

Comments to the Department of Education on Revision of Disability Discharge Application (Submitted July 14, 2008)

Introduction

On behalf of our low-income clients, the National Consumer Law Center (NCLC)¹ is responding to the Department of Education's notice of proposed information collection request concerning the revised disability discharge application. The notice was published on May 15, 2008 (73 Fed. Reg. 28103).

The comments below include suggestions to make the discharge form clearer and easier to use for borrowers. We also discuss key elements that were omitted from the proposed form. We believe that the recommendations described below are essential to improve a process that is administered in a haphazard and inefficient way, severely prejudicing our disabled student loan borrower clients.

Suggested Changes to the Proposed Discharge Application Form

1. The Department Should Use an Accurate and Consistent Definition of Total and Permanent Disability

In various places throughout the form, including in the box at the top of the first page and in the box at the top of section 4, the Department cautions borrowers that they are not eligible if they are "... able to work and earn money in any capacity or in any field of work, even if only on a limited basis." However, the regulatory definition, as stated properly in section 5, is that a borrower must be unable to work and earn money because of an injury or illness that is expected to continue indefinitely or result in death.² There is nothing in the regulation that refers to a borrower's inability to earn money IN ANY CAPACITY or IN ANY FIELD OF WORK.

¹ 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 practice treatises and annual supplements on consumer credit laws, including *Student Loan Law* (3d ed. 2006 and Supp.), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC's Student Loan Borrower Assistance Project provides information about student loan rights and responsibilities to borrowers and advocates. See www.studentloanborrowerassistance.org.

² 34 C.F.R. §682.200(b).

The form should be consistent and should accurately relate the regulatory definition. The added language improperly goes beyond the regulatory requirements.

2. Make the 90 Day Application Return Requirement More Prominent

Borrowers are properly advised in section 3 that they must submit the application within 90 days of the date of the physician's signature. We suggest that this information be underlined or written in larger font to highlight this important deadline for borrowers.

3. Provide More Specific Information to Physicians About the Type of Information That Will be Considered and About the Evaluation Process

We appreciate the addition of section 4 line 3. We assume this is the Department's effort to get more information from the physician at the outset of the application process. One of the major problems with the process as it is currently administered is that physicians are required to provide only general information when signing the form, followed by subsequent requests for additional information. Physicians are very busy and often inundated with requests to fill out paperwork for disabled patients. For nearly all of the clients we see, the doctors have already filled out numerous applications for disability-related benefits. Unfortunately, every government agency has its own form and unfortunately few agencies, including the Department, are willing to consider decisions made by previous agencies. As a result, the patient and the physician must start over each time. For this reason, it is critical to get the most relevant information from physicians at the outset and hopefully avoid unnecessary follow-up.

Although we appreciate the intent beyond this section, we question whether this is the key information that the Department will use in evaluating discharge applications. If not, we suggest that the form should be more precise about other types of information that might be needed. Section 4, line 3 also asks for doctors to provide, at their option, any additional information. This is too vague. Doctors do not know if they should send medical files or other medical records. If these are helpful to the process, we suggest specifically mentioning this in the form. In our experience, some doctors anticipate the need for documentation by sending medical files, only to be told that the Department cannot decipher the records or that the doctors have sent too much information. Other doctors take more of a minimalist approach and simply fill out the forms with basic information about the borrower's condition. In either scenario, we have found that the Department routinely sends follow-up requests for additional information. We understand that these requests will be needed in some cases, but it is essential to try to avoid this as much as possible. This is not only helpful to borrowers, but also streamlines the process and makes it more efficient. We strongly suggest that the information requested in section 3 be directly tied to the information that the Department needs to evaluate applications.

If it is too difficult to include this specific information in section 4, we suggest in addition to improving this section that the Department develop a separate information sheet for physicians that a) repeats the regulatory definition of total and permanent disability; b) briefly explains the application process; c) describes the type of information that is helpful for the physicians to provide; d) explains what types of attachments are helpful, such as medical records or files and

whether this information is required; and e) explains that the Department may be sending follow-up requests for additional information.

We have created our own “physician information sheet” because doctors repeatedly ask us for clarification. We therefore know that many physicians appreciate this additional explanatory information, an official form from the Department would be extremely helpful and would help streamline the process.

4. The Form Should Allow Borrowers to Request Communication with Attorneys

A borrower’s representative is only allowed to sign if the borrower is unable to sign due to her disability. This does not address an issue we consistently face in which the borrower is able to sign, but has an attorney helping her through the process. When we are representing these clients as their attorneys, we want to receive copies of all correspondence and other updates. In fact, we have a right to this. Unfortunately, we have run into numerous practical obstacles, including claims by the Conditional Discharge Unit (CDD) that they cannot program their system to send out duplicate notices to borrower’s attorneys. To make matters worse, when we offer to send in a consent form, it seems that each representative from the Department or CDD asks for a different form.

This is a huge problem for our clients. These borrowers are disabled and are seeking relief because they have trouble dealing with the daily functions of life. As their attorneys, our job is to help them through the disability process and ensure that their rights are protected. We cannot do this if we are not informed about their cases.

This problem could be resolved by simply adding a line to the form where the borrower could request that all communications regarding the case be sent to his/her attorney with a space to provide the attorney’s contact information. The section could also allow borrowers to consent to the Department discussing their cases with the attorney.

Improving the Disability Discharge Process

The proposed form will not resolve some of the most serious problems with the disability discharge system, which include:

- a. An arbitrary medical review system.** The Department routinely requests additional information from physicians who have already signed discharge forms, often giving these doctors unrealistic time tables to respond (such as three days). It is difficult for many doctors to discern what is expected of them. In many cases, doctors are repeatedly asked for the same information. As discussed above, we propose that the form be improved to better inform physicians about the type of documentation that will be most useful in the evaluation process. If this cannot be included in the form, we recommend that the Department provide a separate information sheet to physicians.

- b. Incomplete information about the basis for denials.** A key problem is that borrowers are often told that the reason for a denial is “medical review failure”, a category that can encompass just about anything from failure to sign a form properly, fill out a box, or an actual gap in medical information. This is unacceptable and most likely a violation of borrowers’ due process rights. We have had cases where the real reason for a “medical review failure” was an incorrect address for the physician. The borrower has no way of knowing this and instead is misled into thinking that the denial is based on a medical decision. A related issue is that borrowers and advocates are not informed if the reason for a denial is that the physician failed to complete requests for follow-up information. For this reason, clients and advocates should be informed if a delay is caused by a doctor’s failure to respond to requests for additional information.
- c. The failure to accept Social Security or other federal agency disability determinations as evidence of disability.** Although Congress and the Department have not tied the definition of disability to the standards used by other agencies, there is no reason why the Department could not consider decisions made by other federal agencies. Among other advantages, other federal agencies, such as Social Security, actually have medical staff examining patients and making medically-based decisions.
- d. There is no time limit placed on the Department to make determinations once applications are assigned to them.**
- e. Failure to allow borrowers to submit copies of applications when necessary.**

Many of the advocates we work with have faced a “no-win” situation when they have sent an original application to a loan holder and the application was lost somewhere along the way. The borrower has only a copy, which the Department in many cases will not accept, claiming that the borrower has to start the process all over again. This is an unwarranted imposition on both borrower and physician. Since borrowers are allowed to submit copies of applications to separate loan holders, they should be allowed to submit copies to the Department.