proposed and final rules. The Secretary will acknowledge a Direct Loan borrower's cause of action under State law as a defense to repayment of a loan 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. The Secretary will not recognize, as a defense against repayment of the loan, a cause of action that is not directly related to the loan or the educational services. In this latter category, the Secretary includes such actions as personal injury tort claims or actions based on allegations of sexual or racial harassment.

The borrower may certainly have a cause of action against the school for actions in these categories, but these actions are generally not related to the receipt or distribution of Direct Loan proceeds and are not a defense to collection of a loan. The Secretary believes that borrowers who believe they have a cause of action based on acts or omissions of the school in these areas should be able to choose to pursue appropriate legal recourse; but that it is not appropriate for the taxpayer to face a potential loss based on actions by schools in matters unrelated to the loan programs themselves.

The Secretary will apply this interpretation of the regulations in determining whether a borrower has a recognizable defense against repayment of a Direct Loan under 34 CFR 682.206(c). The Secretary expects that the adjudication of individual claims will provide further explanation of the Secretary's interpretation of the regulatory requirements.

Administrative Processes To Ensure Similar School Liability for Borrower Defenses in Both the Direct Loan Program and the FFEL Program

Some members of the FFEL industry have asserted that there will be greater liabilities for institutions participating in the Direct Loan Program than for institutions participating in the FFEL Program as a consequence of differences in borrower defenses between the Direct Loan and FFEL Programs. These assertions are inaccurate.

The Department has consistently stated that the potential legal liability resulting from borrower defenses for institutions participating in the Direct Loan Program will not be significantly different from the potential liability for institutions participating in the FFEL Program. (59 FR 61671, December 1, 1994, and Dear Colleague Letter GEN 95–8 January 1995) That potential liability usually results from causes of action allowed to borrowers under various State laws, not from the Higher Education Act or any of its implementing regulations.

Institutions have expressed some concern that there is a potential for greater liability for institutions in the Direct Loan Program than in the FFEL Program under 34 CFR 685.206. The Secretary believes that this concern is based on a misunderstanding of current law and the intention of the Direct Loan regulations.

The Direct Loan regulations are intended to ensure that institutions participating in the FFEL and Direct Loan Programs have a similar potential liability. Since 1992, the FFEL Program regulations have provided that an institution may be liable if a FFEL Program loan is legally unenforceable. (34 CFR 682.609) The Secretary intended to establish a similar standard in the Direct Loan Program by issuing 34 CFR 685.206(c). Consistent with that intent, the Secretary does not plan to

initiate any proceedings against schools in the Direct Loan Program unless an institution participating in the FFEL Program would also face potential liability.

An FFEL Program borrower who alleges that he or she has a defense against repayment of his or her loan because of some action or failure of the borrower's school may present his or her arguments to the guaranty agency or the Department during the collection process. (34 CFR 30.24, 682.410(b)(5)(ii)(C), and 682.410(b)(5)(vi)(I)) If, as part of this process, part or all of the loan is deemed unenforceable, the Department will next consider whether the school should be held liable for the amount of the loan forgiven.

The Direct Loan Program regulations at 34 CFR 685.206 establish a similar process and allow the borrower to assert as a defense against repayment of his or her loan ''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.'' If the Department forgives all or part of a loan under this process, it will, in the same manner as it will in the FFEL Program, consider whether the school should be held liable for the amount of the loan forgiven.

Thus, the Secretary will initiate proceedings to establish school liability for borrower defenses in the same manner and based on the same reasons for a school that participates in the Direct Loan Program or the FFEL Program. The school will be entitled to due process in these proceedings, in accordance with the statutory and regulatory provisions addressing them. The Department intends to perform its oversight responsibilities for both loan programs in a manner that provides equitable determinations of institutional liability and promotes sound program administration.

Dated: July 17, 1995.

Richard W. Riley,

Secretary of Education.

[FR Doc. 95–17988 Filed 7–20–95; 8:45 am]

BILLING CODE 4000–01–P