

From: Eileen Connor

To: Department of Education, Negotiators

Date: March 16, 2016

Re: Group Process Initiation

Below I provide two options for draft proposed language for 685.222(f)(1) intended to ensure that the group borrower defense process will be meaningfully available to borrowers and will be considered in appropriate circumstances. These two options are meant to illustrate different approaches that could be taken to ensure the availability of the group process. The approaches, however, are not mutually exclusive and could certainly be combined.

Group Process Option A:

(f) Group borrower defense claims, generally.

(1). Upon consideration of factors including, but not limited to, common facts and claims, ~~fiscal impact~~administrative efficiency, and the promotion of compliance by the school or other title IV, HEA program participants, the Secretary ~~may initiate a process to~~ determines that a group of borrowers has a common basis for borrower defense, whether a group of borrowers identified by the Secretary has a borrower defenses shall identify the members of the group and follow the procedures set forth in subsection (2).

(i) The members of the group may be identified by the Secretary from individually filed discharge applications pursuant to paragraph (e)(6) of this section or from any other source of information, including but not limited to any governmental agencies.

(ii) ~~If the Secretary determines that there are common facts and claims that are widespread,~~ The group may include borrowers identified by the Secretary who have not filed an application under paragraph (e) of this section.

(iii) The Secretary shall presume that a group of borrowers has a common basis for borrower defense in the following circumstances, and other circumstances which the Secretary may from time to time identify:

(1) A court of competent jurisdiction, including a bankruptcy court, certifies a class of students for resolution of a claim based on any act or omission of the school that relates to the making of a federal loan or the provision of educational services financed by that loan;

(2) A governmental agency negotiates a settlement or consent decree with a school that contains findings of fact establishing that the school had a pattern and practice of violations that injured students;

(3) A governmental agency provides the Department with investigative information substantiating that the school had a pattern and practice of violations that injured students.

- (4) The Secretary receives ten (10) or more individual applications for Borrower Defense for a given campus or twenty (20) or more individual applications from a group of commonly owned campuses that credibly allege wrongdoing that took place within five (5) years of each other.
- (5) The Secretary receives a complaint from a lawyer representing a class of borrowers that states claims that would survive a motion to dismiss in federal court.
- (6) The Secretary receives a tip from a whistleblower, including through a qui tam action, that provides credible evidence of behavior that would lead to Borrower Defense.
- (7) The Secretary finds, in a program review or through another investigation or enforcement action, that a school has overstated job placement rates or graduation rates by at least ten (10) percent or that a school has made a misrepresentation to the Department about its treatment of students that merits a fine.

(iv) If the Secretary determines that a group of borrowers does not have a common basis for a borrower defense notwithstanding the presence of one or more of the circumstances described in (f)(1)(iii), the Secretary shall set forth the basis for that determination in a written decision. Copies of the decision shall be publicly available.

Group Process Option B:

(f) Group borrower defense claims, generally.

(1). Upon consideration of factors including, but not limited to, common facts and claims, ~~fiscal impact~~administrative efficiency, and the promotion of compliance by the school or other title IV, HEA program participants, the Secretary may initiate a process to determine whether a group of borrowers ~~identified by the Secretary~~ has a common basis for borrower defense.

(i) The Secretary shall initiate a process to determine, within a reasonable period of time, whether a group of borrowers has a common basis for borrower defense upon the written request of a state attorney general, state or federal enforcement agency, or a legal aid representative.

(ii) The members of the group may be identified by the Secretary from individually filed discharge applications pursuant to paragraph (e)(6) of this section or from any other source of information, including but not limited to any governmental agencies.

~~(iii) If the Secretary determines that there are common facts and claims that are widespread,~~ The group may include borrowers identified by the Secretary who have not filed an application under paragraph (e) of this section.

(iv) If, following a determination process initiated through (f)(1)(i), the Secretary determines that a group of borrowers does not have a common basis for a borrower defense, the Secretary shall set

forth the basis for that determination in a written decision. Copies of the decision shall be publicly available and, if the determination process was initiated by a request pursuant to (f)(1)(i)(A), shall be promptly provided to the individual or agency who requested such determination.