

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STUDENT LOAN FINANCE)	
CORPORATION, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:00-CV-02660 (RWR)
)	
RODERICK R. PAIGE,)	
Secretary of Education,)	
)	
Defendant.)	

Introduction

United States Student Association (“USSA”), U.S. Public Interest Research Group (“USPIRG”), and National Direct Student Loan Coalition (“NDSLCL”) (collectively, “*Amici*”) submit this Memorandum in opposition to Plaintiffs’ Motion for Summary Judgment and in support of Defendant’s Motion for Summary Judgment. *Amici* support the William D. Ford Federal Direct Loan Program (“FDLP”), 20 U.S.C. §§ 1087a-1087j, because it provides relatively low-cost, easy-to-use student loans. Congress enacted the FDLP to benefit students by creating a better loan system than the then-dominant but troubled Federal Family Education Loan Program (“FFELP”), 20 U.S.C. §§ 1071-1087-4. FDLP provided a welcome change not only for the students and schools who embraced it, but for those who enjoyed better service and terms from FFELP as it struggled to compete with the new scheme. FFELP lenders and guarantors were less enthusiastic: the FDLP limited their ability to profit from federally-subsidized student loans.

Amici believe that the discounts that Plaintiffs challenge in this action are essential to the

continued vitality of the FDLP. This Memorandum explains the importance of the FDLP, and the reasons why *Amici* believe that Congress intended to empower the Secretary of Education to establish fees for FDLP loans, including origination fees, that parallel the fees charged on FFELP loans. Accordingly, *Amici* urge this Court to construe the statute in accord with that statutory objective and reject plaintiffs' contrary interpretation.

Interests of Amici

The three organizations whose views are set forth in this Memorandum have distinct but overlapping interests in the federal student loan program.

USSA is an organization of students that organizes and lobbies on students' behalf. A cornerstone of USSA's policy goals is its belief that education is a right, not a privilege. USSA believes that everyone is entitled to an education, and that the increasing financial burden of post-secondary school is a major -- if not *the* major -- bar to that entitlement.

USPIRG is the national advocacy office for a network of state Public Interest Research Groups, which are grassroots, nonpartisan student-based public-interest organizations. There are 100 PIRG chapters on college campuses. USPIRG works on a broad range of issues, including access to education. Specifically, USPIRG sponsors a Higher Education Project that seeks to increase access to higher education by, among other things, advocating improvements to the student loan program and educating the public about the impact of student debt.

NDSLCL is a coalition of colleges and universities that participate in the Direct Loan Program. All NDSLCL's members have invested time and money in switching from guaranteed lending to direct lending, and did so because they believed that direct lending would better serve their students' interests. NDSLCL members exist to educate their students. NDSLCL therefore

favors broader access to education and a straightforward, reliable financial aid program that allows students to concentrate on their studies, not worry about their ability to pay back student loans.

Amici have a strong interest in the issues in this case because the costs and terms of educational loans have a profound effect on access to higher education, and on the educational experience of students. In March of this year, USPIRG released a report entitled *Big Loans, Bigger Problems: A Report on the Sticker Shock of Student Loans* (hereinafter *USPIRG Report*) (Ex. 1), that focused attention on students' heavy and increasing dependence on student loans. From 1992-1993 to 1999-2000, the amount students borrowed in the main student loan program more than doubled, from about \$15 billion to about \$35 billion. *USPIRG Report* at 8. A student's average *annual* loan increased from \$3,186 in 1992-93 to \$4,994 in 1998-99. *Id.* at 9. In 1995-96, the average student debt at graduation was \$11,950 at public, four-year colleges, and \$14,290 at private, four-year colleges. *Id.* at 12.

This increase in debt burden harms both those who decide they cannot afford to pay for college and hence cannot enroll, and those who are able to attend only by incurring debts that will hamper them for years. The February 2001 report of Congress's independent Advisory Committee on Student Financial Assistance, *Access Denied: Restoring the Nation's Commitment to Equal Educational Opportunity* (hereinafter *Access Denied*) (Ex. 2) explores the many ways in which the high cost of education makes it harder for poor students to succeed. *Access Denied* at 5. Low-income students enter four-year colleges and universities at only half the rate of their similarly qualified high-income peers. *Id.* at 4. Those low-income students who are able to enroll must overcome substantial disadvantages. Poor students are far more likely than their wealthy

counterparts to engage in economic behavior that reduces their chance of academic success, such as choosing two-year, rather than four-year programs, working full-time while attending school, and living off-campus. *Id.* at 10-11, 13. In 1996, only 6.1% of post-secondary students in the lowest socioeconomic quartile received a bachelor's degree or higher, compared with 41.1% in the highest quartile. *Id.* at 5.

Those who successfully complete their education will continue to feel the impact of student loan debts long after they leave school. The *USPIRG Report* explains that many students, especially those just beginning college, significantly underestimate the cost of the loan debt they are incurring, and overestimate their ability to meet payments due after graduation. *USPIRG Report* at 12-23. Most student loans must be repaid within the first 10 years after graduation, the very time when most graduates are adjusting to adult life and beginning their own families.

As we discuss in more detail below, the FDLP was established by Congress to help reduce the costs of student loans and to assure that the federal investment in educational loans would benefit students, not line the pockets of lenders and guaranty agencies. The origination fees at issue in this action are a substantial component of the cost of these loans. Plaintiffs' claims -- that the Secretary of Education lacks the authority to reduce such fees and has improperly exercised his authority to reduce interest charges -- would directly prejudice the interests of the prospective student borrowers who Congress wanted to benefit from FDLP.

Each of the *Amici* has long been interested in the successful implementation of the Direct Loan Program and, moreover, the specific issue of the Secretary's authority to set the terms and conditions for FDLP loans. In particular, all three *Amici* participated in the negotiated rulemaking that produced the regulations at issue in this case. *See* Notice of Proposed Rulemaking, 64 Fed.

Reg. 32,358, 32,359 (June 16, 1999).

Argument

Plaintiffs in this case, participants in FFELP and their representatives, ask this Court to set aside three actions by the Secretary that have reduced the costs of FDLP loans to students: a reduction in origination fees, a reduction in interest rates for timely repayment of consolidated loans, and an up-front interest rebate for timely repayment.

Plaintiffs' opposition to these actions is not motivated by the conviction that the Secretary's actions undermine the objectives and success of the federal loan program. To the contrary, Plaintiffs' sole motivation in seeking this relief is to benefit themselves economically. Plaintiffs in no way represent the students or the schools who are the intended beneficiaries of the federal student loan programs. Rather, they hope to turn ambiguous statutory language to their competitive advantage, thereby tilting the level playing field that Congress sought to establish. 20 U.S.C. § 1087e(a)(1) (mandating the "same terms, conditions, and benefits" for borrowers in FDLP as in FFELP).

The crucial question in this case, and the focus of this brief, is whether Congress intended the 4% origination fee that the Secretary "shall charge," § 1087e(c), to protect students or to protect the financial institutions that profit from the FFELP. Plaintiffs would have this Court "make a fortress out of the dictionary," *Markham v. Cabell*, 326 U.S. 404, 409 (1945), quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), by exercising a rigid formalism totally at odds with the federal courts' approach to statutory construction. The Supreme Court and the D.C. Circuit have explained time and again that a court construing a statute must consider the "provisions of the whole law," including "its object and policy," *Dole v. United Steelworkers of*

Am., 494 U.S. 26, 35 (1990), as the meaning of a particular provision “is often clarified by the remainder of the statutory scheme.” *United Sav. Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Here, the statutory scheme establishes two parallel student loan systems offering the “same terms, conditions, and benefits.” The logical reading of § 1087e(c) is that Congress intended to cap the origination fee for FDLP borrowers, just as it did for FFELP borrowers. 20 U.S.C. § 1087-1(c)(2).

Section I of this Memorandum reviews the history of the FDLP. Because understanding the objectives of the statute is crucial to interpreting the disputed statutory language, the history of the statute is worth “recounting for the light it sheds on Congress' purpose in passing the Act.” *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 432 (1986); *see also Watt v. Alaska*, 451 U.S. 259, 266 (1981) (concluding that the circumstances in which legislation was enacted demonstrate that Congress did not intend for the words to be given “literal effect”). *Amici* submit that this history shows that Congress’ objective in enacting FDLP was to create an alternative to the FFELP that would allow students to obtain loans on terms that parallel the terms of loans available under the FFELP.

In Section II, we argue that Plaintiffs’ proposed construction of the statute would frustrate this purpose and therefore should be rejected. Reading the statute with its purpose in mind, it is evident that the meaning of the phrase “[t]he Secretary shall charge the borrower of a loan made under this part an origination fee of 4.0 percent” is not free from doubt; it could properly be seen as a floor and not as a straitjacket. Accordingly, the Secretary has discretion to charge a lower origination fee in order to maintain parity between FDLP and FFELP.

I. HISTORY OF THE DIRECT LOAN PROGRAM

A. Loans before FDLP

Direct loans are not a novelty or anomaly. The very first student loan program that Congress introduced in 1958 as part of the National Defense Education Act of 1958, Pub. L. 85-864, is a direct loan program which served as a model for the Direct Loan Program at issue in this litigation. Under this program, known as the Perkins Loan Program, Congress provides capital to post-secondary institutions. The schools make loans to their students, who in time repay the schools so that the money can be recirculated. 20 U.S.C. §§ 1087aa - 1087vv.

In the Higher Education Act of 1965, the federal government introduced a broader student loan program that built on state guaranteed loan systems. Pub. L. 89-329, 79 Stat. 1219.¹ Guaranteed loans involve more parties than direct loans and, thus, are inherently more complicated. Under the guaranteed loan program, students borrow from lenders (typically banks), and the loans are insured by guaranty agencies. The government reinsures the guaranty agencies by promising to repay the guaranty agencies for defaulted loans. The government also subsidizes some loans. Banks often resell the student debt in secondary markets. When loans are resold, borrowers are sometimes unable to identify the new holders of their loans and do not

¹ Accounting and political considerations made it easier for Congress to expand the guaranteed loan program than the Perkins loan program for two reasons. First, Perkins loan money was appropriated, while guaranteed loan money was "off-budget." Second, because the accounting for Perkins loans was done on a cash basis, and the accounting for guaranteed loans was on an accrual basis, Perkins loans looked more expensive up-front.

know where to turn with service problems. In 1992, the guaranteed loan program that Congress first established in 1965 was renamed the Federal Family Education Loan Program ("FFELP"), 20 U.S.C. §§ 1071 to 1087-4.

By the 1980s, it became apparent to Congress that the guaranteed loan program was plagued with problems. *See Abuses in Federal Student Aid Programs: Hearings before the Permanent Senate Subcommittee on Investigations of the Committee on Governmental Affairs*, 101st Cong. No. 101-659, Pt. 3 at 1-4, 63-66, 176-77 (detailing problems in the mid-1980s), 165-211 (1990) (hereinafter *Senate Hearings*); cf. David Leonard, *Getting the Third Degree*, SmartMoney 107 (March 1996) (Ex. 3). FFELP incurred substantial transaction costs and generated extensive paperwork as each institution participating in the program had its own, often conflicting, information requirements and procedures. Although Congress intended for students to be the beneficiaries of the loan program, many financial institutions were profiting handsomely from the government guarantees and subsidies. The guaranty system created perverse incentives for guaranty agencies to declare loans in default, collect 98% of the loan's value from the government, and then continue to pursue the student -- keeping 27% of whatever the student eventually repaid. *See Leonard, supra*, at 110; *Senate Hearings* at 171 (describing problems with similar predecessor system). Tax law heavily subsidized some of the guaranty agencies, allowing them to pay their officers huge sums and to patronize for-profit businesses owned by those officers. *See, e.g.*, Bob Shireman, *Self-Serving Loan Program*, Washington Post at A23 (Aug. 23, 1995). It proved impossible to audit the loan system fully and cleanly. *See Senate Hearings* at 180-82, 565-70, 686-87, 694-96.

After the savings and loan crisis in the late 1980s, which threatened many of the

participants in the guaranteed loan system, student loan reform became a priority in Congress. The Federal Credit Reform Act of 1990 changed the government's accounting system for student loans to put all student loan capital "off-budget" and required appropriations only for student loan subsidies, guaranty payments, and default losses. Pub. L. 101-508, § 13201, 104 Stat. 1388, 1388-610. In light of the new, more accurate cost figures, Congress began to contemplate a return to primarily direct lending. H. Rep. No. 102-447, at 57-59 (1992); S. Rep. No. 102-204, at 52-53 (1991).

It was obvious that expanding direct lending would save the government money. The guaranteed loan program subsidized financial institutions because the lenders demanded, and received, interest rates several percentage points above the Treasury bill rate in order to make a profit. 20 U.S.C. § 1077a. The government could avoid this cost in a direct loan program because the U.S. Treasury borrows at the Treasury bill rate. *See* U.S. GAO Report to the Chairman, Subcommittee on Postsecondary Education, Committee on Education and Labor, House of Representatives, *Student Loans: Direct Loans Could Save Billions in First 5 Years With Proper Implementation* at 4-6 (Nov. 1992) (noting interest rate savings and exploring likely sources of savings in more detail) (hereinafter *1992 GAO Report*). Direct lending was also intended to simplify the loan process, reduce fraud and abuse, and create repayment options for hard-pressed student borrowers. *See* H. Rep. No. 102-447, at 59 (1992).

B. The Introduction of FDLP

Direct lending was conceived as a replacement for FFELP, although Congress realized it would have to be introduced by degrees. The Higher Education Amendments of 1992 introduced the Federal Direct Loan Demonstration Program, a pilot program of direct loans. Pub. L. 102-

325, Tit. IV, Pt. D, 106 Stat. 448, 569 (1992). Under the 1992 Program, the Secretary was to allow a representative selection of schools to offer Direct Loans to students, and to carefully monitor the program's effectiveness.

The savings from expanding direct lending, and its advantages to students, were so obvious that in the Student Loan Reform Act of 1993, part of that year's Omnibus Budget Reconciliation Act, Congress made Direct Lending the centerpiece of the Committee on Education and Labor's cost-cutting efforts. Pub. L. 103-66, Tit. IV, Subtit. A (1993), 107 Stat. 312, 340; H. Rep. No. 103-111 at 105, 106, *available in* 2 U.S.C.C.A.N. 378, 473, 474 (1993) (predicting \$5.8 billion in savings over five years, of which \$4.3 billion was to come from FDLP). The House bill required FDLP to replace FFELP completely over the next five years. H. Rep. No. 103-11 at 114, *available in* 2 U.S.C.C.A.N. 482 (1993). In light of its higher cost, limited repayment options, and administrative complexity, the House simply did not consider FFELP a viable alternative to FDLP. *Id.* at 112-13, U.S.C.C.A.N. 480-81. The Senate took a more limited view, however, and the bill that was enacted specified a 5% market share for FDLP in 1994-95, growing to at least a 60% share in 1998-99. Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 (1993), 107 Stat. at 366. The General Accounting Office studied FDLP's likely financial impact and concluded that it would save \$4.8 billion within the first 5 years of implementation, net of start-up and administrative costs. *1992 GAO Report*.

Some of these projected savings were returned to students in the form of lower fees, but Congress maintained the parity between the FDLP and the FFELP by lowering the fees in the FFELP to the same level. There are two upfront fees associated with FFELP loans, an origination fee and insurance fee. Before 1993, the combination of these two fees could be as high as 8% of

the loan principal. Pub. L. 103-66, § 4102(a)(3), § 4102(c), 107 Stat. at 366. The only upfront fee in the FDLP is an origination fee, and Congress determined that there was no need to set this fee higher than 4%. In order to maintain parity between the programs and, specifically, not to disadvantage the students whose schools did not participate in FDLP, the Act that established the FDLP also lowered the upfront fees for FFELP loans to 4% by lowering the origination fee cap to 3% of the loan, and the insurance fee to 1%. *Id.*; 20 U.S.C. § 1087-1(c)(2); § 1078(b)(1)(H); § 1078-8(h).

The FDLP was, as predicted, very successful. In its interim report, the GAO observed that as of October 1996, 26% of schools offered direct loans to their students. Health, Education and Human Services Division, U.S. GAO, Report to the Chairman, Committee on the Budget, House of Representatives, *Student Loans: Selected Characteristics of Schools in Two Major Federal Loan Programs*, at 3 (Jan. 1997) (hereinafter *1997 GAO Report*). The FDLP schools accounted for 38% of student loan volume in fiscal year 1995. *Id.* at 4. Most of those schools offered FFELP loans as well, although few students chose the FFELP; in 1996-97, on average 86% of their loans were FDLP loans while the remaining 14% were FFELP loans. *Id.* at 19. As of October 1996, 42% of public four-year and 41% of proprietary (i.e. private, for-profit) schools offered the FDLP. *Id.* at 3.

Schools were delighted with the FDLP. Students no longer had to line up for hours to process their complex financial aid paperwork. Instead, they could quickly fill out a simple form. Financial aid staff no longer had to try to find contact information for an array of lenders; instead, they were able to directly answer students' questions about their loans and expected disbursement times. *See, e.g.*, Patrick Johnson, *Students rejoice in 'easy money,'* Springfield Union-News at

Local-1 (Sept. 13, 1995); Jeff Ristine, *Student loans made easy, quick*, San Diego Union-Tribune at A-1, A-4 (Aug. 15, 1995); *Give direct student loans a chance*, Chicago Tribune (Apr. 18, 1995). The disbursement of loan funds was dramatically quicker under the FDLP. One school found that the number of student borrowers whose funds were available at the beginning of the semester quadrupled or quintupled in direct lending. Stephen Burd, "*Changing the Rules Midstream: Colleges Fight to Keep Semblance of Direct-Lending Program*", The Chronicle of Higher Education at A30 (Oct. 27, 1995) (quoting Edmond Vignoul, director of financial aid at the University of Oregon); *see also, e.g.*, Letter to Nicki Meoli, U.S. Department of Education, from Claire M. Roemer, District Coordinator, Financial Aid, Tarrant County College District (June 10, 1999), Administrative Record ("AR") at tab 27a. Students were able to take out smaller initial loans, confident that if their needs increased later in the semester, they would be able to obtain additional funds quickly.

The introduction of the FDLP also spurred guaranty agencies and lenders to improve the FFELP. Students at schools that remained in the FFELP experienced simplified loan processing, better service, and faster disbursements. The New York State Higher Education Services Corporation, for example, has moved to a "Master Promissory Note" which needs to be signed only once every four years, implemented higher service standards, and improved processing times. Letter to SUNY Cortland Students from David M. Canaski, Director of Financial Aid, SUNY Cortland, *et al.* (Feb. 4, 1999), AR at 15d. The University of California agrees that service and prices in the FFELP have improved since the FDLP's advent. Letter to Nicki Meoli, Department of Education, from Patricia A. Kearney, Executive Director of Student Housing and Financial Aid, University of California, Davis (July 20, 1999), AR at 27c; Letter to Nicki Meoli from

Richard Black, Interim Executive Director, Admissions and Enrollment, University of California, Berkeley (July 22, 1999), AR at 27k. Even a major lender has admitted that competition with the FDLP has made the FFELP a better program. Stephanie Harris, *Interview with James Gathard, Senior Vice President for NationsBank Education Loans*, 3 Student Lending 4 (Jan. 13, 1998), AR at 15j.

In 1998, Congress reauthorized both the FDLP and the FFELP. The 1998 Act reinforces the evidence that Congress contemplated that the two programs should operate in parallel. The FDLP is no longer characterized as a “transitional” program. Higher Education Amendments of 1998, Pub. L. 105-244, §§ 451-60 (1998). The Amendments also gave the Secretary the authority to reduce interest rates to borrowers to encourage on-time loan repayment, *id.* § 452(b)(7), and revised interest rates and administrative cost allocations. *Id.* §§ 542, 454. Apart from these changes, the 1998 reauthorization legislation did not substantially alter the structure of the FDLP, although it introduced a number of substantial modifications to the FFELP.

C. Competition Between the Programs

The FFELP and the FDLP provide the same product: federally-sponsored financing for post-secondary education. Plaintiffs’ suggestion that they are intended not to compete (Pls. Motion for Summary Judgment at 8-9, 17) defies logic. The two programs provide the same product to the same group of consumers. By definition, they must compete. Congress created parallel student loan systems so schools and students could choose the program best suited to their individual needs.²

²The Secretary takes the position that Congress enacted the FDLP to replace the FFELP. We agree that many of the sponsors of the FDLP contemplated that it would displace the FFELP. Our point is that whether Congress intends for the FDLP to eventually replace the FFELP, or it

intends to maintain both programs indefinitely, Congress has unquestionably mandated, for the time being at least, that the two programs shall coexist, and so, necessarily, compete.

Nor have FFELP participants been shy of competing with the FDLP when it has served their purposes. Soon after Congress passed the 1998 reauthorization, FFELP lenders and guarantors began to compete fiercely for market share, and to offer attractive financing packages to schools in an effort to draw them out of the FDLP. Eli J. Lake, *Lenders, Guarantors Flood Loan Market with Rebates*, Daily Education News (March 26, 1999). Discounts in origination fees, insurance fees, and other terms became increasingly common.³ In October 1999, the Department of Education found that by August 27, 1999, the nationwide average discount on FFELP loans was 2.4%, up from 0.4% a year previously. Budget Service, U.S. Department of Education, *Cost of the 1999 Reduction in Direct Loan Fees 1* (Sept. 3, 1999), AR 41 (hereinafter *Cost of the Reduction*).⁴ In nine states with 17% of Direct Loan borrowers, up-front FFELP discounts averaged 2% or more; in 40 states, the District of Columbia, and Puerto Rico, with

³ Among other changes, the 1998 amendments divided the guaranty agencies' reserve funds into two parts: the guaranty agencies' operating funds and the federal government's "federal fund." Previously, it had been unclear who owned the reserve funds. This change provided the guaranty agencies with another opportunity to expand market share at the government's expense. Many simply stopped charging the 1% fee for the federal fund. While some expressed their concern to the government over this threat to FFELP's financial stability, their concern did not keep them from following the general trend. *See, e.g.*, Letter to Secretary Riley from Milton G. Wright, President and CEO, Texas Guaranteed Student Loan Corp. (Apr. 19, 1999), AR at 15f; Letter to Secretary Riley from Mark W. Valenti, President, Connecticut Student Loan Foundation (Apr. 23, 1999), AR at 15h; Letter to Secretary Riley from Paul C. Combe, President, American Student Assistance [the FFELP guarantor for Massachusetts and D.C.] (Apr. 23, 1999), AR at 15g; Letter to Secretary Riley from Val Vikmanis, President, Educational Management Corp. (Apr. 29, 1999), AR at 15i.

⁴ This figure represented the average discount as a percentage of the loan principal. It comprised a 0.8% guaranty fee waiver (either the guaranty agency or the lender paid the fee or it was not paid into the federal fund at all), a 0.6% discount in the origination fee (absorbed by the lender), a 0.6% discount in interest rate reductions, and a 0.4 % discount in on-time repayment incentives. *Id.* at 5.

70% of Direct Loan borrowers, they averaged 1% or more. *Id.* at 1. The Department noted that the discounts varied widely from state to state and by lender and, therefore, the discounts available to an individual student are largely a matter of luck. *Id.* at 3; *see also* AR at 15a, 15l, 15m.

These FFELP discounts are obviously intended to attract student borrowers. The student *Amici* appreciate the savings that the discounts offer to students. However, the discounts pose a threat to the FDLP if they result in a significant number of schools being drawn out of that program. If the FDLP is crippled or collapses because the Secretary is required to impose fees and interest rates far above those for FFELP loans, there will be no reason for FFELP lenders to maintain the discounts or the service improvements that the FDLP's competition has spurred. The Department of Education has estimated that if the FFELP discounts remained in place and it had not implemented the measures challenged in this suit, FDLP would have lost 5% of its loan volume to FFELP for the 2000 fiscal year. Over the ten years 2000-2009, the FDLP would lose loan volume totalling an estimated \$9.9 billion, more than half of total direct loan volume for fiscal year 1999. Letter to Senator James M. Jeffords from Deputy Secretary Marshall S. Smith, Department of Education (Sept. 7, 1999), AR at 42; U.S. GAO and Department of Education, *Final Report Regarding the Findings of the Study Group on the Feasibility of Using Alternative Financial Instruments for Determining Lender Yield under the FFELP* (Jan. 19, 2001).⁵

⁵The following table lays out the estimated losses by year:

Estimated Direct Loan Volume Loss Without Origination Fee Reduction (millions of dollars),
year-by-year totals

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
503	520	542	758	1,084	1,151	1,220	1,294	1,374	1,459

Ultimately, the Department believed that with the FFELP discounts in place and with FFELP lenders aggressively marketing their program to school administrators and the public, all FDLP schools were at risk of leaving the program if the Department did not enact FDLP discounts. *Id.* at 2-3.

The Secretary's concerns are supported by several examples of schools that abandoned the FDLP for the FFELP after guaranty agencies and lenders began discounting FFELP loans aggressively. In the spring of 1999, three schools making up 0.5% of 1997-98 FDLP loan volume announced that they would leave FDLP, all citing loan discounts: Western Kentucky University, Castleton State College, and State University of New York at Cortland. 3 *Direct Lending* at 6 (Mar. 4, 1999); Michael Corkery, *UVM denies students chance for cheaper loans*, The Burlington Free Press at A1, A7 (Apr. 18, 1999, AR at 15c); Letter to SUNY Cortland Students from David M. Canaski, Director of Financial Aid *et al.* (Feb. 4, 1999), AR at 15d; *see also Cost of the Reduction* at 1-2. In January 2000, the University of Vermont switched back to the FFELP, expressing bitter regret that the FDLP had not responded to the discounting by FFELP institutions:

Please understand that this decision is not a reflection of unhappiness on our part about any aspect of the administration of the Direct Loan Program. In all respects we found the delivery systems surrounding the program to be far superior to those of its predecessors. ... The fact remains that the Direct Loan Program has been woefully unable to respond competitively to the savings features developed by VSAC in the Vermont Value program.

Letter from Judith A. Ramaley, Ph.D., President, University of Vermont, to Richard Riley,

Id. at 2.

Secretary of Education (Jan. 20, 2000). Other school officials have told the Department that reduced loan fees are “critical to the survival of the FDSL program.” Letter to Nicki Meoli, U.S. Department of Education, from William D. Boyd, Assistant Vice President, Student Enrollment Services, and Director, Financial Aid, San Diego State University (June 15, 1999), AR at 27b; *accord Cost of the Reduction*.

D. The Secretary’s Decisions Concerning FDLF Fees.

After the 1998 Reauthorization of the Higher Education Act was completed, the Department of Education embarked on rulemaking to effectuate the congressional purpose of maintaining FDLF as an alternative to FFELP. The Department established Negotiated Rulemaking Committees which met from January through May, 1999 to draft proposed rules, and on June 16, 1999, the Secretary published these proposed rules for public comment. Notice of negotiated rulemaking, 63 Fed. Reg. 71,206 (Dec. 12, 1998); Notice of proposed rulemaking, 64 Fed. Reg. 32,358 (June 16, 1999). The preamble to the NPRM stated that the Secretary believed he had the authority under the statute to charge reduced loan fees to all Direct Subsidized and Direct Unsubsidized Loan borrowers, and to provide a reduction to borrowers demonstrating greater financial need. On that same date, the Secretary announced that he was reducing the Direct Loan origination fee from 4.0% to 3.0%. *ED Announces Lower Student Fees on Direct Loans*, available at <<http://www.ed.gov/PressReleases/06-1999/fees.html>> (last visited Mar. 25, 2001).

The rules proposed on June 16, 1999 were promulgated on August 24, 1999, except for a proposed amendment to 34 C.F.R. § 685.211. Final regulations, 64 Fed. Reg. 46,252 (Aug. 24, 1999) (codified at 34 C.F.R. pt. 685). That proposed amendment would have authorized the

Secretary to reduce the interest rate to a borrower who repays on time under requirements specified by the Secretary. The Department delayed publication of that rule pending the submission of a required OMB report to Congress, *id.* at 46,252, and that rule became final on October 27, 1999. Final regulations, 64 Fed. Reg. 57,959 (Oct. 27, 1999).

On August 10, 2000, the Secretary announced two incentive programs for timely repayment by FDLP borrowers: a 0.8 % reduction in the interest rate for Federal Direct Consolidation Loans and an up-front rebate of 1.5% of the loan total. Each of these is contingent on twelve months of timely payments. If the borrower does not timely pay the first twelve installments, the rate reduction or rebate is rescinded. *Education Secretary Riley Announces Lower Interest Rates on Direct Student Loans & Consolidations*, at <<http://www.ed.gov/PressReleases/08-2000/0810b.html>> (last visited Mar. 25, 2001).

II. PLAINTIFFS' CONSTRUCTION OF THE STATUTORY LANGUAGE ESTABLISHING FDLP SHOULD BE REJECTED BECAUSE IT IS INCONSISTENT WITH THE PURPOSE OF THE LEGISLATION.

Plaintiffs' Memorandum ignores both the design of the federal student loan system and the reality of how the system operates. Both the FFELP and the FDLP were created to help students. Both exist to make a post-secondary education more affordable. Neither was created to help Plaintiffs line their pockets or to trap federal administrators in archaic formalisms. The Secretary has fulfilled the FDLP's core command -- to make FDLP loans available with "the same terms, conditions, and benefits" as FFELP loans. Schools are then free to choose the program that better serves their students' needs, without the unfair pressure of major financial disparities between the two programs.

Plaintiffs' claim that the Secretary has acted unlawfully in reducing origination fees rests on 20 U.S.C. § 1087e(a)(1) and § 1087e(c), which read:

(1) Parallel terms, conditions, benefits, and amounts

Unless otherwise specified in this part, loans made to borrowers under this part shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers under sections 1078 [Stafford loans], 1078-2 [federal PLUS loans], and 1078-8 [unsubsidized Stafford loans] of this title.

20 U.S.C. § 1087e(a)(1).

(c) Loan fee

The Secretary shall charge the borrower of a loan made under this part an origination fee of 4.0 percent of the principal amount of the loan.

20 U.S.C. § 1087e(c).

The meaning of these provisions is ambiguous. Plaintiffs correctly observe that "shall" is generally read as mandatory. However, it can be and has been read as permissive where circumstances warrant. For example, in *Young v. Community Nutrition Institute*, 476 U.S. 974

(1986), the Supreme Court upheld the FDA's interpretation of the Food, Drug, and Cosmetic Act. The section at issue, governing dangerous substances that unavoidably make their way into foods, reads: "the Secretary shall promulgate regulations limiting the quantity [of a dangerous substance] therein or thereon to such extent as he finds necessary for the protection of public health." The Court held that the statute was ambiguous and upheld the FDA's approach of setting informal "tolerance levels" instead of promulgating regulations. *See also Conoco, Inc. v. Skinner*, 970 F.2d 1206, 1225 (3d Cir. 1992) ("whether the term 'shall' is construed as directory or mandatory is also dependent on an examination of Congressional intent, 'including whether a mandatory construction would yield harsh or absurd results'"), *quoting Bartholomew v. United States*, 740 F.2d 526, 531 (7th Cir. 1984); *McCarthy v. Busey*, 954 F.2d 1147, 1151-52 (6th Cir. 1992); *United Hospital Center, Inc. v. Richardson*, 757 F.2d 1445, 1453 (4th Cir. 1985) (collecting cases); *Pro Schools, Inc. v. Riley*, 824 F. Supp. 1314, 1320 (E.D. Wis. 1993); *United States v. Instruments, S.A., Inc.*, 807 F.Supp. 811, 816 (D.D.C. 1992).

A mandatory reading of "shall" in § 1087e(c) would yield a result that is both harsh and absurd. Moreover, Plaintiffs' position is consistent with the statute only if Congress intended for the single word "shall" to demonstrate that it has "otherwise specified" that FDLP fees should be an exception to the general rule that FDLP and FFELP loans have the same terms and conditions.

The permissive reading of "shall" is the correct construction of the statute here because it is the only reading that is in accord with the overall purpose of the statute. In construing statutory language, courts must always "remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F. 2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945). Indeed,

the Supreme Court has emphasized that “[w]here the literal reading of a statutory term would ‘compel an odd result,’ *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989), we must search for other evidence of congressional intent to lend the term its proper scope.” *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 454 (1989); *see also Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *American Train Dispatchers Association v. Interstate Commerce Commission*, 54 F.3d 842, 849 (D.C. Cir. 1995). Even though part of a statute may “at first blush” appear to have one meaning when viewed in isolation, “congressional intent can be understood only in light of the context in which Congress enacted a statute and of the policies underlying its enactment.” *Tataranowicz v. Sullivan*, 959 F.2d 268, 275-80 (D.C. Cir. 1992); *see also Martini v. Federal National Mortgage Association*, 178 F.3d 1336, 1345-46 (D.C. Cir. 1999). “The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.” *Watt v. Alaska*, 451 U.S. 259, 266 (1981); *accord McCarthy v. Bronson*, 500 U.S. 136, 139 (1991); *City of Cleveland*, 68 F.3d at 1366 n.4 (“[W]e may consider a provision’s legislative history in the first step of *Chevron* analysis to determine whether Congress’ intent is clear from the plain language of a statute.”).

Plaintiffs’ interpretation of the statute would lead to an “odd result” that is inconsistent with the central purpose of the legislation. When the FDLP was enacted, Congress plainly intended it as an alternative to the FFELP. As § 1087e(a)(1) specifies, the programs were to have generally the “same terms, conditions, and benefits.” Under plaintiffs’ construction, however, the Secretary would have no ability to maintain parity between the FDLP and the FFELP on one of the most critical loan terms, the upfront fees for originating the loan. Congress could not have set

up a program as complex as the FDLP, made its own massive investment in the program, and invited a similar investment from schools, with the intention that the FDLP would be unable to compete with FFELP loans on such a pivotal term. Such a reading is absurd. It would be irrational for Congress to enact an alternative loan program, but then mandate a fee that would preclude that program from being a viable alternative. *See Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (“Congress cannot be presumed to do a futile thing.”). Nor do Plaintiffs suggest any reason why Congress would have chosen this approach.

On the other hand, the origination fee provision is consistent with the purpose of the legislation if § 1087e(c) is construed as a ceiling on the origination fee and not as a command. By reducing the origination fee to 3%, the Secretary has simply restored the parity that Congress intended between the FDLP and the FFELP. Congress never intended to favor students in one program over those in the other. Under the Secretary’s reading, students face similar fees whether their schools choose to participate in the FDLP or not. Even more importantly, schools retain the freedom to participate in a viable direct lending program.

Plaintiffs' claim that § 1087e(c) mandates that FDLP loans must charge a 4% fee makes sense only if Congress enacted this provision in order to create a competitive advantage for FFELP lenders and guarantors by forcing students in the FDLP to pay higher fees than those that can be offered in the FFELP. However, it is clear that the FDLP was not passed to protect the lenders and guaranty agencies that had benefitted to excess under the FFELP. To the contrary, Congress enacted the FDLP because it was disturbed by reports that these lenders and guarantee agencies were profiting at the expense of students and taxpayers. Nothing in the FDLP or its history suggests that the FDLP was intended to help FFELP's lenders and guarantors, or to shield them from losing borrowers to the FDLP. The FDLP was enacted to benefit students, so that they would no longer suffer the bureaucratic inflexibility, high fees and interest rates, and repayment frustrations and abuses that pervaded the FFELP. Plaintiffs' construction of the statute should be rejected because it would benefit lenders and guarantors by harming students -- just the opposite of what Congress intended.

Accordingly, this Court should construe § 1087(e) in the only way that furthers the FDLP's purpose, and hold that the Secretary has the authority to reduce the FDLP loan origination fee to enable FDLP to "have the same terms, conditions, and benefits" to compete with FFELP, as Congress intended.

Conclusion

For the reasons stated above, this Court should deny Plaintiffs' motion for summary judgment and grant the Defendant's motion for summary judgment.