

U.S. Department of Education
Office of Management
Regulatory Information Management Services
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Washington, DC 20202-4536
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ATTN: FOIA Public Liaison

VIA ELECTRONIC MAIL

December 5, 2014

Re: Freedom of Information Act Request for Records Relating to Borrower Defenses to Repayment of Student Loans

Dear FOIA Public Liaison Officer:

This request for records is submitted pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and the Department of Education's implementing regulations, 34 C.F.R. § 5.1 *et seq.* The New York Legal Assistance Group (NYLAG) is a non-profit, public interest group, and we seek these records for non-commercial uses.

Background

As directed by Congress in the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, Subtitle A, the Secretary promulgated regulations providing for borrower defenses under the Direct Loan Program.

34 C.F.R. § 685.206(c) provides that a borrower may, "[i]n any proceeding to collect on a Direct Loan, ... assert as a defense against repayment, 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."

The Secretary's introductory comments state that this regulatory provision allows a 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." Notice of Proposed Rulemaking, 59 Fed. Reg. 42,646, 42,649 (Aug. 18, 1994). Further, the Secretary promised to "work with interested parties to develop regulations for borrower defenses that would apply to both the Direct Loan Program and the FFEL Program." *Id.* The regulation sets forth "an acceptable interim standard" pending "further detailed guidance" on borrower defenses. Final Regulations, 59 Fed. Reg. 61,664, 61,671 (Dec. 1, 1994).

In 1995, the Secretary convened the Borrower Defenses Regulations Negotiated Rulemaking Advisory Committee. The issues 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.” Notice of Intent, 60 Fed. Reg. 11,004 (Feb. 28, 1995).

The Committee recommended at the first meeting that no changes be made to existing regulations, as the current regulations adequately addressed the issue of borrower defenses. The Secretary adopted this recommendation, and clarified 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.” Notice, 60 Fed. Reg. 37,768, 37,769 (July 17, 1995). Further, “the adjudication of individual claims will provide further explanation of the Secretary’s interpretation of the regulatory requirements.” *Id.*

Finally, the Secretary clarified that the borrower defense provision in the Direct Loan Program, 34 C.F.R. § 685.206(c), is a “similar standard” to the FFEL Program regulation, 34 C.F.R. § 682.609, which provides that an institution may be liable if a FFEL Program loan is legally unenforceable, a claim which may be raised by a borrower during the collection process, as provided by 34 C.F.R. §§ 30.24, 682.410(b)(5)(ii)(C), and 682.410(b)(5)(vi)(I). 60 Fed. Reg. 37,768, 37,769–70.

Records Relating to Defenses to Repayment of Student Loans

NYLAG seeks records relating to the Secretary’s implementation and interpretation of the regulations concerning borrower defenses to the repayment of student loans under the Direct Loan and FFEL Programs.

As used in this request, “**borrower defense(s) to the repayment of a student loan**” refers to any defense to repayment of a borrower under the Direct Loan or FFEL program relating to an act or omission of a school, as provided for in 34 C.F.R. §§ 682.609, 685.206(c).

As used in this request, “borrower defense(s) to the repayment of a student loan” is distinct from “discharge” of a student loan. As used in this request, “**discharge**” of a student loan refers to the cancellation of a student loan under the Direct Loan and FFEL Programs for reason of death, disability, closed school, false certification, unpaid refund or bankruptcy, as provided for in 20 U.S.C. § 1087 and implemented by regulations of the Direct Loan and FFEL Programs.

For the purpose of this request, “**records**” includes all recordings or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

A reference to “**the Department**” means the Department of Education and any and all of its subparts, including (but not limited to) the Office of the Inspector General, Student Financial Assistance, and the Office of Postsecondary Education.

Unless otherwise noted, the time period relevant to this request is **July 1, 2011 to the present**.

Request #1: Records of all Department guidance, direction, and/or instruction provided to any guarantee agency, Private Collection Agency (PCA), Title IV Additional Servicer (TIVA), Non-Profit Servicer (NPS), guarantee agency or Department subdivision concerning the application, consideration, resolution and/or adjudication of any discharge or borrower defense to the repayment of a student loan, operative for any time from July 1, 2011 to the present (even if provided earlier than July 1, 2011).

Request #2: Records of all Department guidance, direction, and/or instruction provided to any PCA, TIVA, NPS, guarantee agency or Department subdivision concerning reporting to the Department of information relating to any borrower request for discharge or borrower defense to the repayment of a student loan, operative for any time from July 1, 2011 to the present (even if provided earlier than July 1, 2011).

Request #3: Records of all Department guidance, direction, and/or instruction provided to borrowers or the general public related to defense(s) to repayment of a student loan to the Department and/or any guarantee agency, PCA, TIVA, or NPS, operative for any time from July 1, 2011 to the present (even if provided earlier than July 1, 2011).

Request #4: Records, including any summary or tabulation, of the total number of defenses asserted by borrowers to the repayment of a student loan received by the Department or any guarantee agency, PCA, TIVA, or NPS. This request seeks records broken down by the entity receiving the borrower’s asserted defense, and seeks records of whether the defense was recognized, denied, or is still pending, broken down by entity.

Request #5: Records of the number of loans transferred from any PCA, TIVA, NPS or guarantee agency to the Department’s Default Resolution Group for consideration, resolution and/or adjudication of a borrower defense to the repayment, or discharge, of a student loan, including but not limited to records of the nature of the disposition of such defenses and loans and the time period during which such dispositions were reached.

Request #6: Records of communications, including inquiries, correspondence, calls, requests, etc., received by the Federal Student Loan Ombudsman concerning a borrower defense to the repayment of a student loan.

Request #7: Records of all Department-approved or -created letters used by any PCA, TIVA, NPS or guarantee agency to counsel, inform, and/or advise borrowers regarding a borrower defense to the repayment, or discharge, of a student loan, including records of the transmission by the Department of such letters to any PCA, TIVA, NPS, or guaranty agency.

Request #8: Records of administrative wage garnishment proceedings conducted by any PCA, TIVA, NPS, guarantee agency and/or the Department, in which the borrower raised a defense to the repayment of a student loan, and records of the resolution of the asserted defense.

Request #9: Records of treasury offset proceedings in which the borrower raised a defense to the repayment of a student loan, and records of the resolution of the asserted defense.

Request #10: Records of Department actions, including recoupment, investigation, or enforcement actions, taken as the result of the assertion in any collection activity under the Direct Loan and/or FFEL Programs of a borrower defense to the repayment of a student loan.

Request #11: Records, including any summary or tabulation, of the total number of loans, and dollar amount of loans, under the Direct Loan and FFEL Programs, that have been discharged, including but not limited to records referring to category of discharge and fiscal/program year.

Request #12: Records, including any summary or tabulation, of the total number of loans, and dollar amount of loans, under the Direct Loan and FFEL Programs, that have been cancelled, forgiven and/or written off, because of a borrower defense to the repayment of a student loan, broken down by fiscal/program year or other time period for which such records refer.

Request #13: Records of any estimates, projections, and/or analyses of the allowance for subsidy, as defined in the Federal Credit Reform Act, in the Direct Loan program attributable to loan cancellation (attributable to borrower defense(s) to repayment or otherwise), discharge, compromise, or other write-off of federal student loans, broken down by fiscal/program year and category of allowance.

Request for Waiver of Fees:

I request a waiver of all fees for this request. Disclosure of the requested information to the New York Legal Assistance Group is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Department of Education, including its administration of the billion-dollar federal student loan program. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 34 C.F.R. § 5.33(a). Because NYLAG is a nonprofit organization dedicated to free legal services to low-income New Yorkers, this request will serve no commercial interest. *See id.* NYLAG is a member of an advocacy group dedicated to investigating practices of proprietary schools that may harm students. We seek this information

specifically to disseminate to the other organizations that are members of that advocacy group, which in turn will disseminate it to their clients, who are New Yorkers enrolled in or considering enrolling in proprietary schools. Additionally, NYLAG and its advocacy partners disseminate information to the public through their websites and by the production of special reports.

Should you deny this waiver request, I am willing to pay fees up to a maximum of \$25. If you estimate that the fees will exceed this limit, please advise me of the costs before proceeding. *See* 34 C.F.R. § 5.32(c).

I look forward to receiving a determination pursuant to each request within twenty business days, as required by 5 U.S.C. § 552(a)(6)(A)(i) and 34 C.F.R. § 5.21(c). Please also inform me on a rolling basis of the existence of any records responsive to any request as you identify them, regardless of whether additional records responsive to that or other requests may be identified in the future. I am willing to accept records in electronic format.

If for any reason any request is denied, please inform me of the reason(s) for the denial in writing.

Thank you very much for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Eileen Connor', written in a cursive style.

Eileen Connor
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