

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: False Certification Discharge Regulatory Proposals

Legal service organizations continue to represent the most vulnerable groups of students, primarily students who did not have a high school diploma when they enrolled at a for-profit college and who are eligible for false certification discharges. Many of these borrowers, disproportionate numbers of whom are people of color, have been struggling with debt for decades. This is due, in part, to the Department's unfairly burdensome regulations and standards. We are therefore pleased that the Department has included false certification as an issue for regulation and support many of the Department's proposals.

As we discussed at Session 1, we propose that the Department – in addition to the changes reflected in its issue paper – also consider modifying the regulations as follows:

- (1) Eligibility for Relief: Amend the FFEL and Direct Loan regulations to provide false certification discharge eligibility when schools falsely certify their institutional or programmatic eligibility to participate in the student loan program.
- (2) Ability-to-Benefit Evidentiary Standard: Rescind the current requirement that an applicant include corroborating evidence.
- (3) Group Discharges: Amend the FFEL and Direct Loan regulations to provide an accessible procedure for borrowers and others to apply for group discharges.

Proposal 1: Amend the FFEL and Direct Loan regulations to provide false certification discharge eligibility when schools falsely certify their institutional or programmatic eligibility to participate in the student loan program.

Background: The Higher Education Act (HEA) broadly provides for the Department to grant a loan discharge whenever a student's eligibility to borrow was falsely certified. The statute says: "[I]f such student's eligibility to borrow under this part was falsely certified by the eligible institution . . . then the Secretary shall discharge the borrower's liability on the loan (including interest and collection fees) by repaying the amount owned on the loan."¹

When implementing this statutory directive, the Department has focused exclusively on an institution's falsification of the student-specific eligibility requirements. For example, the Department

¹ 20 U.S.C. § 1087(c).

has recognized false certification based on a student “not having had a high school diploma and not having met the alternative eligibility requirements.”²

This approach, however, ignores the broader problem of schools falsifying their institutional or programmatic ineligibility to participate in the federal student loan program. Indeed, if a school falsely certifies its eligibility for Title IV funding, it has necessarily falsified the student’s eligibility to borrow for programs at the institution. Similarly, if the program fails to satisfy various student outcome measures, such as requirements governing cohort default rates, the school also falsely certifies the student’s eligibility to borrow.³

Recognizing and addressing this gap would provide widespread relief to students at programs and institutions that have engaged in systemic violations or misconduct. If paired with robust enforcement actions to recover the amounts discharged, it would also disincentivize schools from engaging in this wrongful conduct in the first place.

Proposal: The Department should change its narrow reading of the false certification statute. It should no longer limit the discharge exclusively to certifications related to student-specific requirements. Instead, the Department should explicitly state that a school’s falsification of borrower eligibility based on a finding of programmatic or institutional ineligibility to participate in the Title IV or Direct Loan programs constitutes grounds for a false certification discharge.

Proposal 2: Rescind the current requirement that an applicant include corroborating evidence.

Background: For applicants seeking a false certification based on ability-to-benefit or high school-diploma related fraud, the Department requires borrowers to provide some independent, corroborating evidence. In other words, there is a presumption against false certification discharge.

The Department described this requirement in a 1995 letter in which it stated that absent findings of improper ATB practices by authorities with oversight powers, there is “an inference that no improper practices were reported because none were taking place.”⁴ It has also defined “corroborating” evidence to be (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.⁵ Absent such evidence, the Department denies the discharge, suggesting either that the school did not commit ATB fraud, or that the borrower is lying.

This approach ignores the reality for most borrowers (and particularly for low-income borrowers). Under the Department’s invented evidentiary requirement, applicants need, but rarely have access to information like other false certification applications from students, student complaints, statements

² 34 C.F.R. § 685.215(c)(1) & (e)(1).

³ This would similarly apply to certifications related to gainful employment. Under previous gainful employment regulations (which we urge the Department to re-instate), schools were required to certify, for the state(s) from which they are required to obtain authorization, that each “program it offers satisfies the applicable educational prerequisites for professional licensure or certification requirements in that State so that a student who completes the program and seeks employment in that State qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in an occupation that the program prepares students to enter.” 34 C.F.R. § 668.414.

⁴ U.S. Dep’t of Educ., DCL GEN 95-42 (September 1995).

⁵ *Id.*

from former employees, and investigation and audit reports. Applicants also need, but rarely can retain, attorneys who can track down the necessary evidence through Freedom of Information Act (FOIA) requests and legal research. This barrier is then compounded by the Department's document retention policy, which allows the Department to destroy old investigative school records. Legal services attorneys report that the Department often cannot provide records in response to FOIA requests for investigative and other school-related documents because it has destroyed those documents.

Nor has the Department sufficiently monitored school compliance for it to rely so extensively on findings from authorities with oversight powers. Indeed, the Senate Permanent Subcommittee on Investigations determined in 1990 that ED completely abdicated its responsibility to monitor school compliance with the ATB certification requirements (and thus Congress enacted a broad mandate authorizing the Department to grant a loan discharge whenever a student's eligibility was falsely certified by the school). Unfortunately, the Department's oversight of school certification practices have barely improved since that time.⁶

Proposal: The Department should explicitly repeal the corroborating evidence standard and apply a standard fair to borrowers.

Proposal 3: Amend the FFEL and Direct Loan regulations to provide a procedure for borrowers and others to apply for group discharges.

Background: Only a small fraction of the borrowers whose loans were falsely certified ever find out about the school's certification requirements or their right to discharge. We also know that schools who engage in false certification have often done so as a pattern or practice.

The Department has existing authority to address this conduct by providing group discharges. In fact, it has done so in the past. For example, in the 1990s, it identified schools that engaged in widespread ability-to-benefit fraud and granted false certification discharges for all borrowers from those schools who submitted discharge applications, without pursuing the typical individual adjudication.

However, since then, the Department has underutilized this authority. As a result, even when the Department has evidence that a school has engaged in a practice of falsely certifying student eligibility, the Department has not done so. Nor has it even notified the students of the possible relief. Further, under current practice, even if a borrower in the cohort learns about relief, the Department requires that each borrower obtain and present evidence to support her individual application.

Finally, even if a borrower was aware of a school's pattern or practice, and wanted to pursue group relief, the Department lacks any process for them to do so. That is, there is no regulatory standard or

⁶ 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 the Department's 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 students 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).

process describing when the Department should consider providing group discharge eligibility, or permitting someone to petition for such a group discharge.

Proposal: We propose amending the regulations to provide a procedure allowing borrowers and their advocates to seek a determination of group eligibility for false certification discharges. The procedures should also provide a mechanism for state attorneys general to pursue this relief for groups of borrowers who have been subject to the same unlawful practices. Finally, the process (and the regulations more generally) should require the Secretary to fully detail the basis for denying a group discharge request.