

MEMORANDUM

Date: February 3, 2016

To: U.S. Department of Education

From: Noah Zinner

Issue: Non-Native Speakers of English – Ability to Benefit Testing and False Certification Discharges

This memo describes the following proposals:

- (1) Certification Requirements for Schools Enrolling Students Without English Language Proficiency: Amend the Direct Loan regulations to require schools that enroll non-native English speakers without English language proficiency into programs with instruction, instructional materials, or exams in English to certify the student's ability to benefit from the program.
- (2) False Certification Discharges for Non-English Speaking Borrowers Without English Language Proficiency: Clarify discharge eligibility for all Direct and FFEL loan non-English proficient borrowers whose schools falsely certified their ability to benefit by enrolling them in programs with instruction, instructional materials, or exams in English.

Background: During the public negotiated rulemaking, I raised the issue of amending the false certification regulations to establish and/or clarify the right of a student to seek discharge of a federal student loan under 34 C.F.R. § 685.215(a)(1)(i) (for Direct Loans) and 34 C.F.R. §682.402(e)(1)(i)(A) (for FFEL Loans), when a school has falsely certified that a non-native English-speaking student without English language proficiency has an ability to benefit from a Title IV program taught in English. The purpose of these requested amendments is not to restrict student access to programs that legitimately serve non-native English speaking communities, nor is it to create unnecessary barriers for students who speak English fluently in addition to their native language or languages. Rather, amendments are needed to support non-English speaking students who are recruited by and enrolled in institutions that lack the resources and will to educate them.

The Department has already recognized that schools should ensure that non-native English speakers without English proficiency are able to benefit from programs taught in English before enrolling them. At present, the Department's rules require ability-to-benefit (ATB) tests for a "non-native speaker of English," defined as a "person whose first language is not English and who is not fluent in English." 34 C.F.R. §§ 668.141(a), 668.142. The ATB test for such students must meet the requirements of 34 C.F.R. § 668.153 (included in Attachment A) and, by reference, 34 C.F.R. §§ 668.146 and 668.148(b).

As written, the Department's regulations only apply to "non-native English-speaking students" (I will use this term under the Department's own definition from here forward to signify students who additionally lack English-language proficiency) who do not have "a high school diploma or its recognized equivalent prior to enrollment" and who otherwise qualify for federal financial aid. 34 C.F.R. §§ 668.32(e) and 668.141(a). This presumes that those with a high school diploma or recognized equivalent have an ability to benefit from an educational program, even where the school provides no instruction in the language in which the student is fluent. It is a presumption that makes no sense given the real-life experiences of non-English speaking students, including those with high school diplomas and GEDs received in other languages, who are targeted for recruitment into schools where they have no practical ability to benefit from instruction they cannot understand. Under the current regulations these students may not be eligible for a false certification discharge of their federal student loans even where the school provides no instruction, instructional materials, or exams in the student's language.

We and other legal services organizations have regularly encountered former students, including those who earned high school diplomas in their native countries or GEDs in Spanish, but whose schools falsely certified their ability to benefit. These schools represented that the students would receive instruction in their native language or that the students' lack of English-language proficiency would otherwise be accommodated by the school. In one case, several Spanish-speaking students enrolled in a cosmetology school that featured a prominent sign that read "Se Habla Espanol" only to later learn that no Spanish-speaking instruction would be provided. In another case, the instruction was offered in Spanish, but the study materials and tests were all in English. As a result, these students had difficulty learning the skills necessary for employment and could not pass the tests without help from instructors and other students. Often, these students do not withdraw from their programs because they have no idea they may be entitled to a refund or the school misrepresents that they cannot get a refund. None of these students were able to benefit from their educations.

The Department should discourage unprincipled schools from targeting this vulnerable population by requiring schools to directly certify that a non-native English speaking student has an ability to benefit from the program. The required certification should, without exception, be on the basis that a non-native English speaking student can benefit from the program because: (1) the institution provides her or him complete instruction, instructional materials, and exams in her or his native language, (2) the institution provides specific and sufficient accommodation of a student's lack of English language proficiency, such as an approved ESL component, or (3) the student is English-language proficient to the level of instruction. In addition, the Department should provide discharge relief to non-native speaker of English whose ability to benefit was falsely certified.

Proposal No. 1: Amend the Direct Loan regulations to require schools that enroll non-native English speakers without English language proficiency into programs with instruction, instructional materials, or exams in English to certify the student's ability to benefit from the program.

- The Department should amend 34 C.F.R. § 668.32 to provide that a student without English fluency who enrolls in a program with instruction, instructional materials or exams in English is eligible for Title IV funding if, before enrolling, he or she passes an English proficiency exam approved by the Department. The Department should require exams and passing scores that demonstrate a student's oral and written English proficiency at an appropriate postsecondary level for the program's subject matter. This should be required of students without English fluency regardless of whether the student has a high school diploma or equivalent.
- The Department should also amend sections 34 C.F.R. §§ 668.141, 668.153, 668.146 and 668.148 to require appropriate ability to benefit testing in all relevant situations and to specify how it will approve English proficiency exams, levels of proficiency required, and other test requirements. On request, I did some research regarding English-language proficiency exams in higher education, which is included in Attachment B, but the Department should seek input from qualified experts in designing requirements that ensure that non-native English speaking students can benefit from programs that accommodate a lack of English proficiency, while ensuring that they are not targeted by schools that do not.
- There may be circumstances when testing is unnecessary, such as for bilingual education programs (where both the instruction and all the materials are in English and the student's native language) or where the school provides appropriate language accommodations. This would require further information about whether the school currently provides effective language accommodation or bilingual programs.

Proposal No. 2: Expand discharge eligibility to Direct and FFEL loan non-English speaking borrowers whose schools falsely certified their ability to benefit by enrolling them in programs with instruction, instructional materials, or exams in English.

All Direct and FFEL loan borrowers who lacked oral or written English proficiency at the time they enrolled in a program with English instruction, instructional materials, or exams did not have the ability to benefit from their programs. Yet, not all of these borrowers are currently clearly eligible for false certification discharges.

Borrowers who did not have a high school diploma or recognized equivalent prior to enrollment and enrolled between July 1, 1996 and July 1, 2012 should currently be eligible for discharges. The FFEL and Direct Loan regulations should be amended to also provide discharges for non-English speaking borrowers who:

- Had high school diplomas or an equivalent before they enrolled;
- Lacked a high school diploma and enrolled before July 1, 1996¹ and on or after July 1, 2012; or
- Enroll after July 1, 2017.

¹ This is the date on which the English-proficiency ability-to-benefit regulations went into effect. 60 Fed. Reg. 61830 (1996).

Attachment A

34 C.F.R. § 668.153. Administration of tests for individuals whose native language is not English or for individuals with disabilities.

(a) Individuals whose native language is not English. For an individual whose native language is not English and who is not fluent in English, the institution must use the following tests, as applicable:

(1) If the individual is enrolled or plans to enroll in a program conducted entirely in his or her native language, the individual must take a test approved under §§ 668.146 and 668.148(a)(1).

(2) If the individual is enrolled or plans to enroll in a program that is taught in English with an ESL component, the individual must take an English language proficiency assessment approved under § 668.148(b) and, before beginning the portion of the program taught in English, a test approved under § 668.146.

(3) If the individual is enrolled or plans to enroll in a program that is taught in English without an ESL component, or the individual does not enroll in any ESL component offered, the individual must take a test in English approved under § 668.146.

(4) If the individual enrolls in an ESL program, the individual must take an ESL test approved under § 668.148(b).

(5) If the individual enrolls or plans to enroll in a program that is taught in the student's native language that either has an ESL component or a portion of the program will be taught in English, the individual must take an English proficiency test approved under § 668.148(b) prior to beginning the portion of the program taught in English.

Attachment B

Existing English-language Proficiency Exams:

The Department should solicit opinions and advice from recognized experts in the field of language proficiency testing before implementing specific testing protocols for determining English-language proficiency for programs taught in English. However, there are analogous guidelines already in place for many Title IV institutions, linking fluency requirements to the level of instruction.

Probably the most analogous context is that of international students applying to admission at United States colleges and universities. Most U.S. colleges and universities require international students for whom English is not their native language to take an English Language proficiency test before admission. The most common tests for English language ability are the Test of English as a Foreign Language (TOEFL) (<http://www.ets.org/toefl>), the International English Language Testing System (IELTS) (<http://www.ielts.org/>), the Michigan English Language Assessment Battery (MELAB) (<http://www.cambridgemichigan.org/institutions/products-services/tests/proficiency-certification/melab/>), and the Pearson Test of English (PTE) (<http://pearsonpte.com/>). A good critical overview of the use of these tests for admissions and other purposes at "high-research" universities is contained in the dissertation paper K. Kokhan, Examination of the Appropriateness of Using Standardized Test Scores for English as a Second Language (ESL) Placement, Dissertation, University of Illinois at Urbana-Champaign (2014), available at https://www.ideals.illinois.edu/bitstream/handle/2142/50752/Kateryna_Kokhan.pdf?sequence=1.

The TOEFL test was developed by the Educational Testing Service (ETS), the same company that developed the SAT and GRE. In 2005, ETS developed an internet based TOEFL (iBT) that has become more commonly used by colleges. See <https://www.ets.org/toefl/ibt/about>. ETS says the TOEFL iBT "measures your ability to use and understand English at the university level. And it evaluates how well you combine your listening, reading, speaking and writing skills to perform academic tasks." *Id.* Several studies have concluded that the TOEFL provides a valid measure of English language proficiency. See studies listed at <https://www.ets.org/toefl/research/topics/validity>. The current cost to take the test in the United States is \$190. See <http://www.ets.org/toefl/ibt/about/fees/> (click through to location). Here is an overview of the TOEFL iBT format:

Section	Time Limit	Questions	Tasks
Reading	60-100	36-70	Read 3-5 passages from academic texts

	minutes	questions	and answer questions.
Listening	60-90 minutes	34-51 questions	Express an opinion on a familiar topic; speak based on reading and listening tasks.
Break	10 minutes	-	-
Speaking	20 minutes	6 tasks	Express an opinion on a familiar topic; speak based on reading and listening tasks.
Writing	50 minutes	2 tasks	Write essay responses based on reading and listening tasks; support an opinion in writing.

There do not appear to be uniform standards as to what constitutes "English language proficiency" in the context of higher education based on these tests or other measures. Although it appears that the vast majority of the U.S. colleges and universities accept TOEFL scores to demonstrate English language proficiency, and most also accept scores from the IELTS, colleges differ significantly on their minimum score requirements for admission eligibility. See Kokhan dissertation at 18-19 (12-13 of internal document). The ETS explains on its website that "There is no passing or failing *TOEFL*® score; individual higher education institutions and agencies set their own score requirements. TOEFL scores are valid for two years after the test date and there is no limit to the number of times you can take the test, but you cannot take it more than once in a 12-day period." <https://www.ets.org/toefl/ibt/scores/>.

As an example, California State University at Long Beach has the following English language proficiency requirement:

All undergraduate applicants whose native language is not English and who have not attended schools at the secondary level or above for at least three years full time where English is the principal language of instruction must present **a score of 61 (iBt) or above on the Test of English as a Foreign Language (TOEFL)**. Some majors may require a score higher than 61. Some majors and some campuses may require a higher score. A few colleges may also use alternative methods of assessing English fluency: Pearson Test of English Academic (PTE Academic), the International English Language Testing System (IELTS), and the International Test of English Proficiency (ITEP).

http://web.csulb.edu/divisions/aa/catalog/current/admissions/test_requirements.html.

Similarly, the University of California requirement is:

If you've completed all your secondary school/high school in a country where English is not the language of instruction, you can demonstrate proficiency by taking one of these exams and earning the required scores:

Test of English as a Foreign Language (TOEFL) examination: Accepted with **an 80 or better for the Internet-based test** and 550 or better for the paper-based test

International English Language Testing System (IELTS) examination (academic modules): Accepted with a 6.5 or better band score (academic modules)

Keep in mind: A UC campus may require a score higher than the minimum for admission selection.

<http://admission.universityofcalifornia.edu/international/toefl-ielts-exams/>.

Los Angeles Trade-Tech, a community college, requires the following from international students:

Submit proof of English proficiency in the form of an official [TOEFL](#) score report sent directly from [Educational Testing Services \(ETS\)](#). The minimum score requirements are as follows: paper based = 450, computer based = 133, **and internet based = 45**. In lieu of the TOEFL, you may also submit the official results of an [International English Language Test Skills \(IELTS\)](#) report with a minimum 5 band score, or the [Step Eiken](#) with a minimum 2A grade level. Test scores are valid for 2 years. This language requirement is waived if you are from a country that uses English as the primary language in its educational system. It is also waived if you are currently studying at a college or university in the U.S. with a valid I-20.

<http://college.lattc.edu/isc/admissions-requirements/>.

Some schools also accept prior academic experience in the United States (generally a bachelor's degree where the student is applying for graduate study), or successful completion of an institutional English language program prior to applying for admission. See id. at 14-15 (7-8 of internal document). Some universities waive the testing requirement for U.S. citizens and permanent residents. See id. at 16 (9 of internal document).

In sum, while there are widely accepted instruments for measuring English language proficiency at the college level, such as the TOEFL, there do not appear to generally accepted specific standards (i.e., minimum test scores) for proficiency, with different colleges applying different standards.