

VETERANS' READMISSION REQUIREMENTS
Preamble to Proposed Regulations
August 21, 2009

Proposed Regulations: Department of Education - General and Non-Loan Programmatic Issues; Proposed Rule - Federal Register, August 21, 2009, pp. 42379-42463.
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Preamble to Proposed Regulations (pp. 42385-8)

The preamble to the proposed regulations explains the reasoning of the Department of Education in putting forward detailed requirements on institutions with respect to the new veterans' readmission requirements. For the most part, these requirements are intended to parallel those of USERRA.

Part 668 Student Assistance General Provisions

Readmission Requirements for Servicemembers (Sec. 668.18)

Statute: The HEOA added new section 484C to the HEA to address institutional readmission requirements for servicemembers. Section 484C of the HEA provides that an institution of higher education may not deny readmission to a servicemember of the uniformed services for reasons relating to that service. In addition, a student who is readmitted to an institution under this section must be readmitted with the same academic status as the student had when he or she last attended the institution. An affected servicemember is any individual who is a member of, applies to be a member of, or performs, has performed, applies to perform, or has the obligation to perform, service in the uniformed services. This requirement applies to service in the uniformed services, whether voluntary or involuntary, on active duty in the Armed Forces, including service as a member of the National Guard or Reserve, for a period of more than 30 days under a call or order to active duty of more than 30 days.

Any student whose absence from an institution of higher education is necessitated by reason of service in the uniformed services is entitled to readmission if:

- The student (or an appropriate officer of the Armed Forces or official of the Department of Defense) gives advance written or verbal notice of such service to the appropriate official at the institution;
- The cumulative length of the absence and of all previous absences from that institution of higher education by reason of service in the uniformed services does not exceed five years; and
- Except as otherwise provided in this section, the student submits a notification of intent to reenroll in the institution.

However, no advance notice by the student is required if the giving of such notice is precluded by military necessity, such as a mission, operation, exercise, or requirement that is

classified; or a pending or ongoing mission, operation, exercise, or requirement that may be compromised or otherwise adversely affected by public knowledge. In addition, any student (or an appropriate officer of the Armed Forces or official of the Department of Defense) who did not give advance notice of service to the appropriate official at the institution may meet the notice requirement by submitting, at the time the student seeks readmission, an attestation to the student's institution that the student performed service in the uniformed services that necessitated the student's absence from the institution.

When determining the cumulative length of the student's absence for service, the period of service does not include any service:

- That is required, beyond five years, to complete an initial period of obligated service;
- During which the student was unable to obtain orders releasing the student from a period of service in the uniformed services before the expiration of the five-year period and the inability to obtain those orders was through no fault of the student; or
- That is performed by a member of the Armed Forces (including the National Guard and Reserves) who is--
 - Ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of Title 10, U.S.C., or under section 331, 332, 359, 360, 367, or 712 of Title 14, U.S.C.;
 - Ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress;
 - Ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under section 12304 of Title 10, U.S.C.;
 - Ordered to active duty in support of a critical mission or requirement of the Armed Forces (including the National Guard or Reserve); or
 - Called into Federal service as a member of the National Guard under chapter 15 of Title 10, U.S.C., or section 12406 of Title 10, U.S.C.

An affected servicemember must, upon the completion of a period of service in the uniformed services, notify the institution of his or her intent to return to the institution not later than three years after the completion of the period of service. However, a student who is hospitalized for or convalescing from an illness or injury incurred in or aggravated during the performance of service in the uniformed services must notify the institution of his or her intent to return to the institution not later than two years after the end of the period that is necessary for recovery from such illness or injury. A student who fails to apply for readmission within the required period does not automatically forfeit eligibility for readmission to the institution, but is subject to the institution's established leave of absence policy and general practices.

A student who submits an application for readmission to an institution must provide to the institution documentation to establish that:

- The student has not exceeded the specified service limitations; and
- The student's eligibility for readmission has not been terminated.

An institution may not delay or attempt to avoid a readmission of a student under this section by demanding documentation that does not exist, or is not readily available, at the time of readmission.

A student's eligibility for readmission to an institution under this section by reason of such student's service in the uniformed services terminates upon the occurrence of any of the following events:

- A separation of such person from the Armed Forces (including the National Guard and reserves) with a dishonorable or bad conduct discharge;
- A dismissal of such person permitted under section 1161(a) of Title 10, U.S.C.; or
- A dropping of such person from the rolls pursuant to section 1161(b) of Title 10, U.S.C.

Current Regulations: None.

Proposed Regulations:

General

Section 668.18(a) would include the general requirements of the statute that an institution may not deny readmission to a servicemember, but must readmit the servicemember with the same academic status as the student had when the student was last admitted to the institution. The proposed regulations would clarify that the requirements of this section also apply to a student who was admitted to an institution, but did not begin attendance because of service in the uniformed services. The proposed regulations would specify that the institution must promptly readmit a student, and would define "promptly readmit" as readmitting a student into the next class or classes in the student's program unless the student requests a later date of admission, or unusual circumstances require the institution to admit the student at a later date.

Section 668.18(a)(2)(iii) would specify that to readmit a person with the "same academic status" means that the institution admits the student:

- To the same program to which he or she was last admitted by the institution or, if that program is no longer offered, the program that is most similar, unless the student requests or agrees to admission to a different program;
- At the same enrollment status that the student last held at the institution, unless the student requests or agrees to admission at a different enrollment status;
- With the same number of credit hours or clock hours completed previously by the student, unless the student is readmitted to a different program to which the completed credit hours or clock hours are not transferable;
- With the same academic standing (e.g., with the same satisfactory academic progress status) the student previously had;
- If the student is readmitted to the same program, for the first academic year in which the student returns, by assessing the same institutional charges that the student was or would have been assessed for the academic year during which the student left the institution;
- If the student is admitted to a different program, and for subsequent academic years for a student admitted to the same program, by assessing no more than the institutional charges that other students in the program are assessed for that academic year; and

- Waiving charges for equipment required in lieu of equipment the student paid for when the student was previously enrolled.

In the case of a student who is not prepared to resume the program at the point where he or she left off or will not be able to complete the program, Sec. 668.18(a)(2)(iv) would require the institution to make reasonable efforts to help the student become prepared or to enable the student to complete the program including, but not limited to, providing refresher courses at no extra cost and allowing the student to retake a pretest at no extra cost. The institution would not be required to readmit the student if, after reasonable efforts by the institution, the student is still not prepared to resume the program at the point where he or she left off, or is still unable to complete the program. In addition, an institution would not be required to readmit a student if there are no reasonable efforts the institution can take to prepare the student to resume the program, or to enable the student to complete the program.

The proposed regulations would define "reasonable efforts" as actions that do not place an undue hardship on the institution. An "undue hardship" would be defined as requiring significant difficulty or expense to the institution. An institution would carry the burden to prove by a preponderance of the evidence that the student is not prepared to resume the program with the same academic status at the point where the student left off, or that the student will not be able to complete the program.

Section 668.18(a)(3) would make clear that the requirements of this section apply to an institution even if that institution has undergone a change of ownership since the student ceased attendance.

Finally, Sec. 668.18(a)(4) would make clear that the provisions of this section supersede any State law or other requirement that reduce, limit, or eliminate any right or benefit provided by this section.

Service in the Uniformed Services

Section 668.18(b) would delineate what service in the uniformed services means for purposes of this section. This section would expand upon the statutory language to clarify that service in the uniformed services includes active duty for training and full-time National Guard duty under Federal authority (i.e., not National Guard service under authority of State law). In addition, the regulations would specify that qualifying service must be for more than 30 consecutive days under a call or order to active duty of more than 30 consecutive days.

Readmission Procedures

Section 668.18(c) would list the statutory conditions under which an institution must readmit a servicemember. In addition, Sec. 668.18(c)(2)(i) would require an institution to designate one or more offices for the purpose of receiving advance notice from students of their absence from the institution necessitated by service in the uniformed services, and notice from students of an intent to return to the institution. Section 668.18(c)(1)(i) would make clear that advance notice must be provided by the student as far in advance as is reasonable under the

circumstances. However under Sec. 668.18(c)(2)(ii) and (iii), such notice would not need to follow any particular format, nor would a student have to indicate as part of the notice whether the student intends to return to the institution. Also, the regulations would make clear that an institution may not set a brightline deadline for submission of any such notice, but must judge the timeliness of submission by the facts of a particular case. As such notice may be provided by an appropriate officer of the Armed Forces, Sec. 668.18(c)(2)(iv) would clarify who an "appropriate officer" is.

The regulations would also provide that a student's notice of intent to return may be provided orally or in writing and would not need to follow any particular format. Section 668.18(c)(1)(ii) would make clear that the cumulative length of all previous absences by an affected student from the institution would include only the time the student spends actually performing service in the uniformed services. A period of absence from the institution before or after performing service in the uniformed services would not count against the five year limit. For example, after the individual completes a period of service in the uniformed services, he or she is provided a certain amount of time to return to the institution. The period between completing the uniformed service and returning to the institution would not count against the five-year limit.

Exceptions to Advance Notice

Section 668.18(d) would restate the statutory language for exceptions to advance notice.

Cumulative Length of Absence

Section 668.18(e) would restate the statutory types of service that are not included in the cumulative length of the student's absence, including a brief description of the types of services referenced in titles 10 and 14 of the United States Code.

Notification of Intent to Reenroll

Section 668.18(f) would restate the statutory provision providing that a student who fails to apply for readmission within the required periods does not automatically forfeit eligibility for readmission to the institution, but is subject to the institution's established leave of absence policy and general practices.

Documentation

Section 668.18(g) would list the documentation required by the statute that a student must submit with an application for readmission. The regulations would list several specific types of documentation that satisfy the statutory documentation requirements, making clear that the types of documentation available or necessary will vary from case to case.

Termination of Readmission Eligibility

Section 668.18(h) would list the circumstances listed in the statute under which a student's eligibility for readmission to an institution would be terminated, including a brief description of the types of circumstances referenced in title 10 of the United States Code.

Reasons: The regulations are amended to reflect the changes made by the HEOA. The statutory provisions for readmission of servicemembers to institutions of higher education were based on the provisions of the Uniformed Services Employment and Reemployment Rights Act (USERRA) (38 U.S.C. 4301-4334), which established the process for servicemembers to return to employment after serving on active duty. Therefore, in developing these proposed regulations, the Department sought to be as consistent as possible with the regulations implementing the USERRA. The Department believes that the purpose of these provisions, as with the USERRA, is to minimize the disruption to the lives of persons performing service in the uniformed services, allowing a student to return to an institution without penalty for having left because of service in the uniformed services.

General

Because the statute refers to "readmission" of servicemembers, the Department believes that the statute was intended to apply not just to a student who began attendance at an institution and left because of service in the uniformed services, but also to a student who was admitted to an institution, but did not begin attendance because of service in the uniformed services.

In line with the goal of minimizing the disruption to the lives of persons performing service in the uniformed services and to prevent an institution from unduly delaying an individual's readmission, the proposed regulations would require an institution to promptly readmit a student, and would define "promptly readmit" as readmitting a student into the next class or classes in the student's program unless the student requests a later date of admission, or unusual circumstances require the institution to admit the student at a later date. If, for example, an institution must make efforts to help the student become prepared to resume the program, and such efforts would not be completed in time for the student to begin the next class, a later date of admission would be justified.

The proposed requirements in Sec. 668.18(a)(2)(iii) for readmitting a person with the "same academic status" are consistent with USERRA regulations (20 CFR 1002.191 and 1002.192), which require an employer to employ a returning servicemember in the same position he or she left, so as to not penalize the individual for having left to serve in the uniformed services. The Department has chosen to focus only on the readmission of a servicemember by requiring that, if the student is readmitted to the same program, for the first academic year in which the student returns, the institution would have to assess the same institutional charges that the student had or would have been assessed for the academic year during which the student left the institution. However, this protection would not apply to subsequent years, when the

institution could assess the institutional charges that other students in the program are assessed for that academic year.

To address concerns voiced by non-Federal negotiators that the regulations would not allow an institution to readmit a student with a different academic status, even if the student wanted the change, the regulations would make clear that the institution may admit the student with a different academic status if the student requests or agrees to the change.

Consistent with USERRA regulations (20 CFR 1002.198) which require an employer to make reasonable efforts, if necessary, to help an employee become qualified for the reemployment position, Sec. 668.18(a)(2)(iv) would require the institution to make reasonable efforts, if necessary, to help a returning student become prepared or to enable the student to complete the program including, but not limited to, providing refresher courses at no extra cost and allowing the student to retake a pretest at no extra cost. The Department believes requiring an institution to make such an effort is in line with the goal of allowing a student to return to an institution without penalty for having left because of service in the uniformed services.

To ensure that such an effort does not unduly burden the institution financially or administratively, the proposed regulations would use the USERRA regulations definitions of "reasonable efforts"--actions that do not place an undue hardship on the institution and "undue hardship"--requiring significant difficulty or expense to the institution.

In addition, as USERRA regulations (20 CFR 1002.139) provide an employer with a degree of flexibility in meeting its reemployment obligations by not requiring an employer to reemploy an individual under very limited circumstances, so would Sec. 668.18(a)(2)(iv)(B) provide institutions with some flexibility to not readmit a student if, (1) after reasonable efforts by the institution, the student is still not prepared to resume the program at the point where he or she left off, or is still unable to complete the program; or (2) if there are no reasonable efforts the institution can take to prepare the student to resume the program, or to enable the student to complete the program. Consistent with USERRA regulations (20 CFR 1002.139), an institution would carry the burden to prove by a preponderance of the evidence that the student is not prepared to resume the program with the same academic status at the point where the student left off, or that the student will not be able to complete the program.

Consistent with the Department's practice of treating an institution that has undergone a change of ownership as the same institution, Sec. 668.18(a)(3) provides that the requirements of this section would apply to an institution even if that institution has undergone a change of ownership since the student ceased attendance.

As with USERRA regulations (20 CFR 1002.7(b)), Sec. 668.18(a)(4) would make clear that the provisions of this section supersede any State law or other requirement that reduces, limits, or eliminates any right or benefit provided by this section. This provision would make it possible, for example, to readmit a servicemember into a class for a semester even if that class was at the maximum enrollment level set by the institution's State. The preemption only applies when it is the admission of the returning servicemember that would be prevented by the State law or other requirement. The institution is expected to take other steps to come into

compliance with the State law or other requirements for future periods of enrollment. As with USERRA regulations, these regulations would not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an individual's right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the HEA.

Service in the Uniformed Services

Section 668.18(b) clarifies that service in the uniformed services includes active duty for training, because it is a form of active duty in the Armed Forces. Consistent with USERRA regulations (20 CFR 1002.57), service in the uniformed services would include full-time National Guard duty under Federal authority, but not National Guard service under authority of State law, which is not considered to be service in the uniformed services for purposes of these provisions. As explained in 20 CFR 1002.57 of the USERRA regulations:

The National Guard has a dual status. It is a Reserve component of the Army, or, in the case of the Air National Guard, of the Air Force. Simultaneously, it is a State military force subject to call-up by the State Governor for duty not subject to Federal control, such as emergency duty in cases of floods or riots. National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA.

In addition, the regulations would specify that qualifying service must be for more than 30 consecutive days under a call or order to active duty of more than 30 consecutive days. This would exclude shorter periods of Reserve and National Guard service from being added together to trigger this provision.

Readmission Procedures

Section 668.18(c) would list the statutory conditions under which an institution must readmit a servicemember. An institution would be required to designate one or more offices for the purpose of receiving advance notice from students of their absence from the institution necessitated by service in the uniformed services, and notice from students of an intent to return to the institution to ease administrative burden for institutions and to assist students in directing their notice to the appropriate individuals.

Also, consistent with USERRA regulations (20 CFR 1002.85), to ease administrative burden for institutions, a student would have to provide notice that he or she is leaving as far in advance as is reasonable under the circumstances. However, also consistent with USERRA regulations (20 CFR 1002.85 and 1002.88), to ensure that a student's advance notice is not subject to unreasonable requirements by an institution: (1) Such notice would not need to follow any particular format; (2) an institution would have to judge the timeliness of submission by the facts of a particular case; and (3) a student would not have to indicate as part of the notice whether the student intends to return to the institution. For the same reason, the regulations would also provide that a student's notice of intent to return may be provided orally or in writing

and would not need to follow any particular format (consistent with USERRA regulations section 1002.118).

Consistent with USERRA regulations (20 CFR 1002.100), Sec. 668.18(c)(1)(ii) would make clear that the cumulative length of all previous absences by an affected student from the institution would include only the time the student spends actually performing service in the uniformed services. This means that the time a servicemember spent away from the institution either before, after, or in-between periods of service in the uniformed services does not count toward the maximum amount of time the servicemember may spend in active service before losing the protections in this provision.

Documentation

The list of specific types of documentation was included to assist students and institutions in identifying documents that satisfy the statutory documentation requirements.