

July 24, 2015

VIA E-MAIL

Joseph A. Smith
Special Master
U.S. Department of Education

Re: Recommendations Regarding Defense-to-Repayment Relief Process for Federal Student Loan Borrowers

Dear Mr. Smith,

We represent low-income student loan borrowers who have suffered the financial and emotional harm caused by the unlawful, unfair, and deceptive acts and practices of for-profit schools. Based on our experience with these borrowers, we offer the following suggestions for a fair, transparent, accessible, and efficient process for borrowers asserting defenses to repayment (DTR) to federal student loans. Some of us will also submit comments on the Heald attestation form and website on a later date. As detailed below, we urge you to create a process for all borrowers who have been harmed by school fraud. This must be an uncomplicated process that allows borrowers to obtain relief without the assistance of an attorney. It should be based on existing federal laws regarding unfair and deceptive practices, as well as federal laws specifically applicable to higher education institutions, in addition to state laws.

Eligibility for Defense to Repayment

The Department should make it clear that all borrowers are eligible to assert defenses to repayment and should establish a uniform process for asserting defenses for all federal loans, including for consolidation and Parent PLUS loans, regardless of whether the Department holds the loans. While the DTR provisions for each loan program are governed by different regulations, and while the Department appears to have based its recent actions primarily on the borrower defense regulations under the Direct Loan program, the Department also has a mandatory obligation to cancel the loans of FFEL borrowers who establish that they have been subjected to the unlawful, unfair or deceptive practices of a for-profit school. Starting on Jan. 1, 1994, the FFEL Master Promissory Note (MPN) included language making loan holders subject to “all claims and defenses” that a borrower could assert against his or her school, as long as the school “refer[red] [borrowers] to the lender” or was “affiliated with the lender by common

Mr. Joseph Smith

July 24, 2015

Page 2

control, contract, or business arrangement.” These provisions were codified in the federal regulations in 2007.¹

Furthermore, the Department has the same contractual and regulatory duty to cancel consolidation loans based on school misconduct and should include these loans in the DTR process. The MPNs for both FFEL and Direct consolidation loans explicitly provide that borrowers may raise school-based claims as a defense to repayment. This specific language should override general statements that the borrower may waive some unnamed defenses by consolidation.

The Application Process

The DTR application should make it easy for borrowers to assert common violations that constitute defenses to repayment. These options could be provided as checkboxes on a paper form and as a pull-down menu or electronic checkboxes on a web-based form. This will ensure that borrowers without knowledge of consumer protection law, contract law, tort law, or other relevant law will be able to assert these claims.

Borrowers should not be required to submit documentation in support of their claims beyond the application. Our clients and other borrowers like them often have no such records or documentation, in many cases because the schools discouraged them from keeping records. In addition, in many circumstances borrowers are unable to obtain the necessary documents by the time they seek a discharge.

Because borrowers will be asked to sign an application under penalty of perjury, they will provide competent evidence of their enrollment and related facts, of which the Department should not need further verification. Indeed, in many circumstances it can verify these facts based on its own borrower records, including the schools borrowers attended and information about their debts.

A simple, clear application process is essential to ensure that borrowers can access this process without legal assistance. In addition, in cases where borrowers do have legal representation, the Department should establish a process to allow authorized legal representatives to have access to all communications related to the case and to advocate directly on behalf of the borrower.

The Department should continue to provide borrowers the option of forbearance on defaulted and non-defaulted loans from the time they submit applications to the time the Department makes a final determination. This forbearance should be available to both FFEL and Direct loan borrower and include cessation of any wage garnishment, federal benefit offsets, and tax refund intercepts. Some borrowers, including borrowers in repayment plans that may lead to loan forgiveness, may wish to continue making qualifying monthly payments while their applications are reviewed and should be permitted to do so. While we understand that the

¹ 34 C.F.R. § 682.209(g) (published in 72 Fed. Reg. 32,410 (June 2, 2007)).

Mr. Joseph Smith

July 24, 2015

Page 3

Department is currently providing this type of forbearance for Corinthian Direct Loan borrowers, it should make this forbearance available to all other borrowers who submit or plan on submitting DTR claims, including those who have FFEL loans and those who attended other schools.

The Department should ensure that all DTR claims are acknowledged within a reasonable period of time after they are received. While a claim is pending, borrowers should have access to information about the status of the claim, by phone and online with a password.

We recommend an outside time limit of 90 days for complete responses to applications, except in cases where the Department can document a lack of information or other extenuating circumstances. The Department should ensure that the applications are evaluated by a neutral arbiter. If the neutral arbiter denies an application, the written denial should explain all evidence relied upon, reasons any evidence presented by the borrower was insufficient or disregarded, and the specific legal bases for its determination.

Borrowers should also have a right to request appeal or reconsideration and reapply if they have additional information to provide.

Standard for Evaluation of Claims

The Department should set forth federal standards for evaluating all DTR claims, and make it clear that this is a standard available to borrowers nationwide *in addition to* the standards available under borrowers' individual state laws. The Department should grant all borrowers' claims if they are sufficient to establish a defense to repayment under federal or applicable state standards unless there is credible evidence that contradicts the borrower's attestations.

The federal standard should be based on existing law. A claim should be granted under the federal standard if the borrower can show that her school engaged in conduct that:

- A) Met the standard for a federal UDAAP violation (unfair, deceptive or abusive act or practice, see 12 U.S.C. § 5531(a));
- B) Violated the Higher Education Act or regulations thereunder; or
- C) Constituted a violation of the Federal Trade Commission Guides for Vocational Schools.

In assessing DTR applications, the Department should consult all available sources of information within its possession, including prior DTR claims and student complaints, accreditors' audits of schools, state law enforcement or oversight agency records, other federal agency records, and any records held by guarantors. If new information comes to light that would have caused the Department to grant any previously-denied application, the Department should search its records and grant any such previously-denied applications.

The Department should also create an easily accessible, searchable database that includes the allegations and results of all DTR claims that have been adjudicated, including those that

Mr. Joseph Smith

July 24, 2015

Page 4

have been denied, along with the explanations it provided for those denials. This will provide public transparency regarding the DTR process and will allow borrowers to determine whether the claims of other borrowers may serve as supporting evidence.

Borrowers should in no circumstances be barred from asserting defenses to repayment based on procedural barriers that may have been implicated if the borrower were bringing an affirmative case in court. For example, arbitration clauses should not be relevant to the DTR process. In addition, since there is no statute of limitations on federal student loan collection, no state or federal statutes of limitations should bar a borrower from establishing a defense to repayment.

Relief for Borrowers

The Department should grant all borrowers who establish a defense to repayment a full loan discharge. It should also refund any amounts paid on the loan and remove all information regarding the discharged loans from her credit report.

Moreover, the loan discharge should not be treated as taxable income.

Group Relief

The Department should establish a process through which all state Attorneys General, state oversight agencies, and other federal agencies may report to the Department findings or evidence that a school has violated the established federal or state standards. Whenever a government agency reports or the Department itself independently determines that such evidence exists or such a finding has been made, the Department should work with the reporting agency to identify all borrowers who were likely affected by the school violations. It should do the same whenever it finds state or federal law violations based on its own investigations. The Department should then grant a group discharge to all identified borrowers. Under these circumstances borrowers should not be required to submit applications, but should receive automatic loan cancellations.

In addition, when a borrower, a government agency, or an advocate presents evidence suggesting that a group of borrowers is entitled to a loan cancellation based on a DTR claim and requests that the Department initiate an investigation on behalf of that group, the Department should be required to investigate the evidence, notify affected borrowers, and grant group discharges where appropriate. As part of this process, the Department should notify the borrower, agency, or advocate of its decision on the request for investigation and group discharge.

Mr. Joseph Smith

July 24, 2015

Page 5

Conclusion

Your appointment as Special Master affords an opportunity for the Department to fully implement a carefully considered and fair DTR process in order to help – at least in part – those borrowers who have suffered from the fraudulent acts of for-profit schools. We urge you to consider our suggestions and recommend that the Department implement them as soon as possible.

We would appreciate an opportunity to meet with you as a group regarding these recommendations. We prefer to meet after you have had time to consider them and are prepared to provide feedback on our suggestions, as well as specific details about the process you are considering. Please feel free to contact Robyn Smith (rsmith@nclc.org) or Deanne Loonin (dloonin@nclc.org or (617) 542-8010) to set up a meeting or if you have any questions.

Thank you for your attention to our concerns.

Sincerely,

Deanne Loonin and Robyn Smith
Attorneys with the National Consumer Law Center

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