

Comments on Borrower Defenses Against Loan Repayment
Docket ID No. ED-2015-ICD-0076

These comments are submitted on behalf of a number of non-profit student and consumer advocacy organizations across the country in response to the Department of Education's recent request for comments on the proposed information collection for former students who seek a statutory discharge of their federal student loan debt based on acts or omission of their schools giving rise to a cause of action against the school under State law. This statutory discharge—defense to repayment (“DTR”)—is available under 20 U.S.C. § 1087e(h) as implemented by 34 C.F.R. § 685.206(c) and 34 C.F.R. § 682.209(g), but, as the request for comment indicates, it has been historically underutilized.

Our organizations assist low- to moderate-income student loan borrowers who have experienced first-hand the financial and emotional harm caused by the unlawful, unfair, and deceptive acts of for-profit schools. Over the past several months, many of us have been flooded with calls from former students of the Corinthian Colleges, among countless other schools. Many of those contacting us are Corinthian students who graduated several years ago and their parents, but are only now discovering the nature and extent of their schools' misrepresentations to them and reconnecting with peers who share their post-graduation struggles in using their degree. Other callers, having heard media coverage of Corinthian's well-publicized misconduct, have sought information on their legal rights arising from the predatory practices of other for-profit schools. Nearly all of the students we have spoken with were unaware that they could seek a discharge of their federal student loan debt based on their school's misconduct.

Our comments are intended to help ensure that the process for seeking federal student loan relief based on a defense against loan repayment is clear and accessible to all borrowers, and that the Department adjudicates these claims in a timely and equitable manner.

The Department's request for comments asks how it might enhance the quality, utility, and clarity of the information to be collected and how the Department might minimize the burden of this collection on the respondents. Our comments below focus on these two important issues, as well as the process for adjudicating defense to repayment requests that students and former students submit to the Department of Education to ensure that the information collection fulfills its stated purpose. Our priorities are to ensure that borrowers have access to loan relief in the case of school misconduct as required by the statute, through a transparent and streamlined process that is accessible to all borrowers with valid claims.

In these detailed recommendations, we urge the Department to use existing findings of fraud and other abusive practices to grant group relief to borrowers with no additional documentation requirements. We support the comments filed by the Debt Collective that limiting relief to only those who know about and file attestation forms creates an unjust barrier to damages guaranteed by law and to allow borrowers to get a fresh start in education and in life.

In circumstances where class-based relief is not possible, so that the Department requests borrowers to file a form and/or provide documentation, it should ensure that:

- There is minimal burden on borrowers;

- The process is available to all borrowers, not just Direct Loan borrowers;
- There is a streamlined, easy to use application process;
- The process does not require legal expertise or legal assistance;
- A uniform legal standard is available based on federal law with an opportunity for a borrower to add state law claims regardless of the state in which they reside;
- Borrowers' due process rights are respected through a review process that is expeditious and objective and provides for opportunities for appeals and re-application; and finally,
- Borrowers are provided comprehensive relief, including no taxable income consequences, restoration of Pell grant and G.I. bill eligibility, and full discharge of consolidated and non-consolidated loans.

Minimizing Burden on Borrowers and the Department

Use existing findings to grant group relief

Because the Department of Education has thus far not proactively forgiven student loans when it becomes aware of deceptive and abusive school practices, it seems that the Department has interpreted the regulations at 34 C.F.R. § 685.206(c) to require an application from a borrower with a claim. We disagree with this approach. Whenever the Department, through its own investigations or those of other governmental agencies, has collected substantial evidence that a school maintained a pattern and practice of misconduct affecting a group of students, such as Corinthian College students, the Department should grant automatic DTR discharges rather than require individual applications. In such cases, and in consideration of the already low utilization rate of the DTR program, requiring individual applications would prevent eligible applicants from obtaining available relief and would only provide the Department with facts already known to it.

In circumstances in which class-based relief is not possible, such that the Department needs additional documentation or requires an application form, we present the following recommendations to ensure this process is fair, efficient, and preserves defrauded borrowers rights to full relief.

At present, the Department of Education has no general application form for borrowers seeking discharge based on their school's misconduct, although it has recently created a streamlined application form specifically for certain students of the recently closed Heald College. A similar streamlined application form for all students, with important modifications, is needed to ensure that borrowers are not denied loan relief simply because they lack the highly specialized knowledge to frame their schools' illegal misdeeds in legal terms. Even statutory discharge programs with clear application processes are woefully underutilized by eligible students.

A complex and ambiguous application process will further burden borrowers' access to their rights to defense against repayment, and could lead to an unfair and inefficient review process. Borrowers who do apply may send irrelevant information and documents, or fail to send important documentation. Other borrowers may find the process so daunting that they decide not to apply at all despite having valid defenses against repayment.

The Department's Attestation for Certain Heald College students is a good start towards a common form, but key changes are needed to improve the Heald form. In order to be fully accessible, the application form must: 1) be available to all federal student loan borrowers, not only those with Direct loans; 2) request only necessary information needed to validate a claim and administer relief; 3) allow for sworn attestations in lieu of required documentation where possible; 4) not require extensive legal knowledge or legal representation for successful completion; and 5) allow for a uniform federal legal standard as a floor for all borrowers with an opportunity to add state law claims.

Required elements of a streamlined application form

- 1) Eligibility for all borrowers: In order for this process to be successful, the Department must offer a streamlined application form that can be used for borrowers of all federal loan programs, including FFEL loans, Direct loans, and subsequent consolidations of those loans. The Department is obligated to recognize defenses to repayment raised by borrowers in each of these loan programs, and restricting the process to only Direct loans would be inconsistent with longstanding Department policy to take ultimate responsibility for the treatment of federal student loan borrowers regardless of loan program as well as highly damaging to many deserving borrowers.¹ Developing and navigating separate application forms for these separate loan types is unnecessary and would add burden on the Department as well as students. The streamlined form should be accepted electronically as well as by mail. The Department should also offer assistance or submission options via telephone. These submission options should include acceptance of electronic and telephonic signatures, in line with industry standards and as required by the Government Paperwork Elimination Act.
- 2) Request only necessary information: In order to minimize the burden of the application process, where an entire group of students is eligible to assert a defense to repayment, the Department should recognize and grant class-based loan relief. If the Department has enough information from its records and investigations to determine that all students in certain schools, certain programs, and/or certain years were subject to deceptive practices that violate state or federal law, then requiring submission of an application poses an undue burden on borrowers.

In circumstances where class-based relief is not possible, the Department should make available an application form that requests only information needed to validate the defense against repayment and to administer relief. The information requested to validate a claim must align with the realities of abusive marketing techniques and encompass the full scope of misleading communications actionable under State or other law, including oral miscommunications. The current Attestation for Heald Students form unjustifiably limits claims to written fraudulent materials. We have been meeting with large numbers of former

¹ Brief for Defendant-Appellee at 8 n.4, *Salazar v. Duncan*, No. 15-832 (2d Cir. Jun. 22, 2015) (“DOE retains the ultimate discretion to grant or deny a discharge application. . . . And, as the ultimate guarantor of the loans at issue, DOE often steps into the shoes of the guaranty agencies where, for example, a guaranty agency ceases operations. More broadly, DOE manages the FFEL and Direct Loan programs as a whole, and has not, either by regulation or guidance, delegated authority to guaranty agencies. . . .”).

students of Corinthian-owned schools who have shared remarkably similar stories about their recruitment. Repeatedly, former students say that Corinthian recruiters made unsupported job placement claims to students verbally, reinforcing its more general marketing themes of guaranteed post-graduation employment. Former Heald students at our workshops, virtually without exception, recite the Heald advertising slogan “Get in, get out, get ahead,” with irony and without prompting. Students at every Heald campus recount that Heald recruiters reinforced this message at hours-long in-person meetings in which they promised universal post-graduation employment or easy transfer to a four year institution. Students say that they were invited to an in-person meeting with a Heald recruiter immediately after expressing any interest in the school. Most students we spoke with went to these initial meetings intending only to find out more about the school, but left fully enrolled after school sales representatives deflected their questions with false promises, filled out the students enrollment agreements and financial aid documents on the spot, and used “hard sell” tactics to keep them from leaving the meeting without signing. Many students, however, could not recall receiving actual documentation of these promises of employment or scholarship.

Verbal misrepresentations are sufficient to state claims under relevant state laws. Limiting relief to those students attesting to receipt of written misrepresentations fails to address the fact that the most egregious misrepresentations that students are subjected to are verbal. Sworn student complaints, particularly where they are supported by similar complaints from students at the same campuses, about school recruitment and enrollment practices are sufficient to state a claim in state court and so are sufficient to assert a state law defense through the Department’s procedure.

The Department should also track and note substantially similar complaints as indicia of misconduct, whether or not the students received documentation of job placement rates through official school publications. Where it has received multiple complaints regarding an institution, the Department should review and investigate student allegations and then take the appropriate actions to halt federal loan support for illegal conduct.

- 3) No paper documentation requirements: Borrowers should be asked for only the information necessary to substantiate their claims. The Department should not require documentation beyond the application because it would pose an unnecessary burden on both applicants and reviewers at the Department. Rather, the borrower’s statement, signed under penalty of perjury, should suffice as evidence for his or her defense unless the Department has information that conflicts with the claims. If the Department truly needs more information to make a determination, it should investigate the applicant’s claims, and send a follow-up notice to the applicant with a request for the specific documentation necessary to validate the claim. If the borrower does not have reasonable access to the necessary documentation, then the borrower’s attestation should suffice unless the Department has information contrary to the attestation.

Currently, the Heald form requests submission of documents such as transcripts and registration documents. Our clients and other former students like them often have no official records or documentation, in many cases because the schools discouraged them from keeping records. In addition, in many circumstances borrowers are unable to obtain the

necessary documents, such as in the event of a school closure. The Department's estimate of burden for the information collection assumes one hour of burden per respondent. If the Department requires students to gather documentation that may be inaccessible due to the length of time that has passed, geographic distance, or mismanagement or closure of schools, then the Department's burden estimate would be grossly understated. At the same time, the Department should have internal records of students' identities, the schools they attended, the programs they enrolled in, and information related to their debt. If the Department insists on verifying borrowers' sworn statements, in many circumstances it can do so based on its own records.

- 4) No legal expertise requirements: A simplified, clear application process is essential to ensure that borrowers can access this process without legal assistance. The application should use plain language in accordance with the federal Plain Language Act of 2010. The application should not require borrowers to be versed in the law; rather, they should be able to respond to plain language queries that align to state law claims without restating them. After an application has been submitted, the Department can then determine whether each borrower's experience constitutes a valid defense to repayment in accordance with the applicable state and federal laws and the adjudication process outlined below. In cases where borrowers have legal representation, there should be a clear process to allow authorized legal representatives to have access to all communications related to the case and to advocate directly on behalf of the borrower.
- 5) Create a uniform federal legal standard as a floor for all borrowers: We urge the Department to exercise its statutory discretion to consider violations of federal law as grounds for defense against repayment. *See* 20 U.S.C. § 1087e(h). The Department should set forth federal standards for evaluating all DTR claims, and make it clear that this is a nation-wide base standard and that state laws may add additional protections, but never obstruct the federal floor. The Department should grant all borrowers' claims if they are sufficient to establish a defense to repayment under federal or applicable state standards unless there is credible evidence that contradicts the borrower's allegations.

It will be more efficient for the Department to make available one single, universal form, rather than state-specific forms. Additionally, in many states, such as California, state Unfair and Deceptive Acts and Practices laws treat a violation of federal law or regulations as a violation of state law.² If the Department instead makes available state-specific forms, then the Department must provide clear information to borrowers about whether to file the form for the state in which they live or the state where they went to school, if different.

Ensuring Fair Consideration of Applications

In addition to making available consumer-friendly application forms, the Department must adopt an adjudication process that safeguards the rights of borrowers to due process and appropriately compensates borrowers for the harm they have suffered. In order for the adjudication process to

² Cal. Bus. & Prof. Code § 17200 et seq. *See, e.g., Cal. ex rel. Herrera v. Accrediting Comm'n for Cmty. & Junior Colls.*, 2013 U.S. Dist. LEXIS 157826, at *22 (N.D. Cal. Nov. 4, 2013).

achieve these goals, we call for the Department: 1) to compile and use all available information regarding school misconduct, 2) to process applications promptly and provide opportunities for reconsideration, and 3) to give eligible borrowers comprehensive relief if their applications are approved.

- 1) Department use of available information: As mentioned previously, the Department should streamline the review process by considering information already available to the federal government. The Department should closely examine the full record of the school, including previous claims submitted about the school as well as other internal and external data sources. Doing so will reduce the burden on borrowers for whom it is often difficult and time-consuming to provide documentation of their enrollment and of the ways that the school violated state and federal law. As Under Secretary of Education Ted Mitchell notes in his June 2015 blog post regarding debt relief for Corinthian College students, applying legal findings to groups of students will promote efficiency and minimize burden.³ Furthermore, by keeping track of the patterns in the claims that are filed, the Department can uncover illegal school practices and prevent federal funding from continuing to flow to schools that violate the law by deceiving students and burdening them with unmanageable debt.

The Department should gather information about student loan types, dates, amounts, and servicers from its own records. The Department should utilize all available resources to verify a borrower's claim before denying an application or requesting further documentation from the borrower. Information sources available to the Department include relevant prior defense against repayment and loan discharge claims; results from for-profit school undercover testing like that conducted by the GAO from 2010-2011; information published in 2012 in the Senate Health, Education Labor and Pensions Committee Report; school compliance reports regularly made available by educational accreditors; as well as any information available to the Department through its internal investigations or state investigations shared with the Department.

- 2) Due process: Applications received by the Department must be reviewed and adjudicated without undue delay. We request an outer limit of 60 days, with an extension available if the Department has requested additional information from the borrower after reviewing the initial application. However, in many situations the determination should be made much more quickly. For applications submitted via the website, the Department should automate adjudications of simple cases where electronically available information can verify the borrower's claim. For example, in the case of Heald students eligible to use the simple attestation form, the Department could create automated back-end rules for the online application that certify an applicant's eligibility for relief based on the key data and selections entered into the application. The Department should also provide an online notification option that would allow borrowers to check on the status of their application through a password-protected, secure account on the Department's website.

³ Under Secretary Ted Mitchell, "Debt Relief for Corinthian Colleges Students," *HomeRoom: the official blog of the U.S. Department of Education*, June 2015, <<http://www.ed.gov/blog/2015/06/debt-relief-for-corinthian-colleges-students/>>.

Because not all students will be able to receive immediate determinations on their claims, we support the Department's option for full forbearance on Direct student loans throughout the adjudication process, and similar options should be added for FFEL and Perkins loans. We support the language including that option within the application itself, along with the notice to borrowers that they may be liable for interest incurred during this time period in the case that their application is denied. However, the Department should only trigger forbearance for those loans associated with the school for which a borrower is asserting a defense to repayment. For example, if a student has \$20,000 in federal student loan debt from Heald College, and \$10,000 in student loan debt from a subsequent community college program, then only the Heald College loan should go into forbearance if a student is only claiming a defense against repayment for the Heald College loan. The practice of triggering forbearance on all other federal loans, as indicated in Section IV of the current Heald College form, may pose an undue financial burden on borrowers who may see their loan balances increase under forbearance for loans not under dispute.

Moreover, the Department should ensure that upon a borrower's submission of a defense to repayment, all collection activity cease as to defaulted loans, without regard to whether the loans are held or serviced by the Department or a third-party.

Finally, due process requires an opportunity for appeals and for re-application. Any denial of a defense to repayment claim should include a notice explaining the reason for the denial. The Department should not make its determinations binding, especially given that the criteria for the Department's determinations have not yet been made clear and may still be evolving. Borrowers must be notified of their appeal rights. They should have the right to provide additional information or otherwise contest the reason for denial and be given a reasonable timeframe in which to do so. Borrowers must also be notified of the right to submit another application. Notice should be provided at the time of application as well as on the notice of the determination.

3) Comprehensive relief: In addition to relief from obligations to repay an outstanding loan, the Department's regulations authorize the Secretary to provide further relief to borrowers as appropriate under the circumstances. *See* 34 C.F.R. § 685.206. The violations of federal and state law that our clients have experienced at the hands of Corinthian and other schools have burdened many with tens of thousands of dollars of debt and left them without job prospects in their fields and with years of their earning potential wasted. Most students find their credits to be nearly worthless and must repeat their higher education entirely in order to move forward with their lives. Therefore, we urge the Department to provide comprehensive relief to students, including:

- *Cancellation of debt tax forgiveness*. Students should not be required to include cancellation of their student loan debt in their taxable income when it is granted on the basis of a valid defense against repayment. A defense against repayment claim should be treated as an assertion that the liability for the debt is contested based on the misconduct of the school.

- *Reinstatement of Pell Grant and GI bill eligibility.* Many students wasted their Pell Grant and GI Bill eligibility on educations that turned out to be worthless. For students who wish to pursue a higher education at a different institution, the Department should reinstate Pell grant eligibility and provide a waiver to the 36 month limit for veteran and active duty military education benefits. If the Department believes that it lacks authority to do so, we urge the Department to work with other agencies and Congress as necessary to ensure that students can get a fresh start at their education.
- *Clarify that borrowers are entitled to full relief for consolidated loans as well as unconsolidated loans.* Many borrowers who attended schools with illegal, abusive practices have trouble paying back their extensive student loans after finding their education to be occupationally worthless, and consolidate their loans in an attempt to make payment manageable. The Department of Education should clarify that defense against repayment is available to students subjected to misconduct where students subsequently consolidated loans. This relief should include reimbursement as well as removal of debts from borrower credit reports.

The Department should grant full relief to all students with valid claims as supported by state and federal law. Students asserting claims against institutions for inducing them to enroll based on false or misleading representations would be entitled to rescission of contract and full relief under state law. These laws do not call for partial relief in cases where borrowers managed to obtain some measure of success despite, and not because of, an inadequate educational opportunity.

Attached to this letter is a model application form illustrating many of the concepts described in our comments. We appreciate the Department's commitment to ensuring that students "receive every penny of the debt relief they are entitled to, as efficiently and easily as possible."⁴ Student loan borrowers, as well as the taxpayers funding their loans, deserve protection from companies that deceive and defraud students to increase corporate profits. We look forward to continuing to work with the Department to protect students and hold schools accountable.

Thank you for the opportunity to provide comments on the Department's process for reviewing and adjudicating borrower defenses against loan repayment.

Sincerely,

Bay Area Legal Aid

East Bay Community Law Center

Housing and Economic Rights Advocates

Legal Aid Foundation of Los Angeles

National Consumer Law Center (on behalf of our low-income clients)

⁴ See Note 3.

New York Legal Assistance Group

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