

Comments to the Department of Education on Proposed Administrative Wage Garnishment Regulations

(Submitted June 11, 2002)

Introduction

On behalf of our low-income clients, the National Consumer Law Center (NCLC)¹ is responding to the Department of Education's proposed rules implementing regulations for administrative wage garnishment. These comments are also submitted on behalf of the following organizations which represent low and moderate income consumers: Community Legal Services of Philadelphia and The Legal Aid Foundation of Los Angeles. The comments are intended to address the issues of greatest concern to low-income individuals and communities, focusing on ensuring fair collection procedures and adequate safeguards for these populations.

General Comments: Conflicting Statutory Authority

As is acknowledged in the background section, the Department of Education ("Department") has been using administrative wage garnishment procedures to collect defaulted loans for some time. The statutory authority for these procedures is derived from the Higher Education Act (HEA) codified at 20 U.S.C. §1095a.

The Department of Education ("Department") claims that it did not previously adopt regulations governing implementation of the HEA garnishment authority, but instead followed the statutory provisions directly. The Secretary now proposes to adopt regulations to implement administrative wage garnishment. The statutory authority for these regulations, however, is not derived from the HEA, but rather from the Debt Collection Improvement Act of 1996, codified at 31 U.S.C. §3720D.

There are some critical consequences related to this shift in statutory authority. In particular, there is no evidence that the HEA garnishment statute was explicitly or implicitly repealed by the DCIA. Thus, where there is a conflict, there is a strong legal argument that the Secretary must continue to follow the more specific authority provided in the HEA. The most notable conflict, discussed in comment #1 below, is that the HEA limits garnishment to 10% of disposable pay (20 U.S.C. §1095a(a)(1)), while the DCIA allows garnishment up to 15% (31 U.S.C. §3720D(b)(1)).

Comments on Specific Provisions

1. Limits on Garnishment

The DCIA allows federal agencies to garnish up to 15% of a defaulted borrower's disposable pay to collect debts owed to the agency. (31 U.S.C. §3720D(b)(1)). The HEA's garnishment

provisions apply only to the Department of Education. In contrast to the DCIA, the HEA allows the Department to garnish no more than 10% of disposable pay. (20 U.S.C. §1095a (a)(1)). The proposed rule assumes that the Secretary can switch statutes and begin operating under the DCIA authority. We disagree that the Secretary has the legal authority to make this change.

There is no evidence in the congressional record that the DCIA was meant to implicitly repeal the HEA wage garnishment provisions. As long as the two schemes can co-exist without conflict, as discussed below, the more specific HEA provisions that apply only to Department of Education procedures should remain. Therefore, with respect to the conflict regarding garnishment limits, the Secretary must continue to abide by the 10% threshold specified in the HEA.

There is no conflict between the Secretary of Education garnishing up to 10% and other federal agencies garnishing the higher 15% allowed by the DCIA. Each agency runs its own garnishment program and there is no administrative or bureaucratic overlap. Other federal agencies would be allowed to garnish the higher amount because, for these agencies, there are no conflicts between prior garnishment statutes and the DCIA. Unlike the Department of Education, other federal agencies were not previously allowed to use administrative wage garnishment to collect debts owed to them.

2. Use of Contractors

The Secretary acknowledges in section #5 of the "Significant Proposed Regulations" discussion that it cannot contract out "inherently governmental functions" related to wage garnishment. We agree with the Secretary's conclusion. Specifically, we agree with §34.13 (b)(2) of the proposed regulations providing that only qualified employees of the Department may conduct hearings. (Also see #3 below regarding hearing officer requirements).

We are concerned, however, about the statement in the discussion that the Department may use contracted services not only to analyze debtor objections to garnishment but also to propose appropriate findings for particular objections. We request that the Department clarify that any findings proposed by contractors should not be considered final and that Department hearing officers should be required to exercise independent judgment and provide independent, well-supported, rationales for any decisions. The regulations should also make clear that the contractors should in no circumstances be employees of collection agencies or other agencies collecting debts on behalf of the Department. Any contractors involved in the process should also receive specific training on borrower defenses as well as other critical hearing procedures. There are no provisions in the proposed regulations addressing these issues.

3. Hearing Officer Requirements

Borrowers have a constitutional right to a fair hearing, including the right to an independent and neutral arbiter. In order to ensure that these constitutional rights are protected, the Department should set up guidelines and training procedures that hearing officers must follow. The proposed regulations have no such protections. As discussed in #2 above,

§34.13(b)(2) specifies only that the hearing official may be any qualified employee of the Department whom the Department designates to conduct the hearing. The definitions section, §34.3, does not provide any definition of “qualified employee.”

We object to the lack of clear standards for hearing officers. At a minimum, the regulations should mandate that hearing officers receive prescribed legal training. Standards for hearing officers should be incorporated in the regulations and therefore available to the public. The regulations should also prohibit employees of the Department’s collection division from serving as hearing officers. This will help ensure impartial hearings.

In addition, the regulations should provide that borrowers must be offered the opportunity to choose from a list of hearing officers. This will allow borrowers the opportunity to reject anyone on the Department’s list who they feel might be biased against them. Our concerns about the hearing process stem from reports of current problems and prior court cases challenging current procedures. Currently, wage garnishment hearings requested from the Department or from guaranty agencies are usually conducted by “officers” with little or no knowledge of appropriate defenses to garnishment and with little or no special training in hearing procedures. As a result, borrowers are rarely afforded a fair hearing. Compounding this problem, (as discussed in #4 below), the lack of a written record from the hearing prevents many borrowers from pursuing their appeal rights.

4. Record of Hearings

Section 34.16 of the proposed regulations requires that hearing officials issue a written opinion of their decisions. This does not provide sufficient protection for borrowers. Simply requiring a written decision is insufficient to safeguard borrowers’ constitutional due process rights and to ensure that borrowers have knowledge of any grounds for appeal.

In order to protect borrowers’ constitutional due process rights, the regulations should specify that the written hearing decisions must clearly state the grounds for denial and must include information about reconsideration and appeal rights. In addition, the regulations should clarify that decisions may be based only on evidence presented at the hearing. This evidence must be available for inspection to the borrower prior to the hearing. The decision should also clearly explain the borrower’s appeal rights and right to request a hardship waiver at any time s/he becomes eligible. This information about appeals and hardship waivers should be written in large, bold letters and placed conspicuously on the hearing decision form.

5. In-Person Hearings

Section 34.9 of the proposed regulations requires the Department to provide oral hearings only if the borrower requests an oral hearing and then only if the borrower can show good reason why the issues cannot be resolved on paper. This requirement places an unfair burden on borrowers, many of whom are low-income and/or unsophisticated. In order to afford basic due process rights, any borrower who requests an oral hearing should receive an oral hearing. There should be no additional justification required.

For in-person telephone hearings, the regulations should state that the Department must

send a copy of the hearing file to the borrower prior to the hearing.

6. Timely Hearing Notice

The Department states in the introduction to the proposed regulations that requests for hearings submitted after the thirty day period will still be granted, but garnishment will continue prior to issuance of the hearing decision. This statement should be explicitly included in the regulations at §34.8 and 34.9. The regulations should also clarify that borrowers who submit untimely requests may also receive in-person hearings.

7. Defenses to Garnishment

The defenses to garnishment described in the discussion section of the proposed rules and in §34.14(b) are incomplete. In particular, they do not explicitly specify that borrowers may assert defenses to enforceability of the loan based on the borrower's eligibility for cancellation under a federal or state cancellation program or because the loan was previously discharged in bankruptcy.

We are extremely concerned that the proposed regulations provide less protection than borrowers have under the current garnishment system. Section 34.5(c) provides that the notice of garnishment simply must contain "an explanation of your rights, including those in §34.6, and the time frame within which you may exercise your rights." The rights specified in §34.6 include inspection and copying of records, right to enter into a repayment agreement, and a right to a hearing concerning 1) the existence, amount, or current enforceability of the debt; and 2) the rate at which the garnishment order will require your employer to withhold pay. Section 34.14 fails to spell out the enforceability defenses that borrowers can assert.

To help resolve this problem, we urge the Department to formally adopt and mandate the use of garnishment notice forms as well as "Request for Hearing" forms similar to those currently used by the Department. The current forms, published in a March 17, 1998 Dear Guaranty Agency letter, contain a number of boxes that borrower can check to raise common garnishment defenses. Among the most important of these defenses are, "This loan was discharged in bankruptcy", "The borrower has died", "The borrower is totally and permanently disabled", "The borrower is eligible for a closed school discharge", "The borrower is eligible for a false certification discharge" (spelling out the conditions for this type of discharge and other discharges), "The borrower did not sign the promissory note", "The borrower does not owe this loan because it is not his/her Social Security number", plus a catch-all category allowing borrowers to assert additional defenses not specifically listed.

It is critical that borrowers receive explicit notice of these defenses. The regulations should also specify that the notice include information about exemptions to garnishment such as the requirements of 15 U.S.C. §§1671 et seq. and other exclusions listed in §34.23 regarding involuntary separation from employment.

8. Grounds for granting a hardship waiver.

We strongly agree with the Department's inclusion of a hardship defense to garnishment. However, we have concerns about a number of the specific provisions related to the

hardship defense.

First, §34.24(b) states that borrowers may object at any time based on financial hardship to the amount or the rate of withholding. In contrast, §34.24(c)(1) states that the Department will consider an objection to an outstanding garnishment order and provide an opportunity for a hearing only after the order has been outstanding for at least six months. Clarification is required to indicate whether a borrower has a right to raise a hardship objection at any time or only after an order has been in place for six months. We object to the latter interpretation, as borrowers should be able to raise the hardship defense at any time. In particular, a borrower may encounter an unexpected financial hardship a few months into a garnishment order and should be able to raise the defense at that time.

With respect to the grounds for garnishment, we object to the Department's discussion comparing the grounds for a hardship defense to the undue hardship discharge in bankruptcy. We do not agree with the Department's statement that the case law governing undue hardship in bankruptcy is useful guidance in assessing financial hardship in the garnishment context. The bankruptcy standard is a very restrictive standard that should not apply here. A finding of hardship in bankruptcy is permanent. In contrast, a hardship defense to a garnishment, as contemplated by the proposed rules, lasts only six months. Therefore, issues considered by bankruptcy courts, particularly the likelihood that the hardship will continue indefinitely into the future, are irrelevant in the garnishment context.

The regulations should also clarify whether garnishment will continue while a hardship defense is pending. In addition, the regulations in §34.24 should clarify that the same standards for hearing officers for other types of hearings should be required for hearings on hardship defenses.

The hardship defense is one of the most important borrower rights. To ensure that borrowers know about this right and know how to request it, a separate hardship defense form should be included with the notice of garnishment. This form should summarize the grounds for a hardship defense, provide space for a borrower to present his/her case, and clearly explain where to send the form and how to request a hearing.

9. Multiple Garnishment Orders

We object to the Department's assumption (proposed regulations §§34.19, 34.20) that it has authority to issue multiple garnishment orders. There is no provision in either the DCIA (31 U.S.C. §3720D) or the HEA (20 U.S.C. 1095a) allowing multiple garnishments. Instead, there is strong indication that Congress intended to limit the total amount which could be subjected to administrative garnishment to 10% at any one time. The Consumer Credit Protection Act, 15 U.S.C. §1673(a), which provides for a maximum total garnishment of 25%, is relevant not because multiple administrative wage garnishments may equal 25%, but rather to ensure that administrative wage garnishments plus other outstanding garnishment orders do not exceed 25% of the borrower's disposable income.

10. Effect of Current Department Garnishment Regulations

The Department states in the notice of proposed rulemaking that the Secretary did not

previously adopt regulations governing implementation of the HEA garnishment authority. This statement is likely to create confusion with respect to the effect of the regulations at 34 C.F.R. §682.410(b)(10). These regulations specify the procedures for garnishment by guaranty agencies.

The logical conclusion from the Department's current proposal is that by attempting to switch to the statutory authority of the DCIA, the Department is claiming that only the Department will garnish wages to collect debts held by the Department and that the Department will use the proposed regulations to implement this authority. The question remains whether guaranty agencies will continue to garnish wages for debts held by these agencies. If so, the logical conclusion is that the statutory authority for guaranty agency garnishment will have to be derived from the HEA and not the DCIA. This is because only the HEA extends the garnishment authority to parties other than the Department. If this is in fact the Department's intent, the next logical conclusion is that the regulations governing guaranty agency garnishments will continue to be those found at 34 C.F.R. §682.410(b)(10).

These many leaps of logic require far too much speculation. We request that the Department clarify its intention with respect to future garnishments, if any, for loans not held by the Department.

¹ The National Consumer Law Center, Inc. is a nonprofit Massachusetts corporation, founded in 1969, specializing in consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of practice treatises and annual supplements on consumer credit laws, including Student Loan Law (2001), Fair Debt Collection (4th ed. 2000 and Supp.), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers.