

Federal Student Aid

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SUBJECT: Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings

SUMMARY: This letter provides guidance to guarantors and educational institutions participating in the Federal Family Education Loan Program (FFELP) and Federal Perkins Loan Program (Perkins) (hereinafter “holder” or “holders”) as they continue to implement U.S. Department of Education (hereinafter “the Department” or “Education”) regulations (at 34 C.F.R. § 682.402(i)(1)(ii) & (iii) (FFELP) and 34 C.F.R. § 674.49(c) (Perkins)) that govern their actions in defending bankruptcy adversary proceedings in which borrowers seek discharge of student loans authorized by Title IV of the Higher Education Act of 1965, as amended (hereinafter “Title IV”), including Parent PLUS loans, on the basis that excepting the loans from discharge would impose undue hardship upon the borrowers. This letter clarifies that, in determining whether repayment of the student loan would impose an undue hardship on a borrower, a holder may fulfill its regulatory requirements by using the process outlined in the Nov.17, 2022, Department of Justice Guidance to United States Attorneys (hereinafter “November 2022 Guidance” or “Guidance”), including any revised or updated version of the Guidance issued by the Department of Justice. This letter supersedes and replaces DCL GEN-15-13.

Background: Department regulations currently allow a holder to stipulate to the existence of certain facts and recommend that the bankruptcy court find that repayment of a student loan would cause an undue hardship in appropriate cases if it follows a two-step analysis. First, a holder must evaluate a borrower’s undue hardship claim and determine whether the holder believes that repayment would constitute an undue hardship. If the holder determines that requiring repayment would impose an undue hardship, the holder should stipulate to the existence of certain facts and recommend discharge. This responsibility includes recommending that a bankruptcy court grant full or partial discharge of student loan debts in appropriate cases. Second, if the holder determines that requiring repayment would not impose an undue hardship, the holder must then evaluate the cost of objecting to the borrower’s claim of undue hardship in court and may concede discharge if the costs of defending the adversary proceeding exceed the cost of the amount owed. This letter clarifies that a holder may fulfill its regulatory requirements as to the first step of the analysis by following the process outlined in the November 2022 Guidance.


On Nov. 17, 2022, the Department of Justice, in coordination with Education, released new [Guidance](#)  for Assistant United States Attorneys (AUSAs) defending adversary proceedings where borrowers are seeking to discharge student loan debt held by Education. This Guidance was the product of careful legal analysis, decades of bankruptcy litigation experience, and a recognition that there are likely more borrowers eligible for an undue hardship discharge in bankruptcy than currently seek one. Some borrowers have been deterred from seeking discharge of student loans in bankruptcy due to the historically low probability of success and mistakenly believing that student loans are ineligible for discharge. Other student loan borrowers have been dissuaded from seeking relief due to the cost and intrusiveness entailed in pursuing an adversary proceeding.

In clarifying through this letter that holders (other than the Department) may fulfill their regulatory obligations by following the analysis and process outlined in the November 2022 Guidance, Education seeks to allow parity and consistency in the undue hardship analysis across loan holders. Consistent with the Guidance, Education through this letter seeks to promote three goals:

1. To set clear, transparent, and consistent expectations for discharge that borrowers understand regardless of whether they are represented by counsel;
2. To reduce borrowers’ burdens in pursuing an adversary proceeding by simplifying the fact-gathering process. This includes use of an Attestation and, where feasible, information provided through prior submissions to the bankruptcy court and available student loan servicing records; and
3. Where the facts support it, to increase the number of cases where the holder stipulates to the facts demonstrating a debt would impose an undue hardship and recommends to the court that a borrower’s student loans be discharged.

Undue Hardship Analysis: Under the first step of existing Department regulations, a holder must not oppose discharge where it believes continued repayment would constitute an undue hardship. The November 2022 Guidance identifies specific, objective

criteria that may be used to evaluate claims of undue hardship. The Guidance explains that consideration of student loan debt discharge requires an evaluation of a borrower's past, present, and future financial circumstances, and is intended to apply in jurisdictions that follow either the *Brunner* test, see *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987), or a "totality of circumstances" test, see, e.g., *In re Long*, 322 F.3d 549 (8th Cir. 2003), to determine undue hardship. An analysis of these factors, briefly discussed below, can be found in the Guidance.

The first factor in the discharge analysis under the Guidance seeks to determine whether the borrower can presently maintain "a minimal standard of living" while making student loan payments. To address this factor, the Guidance directs AUSAs to use the [IRS Standards](#)  to determine the borrower's "allowable" expenses and compare those allowable expenses to the borrower's income. If the borrower's allowable expenses exceed their gross income, this element of the analysis is satisfied. In addition to the IRS Standard expenses, the Guidance allows borrowers to identify circumstances in which their actual expenditures fall below the expenses required to maintain a minimal standard of living and to project the expenses they would incur if able to address needs that are currently unmet or insufficiently provided for. These projected expenses may be used in assessing the borrower's financial circumstances.

The second factor in the analysis is whether the borrower's current inability to repay the debt while maintaining a minimal standard of living will likely persist for a significant portion of the repayment period. The Guidance directs AUSAs to rely on certain facts that create a presumption that this factor is satisfied. While these presumptions are rebuttable, we expect that to be uncommon and only based on concrete factual circumstances. Mere conjecture about the borrower's future ability to pay is not enough.

The third factor for discharge is whether a borrower has demonstrated good faith regarding the repayment of student loan debt. This analysis depends upon the borrower's actions relative to their loan obligation. Good faith may be demonstrated in numerous ways, and the good faith inquiry "should not be used as a means for courts" or AUSAs "to impose their own values on a debtor's life choices." *Polleys*, 356 F.3d at 1310. The Guidance directs AUSAs to evaluate whether the borrower has taken an action that demonstrates good faith. Where the borrower has taken at least one of those actions and in the absence of countervailing circumstances, the borrower should be found to have demonstrated good faith.

The good faith inquiry should not disqualify borrowers who may not have meaningfully engaged with the repayment process due to possible misinformation, wrongful income driven repayment plan (IDR) determinations, or a lack of adequate information or guidance. Studies have shown that the servicing of student loan debt has been plagued at times by administrative errors and the dissemination of confusing and inaccurate information, and that these issues may have affected borrowers' responses to their loan obligations. The Consumer Financial Protection Bureau has found that borrowers have been wrongfully denied IDR enrollment and that monthly payments have been inaccurately calculated. See, e.g., Consumer Financial Protection Bureau, Supervisory Highlights Fall 2022 and Summer 2021. The Bureau has also found that servicers falsely but affirmatively represented to borrowers that loans were never dischargeable in bankruptcy. See Consumer Financial Protection Bureau, Supervisory Highlights Fall 2014 and Fall 2015. These problems have also given rise to a lack of trust by borrowers in the repayment process.

Finally, the Guidance does not provide an exhaustive list of circumstances that can support a finding that the undue hardship factors have been satisfied. A holder should carefully consider all facts that may support a discharge.

Documentation of Undue Hardship: To meet the goals discussed above, the Department of Justice in coordination with Education developed both legal guidance and an attestation form to gather key information from debtors outside the formal discovery process in the adversary proceeding. To assist the holder in evaluating a borrower's past, present, and future financial circumstances, a borrower should typically be asked to provide relevant information using the form attestation included with the November 2022 Guidance. In most cases, that form should elicit sufficient information to determine whether a borrower can demonstrate an undue hardship without formal discovery. If a holder uses a different method, it should nevertheless request information about the borrower's income and expenses to enable the holder to evaluate the borrower's present ability to pay and should also seek information that will help the holder evaluate the other two factors. In cases where the information provided by the borrower demonstrates undue hardship, holders should stipulate to the facts underlying the undue hardship claim and recommend discharge to the court or otherwise effectuate discharge in accordance with the local jurisdiction's practice without further discovery. In some cases, additional informal clarification of the information provided on the attestation may be necessary, but holders need not engage in formal discovery to confirm facts demonstrating a debtor meets each factor of the Guidance analysis.

Regardless of the method used by the holder to collect relevant information, where the borrower demonstrates sufficient evidence to satisfy each factor identified in the Guidance, a holder satisfies its obligations under the regulations by recommending discharge to the court and stipulating to the facts necessary for that finding.

Provision of Account Information to Borrower: One primary goal of the Guidance is to reduce the need for formal discovery prior to a stipulation. Holders are encouraged to facilitate this goal by providing borrowers and their counsel with all loan servicing and educational records available. In addition, holders may provide a summary cover sheet that identifies key facts

about the borrower's educational or servicing histories, including whether the borrower satisfies any of the criteria within each element described above, to the extent that information is known by the holder.

Conclusion: This letter provides holders with a consistent and practical approach for handling student loans in an adversary proceeding. By following the November 2022 Guidance, holders comply with their obligations under Education regulations while reducing the burden on holders and borrowers in adversarial proceedings. By following the Guidance, a holder should be able to document the facts necessary to stipulate to an undue hardship claim and recommend discharge to the court in appropriate circumstances. This will allow all parties to avoid costly and time-consuming formal discovery while providing for consistent treatment for borrowers with Direct, FFELP, and Perkins loans, regardless of what entity holds the loan.

Sincerely,

Nassar H. Paydar
Assistant Secretary
Office of Postsecondary Education