NATIONAL
CONSUMER LAW
CENTER

Boston Office:
77 Summer Street, 10th Fl.
Boston, MA 02110-1006
Phone: 617-542-8010
Fax: 617-542-8028
Washington Office:
1001 Connecticut Ave., NW, Ste. 510
Washington, DC 20036-5528
consumerlaw@nclc.org
www.ConsumerLaw.org

November 27, 2007

Written Testimony of Deanne Loonin, National Consumer Law Center before the U.S. Department of Education, Office of Postsecondary Education in response to the October 22, 2007, Notice of Establishment of Negotiated Rulemaking Committee

My name is Deanne Loonin. I am a staff attorney with the National Consumer Law Center and Director of NCLC's Student Loan Borrower Assistance Project.[1] I submit the following testimony on behalf of NCLC's low-income clients.

Regulatory Issues Related to The College Cost Reduction and Access Act

IBR and ICRP

Income Based Repayment, available in both the Direct Loan and FFEL programs, and Income Contingent Repayment, available only in the Direct Loan program, are both intended to ensure that the payments we ask of borrowers are reasonable given their ability to pay, and that repayment does not extend forever for borrowers who act in good faith.

IBR and ICR are very similar but not identical in how they operate. To the extent they can be harmonized in ways that do not disadvantage any borrowers, we would support doing so. Some of the following recommendations apply to one or the other program, and some apply to both.

Access for Borrowers in Default. Currently, FFEL borrowers in default can consolidate with Direct Loans by either making three consecutive reasonable and affordable payments OR by agreeing to an ICR and consenting to the I.R.S disclosing certain tax information. Those borrowers that default on FFEL consolidation loans may also consolidate with Direct Loans to access an ICR. These rights are crucial to help distressed borrowers get out of default. In essence, the ICR has become an effective default management tool for many borrowers. It is perhaps not the best tool, but given the dearth of other options and the aggressive nature of student loan collections, it is an essential tool.

[1] For more information, see the Project's web site at www.studentloanborrowerassistance.org.

The same rights for borrowers in default should be available in the new IBR program. At a minimum, FFEL borrowers in default should be allowed to consolidate with FFEL and select an IBR if they prefer that option to consolidating with Direct Loans. They should also have the option, as they do now, to consolidate with Direct Loans and select an ICR or IBR.

Ability to Renew IBR or ICRP After Default. Despite their best intentions, some borrowers will miss payments in IBR or ICR plans. These borrowers should be able to re-enter either program as long as they agree to the I.R.S. disclosure or other information gathering requirements.

Maximum repayment period. Both the IBR and ICR programs allow the Secretary of Education to establish the period after which remaining loan balances are canceled, as long as it is no more than 25 years. We are asking the Secretary to set that maximum at *20 years* for both IBR and ICR. Twenty years is sufficient for most borrowers to fully repay their loans, and those who still have outstanding balances at that point have the greatest need for relief. Such borrowers would have had very low income relative to their debt. For them the financial benefit from borrowing was inadequate, and they should be allowed to move forward with their lives. A 20-year rule also reduces the risk that loan payments would permanently displace critical savings for retirement and children's education in households with little or no financial security. It is also closer to the ten year forgiveness limit offered to borrowers with public service jobs.

Minimum payment. The ICR regulations currently state that if a borrower's ICR payment is more than zero but less than $5.00, then the required payment is $5.00. If applied to IBR, this would violate the payment cap of 15 percent of discretionary income. Instead, if a minimum payment is needed, then both ICR and IBR should set it so that calculated payments below the minimum are set at zero.

Protected income. The IBR repayment formula protects all income below 150 percent of the poverty level. ICR protects the poverty-level only. ICR should be adjusted to match IBR. In addition, 85 percent of income above that base is protected in IBR, while 80 percent is protected in ICR. The ICR program should be adjusted to match the IBR's 85 percent.

Income percentage factors. In addition to its other provisions, ICR has a payment adjustment factor based on the borrower's income level (published annually by the Secretary). This has the benefit of reducing the usual maximum required payment (percentage-of-income) in cases where the total debt is not high. These payment reductions should be maintained in ICR and added to IBR. However, the factors also currently include an *increased* payment for high-income borrowers. Since borrowers can freely enter and exit ICR and now have the IBR options, these higher payments can be avoided by the borrowers. Rather than make borrowers jump through unnecessary hoops, the factors above 1.0 should be eliminated from ICR.

Qualifying payments. The rules need to be clear about what periods of repayment count toward cancellation after the maximum repayment period. It is clear from the new law that any combination of the following is valid, whether consecutive or not and whether the periods occurred before or after the enactment of Public Law 110-84:[2]

[2] The validity of periods prior to the law's passage is especially clear since the public service forgiveness provision explicitly limits that program to periods after October 1, 2007.

- Periods while in IBR;
- Periods while in ICR;
- Periods of economic hardship deferment;
- Payments under a standard (10-year) repayment plan; and,
- Regardless of the repayment plan, payments that are at least equal to the standard repayment plan.

We support rules that make sure that borrowers who act in good faith are able to gain the benefits that the IBR and ICR programs are supposed to provide. This means that if a borrower makes payments that would have counted, but the borrower was technically in a different repayment status (such as making reduced payments in forbearance), then the borrower could still count those periods. In addition, for borrowers who had defaulted on a loan, periods in rehabilitation should count. This also means that payments should accumulate regardless of whether they are consecutive.

Counting Previous ICR Payments if Borrowers Switch to IBR. As discussed above, we recommend that the IBR and ICR programs be harmonized, including an adjustment so that the protected income in ICR matches IBR. However, if these proposals are not accepted, there will be borrowers currently in ICR who will want to switch to IBR in order to get lower monthly payments. These borrowers should not be penalized for making this choice. Payments made to date through ICR should be counted toward the maximum repayment period even if the borrower switches to IBR and begins repayment through that program.

Interest coverage and capitalization. Borrowers with lower incomes relative to their debt levels may have required payments that are less than the interest charged for the period. The treatment of that interest varies by loan type and program.

> For subsidized Stafford loans, the IBR statute is clear that the government pays the interest for up to three years. The rules should clarify that these three years may occur at any point and not simply during the first three years of repayment.
>
> For unsubsidized loans (and subsidized loans beyond an initial three year period), the IBR statute is clear that interest is charged but only capitalizes if and when a borrower exits IBR. It is clear that if a borrower's income increases, he can remain in IBR and make payments that don't exceed the original standard repayment amount, even though the loan balance may have increased due to added interest when he was lower income.
>
> The current ICR rules allow capitalization until the added interest equals 10 percent of the original principal, and after that the interest is treated the same as for unsubsidized loans in IBR. The ICR provision should be changed to match the treatment in IBR.

Confirming income. The process for accessing reduced payments should be as easy for borrowers as possible. To confirm their income for the purposes of setting IBR and ICR payments (as well as for economic hardship deferments), borrowers should be allowed and encouraged to use IRS

Form 4506-T or another electronic method for income verification rather than having to provide hard copies of tax forms and other documentation.

Alternative documentation and changed circumstances. IRS and other government records are not always up-to-date enough to provide a fair indicator of a borrower's ability to repay. Borrowers should be able to provide documentation of changed employment, changed family situations, and other factors that affect their income.

Ensuring access to fair payments. The Secretary should issue guidance that make clear to lenders, servicers and guarantors their responsibility for helping borrowers identify the best option for their circumstances. Borrowers who face any runaround from lenders should be able to consolidate (or reconsolidate) into a Direct Loan, since all options are available there. This will require an amendment to the existing FFEL regulations that limit reconsolidation of FFEL loans to circumstances in which the loan has been submitted to the guaranty agency for default aversion. Instead, we recommend that a borrower that is blocked from obtaining a FFEL IBR be allowed to consolidate or reconsolidate in order to obtain an IBR or ICR through the Direct Loan program.

Public Service Loan Forgiveness

*Definition of public service profession*s. It seems clear from the statute that government jobs, jobs at 501(c)(3) non-profit organizations and military service jobs qualify for the forgiveness program, regardless of the job performed. It is important for the Secretary to confirm this, and to explain the circumstances under which the other professions on the list will qualify for the forgiveness program.

Confirming employment. The Secretary should set up, or work with a contractor to establish, a system for borrowers to confirm their qualifying employment status on a year-by-year basis. That way fewer borrowers will be faced with having to confirm employment records from years before, and the Department will have less of an administrative burden ten years from now.

***Other questions*.**

Some of the other questions that have come up include:

- How is "full-time job" defined?
- What is the connection between public service forgiveness and existing government and private profession-related forgiveness programs?
- What is the connection between public service forgiveness and existing forgiveness programs for military service members?
- If the ten years do not have to be consecutive, how should disparate periods be counted and added?

Additional Proposals for the Rulemaking Agenda

Disability Discharges

This was a topic of discussion at the 2006-2007 round of rulemaking. Although we are not satisfied with the final rules on this topic, we understand that a rehashing of the core issues previously discussed would be unproductive at this time. Instead, the proposals discussed below are intended to supplement the final rules and ensure that disabled borrowers can access this important relief. The intent of these proposals is to make the process more transparent for borrowers, physicians, and loan holders.

Specifically, we propose adding the following topics to the agenda:

1. **Medical Review Failures**

The final rules at 34 C.F.R. §682.402(c)(4)(v) reserve the right for the Secretary to require the borrower to submit additional medical evidence if the Secretary determines that the borrower's application does not conclusively prove that the borrower is disabled. This merely codifies an existing practice in which the Department routinely requests follow-up information from doctors who have completed disability discharge forms.

There are a number of serious problems with the medical review process. Statistical analyses by guaranty agencies submitted to the Department during rulemaking highlighted the large numbers of borrowers that are denied relief due to medical review failure. As a result, many severely disabled borrowers are lost in the system through no fault of their own.

Our experience representing borrowers confirms the difficulties involved in communicating with doctors and explaining to doctors that previous determinations of disability by federal or state agencies carry no weight with the Department of Education. There is no sigh of relief once the doctor fills out the form because we know that at some unanticipated point in the future, the doctor will get requests for more information, or in many cases to simply resubmit information already provided.

While we respect the Department's right to ensure that borrowers that receive discharges are truly disabled, we have serious issues with the random, inefficient, and inequitable way in which this program is administered. Doctors are extremely busy. In most cases, they are even more inaccessible to our low-income clients, many of whom have limited educational levels or limited English skills. It is critical to streamline the process so that as much information can be gathered at the initial point of contact with the doctors, one of the few times when the borrower has the doctor's full attention.

Borrowers should be provided with comprehensive information regarding the Department's planned verification activities and associated timelines at various points in the process, including on the application form and after submission of the form. Such disclosures should outline the income documentation requirements and what, if any, additional documentation may be required within clear and reasonable submission and determination time frames.

We urge the Department to address at least the following key issues in this next round of rulemaking:

Problem 1. **Unrealistic and unreasonable deadlines for follow-up document submissions by physicians.**

We recommend that the Department consider setting a minimum 30 day time limit to allow doctors to respond to follow-up requests for information. This period should be extended if there are extenuating circumstances.

Problem 2. **Failure to notify borrowers when a doctor has failed to provide follow-up information.**

We recommend requiring notice to borrowers prior to denial due to a doctor's failure to reply to requests for additional information and giving borrowers a reasonable amount of time, up to 30 days, to contact their doctors and try to resolve delays.

Problem 3. **Inadequate information about the process.**

We recommend requiring the Department to notify doctors that they will likely be contacted for additional information after completing the discharge forms and requiring the Department to develop a system that would allow doctors to provide this information with the initial applications. In addition, we recommend that the Department codify in the regulations all of the review and verification activities it will conduct during the conditional discharge period, along with applicable response and review time frames and require that this information be disclosed to the borrower within the guarantor's current notification requirements. Guarantors should be allowed to assist the borrower in obtaining and submitting documentation up-front that may be required later.

Due Process Rights in Response to Offset

Currently a borrower's right to request a reduction in collection due to hardship or to raise hardship as a defense to a collection action may or may not exist and may be evaluated differently depending on the type of collection action. This makes no sense. All borrowers should have the right to raise hardship and all should be able to be evaluated under a similar standard.

At a minimum, we urge the Department to ensure that all borrowers have the same rights when facing collection. Currently, the regulations for wage garnishment through the Debt Collection Improvement Act specifically provide at 34 C.F.R. §34.7 that "We consider objections to the rate or amount of withholding only if the objection rests on a claim that withholding at the proposed rate or amount would cause financial hardship to you and your dependents." This same language should be added to the guaranty agency wage garnishment hearing provisions at 34 CFR §682.410, to the tax refund hearing provisions at 34 C.F.R. §30.33 et seq. and to the offset regulations at 34 C.F.R. §30.20. The offset issue is particularly important because the Department currently takes the position that they may reduce offsets due to hardship at their discretion but they are not required to do so.

Repayment Terms after Rehabilitation

The right to a reasonable and affordable rehabilitation payment is often wrongly denied. The problem derives in part from a system established by the Department which provides compensation to collectors for setting up rehabilitation plans only if the plans require borrowers to make certain minimum payments. Collection agencies may also have their own incentive system for employees. A 2007 wage and hour case describes these compensation systems. In this case, the collection agency awarded front-end goals or bonuses to collectors that were earned when collectors met quotas for the amount of debt and number of debtors they were was able to convince to commit to a particular type of repayment program, including rehabilitation.[3] The problem is not confined to collection agencies. Guaranty agencies and the Department routinely misstate the reasonable and affordable repayment requirements.

Borrowers have a statutory right to make reasonable and affordable repayments. [4] The FFEL collectors claim that lenders will only purchase the rehabilitated loans if the balance is paid down sufficiently. They may also claim that negative amortization is prohibited. However, there is no explicit ban on negative amortization in the rehabilitation regulations as there is in the income-sensitive repayment regulations. Further, the FFEL regulations prohibit the imposition of a minimum payment. Documentation is required if the payment is below $50, but these payments are clearly allowed if that is what is reasonable and affordable for a particular borrower.[5] Thus, a very low-income borrower should be able to set up a rehabilitation plan with very low payments, even 0.

The system simply does not work for low-income borrowers. It does not work at the front-end when the borrowers are denied reasonable and affordable repayment terms. If borrowers clear this hurdle, the next barrier arises when the loan is sold and the new lender requires a standard repayment plan rather than allowing the borrower to choose a more affordable plan. According to guaranty agencies, the repayment term guidelines for lenders fail to provide flexibility to establish a monthly payment amount below the amount of monthly

---

[3] Rumler v. General Revenue Corp., 2007 WL 1266747 (S.D.Ind. May 1, 2007).

[4] 20 USC 1078-6(a)(1).

[5] 34 C.F.R. §682.405(b)()(iii)(B).

accrued interest. Thus, while the regulations allow all borrowers to seek rehabilitation and require the payment to be reasonable and affordable, borrowers with very low monthly payments are almost doomed to "redefault" unless these borrowers are able to obtain Income Contingent Repayment under the Direct Loan Program.

In other cases, while the amount of the monthly rehabilitation period may be at least the amount of accrued interest, the required monthly payment amount may still increase dramatically after the purchase of the loan by a lender. While a variety of repayment plan choices are available to these rehabilitated borrowers, the regulations require the borrower to pro-actively request a repayment plan choice. Borrowers are generally not offered that choice, if at all, until after the standard repayment schedule is issued by the lender. A considerable amount of time may pass between the borrower's last qualifying rehabilitation payment, subsequent sale of the rehabilitated loan to a lender, and the lender's issuance of a new repayment schedule. After waiting for a while, the borrower is more likely to be taken off guard by the new repayment requirements and likely interpret any communications with the new holder as negotiations versus exercising a right of choice.

We believe that that a borrower's post-rehabilitation repayment plan choice is information that, in many cases, the guarantor may be able to secure prior to the completion of the borrower's rehabilitation period. This information could then be relayed to the purchasing lender at the time the loan is sold; allowing the lender to honor the borrower's choice immediately as well as ensuring that the repayment terms are appropriately aligned as closely as possible with the monthly payment amounts required during the rehabilitation period. For borrowers with very low monthly repayments or even 0 repayments, the borrower should be allowed to choose to have her FFELP loan consolidated under the Direct Loan program in order to obtain Income Contingent Repayment immediately upon successful rehabilitation completion, versus the current rules which would require the borrower to apply for Direct Loan Consolidation after the rehabilitated loan becomes (again) delinquent.

These proposed changes in the policy guidelines, we believe, would remove barriers toward long-term successful repayment of rehabilitated loans.

We also urge the Department to consider the problem of continued collection efforts while a borrower is repaying through a rehabilitation plan. There is no prohibition on such collection efforts in the regulations that we know of. When representing borrowers, we request that the loan holder agree to a cessation of collection other than routine billing statements. Most collectors agree to this provision. We believe that this should be standardized in the regulations. It is contrary to both borrower and loan holder interests to continue collection efforts while a borrower is making the effort to repay through rehabilitation. Positive reinforcement is needed during this period in order to help ensure that the rehabilitation succeeds.

Thank you for your consideration of these issues.