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To: President-Elect Joseph Biden Transition Team, Department of Education

From: Robyn Smith, Of Counsel, National Consumer Law Center

Date: December 9, 2020

Re: Recommended Revisions to False Certification (Ability-to-Benefit) Discharge Policies and Regulations

I am submitting these recommendations 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 rights and responsibilities for student borrowers and advocates. We also 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

Background

In 1978, the Higher Education Act (HEA) was amended to provide financial aid eligibility to students who had not earned a high school diploma or equivalent, as long as the school certified that they had an "ability to benefit" from the training in which they enrolled.² This meant that the school was required to certify that a student had sufficient skills – reading, writing, language, and math – to be able to succeed in postsecondary education. Initially, the Department of Education (ED) did little to specify how schools should evaluate a student's abilities. In 1987, ED began allowing schools to certify student eligibility by administering an approved ability-to-benefit (ATB) test.

Allowing non-high school graduates to qualify for financial aid led to the massive proliferation of for-profit schools more eager to fill their pockets than provide

¹ See the Project's web site at www.studentloanborrowerassistance.org. NCLC also publishes and treatises which describe the law currently applicable to all types of consumer transactions, including Student Loan Law (6th ed. 2019).

² [S. Rep. No. 58](#), 102nd Cong., 1st Sess. 6 (1991) (hereinafter, "Nunn Report"); Middle Income Student Assistance Act, Pub. L. 95-566, Sec. 6, 92 Stat. 2403 (1978) (codified at 20 U.S.C. § 1088).

educations.³ For-profit schools began aggressively recruiting vulnerable low-income students in front of homeless shelters, welfare and unemployment offices after 1978.⁴ They also targeted people of color. In 1988, these schools expanded their aggressive sales tactics, targeting a new market of vulnerable recruits – 3 million undocumented immigrants who were granted amnesty.⁵ Between 1982 and 1988, loan volume at for-profit schools increased from \$684 million to \$4.15 billion.⁶

Hearings in 1990 before the Senate Permanent Subcommittee on Investigations (a subcommittee of the Committee on Government Affairs) documented the widespread falsification of ATB testing by for-profit schools. These schools engaged in a wide variety of practices, including falsifying test results, providing students with answers to the tests, allowing students to take tests multiple times, and giving students extra time to complete the exams. In addition, schools completed FAFSA applications for the students, indicating that the students had completed high school when in fact they had not. The schools typically concealed false statements by pressuring the students into signing their FAFSA applications without reviewing them first. Schools also engaged in schemes to have students obtain high school diplomas which, unbeknownst to the students, were fraudulent.

After hearing extensive evidence from the Office of Inspector General and others, the Senate Subcommittee placed the blame for the widespread fraud on ED. It concluded that “through gross mismanagement, ineptitude, and neglect in carrying out its regulatory and oversight functions, [ED] had all but abdicated its responsibility to the students it is supposed to service”⁷ The Subcommittee determined the “complete breakdown in effective regulation and oversight” had opened the door for “major fraud and abuse . . . , particularly at proprietary schools.”⁸ Based on the evidence gathered through the Subcommittee’s investigation, Congress enacted a broad mandate authorizing the ED to grant a loan discharge whenever a student’s eligibility to borrower was falsely certified by the institution.⁹

These practices continue to this day. In 2015, for example, the U.S. Department of Justice indicted the owners of FastTrain College in Miami for allegedly obtaining federal financial aid by misrepresenting to the government that 1,300 students were high school graduates.¹⁰ The school told these students that they did not need a diploma or that they would earn one while attending college. Other examples are described in two federal court complaints attached to this memo.¹¹

³ *Id.* at 6.

⁴ Schools for Scandal, CONSUMER REPORTS 303, 304 (May 1992), attached hereto as Attachment 1.

⁵ *Id.* at 304.

⁶ Nunn Report, *supra* note 2, at 7.

⁷ *Id.* at 33.

⁸ *Id.* at 11.

⁹ 20 U.S.C. § 1087(c)(1); 34 C.F.R. §§ 682.402(e)(3)(ii)(A) (FFEL Program Loan), 685.215(c)(1)(i) (Direct Loan).

¹⁰ See [Second Superseding Indictment](#), *U.S. v. Amor*, U.S. Dist. Ct., S. Dist. of Fla., Case No. 14-20750-CR-LENARD (Sept. 29, 2015).

¹¹ See Attachments 2 & 3.

Despite HEA's discharge mandate, ED has denied discharges to many deserving borrowers by imposing evidentiary burdens that are almost impossible to meet and retroactively imposing new regulatory restrictions. These borrowers – many of whom have suffered from debt burdens for decades – deserve false certification discharges.

Recommendations

We recommend ED make the three following changes: (1) rescind its “corroborating evidence” rule and replace it with a borrower-centered policy that is more aligned with the intent of the HEA discharge mandate; (2) expand the number of group discharges available to students who attended schools that engaged in widespread ATB or high-school-diploma certification fraud; and (3) cease retroactively applying the false certification regulations it adopted in 2019 to loans disbursed prior to July 1, 2020. We also request that ED provide updated discharge applications in other languages, including at a minimum Spanish.

1. Rescind Corroborating Evidence Standard and Establish a Burden of Proof Fair for Borrowers.

According to a 1995 memo, in most circumstances ED requires borrowers to provide independent evidence before it will grant false discharges based on ATB or other high school-diploma related fraud.¹² It defines this “corroborating” evidence as (1) proof of government findings that the borrower's school engaged in ATB fraud; or (2) proof that a sufficiently large number of other students who attended the same school submitted discharge applications detailing similar fraud allegations. Absent such evidence, ED essentially infers that no ATB fraud occurred and that the borrowers are lying,¹³

Most borrowers cannot provide this evidence. They need, but rarely have access to, attorneys who can track down the necessary evidence through Freedom of Information Act (FOIA) requests and legal research. Even more important, as the Senate Subcommittee determined in 1990, ED completely abdicated its responsibility to monitor school compliance with the ATB certification requirements. ED's oversight of school certification practices has barely improved since that time.¹⁴ Thus, ED's Kafkaesque

¹² U.S. Dep't of Educ., DCL GEN 95-42 (September 1995).

¹³ *Id.*

¹⁴ See U.S. Gov't Accountability Office, GAO-09-600, *Stronger Department of Education Oversight Needed to Help Ensure Only Eligible Students Receive Federal Student Aid* at 24 (August 2009) (“weaknesses in [ED's] systems of controls for monitoring test publishers may not adequately guard against fraud and abuse in the ATB test program.” The GAO determined that ED regulations do not allow for timely identification of improper test administration and did not require test publishers to follow up on test score irregularities, or take corrective action, allowing ATB fraud to continue unchecked. It also noted repeated instances where schools and independent test administrators violated the ATB process by giving out answers to test questions, changing test answers to ensure individuals passed, and allowing student to take the same test multiple times); Office of Inspector Gen., U.S. Dep't of Educ., *Audit of FSA's Controls Over ED-Approved ATB Programs*, ED-OIG/A03-B0001 (Aug. 22, 2002) (identifying ED weaknesses in oversight of ATB program).¹⁴

inference that a school did not engage in improper ATB practices absent any government findings makes no sense.

ED should replace the corroborating evidence standard with a new evidentiary policy. Borrowers who submit a sworn application establishing their eligibility for a false certification discharge should be considered presumptively eligible for discharge. Once presumptive eligibility is established based on a borrower's application, the burden should then shift to ED to disprove the borrower's eligibility. Absent any credible evidence contradicting the borrower's sworn statement or disputing the borrower's credibility, ED should grant the discharge. ED should not consider electronic information provided by a school as credible evidence sufficient to overcome the presumption. ED should also not consider evidence or documents from a school engaged in the falsification or alteration of student records or documents submitted to ED, according to the findings of ED, any other government agency, an accreditor, or a court.

Moving forward, ED should revise its document retention policies and keep all of the following evidence indefinitely, given that there is no statute of limitations applicable to government student loans, and should provide this evidence (with appropriate redactions for privacy purposes) to borrowers on request: (1) all evidence that it collects in evaluating discharge applications; (2) all discharge applications, which can also serve as corroborating evidence to support other discharge applications; and (3) all evidence gathered during or findings after any kind of school review or investigation that demonstrates any potential violation that would serve as a basis for a student loan discharge.

2. *Expand the Number of Schools for Which ED Will Grant Group Discharges.*

Individual borrowers do not have access to the full range of information that guaranty agencies and ED collect about student complaints, ED audits and investigations, findings from other false certification discharges, and other key information. In addition, most borrowers are unaware of their potential false certification discharge eligibility based upon ATB or high-school-diploma fraud. This is a form of relief of which most of the public is unaware, in part because it is based on complex financial aid eligibility requirements.

In the 1990s, in order to address this problem, ED identified schools that engaged in widespread ATB fraud and determined that it would grant false certification for all borrowers who submitted discharge applications that demonstrated eligibility, without requiring corroborating evidence.¹⁵ This is often referred to as a "group discharge."

¹⁵ For a list of schools for which ED has granted group discharges, see Nat'l Consumer Law Center, Student Loan Law, Section 10.4.2.7 (6th ed. 2019) (listing a small number of schools for which ED has granted group discharges, based on a list provided to NCLC by ED in 1998).

Since that time, as far as we know, ED has not added any schools to the group discharge list unless forced to do so by litigation.¹⁶

ED should expand the use of group discharges by affirmatively granting group discharges to appropriate cohorts of borrowers in cases where there is proof that a school engaged in systemic false certification violations. ED may do this under its discharge authority or under its authority to compromise and settle debts. ED should use a process in which it: (1) identifies now-closed schools that engaged in widespread ATB or high-school-diploma fraud based on the evidence within its possession (or provided to it in the course of the process), in consultation with student borrower advocates and state law enforcement agencies; (2) identifies all borrowers who attended these schools and who may have been impacted by the violations at these schools; (3) sends these borrowers discharge applications; and (4) grants discharges to those borrowers who return applications that indicate they are eligible for discharge, without requiring corroborating evidence.

3. Cease Retroactively Applying the 2019 Amendments to the False Certification Discharge Regulations.

In 2019, ED amended the ATB/high-school diploma false certification regulations in two primary ways. First, the new regulations bar a borrower from receiving a false certification discharge whenever the borrower has signed a written attestation that he/she had a high school diploma.¹⁷ ED ignored evidence of rampant documentation falsification at institutions that commit false certification violations. The new provision also incentivizes predatory schools to defraud both students and taxpayers while denying relief to injured borrowers.

Students at predatory schools do not typically prepare their own financial aid applications or documents. Instead, recruiters and financial aid representatives fill out the documents for students and instruct them to sign. This can lead to students unknowingly signing documents that contain false or inaccurate information. Since most of the financial aid forms are completed electronically,¹⁸ a borrower need not even be present to review or sign the financial aid documents before they are submitted. Furthermore, the types of institutions that commit false certification often utilize high-pressure sales tactics, where students are pressured to enroll immediately and presented with large stacks of documents to sign with limited time to review. Under this new rule, a student who unknowingly signs an attestation that misrepresents his or her eligibility is permanently disqualified from seeking a false certification discharge.

¹⁶ In 2017, ED agreed to group discharges for as many as 36,000 students who attended the Philadelphia campus of the Wilfred Academy of Hair and Beauty Culture and the New York campus of Robert Fiance to settle a lawsuit filed by New York Legal Assistance Group. Patricia Cohen & Emily Rueb, [U.S. To Help Remove Debt Burden for Student Defrauded by For-Profit Chain](#), NEW YORK TIMES (Aug. 9, 2017).

¹⁷ 34 C.F.R. § 685.215(e)(1)(ii).

¹⁸ See U.S. Dep't of Educ., *Federal Student Aid Handbook* at AVG-5 (Dec. 2017) ("most students use FAFSA on the Web to apply for federal student aid...").

ED has recently been denying false certification discharge applications from borrowers who obtained loans prior to July 1, 2020 on the basis that the borrowers submitted FAFSAs in which they attested that they had completed high school. The FAFSA is similar to a written attestation of high school completion because it requires borrowers to certify their education status for financial aid eligibility. In doing so, ED has ignored the declarations from these borrowers in which they detailed how they were rushed through enrollment and pressured to sign a large stack of documents with limited or no time to review them. Legal services organization representing these borrowers are currently considering filing litigation about this practice. ED should immediately halt denying applications on this basis and consider borrower declarations.

The second amendment concerns the date used to determine discharge eligibility. ED amended the false certification discharge regulation to use the loan disbursement date, rather than the loan origination date, to indicate when a borrower was falsely certified.¹⁹ Prior to this amendment, ED used the origination date – the actual date a school certifies a borrower’s financial aid eligibility – for determining whether a borrower is eligible for a false certification discharge.

ED is now denying false certification discharge applications from borrowers with loans disbursed before July 1, 2020, on the basis that although the school submitted an origination package in which it falsified the eligibility of a borrower who lacked a high school diploma, it can cure this falsification if the disbursement date is delayed long enough to allow the borrower to complete six credit hours of his/her program.²⁰ Again, legal services organizations representing borrowers are exploring litigation about this issue.

Accordingly, ED should cease denying false certification discharge applications from borrowers with pre-July 1, 2020 financial aid on this basis. ED should also rescind these and other 2019 amendments to the false certification discharge regulations.

4. Provide Updated Discharge Applications and Instructions in Spanish.

Finally, none of the federal student loan discharge forms – for closed school, unpaid refund, false certification, or borrower defense – are currently available in Spanish. ED had previously provided all except the borrower defense forms in Spanish, but those forms expired as of August 31, 2008. Because many of the student preyed upon by for-profit schools are immigrants who only speak and read Spanish – especially in certain parts of the country, like California – it is critical that ED provide accessible application forms in Spanish.

Conclusion

¹⁹ 34 C.F.R. § 685.215(a)(1)(i).

²⁰ The 6-hour credit completion is an alternative means to certify the eligibility of borrowers who lack high school diplomas.

The long history of ATB and high-school-diploma abuses by for-profit schools, and ED's neglect of its duty to monitor these schools and protect students, have left hundreds of thousands of students with debt. This debt should not have been made in the first place and should be cancelled. ED should rescind the false certification discharge standards and policies that prevent students from qualifying for the relief mandated by Congress. It should also create fair evidentiary standards that give greater weight to student testimony, expand group discharges, and provide false certification and other discharge forms in Spanish.