



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF POSTSECONDARY EDUCATION

Issue Paper #6: Borrower Defense to Repayment
Session 1: October 4-8, 2021

Issue:	Borrower Defense to Repayment – Adjudication Process
Statutory cites:	§455(h) of the Higher Education Act of 1965, as amended
Regulatory cites:	34 CFR 685.206(c) and (e) 34 CFR 685.222

Summary of issues: Section 455(h) of the Higher Education Act of 1965, as amended (HEA), requires the Secretary to specify in regulation which acts or omissions by an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. This includes a Federal Family Education Loan once it has been brought into the Direct Loan program either through consolidation or the new suggested claims process for lenders and guaranty agencies. This paper proposes changes to the borrower defense to repayment regulations, general definitions, group claims, and adjudication of claims.

Current regulations in 34 CFR 685.206(c) and (e), and 34 CFR 685.222 govern defenses to repayment. Those defense to repayment standards have changed multiple times in recent years. The Department first promulgated borrower defense regulations in 1995 which were subsequently amended in 2016 (81 FR 75926) and 2019 (84 FR 49788). The 2016 regulations, *inter alia*, laid out standards and processes for adjudicating borrower defense claims. The 2019 regulations changed these standards and processes, and effectively barred relief for many borrowers who would likely have received relief under the 1995 or 2016 borrower defense regulations, or both. This is due to requirements such as proving intent behind a substantial misrepresentation, preventing the use of common evidence, requiring the borrower to document the amount of harm suffered, and a strict three-year limitation period on filing a claim. While the Department has yet to adjudicate any claims under the 2019 rule because it only covered new loans first disbursed on or after July 1, 2020, the regulatory impact analysis of the 2019 rule estimated that billions of dollars of fewer discharges would occur due to that rule.

The Department has identified the following issues around borrower defense regulations:

- Current regulations tie the applicable standards for borrower defense claims to a loan's disbursement date. This requires the Department to apply three different sets of rules depending on loan disbursement dates and complicates adjudications because a single borrower with multiple loans may fall under multiple rules depending on a loan's disbursement date.
- There are other categories of acts by an institution that should give rise to a borrower defense claim and there are other examples of misrepresentations or omissions that would provide greater clarity about what could lead to a borrower defense claim. These reflect other acts and omissions that are covered under other State standards and makes the federal standard more comprehensive.

Borrower Defense to Repayment – Adjudication Process 2

- Group claims are not allowed under current regulations and past regulations have resulted in individual adjudications of claims that may be better handled as group claims.
- The Department wants to create a faster approval process for borrower defense claims based upon findings that come from other Department processes. For example, findings from final program review determinations (FPRDs) could contain evidence that leads to an approved borrower defense claim, and the process of generating the FPRD already includes an extensive fact-finding opportunity for the institution to respond to the Department's findings.
- Borrowers should have clearly defined protections from interest accumulation while their claims are being adjudicated.
- Different versions of the regulations impose limitations on when a borrower can submit a borrower defense claim to the Department and whether they can receive refunds if their claim is approved. These limitations periods can be prohibitively restrictive for borrowers who may not obtain evidence that would result in a successful borrower defense claim until after the limitations period. Moreover, these timeframes are inconsistent with other discharge regulations, such as closed school loan discharges, which do not limit when the borrower can submit a claim to the Department.
- Regulations do not require institutions to comply with the Department's requests for records and other relevant evidence. The different borrower defense regulations further complicate the institutional response process because the Department must determine which regulation govern the claim, based on the loan's disbursement date.
- The Department does not currently have any set processing and adjudication timelines for individual borrower defense claims.
- Borrowers with FFEL Program loans must take additional steps to receive a loan discharge even once their claim is approved.

Solutions: Borrowers should have a path to relief through the borrower defense to repayment process when they were subject to conduct such as substantial misrepresentations by their institutions. In improving this process, the Department is seeking to streamline multiple regulatory requirements into a single federal standard that will be easier for borrowers to understand and have clearer rules around what conduct could result in an approved borrower defense to repayment claim. This approach will also place a greater emphasis on adjudicating group claims, which recognizes that borrower defense approvals to date have all been based upon common evidence that applies across borrowers. To achieve these goals, the Department proposes the following solutions to the issues identified above for discussion with the negotiating committee:

Applicable regulations for the borrower and retroactivity. Develop a single federal standard for all borrower defense claims regardless of when the loan was first disbursed. This standard would be more generous by removing any limitations periods and by covering a broader range of conduct than the three existing rules. Borrowers would be able to request their claims be adjudicated under otherwise applicable specific State law through a reconsideration process if they are not satisfied with the outcome of the adjudication under the federal standard. The borrower would specify the State law and the basis for that specification. The Department notes that the new standard would only apply to institutional recoupment actions after the effective date of the new regulation. This difference would not add significant complexity because it is less complex than navigating multiple standards and processes based on disbursement date.

Evidentiary standard. The new single federal standard would continue to provide that a decision on the claim will be based on a preponderance of evidence. Borrowers would not be required to prove they relied upon the institutional wrongdoing if a reasonable person could have been expected to rely upon that wrongdoing. Allowing inferences on a reasonableness standard is appropriate because borrowers may not always understand the nuances of the BD application or process.

Categories of acts that could lead to a borrower defense claim. The Department would adopt five categories of acts that could lead to successful borrower defense claims. These are: (1) substantial misrepresentation, (2) omissions, (3) breach of contract, (4) aggressive recruitment, and (5) adjudications, which include court judgments and findings by the Department of Education. The first three categories have been included in prior regulations. The category of adjudications is a reinstatement and expansion of a category that was included in the 2016 regulation. The Department proposes adding aggressive recruitment because it is covered by many existing State standards and this results in a more comprehensive federal standard.

Revise the definition of misrepresentation. The Department proposes to adopt the current definition of misrepresentation under 34 CFR 668, Subpart F. The Department would expand the current non-exhaustive list of potential examples of potential topics where misrepresentation may occur to include:

- Job placement rates
- Program costs
- The tax status of the institution

Definition of omissions. The Department proposes defining a misleading or deceptive omission by an institution as an act that could lead to a successful borrower defense claim. It also provides examples of omissions that could be grounds for a borrower defense claim, such as:

- Significant exclusions from, or methodological problems with, job placement rates
- If additional education is needed in the field, such as obtaining additional credentials in a field that requires program completers to go into that line of employment
- If the academic program lacks certifications/approvals
- Transferability of credits

Emphasis on group process. A group process for adjudicating claims would be the default approach. The Department proposes to identify and define groups based on occurrences such as: actions by the federal government, State attorneys general, other State agencies or officials, or other law enforcement activity; lawsuits related to educational programs filed against institutions or judgments rendered against institutions; individual borrower defense claims with common facts; and requests by attorneys general or law enforcement organizations. Individual applications covered by a group process would be adjudicated through that group process. The Department would request additional information from institutions. Decisions on whether to approve claims associated with the group would be made by the Department, with institutional recoupment operating through a separate process.

Individual applications. Applications that are not covered by a group process would be considered once they are complete. Complete would be defined as stating a claim that the Department would be able to review, including requesting a response from an institution. Though not included in regulation, the Department will furnish additional examples of what it means to state a claim to assist borrowers in filing applications. This contrasts with current practice where claims that do not state a claim are just denied instead of being viewed as incomplete. From there, the claim form and information submitted by

Borrower Defense to Repayment – Adjudication Process 4

the borrower would be sent to the institution for a response and adjudicated based upon evidence from the institution, held by the Department, and provided with the application.

Evidence solely from applications — The past two instances of negotiated rulemaking raised questions about whether a borrower’s application or a group of applications should be considered sufficient evidence to adjudicate a borrower defense claim on its own. The Department is guided by the principle that a borrower defense application is a form of evidence. Statements made by borrowers in a borrower defense application could provide evidence for areas where the borrower would have knowledge of the issue (e.g.: the borrower’s interaction with admissions staff). That said, the Department would want to seek evidence from the institution, the Department, and any other relevant sources and consider any of that evidence as applicable plus what is in the application. Multiple applications asserting similar claims could be grounds for a group process or additional forms of corroborating evidence.

Process based on prior Departmental action. Codify a process to consider information from existing Department findings as the basis of borrower defense claims. For example, if a Final Program Review Determination (FPRD) or Final Audit Determination (FAD) reveal that an institution misstated job placement rates, the Department may use those findings to grant borrower defense discharges to affected borrowers. In the case of findings based upon a FPRD or FAD the institution would not provide an additional response because they had already done so as part of the FPRD and FAD process.

Borrower status during and after adjudication. As a default option, the Department proposes that when a borrower initially files a borrower defense claim, their loans will be placed in forbearance if they were in repayment and stop collections if they were in default while the Department adjudicates their claim. Borrowers would be able to opt out of forbearance or stopped collections. This would apply to all of a borrower’s loans, even if not all of them are related to the borrower defense claim. Claims in forbearance for more than 180 days would stop accumulating interest.

After adjudication, the Department proposes several options for borrowers’ statuses. If the Department approves a claim, the borrowers’ loans will stay in interest-free forbearance while the loan balance is discharged in accordance with the amount of relief provided. If the Department grants partial relief or denies the claim altogether, the borrowers’ loans stay in forbearance or stopped collections for 90 days after the partial discharge to afford the borrower an opportunity to request reconsideration and to help ease the borrower back into repayment or collection activities. Borrowers who request reconsideration will remain in forbearance or stopped collections while the Department reviews the reconsideration request.

Limitation periods for borrowers. Eliminate limitations periods for borrowers to submit a borrower defense to repayment claim so long as they still have an outstanding Direct Loan associated with their claim. The Department also proposes to remove limitations periods on borrowers’ ability to receive a refund on any amounts they paid on the outstanding Direct Loans associated with their claim.

Institutional response process. Develop a time-limited institutional response process that would be required of the institution. This process would be separate from the process used to adjudicate any assessment of liabilities to the institution.

Generally, the Department contemplates an institutional response process for both individual and group claims. Institutions would have 60 days to respond to the Department’s requests for relevant evidence—the midpoint of the current timelines generally afforded for responding to program reviews. If the

institution did not have evidence, it would provide an affidavit to that effect certified by the institution's leadership. If institutions waive the institutional response process or choose not to respond the Department would assume the institution does not contest the allegations made by the borrower.

Time to process and adjudicate applications. Provide a hold harmless period where interest stops accumulating on loans held by borrowers that have pending borrower defense claims for six months or longer. This interest pause would then continue until the Department adjudicates the claim and then follow the post-adjudication proposals described in the second issue paper.

The Department strives for expediency and thoroughness in administering the borrower defense claim process. The Department solicits ideas from the committee on establishing reasonable timeframes for adjudication. Questions for consideration by the committee include:

1. What is a reasonable timeline to adjudicate borrower defense claims?
2. Would the timeline be the same or different for individual claims versus group claims?
 - a. Should the clock stop or reset on an individual claim if it is captured within a group process before the Department issues an adjudication decision?
3. How should the Department treat evidence or cases that are in ongoing, unresolved, or settled litigation (*qui tam*, etc.)?

Treatment of FFEL Program Loans. Streamline the process for borrowers with FFEL Program loans. If a borrower's claim is approved, FFEL lenders would be required to execute the relevant amount of relief, which could include relieving the borrower from further repayment of their FFEL Program loan and issuing refunds to the borrower of amounts they paid. The lender would then submit a claim to the guaranty agency (GA) and the GA would submit a claim to the Department to repay the lender. This accomplishes the same outcome as if the borrower consolidated without requiring the borrower to go through that process.

Proposed Regulations:

To assist the Committee in discussing these issues, the Department is providing draft revisions to the borrower defense regulatory language for the issues described above and incorporating the Department's proposals.

§685.206 Borrower responsibilities and defenses. [forthcoming]

* * * * *