MEMORANDUM

Date: February 3, 2016

To: U.S. Department of Education

From: Eileen Connor and Noah Zinner

Issue: Closed School and Unpaid Refund Discharge Regulatory Proposals

The memo describes four proposals:

(1) Closed School Discharge Applications for Students: Amend the Direct Loan and FFEL regulations to require the Department to send discharge applications and information to closed school borrowers at least twice: (a) immediately after a school closes, as currently required by the regulations, and (b) with the first monthly repayment statement, which is not currently required.

(2) Information for Students at Schools that Are Completing Programs Before Closing: For schools that plan on closing but intend to allow students to complete all their programs prior to closure, amend the Direct Loan and FFEL regulations to require that schools disclose to students: (a) the expected date of closure, and (b) information about their right to a discharge if they withdraw within 120 days of school closure. If the actual closure date is later than the expected and disclosed date, the regulations should be amended to extend the 120-day look back period by the number of days between the expected and actual date of closure.

(3) Information for Students When Teach-Outs Are Offered After Closure: Amend the FFEL and Direct Loan regulations to provide that whenever a school campus closes and a teach-out is offered at a different campus or school, the closing school must provide to students a closed school discharge application and a disclosure that the student may opt out of the teach-out and seek a discharge.

(4) Department Review of Closed School and Unpaid Refund Discharge Denials: Amend the FFEL Loan regulations to provide for Department review of guaranty agency denials of closed school and unpaid refund discharge applications.

Proposal No. (1): **Amend the Direct Loan and FFEL regulations to require the Department to provide closed school discharge applications and information to potentially eligible borrowers with their first monthly repayment statement after their school has closed.**

Legal services organizations have a constant influx of clients whose schools closed five to thirty years ago and who had no idea that they are eligible for a discharge. The Department has acknowledged that in the past it has received small percentages of closed school loan discharge applications from borrowers who qualify for discharges. Undersecretary Mitchell stated that the percentage of eligible borrowers who have sought closed school discharges

has been around 6%.[1] Our experience suggests that this does not reflect lack of demand, but rather lack of outreach and information about available relief.

Currently, after a school closes and the Department confirms the date of the school's closure, the Department is required to mail discharge applications to borrowers who appear to have been enrolled at the time of the school's closure or to have withdrawn not more the 120 days prior to closure.[2] This often happens one to three months after the school has closed when the borrower may not be focused on his or her student loan repayment burden because he or she is in the grace period.

The Department could improve borrowers' awareness of their right to a closed school discharge by sending closed school discharge applications and information a second time, when the borrower enters repayment and receives his or her first monthly statement. If the information is included with the first monthly statement, borrowers are more likely to respond because they are obligated to start making payments. Given that the Department would have already identified all potentially eligible borrowers, a second mailing should not be overly burdensome for the Department or servicers.

Proposal No. (2): **For schools that plan on closing but intend to allow all students to complete their programs prior to closure, amend the Direct Loan and FFEL regulations to require schools to disclose to students the expected date of closure and information about their right to a discharge if they withdraw within 120 days of school closure. If the actual closure date is later than the expected and disclosed date, the regulations should be amended to extend the 120-day look back period by the number of days between the expected and actual date of closure.**

When schools announce that they are closing but plan on allowing all their students to first complete their programs, the schools currently have no obligation to inform their students about the expected date of closure or of their loan discharge rights. As a result, students who experience a deterioration in the level of instruction are hesitant to withdraw and in many cases do not know they have the right to withdraw. If they are aware of this right, they do not know when they can withdraw and be eligible for a closed school discharge.

To provide borrowers in this difficult situation with more choice about how to proceed with their higher education, the regulations should be amended to require that the school provide written disclosures to students. The regulation should state that whenever a school notifies the Department that it intends to close but to stay open long enough for students to complete their programs, it must provide a written notice, in a form approved by the Department, to students about the expected date of closure and their right to a discharge if they withdraw within 120 days prior to closure.

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[1] Paul Fain, Best of a Bad Situation?, www.InsideHigherEd.com (Dec. 9, 2014).
[2] 34 C.F.R. § 685.614(f).

Informing students in a failing school of their rights to closed school discharge and allowing them to exercise these rights demand that students rely on an expected date of closure when deciding whether or not to withdraw. Therefore, if the actual closure date is later than the expected date disclosed in the written notice, the regulations should provide that the 120-day look back period is extended by the number of days between the expected and actual date of closure.

Proposal No (3): **Amend the FFEL and Direct Loan regulations to provide that whenever a school campus closes and a teach-out is offered at a different campus or school, the closing school must provide to students a closed school discharge application and a disclosure that the student may opt out of the teach-out and seek a discharge.**

In some cases, after a school closes the students are offered a teach-out either at a different campus or at a different school. In most cases, students are not aware that they may choose to not participate in a teach-out and instead seek a closed school discharge.

For example, after Corinthian campuses closed in Florida, students were told that they could complete their programs at other Corinthian campuses. Some students had difficulty getting to these other campuses, but were not aware they had the option of seeking a discharge instead.

This problem could be addressed by amending the FFEL and Direct Loan regulations to require closing schools to provide students with a discharge application, along with a disclosure about their right to seek a discharge instead of participating in a teach-out. The regulations should require that this information be provided when students are first offered a teach-out.

Proposal No (4): **Amend the FFEL Loan regulations to provide for Department review of guaranty agency denials of unpaid refund and closed school discharge applications.**

FFEL borrowers whose loans are held by guaranty agencies should have the same right to challenge an erroneous unpaid refund or closed school discharge decision as Direct Loan and FFEL Loan borrowers whose loans are held by the Department. Current FFEL Loan regulations do not provide borrowers with any right to seek review of guaranty agency denials of closed school discharges.[3] In addition, although current FFEL Loan regulations provide borrowers with a right to seek review of guaranty agency denials of unpaid refund discharges, they may only seek review from the guaranty agency itself. Borrowers currently have no right to seek review from the Department.[4]

[3] 34 C.F.R. § 682.402(d).
[4] 34 C.F.R. § 682.402(l)(4)(vii).

Even when FFEL borrowers are able to get administrative review, unlike Direct Loan borrowers, their right to seek further review in court is not clear. The Administrative Procedure Act (APA) does not provide for judicial review of decisions by private, non-governmental entities such as guaranty agencies. Nor is there any explicit right to judicial review of guaranty agency decisions in the Higher Education Act.

As a result, FFEL borrowers whose loans are held by guaranty agencies have no way to challenge an erroneous unpaid refund or closed school discharge decision from a guaranty agency. Only Direct Loan and FFEL Loan borrowers whose loans are held by the Department may seek judicial review of administrative unpaid refund or closed school discharge denials. This is arbitrary and a denial of borrower due process.

The Department can rectify this by amending the FFEL regulations to provide borrowers with a right to seek review from the Department of guaranty agency decisions on unpaid refund and closed school discharges. Then, a borrower may seek reversal of an erroneous guaranty agency decision by the Department or, if the Department affirms a decision, the borrower may seek judicial review under the APA.

This proposal aligns with the Department's position on other types of guaranty agency decisions. The regulations currently allow borrowers to seek the Department's review of guaranty agency false certification discharge denials.[5] In addition, the Department has acknowledged due process issues for borrowers who cannot seek judicial review of guaranty agency administrative wage garnishment decisions.[6]

[5] 34 C.F.R. § 668.402(e)(11).

[6] *See* U.S. Dep't of Educ. Memorandum of Points and Authorities Supporting Motion to Dismiss, Hutchins v. U.S. Dep't of Educ., CV-F-02-6256-OWW-DLB (E.D. Cal. filed Apr. 25, 2003) (Dep't acknowledged due process problems and supported implying a private right of action under HEA for judicial review of guaranty agency administrative wage garnishment decisions); 78 Fed. Reg. 45,618, 45,645 (July 29, 2013) (Dep't stated that guaranty agency wage garnishment decisions are subject to judicial review when it amended the FFEL regulations to require a summary record of the garnishment hearing process).