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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), )

MEMORANDUM DECISION RE:  
WASHINGTON STATE UNIVERSITY'S  
MOTION TO DISMISS

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). )

**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

MEMORANDUM DECISION RE: . . . - 1

ENTERED  
AUG 15 *FE*

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

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

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

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

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


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

16           The federal agency charged with the duty to administer a federal  
17 student loan program has now clarified its original intention in  
18 promulgating 34 C.F.R. § 674.49 and amended the language of the  
19 regulation to more clearly express its original intention. Construction  
20 of a regulation by the agency which promulgated it and which is charged  
21 with its administration is entitled to substantial weight. *Thomas*  
22 *Jefferson Univ. v. Shalala*, 512 U.S. 504, 114 S. Ct. 2381, 129 L. Ed. 2d  
23 405 (1994). The amended language of 34 C.F.R. § 674.49 and the comments  
24 explaining those amendments indicate that, at least in the opinion of  
25 the federal agency administering student loan participation agreements,  
26 education institutions are not necessarily waiving their sovereign  
27 immunity as the institution ". . . may assert any defense consistent  
28 with its status under applicable law to avoid discharge . . . ." With  
29 this language added to the regulation and the agency's construction of  
30 that language, it is no longer clear that an education institution  
31 waives its sovereign immunity by participating in the Perkins Student  
32 Loan Program. A waiver of sovereign immunity must be clear and

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

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

9 DATED this 15<sup>th</sup> day of August, 2000.

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12 PATRICIA C. WILLIAMS, Bankruptcy Judge  
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