

Comments to the Department of Education on Notice of Proposed Rulemaking, 77 Fed.

Reg. 42086 (July 17, 2012)

Docket ID ED-2012-OPE-0010

Submitted August 16, 2012

The following comments are submitted on behalf of the National Consumer Law Center's low-income clients. The National Consumer Law Center (NCLC) is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys and their clients, as well as community groups and organizations that represent low-income and older individuals on consumer issues. NCLC's Student Loan Borrower Assistance Project provides information about student rights and responsibilities for borrowers and advocates and provides direct legal representation to student loan borrowers. Most of the clients we represent are low-income borrowers living in Massachusetts. We also work with other advocates across the country representing low-income clients. In addition, we seek to increase public understanding of student lending issues and to identify policy solutions to promote access to education, lessen student debt burdens and make loan repayment more manageable.¹

Deanne Loonin, Director of NCLC's Student Loan Borrower Assistance Project, was the primary negotiator representing legal aid clients at the negotiated rulemaking sessions in which these regulations were developed. We were part of the consensus reached on this package of proposed regulations. We support the proposed regulations and applaud the Administration for taking important steps to streamline affordable payment programs and provide broader relief to student loan borrowers. The comments below highlight a few points that we believe are not clear or need additional attention.

A. Income Based and Income Contingent Repayment Plans

We support the proposed regulations implementing the "Pay As You Earn" repayment plan (also called ICR-A). Under the proposed rules, ICR-A has several additional important features, including capping the amount of interest that can be capitalized and allowing borrowers to change repayment plans without penalty.

Furthermore, we support the Department's efforts to establish a defined process for borrowers to verify their income and family size annually and to allow borrowers to request to have their monthly payment amount recalculated at any time. We encourage the Department to continue to look for ways to mitigate the penalty for borrowers who submit their paperwork late and to encourage those borrowers to submit their income documentation for review.

With these improvements to the income based and income contingent repayment plans, it is especially important that borrowers be able to access the IBR and ICR plans. We are pleased that beginning next month, Direct loan borrowers applying for IBR will be able to provide their

¹ See the Project's web site at www.studentloanborrowerassistance.org. NCLC also publishes and annually supplements practice treatises which describe the law currently applicable to all types of consumer transactions, including *Student Loan Law* (4th ed. 2010 and Supp.).

income information electronically, using a process similar to the one already in use for the FAFSA. However, borrowers attempting to consolidate their loans and repay through IBR routinely face administrative hurdles, particularly when consolidating as a way out of default. We frequently hear from borrowers, advocates, and servicers, that the consolidation department does not forward the borrower's repayment selection form or income information to the servicer after consolidating the loan. Borrowers are confused and frustrated by repetitive requests for information they have already submitted. Ultimately, this prevents some borrowers from accessing IBR and increases the likelihood of default.

B. Total and Permanent Disability Discharges

1. Early Implementation

We support the proposal to streamline the total and permanent disability (TPD) process through a single point of entry. We caution that this new process will only be an improvement for borrowers if the Department or its contractor has sufficient resources and training to efficiently and accurately administer this program. It is also critical that the Department provide clear information to borrowers about how to apply for disability discharges and where to send applications.

We urge the Department to implement these proposed reforms earlier than the effective date to the extent possible. For example, the proposed regulations require communications and other notices to be sent to borrower representatives in addition to borrowers. We have been told many times that the Department is already sending such notices upon request by borrowers or their representatives. This is not our experience.

We understand that the Department has the capacity to send notices to representatives. We therefore urge the Department to investigate why this is not currently being done and to take steps to ensure that this improvement is in place as soon as possible.

Further, the Department has committed to creating a standard third party release form. We urge the Department to do this as soon as possible. We continue to get inconsistent and inaccurate information about which release form is required and whether information can ever be provided to third parties.

2. Cessation of Collection

The preamble to the regulations includes a discussion about whether the Department must terminate Treasury offsets after receiving a completed TPD application. The Department reiterated its current policy that it ceases offset in these circumstances only in some cases. We are requesting clarification about the Department's current policy and the criteria it considers in deciding whether to cease offset while the TPD application is under review.

We believe that the Department's rationale for continuing offset, at least in part, is because it believes that the TPD review process is fast and efficient. Unfortunately, this has generally not been our experience. In just the past few months, we had at least two cases in

which Nelnet apparently lost applications that were properly sent by guaranty agencies. Nelnet had not registered the applications in their system. As a result, the review process dragged on for a number of months. These applications moved forward only because we were able to intervene on behalf of our clients. We urge the Department to reconsider this discretionary policy and instead cease all Social Security offsets after receipt of completed application.

3. Tying TPD Determinations to Social Security Standards

While we support the improvements in the proposed regulations, we continue to emphasize the points we made during the meetings about tying the TPD determination to Social Security disability standards. By deciding not to add this issue to the agenda, the Department failed to address the most important problem with the TPD process.

The Department can use the regulatory process to make the most significant improvement to TPD by allowing borrowers to provide proof of Social Security disability determinations as presumptive proof of disability discharge. We do not believe that statutory change is required in order to make this critical change.

We provided information to the Department during the sessions indicating that Nelnet had developed a draft procedure that would use proof of SSA disability as the basis for TPD determinations. The system takes into account the various SSA disability tiers. The Department negotiators indicated at the sessions that they did not adopt this draft. We urge the Department to reconsider this position, using the draft procedure as a model of how the Department could create a streamlined system allowing borrowers to obtain disability discharges by providing proof of SSA disability determinations. We have attached a copy of this draft to these comments (see pp. 5-6).

Again, we thank the Department for taking affirmative steps to improve the loan programs for borrowers from loan origination through collection. We support the proposed regulations.

Thank you for your consideration of these comments. Please feel free to contact Deanne Loonin if you have any questions or comments. (Ph: 617-542-8010; E-mail: dloonin@nclc.org).

TITLE:	Medical Review of Total and Permanent Disability Discharge Applications Procedures, applications received pre 07/01/10 and post 07/10/10.	Page 1 of 10
BUSINESS UNIT:	TPD Unit	STATUS: Draft
CLIENT:	Department of Education	ISSUE DATE: 08/12/10

OBJECTIVE **The purpose of this procedure is to:**

Perform the Medical Review on applicant (borrower, joint, co-made and endorser) discharge application to determine whether there is evidence the applicant can work or engage in substantial gainful employment, (applications received pre 07/1/2010 and post 07/1/2010).

The following proposed process is intended to tell how we plan to fulfill the following TPD requirements:

12, 30h, 30i, 30m, 62, 71, 70, 72, 73, 73.1, 74, 75, 76, 77, 78, 90, 145, B08, B21

STANDARD **The expectation for delivering the outcome of this procedure is to:**

Process the "Pass" and "Fail" status to determine eligibility for monitoring period then discharge (pre 7/1/10) or eligibility for discharge then monitoring (post 07/1/2010) The loans will be submitted to FSA for discharge approval or denial (90).

BUSINESS PROCESS PATH **This procedure is classified within the following business process:**

OVERVIEW (OPTIONAL) **The background or context for this procedure is the following:**

- a) Applicants who have met the requirement for Document Review, NSLDS Check and Pre-Medical Review are systemically identified to perform the Medical Review Check (62)
- b) The "Total and Permanent Disability Discharge Protocol for Pre-Medical Check and Medical Review" Version 2, is used to evaluate the applicants discharge application, except for Veteran applicants (70).
- c) Discharge applications for Veteran Discharge do not require the physician signature or medical information (73).

NELNET PROCEDURE

TITLE:	Medical Review of Total and Permanent Disability Discharge Applications Procedures, applications received pre 07/01/10 and post 07/10/10.	Page 2 of 10
BUSINESS UNIT:	TPD Unit	STATUS: Draft
CLIENT:	Department of Education	ISSUE DATE: 08/12/10

- d) Applicants applying for Veteran Discharge must submit documentation from the Veteran's Administration determining their condition is a service connected disability or totally disabled based on an individual unemployment determination (76).
- e) The TPD Servicer shall implement the "Total and Permanent Disability Discharge PROTOCOL FOR PRE-MEDICAL CHECK AND MEDICAL REVIEW" Version 2, for all pre-medical reviews. (67)

RELATED PROCEDURES

In order to perform this procedure, the associate must also know the following procedures (if any):

PROCEDURE STEP-BY-STEP

Perform these steps to arrive at the desired or necessary outcome including conditional steps (if this happens, then do this instead):

Review for applications received before July 1, 2010 by the loan holder:

If anything in the application completed by the physician or any documentation accompanying the application indicates the borrower is working or can work either now or in the future, DENY (Fail) the application. If there is conflicting information in the application you must **FOLLOW-UP** (see physician follow-up procedures) with the physician to resolve the conflict and determine if the borrower is disabled. Otherwise **APPROVE (Pass)** the application.

Review for applications received on or after July 1, 2010 by the loan holder:

If anything in the application completed by the physician or any documentation accompanying the application indicates the borrower can engage in substantial gainful employment either now or in the future, DENY (Fail) the application. If there is conflicting information in the application you must **FOLLOW-UP** (see physician follow-up procedures) with the physician to resolve the conflict and determine if the borrower is disabled. Otherwise **APPROVE (Pass)** the application.

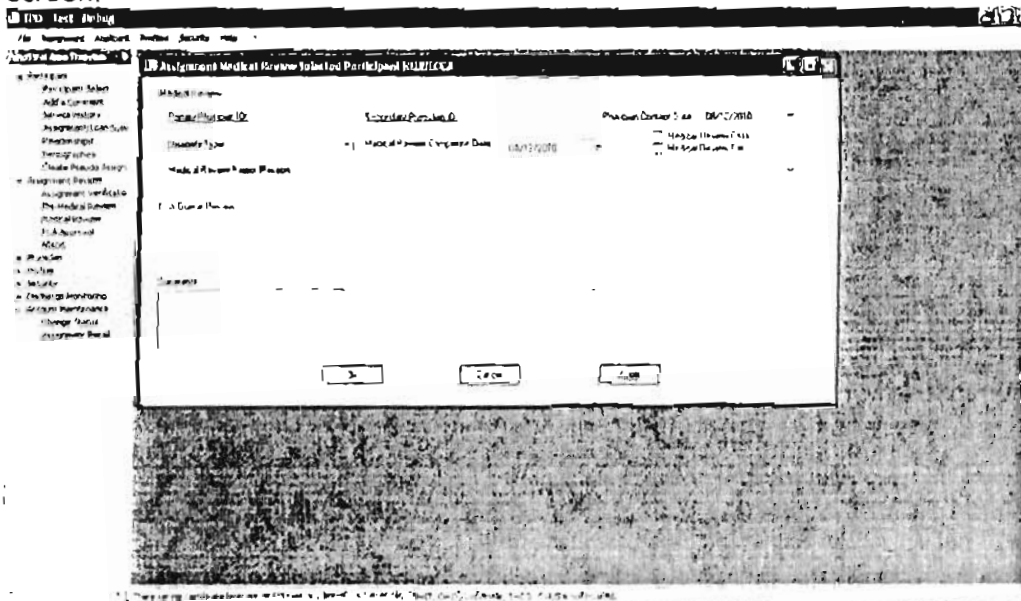
Physician Follow-Up:

If something in an application requires follow-up either because further research is indicated when a borrower would otherwise be denied discharge or there is conflicting information, staff may attempt to contact the physician or physician's office by phone to clarify medical information on the application or inquire regarding the outcome of a planned medical treatment, therapy or surgical intervention. You may speak directly to the physician or an office staff person that relays communications between you and the physician.

NELNET PROCEDURE

TITLE:	Medical Review of Total and Permanent Disability Discharge Applications Procedures, applications received pre 07/01/10 and post 07/10/10.	Page 3 of 10
BUSINESS UNIT:	TPD Unit	STATUS: Draft
CLIENT:	Department of Education	ISSUE DATE: 08/12/10

- Attempt contact with the physician or physician's office by making at least (2) separate call attempts on 2 different days.
- Physician's office voice mail or physician's answering Service: leave a generic message, stating you are following-up on the borrower's application for a student loan discharge due to disability, provide the name of the borrower but do not discuss medical details in the message.
- If you cannot reach the physician after 10 days, the disability application will be forward to the TPD Analyst for follow-up wit the physician. If physician cannot be reach in 20 days deny the Medical Review.
- Note attempts on the TPD System... Assignment Medical Review Selected Participant screen.



- Physician Contact Date- date physician was first contacted.
- Comments Box- note attempts, left message on voice mail or with answering service or name of person left message with.

Conversation with Physician: The following questions must be asked in your conversation with the physician.

- Application received before July1, 2010:

NELNET PROCEDURE

TITLE:	Medical Review of Total and Permanent Disability Discharge Applications Procedures, applications received pre 07/01/10 and post 07/10/10.	Page 4 of 10
BUSINESS UNIT:	TPD Unit	STATUS: Draft
CLIENT:	Department of Education	ISSUE DATE: 08/12/10

1. Always ask the physician if the borrower is still unable to work and earn money. If the physician clearly indicates that the borrower is *currently* able to work and earn money, DENY (Fail) the medical review.

If the physician believes that the borrower *will* be able to work and earn money again in the future, because of a planned medical treatment, therapy or surgical intervention, DENY (Fail) the medical review.

If the physician believes that the borrower *might* be able to work and earn money again in the future, because of a planned medical treatment, therapy or surgical intervention, this is NOT AN ACCEPTABLE REASON FOR DENIAL – you should not deny the medical review for this reason. Note the TPD System Assignment Medical Review Screen “Comment box” with this information and APPROVE the medical review (as long as the application is otherwise acceptable for this protocol).

- Applications received on or after July 1, 2010:

1. Always ask the physician if the borrower is still unable to engage in any substantial gainful activity (see definition in Section 5) by reason of a medically determinable physical or mental impairment that (1) can be expected to result in death; (2) has lasted for a continuous period of not less than 60 months; or (3) can be expected to last for a continuous period of not less than 60 months. If the physician clearly indicates that the borrower is currently able to engage in substantial gainful employment, DENY the medical review.

If the physician believes that the borrower *will* be able to engage in substantial gainful employment again in the future, because of a planned medical treatment, therapy or surgical intervention, DENY the medical review.

If the physician believes that the borrower *might* be able to engage in substantial gainful employment again in the future, because of a planned medical treatment, therapy or surgical intervention, this is NOT AN ACCEPTABLE REASON FOR DENIAL – you should not deny the medical review for this reason.

Note the TPD System Assignment Medical Review Screen “Comment box” with this information and APPROVE the medical review (as long as the application is otherwise acceptable for this protocol).

Borrower's privacy-

To address the physician office's concern regarding the borrower's privacy, fax the physician office a copy of the borrower's discharge application (masking the social security number),

NELNET PROCEDURE

TITLE:	Medical Review of Total and Permanent Disability Discharge Applications Procedures, applications received pre 07/01/10 and post 07/10/10.	Page 5 of 10
BUSINESS UNIT:	TPD Unit	STATUS: Draft
CLIENT:	Department of Education	ISSUE DATE: 08/12/10

circling the privacy release in the borrower section. One the application is sent, follow-up with the physician within 24 hours of faxing the application.

3) Receipt of Social Security Administration (SSA) Notice of Award: (Provide detailed service history comments for type of SSA Notice Award along with results).

- a) SSA Notice of Award indicates the next review will occur anywhere between 6 and 30 months - If this is true, then SSA's internal disability rating is MIE "Medical Improvement Expected." Consider this document as supportive evidence for the general medical review process and follow-up if necessary. **This rating by itself does not enable the borrower to pass the medical review.**
- b) SSA Notice of Award indicates the next review will be in 3 years - If this is true, then SSA's internal disability rating is MIP "Medical Improvement Possible." If the date of the Notice of Award letter is within 3 years of the date of your review, APPROVE (**Pass**) the pre-medical check and the medical review, **unless** the medical information indicates that the borrower is currently working or the physician checks "No" after question 1 in section 4. The borrower enters the three-year monitoring period. If the date of the Notice of Award letter is more than 3 years ago, on the date of your review, you should consider the rating as supportive evidence for the medical review and follow-up if necessary.
- c) SSA Notice of Award indicates next review will be in 5 to 7 years - If this is true, then SSA's internal disability rating is MINE "Medical Improvement Not Expected." APPROVE (**Pass**) the pre-medical check and the medical review, **unless** the medical information indicates that the borrower is currently working or the physician checks "No" after question 1 in section 4.
- d) If the SSA documentation warrants approving the pre-medical check and medical review, you should APPROVE (**Pass**) the pre-medical check, even if the physician's responses are incomplete, **unless** the medical information indicates that the borrower is currently working or the physician checks "No" after question 1 in section 4 (or Question 3a on older applications).
- e) Example 1: SSA Notice of Award is less than 3 years old SSA's internal disability rating is MIP. There is no indication in the medical information that the borrower is currently working and the physician checked "Yes" after question 1 in section 4. **Pass** the pre-medical check and medical review; the application may be accepted, even if the physician did not fully answer questions 2 or 3 in section 4.
- f) Example 2: SSA Notice of Award is less than 3 years old. SSA's internal disability rating is MIP. The physician checked "Yes" after question 1 in section 4, but states in his response to question

NELNET PROCEDURE

TITLE:	Medical Review of Total and Permanent Disability Discharge Applications Procedures, applications received pre 07/01/10 and post 07/10/10.	Page 6 of 10
BUSINESS UNIT:	TPD Unit	STATUS: Draft
CLIENT:	Department of Education	ISSUE DATE: 08/12/10

3 that the borrower is having difficulty in her current job as elementary school teacher Fail the pre-medical check. Do not conduct a medical review.

4) Example of Reasons to Deny A Borrower Medically

Here are some examples of RARE circumstances when there is evidence that the borrower is able to work and earn money or participate in substantial gainful employment activity.

- a) The physician indicates that the borrower is currently working; DENY the discharge based on medical determination.
- b) The physician indicates that the borrower will likely work and earn money in the future; DENY the discharge based on medical determination.

c) You follow-up with the physician regarding the outcome of a drug therapy and also ask if he borrower is able to work and earn money (Pre-July 1, 2010) or able to engage in substantial gainful employment (July 1, 2010, forward). *Remember, if you choose to call a physician, you must always ask one of these questions.* The physician indicates that the borrower is improving and should be able to return to work after concluding the drug therapy; DENY medical review.

5) Examples of Unacceptable Reasons To Deny A Borrower Medically

- a) The limitations described compare to an individual who is still able to work and earn money or participate in substantial gainful employment;
- b) The limitations described do not clearly indicate total and permanent disability;
- c) The physician responds sufficiently to all questions on the application, but you would need more information to conclude on your own that the borrower is totally and permanent disabled;
- d) You follow-up with the physician to clarify some information on the form, or regarding the outcome of a planned surgery. You cannot reach the physician after (10) days;
- e) The medical information indicates recent attempts to work, but the physician provides a clear explanation that the disabling condition prevents the borrower from working and earning money in any capacity.

Note: In examples 1-5 above, if the application is otherwise acceptable according to this protocol, APPROVE the medical review.

6) RESOLVING CONFLICTING PHYSICIAN INFORMATION FROM MULTIPLE PHYSICIANS

If the application is supported by medical information or statements made by physicians other than the physician who signed the application, you should include this information in your review of the application.

NELNET PROCEDURE

TITLE:	Medical Review of Total and Permanent Disability Discharge Applications Procedures, applications received pre 07/01/10 and post 07/10/10.	Page 7 of 10
BUSINESS UNIT:	TPD Unit	STATUS: Draft
CLIENT:	Department of Education	ISSUE DATE: 08/12/10

In the RARE circumstance that another physician states that the borrower is able to work and earn money, you should verify the physician's license and DENY the medical review. If the borrower contests this physician's statement, the borrower will need to work with this physician and the certifying physician to resolve the conflict.

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- The TPD Servicer shall resolve multiple disability dates with the physician if more than one date is presented or if multiple physicians sign the disability application. (72)

7) Medical Determination: Assignment Medical Review Screen

The screenshot shows a web-based form titled "Medical Review". The form includes the following fields and controls:

- Physician Name:** James Phelan, MD
- Disability Type:** Mental of Physical Completion Date: 10/13/2010
- Physician Contact Date:** 10/13/2010
- Medical Review Pass/Fail:** A dropdown menu with "Medical Review Pass" selected.
- Medical Review Reject:** A dropdown menu.
- Comments:** A large text area for entering notes.
- Buttons:** "OK", "Cancel", and "Help" buttons are located at the bottom of the form.

Physician Contact Date – date physician's office was contacted.

Disability Type- assessment of physician response to determine (77):

- Catastrophic – ex. Brain trauma
- Physical – ex. degenerative spinal disorder
- Psychological – ex. bipolar

Medical Review Completion Date- date Medical Review was complete.

Medical Review "Pass" or "Fail"- check appropriate box

Medical Review Reject – if "Fail" us drop down for list of options. (71)

Comments – Use comment box for free form text (71)

- Reason for physician follow-up
- Detailed explanation of the applicant's condition using physician comments.

NELNET PROCEDURE

TITLE:	Medical Review of Total and Permanent Disability Discharge Applications Procedures, applications received pre 07/01/10 and post 07/10/10.	Page 8 of 10
BUSINESS UNIT:	TPD Unit	STATUS: Draft
CLIENT:	Department of Education	ISSUE DATE: 08/12/10

Note: Applicants who failed the Medical Review, the TPD system will identify and initiate communication, including the Borrower Notice of Ineligibility Denial Letter (30h,30i,30m), Loan Holder Ineligibility Denial Letter (30h) and Endorser Notice of Ineligibility Letter (30h).

“The Medical Review has been completed.”

- After the Medical Review, complete for tracking purposes and quality control enter the physician information into the TPD System.

Field	Source	
License Number	Application and verified by link provided by FSA	(73.1)
Licensing State	Application	
Expiration Date	Verified on link provided by FSA	
Last and First Name	Application and verified on link provided by FSA	
Physician Fraudulent Indicator	TPD System monitoring physician trends	74

When the applicant passes the medical review, the TPD Servicer's system will systematically generate a report to discharge all of the borrower's loans, including coordinating the discharge of all loans held by the Department (including appropriate correspondence to the borrower). (B08 and B21) as well as, advising the borrower to apply for a discharge with each loan holders holding other loans. (78)

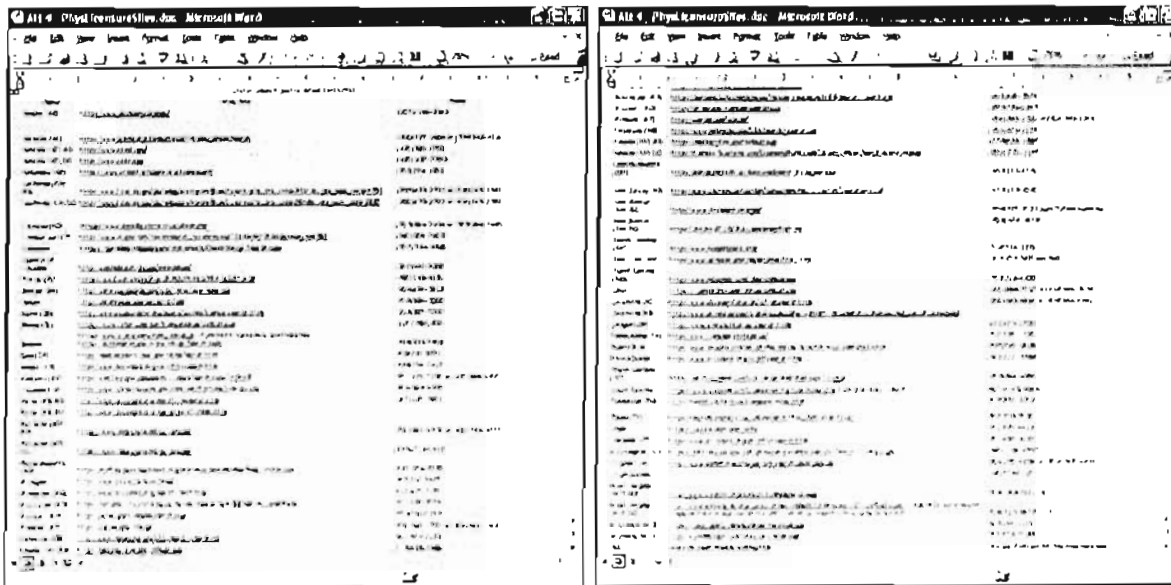
NELNET PROCEDURE

TITLE:	Medical Review of Total and Permanent Disability Discharge Applications Procedures, applications received pre 07/01/10 and post 07/10/10.	Page 9 of 10
BUSINESS UNIT:	TPD Unit	STATUS: Draft
CLIENT:	Department of Education	ISSUE DATE: 08/12/10

Credit Bureau Reporting:

- The TPD system will systematically report all ineligible debts to the national credit bureau using Standard Metro Formats 2 to reflect the change in ownership, except for pseudo accounts (joint, co-made and endorser) (12,145).

(73.1)



“The procedure has ended.”

NELNET PROCEDURE

TITLE:	Medical Review of Total and Permanent Disability Discharge Applications Procedures, applications received pre 07/01/10 and post 07/10/10.	Page 10 of 10
BUSINESS UNIT:	TPD Unit	STATUS: Draft
CLIENT:	Department of Education	ISSUE DATE: 08/12/10

REFERENCES (OPTIONAL) For applicable regulatory, legal, industry, and other relevant governing requirements, see the sources for the following:

REFERENCE TYPE	CITATION
REGULATIONS:	n/a
STATUTES (LAWS):	n/a
COMMON MANUAL:	n/a
DEAR COLLEAGUE LETTERS:	n/a
POLICY CHANGES (NUMBER AND TITLE):	n/a
OTHER (SPECIFY):	n/a

PROCEDURE REVISION HISTORY The following list identifies earlier, final versions of this procedure by issue date (if any) ending with this version:

VERSION	ISSUE DATE	AUTHOR	DESCRIPTION OR REASON FOR THE REVISION
(v01)	08/12/10	Melissa Jefferson	