

Negotiated Rulemaking Session

Affordability and Student Loans Committee

NAICU Summary Analysis

The Department of Education convened stakeholders to form the Affordability and Student Loans negotiated rulemaking committee. The committee, which focused on a range of topics critical to both student loan borrowers and institutions, reached consensus on four of the eight topics (listed below) that were being negotiated.

For the four areas where consensus was reached, the Department of Education is bound to the agreement when releasing its draft regulations for public comment, and no negotiator is allowed to express negative views of the agreed upon language. It is expected that the Department will release a Notice of Proposed Rulemaking in early 2022, with a final rule to be released by November 1, and an effective date of July 1, 2023.

On the four topics where the committee could not reach consensus, the Department now has the ability to rewrite the regulation as it wishes. The Department is not bound to language proposed to the committee during the negotiations.

I. Summary of Issues on Which Consensus was Reached

Total and Permanent Disability (TPD) Discharge

Department's Proposed Solution

- *Eliminate the three-year post discharge income monitoring period.* Currently, during the three-year post-discharge monitoring period, borrowers must furnish income information annually. Borrowers who do not respond to these requests for earnings information have their loans reinstated.
- *Expand the number of Social Security Administration (SSA) situations that would allow a borrower to qualify for a TPD discharge.* In current regulations, the borrower can only qualify for a discharge if they fall under the Social Security Administration's Medical Improvement Not Expected (MINE) category. The Department proposes to allow borrowers to qualify for discharge if they meet any of the following conditions:
 - The borrower can show that they qualify for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits and the borrower's next scheduled disability review will be within three years, and that the borrower's eligibility for disability benefits in the three- year review category has been renewed at least once;
 - The borrower has a disability onset date for SSDI or SSI of at least five years prior or has been receiving benefits for a least five years prior to the application for TPD.
 - The borrower qualifies for the SSA compassionate allowance program; or

- For borrower's currently receiving SSA retirement benefits, documentation that, prior to the borrower qualifying for SSA retirement benefits, the borrower met any of the requirements above.
- *Expand allowable SSA documentation.* Allow borrowers to submit a Benefit Planning Query (BPQY), which is another form of documentation produced by SSA that contains similar information to the notice of award and is easier to obtain.
- *Accept TPD certifications from certain health care professionals who are not physicians.* Allow, in addition to physicians, nurse practitioners, physician assistants licensed by a State, licensed certified psychologists at the independent practice level to provide TPD certifications.
- *Extend the period of the first payment due date after a loan reinstatement.* Extend the date the payment is due on a loan that is reinstated from 60 to 90 days after the date of the notification of reinstatement.
- *Conditions of reinstatement of a loan after a TPD discharge.* Allow for a reinstatement of a loan within three years after the discharge is granted if the borrower receives a new TEACH grant or Direct Loan program, except for Direct Consolidation Loans that include loans that were not discharged. The annual earnings from employment that exceed 100% of the poverty level, the requirement that previous disbursements of Title IV loans made prior to the discharge be returned, and the receipt of a notice from SSA that the borrower is no longer disabled is no longer required.

Committee Response

The committee agreed to consensus on this issue topic.

Interest Capitalization

Department's Proposed Solution

- The Department proposed to eliminate capitalization events where it has the authority to do so. In circumstances where interest capitalization is required by statute, the Department cannot end capitalization for borrowers. Instances where capitalization is required in statute include when the borrower exits a deferment period and when a borrower leaves the Income-Based Repayment plan. The instances where the Department proposed to eliminate interest capitalization are as follows:
 - Failure to recertify enrollment on an income-driven repayment (IDR) plan;
 - Leaving an Income-Contingent Repayment (ICR) plan, Pay As You Earn (PAYE) repayment plan, and Revised Pay As You Earn (REPAYE) repayment plan;
 - Negative amortization under the ICR plan — Under the current ICR plan, borrowers whose payments do not cover accumulating interest see that interest capitalizes annually until the capitalized interest reaches 10% or more of the original principal balance. Unpaid interest does not capitalize under the other IDR plans unless the borrower leaves those plans;
 - Exiting forbearance;
 - Entering repayment, when borrowers' loans enter repayment for the first time (interest currently capitalizes when borrowers' grace periods end); and
 - When a borrower defaults on a loan.

Committee Response

The committee agreed to consensus on this issue topic.

False Certification Discharge

Department Proposed Solution

- *Borrower's status.* Use the borrower's status regarding the requirement to have a high school diploma or its equivalent apply at the time the loan was originated, not at the time the loan was disbursed.
- *Qualification of loans.* Explicitly state in the regulations that all loans may qualify for the discharge based on a false certification of high school diploma or equivalent by the school.
- *Attestation.* Rescind the provision in the regulations that any borrower who attested to having a high school diploma or equivalent does not qualify for a false certification discharge.
- *Discharge without an application.* Specify that the Secretary of Education may grant a false certification discharge for all loans without an application due to falsification of Satisfactory Academic Progress.
- *Disqualifying status.* Ensure that all borrowers are treated the same as it relates to receiving a discharge due to the inability to meet certain employment requirements due to a physical or mental condition; age; criminal record; or other reason.
- *Application submission.* Require borrowers to submit an application within 60 days of their loan being placed into forbearance but allow borrowers an additional 30 days to submit supplemental information.
- *Signature specimens.* Remove the requirements that borrowers submit signature specimens when applying for discharge due to unauthorized loan, unauthorized payment, or identity theft.
- *Alternative evidence.* Replace the requirement that a borrower provide a judicial determination of identity theft with alternative evidence, such as through the FTC Identity Theft Affidavit process, filing a police report, or disputing the loan through all three credit bureaus.
- *Group process.* Allow for a state attorney general or non-profit legal organization to submit an application for a group process discharge.

Committee Response

The committee agreed to consensus on this issue topic.

Prison Education Programs

Department Proposed Solution

- *Eligible program.* A prison education program is now considered an eligible program. A new section is created to define an eligible prison education program.
- *Student eligibility.* Gives access to federal Pell Grants to students who are incarcerated and enrolled at an eligible program.

- *Added definitions.* Add definitions of advisory committee, feedback process, and relevant stakeholders to the approval and operation of the prison education program.
- *Added waiver exception.* Current regulations include waiver language regarding the requirement that institutions do not qualify as an eligible institution for purposes of Title IV if more than 25% of the institution's regular enrolled students are incarcerated. It was proposed to allow institutions to receive a waiver if they are a nonprofit institution that provides four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma and has continuously provided an eligible prison education program approved by the Department for at least two years. The Secretary will not approve a program if it does not maintain a completion rate of 50% or provides one or more prison education programs that are non-compliant, administratively incapable, or not financially responsible.
- *Waiver limitations.* For five years after a waiver is granted, an institution cannot enroll more than 50% students who are incarcerated and not more than 75% for an additional five years. This does not apply to institutions with a mission to primarily serve incarcerated students.
- *Educational programs.* An eligible institution that seeks to establish the eligibility of an educational program must obtain the Secretary's approval for the first eligible prison education program offered at the first two additional locations at a federal, state, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility or other similar correctional institution; and for an undergraduate program that is at least 300 clock hours but less than 600 clock hours and does not admit as regular students only persons who have completed the equivalent of an associate degree.
- *Reporting requirements.* An eligible institution must report to the Secretary in a manner prescribed by the Secretary, no later than 10 days after the change occurs, of any change in its establishment or addition of an eligible prison education program at an additional location at a federal, state, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility or other similar correctional institution that was not previously included in the institution's application for approval.
- *Institutional information.* A clarification that enrolled and prospective students must be informed whether or not an occupation that a prison education program prepares students for involves state or federal prohibitions of the licensure or employment of formerly incarcerated individuals.
- *Accreditation requirements.* A prison education program must meet the institution's accrediting agency or state approval agency requirements.
- *Application requirements.* An institution that seeks to offer a prison education program must apply to the Secretary to have its first prison education program at its first two additional locations approved. Following the Secretary's initial approval of a prison education program, additional prison education programs at the same location may be determined to be eligible without further approvals from the Secretary except where required, if such programs are consistent with the institution's accreditation or its state approval agency.
- *Best interest determination.* The prison's oversight entity must determine that the prison education program is in the best interest of students.

Committee Response

The committee agreed to consensus on this topic after modifications to address concerns regarding the treatment of a prison education program as an additional location and the mandatory assessment requirements of an oversight entity regarding the best interest of students.

II. Summary of Issues on Which Consensus was not Reached

Closed School Discharge

Department Proposed Solution

- *Reinstate automatic closed school discharges.* Reinstate the automatic closed school discharges for borrowers who do not enroll elsewhere when an institution closes but reduce the period before automatic discharges occur from three years to one year following a closure. This would apply to borrowers who accepted a teach-out plan but did not complete it.
- *Establish a consistent window of eligibility for students who withdrew from a school before it closed.* Standardize the window of eligibility, regardless of the disbursement date of the loan, to 180 days. (In current regulations, to qualify for a closed school discharge, a borrower must have been enrolled at the institution on the date of its closure or have withdrawn no more than 120 days prior to its closure (180 days for loans made on or after July 1, 2020).)
- *Amend the closure date of an institution.* Consider an institution to be closed if most of their programs cease to operate. (Currently, institutions are considered to be closed if all of their programs cease to operate.)
- *Expand the definition of school.* Expand the definition of a school to include a branch campus or any additional location regardless of whether or not the branch campus or additional location is considered eligible to participate in Title IV of the Higher Education Act (HEA).
- *Expand the list of exceptional circumstances needed to extend the 180-day look back period to include:*
 - Whether an institution is or was placed on probation or issued a show-cause order, or placed on an accreditation status that poses an equivalent or greater risk to its accreditation, by its accrediting agency for failing to meet one or more of the agency's standards;
 - A finding by a state or federal government agency that the school violated state or federal law related to education or services to students;
 - A state or federal court judgment that a school violated state or federal law related to education or services to students;
 - The school discontinued a significant share of its academic programs;
 - The school permanently closed all or most of its ground-based locations while maintaining online programs; and

- The school was placed on the heightened cash monitoring 2 payment method.

Committee Response

The committee did not reach consensus on this topic (only one dissenter). There was disagreement with the definition of “school” and the proposal that an institution does not have to be completely closed to allow students to apply for a closed school discharge. There were also concerns regarding the 180-day look back period. An alternative was suggested that the Department simply allow the period that a student could apply for a closed school discharge to begin when it was announced to the student that the institution was closing. There also were concerns that the Department could be attempting to recoup “closed school” money from institutions that are still open.

Public Service Loan Forgiveness

Department’s Proposed Solution

- *Employee or employed definition.* Clarify that an employee is someone who receives an IRS W-2 from a qualifying employer or an organization that has contracted with a qualifying employer to provide payroll or similar services for the qualifying employer and which provides the Form W-2 under that contract.
- *Full-time definition.* Expand the definition of full-time by adding that full-time means working in qualifying employment in one or more jobs at a rate equivalent to 30 hours per week as determined by multiplying each credit or contract hour taught per week by at least 3.35 hours worked each week, in non-tenure track employment at an institution of higher education.
- *Military service definition.* Clarify the current definition to include families or survivors of members of veterans of the U.S. Armed Forces or the National Guard.
- *Qualifying Employer definition.* Allow an employer to attest to the public service nature of the organization on a form approved by the Secretary, as long as the organization is still a 501(c)(3).
- *Qualifying repayment plan.* Clarify that all income-driven repayment plans can count towards Public Service Loan Forgiveness (PSLF) instead of just the income-based repayment plan. Allow for a consolidated standard repayment plan with a 10-year repayment term to qualify.
- *Add definitions of the following:*
 - Non-tenure track;
 - Other school-based services;
 - Public health;
 - Public service;
 - Public service for individuals with disabilities;
 - Public service for the elderly;
 - Public education service;
 - Public library service; and
 - School library services.

- *Receiving forgiveness.* A borrower is eligible for forgiveness as long as they are employed full-time by a qualifying employer at the time they apply. They do not have to be employed full-time by a qualifying employer at the time forgiveness is granted.
- *Qualifying payments.* A borrower is not required to make 120 separate payments but required to satisfy the equivalent of 120 payments. This can be done by doing one of the following:
 - Paying at least the full scheduled amount due for a monthly payment under a qualifying repayment plan;
 - Paying in multiple installments that equal the full scheduled amount due for a monthly payment under the qualifying repayment plan;
 - For a borrower on an income-driven repayment plan, paying a lump sum or monthly payment amount that is equal to or greater than the full scheduled amount in advance of the borrower's scheduled payment due date for a period of months not to exceed the period from the Secretary's receipt of the payment until the borrower's next annual repayment plan recertification date;
 - For a borrower on a 10-year standard repayment plan or consolidation standard repayment plan with a 10-year repayment term, paying a lump sum or monthly payment amount that is equal to or greater than the full scheduled amount in advance of the borrower's scheduled payment due date for a period of months not to exceed the period from the Secretary's receipt of the payment until the lesser of 12 months from that date or the date upon which the Secretary receives the borrower's next submission for loan forgiveness;
 - Receiving one of the following forbearances or deferments:
 - Cancer treatment;
 - Peace Corps service;
 - Rehabilitation training program;
 - Economic hardship;
 - Military service;
 - Post-active duty student;
 - AmeriCorps;
 - National Guard Duty;
 - U.S. Department of Defense Student Loan Repayment Program; or
 - An administrative forbearance.
 - Being employed full-time by a qualifying employer at any point in the month that a payment is made.
- *Forgiveness after loans have been consolidated.* A borrower is able to have previous payments count on Direct loans that have been consolidated into a Direct Consolidation Loan as long as the previous loans meet certain qualifying criteria.
- *No application required.* An application is not required from borrowers if the Secretary has the information it needs to process the forgiveness.
- *Reconsideration process.* A borrower will have 90 days to ask the Secretary to reconsider the application or 180 days from when the new final rule goes into effect if they were denied before that date. A borrower can submit a reconsideration request as long as they have new information.

- *Hold harmless.* A borrower will be considered to have made the qualifying monthly payments if they were in a deferment or forbearance that was not previously listed as long as they either: (1) make an additional payment equal to or greater than their monthly payment amount; or (2) qualify for a \$0 payment on an income-driven repayment plan.

Committee Response

No consensus was reached.

Members wanted to see the following expansion of the definition of qualifying employer:

- for-profit organizations be included and not have a 501(c)(3) status be the main indicator;
- the removal of the additional reporting requirements by guaranty agencies;
- all forbearances and deferments be counted as payments on PSLF;
- an action taken by the Department to let borrowers know they are in the wrong repayment type; and
- a list of occupations that would qualify for PSLF.

Borrower Defense to Repayment

Department Proposed Solution

- *Aggressive and deceptive recruiting tactics.* A new section, included under Subpart R, was proposed regarding aggressive and deceptive recruiting tactics or conduct that would define these tactics and inform institutions of the consequences of participating in such tactics.
- *New borrower defense process created.* A new borrower defense to repayment (BD) process to strengthen borrower protections was proposed in 34 CFR Part 685, Subpart D that would begin after July 1, 2023.
- *Third-party requestor.* A new definition of third-party requestor was proposed to capture legal assistance organizations. This third-party requestor could submit a request to the Department asking for consideration of a particular group and it would be up to the Department to deny or approve the requested group.
- *Group process.* A group process for borrowers was proposed to third-party requestors to initiate group claims. A group process could also be initiated by the Department. (The individual process for determining a borrower defense to repayment remains.)
- *Institutional response.* An institution would be notified when a borrower submits a claim and is given 60 days to respond. When this happens, the 6-year limitation period is paused.
- *Adjudication of borrower defense applications and timelines.* A borrower could submit a claim and the Department would adjudicate it based on the information given. The Department could decide to conduct a second adjudication process using any state standards requested by a third-party requestor. The Department would adjudicate any claims two years from the date the Department official provided a response to the third-party requestor (for a group claim) informing them of whether or not the Department would choose to form a group and other information requested by the third-party requestor, which could be extended an additional year due to any state standard. The

Department would adjudicate any claims two years from the date the Department official determines a borrower submitted a completed application (for an individual claim). These timelines would not apply to a reconsideration process after a borrower is denied a claim. The Department would be required to notify the group or individual at least one year after the dates previously described and if the Department did not respond by the two- or three-year time frame, then the loans covered by the claims would be deemed unenforceable.

- *Reconsideration process.* The borrower would have 90 days from the notice given by the Department stating their denial to ask for a reconsideration for the following things:
 - Administrative or technical errors;
 - Consideration under state law; or
 - New evidence.

A third-party requestor could also ask for a reconsideration under a state law standard. Borrowers could ask for a reconsideration at any time when there is new evidence.

- *Discharge.* A full discharge amount is the base unless the Department is presented with clear and convincing evidence stating otherwise.
- *Recovery from institutions.* There is a 6-year limitation period placed on institutions. This period is tolled when claims are submitted and the institution is notified by the Department.
- *Misrepresentation.* This definition was proposed to be modified to include the following:
 - Actual institutional selectivity rates, rankings, or student admission profiles if they are materially different from those included in the institution's marketing materials, website, or other communications made to the student or from those provided by the institution to national ranking companies;
 - A representation regarding the tax status of the institution that is different from the tax status as determined by the Secretary for purposes of administering the Title IV, HEA programs under the Higher Education Act of 1965, as amended;
 - Specialized, programmatic, or institutional certifications, accreditation, or approvals that were not actually obtained, or that the institution fails to remove from marketing materials, websites, or other communications to students within a reasonable period of time after such certifications or approvals are revoked or withdrawn; and
 - Assistance that will be provided in securing required externships or the existence of contracts with specific externship sites.
- *Pre-dispute arbitration.* The 2016 regulatory text regarding agreements between an eligible school and the Secretary for participation in the Direct Loan program was proposed to be reinstated with technical changes.

Committee Response

Consensus was not reached. The disagreement primarily came from the for-profit negotiator who expressed concerns regarding pre-dispute arbitration and the potential costs to students. The Department indicated that they would be willing to consider this issue to have reached consensus and offer the language that all the negotiators agreed to except for the for-profit negotiators.

Income Driven Repayment Plan

Department's Proposed Solution

- *Expanded Income Contingent Repayment plan to allow for the following:*
 - Include undergraduate Direct Unsubsidized loans, Direct Subsidized loans, and Direct Consolidation loans only;
 - The combined income of the borrower and spouse to be used in the calculation of income in all cases, regardless of whether the borrower and spouse file a joint federal income tax return or file separate tax returns, unless a married borrower certifies that the borrower is separated from the borrower's spouse or is unable to reasonably access the spouse's income. In that case, only the borrower's income is used in the calculation;
 - The spouse's eligible loan debt to be included for the purposes of adjusting the borrower's monthly payment amount if the spouse's income is included in the calculation of the borrower's monthly payment amount based on income;
 - A monthly payment amount of 0% if income is less than or equal to 200% of the applicable federal poverty guideline (this equates to a \$0 payment);
 - A monthly payment of 5% of the portion of income that is greater than 200% of the applicable federal poverty guideline and less than or equal to 300% of the applicable federal poverty guidelines, divided by 12;
 - A monthly payment of 10% of the portion of income that is greater than 300% of the applicable federal poverty guidelines, divided by 12;
 - During all periods when the borrower has a \$0 payment, the Secretary credits the borrower's account with an amount equal to the amount of accrued interest on all of the borrower's Direct Subsidized Loans and Direct Subsidized Consolidation Loans being repaid under the plan;
 - A borrower who is repaying under an IDR plan may change at any time to any other repayment plan for which the borrower is eligible, except when paying on a defaulted loan under the Income-Contingent and Income-Based repayment plan unless certain requirements are met;
 - The Secretary capitalizes unpaid accrued interest for a Direct Unsubsidized Loan, a Direct Unsubsidized Consolidation Loan that qualifies for a grace period under the regulations that were in effect for consolidation applications received before July 1, 2006, a Direct PLUS Loan, or for a Direct Subsidized Loan for which the first disbursement is made on or after July 1, 2012, and before July 1, 2014, when the borrower enters repayment;
 - Forgiveness is granted after 20 years;
 - A hold harmless to allow the borrower to receive credit toward forgiveness if the borrower postponed monthly payments due to a forbearance or deferment not listed in regulations and makes a payment equal to or greater than the amount the borrower would have been required to pay during that period on any income-driven repayment plan, including a \$0 payment.
 - Borrowers are automatically enrolled in an IDR plan that results in the lowest monthly payment.

Committee Response

Consensus was not reached. Because this is an additional plan to the other income-driven repayment plans, the committee was very concerned with the proposal to only apply this plan to undergraduate borrowers, which would just add to the confusion of the existing plans. The committee also wanted the \$0 payment option to extend to at least 300% of the poverty level instead of 200%. In addition, there were members who believed that forgiveness should be less than 20 years.

III. Negotiated Rulemaking Committee Members

- Federal Negotiator - Jennifer Hong
- Office of General Counsel (non-voting) - Todd Davis, Soren Lagaard, and Brian Siegel
- Facilitators (non-voting) – Kayla Mack, Cynthia Jeffries, Brady Roberts, and Emil Totonchi, Federal Mediation and Conciliation Service
- Non-Federal Negotiators
 - Accrediting Agencies
 - Heather Perfetti, Middle States Commission on Higher Education (primary)
 - Michale S. McComis, Accrediting Commission of Career Schools and Colleges (alternate)
 - Dependent Students
 - Dixie Samaniego, California State University (primary)
 - Greg Norwood, Young Invincibles (alternate)
 - Federal Family Education Loan Lenders and/or Guaranty Agencies
 - Jaye O’Connell, Vermont Student Assistance Corporation (primary)
 - Will Shaffner, Higher Education Loan Authority of the State of Missouri (alternate)
 - Financial Aid Administrators at Postsecondary Institutions
 - Daniel Barkowitz, Valencia College (primary)
 - Alyssa A. Dobson, Slippery Rock University (alternate)
 - Four-year Public Institutions
 - Marjorie Dorime-Williams, University of Missouri (primary)
 - Rachelle Feldman, University of North Carolina at Chapel Hill (alternate)
 - Independent Students
 - Michaela Martin, University of La Verne (primary)
 - Stanley Andrisse, Howard University (alternate)
 - Individuals with Disabilities or Groups Representing them
 - Bethany Lilly, The Arc of the United States (primary)
 - John Whitelaw, Community Legal Aid Society (alternate)
 - Legal Assistance Organizations that Represent Students and/or Borrowers
 - Persis Yu, National Consumer Law Center (primary)
 - Joshua Rovenger, Legal Aid Society of Cleveland (alternate)
 - Minority-serving Institutions

- Herman J. Felton, Jr., Wiley College (primary)
 - Noelia Gonzalez, California State University (alternate)
 - Private, Nonprofit Institutions
 - Misty Sabouneh, Southern New Hampshire University (primary)
 - Terrence S. McTier, Jr., Washington University (alternate)
 - Proprietary Institutions
 - Jessica Barry, The Modern College of Design in Kettering, Ohio (primary)
 - Carol Colvin, South College (alternate)
 - State Attorneys General
 - Joseph Sanders, Illinois Attorney General’s Office (primary)
 - Eric Apar, New Jersey Department of Consumer Affairs (alternate)
 - State Higher Education Executive Officers, State Authorizing Agencies, and/or State Regulators
 - David Tandberg, State Higher Education Executive Officers Association (primary)
 - Suzanne Martindale, California Department of Financial Protection and Innovation (alternate)
 - Student Loan Borrowers
 - Jeri O’Bryan-Losee, United University Professions (primary)
 - Jennifer Cardenas, Young Invincibles (alternate)
 - Two-year Public Institutions
 - Robert Ayala, Southwest Texas Junior College (primary)
 - James Gardner, Cuyahoga Community College (alternate)
 - U.S. Military Service Members, Veterans, or Groups Representing them
 - Justin Hauschild, Student Veterans of America (primary)
 - Emily DeVito, The Veterans of Foreign Wars of the U. S. (alternate)
 - Added Negotiator due to committee vote
 - Anne Precythe, Missouri Department of Corrections
- Advisors-Non Voting
 - Economic and/or Higher Education Data
 - Rajeev Darolia, University of Kentucky
 - Qualifying Employers on the Topic of Public Service Loan Forgiveness
 - Heather Jarvis, Fosterus

IV. Committee Meeting Dates

- October 4-8, 2021
- November 1-5, 2021
- December 6-10, 2021