VETERANS EDUCATION SUCCESS

September 28, 2020

U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202
Via electronic submission

Re: Borrower Defense to Loan Repayment Universal Form, Docket Number: ED-2020-SCC-0043

Dear Sir/Ma'am:

Thank you for the opportunity to comment on the use of a new universal application form to collect new information from applicants under the Department of Education's Borrower Defense to Loan Repayment Program. One of the services Veterans Education Success provides to military-connected students is free assistance in applying for borrower defense. We have seen myriad examples of predatory and deceptive behavior by schools that reinforce the need for a clear and fair process for the discharge of federal student loans that result from fraud. We are providing comments to enhance the quality, utility, and clarity of the information collected through the universal form so defrauded borrowers will be better able to utilize the borrower defense program.

The Proposed Borrower Defense Form is Unnecessarily Long and Confusing

As an initial matter, we note that the proposed form is excessively long. The form is 24 pages long compared to the current form, which is only nine pages long. The 24 page length of this form is, in itself, a deterrent to borrowers completing it. Even in its current nine-page form, Veterans Education Success receives many requests every month from military-connected students seeking assistance in completing it. If borrowers are already deterred by a nine-page form, this is likely to happen much more frequently with a form that is 15 pages longer. A user-friendly way to shorten section 4 on the form is to list out the types of concerns borrowers might have, and then request more details. This is the approach that the U.S. Department of Veterans Affairs' GI Bill Student feedback portal intake form takes. Specifically, in section 4 after every type of conduct being alleged the form repeats, verbatim, the list of documents that a borrower can submit in support of their application. Including this list at the beginning or end of section 4, rather than repeating it multiple times throughout, would shorten the form and still convey to the borrower the types of evidence requested.

Response: The Department declines to make the proposed changes. It is important to recognize that the overwhelming majority of borrower defense applications are submitted online. As part of the development of this application, the online borrower defense application process is undergoing a complete redesign effort. As part of this effort, the design of the online user

experience was tested with actual borrower defense applicants, none of whom expressed confusion about how to complete the application or expressed concerns about its length. Indeed, the same approach taken by the GI Bill Student feedback portal is the approach we will be taking when the new application is implemented—as is common for online applications. Borrowers will first be asked to identify the types of conduct about which they may want to file a borrower defense application, and are then asked to provide additional, targeted information based on those types of conduct. This approach avoids "information overload" for applicants, and also drastically reduces the "length" of the application. In addition, in the online version of the application, and Section 4 in the paper application—includes "suggested" types of evidence that a borrower might wish to upload to support his or her allegations against the institution. To the extent that a borrower believes that a piece of evidence is relevant to multiple types of conduct, he or she need not upload it for each type of conduct against which the borrower is making a claim. The borrower will see the evidence already uploaded when completing subsequent subsections related to other types of conduct, and it will be clear that uploading it twice is unnecessary.

Additionally, we recommend having separate forms for each set of regulations that apply to an individual borrower's circumstance to shorten the length of the form and make it more comprehensible for borrowers. Having one form for multiple regulations is confusing. Because this is a universal form, it will apply to all three borrower defense rules effective July 1, 1995, July 1, 2017, and July 1, 2020. The form does not clearly explain the different standards under the three rules and some clarification is needed so that questions geared towards certain rulesdon't interfere or harm other borrowers who fall under a different rule. Maintaining simplicity and clarity is paramount as most borrowers are unfamiliar with the nuances of the different statutes and regulations. Having separate forms for each borrower defense rule would help the borrower better understand what is required for his or her particular circumstance. This would also allow the Department to provide a clear description of the grounds for eligibility under each standard.

Response: Because the overwhelming majority of borrowers submit applications online, and the online application will use a borrower's loan information to dynamically determine which regulation or regulations each borrower's loan or loans is subject to (and ask the relevant questions), we decline to make this change. The use of a single, electronic "smart" form significantly reduces the burden on borrowers as the Department will access the borrower's information and the dates of the relevant loans for them, and this information will trigger the appropriate fields in the "smart" form. It removes the potential for student error in identify the relevant loans or selecting the appropriate form. All of that will be done for the borrower through the electronic form. A single "smart" form also reduces the application burden by allowing a borrower to submit a single application, even if loans from different time periods and adjudicated under different regulations are involved. A single application will determine when the borrower took each loan, and based on that date and the relevant regulation, elicit the information necessary to determine a borrower's eligibility for discharge—even if the borrower's loans will be adjudicated under different sets of regulations.

The Department included in its notice for comment its responses to both Congressional[1] and legal aid concerns with the previous notice for comment on changing the borrower defense form. We echo many of the areas of concern in both of those comments that the Department either

disagreed with or did not address. Below, we highlight a few areas of particular concern to the military-connected students we assist with borrower defense applications.

Instructions

The instructions section lists examples of what does not make a borrower eligible for relief under borrower defense. By placing this list on the first page of the application, the borrower is likely to be discouraged from seeking relief because the list inundates the borrower with reasons they should not pursue a claim. Moreover, it is the Department's responsibility to determine whether a claim is meritorious, not the borrower's responsibility, yet this proposed form shifts the burden to the borrower to first attempt to judge the meritoriousness of the claim before even applying for relief. We would prefer a return to the previous borrower defense form that more simply explained that "If your school misled your or engaged in other misconduct" a borrower may be eligible for borrower defense relief because it does not require the borrower to adjudicate their own claim, but rather invites them to explain the circumstances in total.

Response: The Department does not adopt this recommendation. Based on the large number of ineligible claims that the Department has received, it is imperative that borrowers understand from the start which kinds of conduct may have disappointed the student, but are nonetheless not examples of misconduct that would lead to borrower defense relief. It is imperative that the Department not create false hopes or waste the time of a borrower whose allegations, even if proven true, would not result in borrower defense relief. In addition, it is important that staff focus their effort and attention on eligible claims so that the Department can adjudicate the claims quickly and provide eligible borrowers with the appropriate relief.

We also urge the Department to use more accessible word choices in the instruction page, in order to ensure that all Borrowers understand what the Department is seeking to explain. Borrowers frequently complete the application without the assistance of a lawyer and will likely not know whether their circumstance includes a "misrepresentation" or "untruthful representation," which is the verbiage the proposed form includes. Using more accessible language like "lie" or "dishonest" or "false" will allow borrowers to better understand what type of conduct the Department is seeking. Also, including examples of the type of specificity that must be alleged would assist borrowers in further understanding what would substantiate an allegation.

Response: The Department is required to use the critically important terms that appear in our regulations, which carefully define those terms. Introducing new terms, without similar regulatory definitions, could be confusing to borrowers and could result in the determination that a claim is ineligible because it does not meet the standard for a misrepresentation as defined by the relevant regulations. While we appreciate your suggestion for providing examples of the specificity that a borrower must allege to substantiate an allegation, there is no single standard for specificity as the level of details needed to adjudicate the claim could differ based on the type of allegation made by the borrower. In our list of data elements, we have included a number of the types of misrepresentation that most frequently appear in the eligible borrower defense applications we have received to date, as well as types of misconduct that we have identified through our own investigations, media reports, and institutional disclosure that would likely result in a borrower's eligibility for borrower defense relief. We added those examples to help borrowers better understand the types of claims that would be eligible for borrower defense

relief. We do not plan to add to that list at this time, but will continue to monitor the situation and could expand the list in the future.

Section 4- Basis for Borrower Defense

The proposed form contains excessive questions and requests for additional documentation that will likely discourage students with potentially valid claims from applying because they may perceive the burden as insurmountable. In each subsection of section 4 there is a request for documents supporting the applicant's claims. The repeated request for documentation may lead borrowers to believe that unless they have all the types of the documentation listed, they will not qualify for relief. This is particularly problematic for military-connected students because many of them initially enroll in schools while they are still on active duty and use their military email addresses which allows them to read school-related emails while they are on duty. After leaving active duty, these borrowers no longer have access to those emails and cannot use them as supporting documentation. Not having access to that documentation is likely to discourage military-connected students from pursuing the application, even though they may otherwise qualify for relief.

Response: We do not adopt these recommendations. The Department does not, and cannot, adjudicate borrower defense claims based on hearsay evidence alone. While we understand that some borrowers may no longer have access to emails that would support their allegations, some may have printed relevant emails and filed those documents with their student loan or admission records and others may have access to other documents that support the claim. In addition, in some instances the Department may be in possession of evidence that would support the borrower's claim even if no additional evidence is uploaded, so the borrower's failure to upload emails may be irrelevant. Under the 2019 Borrower Defense to Repayment regulations, the Department is required to share with a borrower defense applicant all of the evidence that the Secretary will use to adjudicate the claim and provide the borrower with the "last word" in responding to that evidence. But under no circumstances can the Department require the taxpayer to take on the loan repayment obligation for a borrower who cannot in some way substantiate his or her allegations of misconduct on the part of the institution.

To ensure this does not deter applicants with valid claims who might think they need extensive supporting documentation to qualify, the proposed form should include an explanation that a borrower may still be eligible for relief even if documentation from the list is not included. Further, the Department stated in a response to the Comment from the Legal Aid Community to the Department of Education that, "The need for documentary evidence, beyond mere testimony, is a bedrock principle of due process and the proper and fair adjudication of claims of harm, inside and outside of the courtroom."[3] This ignores the legal principle that testimony may be a form of evidence, particularly when it is contained in sworn affidavits or witness statements. Moreover, the Department's approach to disregarding all testimonial evidence is not consistent with other administrative proceedings, such as those utilized by the Department of Veterans Affairs. At the very least, the proposed form should include under "documentation" an explanation that sworn affidavits and witness statements may also be included.

Response: We appreciate your recommendations and will make it clear that other forms of evidence not included on the list may be sufficient to support the allegations of misconduct and

that a borrower should not forfeit his or her opportunity to seek relief simply because he or she is not sure that appropriate or adequate evidence is available.

The subsection "Educational Services" should include an additional option under the examples of school misrepresentation that states, "My school changed the requirements of my program after I enrolled." Many military-connected students tell Veterans Education Success that they enrolled in a program only to find out immediately before their expected graduation date that the school had changed the requirements of the program thereby delaying their ability to graduate on time. By including this as an additional example of a school misrepresentation, borrowers will understand that this is a form of misrepresentation for which borrower defense may be warranted.

Response: While typically an institution is required to adhere to the requirements listed in the college catalogue under which the student enrolled, there are instances in which programs must make changes to ensure that graduates have up-to-date skills and are prepared to enter a dynamic and rapidly changing workforce. If a student has been enrolled in a program for a long time, it is not unreasonable to believe that a program has changed over time to meet current workforce standards, recommendations of the program's professional advisory board, and to respond to job placement outcomes. This is foundational to the continuous improvement model that accrediting agencies require of institutions. While institutions should communicate clearly to students when program requirements are changing, and provide them a pathway for completing their program under the new requirements, it is not necessarily a misrepresentation when a program updates its requirements, especially since changes in program requirements typically require the support of the faculty through an institution's governance process.

The subsection "Program Cost and Nature of Loan" should include an additional option under "Did the school mislead you…" that says "My school told me that my GI Bill would cover the entire cost of my tuition and fees, but it did not." Veterans Education Success has received many, many complaints from students that schools told them the GI Bill benefit would satisfy the entire tuition and fees, only to discover later that they must take out student loans to cover unmet costs. By including this as an additional example of how a school may mislead a borrower, the applicant will understand this is a misrepresentation that may make them eligible for borrower defense.

Response: The Department has already included misrepresentation about the cost of a program and availability of financial aid as an eligible category for BD relief. Therefore, an instance such as the one described would already be covered. Because statute dictates the definition of "cost of attendance" to institutions — a definition that includes the cost of housing, transportation, childcare, food, equipment and supplies – it is not necessarily a misrepresentation to state that the student's GI Bill benefits cover the cost of tuition and fees, but not the full cost of attendance. Further complicating this issue, statute does not permit the Department to take into account an individual's GI Bill benefits when calculating a student's EFC. This is why some veterans whose GI Bill benefits cover the full cost of attendance still have the opportunity to take federal student loans. However, in the case that an institution did misrepresent the cost of attending the institution, its published cost of attendance, or the availability of student aid, the borrower would be entitled to borrower defense relief, as the current form already explains.

Section 5-Financial Harm

The new universal form includes a financial harm section for loans taken out after July 1, 2020. The section is unnecessarily ambiguous and unclear about what constitutes financial harm. The section begins by listing what does not constitute financial harm but does not provide a similar list of examples as to what financial harm to the applicant would be. Either more examples should be provided or the question should be framed more generally following the suggestion from the legal aid comment[4] which the Department declined to adopt.

The question "What is the total monetary loss associated with your federal student loans that you have incurred due to your school's alleged misrepresentation?" is confusing. A reasonable interpretation of this question would lead a borrower to merely list the total amount of student loans acquired while attending the school. On the first page of the proposed form, however, the instructions state, "The act of taking a loan or holding student debt is not, by itself, considered to be financial harm." There is no way for a layperson, or indeed even a lawyer, to decide "the total monetary loss associated with your federal student loans" attributable to a school's alleged misrepresentation if, according to the instructions, the answer cannot be the amount of the loan or debt itself. This question must be either made comprehensible or removed entirely.

Response: The Department's regulations require the Department to provide an opportunity for a borrower to estimate the monetary loss incurred as a result of the alleged misrepresentation. However, as our regulations also make clear, relief is limited to a borrower's federal student loan debt associated with the program for which the borrower alleges misconduct took place. The Department has the ability to determine how much the student borrowed to attend the program or institution where the alleged misconduct took place. Therefore, we will add a brief explanation stating that the student can include on the form the amount of Federal debt he or she has taken to enroll in the program, but the Department has direct access to this information and the borrower may leave it blank if this information is not readily available to the student.

Additionally, the section asks borrowers, "have you failed to meet other requirements or qualifications for employment…such as…your ability to pass a drug test, satisfy driving record requirements, or meet health qualifications?" As worded, this question may intimidate borrowers into not applying for borrower defense entirely even though this information is only relevant to financial harm as set forth in 34 C.F.R. § 685.206(e)(8)(v), and not to the threshold issue of eligibility. A borrower may still qualify for borrower defense, but perhaps have experienced less monetary loss due to losing a job opportunity for other reasons, but this question makes it appear that if someone ever failed a drug test or had a poor driving record, they should not bother applying at all. This question should be modified to ask more succinctly "After you graduated were you unable to get or keep a job for any reason other than your education?" This will still satisfy the intent of the inquiry, but also not deter borrowers from applying.

Response: We agree that the language you suggested provides a more "plain language" statement of the question, and we will amend the language to adopt your recommendation. However, the Department will continue to include the borrower's inability to pass a drug test, to satisfy driving records requirements, or to meet health qualifications as examples of the kinds of things other than the quality of education received that may have interfered with the borrower's ability to obtain or retain employment.

Section 6 – Forbearance and Stopped Collections

This section asks borrowers to opt-in to stopping involuntary collections despite that the stopped collections will be automatic as outlined in 34 CFR § 685.222(e). This question is, therefore, misleading to applicants and may be confusing borrowers into unintentionally opting out of the automatic temporary relief the regulation was designed to provide.

Response: The Department appreciates your comment and agrees that under 34 CFR 685.222(e), collections stop automatically during the period in which the Department adjudicates the claim. The form should have informed the borrower that if he or she is involved in a loan rehabilitation program, he or she can voluntarily continue to make payments to satisfy the requirements of the rehabilitation, although doing so is not required.

Conclusion

Borrower Defense is an essential tool for borrowers who have been the victims of fraud. It is designed to benefit borrowers and the process should not discourage its utilization. Simplifying, shortening, and clarifying the universal borrower defense form will not only assist the Department in reviewing applications, but will help ensure students who have been defrauded are not misled or confused while trying to apply for the program.

[4] *Id*. at 10-11.

Sincerely,

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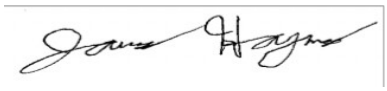

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