



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.

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 rules

don'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.

The Department included in its notice for comment its responses to both Congressional¹ and legal aid² 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 you 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.

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.

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

¹ Letter to Secretary Betsy DeVos, Committee on Education and Labor, May 4, 2020, available at <https://beta.regulations.gov/document/ED-2020-SCC-0043-0011>.

² Comment from the Legal Aid Community to the Department of Education, May 4, 2020, available at <https://beta.regulations.gov/document/ED-2020-SCC-0043-0011>.

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.

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.

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.

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.

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

³ *Id.* at 5.

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 comment⁴ 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.

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.

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.

Conclusion

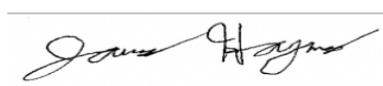
Borrower Defense is an essential tool for borrowers who have been the victims of fraud. It is designed to benefit borrowers and the process should not discourage its utilization. Simplifying, shortening, and clarifying the universal borrower defense form will not only assist the Department in reviewing 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,



Aniela K. Szymanski
Senior Director of Legal Affairs and Military Policy



James Haynes
Federal Policy Manager