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SARAH DIEFFENBACHER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SARAH DIEFFENBACHER,

Plaintiff,

v.

BETSY DEVOS, in her official capacity as Secretary of the United States Department of Education,

Defendant.

Case No.: 5:17-cv-00342-VAP-KK

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATUS REPORT

In response to Defendant Betsy DeVos's Status Report filed on September 7, 2017 (Doc. No. 32), Plaintiff Sarah Dieffenbacher respectfully requests that the Court proceed as expeditiously as possible to consider the merits of Plaintiff's objection to the enforceability of her student loans, as contemplated in the Court's June 8, 2017, Order. (Doc. No. 31.) In support of her Response, Plaintiff provides the purported agency decision dated June 15, 2017, referenced and quoted in the Defendant's filing.

Three months ago, this Court denied Defendant's request for a voluntary remand. Plaintiff opposed any remand because, among other reasons, Plaintiff has challenged the legal enforceability of her federal student loans four times over the course of more than two years to no avail. (Doc. No. 26 at 5.) In rejecting Defendant's request, the Court found that there was no "substantial or legitimate concern guiding its request for a remand." (Doc. No. 31 at 6.) Rather, the request "appear[ed] to be an attempt to evade judicial review so that [Defendant] can retain the ability to garnish Plaintiff's wages without a conclusive ruling as to the enforceability of her loans." (*Id.* at 6-7.)

Nevertheless, the Court did agree to temporarily hold this case in abeyance "to afford the Department an opportunity to make a final determination" regarding the enforceability of her student loans. (*Id.* at 7.) Thus, the Court requested a status report within 90 days of the Order. If that report revealed that "the Department has failed to issue a final decision as to Plaintiff's loan cancellation application within those ninety days, this Court will proceed to consider the issue of enforceability on the merits." (*Id.*)

Defendant's Status Report—filed on the 91st day—reveals that it has in fact failed to issue a conclusive ruling as to the enforceability of Ms. Dieffenbacher's loans. Without directly acknowledging this Court's earlier directive, the Defendant asserts that it needs another six months (Doc. No. 32 at 2), to "evaluat[e] criteria

for Borrower Defense relief for claims similar to that of Ms. Dieffenbacher." (Doc. No. 32-2 at 1.)

Defendant's assertion that it will issue a final decision within six months is specious in light of its previous conduct, both in the prosecution of this litigation and otherwise. Defendant has had two and a half years to consider Ms. Dieffenbacher's application for loan discharge. (*See* Doc. No. 31 at 2.) Moreover, it has publicly stated that no borrower defense applications have been processed in more than six months. *See* Letter from James F. Manning, Acting Under Sec'y, U.S. Dep't of Educ., to Sen. Richard J. Durbin 2 (July 7, 2017), https://perma.cc/H9XM-DSLP ("No borrower defense applications have been approved between January 20, 2017 and today.").

Further, Defendant has been neither forthcoming nor candid in its previous representations to this Court and Plaintiff. It stated that it lacked power to place Ms. Dieffenbacher's FFEL loans in forbearance, and then cited the need to place those loans in forbearance as the basis for remand. (Doc. No. 31 at 6.) Then, despite being denied a remand, Defendant assigned the loans to itself and had them "placed in forbearance status" only a week after the Court's Order. (Doc. No. 32 at 2.) Most egregiously, Defendant waited until the last permissible moment to inform the Court and Plaintiff that it would not reach the merits of Ms. Dieffenbacher's objection within the Court's timeframe, despite apparently having reached that decision in early June.

The purported agency decision of June 15, attached in its entirety hereto, is yet another blatant attempt on the part of the Defendant to evade judicial scrutiny of its failure to discharge Plaintiff's loans. Issued just days after the Court denied Defendant's request for remand, it purports to withdraw its earlier, final decision. But this communication, styled as an "interim decision," may not be used to circumvent the Court's Order or thwart its jurisdiction. *See City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's

voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."). Defendant's latest decision does not conclusively protect Plaintiff from further efforts by Defendant to collect on loans that she asserts are unenforceable on their own terms. Nor does it ensure that Plaintiff will *ever* receive from Defendant a decision regarding the enforceability of her loans made in accordance with the norms of administrative law and due process.

In both its June 15 letter and its Status Report, Defendant does not acknowledge that it failed to consider, and does not promise that it ever will consider, the actual material Plaintiff presented on November 2, 2016 in support of her objection to the notice of garnishment. (Doc. No. 32-1 at 3) (explaining that retraction of wage garnishment order was "due to the fact that [Defendant] failed to consider Ms. Dieffenbacher's March 28, 2015 application for discharge of her loans on the basis of borrower defense.") Defendant has neither admitted its error nor committed to a plan for correcting that error. *Cf. Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). Absent such an admission and commitment, the conclusion remains that Defendant's attempts to insulate its actions from judicial review are "both frivolous and in bad faith." (Doc. No. 31 at 7.) *See Flanagan v. Arnaiz*, 203 F.3d 830, *1 (9th Cir. 1999) (concluding that finding of bad faith had become law of the case).

The undisputed facts before the Court establish that Ms. Dieffenbacher's loans are not legally enforceable and must be discharged, and Defendant's decision to the contrary cannot be sustained. As such, Plaintiff respectfully requests that this Court proceed expeditiously to reach the merits of Ms. Dieffenbacher's fully ripe and justiciable case. Her loan documents specify that she has the right to defend against collection of her loans on the basis of Everest's wrongdoing. (Doc. No. 1 at 65.) Defendant's regulations specify that Ms. Dieffenbacher is entitled to decision on the merits if she raises such an objection in a request for a hearing on an

administrative wage garnishment, 34 C.F.R. § 682.410(b)(9)(i)(G), which she did. (Doc. No. 1 at 7.) And notwithstanding Defendant's bare assertion that it "is currently evaluating criteria for Borrower Defense relief for claims similar to that of Ms. Dieffenbacher," (Doc. No. 32-2 at 1), the "criteria" for defense to repayment have been established since 1994, and are written into Ms. Dieffenbacher's loan notes.

Dated: September 13, 2017

Respectfully Submitted,

/s/ *Alec P. Harris*

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Attorneys for Plaintiff Sarah Dieffenbacher

UNITED STATES DEPARTMENT OF EDUCATION

June 15, 2017

Alec Harris
Legal Services of Harvard Law School
122 Boylston Street
Jamaica Plain, MA 02130

Re: Sarah R. Dieffenbacher
Request for Hearing
Account No. [redacted]
FFEL Subsidized Loan taken 5/18/2007, original amount $875
FFEL Subsidized Loan taken 5/18/2007, original amount $2,625
FFEL Unsubsidized Loan taken 5/18/2007, original amount $4,000

ADMINISTRATIVE WAGE GARNISHMENT HEARING DECISION

This purpose of this letter is to withdraw the January 30, 2017 Administrative Wage Garnishment ("AWG") Hearing Decision, which reviewed your client's objection to collection of a defaulted Federal Family Education Loan Program (FFEL) student loan account held by the Educational Credit Management Corporation (ECMC) through wage garnishment action. This letter represents the Department's interim decision on your client's objections, as the evaluation of at least one element of your client's objection is not yet complete. The Department will issue a final administrative wage garnishment hearing decision as soon as the review of all of your client's objections has been completed.

EVIDENCE CONSIDERED:

File documents provided by ECMC
Borrower Defense application dated March 28, 2015

INTERIM DECISION:

The defaulted FFEL student loan account previously held by ECMC has been assigned to the Department. The Department has determined that your client's account is not subject to collection through AWG while your borrower defense discharge application remains pending and has put it into administrative forbearance status, which means that no payments will be due on the loans during this time. The loans, along with other FFEL and Direct loans held by the Department, will remain in administrative forbearance until the review of your client's borrower defense application is complete. Once the review of your client's borrower defense application is complete, the Department will issue a final agency decision regarding the enforceability of your client's student loans held by the Department.

Federal Student Aid
Borrower Services, Customer Care Group
500 W. Madison Street, Suite 1520
Chicago, Illinois 60661

Mr. Alec Harris
Re: Sarah R. Dieffenbacher

REASON FOR DECISION:

• Your client objected that she believes her loans are not enforceable debts.
On January 30, 2017 the Department issued an administrative wage garnishment decision that concluded that your client's FFEL loans held by ECMC were subject to collection through AWG at 15% of her disposable pay. The January 30, 2017 decision failed to consider the application, dated March 28, 2015, that your client had filed to discharge her loans on the basis of borrower defense to repayment, which remained pending with the Department at the time the January 30, 2017 decision was issued. Because the January 30, 2017 decision did not consider all the relevant factors, it is hereby withdrawn. No AWG is authorized on loans held by the Department while the borrower defense discharge application remains pending.

CONSEQUENCES OF THE DECISION AND FURTHER RIGHTS:
The student loans your client took pursuant to the FFEL student loan program that were previously held by ECMC have been assigned to the Department. All of these loans, as well as student loans already held by the Department, are currently in administrative forbearance, which means that no payment is due. No wage garnishment on these loans will be initiated until the review of your client's borrower defense application is complete. The Department will await the final resolution of your borrower defense claim by the Borrower Defense group, a unit within the Department with the specialized expertise to resolve such claims, before issuing a final decision addressing your client's claim that her loans are not enforceable debts. The Department will issue a final administrative wage garnishment hearing decision as soon as the review of all of your client's objections has been completed.

Sincerely,

Myra Tyler
Hearings Official
Hearings & Interagency Appeals

Federal Student Aid
An OFFICE of the U.S. DEPARTMENT of EDUCATION

Borrower Services
Customer Care Group
500 W. Madison St., Suite 1520
Chicago, IL 60661-4544

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