

MEMORANDUM

Date: March 10, 2016

To: U.S. Department of Education

From: Eileen Connor and Noah Zinner, Negotiators for Legal Assistance Organizations That Represent Consumers

Re: Issue Paper 4 –Additional False Certification Discharge Proposals on Establishing a Fair Review Process for Borrowers and on Group Relief.

In a February 3, 2016 memorandum, we proposed amendments to Department regulations that would make false certification relief fair and accessible to borrowers. The Department, though it has stated that it is still considering amendments to its false certification regulations, has yet to propose any specific language for two central components of such changes. We therefore respectfully ask the Department to make additional modifications and additions to its regulations for the below issues, and propose specific language to this end:

- 1) Fair Evidentiary Burdens for Borrowers Seeking Discharge Based on Ability-to-Benefit and Other High-School Diploma and Equivalent Fraud: In our February 3, 2016 memorandum, we asked the Department to make common-sense amendments to Direct Loan and FFEL regulations in order to make the process fair to borrowers. (See Proposal 3 in attached Feb. 3, 2016 memo.) The Department has yet to propose language on this issue.
- 2) Specify the Department's Use of Its Group Discharge Authority for False Certification Under Existing Regulation: In our February 3, 2016 memorandum, we asked the Department to amend Direct Loan and FFEL regulations to ensure that it uses its already existing group discharge authority for false certification. (See Proposal 4 in attached Feb. 3, 2016 memo.) The Department has yet to propose language on this issue.

We look forward to discussing these proposals with you in more detail at the final negotiated rulemaking session and refer you to our February 3 memoranda for further explanation of the pressing need for further amendment to the rules on these issues. We have included our February 3, 2016 memorandum for your additional review.

Our proposals are in red and the Department's Session 2 proposals are in blue.

A. Additional explanation of the need for amendments establishing fair evidentiary burdens for borrowers:

As we explained in detail in Part 3 of our February 3 memo, the Department's current procedure for review of false certification applications is heavily weighted against borrowers. Borrowers rarely are able to provide evidence beyond their own sworn statements to support their application. Compounding the problem, while the Department demands that borrowers seeking discharge submit an application under penalty of perjury, it treats these sworn statements as meritless unless supported by specific findings on ability-to-benefit or other high school diploma or equivalent violations from

government agencies and regulators.¹ In support of our February 3 explanation of the need to amend the evidentiary standards so that deserving borrowers have access to discharge relief, we give two recent examples from the legal services community.

- First, a former Heald College student submitted a false certification application stating, under penalty of perjury, that he had neither a high school diploma nor a GED before or after he enrolled in 2007, and that Heald had not given him any test to determine whether he could benefit from Heald’s medical assistant program. He was never able to find a job in his field and Heald—a for-profit purchased by Corinthian Colleges, Inc. in 2009—clearly did not prepare him to do so. His application also provided the name and contact information for a witness. The student’s servicer denied his application without any indication that it had investigated his claims, stating simply that “[d]uring our research ECMC was unable to locate any violations by Heald College regarding ability to benefit standards. Therefore your application is denied and the liability remains in force.”
- A second student, who attended the now defunct Academy of Healing Arts in Las Vegas in 2007, submitted a false certification application that, along with the required statements and signatures, included the following explanation:

“I called the Academy of Healing Arts in Las Vegas after seeing a television advertisement that said that it accepted students without a high-school diploma or GED. The advertisement said that the school would help me get my GED, which was the main reason I was interested. When I spoke to someone at the school to find out more information they repeated this claim. The school never offered any instruction or assistance towards a GED to me or, to my knowledge, any other student while I was there. They told me they would get a GED teacher but never did.”

The former student’s false certification application was denied because the reviewer was unable to locate any violations by the school regarding ability-to-benefit standards. After her denial, the borrower discovered through an online search that the Department had itself found that the school, which specifically marketed to students without high school diplomas or GEDs, had falsified records related to the high school credentials of its students.²

Under the Department’s unattainable current standards, and in light of borrowers’ experiences, it is clear that the Department will need to amend its regulations if it intends to make this statutory relief accessible.

¹ U.S. Dep’t of Educ., Dear Colleague Letter Gen 95-42, (Sept. 1995). “Because several authorities with oversight responsibilities, including the Department, accrediting agencies, guarantors, state licensing bodies, and the school’s own auditor, would typically have both the opportunity and responsibility to find and report improper ATB admission practices, the absence of any such finding in reports about a school raises an inference that no improper practices were reported because none were taking place.”

² Letter from Martina Fernandez-Rosario, Div. Dir., San Francisco/Seattle School Participation Division, U.S. Dep’t of Educ., to Andrew D. Shackleford, Partner, LaSalle Capital Group, LP (Mar. 18, 2015) (Available at: https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/FPRD/AcademyofHealingArtsLas%20Vegas_NV_031100_03182015_FPRD.pdf).

- B. The Department must amend its regulations to ensure its use of an automatic, group discharge procedure in appropriate circumstances.

Although the Department has existing authority to grant group false certification discharge, without application, it has rarely utilized this authority. In certain situations, such as those involving false certification of ability-to-benefit through tests that were systematically improper, given to an identifiable group of students, the Department's regulations should be amended to state that it will use its authority to grant discharge relief without application. In such cases, it is appropriate and fair to grant discharge based entirely on students' entitlement to relief, instead of their awareness of their rights and luck or skill in navigating an application process.

PART 682 -- FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

§ 682.402 Death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments.

(e) False certification by a school of a student's eligibility to borrow and unauthorized disbursements.

(3) Borrower qualification for discharge. Except as provided in paragraph (e)(~~14~~15) of this section, to qualify for a discharge of a loan under paragraph (e) of this section, the borrower must submit to the holder of the loan a ~~written request and a sworn statement~~ *application for discharge on a form approved by the Secretary. The Secretary shall not require a written application for discharge from borrowers when exercising authority under paragraph (e)(15) of this section.* The ~~statement~~ *application* need not be notarized, but must be made by the borrower under penalty of perjury and, in the statement, the borrower must --

(i) State whether the ~~student borrower~~ has made a claim with respect to the school's false certification with any third party, such as the holder of a performance bond or a tuition recovery program, and if so, the amount of any payment received by the borrower (or student) or credited to the borrower's loan obligation;

(ii) *High school diploma or equivalent.*

(A) In the case of a borrower requesting a discharge based on defective testing of the student's ability to benefit, state that the borrower (or the student for whom a parent received a PLUS loan) --

(A1) Received, on or after January 1, 1986, the proceeds of any disbursement of a loan disbursed, in whole or in part, on or after January 1, 1986 to attend a school; and

(B2) Was admitted to that school on the basis of ability to benefit from its training and did not meet the applicable requirements for admission on the basis of ability to benefit as described in paragraph (e)(13) of this section.

(B) If the borrower's statement meets the requirements for discharge pursuant to this section, the holder of the loan shall grant the application absent specific evidence contradicting the borrower's statement.

(C) If the guaranty agency, lender or the Secretary obtains specific evidence contradicting the borrower's statement, the guaranty agency, lender or the Secretary shall provide a copy of the evidence to the borrower and the borrower shall have an opportunity to present additional evidence to rebut the evidence obtained by the lender, guaranty agency or Secretary. The following evidence shall be sufficient to rebut the evidence provided by the school:

(1) If the school claimed the student was eligible through ability-to-benefit testing, the school's academic and financial aid files do not include a copy of test answers and results showing that the borrower obtained a passing score on an ability-to-benefit test approved by the Secretary;

(2) If the school claimed the student was eligible through ability-to-benefit testing, no testing agency has registered a passing score on an ability-to-benefit test approved by the Secretary for the borrower;

(3) The school directed the borrower to take an online test to obtain a high school diploma, the borrower states that he or she believed the test to be legitimate and the high school diploma is invalid;

(4) The Department, a federal or state agency, or an accrediting agency, reported ability-to-benefit certification or related violations by the institution within three years before or after the borrower's enrollment;

(5) A state court judgment has been obtained based in part on allegations or evidence of ability-to-benefit certification or related violations by the institution within three years before or after the borrower's enrollment;

(6) A federal agency made findings of inadequate oversight of the institution's administration of its ability-to-benefit test within three years before or after the borrower's enrollment;

(7) A manager or director affiliated with the institution has been convicted of violating the Higher Education Act or regulations thereunder for acts committed within three years before or after the borrower's enrollment;

(8) 10% or more of borrowers enrolling in the institution within a year of the borrower submitted discharge applications under (c)(1) to the Secretary, a guaranty agency, or lender;

(9) One or more current or former employees of the institution has alleged ability-to-benefit violations by the institution within three years before or after the borrower's enrollment;

(10) The school had a withdrawal rate of 33% or higher during the period of the borrower's enrollment; or

(11) The school had a Cohort Default Rate of 30% or higher for the borrower's cohort.

(15) Discharge without an application. A borrower's obligation to repay all or a portion of an FFEL Program loan ~~may~~ *shall* be discharged without an application from the borrower if the Secretary, or the guaranty agency with the Secretary's permission, determines that the borrower qualifies for a discharge based on information in the Secretary or guaranty agency's possession. *A discharge shall be granted without application under this subsection if available information indicates a pattern and practice of false certification by the school.*

PART 685—WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM

§685.215 Discharge for false certification of student eligibility or unauthorized payment.

(c) *Borrower qualification for discharge. Except as provided in paragraph (c)(7) of this section, ~~in order to~~ to qualify for discharge under this section, the borrower must submit to the Secretary an written application for discharge on a form approved by the Secretary. The application request and a sworn statement, and the factual assertions in the statement must be true. The statement need not be notarized but must be made by the borrower under penalty of perjury; ~~in the statement, and in the application, the borrower's responses must demonstrate to the satisfaction of the Secretary that must meet~~ the requirements in paragraphs (c) (1) through (67) of this section have been met. *The Secretary shall not require a written application for discharge from borrowers when exercising authority under paragraph (c)(7).**

(7) Discharge without an application. The Secretary ~~may~~ *shall* discharge a loan under this section without an application from the borrower if the Secretary determines, based on information in the Secretary's possession, that the borrower qualifies for a discharge. *The Secretary shall grant a discharge without application under this subsection if available information indicates a pattern and practice of false certification by the school.*

(d) *Discharge procedures.*

(1) If the Secretary determines that a borrower's Direct Loan may be eligible for a discharge under this section, the Secretary ~~mails, provides~~ the borrower an disclosure application and an explanation of the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends

any efforts to collect from the borrower on any affected loan. The Secretary may continue to receive borrower payments.

(i) If the borrower's statement meets the requirements for discharge pursuant to paragraph (c)(1), the Secretary shall grant the application absent specific evidence contradicting the borrower's statement.

(ii) If the school provides or the Secretary obtains specific evidence contradicting the borrower's statement, it shall provide a copy of the evidence to the borrower and the borrower shall have an opportunity to present additional evidence to rebut the evidence provided by the school. The following evidence shall be sufficient to rebut the evidence provided by the school:

(A) If the school claimed the student was eligible through ability-to-benefit testing, the school's academic and financial aid files do not include a copy of test answers and results showing that the borrower obtained a passing score on an ability-to-benefit test approved by the Secretary;

(B) If the school claimed the student was eligible through ability-to-benefit testing, no testing agency has registered a passing score on an ability-to-benefit test approved by the Secretary for the borrower;

(C) The school directed the borrower to take an online test to obtain a high school diploma, the borrower states that he or she believed the test to be legitimate and the high school diploma is invalid;

(D) The Department, a federal or state agency, or an accrediting agency, reported ability-to-benefit certification, high school diploma certification, or related violations by the institution within three years before or after the borrower's enrollment;

(E) A state court judgment has been obtained based in part on allegations or evidence of ability-to-benefit certification, high school diploma certification, or related violations by the institution within three years before or after the borrower's enrollment;

(F) A federal agency made findings of inadequate oversight of the institution's administration of its ability-to-benefit test within three years before or after the borrower's enrollment;

(G) A manager or director affiliated with the institution has been convicted of violating the Higher Education Act or regulations thereunder for acts committed within three years before or after the borrower's enrollment;

(H) 10% or more of borrowers enrolling in the institution within one year of the before or after the borrower submitted discharge applications under (c)(1) to the Secretary, a guaranty agency, or lender;

(I) One or more current or former employees of the institution has alleged ability-to-benefit violations by the institution within three years before or after the borrower's enrollment;

(J) The school had a withdrawal rate of 33% or higher during the period of the borrower's enrollment; or

(K) The school had a Cohort Default Rate of 30% or higher for the borrower's cohort.