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STUDENT DEFENSE

Action Memorandum

Automating the Discharge of Federal Student Loan Debt for Individuals who are Totally and Permanently Disabled

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I. Summary

Under the Higher Education Act ("HEA"), student loan borrowers who are "totally and permanently" disabled are entitled to a complete discharge of their federal student loans.[1] But under current practices, even after the Social Security Administration ("SSA") determines that an individual is eligible for such a discharge, the U.S. Department of Education ("Department") requires a borrower to go through additional hoops. Rather than using information shared between agencies to automate the process after an SSA determination, the Department forces borrowers to separately apply for a total and permanent disability ("TPD") discharge. As a result, and because of this additional hurdle, over 60% of borrowers identified by SSA as eligible for relief (approximately 350,000 borrowers) had not applied for, let alone received, the relief to which they are entitled.[2]

In order to provide relief to these borrowers, the Department could take several executive actions under the next administration, including:

1. Immediately issue an Interim Final Rule ("IFR") to suspend all debt collections for individuals who have matched as TPD-eligible through the SSA data ("SSA matches").
2. Commence a negotiated rulemaking to allow TPD discharges for such individuals to be provided automatically (*i.e.* without an application) and without a post-discharge monitoring period.

These changes would provide student loan discharges for hundreds of thousands of student loan borrowers with disabilities who are not receiving the relief to which they are entitled.

II. Background and Current State

Under the HEA, student loan borrowers with total and permanent disabilities are entitled to a discharge of their outstanding debt.[3] Borrowers with FFEL Program loans, Direct Loans, and Perkins Loans are entitled to the discharge.[4] Borrowers are considered to have a total and permanent disability if they are "unable to engage in any substantial gainful activity," which relates to earning income, by reason of any medically determinable physical or mental impairment that can be expected to result in death, expected to last for a continuous period of sixty months, or has lasted for a continuous period of sixty months.[5]

Pursuant to 2013 changes to the Department's TPD regulations, an SSA designation of "Medical Improvement Not Expected" ("MINE") qualifies a borrower for TPD relief.[6] Borrowers are also considered to have a total and permanent disability if they have been determined by the Secretary of Veterans Affairs ("VA") to be unemployable due to a service-connected condition.[7] Generally, borrowers will apply for a TPD discharge based on a doctor's certification, certain disability documentation or identification from the SSA, or a VA determination that the borrower is unemployable due to a service-connected condition.

As a practical matter, the Department regularly receives lists of borrowers who are eligible for TPD discharges thanks to information-sharing agreements signed with the VA (under a program announced in the Trump Administration)[8] and with SSA (under a program initiated in the Obama Administration).[9] The Department then notifies these borrowers—hundreds of thousands of individuals—that they are eligible for relief. According to data the Department provided to the National Student Legal Defense Network ("Student Defense") through the Freedom of Information Act ("FOIA"), as of November 2019, 571,527 borrowers matched through the SSA process alone.[10] But most of these

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borrowers fail to seek relief even though the Department has sent them notices: according to the Department's response to the Student Defense FOIA, as of November 2019, 353,445 SSA-matched borrowers, or over 60%, had not received the relief to which they are entitled.

When borrowers fail to apply, and thus fail to receive the discharge, but are delinquent in repayment, the Department often sends these individuals to forced collections and garnishes their disability benefits, all for debts they should no longer owe. If the facts present themselves, the Department's alternative means of involuntary collections may also be used against these borrowers.

After years of bipartisan public pressure, in August 2019 President Trump signed a Presidential Memorandum directing Secretary DeVos to automatically discharge federal student loan debt for veterans identified as eligible by the VA, explaining that the TPD application process was "prevent[ing] too many of our veterans from receiving the relief for which they are eligible" which, in turn, was "frustrat[ing] the intent of the Congress that their Federal student loan debt be discharged."[11]

Approximately three months after the Presidential Memorandum, "Trump Administration lawyers" determined that the agency could not legally move ahead with automatic discharges unless they rewrote the TPD regulations to allow for relief without an application.[12] On November 26, 2019, the Department published an IFR to amend the Perkins, FFEL, and Direct Loan TPD regulations to allow for automatic discharges for VA matches ("VA IFR").[13] According to the VA IFR, the TPD application process was "a barrier that creates significant and unnecessary hardship for our disabled veterans" and removing it was therefore "a pressing problem of national concern."[14] Pursuant to the VA IFR, automatic TPD discharges for veterans appear to be back on track.

Although the same principle applies to the over 350,000 SSA matches who have not received relief, the Trump Administration has not taken any steps to automatically discharge their loans.

In general, the Department treats determinations made by the SSA differently from those made by the VA in one key respect: post-discharge monitoring requirements. Once the Department discharges a debt due to a VA determination of disability, there is no further monitoring of the borrower, seemingly due to a statutory provision that a borrower who is eligible for a TPD discharge due to a determination by the VA "shall not be required to present additional documentation…"[15] But the HEA also provides that "[t]he Secretary *may* develop" safeguards to prevent fraud and abuse involving non-VA disability determinations.[16]

In response to a 1999 Department of Education Inspector General report finding a large percentage of likely fraudulent discharges,[17] the Department took a series of steps to respond to the fraud. The processes have evolved over the years, but since 2010, the Department requires borrowers to be monitored for three years after discharge, during which time the loans can be reinstated for any of the following three reasons: (i) the borrower has earnings beyond a minimally acceptable amount; (ii) the borrower has incurred new federal student loans; or (iii) SSA changes its disability determination.[18] If the borrower does not satisfy these reinstatement period requirements, the "Secretary reinstates [the] borrower's obligation to repay" the previously discharged loan.[19] The Department will also reinstate

a borrower's loans if the borrower fails to provide the required information during the monitoring period, though the regulatory text is ambiguous on this point.[20]

There is widespread support to extend automatic TPD relief to SSA matches. In response to a March 3, 2020 letter from Student Defense and over 30 other advocacy groups,[21] the Department's spokesperson signaled interest in providing such relief, stating to NPR:

> The Department's current implementing regulations require it to receive an application before completing a civilian [total and permanent disability] discharge, but we are interested in providing automatic discharge to these borrowers and believe the FUTURE Act makes this a possibility — but will require the department to undergo negotiated rulemaking.[22]

If the current administration does not follow through, the next administration should provide the same relief for borrowers with disabilities identified by the SSA as they do for those identified by the VA – something that Student Defense along with a bipartisan coalition in Congress has called upon the Trump Administration to do.[23] There are simply no significant or persuasive reasons not to extend this automatic relief to all borrowers—veterans or civilians—who share the statutory right to relief and who have been identified by the federal government as eligible.

III. Proposed Action

Upon taking office, the next administration could take several executive actions to provide relief to borrowers, including:

(1) Issue an IFR to suspend all debt collection activity for SSA matches.[24]

The Department can first issue an IFR to immediately suspend all collection activity for SSA matches while a broader negotiated rulemaking (discussed below) takes place. Although the Department is ordinarily required by the HEA to use negotiated rulemaking to develop a notice of proposed rulemaking ("NPRM") for programs authorized under Title IV, it can issue an IFR—to go into effect immediately—when it finds that, for "good cause," the negotiated rulemaking process is "impracticable, unnecessary, or contrary to the public interest."[25]

There is good cause to suspend collections while the Department conducts the negotiated rulemaking. Pursuant 34 CFR § 685.213(b)(1)(ii), if a Direct Loan borrower "notifies the Secretary that [she] claims to be totally and permanent disabled prior to submitting a total and permanent disability discharge application, the Secretary . . . [s]uspends collection activity on any of the borrower's title IV loans held by the Secretary, and notifies the borrower's other title IV loan holders to suspend collection activity on the borrower's title IV loans for a period not to exceed 120 days."[26] While the Department could interpret the SSA match as a qualifying notification without a rulemaking, it will need the IFR in order to extend the duration of the suspension through to the effective date of the new regulation (i.e. beyond the 120 day period set forth in the current regulation).

While the proposed IFR is more limited than the VA IFR (which provided the automatic discharges themselves) it would rely on the same finding that the TPD application process was preventing Americans with disabilities from receiving the relief they are entitled to under the law, and that removing the barriers to relief was "a matter of pressing national concern."

Finally, the economic fallout from the COVID-19 pandemic provides further good cause for this relief. Borrowers who are totally and permanently disabled and saddled with debt are among the most in need of economic relief.[27] They should not be required to continue making payments, on loans that the Department knows they do not owe, while the lengthy negotiated rulemaking process takes place.

As with the VA IFR, the proposed IFR would go into effect immediately but still allow the public an opportunity to comment.[28]

(2) Commence a negotiated rulemaking to grant automatic discharges to SSA matches and eliminate the post-discharge monitoring period.

The same day that the Department announces the IFR to suspend collections, it should announce that it is starting a negotiated rulemaking process, the first step of which is to publish a notice in the Federal Register announcing its

intent to conduct negotiated rulemaking and identifying (i) the need for a TPD application for SSA matches and (ii) the post-discharge monitoring period as the areas in which it intends to develop or amend regulations. This notice also announces regional public meetings to obtain advice and recommendations on the issues to be negotiated from the public, which should take place as soon as possible.[29]

The first issue this rulemaking will address is elimination of the need for a TPD application for SSA matches.[30] The rationale would closely track the VA IFR, which found that the requirement to apply for TPD relief was preventing "at least 20,000 totally and permanently disabled veterans from obtaining discharges of their student loans, as the law provides."[31] As it did for veterans, removing this unnecessary barrier for civilians will clear the way for borrowers with disabilities to receive the relief that the Department knows they are statutorily entitled to.

The negotiated rulemaking will also address the post-discharge monitoring period, which was not at issue in the VA IFR. As discussed above, the HEA contemplates, but does not require, a post-discharge monitoring period.[32] Thus, the Department has the authority, through a new rulemaking, to eliminate the monitoring period for SSA matches.[33] For the following two reasons, we believe that this is the most sensible and efficient approach.

First, the monitoring period is not working as intended and, if left intact, would likely cause tens (if not hundreds) of thousands of SSA-matched borrowers to have loans reinstated after the automatic discharge is provided. As the December 4, 2019 NPR report makes clear, even under the current application-based system, the monitoring period is causing tens of thousands of eligible borrowers to have their loans reinstated not because of fraud in the system, but for the simple failure to fill out paperwork.[34] According to a 2016 GAO Report: in fiscal year 2014, of the 62,303 borrowers that had their loans reinstated, 61,074 of them (or 98%) were due to failure to submit an annual income verification form. The percentage was the same in 2015.[35] And once a borrower is kicked out for failure to submit paperwork, it triggers an appeals process, which creates even more extra work for the Department and for borrowers. The Department can avoid such an absurd and burdensome result by eliminating the monitoring period for SSA matches. [36]

Second, for SSA matches the risk of fraud in the system is low. SSA has already gone through its process to designate these borrowers as "Medical Improvement Not Expected."[37] There is no need for the Department (let alone borrowers) to shoulder the extensive burden and cost of imposing even more hurdles on borrowers SSA has already found qualify.

IV. Risk Analysis

We see little risk in first suspending collections and then eliminating the post-discharge monitoring period and need for a TPD application for SSA matches, and in granting the automatic discharges. While it is possible that some will raise concerns of borrower-fraud without the monitoring period for SSA matches, we believe the SSA MINE designation process provides a sufficient guardrail and see little risk of a party being injured by the rule proposed here. Politically, we do not see pushback on efforts to help Americans with permanent disabilities.

Endnotes

1 HEA § 437(a); 20 U.S.C. § 1087(a).

2 *See* U.S. Department of Education, Final Response to FOIA Request No. 20-00411-F (Jan. 29, 2020), *available at:* https://www.defendstudents.org/foia/disability#matchingagreements.

3 HEA § 437(a); 20 U.S.C. § 1087(a).

4 34 C.F.R. §§ 674.61 (Perkins), 682.402(c) (FFEL), 685.213 (Direct Loan).

5 HEA § 437(a)(1); 20 U.S.C. § 1087(a)(1).

6 *See* 77 Fed. Reg. 66,088, 66,091-93 (Nov. 1, 2012).

7 HEA § 437(a)(2); 20 U.S.C. § 1087(a)(2).

8 *See* Press Release, U.S. Dep't of Educ., "U.S. Department of Education and U.S. Department of Veterans Affairs Team Up to Simplify Student Loan Discharge Process for Disabled Veterans" (Apr. 16, 2018), *available at:* https://www.ed.gov/news/press-releases/us-department-education-and-us-department-veterans-affairs-team-simplify-student-loan-discharge-process-disabled-veterans.

9 *See* Press Release, U.S. Dep't of Educ., "U.S. Department of Education Acts to Protect Social Security Benefits for Borrowers with Disabilities" (Apr. 12, 2016), *available at:* https://www.ed.gov/news/press-releases/us-department-education-acts-protect-social-security-benefits-borrowers-disabilities.

10 *See* U.S. Department of Education, Final Response to FOIA Request No. 20-00411-F (Jan. 29, 2020), *available at:* https://www.defendstudents.org/foia/disability#matchingagreements.

11 *See* Presidential Memorandum on Discharging the Federal Student Loan Debt of Totally and Permanently Disabled Veterans (Aug. 21, 2019), *available at:* https://www.whitehouse.gov/presidential-actions/presidential-memorandum-discharging-federal-student-loan-debt-totally-permanently-disabled-veterans/.

12 *See* Michael Stratford, "Trump pledge to forgive disabled veterans' student loans delayed — at Education Department," Politico (Nov. 21, 2019), *available at:* https://www.politico.com/news/2019/11/21/trump-disabled-veterans-student-loans-072750. We do not know whether this determination was made by the Department of Education or elsewhere in the executive branch.

13 *See* 84 Fed. Reg. 65,000 (Nov. 26, 2019), *available at:* https://www.govinfo.gov/content/pkg/FR-2019-11-26/pdf/2019-25813.pdf.

14 *Id.* at 65,002.

15 20 U.S.C.A. § 1087(a)(2) (language added August 14, 2008).

16 20 U.S.C.A. § 1087(a)(1) (emphasis added) (language added July 1, 2010).

17 U.S. Dep't of Educ., Office of Inspector Gen., A06-80001, Improving the Process for Forgiving Student Loans (June 7, 1999).

18 34 C.F.R. § 685.213(b)(7)(i).

19 *Id.*

20 34 C.F.R. § 685.213(b)(8). The regulatory text does not specifically require reinstatement, but rather, in a section titled "Borrower's responsibilities after a [TPD] discharge," provides that, during the monitoring period, the borrower "must" provide the Secretary with the required information. The preamble to the 2012 rule states that a "borrower who does not provide the required documentation (particularly income documentation) will have his or her loans reinstated and will be required to resume payment on the loan." 77 Fed. Reg. at 66,097; *see also* FSA Website at https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/disability-discharge#postdischarge ("During the postdischarge monitoring period, Nelnet will require you to submit documentation of your annual earnings from employment on a form that Nelnet will provide. If you don't submit this form with the required documentation of your income, your obligation to repay your loans or complete your TEACH Grant service obligation will be reinstated."). The Department further explained that "a large proportion of discharged borrowers end up with their loans reinstated because of failure to submit adequate information during the post-discharge monitoring period." 77 Fed. Reg. at 66,119.

21 *See* Letter from Advocacy Groups to Sec. DeVos (Mar. 3, 2020), *available at:* https://www.defendstudents.org/news/coalition-urges-devos-to-provide-critical-loan-relief-to-350000-americans-with-disabilities.

22 Cory Turner, "Letters Urge Betsy DeVos To Erase Student Loans For Borrowers With Disabilities," *National Public Radio* (March 3, 2020), *available at:* https://www.npr.org/2020/03/03/811170628/letters-urge-betsy-devos-to-erase-student-loans-for-borrowers-with-disabilities.

23 *See* Press Release, "Sen. Coons leads bipartisan effort to urge Trump Administration to immediately discharge outstanding federal student loans for permanently disabled Americans," (Oct. 9, 2019), *available at:* https://www.coons.senate.gov/news/press-releases/sen-coons-leads-bipartisan-effort-to-urge-trump-administration-to-immediately-discharge-outstanding-federal-student-loans-for-permanently-disabled-americans.

24 The distinctions in the HEA between TPD relief for veterans and civilians cautions against using an IFR to eliminate both the monitoring period and the need for an application for SSA matches. The good cause determination in the VA IFR was tied specifically to HEA language that is unique to veterans, namely that the veteran "shall not be required to present additional documentation for purposes of this subsection." HEA § 437(a)(2). Citing this language, the Department found good cause to eliminate the application requirement by IFR because: "As a result of this automated process and the requirements of section 437(a)(2), which specifically states no additional documentation is to be required, there will no longer be a need for, nor will the Department have the discretion to require, a separate application from identified borrowers." VA IFR at 65,005. Because there is no such HEA language for SSA matches, use of an IFR to eliminate the need for an application, as well as eliminate the monitoring period, may be more susceptible to legal challenge. The Department can more safely accomplish the same goal by using the IFR to suspend collections pending the larger negotiated rulemaking addressing the need for an application and the monitoring period.

25 5 U.S.C. § 553(b)(B). *See also* 20 U.S.C. § 1098a(b)(2) ("All regulations pertaining to this subchapter . . . shall be subject to a negotiated rulemaking . . . unless the Secretary determines that applying such a requirement with respect to given regulations is impracticable, unnecessary, or contrary to the public interest (within the meaning of section 553(b)(3)(B) of title 5), and publishes the basis for such determination in the Federal Register at the same time as the proposed regulations in question are first published."); *Nat'l Educ. Ass'n v. DeVos,* 379 F. Supp. 3d 1001, 1020 (N.D. Cal. 2019) (discussing the HEA's "good cause" requirement).

26 The same provision exists in both the FFEL and Perkins regulations. *See* 34 C.F.R. § 682.402(c)(2)(ii)(C)(FFEL); 34 C.F.R. § 674.61(b)(2)(ii)(C) (Perkins).

27 As of June 2019, 225,000 out of the 365,000 borrowers who had matched through the SSA process had already defaulted on their loans, and many were having their disability checks garnished. *See* Clare Lombardo and Cory Turner, "Student Loan Borrowers With Disabilities Aren't Getting Help They Were Promised" *National Public Radio* (Dec. 4, 2019), *available at:* https://www.npr.org/2019/12/04/776058798/why-student-loan-borrowers-with-disabilities-arent-getting-the-help-they-deserve.

28 *See* 84 Fed. Reg. 65,001 ("Although the Secretary has decided to issue these final regulations without first publishing proposed regulations for public comment, we are interested in whether you think we should make any changes in these regulations. We invite your comments. We will consider these comments in determining whether to revise the regulations.").

29 20 U.S.C. § 1098a(a)(2). Details about the negotiated rulemaking process are available here: https://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html. Because we anticipate additional topics for negotiated rulemaking, we do not discuss here the requirement, in 20 U.S.C. § 1098a(a), that the Department "obtain public involvement in the development of proposed regulations" before commencing a negotiated rulemaking. This is a step that the Department will want to consider taking prior to starting any negotiated rulemaking; multiple topics can be included in the "regional meetings" and "electronic exchanges" required by the HEA.

30 *See* 34 C.F.R. § 685.213(b)(1) ("To qualify for a discharge of a Direct Loan based on a total and permanent disability, a borrower must submit a discharge application to the Secretary on a form approved by the Secretary.").

31 *Id.* at 65,002.

32 20 U.S.C. § 1087(a)(1) ("The Secretary ***may*** develop such safeguards as the Secretary determines necessary to prevent fraud and abuse" and "the Secretary ***may*** promulgate regulations to reinstate the obligation of, and resume collection on, loans discharged under this subsection. . .") (emphasis added).

33 In December 2019, Congress added an "automatic income monitoring" section to the HEA's TPD provisions. *See* 20 U.S.C. § 1087(a)(3). The new section requires the Secretary to establish and implement procedures to use IRS tax return information in order to determine continued eligibility for a TPD discharge during the monitoring period. The provision does not require a monitoring period, but rather requires automatic income monitoring where there is one. To the extent the monitoring period is not eliminated for borrowers who apply for TPD relief based on a doctor's certification, this new automatic monitoring provision would apply.

34 *See* Lombardo and Turner, *supra* note 27.

35 *See* GAO Report: "Social Security Offsets: Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief" at 35, Fig. 10 (Dec. 2016), *available at:* https://www.gao.gov/assets/690/681722.pdf.

36 The negotiated rulemaking could, but does not have to, address elimination of the monitoring period for borrowers who apply for TPD relief based on a doctor's certification. Assuming the monitoring period is not removed for such borrowers, the new HEA automatic income monitoring provision, *supra* note 33, will apply.

37 SSA's procedures and criteria for setting a MINE designation are available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0426525045. *See also* 77 Fed. Reg. at 66,091-93 (describing SSA's MINE designation process and noting that such designations are reviewed by SSA no less frequently than once every seven years and no more frequently than once every five years).

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