

MEMORANDUM

Date: October 21, 2021

To: U.S. Department of Education

From: Persis Yu and Joshua Rovenger, Negotiators for Legal Assistance Organizations that Represent Students and/or Borrowers

Re: Closed School Discharge Regulatory Proposals

We appreciated the robust discussion on Closed School Discharge and, as we mentioned, we support many of the Department's proposed changes as it relates to the regulation. We also look forward to additional discussion about the importance of granting automatic discharges for *all* borrowers who did not complete their program because their school closed on or after January 1, 1986 and prior to November 1, 2013, and about the need to eliminate the extra-statutory requirement that a student cannot get a closed school discharge if she later re-enrolls and transfers most credits to a comparable program.¹

As we mentioned during the session, we also have specific proposals that we ask the Department to consider:

- (1) Automatic Discharge: The Department should make the language in sub-section (h) on automatic discharges mandatory.
- (2) Ensuring Relief from Predatory Credential Stacking: The Department should clarify that a student is eligible for a closed school discharge on all loans associated with a school when that school conditions admission into one program on completion of another (i.e. when a borrower is guaranteed enrollment into a bachelor's degree program after they complete the credits for an associate degree program). This issue is not addressed by the Department's current sub-topics.
- (3) Exceptional Circumstances: The Department should include additional examples of the "exceptional circumstances" that warrant extending the closed school discharge window. The Department should also make the extended date presumptively effective unless the Secretary rebuts the presumption that such circumstances warrant an extension of the window.

¹ As discussed, the current proposal will pose a barrier to the very borrowers who have been suffering the longest. This is particularly inequitable since the Higher Education Act does not impose the requirement, and since most students are unable to transfer most of their credits after their institution closes. Indeed, other programs for students who attended a closed school are not so limited, and expressly apply to those "who transfer to another institution." *See, e.g.*, Md. Code. Educ. Art. 11-203(e)(2)(ii) (Maryland's program to reimburse students who attended a closed school for non-Title IV tuition and fees). The Department could, instead, universally apply the standard it proposes for schools closed on or after July 1, 2019 (barring a student from relief only if they complete an accreditor approved teach-out.)

Proposal 1: The Department should change the discretionary language in the automatic discharge section of its proposed regulatory language.

Background: We are pleased to see the return of an automatic discharge provision in this regulation. As proposed, sub-section (h) of the proposed regulation states that “If the Secretary determines based on information in the Secretary’s possession that the borrower qualified for the discharge of a loan under this section, the Secretary *may* discharge the loan without an application from the borrower.” We see no reason for this to be discretionary. Instead, if a borrower is eligible for an automatic discharge, the Secretary should be required to provide one.

Proposal: The Department should replace “may” with “shall” in proposed sub-section (h) of the regulation. The Department should retain its discretion to provide a discharge in other circumstances.

Proposal 2: The Department should clarify that a student is eligible for a Closed School Discharge on all loans associated with a school when that school conditions admission into one program on completion of another.

Background: Some schools, particularly for-profit institutions, manipulate a student into enrolling in multiple credential programs. Often, they will require the student to enroll in a diploma or associate degree program before they can enter a bachelor’s degree program. This is true even if the student *always* and *expressly* intended to pursue a bachelor’s program.

ITT Tech is a notorious example of predatory degree stacking. ITT admissions representatives would tell students it was enrolling them in a bachelor’s degree program but would require students to complete an associate degree program before allowing them to begin the bachelor’s degree program. The associate degree credits would count towards the credits needed to complete the bachelors. When ITT Tech closed, the current closed school discharge standard left students repaying a substantial portion of the debt they borrowed to attend ITT. Students in stacked programs appeared to have completed an associate degree, rendering the associated debt ineligible for a closed school discharge.

There is no reason for the Department to accept the school’s artificial fissuring of the two programs. In truth, the student went to the school for the bachelor’s degree and was working towards that degree the entire time. They should be permitted to discharge the entirety of the debt borrowed in pursuit of the stacked degree.

Proposal: The Department should explicitly clarify that a student is eligible for a discharge on all loans associated with a school in circumstances like these, that is: (1) where a school conditions admission into one program on completion of another, (2) the school closes while the student was in the second program, and (3) the student, within a reasonable period of time, continued from the first program into the second.

To accomplish this change, we propose that the Department add the following to 34 C.F.R. § 685.214(a)(2):

“Program of Study” includes completed credential levels at the same institution that share the first four digits of the CIP code as the credential level that the borrower did not complete if the borrower was enrolled in the non-completed program within a reasonable time (18 months) after the completed program. Irrespective of the CIP code, the term “Program of Study” also includes a completed credential

level at the same institution as a non-completed program if the credential level that the borrower did not complete was designed or represented to be a continuation of the program that the borrower completed.

Proposal 3: The Department should include additional examples of the “exceptional circumstances” that warrant extending the closed school discharge window and should require the Secretary to affirmatively rebut a presumption that such circumstances warrant an extension of the window.

Background: We support the Department’s decision to include examples of “exceptional circumstances” that justify expanding the withdrawal eligibility window. We also applaud the Department’s recent use of that authority as it relates to IIT Tech.

The “exceptional circumstances” provision recognizes that in anticipation of a school closing, an institution often fails to maintain necessary equipment and facilities, stops paying instructor wages, fails to replace instructors who have departed, and discontinues programs before students have completed them. As the GAO plainly stated: “research has indicated that a school’s financial struggles can have negative effects on its operations.”² Unfortunately, in practice, the Department has rarely found such “exceptional circumstances,” and has only extended the look-back window in extreme conditions (such as after the implosion of Corinthian Colleges and IIT Tech).

The Department’s current, non-exhaustive list is a good start. There are, however, other circumstances that signal a potential closure and yield the same “negative effects” on operations. Most notably, the Department placement of a school on heightened cash-monitoring status is often the precursor to significant cuts. This was the case for schools owned by Corinthian, those owned by Education Corporation of America (HCM status in March 2015 and closed in December 2018), and IIT Tech (HCM status in August 2014 and closed in September 2016).

Another event that the Department should specifically recognize as an “exceptional circumstance” is when there is a judgment against a school for violations of state or federal law that adversely impact the school’s finances. By way of example, in November 2015, a federal court entered a Consent Judgment against Education Management Corporation (EDMC) – owner of the Art Institutes, Argosy University, South University, and Brown-Mackie Colleges. The Court ordered EDMC to pay \$95.5 million to the Department and several states for an illegal scheme to pay incentive compensation to recruiters based on the number of students they enrolled. This judgment was the beginning of the end for these schools, leading to the closure of 22 Brown-Mackie campuses in June 2016, and the sale and subsequent closure of many of the others in 2018 and 2019.

Proposal: The Department should include the following examples of exceptional circumstances: (1) the placement of a school on heightened cash monitoring status, and (2) a judgment, whether stipulated or contested, against a school for violations of state or federal law that required a payment that adversely impacted the school’s finances. The Department can accomplish this change by adding in these examples as numbers (8) and (9) to its proposal at § 685.214(i).

² U.S. Gov’t Accountability Off., GAO-17-555, Higher Education: Education Should Address Oversight and Communication Gaps in its Monitoring of the Financial Conditions at Schools 28 (2017).

Furthermore, in order to ensure that the Department appropriately evaluates whether any event constitutes such an exceptional circumstance, it should: (1) presume that such an event warrants an expansion of the eligibility window, and (2) require the Secretary to affirmatively rebut that presumption. To accomplish these changes, we propose that the Department modify the current versions of 34 C.F.R. § 685.214(c)(1)(i)(B) and § 685.214(c)(2)(i)(B) to read:

The Secretary shall extend the 180-day period if an exceptional circumstance, as described in paragraph (i) of this section, occurred. The extension for the exceptional circumstances takes effect unless the Secretary makes a written finding, upon clear and convincing evidence, that the event does not justify an extension of the 180-day period.