

## Final Rules Issued by the Department on Education

### Summary

November 2022

The Department of Education issued final rules that will go into effect on July 1, 2023. The Department has amended regulations pertaining to prison education programs, change in ownership/change in control, 90/10 for proprietary institutions, borrower defense to repayment, public service loan forgiveness, interest capitalization, closed school discharge, false certification discharge, and total and permanent disability discharge. Below is a summary of the final rules proposed by the Department.

### Change in Ownership and Change in Control

- *Amends the definitions of additional location and branch campus.* The definitions of additional location and branch campus are amended to clarify that both must be a physical facility that is geographically separate from the main campus within the same ownership structure. The definition also clarifies that additional locations are only able to participate in Title IV funding through the main campus and that branch campuses must be approved by the Secretary and be independent from the main campus.
- *Defines main campus:* The definition of a main campus is defined to be the primary physical facility where the institution offers eligible programs and is certified by the Secretary and the appropriate accrediting agency to be the main campus.
- *Amends the definition of a nonprofit institution.* It is proposed to define a nonprofit institution as an institution that has no part of its net earnings benefiting any private entity or natural person. A nonprofit institution cannot have a revenue-sharing agreement with any former owner, or current or former employee, of the institution or member of its board unless it can be demonstrated that they are reasonable based on the market price for such services or materials. It also cannot have a revenue-sharing agreement with a natural person or entity related to or affiliated with the former owner, or current or former employee, of the institution or member of its board.
- *Establishes reporting requirements.* An institution must report to the Secretary, no later than 10 days after the change occurs, a change in ownership when a natural person or entity acquires at least 5 percent ownership interest but less than 25 percent ownership interest and a change in control when more than 25 percent of ownership interest is acquired.
- *Defines change in ownership resulting in a change in control.* A change in ownership is defined as resulting in a change in control if the following occurs for entities that are not considered closely held or needing to be registered with the Security Exchange Commission:
  - A person, or combination of persons, acquires at least 50 percent of the total outstanding voting interests or ceases to hold 50 percent of the total outstanding voting interests
  - A partner in a general partnership acquires or ceases to own at least 50 percent of the voting interests in the general partnership;

- If a general partner or managing member holds an equity interest, any change of that general partner or managing member;
- A person becomes, or is replaced as, the sole member or shareholder;
- An entity that has a member or members ceases to have any members and an entity that has no members gains a member or members;
- Under certain conditions, the addition or removal of any entity that provides, or will provide, audited financial statements to the Department after a change of ownership that results in a change in control.
- An owner transfers 50 percent or more of the voting interests in the institution to an irrevocable trust where the trustee is a non-family member;
- The death of an owner who transferred 50 percent or more of the voting interests in the institution or an entity to a revocable trust where the trustee is a non-family member.
- An institution changes tax status, thus a proprietary institution would remain as such even if it converts to a nonprofit under the IRS or becomes affiliated with a public system unless the Secretary approves its conversion.

### **Borrower Defense to Repayment**

- *Creates a new borrower defense process.* A new borrower defense to repayment process to strengthen borrower protections is created in 34 CFR Part 685, Subpart D, and becomes effective on July 1, 2023.
- *Adds a new section on aggressive and deceptive recruiting tactics.* The new section, under Subpart R, addresses aggressive and deceptive recruiting tactics or conduct that would define these tactics and informs institutions of the consequences of participating in such tactics.
- *Allows a State requestor to represent a group of borrowers.* A new definition of a state requestor is proposed to allow a state, a state attorney general, a state oversight agency, or a state regulatory agency to submit a borrower defense claim on the behalf of a group of borrowers.
- *Allows legal assistance organizations to represent a group of borrowers.* The Department allows for a legal assistance organization to file a group claim on behalf of borrowers. A legal assistance organization means an organization providing legal assistance with respect to civil matters to low-income individuals without a fee that employ attorneys who are full-time employees, provide civil legal assistance on a full-time basis, and are continually licensed to practice law.
- *Creates the new term “third party requestor.”* This is a state requestor or a legal assistance organization.
- *Allows for a group process.* A group process for borrowers was adopted for 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). When a group claim is submitted, the Secretary will notify the institution and give the institution 90 days to respond.

- *Gives institutions the ability to respond.* An institution would be notified when a borrower submits a claim and is given 90 days to respond. When this happens, the 6-year limitation period is paused.
- *Creates additional due process for institutions.* Before institutions are held liable for any amounts owed to the Secretary due to an approved borrower defense claim, additional due process is given to institutions. Institutions are now eligible to appeal the final decision of the Department when their former student's obligation to repay their loan is discharged.
- *Allows for the adjudication of borrower defense applications with timelines.* A borrower could submit an individual claim or be a part of a group claim and the Department would adjudicate it based on the information given. The Department would adjudicate group claims within one year from the date it notified the state requestor and adjudicate individual claims in three years from the date the Department official determines a borrower submitted a completed application. 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.
- *Institutes a 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. The Secretary may reopen a borrower defense application that was denied at any time.

- *Provides for a discharge of loan amounts.* Only a full discharge amount will be considered.
- *Seeks to recover funds from institutions.* There is a 6-year limitation period placed on institutional liability. This period is paused when claims are submitted and the institution is notified by the Department. Also, this limitation period does not apply at all for borrowers who receive a favorable judgement based on state or federal law in a court or administrative tribunal of competent jurisdiction in connection with the borrower's decision to attend the institution. When a claim is submitted, the pause of the limitation period is only lifted when an application is denied.
- *Modifies the definition of misrepresentation.* This definition was proposed to be modified to include the following:
  - Actual institutional selectivity if the institution or program actually employs an open enrollment policy;
  - A representation regarding the tax status of the institution if it 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;
  - Assistance that will be provided in securing required externships or the existence of contracts with specific externship sites;
  - Assistance that will be provided to obtain a high school diploma or General Educational Development Certificate (GED);
  - The pace of completing the program or the time it would take to complete the program contrary to the stated length of the educational program;
  - As it relates to an institution's financial charges, the amount, method, or timing of payment of tuition and fees that the student would be charged for the program;
  - The licensure passage rates and employment rates around the employability of graduate students; and
  - Language regarding the omission of fact.
- *Bans pre-dispute arbitration.* The 2016 regulatory text regarding agreements between an eligible school and the Secretary for participation in the Direct Loan program is reinstated with technical changes. These provisions include:
    - Prohibiting a ban of class action lawsuits;
    - Prohibiting pre-dispute arbitration agreements;
    - Requiring institutions to submit records for borrower defense claims filed in arbitration by or against the institution such as:
      - The initial claim or complaint and counterclaim;
      - The arbitration agreement filed with the arbitrator or arbitration administrator or any dispositive motion filed by a party to the lawsuit;
      - The judgement/award issued, if any; and
      - Any correspondence between the institution and the arbitrator if the institution is subject to fees and refuses to pay such fees;

### Closed School Discharge

- *Reinstates automatic closed school discharges.* Reinstates the automatic closed school discharges for borrowers who do not enroll elsewhere when an institution closes but reduces the period before automatic discharges occur from three years to one year following a closure. This would also apply to borrowers who accepted a teach-out plan but did not complete it.
- *Establishes a consistent window of eligibility for students who withdrew from a school before it closed.* Standardizes the window of eligibility to 180 days for loans taken out on or before January 1, 1986. (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).
- *Amends the closure date of an institution.* Considers an institution to be closed if the institution ceased to provide educational instruction in programs in which most students at the institution were enrolled or when the Secretary determines that an institution ceased to provide educational instruction for all of its students (currently, institutions are considered to be closed if all of their programs cease to operate).

- *Expands the definition of school.* Expands 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).
- *Expands the list of exceptional circumstances needed to extend the 180-day look back period:*
  - 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.

### **Total and Permanent Disability Discharge**

- *Eliminates 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.
- *Expands the number of Social Security Administration (SSA) situations that would allow a borrower to qualify for a Total and Permanent Disability (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.
- *Expands allowable SSA documentation.* Allows 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.

- *Accepts TPD certifications from certain health care professionals who are not physicians.* Allows, in addition to physicians, nurse practitioners, physician assistants licensed by a State, a licensed certified psychologists at the independent practice level to provide TPD certifications.
- *Extends the period of the first payment due date after a loan reinstatement.* Extends 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.
- *Creates new conditions of reinstatement of a loan after a TPD discharge.* Allows for a reinstatement of a loan within three years after the discharge is granted if the borrower receives a new TEACH grant or new loan under the Perkins or Direct Loan program, except for Direct Consolidation Loans that include loans that were not discharged. The annual earnings from employment that exceed 100 percent 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.

### **False Certification Discharge**

- *Reconsiders a borrower's status.* Uses 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.
- *Expands the qualification of loans.* Explicitly states in the regulations that all loans may qualify for the discharge based on a false certification of a high school diploma or equivalent by the school.
- *Removes attestation for borrowers.* Rescinds 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.
- *Allows for the discharge without an application.* Specifies that the Secretary may grant a false certification discharge for all loans without an application due to falsification of Satisfactory Academic Progress by an institution.
- *Requires equal treatment in disqualifying status.* Ensures 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;
- *Clarifies application submission.* Requires borrowers to submit an application within 60-days of their loan being placed into forbearance but allows borrowers an additional 30-days to submit supplemental information.
- *Removes signature specimens requirement.* Removes the requirements that borrowers submit signature specimens when applying for discharge due to unauthorized loan, unauthorized payment, or identity theft.
- *Allows for alternative evidence.* Replaces 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.
- *Establishes a group process.* Allows for a state attorney general or non-profit legal organization to submit an application for a group process discharge.

## Public Service Loan Forgiveness

- *Clarifies the definition of employee or employed.* It is clarified 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.
- *Expands the definition of full-time.* The definition of full-time is expanded 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.
- *Modifies the definition of military service.* Clarifies the current definition to include families or survivors of members of veterans of the U.S. Armed Forces or the National Guard.
- *Allows qualifying employers to attest.* An employer is allowed to attest to the public service nature of the organization on a form approved by the Secretary of Education (Secretary), as long as the organization is still a 501(c)(3).
- *Expands qualifying repayment plan.* It is clarified that all income-driven repayment plans can count towards Public Service Loan Forgiveness (PSLF) instead of just the income-based repayment plan. Allows for a consolidated standard repayment plan with a 10-year repayment term to qualify.
- *Adds definitions of the following:*
  - Non-tenure track employment;
  - Other school-based services;
  - Public health;
  - Non-governmental public service;
  - Public service for individuals with disabilities;
  - Public service for the elderly;
  - Public education service;
  - Public library service; and
  - School library services.
- *Clarifies when borrowers are eligible to receive forgiveness.* A borrower is able to be 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.
- *Modifies 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.
- *Allows for previous payments on loans to count prior to consolidation.* A borrower is able to have the weighted average of 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.
- *Eliminates the requirement of an application.* An application is not required from borrowers if the Secretary has the information it needs to process the forgiveness.
- *Establishes a reconsideration process.* A borrower will have 90 days to ask the Secretary to reconsider the application. Borrowers who were denied loan forgiveness after October 1, 2017 will have 180 days from when the new final rule goes into effect to request a reconsideration. A borrower can submit a reconsideration request as long as they have new information.
- *Creates a 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.

### **Interest Capitalization**

- The Department eliminates 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 will 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 capitalize annually until the capitalized interest reaches 10 percent 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.

## Prison Education Programs

- *Modifies the definition of eligible program.* A prison education program is now considered an eligible program. A new section is created to define an eligible prison education program.
- *Enhances student eligibility.* Gives access to Federal Pell grants to students that are incarcerated and enrolled at an eligible program.
- *Adds new definitions.* A new definition of advisory committee, feedback process, and relevant stakeholders to the approval and operation of the prison education program is added.
- *Adds 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 percent 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. Regarding programs other than those previously mentioned, the Secretary will not approve a program if it does not maintain a completion rate of 50 percent or provides one or more prison education programs that are non-compliant, administratively incapable, or not financially responsible.
- *Establishes waiver limitations.* For five years after a waiver is granted, an institution cannot enroll more than 50 percent students who are incarcerated and not more than 75 percent for the remaining period. This does not apply to institutions with a mission to primarily serve incarcerated students.
- *Increases the Secretary's Authority.* 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. The Secretary's approval must also be given for an

undergraduate program that is at least 300 clock hours, but less than 600 clock hours, and does not only admit as regular students those who have completed the equivalent of an associate's degree.

- *Establishes 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. In addition, an institution must submit reports to the Secretary in accordance with any deadlines established in the Federal Register.
- *Creates a role of a prison oversight entity.* An oversight entity must approve prison education programs and will do so based on the feedback of an advisory committee and its own overall determinations.
- *Ensures institutional information is given to students.* 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.
- *Clarifies accreditation requirements.* A prison education program must meet the institution's accrediting agency or State approval agency requirements. An accrediting agency can satisfy this requirement as long as it evaluates at least the first prison education program located at the first two additional locations; evaluates the first additional prison education program offered by a new method of delivery; performs a site visit no later than one year after the initiation of the prison education programs at the first two additional locations; and approves the methodology for how the institution is providing a prison education program that meets the same standards as substantially similar programs that are not prison education programs.
- *Mandates 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.
- *Allows the Secretary to limit or terminate approval.* The Secretary can limit or terminate the approval of an institution to provide an eligible prison education program if the institution is in violation of any terms of the agreement to offer prison education programs.
- *Creates best interest determinations.* An oversight entity must determine that the prison education program is in the best interest of students after the two years of initial approval of the program.



## Title IV Revenue and Non-Federal Education Assistance Funds (90/10)

*This rule is only for for-profit institutions.*

- *Clarifies that ten percent of all revenue to for-profit institutions must be from sources other than federal funds.* The Department clarifies that it is not just Title IV funds that are used in calculating the revenue percentage 90/10 ratio, but it is all federal funds.
- *Allows for income share agreements to be considered revenue derived from sources other than Federal funds.* If institutions include income-share agreements as cash in the annual audit they submit to the government, then additional criteria apply.
- *Add additional requirements for institutions.* For-profit institutions are given additional requirements to adhere to when complying with the 90/10 rule.