NASFAA's "Off the Cuff" Podcast – Episode 271 Transcript

OTC Inside the Beltway: Debriefing Negotiated Rulemaking, New Gainful Employment Regulations, and Influx of Borrower Defense Claims

Justin Draeger:

Hey, everybody. Welcome to another edition of "Off The Cuff." I'm Justin Draeger.

Karen McCarthy:

I'm Karen McCarthy from NASFAA's Policy Team.

Jonathan Fansmith:

And I'm Jon Fansmith, ACE's, Senior Vice President of Government Relations and National Engagement.

Justin Draeger:

Did you change the title last month Jon?

Jonathan Fansmith:

I have a new title. Well, we've added an office of National Engagement, which would be great to talk with you guys about some time. But yes, we've added a new office of National Engagement and that's within my unit. So my title has changed to reflect it.

Justin Draeger:

You are 1,000 times more engaging today than you were last month. I'll just say that right off the bat. Is that part of the-

Karen McCarthy:

It's the title.

Jonathan Fansmith:

It's the title. Absolutely.

Justin Draeger:

Yeah.

Jonathan Fansmith:

Also, I spent less time with you in the last month, Justin, so it feels a little like pressure a little less.

Justin Draeger:

Yeah, I hear that. Just so you know, Karen, I was with Jon earlier today. He was doing a Federal Update for all the presidents and CEOs of the Higher Ed Association, 60 some of them of the Washington Higher Ed Secretariat. And the ACE President Ted Mitchell, who will be on the podcast I think in a week or two actually talking about some new college price initiatives. But tried to move Jon off by skipping us right to lunch and Jon's ACE colleagues quickly rose to his defense and said, "What about the Federal Update?"

Jonathan Fansmith:

And then the rest of the crowd all groaned. What about the federal?

Justin Draeger:

Because they were like, "Well, I thought we were getting lunch." But breaking news in the middle of Jon's update because as we all know... We're taping on Tuesday. So this might all be old news because within 48 hours we may... We'll know if McCarthy's no longer speaker of the house, we may or may not have a new speaker by Thursday.

Jonathan Fansmith:

We may know by the end of this podcast whether they're going to move to a formal vote to remove him because I think the motion to table it is going to go forward any minute now.

Justin Draeger:

So what happens is they move to table. There's three basic options. People aren't going to necessarily be tuning into NASFAA's Off The Cuff for-

Jonathan Fansmith:

Breaking news on the speaker's status.

Justin Draeger:

Yeah, I don't necessarily see it, but if they were going to do it, they have to motion a table. If the motion table passes, McCarthy survives. If the motion table fails, then they have to actually have the motion to vacate. And that's when McCarthy either survives or he doesn't.

Jonathan Fansmith:

And did you see, it's breaking news as we record this, obviously not to people listening, but he just came out and gave a few quotes and essentially said, "Yeah, it looks like I'm going to go down."

Justin Draeger:

Well, because on the minority side, Jeffreys, who's been holding his car is very close to the vest, hasn't been signaling, but this morning while you were giving your update at the secretariat, Jon, he basically said that-

Karen McCarthy:

"We're not helping you?"

Justin Draeger:

Well, it's the majority party's job to basically elect the speaker, not the minority party's job. And so majority govern, go ahead, do your thing.

Jonathan Fansmith:

And importantly, we are not going to vote in favor of keeping the speaker in place, which means five Republicans voting if all the Democrats show up and they all vote against Speaker McCarthy, which is the implicit threat in what leader Jeffrey said, "It takes five Republicans to kick speaker McCarthy out." And there's more than five probably right now, you'd probably say there's about 12 safe votes to vote them out on the Republican side.

Justin Draeger:

Now, you never say never, because last week everybody thought there would be a shutdown and then there's a last-minute deal. There is a way Speaker McCarthy can save his job, which is massive concessions potentially to Democrats. In some way he delivers some middle of the road massive concession to Democrats, can deliver some Republican votes on something spending wise, I don't know, potentially making good on some Ukraine funding, no spending cuts, maybe a spending increase here or there that concedes to some middle of his party. I don't know. I'm out of the business of predicting short-term anything anymore on Capitol Hill. But he who knows, he could find a way to save his job, but not without some democratic support at this point.

Jonathan Fansmith:

This is the tight rope he's been walking. If he can only stay in power with Democratic support, the Republicans who would vote to retain him, a lot of them will drift away. It's a very bad precedent for the speaker of the leader of the majority party to essentially say, "I owe my position and my ability to pass legislation to the minority party."

At that point, his role as a leader of the majority is gutted. And if you are a Republican member and anything other than a toss-up seat and you're going back to your constituents and saying, "I supported this guy who's cutting deals left and right with the Democrats and helping them advance their agenda when we control the chamber." Yikes. That's a tough look.

Justin Draeger:

Well, it is a tough look. If you're watching government in action, a couple of things. The last speaker of the house to receive a unanimous vote from their own caucus, Republican or Democrat, was John Boehner, who ultimately was ousted by his own party for making a deal with the other side.

Jonathan Fansmith:

Under threat of a motion to vacate?

Justin Draeger:

Yeah. So it was the beginning of the end, but even Speaker Pelosi wasn't receiving unanimous votes from her Democratic majority. Now that was, she still had the votes wrapped up, but they still had the count. She knew she had her votes, but there were symbolic votes on the Democratic side against her. So we haven't had unanimous, it's normal today, but on the Republican side votes to vacate you do have sort of an ungovernable majority over on the Republican side that you didn't quite have on the Democratic side.

I will say bringing it back to education, I don't know if you saw Dr. Foxx, who's the chairwoman of the House Education Committee, put out her statement yesterday about all of this, which is she's standing with the speaker, at least as of yesterday and said, "We've delivered historic wins for Americans." A motion to vacate is quote, "Asinine and a waste of valuable time." So she is-

Jonathan Fansmith:

Not mincing words there.

Justin Draeger:

She's never one to mince words. So she has been very clear, and she said at the end quote, "I stand with you, Mr. Speaker." So he certainly has his backers as he's scrambling to keep the speakership right now. And then of course, we did mention we avoided a shutdown, which personally I'm happy about because we went and hiked in federal lands-

Karen McCarthy:

Park.

Justin Draeger:

Yeah, federal National Park on Sunday.

Karen McCarthy:

Here in my house, we were talking about, "What do you see as a regular American if the government shuts down?" I was like, "This thing that people seem to latch on right away are the National Parks." Like that.

Justin Draeger:

Well, and it's so unpredictable though because in the Obama... When we had the shutdown down during the Obama years, the National Parks did close down. They shut down, they-

Jonathan Fansmith:

Yeah, they put the gates up-

Justin Draeger:

... put barriers.

Jonathan Fansmith:

... and signs.

Karen McCarthy:

And people were very angry.

Justin Draeger:

I would've been angry if I had... The angriest part would've been the 90-minute drive to Old Rag Mountain in Virginia and then have to turn around.

Jonathan Fansmith:

And you just curse Congress the entire way back. Is that...I mean?

Justin Draeger:

Yes, because they don't update the websites. It was the perfect storm the-

Jonathan Fansmith:

They can't update their websites-

Justin Draeger:

... Sunday, the weekend.

Jonathan Fansmith:

... they're in shutdown. They're-

Justin Draeger:

I know.

Jonathan Fansmith:

... not legally allowed.

Justin Draeger:

I was probably we're a meshed in this. So on Saturday morning I got up, had my coffee, sat on the back porch with my wife and I literally opened the Department of Interior's contingency plans. I looked for the National Park Service and started reading. I read the whole contingency plan, I was like, "This tells me nothing." I was like, "I can't tell if they're closing the National Parks or not." Anyway-

Jonathan Fansmith:

I have this work, different but similar conversation because my wife is a federal employee and for a month, I've been telling her-

Justin Draeger:

So the stakes were slightly higher for you, Jon, just go ahead.

Jonathan Fansmith:

Well, and the stakes were this. She was so excited because I've been telling her for a month that, "We're going to have a shutdown. The only question was, how long? Probably two weeks." And she's like, "Great, because you get... By law, you have to be compensated for your time during a shutdown." And I go, "Sure." She's like, "Great. Two-week paid vacation. I'm looking forward to that." And then Saturday morning, all the plans erupted.

Justin Draeger:

This is the part I tell my wife and often I'll say this to NASFAA members who will listen, but I'm like, "The taxpayers ultimately lose because the shutdown, the federal workers stop working. There are impacts and then we always back pay." So not that I'm advocating that we don't pay the federal workers, but I'm just like, "We back pay for no work." Which is fair. We don't hold the federal workers responsible for Congress's dysfunction.

Jonathan Fansmith:

I'll also say though, we're fortunate enough that we're at a place where not getting her income for two weeks doesn't short term isn't going to really materially affect our obligations. But there are a lot of people in her agency in her office who at a GS-5 level or something like that, like two weeks without pay, even if you're eventually going to get it, it's a huge disruption in your lives and it does cost real hardship for mean it's 2 million plus federal workers. We joke a little bit about it, but the shutdown is impactful. We've already it, but who knows, 45 days we might be talking about this again.

Justin Draeger:

I think it also impacts people who ultimately decide whether they'll work for the federal workforce or not. It becomes unstable. So we basically punted the ball down the road a little bit. So we have 45 days to figure this out. First, like we said, "We have to figure out the speakership." But then again, we get through to about November 17th, we'll have to figure out funding again. But Jon, there's a quirk in here that we talked about the last time you were on, about how this will impact expedited funding for FSA. They've asked for additional budget. Can you talk us through that a little bit?

Jonathan Fansmith:

Yeah, I'm glad you brought it up because it is something that this bill is not really uncommonly for large legislation that's Congress has done recently. There's not a lot of things that are specific to higher education in it. But there is one thing that's not in there that's really important, which is this idea of expedited funding. And really what that is, so we've funded 45 days more of government operations, office management budget, the White House is accounting firm, and many other things.

But has said that equates to about 13% of your annual funding. And I like how we say, "OMB calculate." That if you just divide 45 days by 365 days, you get like 12%. It's not like some advanced calculation. They just counted the days up. But anyway, they say, "This is the amount of money you have to spend out of your budget over this period of time." Fine, that makes a lot of sense. You've got 45 days to get four, five days' worth of money to do it.

And the only problem is we just restarted student loan repayment, 28 million borrowers who have not been making payments coming back online, another 8 million under various contingencies related to whether they're in deferral or whether other things around forgiveness and things like that. Bringing all those people back online looks like it's going to be very difficult to do. And so the Department of Education, FSA in particular, which we talked about this a lot, is underfunded relative to the amount of work they're doing, the scope of the work they're doing, the complexity of the work they're doing, fastest simplification, return of repayment, the forgiveness programs, a new repayment program they're implementing.

There's a lot of very big things happening, and they just didn't get an increase in the last funding year. They're well below what they need to effectively function. That's not a partisan thing. Both sides actually agreed they're not where they should be. The Senate had included this provision in their proposed extension bill that said, "Great."

They can accelerate funding from the rest of their time just to address these issues that they can essentially borrow from the future a little bit and increase appropriation so that they can derive, send that extra funds to do the work that they need to do, especially around the restart of repayment that did not survive in the final CR.

This has become and we've talked about this in depth before, but especially among house Republicans, the idea of this Department of Education, particularly FSA and the loan forgiveness issues, how politically charged they've become. It just was something that was never going to pass through the house. So it was not included in the house version, which ultimately is the version that had to move forward. So it's not there in the final bill.

What is the impact going to be? We're talking about 45 days. The department's been preparing for this for a while. I think we're all confident that they have a good plan to put forward, but it's a resource issue and they may just not have enough resources. And certainly, without the guarantee of funding beyond those 45 days, students are still going to be in repayment during a shutdown. That doesn't stop. You really have to worry that we might hit a point, especially if we get to a shutdown, especially if we don't get an extension of funding or an increase of funding, that we're going to start to see much bigger problems that are going to start to impact tens of millions of borrowers.

Justin Draeger:

So we've hit this place where FSA's funding needs are becoming dire. It would've been worse with a shutdown, but we've skirted a shutdown for now, but they still don't have that increase that they've asked for. And we're starting to feel that in the profession a little bit. Our regional conferences are having to work with their federal trainers to come up with other arrangements and FSA is working with our regional associations and finding other ways to reach out to our members virtually.

But we are losing some of that in-person training that we've had and relied on. All that to say is we are starting to feel some of the downstream impacts of that fiscal tightening that's happening at FSA and that will likely be felt in other ways. So we'll continue to watch all that and report on all of that. We're going to continue the stream of fiscal impacts at the Department of Education.

One of the things that they also pushed on to get out the door before the federal shutdown and certainly would've been impacted by the federal shutdown, is negotiated rulemaking on student debt relief. So the department did announce some of the federal negotiators and had to show some of their cards on how they're going to move forward on negotiated rulemaking for student debt relief. Karen, you want to catch us up on that?

Karen McCarthy:

Sure, yes. What they released last week were the lists of the non-federal negotiators. That list did not include who the named federal negotiator will be. I'm not sure. That's a little bit different. In the past we've always learned all the negotiators at the same time, so I'm not sure what might be happening on that side of things. And they also issued an issue paper, which they do at the beginning of every Neg Reg.

They have in recent Neg Regs sometimes come to the table on the first session with draft regulatory language. That is their starting point. So I suppose they could still do that. What they have posted at this point is an issue paper that includes all of the history of what's been happening with debt cancellation and the provision of the HEA that they're hanging their hat on to conduct this negotiated rulemaking.

And then they are asking the negotiators to come prepared for that first session later this month to address issues around they have five different groups of borrowers and how can we help these groups of borrowers? And so it's the only issue paper they released. We have always said sometimes these Neg Regs have 14, 15 issues that they're tackling.

This one is a single-issue negotiation, but when you look at those five groups of borrowers, you can see that they will be there a while. So for example, one of the groups of borrowers is borrowers who attend a program that is not, turns out not to be of financial value to them. So there's a lot in that question and you could talk about that for days. And there are groups of borrowers that they want the negotiators to come to the table on the first day to be prepared to talk about.

Justin Draeger:

Yep. So those five categories that you just mentioned, Karen, include borrowers whose balances are greater than what they originally borrowed. So you're thinking capitalized interest and they're not paying enough down to cover both principal and interest. Borrowers whose loans first entered repayment decades ago. So you're thinking lingering debt haven't been able to pay them off. Third borrowers who attended programs that did not provide sufficient financial value.

And that's in quotes that'll tie into maybe our next topic, but that's not necessarily well-defined just yet or we do have some final rules and maybe there's a definition that now is applicable. Four borrowers who are eligible for relief under programs like income driven repayment or perhaps loan forgiveness but have not applied for them. And then fifth borrowers who have experienced financial hardships and need support, but for whom the current student loan system does not adequately address. Maybe we call that category everyone else?

Karen McCarthy:

Yeah.

Jonathan Fansmith:

It's the catchall category.

Karen McCarthy:

Yeah. But the interesting thing I think about the categories is that some people have interpreted this Neg Reg as the way that the administration will carry out their original debt cancellation plan and they have never said that this is just the next step towards offering borrower relief. And when you look at these categories, this is not a one for one, what the administration was intending to do previously. So clearly, they're willing and want to go in some... I don't know, different, broader... I don't know where they'll end up, but it will not be one for one, what we saw with their original debt cancellation.

Jonathan Fansmith:

As one of those people who said that in my defense, the department announced this basically in the immediate aftermath of losing up this different court-

Karen McCarthy:

Oh, I was-

Jonathan Fansmith:

No, no, no, no, no, but you were right.

Karen McCarthy:

I didn't even know you said that, Jon. I didn't know-

Jonathan Fansmith:

I think there is this-

Karen McCarthy:

... I'm sorry.

Justin Draeger:

I'm honored, Jon.

Jonathan Fansmith:

I think you're actually maybe on this podcast too. I'm sure it's definitely been recorded somewhere. So I was totally wrong. But there was a reasonable assumption that this was how they're going to like... And frankly, that it was going to be more of a political process that was intended to keep the idea that they're fighting for forgiveness.

It's a great point, they are like, "What they're talking about?" Here is actually something much more specific, a little bit more... Maybe thoughtful is not the right word, but detailed in terms of what they're looking at and what they might propose. And I think that's Justin pointed out that hook to sufficient financial value with some of the other Regs they're putting in place. You can see part of a plan pulling together with this that I think probably was overlooked a little bit when they first announced it, certainly by me and maybe not by you, Karen.

Karen McCarthy:

Oh, no, I didn't know. I saw it somewhere. I was like, "They actually said that they're going to do the same thing? Because I don't think they said that." And then when I saw that I was like, "Yeah, this is a little different."

Justin Draeger:

We know that they've also announced the list of negotiators, so we have civil rights organizations that'll be represented. Legal assistance organizations like the National Consumer Law Center. We also have financial aid administrators that will be at the table. We have the Missouri Attorney General's Office, which is interesting when you consider some of the lawsuits that were involved in the last executive order from the president when he was pursuing debt cancellation.

We have public institutions and private institutions, and proprietary institutions. We have the Federal Family Education Loan, lenders, servicers, and guarantee agencies represented, the Student Loan Servicing Alliances represented. So really do have a pretty broad swath of individuals and constituencies represented. And negotiations are set to begin very quickly here in the month of October.

Karen McCarthy:

Justin, I just wanted to clarify one bit that you mentioned that there were financial aid administrators who were named negotiators and because I am so detail obsessed, I just wanted to point out that there is not a stakeholder seat designated for financial aid administrators. The financial aid administrators were named to represent their institutional sector. So they'll be representing the public institutions, the private institutions.

Justin Draeger:

Understood. Okay?

Karen McCarthy:

Yes.

Justin Draeger:

All right.

Karen McCarthy:

And then the other thing is that Ed is continuing to do these negotiations virtually. They have not returned to in-person negotiations. So it is possible for anybody to watch the live stream, if you want, of the negotiations. They will post a link to do that. It's not yet on their negotiated rulemaking page, but that will be an option.

Justin Draeger:

It's always interesting to try to negotiate virtually, maybe not the best venue for negotiation, but certainly a great venue for public participation in terms of watching.

Karen McCarthy:

Yeah. Same trade-offs as everything online, I feel like-

Jonathan Fansmith:

And based on what former negotiators have said about the accommodations around it, physically, probably a little bit more comfortable too. So there is that.

Justin Draeger:

Oh, that's true. Yeah. Okay. Thanks very much for those updates. Let's go to our next topic, which also played into the potential government shutdown because the Department of Education trying to get regulations out the door, which could have been stalled, if there was a government shutdown, gainful employment, and financial value regulations. Jon, you want to give us a broad overview of what's going on here?

Jonathan Fansmith:

Yeah. And certainly, the gainful employment part I think is familiar to people who would be listening to this podcast because this is something the Department of Education has been dealing with in one way or the other since 2010. And it really was the Obama administration had put forward regulations around what are defined in the Higher Education Act as gainful employment programs.

Programs are intended to lead to gainful employment. Really the focus is on a short-term career improvement. What that's come to mean in law is all programs at for-profit institutions, degree-granting, non-degree-granting, and then non-degree programs at nonprofit institutions. So think about certificate programs mostly, that's the bulk of what we're talking about.

Went through various versions with the Obama administration, challenged in court multiple times, finally implemented towards the end of that administration tenure, the Trump administration essentially killed those regulations, and then the Biden administration has brought them back like many other aspects of regulations that were part of the Obama administration and killed by the Trump administration.

The fundamental part of it is this idea of defining whether a program and educational program is giving a good return on investment for the people who participate in it. And for the gainful employment programs is one that's identified. The test really is if you are not doing that, then they will cut off financial aid to students in those programs. Institutions won't have access to financial aid for students who want to enroll in those programs.

The test that they use, there's a two-part test under the new... This Biden error regulations that were released last Thursday. The first essentially says, "We're going to measure debt versus earnings." And there's two calculations about, "How much of your discretionary income is taken up by repaying the loans you took out to enter the program?" So loans versus earnings. The second part, which is new, which wasn't part of the Obama administration's proposal, is that your program's graduates have to be earning at least $1 more than the average income earned by high school graduates within your state.

So that's a second part. It's their over interacting components to that in terms of whether a program fails the test or not. And for those programs, they could lose Title IV access. The other thing, and you mentioned the financial value transparency piece, this came up a bunch of the Obama administration by administration is approached this in different ways. They talked about value lists and things like that. What it's actually played out to is using that same kind of return-on-investment approach across every program.

So not just the proprietary ones, not just the certificates, and nonprofits, but all programs, degree programs included at nonprofit institution. So your history BA, your master's in English literature, your certificate program in electrical engineering or something. Whatever they are, they will now all have to submit the same information. They'll all be evaluated based on these tests and whether they are financially providing financial value to their students.

Implications are a little bit different. You don't lose access to Title IV, but for certificate programs and graduate programs, if you fail those tests, current students and prospective students will be sent a notice saying, "You're entering a program that has demonstrated in the past. Poor financial returns. You need to acknowledge that this is a risk you are facing by entering into this program." Sign off that you understand the risk and return that.

Obviously for a lot of programs, that would be a strong factor in dissuading students from enrolling, which is the point the department is saying, "We can pick which are the good programs and which aren't the good programs, and make sure we're steering people away from bad programs." One thing that's interesting, they did exempt Undergraduate Degree Programs so that BA in history I mentioned those still have to report all the data.

All that data will be available on a new website. The department is building that will incorporate all this information, but that acknowledgement process that won't apply. That's probably the biggest difference from what they propose to what they're doing. It's also reflects what we've heard again and again from this administration that where they worry about people taking on too much debt. It's for certificate programs and it's for master's programs specifically on the graduate side. That's where they see the problems of borrowing. That's where they see over borrowing versus low returns. That's really where a lot of their focus is.

Justin Draeger:

So a couple follow up. So just to make note on... So it's basically the same two metrics for both things on the GE side. So we're talking about a Debt-to-Earnings Ratio and an earnings premium test, that will apply to gainful employment. That will apply to the financial value transparency framework. It's just on the GE, which will apply to certificate programs and programs at proprietary schools. There is an accountability metric that will basically impact eligibility for Title IV.

And then moving to financial value transparency framework we're still using Debt-to-Earnings and earnings premium, but that's just a disclosure that has to be confirmed and the confirmation has to be done by the school. Presumably with some confirmation that's created by the department, but that has to be tracked by the school for certificate and graduate programs. And for all undergraduate programs the school will still have to tell the student where they can find this new website that Jon talked about. So one question I have is this is going to be a-

Karen McCarthy:

Huge.

Justin Draeger:

... lot of... Yeah. A lot of data collecting and reporting. This is a whole new set of... If schools under the old GE were... Which we know a lot of four-year schools were purging themselves of certificate programs to get out from under GE the first time. This going to make no difference. Forget it. Forget purging yourself of certificate programs to get out from underneath reporting. No different. Because this is going to apply to all Title IV eligible programs. So you'll be reporting on all of your programs.

One. Now, some of these will be disclosures and some of these will impact Title IV eligibility. The second thing I would say is with this massive new reporting and Jon, I'd be interested in your take on this, Democrats and Republicans don't agree on a lot, but they certainly seem to agree on institutional accountability. Now, maybe they have different ways of going about it, but I never really see Democrats or Republicans turning back the clock on reporting. So we're going to create this massive new reporting structure and I could see both Democrats and Republicans in Congress doing something with it.

Karen McCarthy:

Yeah. Even if some new administration came in and got rid of the financial value, trends, the website, all of that, they still have all this data. I envision them, well, this is super useful. We could use this for these other reasons. They never tell schools to stop reporting anything.

Justin Draeger:

I just have a sense that once the machine starts, you don't turn the machine off.

Jonathan Fansmith:

No, you're right. Congress sees reporting and disclosure, all of these things that isn't a direct financial cost that they have to address as a free good. If you want to get some outcome, but it's going to cost the federal government X amount of money to do it themselves. Why don't we just simply make a school provide that information or do X, Y, and Z? It's an easy way to make policy changes. I think you're totally right. You add more data in, you add more information. It allows you to start parsing.

That's where you get into these really tricky things about where do you draw the lines? What qualifies as low financial value program? Do you account for things like fields in which we don't compensate people very well in our society, but we really need people doing it like social workers or counselors or a lot of health professions below the medical, the doctor/nurse level? Yeah, you're not wrong, Justin. This is not going away. And what we've seen over 20 years, it only speaks the last 20 years, is it's growing and it's growing and it's growing and it's growing. It doesn't ever go away.

Justin Draeger:

Yeah. Okay. Well, on that cheery note, let's get-

Karen McCarthy:

Oh, wait.

Justin Draeger:

... some else, Karen.

Karen McCarthy:

Yes, I do.

Justin Draeger:

Okay, go ahead. Because I do want to make sure we have time for borrow defense, but go ahead.

Karen McCarthy:

Yeah, because we haven't talked about the effective date at all.

Jonathan Fansmith:

Oh, yeah.

Justin Draeger:

Oh, right. Okay. That's an excellent point. So this all goes into effect July 1, 2024. And do schools have to start reporting by when? Do they have to put this apparatus together?

Karen McCarthy:

Yeah. What it says in the rule is that, "The reporting will begin effective July 1st." Ed has to create this big thing and put out guidance, set it all up. We already talked about how much Ed has on its plate. It's a big thing for them to create as well, a lot of work for them. But it did say that the reporting requirements will kick in as of July 1.

Justin Draeger:

All right. Let's turn to our final topic. This is a long episode, I understand, but these are landing all over the country, which are borrower defense claims, and we've been hearing these pop-up all-over colleges and universities, and career schools for weeks now. They've seemed to have landed in batches and NASFAA is... This article may have already landed and if so, we'll ask Maria to put these in the show notes. But we've been hearing a lot of questions from institutions. We tried to answer these in this Today's News Article. Let's hit a couple of these today.

One of the questions we've received is just the nature of the claims themself. So Karen, maybe you can try to take a stab at answering this, but schools have been pointing out that a lot of the claims that they've received seem to be frivolous in nature, that they don't rise to the standard of what a borrower defense claim is, which is usually that they've been misled or that they've somehow been defrauded by their institution. So is the department doing any upfront filtering of these borrowed defense claims before they reach an institution?

Karen McCarthy:

No, they are not doing any pre-screening. And I can speculate a little bit on, "Why that might be the case?" One is that the rules that we're operating under, "Don't require that they do pre-screening." They do require that they send all of the claims to the institutions to allow them the opportunity to respond. The rules though, "Do not require that they do pre-screening."

The other thing is that as a result of the Sweet versus Cardona court settlement, Ed is under a deadline to get through their backlog of all of these claims that we've been hearing about for years and years. Of course, they could at their discretion, review all of these and do this pre-screening, but they have this court settlement deadline hanging over their head. So I'm not really surprised that they are not opting to do any pre-screening since they're not required to.

Justin Draeger:

So they just have to get all these out the door because they're court mandated and so they're not doing the prescreening. So the schools could be seeing borrow defense claims that are like, "I can't afford to pay my loan." Which the school could be very sympathetic to, but is not a borrow defense claim.

Karen McCarthy:

Correct. Yeah. And I will say that depending on what happens with the court injunction, the newest rules... So those are the ones that are under the court injunction. They do require that the department do a review for material completeness before sending to the school. So depending on what happens, if those rules ever go into effect, we won't be continuing to get these claims that have not been pre-screened at all. And eventually we will have that review by the party.

Justin Draeger:

So that also explains why schools are getting so many borrow defense claims now.

Karen McCarthy:

Yes.

Justin Draeger:

There's a backlog, they're trying to clear them all, and they're all presumably under previous rules. The new rules are all under court injunction. Those claims aren't arriving on college campuses. Are schools required to respond? And maybe a better question is if a school doesn't respond, are they somehow admitting that they are culpable for these claims?

Karen McCarthy:

No, schools are not required to respond. We are recommending that in its decision, the school consult with their legal counsel to decide if they want to respond to all or some or none, completely up to them. If it helps in the decision making, it is our understanding from the department that whether or not the school does respond has no bearing whatsoever on Ed's either approval of the claim relief to the borrower or Ed's decision, whether they come back to the school to seek recoupment from the school, that those are completely separate processes. Whether or not the school responds doesn't have any bearing on either of those two things.

Justin Draeger:

And in fact, recoupment is a completely separate presumably process than the approval of a borrower defense claim that those might be two separate processes completely.

Karen McCarthy:

Yeah. And Ed also said, "A, that the recoupment process is completely separate, and B, if they did decide to seek recoupment from the school, the school at that time would have another opportunity to respond to the claim." So it's not like speak now or forever hold your peace.

Justin Draeger:

So if I'm an institution and I'm trying to decide which ones I wanted to respond to and which ones I didn't, let's say I decide I do want to respond to some. A school could actually look at their borrower defense claims, see which ones might be fall under legitimate complaints and have some material completeness, which is a terminology in borrow defense language. And just respond to those. And ignore the rest again, working with their legal counsel. Another question, Karen, which is why haven't schools heard from the Department of Education? And do we expect to hear from the Department of Education, which would be a natural question from schools?

Karen McCarthy:

Yeah. I don't know the answer to the first question, "Why they haven't heard?" Because I feel like that just, "Where we are now?" Part of the confusion is because these things just started showing up, and schools are like, "I got this borrower defense claim notification. What do I do with it? Why are we getting them now?" On all these questions. And the department didn't send out any broad guidance or post any electronic announcements or anything at all about that.

So we have asked them if they would consider doing that and they are looking into that, and hopefully they will be issuing some guidance that outlays some of the things that are our understanding about the separate processes and whether you have to respond so that people are hearing that right from the horse's mouth from the department.

Jonathan Fansmith:

This is we've been hearing about this for a while now. I'm curious why all of a sudden this is just the department's releasing these or has there been a flood of claims that are just being processed now?

Justin Draeger:

And to put a finer point on it, we've even received questions from our members or even maybe borderline accusations like that. There are groups out there encouraging borrowers who might be struggling to just file a borrower defense claim against their institution in hopes of forgiveness. And I just want to say, "We have not seen real evidence of that anywhere." And we've looked and we've not seen any advocacy groups going out and saying, "File frivolous borrower defense claims." In the confusion that is debt forgiveness, loan repayment-

Jonathan Fansmith:

PSLF.

Justin Draeger:

Yeah. PSLF. It is relatively easier or has been in the past to file a borrower defense claim. There's a very simple website. You can go out and submit a claim.

Karen McCarthy:

And that is partially by design.

Justin Draeger:

It's not supposed to be a barrier. One other point about this, is that good or bad? Karen, I think you can probably speak to this because I wasn't a part of the last negotiation or watching as closely as you and your team, but schools are receiving all these notifications because they wanted to know when students were filing claims against them. Yes?

Karen McCarthy:

Yeah. This was definitely at the urging of institutional negotiators during borrower defense that they wanted to be able to see these. And the process in the past was just happened between the borrower and the Department of Ed, and the school was kept out of the loop. And the schools wanted to be more engaged and wanted to be able to review them and respond to them. Now, we're seeing all of them. As you mentioned, lots of things going on at the same time. The repayment starting again, we had the backlog, Ed trying to clear out the backlog to comply with the court settlement. All those things all happening at the same time as well.

Justin Draeger:

Yeah, this is a full episode. I don't know if we can, but let's hope for a quieter October. And Jon, it's always a pleasure to have you on and we'll look to have you back here in the month of November. Thanks everybody for joining us for another edition of “Off The Cuff.” Thank you, John. Thank you, Karen. Remember everybody to subscribe, tell a friend, and we will see you again very soon.