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Readmission of Servicemembers to Postsecondary Institutions - Details Regarding the Department of Education (DOE) Regulations Implementing the New Law on Mandatory Readmission of Mobilized Reserve and Guard and Active Duty Students

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1.1.2.4 - Students

Background

On August 14, 2008, President George W. Bush signed into law the Higher Education Opportunity Act of 2008, Public Law 110-315. Section 487 of that Act accords the postsecondary education student whose education was interrupted by voluntary or involuntary military service the right to readmission to the educational program. These new requirements apply to any educational institution that participates in title IV federal student financial aid programs, including Pell Grants, Stafford Loans, and the Federal Work-Study Program.

This new law applies to the student who is a member of the National Guard or Reserve and who is called to active duty involuntarily or volunteers for an extended period of active duty. The law also applies to the student who starts an educational program (often part-time) while on active duty and who then must interrupt the educational program because of a deployment or a Permanent Change of Station (PCS). The law also applies to a student who interrupts his or her education to enlist in a regular component of the armed forces. Such a person is entitled, as a matter of federal law, to resume the educational program later, either during or after the person's active duty service.

This new law went into effect on August 14, 2008 (the date of enactment) and is codified under [20 United States Code \(U.S.C.\) Section 1091c](#). I invite the reader's attention to [Readmission Requirements for Servicemembers, Public Law 110-315 Section 487](#).

The Department of Education (DOE) has published regulations that further implement the statute. The regulations, [title 34 of the Code of Federal Regulations, at section 668.18 \(34 C.F.R. 668.18\)](#), went into effect July 1, 2010. Until the regulations were made effective, each educational institution was expected to make a good faith effort to comply with the language of the statute. For anyone interested in the discussion on the comments DOE received from the public that were considered in writing 5 C.F.R. section 668.18, see page 55905 of the [October 29, 2009 Federal Register](#).

It should be noted that the subject statute and its implementing regulations are heavily based on the [Uniformed Services Employment and Reemployment Rights Act \(USERRA\)](#), a federal statute that protects servicemembers' and veterans' civilian employment rights. Among other things,

under certain conditions, USERRA requires employers to put individuals back to work in their civilian jobs after military service. USERRA also protects service members from discrimination in the workplace based on their military service or affiliation. The new law regarding institutions of higher education affords similar protections with respect to educational programs.

General Overview of Higher Education Readmission Requirements

These provisions require an institution of higher education to readmit a servicemember with the same academic status as the student had when he or she last attended the institution. The regulations provide 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, the institution does not increase the tuition and fee charges above the prior amount the student was or would have been assessed for the academic year when the student left the institution, unless there are sufficient veterans’ education benefits or other servicemember education benefits to pay the increased amount of those tuition and fee charges;
- 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.

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, the institution must 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 is no reasonable way for the institution to prepare the student to resume the program or to enable the student to complete the program.

Frequently Asked Questions, Answers, and More Specific Details

What is the purpose of this new law and the implementing regulations?

The purpose of this law is to minimize the disruption to the lives of persons performing service in the uniformed services, by allowing a student to return to an educational institution without penalty for having left because of such service. The educational institution must promptly readmit the former student who meets this law's eligibility criteria, and denying readmission is a violation of federal law.

What is the relationship between this new law and state laws and college or university policies?

This new law is a floor and not a ceiling on the rights of the student whose education is interrupted by voluntary or involuntary military service. A state law or a university policy could give the student greater or additional rights, but it cannot take away rights conferred by this federal law. This is similar to the relationship between USERRA and state laws or employer policies.

Under the United States Constitution, federal law trumps conflicting state law. Article VI, Clause 2, commonly called the "Supremacy Clause." If an individual meets the eligibility criteria for reinstatement to an educational program, the institution must reinstate the individual, even if doing so violates state law or the institution's own policies.

For example, let us assume that Joe Smith is a student at the XYZ Community College when he is called to the colors, as a member of the National Guard. Joe had just completed the first year of a two-year program. He completes his year on active duty and then applies for reinstatement at the college. State law limits the college's enrollment to 20,000 students, and the college almost always operates at capacity, with several hundred additional students on the waiting list. Joe applies for readmission at the start of the 2011-12 academic year, and the college tells him that he must wait at least one semester, because the 20,000 enrollment limit has been met. This action violates federal law—Smith has the right to readmission because he meets the requirements of federal law. It is the college's choice—comply with federal law by making an exception to the state law limit, or displace another student to make room for Smith.

To which institutions does this apply?

This law applies to any postsecondary institution that participates in a Title IV, Higher Education Act (HEA) student financial aid programs. This includes Pell Grants, Federal Supplemental Educational Opportunity Grants, Federal Work-Study, Federal Stafford Loans, Federal PLUS Loans, Federal Perkins Loans, Academic Competiveness Grants, National Science and Mathematics Access to Retain Talent (SMART) Grants, Teacher Education Assistance for College and Higher Education (TEACH) Grants, and the Leveraging Educational Assistance Partnership Program.

While I was away on active duty, my college was bought out by another college. Does that matter?

If the institution changed ownership and Title IV participation continued, these rules continue to apply

To whom does this new law apply?

This new law applies to anyone who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform *service in the uniformed services* and was admitted to the institution, then left the institution to perform such service. The law applies even if the individual had not yet begun attending the institution at the time he or she was called to the colors.

Service in the uniformed services means voluntary or involuntary service in the Armed Forces, including the National Guard or Reserve, on active duty, active duty for training, or full-time National Guard duty under Federal authority, for more than 30 consecutive days under a call or order to active duty of more than 30 consecutive days.

What is Not Covered?

The law does not apply to National Guard service under state authority, and the law does not govern an educational institution's policies about absences from class to attend inactive duty training (drill weekends).

What does *promptly readmit* mean?

Promptly readmit means that an institution must readmit the student into the next class or classes in the student's program beginning after the student provides notice of his or her intent to reenroll, unless the student requests a later date of readmission or unusual circumstances require the institution to admit the student at a later date.

For example, a later date of admission would be justified if 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.

What does it mean to readmit a student with the *same academic status*?

The educational institution must readmit the individual to the same *program*, unless the individual requests or agrees to admission to another program. If the institution no longer offers that program, the institution must readmit the returning student to the program that is most similar to the program he or she left for service.

The institution must readmit the student to the same *enrollment status* (e.g., full-time), unless student requests or agrees to a different enrollment status.

The institution must readmit the student with the same *number of credit hours or clock hours* completed, unless the student is admitted to different program and the hours are not transferable.

The institution must readmit the student with same *academic standing* (e.g., satisfactory academic progress status)

For the first academic year after returning to school, the institution must charge same *tuition and fee charges as when he or she left, unless* military benefits will pay increase. Under no circumstances may the institution charge more than it charges other students. For subsequent academic years or a different program, the institution must charge the returning veteran no more than it charges other students in the same program.

What if the student is not prepared to resume the program where he or she left off, or will not be able to complete the program?

The institution must make *reasonable efforts* at no extra cost to help the student become prepared, or to enable the student to complete the program including, but not limited to, providing refresher courses and/or allowing a student to retake a pretest.

What are *reasonable efforts*?

Reasonable efforts are actions that do not place an *undue hardship* on the institution. An *undue hardship* exists if an action requires significant difficulty or expense when considered in light of the overall financial resources of the institution and the impact otherwise of such action on the operation of the institution.

When is an institution not required to readmit a service member?

The institution is not required to readmit the student if the institution determines, after reasonable efforts, that the student is not prepared to resume the program at the point where he or she left off or is unable to complete the program, and if the institution determines that there are no reasonable efforts that it can take to prepare the student to resume at the point where he or she left off or to enable the student to complete the program.

The institution carries 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.

What are the conditions for the right to readmission?

An otherwise eligible servicemember qualifies for the right to readmission if the school is given notice of absence for service, the cumulative length of absences does not exceed five years, and the student gives notice of his or her intent to return to the institution.

Condition 1: Notice of absence for service.

Notice to the education institution may be given by the student or by an *appropriate officer* of the Armed Forces or official of the Department of Defense (DOD). An *appropriate officer* is a commissioned, warrant, or noncommissioned officer authorized to give such notice by the military

service concerned. The notice may be oral or written and must be given to the office designated by the school.

The notice should be provided as far in advance as is reasonable. Advance notice *not required if precluded by military necessity* (e.g., 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).

If the student failed to give advance notice and such notice was not precluded by military necessity, the student may submit an attestation when seeking readmission that the student performed service that necessitated the student's absence.

An educational institution must designate one or more offices that a student may contact to provide notification of absence due to service and notice of intent to return.

An institution may not require that the notice of absence for service follow any particular format. An institution may not establish a rule for timeliness (e.g., a "bright line" deadline for submission); timeliness must be determined by the facts in a particular case. The notice does not need to indicate whether the student intends to return to the institution.

Condition 2: Five-year cumulative length of absences

The five-year limit includes only the time the student spends actually performing service in the uniformed services. A period of absence from the institution before, after, or in between performing service does not count (e.g., the period between completing service and returning to the institution). *All* involuntary service and *some* voluntary service are exempted from the computation of the five-year limit. The exemptions from the five-year limit are identical to USERRA's exemptions from its five-year limit. Please see Law Review 201, available at www.roa.org/law_review.

Condition 3: Notice of intent to return to the educational institution.

The notice of intent to return may be oral or written and must be given to the office designated by the school. The notice must be provided not later than three years after the completion of the period of service. For 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, the notice must be provided 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 applicable period does not automatically forfeit eligibility for readmission to the institution, but the student is subject to the institution's established leave of absence policy and general practices.

A service member who provides notice of intent to return must provide documentation to establish that he or she has not exceeded the cumulative 5-year limit on absences from the

institution and that his or her eligibility for readmission has not been terminated. See Attachment 1.

The types of documents necessary will vary from case to case. Not all of these documents are available or necessary in every instance. An institution may not delay or attempt to avoid readmission of a student by demanding documentation that does not exist or is not readily available at the time of readmission.

An institution must designate one or more offices that a student may contact to provide notification of absence due to service and notice of intent to return. An institution may not require that the notice of intent to return follow any particular format.

Termination of readmission eligibility

A student's eligibility for readmission terminates upon the occurrence of:

1. A dishonorable or bad conduct discharge
2. A dismissal of a commissioned officer permitted under section 1161(a) of Title 10 USC by sentence of a general court martial, in commutation of a sentence of a general court-martial, or , in time of war, by order of the President
3. A dropping of a commissioned officer from the rolls pursuant to section 1161(b), Title 10 USC due to absence without authority for at least three months, separation by reason of a sentence to confinement adjudged by a court-martial, or a sentence to confinement in a Federal or State penitentiary or correctional institution

ATTACHMENT ONE: DOCUMENTATION LIST

Documents that satisfy the requirement that a student seeking readmission must provide documentation to establish that (1) he or she has not exceeded the cumulative 5-year limit on absences from the institution; and (2) his or her eligibility for readmission has not been terminated, include, but are not limited to:

1. DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty.
2. Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service.
3. Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority.
4. Certificate of completion from military training school.
5. Discharge certificate showing character of service.
6. Copy of extracts from payroll documents showing periods of service.
7. Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation

WHERE TO GO FOR ASSISTANCE:

If you believe an educational institution is in violation of the law and its implementing regulation, contact Ms. Wendy Macias, Office of Postsecondary Education, U.S. Department of Education, 202-502-7526, wendy.macias@ed.gov. For some months or years, it will be necessary for DOE to educate institutions about this new law.

[1] CDR Johnson served on active duty for more than 20 years in the Navy Judge Advocate General's Corps, including many years as the Staff Judge Advocate of the Naval Reserve Recruiting Command. He expresses his appreciation to Ms. Wendy Macias (Office of Postsecondary Education, U.S. Department of Education) and Steve Finley, Esq. (Office of the General Counsel, U.S. Department of Education) for their assistance to him in writing this article. CDR Johnson can be reached at wayneljohnson@hotmail.com.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) at <mailto:samwright50@yahoo.com>.

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Please see Law Review 19027 (March 2019) for new information on this topic.