

Part 685 William D. Ford Federal Direct Loan Program

24. Section 685.206 is amended by revising paragraph (c) to read as follows:

§ 685.206

Borrower responsibilities and defenses.

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(k) *Borrower defenses.* (1) If a borrower defense is approved under § 685.206(c) or § 685.222—

(i) The Secretary discharges the obligation of the borrower in whole or in part in accordance with the procedures in §§ 685.206(c) and 685.222, respectively; and

(ii) The Secretary returns to the borrower payments made by the borrower or otherwise recovered on the loan that exceed the amount owed on that portion of the loan not discharged. ~~if the borrower asserted the claim not later than—~~

~~(A) For a claim subject to § 685.206(c), the limitation period under applicable law to the claim on which relief was granted; or~~

~~(B) For a claim subject to § 685.222, the limitation period in § 685.222(b), (c), or (d), as applicable.~~

(2) In the case of a Direct Consolidation Loan, a borrower may assert a borrower defense under § 685.206(c) or § 685.222 with respect to a Direct Loan, a FFEL Program Loan, a Federal Perkins Loan, Health Professions Student Loan, Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act, Health Education Assistance Loan, or Nursing Loan made under subpart II of part B of the Public Health Service Act that was repaid by the Direct Consolidation Loan.

(i) The Secretary considers a borrower defense claim asserted on a Direct Consolidation Loan by determining—

(A) Whether the act or omission of the school with regard to the loan described in paragraph (k)(2) of this section other than a Direct Subsidized, Unsubsidized, or PLUS Loan, constitutes a borrower defense under § 685.206(c), for a Direct Consolidation Loan made before July 1, 2017, or under § 685.222, for a Direct Consolidation Loan made on or after July 1, 2017; or

(B) Whether the act or omission of the school with regard to a Direct Subsidized, Unsubsidized, or PLUS Loan made on after July 1, 2017 that was paid off by the Direct Consolidation Loan, constitutes a borrower defense under § 685.222.

(ii) If the borrower defense is approved, the Secretary discharges the appropriate portion of the Direct Consolidation Loan.

(iii) The Secretary returns to the borrower payments made by the borrower or otherwise recovered on the Direct Consolidation Loan that exceed the amount owed on that portion of the Direct Consolidation Loan not discharged. ~~if the borrower asserted the claim not later than—~~

~~(A) For a claim asserted under § 685.206(c), the limitation period under applicable law to the claim on which relief was granted; or~~

~~(B) For a claim asserted under § 685.222, the limitation period in § 685.222(b), (c), or (d), as applicable.~~

(iv) The Secretary returns to the borrower a payment made by the borrower or otherwise recovered on the loan described in paragraph (k)(2) of this section only if—

(A) The payment was made directly to the Secretary on the loan; and

(B) The borrower proves that the loan to which the payment was credited was not legally enforceable under applicable law in the amount for which that payment was applied.

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§ 685.220

[Amended]

29. Section 685.220 is amended by:

A. Removing the words “subpart II of part B” from paragraph (b)(21) and adding, in their place, the words “part E”.

B. Removing paragraph (d)(1)(i).

C. Redesignating paragraph (d)(1)(ii) as (d)(1)(i), and paragraph (d)(1)(iii) as (d)(1)(ii).

30. Section 685.222 is added to subpart B to read as follows:

§ 685.222

Borrower defenses.

(a) *General.* (1) For loans first disbursed prior to July 1, 2017, a borrower asserts and the Secretary considers a borrower defense in accordance with the provisions of § 685.206(c), unless otherwise noted in § 685.206(c).

(2) For loans first disbursed on or after July 1, 2017, a borrower asserts and the Secretary considers a borrower defense in accordance with this section. To establish a borrower defense under this section, a preponderance of the evidence must show that the borrower has a borrower defense that meets the requirements of this section.

(3) A violation by the school of an eligibility or compliance requirement in the Act or its implementing regulations is not a basis for a borrower defense under either this section or § 685.206(c) unless the violation would otherwise constitute a basis for a borrower defense under this section.

(4) For the purposes of this section or § 685.206(c), “borrower” means—

(i) The borrower; and

(ii) In the case of a Direct PLUS Loan, the student and any endorsers.

(5) For the purposes of this section or § 685.206(c), a “borrower defense” refers to an act or omission of the school attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided and that meets the requirements under paragraphs (b), (c), or (d), and includes one or both of the following:

(i) A defense to repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part; and

(ii) A right to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(6) If the borrower asserts both a borrower defense and any other objection to an action of the Secretary with regard to that Direct Loan, the Secretary notifies the borrower of the order in which the Secretary considers the borrower defense and any other objections. The order in which the Secretary will consider objections, including a borrower defense, will be determined by the Secretary as appropriate under the circumstances.

(b) *Judgment against the school.* (1) The borrower has a borrower defense if the borrower, whether as an individual or as a member of a class, or a governmental agency, has obtained against the school a nondefault, favorable contested judgment based on State or Federal law in a court or administrative tribunal of competent jurisdiction.

(2) A borrower may assert a borrower defense under this paragraph at any time.

(c) *Breach of contract by the school.* (1) The borrower has a borrower defense if the school the borrower received a Direct Loan to attend failed to perform its obligations under the terms of a contract with the student.

(2) A borrower may assert a defense to repayment of amounts owed to the Secretary, and a right to recover amounts previously collected by the Secretary, under this paragraph at any time after the breach by the school of its contract with the student. ~~A borrower may assert a right to recover amounts previously collected by the Secretary under this paragraph not later than six years after the breach by the school of its contract with the student.~~

(d) *Substantial misrepresentation by the school.* (1) A borrower has a borrower defense if the school or any of its representatives, or any institution, organization, or person with whom the school has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services, made

a substantial misrepresentation in accordance with 34 CFR part 668, subpart F, that the borrower reasonably relied on when the borrower decided to attend, or to continue attending, the school. A borrower may assert, at any time, a defense to repayment under this paragraph (d) of amounts owed to the Secretary. ~~A borrower may assert a claim under this paragraph (d) and to recover funds previously collected by the Secretary. not later than six years after the borrower discovers, or reasonably could have discovered, the information constituting the substantial misrepresentation.~~

(2) For the purposes of this section, a designated Department official pursuant to paragraph (e) of this section or a hearing official pursuant to paragraphs (f), (g), or (h) may consider, as evidence supporting the reasonableness of a borrower's reliance on a misrepresentation, whether the school or any of the other parties described in paragraph (d)(1) engaged in conduct such as, but not limited to:

- (i) Demanding that the borrower make enrollment or loan-related decisions immediately;
- (ii) Placing an unreasonable emphasis on unfavorable consequences of delay;
- (iii) Discouraging the borrower from consulting an adviser, a family member, or other resource;
- (iv) Failing to respond to the borrower's requests for more information, including about the cost of the program and the nature of any financial aid; or
- (v) Otherwise unreasonably pressuring the borrower or taking advantage of the borrower's distress or lack of knowledge or sophistication.

* * * * *

(k) *Transfer to the Secretary of the borrower's right of recovery against third parties.* (1) Upon the granting of any relief under this section, the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the contract for educational services for which the loan was received, against the school, its principals, its affiliates, and their successors, its sureties, and any private fund. If the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense and for the same loan for which the discharge was granted under this section.

(2) The provisions of this paragraph (k) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(3) ~~Nothing in this Notwithstanding~~ paragraph (k), ~~nothing~~ limits, ~~or~~ forecloses, ~~or delays~~ the borrower's right to pursue legal and equitable relief against a party described in this paragraph (k) for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

33. Section 685.300 is amended by:

A. Redesignating paragraph (b)(11) as paragraph (b)(12).

B. Adding a new paragraph (b)(11).

C. Adding new paragraphs (d) through (k).

The additions read as follows:

§ 685.300

Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

* * * * *

(b) Program participation agreement. In the program participation agreement, the school must promise to comply with the Act and applicable regulations and must agree to –

(11) Comply with the provisions of paragraphs (d) through (i) regarding student claims and disputes.

* * * * *

(d) ~~Borrower-defense Claims in an internal dispute process.~~ The school will not compel any student to enter into or seek to enforce any agreement that requires a student to pursue a complaint based on a borrower defense claim through an internal institutional process before the student presents the complaint to an accrediting agency or government agency authorized to hear the complaint.

(e) *Class action bans.* (1) The school shall not enter into or seek to rely in any way on any pre-dispute arbitration agreement, ~~nor on any other pre-dispute agreement,~~ with a student, with respect to any aspect of a class action that is related to a borrower defense claim including to seek a stay or dismissal of particular claims or the entire action. ~~unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed or the review has been resolved.~~

(2) Reliance ~~on a pre-dispute arbitration agreement, or~~ on any other pre-dispute agreement with a student, with respect to any aspect of a class action includes, but is not limited to, any of the following:

(i) Seeking dismissal, deferral, or stay of any aspect of a class action;

(ii) Seeking to exclude a person or persons from a class in a class action;

(iii) Objecting to or seeking a protective order intended to avoid responding to discovery in a class action;

(iv) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action;

(v) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action after the trial court has denied a motion to certify the class but before an appellate court has ruled on an interlocutory appeal of that motion, if the time to seek such an appeal has not elapsed or the appeal has not been resolved; and

(vi) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action after the trial court in that class action has granted a motion to dismiss the claim and, in doing so, the court noted that the consumer has leave to refile the claim on a class basis, if the time to refile the claim has not elapsed.

(3) *Required provisions and notices.* (i) The school must include the following provision in any ~~mandatory pre-dispute~~ agreements with a student ~~recipient of a Direct Loan for attendance at the school, or, with respect to a Parent PLUS Loan, a student for whom the PLUS loan was obtained,~~ that include any ~~agreement regarding pre-dispute arbitration or any other~~ pre-dispute agreement addressing class actions and that are entered into after the effective date of this regulation:

“We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. ~~This provision applies only to class action claims concerning our acts or omissions regarding the making of the Direct Loan or the provision by us of educational services for which the Direct Loan was obtained.~~”

(ii) When a pre-dispute ~~arbitration agreement or any other pre-dispute~~ agreement addressing class actions has been entered into before the effective date of this regulation that did not contain a provision described in paragraph (e)(3)(i) of this section, the school must either ensure the agreement is amended to contain the provision specified in paragraph (e)(3)(iii)(A) of this section or provide the student to whom the agreement applies with the written notice specified in paragraph (e)(3)(iii)(B) of this section.

(iii) The school must ensure the agreement described in paragraph (e)(3)(ii) of this section is amended to contain the provision specified in paragraph (e)(3)(iii)(A) or must provide the notice specified in paragraph (e)(3)(iii)(B) to students no later than the exit counseling required under § 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment.

(A) *Agreement provision.*

“We agree that neither we nor anyone else ~~who later becomes a party to this agreement~~ will use it to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. ~~This provision applies only to class action~~

~~claims concerning our acts or omissions regarding the making of the Direct Loan or the provision by us of educational services for which the Direct Loan was obtained.”~~

(B) Notice provision.

~~“We agree that neither we nor anyone else will ~~not to~~ use any pre-dispute agreement to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Direct Loan or the provision by us of educational services for which the Direct Loan was obtained.”~~

(f) Pre-dispute arbitration agreements.

(1) The school ~~will not compel a student to~~ shall not enter into or seek to rely in any way on a mandatory pre-dispute arbitration agreement ~~with respect to any aspect of a borrower defense claim~~ with a student for any claim related to the making of a student loan or the provision of educational services, or delegate to any arbitrator the authority to determine issues of arbitrability for any claim, including any pre-dispute agreement’s scope, validity, or enforceability.

(2) Reliance on a mandatory pre-dispute arbitration agreement ~~with respect to any aspect of a borrower defense claim~~ includes, but is not limited to, any of the following:

(i) Seeking dismissal, deferral, or stay of any aspect of a judicial action filed by the student;

(ii) Objecting to or seeking a protective order intended to avoid responding to discovery in a judicial action filed by the student; and

(iii) Filing a claim in arbitration against a student who has filed a ~~suit on the same claim~~ claim on the same issue in court.

(3) *Required provisions and notices.* (i) The school must include the following provision in any mandatory pre-dispute arbitration agreements with a student ~~recipient of a Direct Loan for attendance at the school, or, with respect to a Parent PLUS Loan, a student for whom the PLUS loan was obtained,~~ that include any agreement regarding arbitration and that are entered into after the effective date of this regulation:

~~“We agree that neither we nor anyone else will use this agreement to stop you from bringing a lawsuit in court. regarding our acts or omissions regarding the making of the Direct Loan or the provision by us of educational services for which the Direct Loan was obtained. You may file a lawsuit for such a claim or you may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to lawsuits concerning other claims.”~~

(ii) When a mandatory pre-dispute arbitration agreement has been entered into before the effective date of this regulation that did not contain a provision described in paragraph (f)(3)(i), the school shall either ensure the agreement is amended to contain the provision specified in paragraph (f)(3)(iii)(A) of this section or provide the student to whom the agreement applies with the written notice specified in paragraph (f)(3)(iii)(B) of this section.

(iii) The school shall ensure the agreement described in paragraph (f)(3)(ii) of this section is amended to contain the provision specified in paragraph (f)(3)(iii)(A) or shall provide the notice specified in paragraph (f)(3)(iii)(B) to students no later than the exit counseling required under § 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment.

(A) Agreement provision.

~~“We agree that neither we nor anyone else who later becomes a party to this pre-dispute arbitration agreement will use this pre-dispute arbitration agreement to stop you from bringing a lawsuit regarding our acts or omissions regarding the making of the Direct Loan or the provision by us of educational services for~~

~~which the Direct Loan was obtained.~~ You may file a lawsuit ~~for such a claim~~ or you may be a member of a class action lawsuit for such a claim even if you do not file it. ~~This provision does not apply to other claims.”~~

(B) *Notice provision.*

“We agree not to use any pre-dispute arbitration agreement to stop you from bringing a lawsuit. ~~regarding the making of the Direct Loan or the provision by us of educational services for which the Direct Loan was obtained.~~ You may file a lawsuit ~~regarding such a claim~~ or you may be a member of a class action lawsuit regarding such a claim even if you do not file it. ~~This provision does not apply to any other claims.”~~

(g) *Submission of arbitral records.* (1) A school shall submit a copy of the following records to the Secretary, in the form and manner specified by the Secretary, in connection with any claim filed in arbitration by or against the school ~~concerning a borrower defense claim:~~

- (i) The initial claim and any counterclaim;
- (ii) The pre-dispute arbitration agreement filed with the arbitrator or arbitration administrator;
- (iii) The judgment or award, if any, issued by the arbitrator or arbitration administrator;
- (iv) If an arbitrator or arbitration administrator refuses to administer or dismisses a claim due to the school's failure to pay required filing or administrative fees, any communication the school receives from the arbitrator or an arbitration administrator related to such a refusal; and
- (v) Any communication the school receives from an arbitrator or an arbitration administrator related to a determination that a pre-dispute arbitration agreement ~~regarding educational services~~ provided by the school does not comply with the administrator's fairness principles, rules, or similar requirements, if such a determination occurs.

(2) *Deadline for submission.* A school shall submit any record required pursuant to paragraph (g)(1) of this section within 60 days of filing by the school of any such record with the arbitrator or arbitration administrator and within 60 days of receipt by the school of any such record filed or sent by someone other than the school, such as the arbitration administrator or the student.

(h) *Submission of judicial records.* (1) A school shall submit a copy of the following records to the Secretary, in the form and manner specified by the Secretary, in connection with any claim filed in a lawsuit by the school against the student, or by any party, including a government agency, against the school ~~concerning a borrower defense claim:~~

- (i) The complaint and any counterclaim, ~~and any amendments thereto;~~
- (ii) Any dispositive motion filed by a party to the suit; and
- (iii) The ruling on any dispositive motion and the judgment issued by the court.

(2) *Deadline for submission.* A school shall submit any record required pursuant to paragraph (h)(1) of this section within 30 days of filing or receipt, as applicable, of the complaint, answer, or dispositive motion, and within 30 days of receipt of any ruling on a dispositive motion or a final judgment.

(i) *Definitions.* For the purposes of paragraphs (d) through (h) of this section, the term—

~~(1) “Borrower defense claim” means a claim that is or could be asserted as a defense to repayment under § 685.206(c) or § 685.222;~~

(1) “Class action” means a lawsuit in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23;

(2) “Dispositive motion” means a motion asking for a court order that entirely disposes of one or more claims in favor of the party who files the motion without need for further court proceedings;

(3) “Pre-dispute arbitration agreement” means an agreement between a school and a student providing for arbitration of any future dispute between the parties; and

~~(5) "Mandatory pre-dispute arbitration agreement" means a pre-dispute arbitration agreement included in an enrollment agreement or other document that must be executed by the student as a condition for enrollment at the school.~~

(k) *Scope of covered agreements.* For purposes of this section, any agreement between a school's employees, representatives, agents, managers, directors, heirs, successors, or assignees and a student shall be deemed to be an agreement between a school and its students. Limitations under this section on any agreement between a school and its student apply to a school's heirs, successors, assignees, or any other entities that become parties to the contract after execution or amendment.

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