

U.S. Education Department's Notice of Proposed Rulemaking

(Disability Discharges)

August 3, 2000

I. Introduction

The National Consumer Law Center (NCLC) and Consumers Union are responding to the Department of Education's proposed rules amending the disability discharge process under the Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program regulations. These comments are intended to address the issues of greatest concern to low-income individuals and communities.

The National Consumer Law Center, Inc. is a nonprofit Massachusetts corporation, founded in 1969, specializing in consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of thirteen practice treatises and annual supplements on consumer credit laws, including *Unfair and Deceptive Acts and Practices* (4th ed. 1997), *Truth In Lending* (4th ed. 1999), *Repossessions and Foreclosures* (4th ed. 1999), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers.

Consumers Union, the publisher of *Consumer Reports* magazine, is a nonprofit organization that advances the interests of consumers by providing information and advice about products and services and about issues affecting their welfare, and by advocating a consumer point of view. Both Consumers Union's publications and advocacy work address student financial aid issues. For more than a decade, Elizabeth Imholz, the signatory for Consumers Union, has worked as an advocate on student aid issues, focusing particularly on the effect of federal policies on low- and moderate-income students.

The Department's proposed rule is not authorized by the statute, will not work, will result in genuinely disabled borrowers not receiving discharges to which they are entitled, and will require guaranty agencies and Department staff to meet impossible demands for vastly increased staffing and medical and vocational expertise. During the negotiated rulemaking process, several negotiating team members presented detailed proposals ("the nonfederal proposals") to reform disability discharge determinations. The nonfederal proposals included a mechanism for revoking discharges that were incorrectly granted, or that were given to borrowers who later experienced significant improvement within a limited time period. We urge the Department to rewrite the regulation in accordance with the nonfederal proposals, which provide for a more reasonable approach, that will address the Department's concerns in a manner consistent with the statute.

II. The NPRM is Not an Appropriate Response to the IG Report on Disability Discharges

a) The IG Report Does Not Show Large Numbers of Inappropriate Disability Discharges

The NPRM starts from an incorrect premise: that the IG report reveals systemic problems with the pre-1999 disability discharge system. In fact, the IG reported that a small number of borrowers earned substantial income after receiving a disability discharge. The 23% figure in the IG report consist of only 1% who earned more than \$30,000, and 22% who had some earnings, between \$0 and \$30,000, in 1997. There is no breakdown in the income ranges below \$30,000, and we believe it is likely that the 22% are concentrated at the lower end of that range, probably below the \$700 month income disregard established by the Social Security Administration for Disability Insurance recipients, and quite probably below the poverty level.

A careful reading of the IG's report and findings is important. The discharge process should not be made impossibly burdensome for 99% of borrowers because of abuse, or changed circumstances, in 1% of cases. It is also essential to evaluate whether the problems brought to light by the IG report reflect intentional fraud by borrowers on a large scale, or other factors. In our view, the IG's findings result from a combination of:

- 1) a discharge application form for use by physicians that does not provide clear instructions and guidance to the physicians, making it difficult for gurantee agencies and Department staff lacking medical training to interpret their responses, and
- 2) the fact that many disabled individuals attempt to rehabilitate and have trial periods of employment, although few are able to resume substantial unassisted employment.

b) The NPRM Does not Follow the IG's Recommendations

The Inspector General report made five recommendations to address the reported deficiencies in disability discharge determinations. The IG recommendations have much more in common with the nonfederal negotiator proposals than with the NPRM drafted by the Department.

The first IG recommendation was to improve the disability form to require a doctor's professional license number and office telephone number, a recommendation the Department can and should implement, without any new regulations.

The second IG recommendation was to establish a focal point, i.e. a knowledgeable coordinator within the Department, to assist guaranty agencies in making disability discharge decisions. This would not require regulations, and we would support this step.

The third IG recommendation was to provide guidance to agencies as to how to deal with conflicting information, including evidence that a borrower seeking or receiving a disability discharge is subsequently employed. We believe that the nonfederal proposal, providing for a procedure to revoke discharges, as well as providing for clear standards as to how much employment would result in a finding that a borrower was no longer disabled, squarely addresses this recommendation, while the Department's NPRM does not.

The fourth recommendation was to establish a procedure for reinstating a discharged loan, i.e. a discharge revocation procedure. This is exactly what the nonfederal negotiators recommend, and is contrary to the approach in the Department's NPRM.

The fifth recommendation is that the Department consider working with the Social Security Administration (SSA)

either to have SSA determine eligibility under the Department's disability definition (which we believe is impractical) or to require that borrowers qualify for SSA disability benefits to get a discharge. The nonfederal negotiators believe their proposal provides a practical and realistic way to benefit from SSA's extensive disability determination apparatus, while the Department's approach makes little or no effective use of the SSA disability review process.

III. A Discharge Revocation Procedure Can Fully Address Two Distinct Problems Raised by the IG Report: Borrowers Who Received Discharges But Were Not Disabled At All, and Those Whose Disability Has Ended

The concern prompting the IG report and the NPRM was that some borrowers who received disability discharges were found later to be employed. We believe that there are three situations where borrowers become employed after receiving a disability discharge, and each should be addressed in a different way.

The first situation is a disabled borrower who has minimal earnings, which do not represent a return to full employability. Obviously some threshold needs to be established to distinguish between sheltered work or unsuccessful rehabilitation attempts on the one hand, and genuine rehabilitation and return to the workforce on the other. It seems logical to use the thresholds established by the SSA for its Disability Insurance program, the most comprehensive disability program run by the federal government.

The second situation is a disabled borrower whose condition improves, and who ceases to be disabled. Federal policy strongly favors efforts of the disabled to return to work¹. Therefore, the student loan discharge regulations should avoid excessive disincentives for the disabled to return to work. While the borrower may no longer have the inability to earn income that supported the loan discharge, the regulation should balance the policy of maximizing loan repayment with the policy of assisting the disabled in returning to work. We believe the proper balance can be struck by providing for a revocation of discharge for a limited time period if the borrower returns to substantial employment, but that disability discharges should not be revoked beyond a two-year period.

The third situation involves either an erroneous determination of disability, or outright fraud. If a guarantee agency or the Department obtains information after a discharge that establishes that the discharge was not properly granted in the first place, certainly the discharge should be revoked. However, basic principles of fairness and due process require that the burden be on the Department to initiate such a revocation on the basis of reliable evidence. The Department's proposal reverses the proper burden, and requires every disabled borrower to prove at the end of a waiting period that their discharge should not be revoked.

IV. The Department's Proposed Disability Determination System is Administratively Unworkable and not Cost-Effective

Without a very large staff of medically trained disability reviewers the Department cannot fairly second-guess physician certifications of disability.

From the time the IG report was issued, the Department has instituted a variety of ad hoc procedures, some of which are set forth in the Dear Colleague letter. Legal services advocates have seen numerous instances in which an unambiguous certification, on the proper form, by a licensed physician, has been rejected as a basis for a disability discharge. It appears that the Department personnel involved are particularly skeptical of mental health diagnoses, which if true, would raise serious discrimination implications under the Americans with Disabilities Act. More importantly, the decision making process, which the Department apparently now wants to codify in regulations, is

arbitrary and indefensible.

The proposed regulation calls for institutions, lenders and guarantee agencies to engage in ad hoc decision making. At Sec. 674.61(b)(3)(i) Perkins schools must review a physician certification and determine that "it supports the conclusion that the borrower meets the criteria for a total and permanent disability discharge". Lenders and guarantee agencies are charged with the identical task in the corresponding provisions for FFEL loans.

It is simply not possible, even for a medically trained reviewer, to determine, merely by reading a physician's certification, whether a borrower is disabled. There are many diagnoses, for example, that may or may not be disabling, including many mental health conditions such as severe depression. SSA's disability determination system includes detailed listings of impairments, and an elaborated procedure to evaluate the claimant's impairments in conjunction with other important factors such as age, prior work, and education. At a minimum, a fair disability review process would require the reviewer to obtain the borrower's complete medical records. As a practical matter, we believe that the requirements of administrative due process would call for a review system on the order of what SSA has established, something the Department clearly is not contemplating.

Although the Department could conceivably "staff up" an entire disability claim review operation, we are skeptical the Department can commit the resources necessary to do the job properly. The Social Security Administration, through state disability review agencies, employs tens of thousands of employees to review about 2 million new applications for disability benefits and review about 1.8 million open cases, each year. The IG report refers to approximately 40,000 student loan disability discharges granted over a 2 ½ year period. SSA expends about \$600 per initial disability determination, about \$400 for reconsideration, and about \$1,400 per administrative appeal hearing². The Department would obviously not realize the economies of scale of the SSA, and hence could easily expend more, perhaps \$2,000 per disability review or more. If the Department spent \$2,000 per case for the 40,000 discharges covered by the IG report it would expend \$80 million. The IG report suggests that up to \$73 million in loans were discharged for borrowers who had some employment income in the ensuing years. If, as we believe, a large majority of these disabled borrowers would not meet a reasonable threshold earnings test, the number of disability discharges that would be denied with a perfect disability review process would have been substantially less than \$73 million, and hence to spend \$80 million, or even half that amount, on a disability review process would not be cost effective.

While we certainly agree that ineligible borrowers should not receive discharges, the Department must make a clear choice. Either it can improve the streamlined procedures now established for disability discharges without greatly increasing their cost, or it can attempt to provide SSA-like reviews at a cost that would undoubtedly exceed any savings in preventing or correcting erroneous discharge decisions. In contrast, the nonfederal proposal does not require a new bureaucracy, while still addressing the main concern of the IG report, namely disability discharge recipients who return to work.

V. A Conditional Discharge Is Not Authorized By The Statute

The Statute, §1087(a) says simply that if a borrower becomes totally and permanently disabled, the Secretary discharges the loan by paying the balance in full. There is no authorization to defer or suspend loan repayment or create any other temporary loan status. The Department's proposal for a suspension of collection activity for three years will inevitably lead to litigation by borrowers applying for disability discharges.

On the other hand we believe the Department has the legal authority to revoke a discharge that was improperly

granted, even based on information that develops after the initial decision. The Department has in fact established discharge revocation for the closed school discharge, see 34 C.F.R. §682.402(d)(4)(ii).

We believe this provision is consistent with the Department's inherent authority to reconsider an agency decision in light of newly discovered evidence or subsequent occurrences, so long as the reconsideration is based on reliable evidence and the borrower receives due process. The closed school discharge revocation clearly contemplates the possibility the Department could undo a discharge after it was properly granted, even based on a subsequent development, such as a borrower refusing to cooperate in actions against a school to recover the loan funds. This is similar to the revocation of a disability discharge on the basis of improvement of a borrower's medical condition such that he or she is no longer disabled.

VI. The Proposed Rule's reference to Certification or Documentation of Disability from the Social Security Administration will not Work because SSA Does not Provide Certification or Documentation as Described in the Proposed Rule

The proposed preamble states:

We are working with the SSA to determine if there is specific documentation that the SSA provides to some individuals that would be comparable to a physician's certification that a borrower is totally and permanently disabled as defined in our regulations.

We would first urge the Department to say precisely what it intends in the preamble and the rule. As presently written, the preamble and rule may suggest to some readers that documentation that a borrower has been found disabled by SSA will be sufficient to establish disability for a student loan discharge. This is clearly not what the Department intends. As presently written the preamble and Sec. 674.61(b)(3)(ii) are potentially misleading, and allude to the Department working with SSA to identify unspecified "documentation" that might be acceptable. The Department should make plain its intentions.

It is our understanding that the Department intends to rely on SSA's system of classifying Disability Insurance and SSI Disability recipients for purposes of continuing disability reviews. SSA uses three categories to determine how frequently to review a beneficiary's eligibility: medical improvement expected diary (MIE), medical improvement not expected (MINE) and medical improvement unpredictable (MIU.) See 20 C.F.R. §416.990(c), (d). If the Department intends to limit its waiver of physician certifications to only those borrowers found by SSA to be in the MINE category, a very small percentage of Social Security and SSI Disability recipients will benefit from any streamlining. The MINE category is limited to individuals who have very serious disabilities, usually that are progressive and/or fatal, such as full-blown AIDS or ALS (Lou Gehrig's disease.) These borrowers would probably not have any trouble obtaining a physician certification of permanent disability in any event.

To make effective use of the SSA's extensive disability review system, we urge the Department to go further. The Department should use the Continuing Disability Review classifications, if at all, as a basis for determining which borrowers' disability discharges to review for possible revocation within the limited time period (our suggestion being 2 years.) Borrowers should be able to supply a disability benefits award letter in lieu of a physician certification in all cases, as sufficient evidence to warrant a disability discharge. Borrowers who rely on SSA awards could be required to sign an appropriate release so that the Department could share information with SSA on earnings records and continuing disability reviews, which would allow automatic revocation of student loan discharges when warranted by a return to substantial employment or medical improvement.

The possibility of substantial improvement in a claimant's condition can be handled through a revocation procedure, without undermining the validity of ED relying on SSA disability determinations as conclusive. The Department should treat SSA disability findings as sufficient to grant a student loan disability discharge, subject only to the possibility the discharge could be revoked or rescinded if the borrower engages in substantial work activity or is found by SSA to no longer be disabled, in a defined period, which we suggest would be two years. In this way, the Department can take advantage of the SSA's extensive disability review resources, while addressing its own concerns about disabled borrowers whose condition later improves.

¹-See Work Incentives Improvement Act, Public Law No: 106-170, providing for continued medical benefits and incentives for disability insurance beneficiaries to return to work, and making the following findings (Section 2):

(9) In addition to the fear of loss of health care coverage, beneficiaries cite financial disincentives to work and earn income and lack of adequate employment training and placement services as barriers to employment.

(10) Eliminating such barriers to work by creating financial incentives to work and by providing individuals with disabilities real choice in obtaining the services and technology they need to find, enter, and maintain employment can greatly improve their short and long-term financial independence and personal well-being.

(11) In addition to the enormous advantages such changes promise for individuals with disabilities, redesigning government programs to help individuals with disabilities return to work may result in significant saving and extend the life of the Social Security Disability Insurance Trust Fund.

²-Social Security Administration, Social Security Accountability Report for Fiscal Year 1999, pp. 84-87