

Comments to Proposed Loan Discharge Applications
Docket ID ED-2017-ICCD-0057
(80 Fed. Reg. 19364 (April 27, 2017))

June 26, 2017

As organizations that represent low-income student loan borrowers, we thank you for the opportunity to comment on the Department of Education’s revised proposed forms for all the following types of loan discharges: (1) Unpaid Refund; (2) School Closure; (3) False Certification - Ability to Benefit; (4) False Certification - Disqualifying Status; and (5) False Certification - Unauthorized Signature/Payment.

Our organizations assist low-income student loan borrowers who have experienced first-hand the financial and emotional harm caused by for-profit schools that violate federal regulations or close before they are able to complete their educations. Our comments are intended to help ensure that the forms for seeking discharges are clear, accessible, and fair to all potentially eligible borrowers.

1. Comments Regarding Proposed Closed School Discharge Form

We are concerned that proposed Questions 13, 14, and 15 make the form more difficult to understand and complete for borrowers who are not represented by attorneys. They include several terms that students are not likely to understand and that are not authorized by the regulations.

- Teach-out: Because the term “teach-out” has a specific meaning in the context of school closures, its use to refer to two different situations in Questions 13 and 14 will likely cause confusion to borrowers and advocates. The regulations define a “teach-out” as an arrangement by the closed school with another school to allow the students to complete the same program without additional payments for the term that students were unable to complete due to school closure.¹ Similarly, Section 5 of the form itself defines a teach-out as “a written agreement between schools.” The term does not refer to a program offered by another school that has no such official arrangement, which the student usually finds on his or her own.

Unfortunately, Question 14 confusingly uses the term “teach-out” to refer to both of these situations – an officially arranged teach-out with another school and any other program that is the same or comparable that a student found through other means. Because the term “teach-out” is frequently used incorrectly by the closing school itself, the media, and other for-profit schools who seek to market their programs to closed school students, using the term in an imprecise manner on the new form is likely to compound borrower confusion and may lead to inadvertent incorrect answers, which the borrower must affirm under penalty of perjury. This term should not be used in the proposed application.

- Comparable Program: Question 13 includes the following as an answer: “I enrolled in the same or a comparable program at another school.” It does not, however, provide any definition of “comparable.” In addition, the regulation itself does not refer to a “comparable” program, it only refers to the same program. The regulations state that a borrower is eligible for a closed school discharge if he/she “[d]id not complete the program of study because the school closed . . .” and

¹ See 34 C.F.R. §§ 600.2, 602.3.

“[d]id not complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school.”² The word “comparable” should be removed from Question 13. Similarly, the words “or a comparable” should be omitted from the Borrower Certifications paragraph in Section 3 of the new form.

- Competency Testing: Question 15 includes the following as an answer choice regarding transferred credits: “My new school exempted me from completing core credit for the program after evaluating my competency through testing or interviews, or by other comparable means – You are not eligible for a discharge.” The regulations do not authorize the Department to include this as a required qualification for a closed school discharge.³ Moreover, this question includes technical terms that an average student may not understand. Because the student is signing these applications under penalty of perjury, questions like this will likely lead to inadvertent incorrect answers. Therefore, this answer choice should be omitted.
- Confusing Instructions about Skipping Questions: In addition, although Question 15 should only be answered after a borrower checks the appropriate boxes in Questions 13 and 14, borrowers are likely to miss the instructions about skipping to Question 16, and then get confused about how to answer Question 15. For example, a borrower may have undergone competency testing on subjects that he/she did not learn about at the closed school. A borrower may take a competency test on basic math skills that have nothing to do with courses completed at the closed school. Similarly, the borrower may answer yes to this question based on competencies learned at the closed school, even though he/she enrolled in an entirely different program or when he/she did not complete the program at the second school. In each of these situations, the borrower would still be eligible for a closed school discharge.

Suggested Revisions: The Department should replace proposed Questions 13, 14, and 15 with the following:

13. Did the student complete or is the student in the process of completing the same program at a new school?
- NO. The student did not complete and is not in the process of completing the same program at another school – Skip to Item 14.
 - YES. The student enrolled in the same program at another school and completed or is in the process of completing the program. PLEASE check all that apply:
 - The new school accepted one or more credits from the closed school – YOU ARE NOT ELIGIBLE FOR A DISCHARGE.
 - The new school gave the student one or more credits after the student passed a test on a subject taught at the closed school – YOU ARE NOT ELIGIBLE FOR A DISCHARGE.

² 34 C.F.R. §§ 685.214(c)(i)(B), (C) and 682.402(d)(3)(ii)(A),(B).

³ *Id.*

- The new school did not require the student to retake classes that the student completed at the closed school – YOU ARE NOT ELIGIBLE FOR A DISCHARGE.
- None of the above is true – Continue to Item 14.

2. Comments Regarding All Proposed Discharge Forms

- a. Revised Forms Include Improper Claw-Back Language that Could Result in Federal Seizure of State Student Tuition Recovery Fund Payments.

On the proposed Closed School and False Certification (ATB) Discharge forms, the Department added the following underlined language in the section regarding Borrower Certifications, Assignment, and Authorization:

If I have received or if I receive in the future a refund from the school identified in Section 2 of this form or from any owners, affiliates, or assignees of the school, or from any third party that may pay claims for a refund because of the actions of the school, I hereby assign and transfer to the U.S. Department of Education my right to that refund, up to the amount of my loans discharged by the Department.

The Unpaid Refund and two False Certification Discharge (Disqualifying Status and Unauthorized Signature and Payment) contain the above language without the proposed modification.

This broad language would allow the Department to seize amounts paid to borrowers by state bonds or tuition recovery funds (collectively, “funds” or “state funds”). These funds exist to supplement the financial relief available to harmed borrowers through federal student loan discharges. States typically allow a borrower to apply for reimbursement of out-of-pocket cash paid directly to the school, private student loan payments, and federal loan payments. But most do not grant any relief until *after* the borrower applies for and receives a ruling on available federal student loan discharge relief. In this way, state funds provide relief not available through federal loan discharges (for private loans and cash payments) and avoid refunding a borrower amounts he/she has already received from a federal student loan discharge.

To allow the federal government to take from borrowers refunds that are specifically targeted toward their private loans and/or out-of-pocket cash payments would be both unfair and in direct conflict with many states’ laws. In order to address this problem, we recommend that this section be amended to include the following underlined language:

If I have received or if I receive in the future a refund from the school identified in Section 2 of this form or from any owners, affiliates, or assignees of the school, or from any third party that may pay claims for a refund of payments made on federal student loans because of the actions of the school, I hereby assign and transfer to the U.S. Department of Education my right to that refund, up to the amount of my loans discharged by the Department.

Without such a change, this language would allow the Department to seize much-needed refunds from borrowers, which refunds are meant to reimburse borrowers for out-of-pocket cash and private student loan payments taken by fraudulent schools.

b. Revised Forms Allow Department to Claw-Back from Borrower Refunds Based on Non-Material Statements.

On all of the forms, the Department revised the following language in the section regarding Borrower Certifications, Assignment, and Authorization:

The Department may . . . revoke a discharge that was previously approved . . . if you provide testimony, a sworn statement or documentation that does not support *the statements* ~~a material misrepresentation~~ you made on this form or in any accompanying documents.

This proposed amendment is unnecessarily punitive. It would allow the Department to revoke a discharge for a minor or inadvertent mistake. All of these discharge forms are complicated and difficult for borrowers to complete without assistance. Most for-profit school borrowers have a difficult time understanding these complicated forms full of confusing legal terms. Due to the lack of sufficient funding for free legal services, most do not have access to free legal assistance for completing discharge applications. As a result, borrowers make unintentional mistakes that do not have any bearing on their eligibility for a discharge.

This proposal – changing the words “material misrepresentation” to “statements” – punishes unsophisticated borrowers harmed by for-profit schools. Meanwhile the for-profit schools that engage in fraud and who can pay attorneys to represent them are only liable for “substantial misrepresentations.”⁴ Indeed, under the proposed defense-to-repayment regulations, the only false statements for which a school may be liable are substantial misrepresentations.⁵ As a result, the parties responsible for defrauding taxpayers and students out of hundreds of thousands, millions, or billions of dollars are only liable for substantial misrepresentations, but individual borrowers harmed by these schools may have a comparatively tiny amount of discharge relief taken from them if they make any inadvertent misstatement, even if it has no bearing on whether or not they are eligible for the discharge.

There is no need for the Department to claw-back refunds from borrowers for minor mistakes made on complicated discharge forms. For this reason, we oppose this proposed modification. The term “material misrepresentations” in each of the discharge forms should not be changed.

c. Revised Forms are Not Sufficiently Accessible to Low-Income Student Loan Borrowers.

The Department should consider best practices in form design and learn from borrowers’ experiences with existing Department forms and user interfaces. From prior experience, we know that a poorly designed form will discourage eligible applicants from seeking and accessing relief. In particular, the revised forms do not address the following:

⁴ 20 U.S.C. § 1094(c)(3) (institution may be terminated or suspended for substantial misrepresentation).

⁵ 81 Fed. Reg. 75,926 at 76,083 (adding § 685.222(b)-(d)).

- The revised forms do not appear to incorporate plain language tailored to the intended audience – students who were defrauded, primarily by unscrupulous for-profit colleges. Following best practices for form design and The Plain Writing Act of 2010, the Department should use plain language on all versions of the discharge forms.
- In addition, the Department should avoid language that requires applicants to interpret complex legal concepts (such as “teach-out,” “comparable program,” “core credits,” etc.). As far as we are aware, the Department has not tested the forms for consumer comprehension and usability, to ensure all students who attend various institution levels and types are able to comprehend and complete the forms.

We understand that testing may take time. We suggest that the Department continue to use the forms with our recommended changes, while starting a process to test the forms for consumer comprehension and usability. We encourage the Department to seek input on the forms and on this testing process from other federal agencies which have extensive testing experience, including the Federal Trade Commission and the Consumer Financial Protection Bureau.

- The Department should provide support structures for borrowers who need assistance filling out the forms, including a help line, a chat function, a search function, and a frequently asked questions section. Contractors and staff providing assistance should be trained on how to advise and assist borrowers and evaluated by consumer feedback and compliance testing.
- Any “yes” or “no” options on the form should be clearly marked as distinct and placed side-by-side. The Department should also place consequences of each option directly below the choice, rather than in the preceding text.

d. The Forms Should Be Provided in Other Languages.

These forms should also be available in languages other than English, particularly in Spanish and other languages commonly used by borrowers. Many for-profit colleges have specifically targeted their deceptive conduct towards Spanish speakers who are not proficient in English (Limited English Proficiency or LEP individuals). Just a few examples from California alone include Meadows College of Business, CIT College, Northern California Institute of Cosmetology, Webster Career College, Wyotech and Heald. In addition, for-profit schools often target students in other languages. In Southern California, many schools target and harm Korean-speaking students and parents. Additionally, in New York, ASA College targets LEP immigrants by advertising ESL classes and conducting admissions and financial aid counseling in other languages.⁶ Discharge forms should be available in Spanish and other languages spoken by LEP students commonly targeted by fraudulent for-profit schools.

Currently, there are no up-to-date forms in Spanish or any other languages. The Department previously published Spanish-language discharge forms which expired on August 31, 2008. Despite this fact, Spanish-speaking borrowers continue to use the outdated forms because they cannot read the English forms and should not certify the statements in any form that they cannot read themselves. While the

⁶ See Class Action Complaint and Plaintiff Affidavits in Sanchez v. ASA College, SDNY, 14-cv-5006.

Department has informed us that it instructed servicers to accept the outdated Spanish-language forms, some continue to reject them.

Translated discharge forms are critical to ensuring that LEP borrowers harmed by unscrupulous for-profit colleges are able to understand and exercise their federal right to apply for discharges. If these forms are not translated into Spanish and other languages, LEP borrowers will be denied the loan discharges to which they are entitled by law, which will likely result in large numbers of them defaulting on their loans, suffering from the Department's harsh involuntary debt collection tactics, and being barred from access to quality higher education. This result is contrary to the purpose of the Higher Education Act, as well as the requirements of Title VI of the Civil Rights Act, and the Department's own commitment to equal access to education.

e. Borrowers Should Not Have to Waive Consumer Protections in Order to Seek Relief.

Loan discharge forms like these should never include a mandatory requirement for applicants to allow robocalling and autodialing to their cellphones, including via text messages. Unfortunately, such a provision appears in the Borrower Certifications, Assignment, and Authorization section of each of these forms. Seeking any type of discharge relief should not come at the cost of waiving important consumer protections. At most, the forms should include "yes" and "no" check boxes in which applicants have the option of providing consent. If any waiver language is included, applicants should also be advised of their right to revoke consent and informed about how to do so.

Thank you again for your work to help defrauded borrowers and protect taxpayers. We appreciate your careful consideration of these comments.

Sincerely,

Atlanta Legal Aid Society, Inc.
Housing and Economic Rights Advocates
Legal Aid Foundation of Los Angeles
National Consumer Law Center, on behalf of its low-income clients
Project on Predatory Student Lending, Legal Services Center of Harvard Law School
Public Law Center