

MEMORANDUM

November 30, 2021

TO: Interested Parties

FROM: Winston Berkman-Breen, Deputy Director of Advocacy & Policy Counsel
Claire Torchiana, Counsel

RE: **Considerations for the Department of Education’s Negotiated Rulemaking Committee Regarding the Secretary’s Broad Compromise & Modification Authority**

Introduction

The Department of Education (ED) convened a negotiated rulemaking committee beginning in October 2021 to revise regulations regarding student loans, and various related forgiveness and discharge programs. These programs include Public Service Loan forgiveness (PSLF), Borrower Defense to Repayment (BDR), Total and Permanent Disability (TPD); Closed School discharge (CS), False Certification discharge, and Income-Driven Repayment plans (IDR), among others.¹ We submit this memorandum for consideration ahead of the final session, which will take place between December 6-10, 2021.

In particular, we urge ED to consider the Secretary of Education’s (Secretary) plenary authority to compromise and modify federal student loan debt as a supportive measure to achieve the statutory intent and purpose of the HEA discharge provisions where relevant. There are well-documented instances where either breakdowns in program administration or industry misconduct have deprived potentially eligible borrowers of their statutory right to loan relief. The Secretary should use his existing authority to execute Congress’s vision and make these borrowers whole by bringing them within the fold of existing discharge programs.

As necessary, this authority should be used to revise implementing regulations for each of these programmatic avenues for debt cancellation to reflect lessons learned about why potentially eligible borrowers are unable to access relief. It should also be used routinely and systematically to address circumstances within the intent of the discharge programs but outside of the rulemaking context where debts pose an unfair or inequitable burden to borrowers.

¹<https://www.ed.gov/news/press-releases/new-negotiated-rulemaking-committee-focus-student-loans-targeted-discharge-and-forgiveness-authorities>.

1. *The Secretary has broad authority to compromise and modify federal student loan debts.*

As explored by several scholars and practitioners,² it is established that the Secretary has broad authority to compromise and modify federal student loan debts. The Secretary has general authority to cancel debt owed to the federal government as conferred by Congress to administrative agencies in the Federal Claims Collection Act of 1966 (FCCA).³ 31 U.S.C. § 3701 *et seq.* This authority is further developed by the Federal Claims Collection Standards (FCCS). 31 C.F.R. Subt. B, Ch. IX. Even more broadly, however, Congress granted the Secretary specific authority to create, cancel, and modify debts made under the Higher Education Act (HEA).

In brief, Congress granted the Secretary authority in the HEA to promulgate regulations; sue and be sued; to include terms, conditions, and covenants related to repayment; and to compromise and modify student loan debts. 20 U.S.C. § 1082(a) *et seq.* These authorities apply equally to the Family Federal Education Loan Program (FFELP), the Direct Loan Program (DLP), and Perkins loan program.⁴

First, the Secretary has statutory authority to compromise federal student loan debts pursuant to the HEA. 20 U.S.C. § 1082(a)(6). The only limitation on this authority is that the Secretary must request review by the Attorney General of a settlement that exceeds \$1,000,000. 20 U.S.C. § 1082(b). The Secretary promulgated regulations regarding his authority to compromise a debt, which were amended in 2016. 34 C.F.R. § 30.70. These specify that, “under the provisions of [the FCCS found at] 31 CFR part 902 or 903,” the Secretary may “compromise a debt in any amount, or suspend or terminate collection of a debt in any amount” if these arise under the Title IV program. 34 C.F.R. § 30.70(e)(1). While this provision contains a cross reference to the FCCS, this provision seems to clarify that the Secretary is not required to follow procedures outlined in the FCCS, which generally limits amounts that an agency can compromise without seeking approval from the Attorney General to \$100,000.⁵ To the extent the Department interprets § 30.70 as limiting the Secretary’s authority, the Department should consider amending its regulation to remove the cross-reference to the FCCS, as no such reference is contained in the HEA or the FCCA, and the FCCS does not reference the Department’s regulations.

Second, the Secretary may also “consent to modification, with respect to rate of interest, time of payment of any installment of principal and interest or any portion thereof, or any other provision of any note or other instrument” of any loan made under the Title IV program. 20

² See e.g., <https://static.politico.com/4c/c4/dfaddbb94fd684ccfa99e34bc080/student-debt-letter-2.pdf.pdf>

³ See fn.1 <https://static.politico.com/4c/c4/dfaddbb94fd684ccfa99e34bc080/student-debt-letter-2.pdf.pdf>

⁴ See <https://static.politico.com/4c/c4/dfaddbb94fd684ccfa99e34bc080/student-debt-letter-2.pdf.pdf> at 3, fn. 5.

⁵ The FCCS outlines procedures for compromise of loans above a certain dollar amount, while section § 30.70 provides that the Secretary has authority to compromise debts in “any amount.” Additionally, § 30.70 was amended to reflect the Secretary’s broader authority -- not to limit it, meaning a limiting reading would contract the regulation’s underlying purpose. See *Id.* at 5.

U.S.C. § 1082(a)(4). The Secretary may modify a loan to a \$0.00 balance.⁶ This authority is not limited by Congress' appropriations power, nor by the FCCS.⁷

2. *The Secretary should exercise his discretionary authority where relevant to fully effectuate the purpose and intent of the HEA.*

As discussed by negotiators during the October and November 2021 sessions,⁸ there are situations in which a student loan borrower applying for discharge or forgiveness will not fit neatly into the implementing program regulations even though discharge of their loans would align with the broader policy purpose of the relevant program. Very often borrowers may be barred through no fault of their own. The basic purposes undergirding the various HEA discharge programs are fairly straightforward, though the implementing regulations may sometimes be unwieldy, or borrowers may suffer from administrative or industry breakdowns.

For instance, the PSLF program broadly serves to discharge federal student loan debt for borrowers who have worked in public service.⁹ However, poor communication when the program began and servicer misconduct around eligibility requirements resulted in tens or hundreds of thousands of public service workers making payments that ultimately did not count toward loan forgiveness.¹⁰ The closed school discharge program serves to cancel federal loans for borrowers who cannot complete their program due to their school's closure.¹¹ However, rigid eligibility windows and school malfeasance can render these stranded borrowers ineligible for discharge.¹² Income-driven repayment programs were intended to permit borrowers to work in public service by offering lower monthly payments and currently promise loan forgiveness after

⁶ *Id.* at fn 21, citing *Carr et al. v. DeVos*, Case No. 19-cv-6597 (S.D.N.Y.), Dkt. No. 15-1 (Decl. of Cristin Bulman), 16 (Stipulation of Dismissal) (Secretary modified DLP and FFELP loans of Plaintiffs pursuant to 20 U.S.C. § 1082(a)(4) resulting in balances of \$0.00).

⁷ *Id.* at 6.

⁸ See e.g., Statement by Joe Sanders, November 2 2021 session on PSLF.

⁹ "Provides loan forgiveness for service in areas of national need, including the military, law enforcement officers, firefighters, public defenders, prosecutors, early childhood educators, and librarians and for certain other public sector jobs." 110 CIS Legis. Hist. P.L. 84. See also, <https://www.ed.gov/news/press-releases/us-department-education-announces-transformational-changes-public-service-loan-forgiveness-program-will-put-over-550000-public-service-workers-closer-loan-forgiveness> ("Borrowers who devote a decade of their lives to public service should be able to rely on the promise of Public Service Loan Forgiveness.").

¹⁰ Memorandum, From Ben Kaufman & Winston Berkman-Breen to Interested Parties (Oct. 29, 2021), https://protectborrowers.org/wp-content/uploads/2021/10/2021_10_29-Neg-Reg-Memo-re-Fixing-PSLF.pdf.

¹¹ The mandate in the HEA is broad: the Department "shall discharge a borrower's liability on a loan" if the student "is unable to complete the program in which such student is enrolled due to the closure of the institution . 20 U.S.C. § 1087(c)(1) 28 (FFEL Loans); 20 U.S.C. § 1087e(a)(1) (Direct Loans have the same terms and conditions as FFEL Loans unless otherwise specified); 20 U.S.C. § 1087dd(g)(1) (Perkins Loans, including National Direct Student Loans. 59 Fed. Reg. 94-1008 (Jan 14, 1994) ("loans will be canceled for student borrowers who are unable to complete their program of study because the school closed").

¹² For instance, thousands of former ITT borrowers who did not receive the benefit of their educational bargain because of their school's malfeasance predating closure were until recently saddled with massive debts. <https://www.ed.gov/news/press-releases/extended-closed-school-discharge-will-provide-115k-borrowers-itt-technical-institute-more-11b-loan-forgiveness>.

20 or 25 years.¹³ However, they have historically resulted in few borrowers successfully navigating the program and have caused borrowers' balances to balloon in the process.¹⁴

When borrowers meet the spirit of existing statutory debt cancellation programs, but are rendered ineligible for bureaucratic or other reasons, including in cases of misconduct by schools or mismanagement by Education Department vendors or staff, the Secretary can and should use his broad compromise and modification authority to act as a backstop and deliver relief where it is urgently needed. This approach can be fixed in regulatory provisions (see illustrative PSLF example below), or used methodically on a case-by-case basis by the Secretary.

Conclusion

We urge the Secretary to routinize and systematize the use of his broad authority to compromise and modify loans to achieve the policy goals of the HEA discharge and forgiveness programs where a particular borrower or class of borrowers intended to benefit from these programs may fall through the regulatory cracks. Borrowers who are disabled, have worked in public service jobs for 10 years or more, have been burdened by unaffordable debts, or who were defrauded by their school should receive discharges even when a technicality may hinder their application or where evidence exists of misconduct or mismanagement by schools, vendors, or government officials. Although this authority can be executed using sub-regulatory discretion at any time, incorporating it into the discharge and forgiveness program regulations through rulemaking both will provide clarity for how the most vulnerable borrowers should access this relief and will help to protect Congress's intent for these programs from potential erosion by future administrations without a commitment to borrowers' wellbeing.

Illustrative Examples

- 1) Incorporating catch-all provisions in regulatory language to capture a wide set of borrowers.** The Secretary could add the following language to Public Service Loan Forgiveness regulations to ensure all borrowers who have worked 120 months in qualifying employment can qualify:

“(5) Notwithstanding paragraphs (c)(1)-(4) of this section, a borrower may obtain loan forgiveness for a federal student loan(s) if the borrower indicates in a manner determined by the Secretary and during the application process described in paragraph (e) of this section, and verifiable using the procedures described therein, that after October 1, 2007, and during the term of said loan(s), the borrower worked the equivalent of 120 months in qualifying employment.”

¹³ See, e.g., 34 C.F.R. §§ 682.215, 685.221, 685.209(a), 685.209(c), 685.209(b). The first income-contingent plan was meant to “provide borrowers with a variety of repayment plans, including an income-contingent repayment plan, so that borrowers[?] . . . obligations do not foreclose community service-oriented career choices.” Staff of S. Comm. on the Budget, 103d Cong., Reconciliation Submissions of the Instructed Committee Pursuant to the Concurrent Resolution on the Budget (H.R. Con. Res. 64) 453 (Comm. Print 1993).

¹⁴ National Consumer Law Center & Student Borrower Protection Center, *Education Department's Decades-Old Debt Trap: How the Mismanagement of Income-Driven Repayment Locked Millions in Debt* (March 2021), <https://protectborrowers.org/wp-content/uploads/2021/03/IDR-Brief-NCLC-SBPC.pdf>.

2) Limiting the impact of improper use of forbearance, use of forbearance against public policy, non-consensual use of forbearance

The Secretary can use his broad compromise or modification authority in instances where prolonged forbearances have derailed a borrower's qualification for forgiveness, such as with PSLF or IDR forgiveness. Borrowers who qualified for low-payments under such plans but were directed into forbearance should be able to receive monthly credit applications for forgiveness in the months they were not making payments. As in the example above, the Secretary could write this into income-based plan regulations. Alternatively, the Secretary can use his modification authority to modify a loan balance to zero on an individual basis where a borrower shows she has been in an income driven repayment plan for long enough to qualify for forgiveness.

3) Ensuring IDR payments follow borrowers across consolidations and loan types

The Secretary can also use his compromise or modification authority to ensure borrowers on an income-driven repayment plan who consolidated their loans -- for instance from FFEL loans into a Direct Consolidation Loan -- do not lose credit towards forgiveness. As explained above, this approach can be captured in regulatory text, as currently proposed by the Department, or used by the Secretary on an individualized basis when appropriate.

4) Implementing a timeline for the Department to resolve Borrower Defense claims

The Department can rely on the Secretary's broad authority to implement through regulation a timeline for the adjudication of borrower defense applications, including set and tiered levels of debt relief for borrowers where the Department does not meet this objective. The Secretary has clear statutory authority to provide relief for these borrowers. This approach could also be used on a case-by-case basis.

5) Providing relief for borrowers who withdrew more than 180 days prior to a school's closure

The Department can, through regulations or when considering individual borrower discharge applications, provide relief for individuals who withdrew from a closed school prior to the 180 day withdrawal window. This may be relevant for certain borrowers, for instance an individual who believed her school would close imminently and decided to withdraw, but who may have missed the withdrawal window.