NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF WASHINGTON

In Re: CAROLYN E. JONES, Debtor(s).	No. 98-07724-W1G Adv. No. A00-00040-W1G
CAROLYN E. JONES, Plaintiff(s), vs. STATE OF WASHINGTON HIGHER EDUCATION COORDINATING BOARD; UNIVERSITY ACCOUNTING SYSTEMS, INC.; NORTHWEST EDUCATION LOAN ASSOCIATION; WCI FINANCIAL SERVICES, INC.; RC SERVICES; WASHINGTON STATE UNIVERSITY; SALLIE MAE; SALLIE MAE SERVICING CORPORATION; U.S. DEPARTMENT OF EDUCATION; UNITED STATES OF AMERICA; and STATE OF WASHINGTON, Defendant(s).	MEMORANDUM DECISION RE: WASHINGTON STATE UNIVERSITY'S MOTION TO DISMISS

FILED

AUG 15 2000

T. S. McGREGOR, CLERK
U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

THIS MATTER came on for hearing before the Honorable Patricia C. Williams on July 31, 2000 upon Washington State University's Motion to

ENTERED
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Dismiss for Lack of Subject Matter Jurisdiction and Sovereign Immunity. Plaintiff was represented by John Munding and defendant Washington State University was represented by John Salmon, III. The Court heard argument of counsel and was fully advised in the premises. The court now enters its Memorandum Decision.

This court's Memorandum Decision entered in *Huffine v. California State University-Chico, et al. (In re Huffine)*, No. A97-0012-W1B, (Bankr. E.D. Wash., March 10, 2000), concluded that in accordance with *Innes v. Kansas State Univ. (In re Innes)*, 184 F.3d 1275 (10th Cir. Kan. 1999), the Perkins Student Loan Program as a whole clearly required participating educational institutions to waive sovereign immunity in adversary proceedings alleging undue hardship. The Student Loan Participation Agreement between defendant Washington State University and the Department of Education reviewed in the *Huffine* decision is the exact Agreement applicable to the instant case. That Agreement included by reference 34 C.F.R. § 674.49.

Effective July 1, 2000, the Department of Education amended the language of 34 C.F.R. § 674.49 to address the waiver of sovereign immunity by educational institutions which may qualify for such immunity. 34 C.F.R. § 674.49, as changed by the addition of the highlighted language, now reads as follows:

> (1) The institution must use due diligence and **may assert any defense consistent with its status under applicable law to avoid discharge of the loan.** The institution must follow the procedures in this paragraph to respond to a complaint for a determination of dischargeability under 11 U.S.C. 523(a)(8) on the ground that repayment of the loan would impose an undue hardship on the borrower and his or her dependents, **unless discharge would be more effectively opposed by avoiding that action.**

The comments of the Department concerning this issue of waiver of sovereign immunity appear at 64 Fed. Reg. 58,307 (1999):

> . . . Recently, some State institutions have responded to undue hardship complaints by asserting that sovereign immunity barred relief on these claims in bankruptcy proceedings. We intend the proposed amendment to make clear that every institution must use due diligence to oppose discharge, but that State institutions may do so - if they wish - by asserting sovereign immunity as a defense to an undue hardship complaint. Unfortunately, some courts misconstrue Department regulations to bar State institutions from asserting sovereign immunity in these circumstances. We intend this amendment as an authoritative explanation of the meaning of the Federal Perkins Loan regulations and Program Participation Agreement on this due diligence obligation.

The federal agency charged with the duty to administer a federal student loan program has now clarified its original intention in promulgating 34 C.F.R. § 674.49 and amended the language of the regulation to more clearly express its original intention. Construction of a regulation by the agency which promulgated it and which is charged with its administration is entitled to substantial weight. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994). The amended language of 34 C.F.R. § 674.49 and the comments explaining those amendments indicate that, at least in the opinion of the federal agency administering student loan participation agreements, education institutions are not necessarily waiving their sovereign immunity as the institution ". . . may assert any defense consistent with its status under applicable law to avoid discharge . . . ." With this language added to the regulation and the agency's construction of that language, it is no longer clear that an education institution waives its sovereign immunity by participating in the Perkins Student Loan Program. A waiver of sovereign immunity must be clear and

unequivocal. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999). The clarity of intention found by the *Innes* and *Huffine* decisions, *supra*, can no longer be said to exist. Consequently, Washington State University's Motion to Dismiss on the basis of sovereign immunity is **GRANTED**.

The Clerk of Court is directed to file this Memorandum Decision and provide copies to counsel.

DATED this 15th day of August, 2000.

PATRICIA C. WILLIAMS, Bankruptcy Judge