

MEMORANDUM

Date: March 7, 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 – False Certification Discharge Proposals

We thank the Department for considering our proposals regarding false certification discharge, which we submitted by memorandum on February 3, 2016. We appreciate that the Department proposed language to address the discharge rights of students whose schools sought to evade certification requirements by referring them to fraudulent high school diploma mills. However, we respectfully ask the Department to make additional modifications and additions to its regulations to address the following issues identified in our February 3 proposals, and propose specific language to this purpose:

- 1) Discharge for Students Referred to Fraudulent High School Diploma Mills by their Schools: We support the Department's proposal to clarify false certification discharge rights for students whose schools falsified or promoted the falsification of their high school diploma, with minor changes to clarify that students whose schools referred them to fraudulent third party diploma mills need not prove a formal arrangement between the school and the third party.
- 2) Discharge for Students Whose Schools Falsely Certified Their Academic Progress: The Department did not address our previous proposal addressing discharge for students whose schools misrepresented their academic progress in violation of 20 U.S.C § 1091(a)(2). We therefore repeat this proposal and provide suggested amendments to 34 C.F.R. §§ 682.402 and 685.215. See Proposal 2 of our February 3, 2016 memorandum on "False Certification Discharge Regulatory Proposals" for additional explanation.
- 3) Discharge For Students Based on Disqualifying Condition: We support the Department's proposal to clarify false certification discharge rights for students without ability to benefit from their education because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary, with minor changes to clarify that students who were disqualified from working in their field under any mandate, not just those from a state, are eligible for relief.
- 4) Requiring Schools that Enroll Students with Limited English Proficiency to Certify Ability to Benefit: The Department did not address our previous proposal to require schools enrolling students with limited English proficiency to ensure that these students are able to benefit from the program, and to provide for the Department's discharge for students who are falsely certified under established criteria. We therefore repeat this proposal and provide possible amendments to 34

C.F.R. §§ 682.402, 685.215, and 668.148. This issue was discussed at length in our February 3, 2016 memo on “Non-Native Speakers of English-Ability to Benefit Testing and False Certification Discharges.”

5) Discharge Based on Electronic Forgery and Fraud: The Department did not address our proposal to update false certification discharge regulations to ensure that FFEL and Direct Loan borrowers whose schools electronically obtain loans or disbursements without borrower authorization are able to obtain discharges. We therefore repeat this proposal and provide possible amendments to 34 C.F.R. §§ 682.402 and 685.215. See Proposal 1 of our February 3, 2016 memorandum on “False Certification Discharge Regulatory Proposals” for additional explanation.

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 our requested changes.

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

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—

(1) General. (i) The Secretary reimburses the holder of a loan received by a borrower on or after January 1, 1986, and discharges a current or former borrower's obligation with respect to the loan in accordance with the provisions of paragraph (e) of this section, if the borrower's (or the student for whom a parent received a PLUS loan) eligibility to receive the loan was falsely certified by an eligible school. On or after July 1, 2006, the Secretary reimburses the holder of a loan, and discharges a borrower's obligation with respect to the loan in accordance with the provisions of paragraph (e) of this section, if the borrower's eligibility to receive the loan was falsely certified as a result of a crime of identity theft. For purposes of a false certification discharge, the term "borrower" includes all endorsers on a loan. A student's or other individual's eligibility to borrow shall be considered to have been falsely certified by the school if the school—

(A) Certified the student's eligibility for a FFEL Program loan on the basis of ability to benefit from its training and the student did not meet the applicable requirements described in 34 CFR Part 668 and section 484(d) of the Act, as applicable and as described in paragraph (e)(13) of this section; ~~or~~

(B) Signed the borrower's name without authorization by the borrower on the loan application or promissory note; ~~or~~

(C) Certified the eligibility of an individual for an FFEL Program loan as a result of the crime of identity theft committed against the individual, as that crime is defined in § 682.402(e)(14); ~~or-~~

(D) Certified the student's satisfactory progress in the student's course of study and the student did not meet the eligibility requirements described in section 484 of the Act or the conforming regulations.

.....

(3) Borrower qualification for discharge. Except as provided in paragraph (e)(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. The statement need not be notarized, but must be made by the borrower under penalty of perjury, and, in the statement, the borrower must—

.....

(iii) In the case of a borrower requesting a discharge because the school signed the borrower's name on the loan application or promissory note—

(A) *For a loan application or promissory note that was not submitted electronically, S*state that the signature on either of those documents was not the signature of the borrower; and ~~(B) P~~provide five different specimens of his or her signature, two of which must be not earlier or later than one year before or after the date of the contested signature; ~~or~~

(B) For a loan application or promissory note that was submitted electronically, state that he or she did not sign or authorize the document in question, and the proceeds of the loan were not delivered to him or her or applied to charges owed to the school. The guaranty agency shall grant a discharge based upon this statement unless the school provides evidence showing that—

(1) the borrower authorized the submission of the electronic loan application or promissory note;

(2) the school authenticated the borrower's identity and any electronic signature may reasonably be attributed to the student; and

(3) the proceeds of the loan were delivered to the student and/or applied to charges owed by the student.

(iv) In the case of a borrower requesting a discharge because the school, without authorization of the borrower, endorsed the borrower's name on the loan check, ~~or~~ signed the authorization for electronic funds transfer or master check, *or received a loan disbursement*, the borrower shall—

(A) *For an unauthorized loan check endorsement or electronic funds transfers, C*certify that

he or she did not endorse the loan check or sign the authorization for electronic funds transfer or master check, or authorize the school to do so; ~~(B) Provide~~ five different specimens of his or her signature, two of which must be not earlier or later than one year before or after the date of the contested signature; and ~~(C) State~~ that the proceeds of the contested disbursement were not received either through actual delivery of the loan funds or by a credit in the amount of the contested disbursement applied to charges owed to the school for that portion of the educational program completed by the student; *or*

(B) For an unauthorized electronic loan disbursement, state that he or she did not authorize the loan disbursement and the proceeds of the loan were not delivered to him or her or applied to charges owed to the school. The guaranty agency shall grant a discharge based upon this statement unless the school provides evidence showing that—

(1) the borrower affirmatively confirmed the amount and type of loan or disbursement; and

(2) the proceeds of the disbursement were delivered to the borrower or applied to charges owed by the borrower.

.....

(7) Guaranty agency responsibilities with respect to a claim filed by a lender based on the borrower's assertion that he or she did not sign the loan application or the promissory note that he or she was a victim of the crime of identity theft, or that the school failed to test, or improperly tested, the student's ability to benefit.

.....

(iii) If the agency determines that the borrower does not qualify for a discharge, it shall, within 30 days after making that determination—

(A) Notify the lender that the borrower's liability on the loan is not discharged and that, depending on the borrower's decision under paragraph (e)(7)(iii)(B) of this section, the loan shall either be returned to the lender or paid as a default claim; and

(B) Notify the borrower that the borrower does not qualify for discharge, and state the reasons for that conclusion. *If the guaranty agency denies a discharge application submitted pursuant to paragraph (e)(3)(iii)(B) or (e)(3)(iv)(B), it must provide the borrower with the evidence upon which it relied. The guaranty agency shall reverse its denial if the borrower provides any evidence contradicting the evidence relied upon by the guaranty for any one of subsections (1) through (3) of paragraph (e)(3)(iii)(B) or for either subsection (1) or (2) of paragraph (e)(3)(iv)(B).*

(C) The agency shall advise the borrower that he or she remains obligated to repay the loan and warn the borrower of the consequences of default, and explain that the borrower will be considered to be in default on the loan unless the borrower submits a written statement to the agency within 30 days stating that the borrower—

- (1) Acknowledges the debt and, if payments are due, will begin or resume making those payments to the lender; or
- (2) Requests the Secretary to review the agency's decision.

.....

(8), (9), and (10): Make the same changes as made in (7) above.

PART 685—WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM

§ 685.32 Student eligibility—general.

A student is eligible to receive Title IV, HEA program assistance if the student either meets all of the requirements in paragraphs (a) through (m) of this section or meets the requirement in paragraph (n) of this section as follows:

.....

(o) Has, in the case of a borrower whose native language is not English and who is not fluent in English, been determined by the school to have an ability to benefit from the education or training offered in accordance with Subpart J of this section.

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

(a) *Basis for discharge.*

(1) *False certification.* The Secretary discharges a borrower's (and any endorser's) obligation to repay a Direct Loan in accordance with the provisions of this section if a school falsely certifies the eligibility of the borrower (or the student on whose behalf a parent borrowed) to receive the loan. The Secretary considers a student's eligibility to borrow to have been falsely certified by the school if the school—

(i) Certified the ~~student's~~ eligibility of a student who for a Direct Loan on the basis of ability to benefit from its training and the student did not meet the eligibility requirements described in 34 CFR part 668 and section 484(d) of the Act, as applicable;

(A) ~~Reported not having~~*Did not have* a high school diploma or its equivalent; and

(B) Did not satisfy the alternative to graduation from high school requirements under section 484(d) of the Act that were in effect at the time of certification; or

~~(#C) Certified the eligibility of a student who is not a high school graduate based on a false high school diploma falsified provided by the school, or by a third party to whom the school referred the student under an arrangement with the school;~~

(iii) Certified the eligibility of a student who is a non-native English speaker without the ability to benefit from the education or training offered in accordance with Subpart J of this section;

(iv) Signed the borrower's name on the loan application or promissory note without the borrower's authorization;~~or~~

(v) Certified the eligibility of a student who, because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary, would not meet the State requirements for employment (in the student's State of residence when the loan was originated) in the occupation for which the training program supported by the loan was intended;~~or~~

(v) Certified the individual's eligibility for a Direct Loan as a result of the crime of identity theft committed against the individual, as that crime is defined in paragraph (c)(45)(ii) of this section;
or

(vi) Certified the student's satisfactory progress in the student's course of study and the student did not meet the eligibility requirements described in section 484 of the Act or the conforming regulations.

(2) *Unauthorized payment.* The Secretary discharges a borrower's (and any endorser's) obligation to repay a Direct Loan if the school, without the borrower's authorization, endorsed the borrower's loan check~~or~~, signed the borrower's authorization for electronic funds transfer, *or received a loan disbursement*, unless the proceeds of the loan were delivered to the student or applied to charges owed by the student to the school.

.....

(c) *Borrower qualification for discharge.* *Except as provided in paragraph (c)(7) of this section, in order 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).*

(1) ~~Ability to benefit~~*High school diploma or equivalent.* In the case of a borrower requesting a discharge based on ~~not having had a high school diploma and not having met the alternative to graduation from high school eligibility requirements under section 484(d) of the Act applicable at the time the loan was originated, or where the school or a third party under arrangement with the school to whom the school referred the student provided a false falsified the student's high school diploma, defective testing of the student's ability to benefit,~~ the borrower must state in the application ~~that~~ that the borrower (or the student on whose behalf a parent borrowed)—

(i) Received a disbursement of a loan, in whole or in part, on or after January 1, 1986 to attend a school;

and

(ii) Did not have a valid high school diploma at the time the loan was certified; ~~and/or~~

(iii) Did not satisfy the alternative to graduation from high school statutory or regulatory eligibility requirements identified on the application form and applicable at the time the institution certified the loan.

~~(ii) Received a Direct Loan at that school on the basis of an ability to benefit from the school's training and did not meet the eligibility requirements described in 34 CFR part 668 and section 484(d) of the Act, as applicable;~~

(2) *Unauthorized loan.* In the case of a borrower requesting a discharge because the school signed the borrower's name on the loan application or promissory note without the borrower's authorization, the borrower must—

(i) *For a loan application or promissory note that was not submitted electronically, State* that he or she did not sign the document in question or authorize the school to do so; and ~~provide(ii)~~ *Provide* five different specimens of his or her signature, two of which must be within one year before or after the date of the contested signature.

(ii) For a loan application or promissory note that was submitted electronically, state that he or she did not sign or authorize the document in question, and the proceeds of the loan were not delivered to him or her or applied to charges owed to the school. The Department shall grant a discharge based upon this statement unless the school provides evidence showing that—

(A) the borrower authorized the submission of the electronic loan application or promissory note;

(B) the school authenticated the borrower's identity and any electronic signature may reasonably be attributed to the student; and

(C) the proceeds of the loan were delivered to the student and/or applied to charges owed by the student.

(3) *Unauthorized payment.* In the case of a borrower requesting a discharge because the school, without the borrower's authorization, endorsed the borrower's loan check, ~~or~~ signed the borrower's authorization for electronic funds transfer, *or received a loan disbursement*, the borrower must—

(i) *For an unauthorized loan check endorsement or electronic funds transfer, State state* that he or she did not endorse the loan check or sign the authorization for electronic funds transfer or authorize the school to do so; ~~(ii) Provide~~ *provide* five different specimens of his or her signature, two of which must be within one year before or after the date of the contested signature; and ~~(iii) State state~~ that the proceeds of the contested disbursement were not delivered to the student or applied to charges owed by the student to the school.

(ii) For an unauthorized electronic loan disbursement, state that he or she did not authorize the

loan disbursement and the proceeds of the loan were not delivered to him or her or applied to charges owed to the school. The Department shall grant a discharge based upon this statement unless the school provides evidence showing that—

(A) the borrower affirmatively confirmed the amount and type of loan or disbursement; and

(B) the proceeds of the disbursement were delivered to the borrower or applied to charges owed by the borrower.

.....

(35) Disqualifying condition. In the case of a borrower requesting a discharge based on a condition that would disqualify the borrower from employment in the occupation that the training program for which the borrower received the loan was intended, the borrower must state in the application that the borrower (or student for whom a parent received a PLUS loan)—

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

(ii) Did not meet ~~State-the~~ requirements for employment (in the student's State of residence) in the occupation that the training program for which the borrower received the loan was intended because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary.

(6) Individuals whose native language is not English. In the case of a borrower, whose native language is not English and who is not fluent in English, requesting a discharge based on not having met eligibility requirements under 668.153, the borrower must state in the application that that the borrower (or the student on whose behalf a parent borrowed)—

(i) Received, on or after July 1, 2017, the proceeds of any loan disbursed, in whole or in part, on or after July 1, 2017 to attend a school; and

(ii) Did not meet the eligibility requirements under 668.153.

(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 ~~mail~~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.

(2) If the borrower fails to submit the ~~written request and sworn statement~~application described in paragraph (c) of this section within 60 days of the Secretary's ~~mailing~~providing the ~~disclosure~~ application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

(3) If the borrower submits the ~~written request and sworn statement application~~ described in paragraph (c) of this section, the Secretary determines whether to grant a request for discharge under this section by reviewing the ~~request and sworn statement application~~ in light of information available from the Secretary's records and from other sources, including guaranty agencies, State authorities, and cognizant accrediting associations.

(4) If the Secretary determines that the borrower meets the applicable requirements for a discharge under paragraph (c) of this section, the Secretary notifies the borrower in writing of that determination.

(5) If the Secretary determines that the borrower does not qualify for a discharge, the Secretary notifies the borrower in writing of that determination and the reasons for the determination. *If the Department denies a discharge application submitted pursuant to paragraph (c)(2)(ii) or (c)(3)(ii), it must provide the borrower with the evidence upon which it relied. The Department shall reverse its denial if the borrower provides any evidence contradicting the evidence relied upon by the Department for any one of subsections (A) through (C) of paragraph (c)(2)(ii) or for either subsection (A) or (B) of paragraph (c)(3)(ii).*

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

§ 668.148 Additional criteria for the approval of certain tests.

....

(b) If a test is designed solely to measure the English language competence of non-native speakers of English—

(1) The test must meet the criteria set forth in § 668.146(b)(6), (c)(1), (c)(2), and (c)(4); and

(2) The *school* must recommend a passing score *through an established written policy that justifies the proposed score based on the level of instruction, to be approved by the Secretary.* ~~based on the mean score of test takers beyond the age of compulsory school attendance who completed U.S. high school equivalency programs, formal training programs, or bilingual vocational programs.~~ Recommended passing scores adhering *to relevant* guidelines established by licensing agencies or accreditors shall be presumed to comply with this section.

§ 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, *and who did not have a high school diploma or its equivalent prior to enrollment*, 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.

(b) For an individual whose native language is not English and who is not fluent in English, who had a high school diploma or its equivalent received through testing or instruction in a language other than 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 additional testing is not required.

(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).

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

(4) 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.