

United States Department of Education
First Report of the Special Master for Borrower Defense to the Under Secretary
September 3, 2015

On June 25, 2015, Ted Mitchell, Under Secretary of the United States Department of Education (the Department, or ED), appointed me as Special Master tasked with advising the Department about borrower defense issues. I have been asked to help the Department develop processes and systems to provide relief to Federal student loan borrowers who have legal claims against the schools they attended.

My appointment was part of an ongoing effort by the Department to address issues arising from abusive practices of institutional participants in ED student loan programs. It followed years of effort to, in Under Secretary Mitchell's words, "hold career colleges accountable for giving students what they deserve—a high-quality, affordable education that prepares them for their careers," including through increased enforcement activities in this area.

The unfortunate reality is that some colleges, including certain career colleges, have used abusive practices to prey on students. They have made false and misleading statements to students or prospective students about the value of certain career college programs or the financing needed to pay for a program. Such practices can have serious adverse effects for both students and taxpayers. Accordingly, prior to my appointment, Secretary of Education Arne Duncan made it clear that such predatory practices would not be tolerated. He also stated that students affected by such practices would receive the loan relief they deserved under the law.

My paramount goal as Special Master is to develop a system for providing debt relief to borrowers that is **fair, transparent, and efficient**, with minimal burden on borrowers. Under Secretary Mitchell asked me to advise on the creation of a durable process—one that would, consistent with the Higher Education Act, be applicable to the crisis that unfolded with the closure of Corinthian Colleges, but also one that would apply more broadly to students at all institutions who believe they have been defrauded by their colleges. To that end, I have been asked to advise the Department regarding:

- Creation of a simple application for debt relief for all borrowers applying for loan discharges based on borrower defense.
- Issues of law and fact related to borrower defense claims received by the Department.
- The process by which the Department can recover money from schools after successful borrower defense claims.

At the time of my appointment, I stated I would regularly inform students, stakeholders, and the public at large about my work as Special Master. This report is intended to be the first in a series of reports describing the progress the Department has made on this important issue.

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In this report, I use the term Borrower Defense Program (or BDP) to refer to the Department's plans, systems, and processes designed to enable aggrieved borrowers to assert a defense to repayment of their federal student loans. That right—commonly known as “borrower defense” or “defense to repayment”—emanates from provisions in the Higher Education Act and associated regulations.¹ As I mentioned above, the Department's goal is to make these processes fair, transparent, and efficient. Success requires ensuring that borrowers are aware of their options and can clearly understand the processes so that they can make informed choices about seeking relief. In addition, the BDP should allow borrowers to pursue that defense with as little burden as is possible, consistent with the development of facts sufficient to support the defense. In the interest of efficiency and ease to the borrower, I intend to establish both clear rules of decision about what evidence of wrongdoing is sufficient to provide relief for borrowers and protocols for when similar claims can be treated together and alike. Successful borrower defense claims will not only result in relief to the borrower, but will also have consequences for the school whose conduct created such a defense.

As will be more fully described below, BDP stems from the Department's receipt of an unprecedented number of claims from aggrieved borrowers, and represents new territory for ED. This being the case, BDP will proceed deliberately to address borrower claims through the development of protocols and precedent based on the facts presented by student claims.² This is critical if the Department is to create a durable system that helps not only the borrowers that already have submitted claims, but also those that may submit claims in the future.

I. Legal and Regulatory Background Regarding Borrower Defense

The following forms the statutory and regulatory framework that guides my work as Special Master.

Section 455(h) of the Higher Education Act (HEA) requires that the Department define by regulation which acts or omissions of a school constitute defenses to repayment of a Direct Loan.³ In 1994, the Department promulgated regulations providing that a borrower may, in any proceeding to collect on a Direct Loan, “assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.”⁴

If the borrower's defense is successful, the borrower “is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay.” The Secretary may provide the borrower further relief as the Secretary deems appropriate, including “[r]eimbursement of the borrower for amounts paid toward the loan,” “[d]etermining that the borrower is not in default on the loan” and is therefore eligible for title IV assistance, and

¹ 20 U.S.C. § 1087e(h); 34 C.F.R. § 685.206(c).

² As discussed below, the Department is offering to put Corinthian borrowers who wish to raise a defense to repayment into forbearance so that they do not have to make payments on their loans while this system is being developed and their claims are being reviewed.

³ 20 U.S.C. § 1087e(h).

⁴ 34 C.F.R. § 685.206(c)(1).

“[u]pdating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower’s Direct Loan.”⁵

In the event of a successful defense to repayment, the regulations authorize the Secretary to initiate “an appropriate proceeding” against the school whose conduct gave rise to such defense “to pay to the Secretary the amount of the loan to which the defense applies.”⁶

The history of the borrower defense regulations and the Department’s interpretation of them are worth noting. The borrower defense rule was first adopted in 1994 as a temporary measure pending promulgation of a rule through the negotiated rulemaking process.⁷ On April 25, 1995, the Secretary of Education convened the Borrower Defenses Regulations Negotiated Rulemaking Advisory Committee (Committee), which represented all affected parties, including representatives of institutions of higher education, higher education organizations, student loan lenders, guaranty agencies, loan servicers, legal aid organizations, students, and the Department.⁸ During the Committee’s first session, however, the Department was informed that the non-Federal negotiators had all agreed to recommend to the Department that no changes be made to existing regulations. The non-Federal negotiators on the Committee told the Department that they were satisfied that the current regulations adequately addressed the issue of borrower defenses and that no further regulatory action was needed. The Secretary accepted this recommendation, and the Department stated at the time that “the Secretary believes that borrower defenses issues, in particular issues related to the consequences of such defenses, can be adequately addressed by clarifying current regulations and by administrative processes.”⁹

In 1995, the Department issued a Notice of Interpretation providing basic guidelines for the borrower defense process. These guidelines indicated that the Department will acknowledge a Direct Loan borrower’s cause of action under state law as a defense to repayment of a loan only if the cause of action directly relates to the loan or to the school’s provision of educational services for which the loan was provided. The Department will not recognize actions such as personal injury tort claims or actions based on allegations of civil rights violations as defenses to repayment. Under these regulations, the Department looks to the law of the state where the action took place to determine whether to accept the borrower defense.¹⁰

The regulation provides that a borrower may assert, as a defense to repayment, a school’s actions or omissions that “would give rise to a cause of action against the school under applicable State law.”¹¹ The borrower defense regulations speak of the consequences of a “successful” borrower’s defense. By its own terms, the regulation indicates that a borrower’s defense is based on acts or omissions by the school. Thus, for the defense to be successful, the evidence must support the claim that those acts or omissions occurred. Furthermore, the terms of the regulation also indicate that, from a legal point of view, those acts or omissions must be such that they

⁵ *Id.* at § 685.206(c)(2). Direct Loan refers to loans made by the Department under the William D. Ford Federal Direct Loan Program.

⁶ *Id.* at § 685.206(c)(3).

⁷ 59 Fed. Reg. 42649 (Aug. 18, 1994); 59 Fed. Reg. 61664 (Dec. 1, 1994).

⁸ 60 Fed. Reg. 11004 (Feb. 28, 1995).

⁹ 60 Fed. Reg. 37768 (July 21, 1995).

¹⁰ *Id.*

¹¹ 34 C.F.R. § 685.206(c)(1).

would give the borrower a cause of action against the school. In other words, it is the cause of action under state law against the school that establishes an equivalent right to relief from the obligation to repay a Direct Loan. If the relevant evidence, considered as a whole, would not support a state law cause of action, then the acts or omissions asserted cannot be the basis of a defense to repayment.¹²

Nothing in the regulation requires the borrower to be the sole source of evidence establishing a right to relief under state law. Accordingly, on June 8, 2015, the Department took an unprecedented step and announced that it would use existing evidence, where appropriate, to ease borrowers' burden in establishing their eligibility for borrower defense relief:

Wherever possible, the Department will rely on evidence established by appropriate authorities in considering whether whole groups of students (for example, an entire academic program at a specific campus during a certain time frame) are eligible for borrower defense relief. This will simplify and expedite the relief process, reducing the burden on borrowers.¹³

II. Background Regarding Corinthian Colleges' Collapse

The Department's investigation into the falsification of Corinthian Colleges' placement rates began in the winter of 2013. In January 2014, the Department asked Corinthian for data regarding the school's advertised placement rates. Following a back and forth during which the Department pressed Corinthian for placement rate data and Corinthian refused to provide that data, the Department placed Corinthian on heightened cash monitoring status in June 2014.¹⁴

In July 2014, the Department and Corinthian reached an Operating Agreement in which Corinthian agreed to cease operations by teaching out at least a dozen of its campuses and by selling as many of the rest of its schools as possible. The Department also appointed a monitor, Patrick Fitzgerald, the former U.S. Attorney for the Northern District of Illinois, who was charged with overseeing Corinthian's operations and wind-down activities, including its federal student aid draws, its expenditures (including refunds required under the Operating Agreement), and its compliance with its obligations to the Department.

In November 2014, Corinthian agreed to sell 53 of its Everest and WyoTech campuses, covering about 35,000 students, to Zenith, a newly created non-profit organization. In that transaction, the Department secured conduct provisions about Zenith's ownership of its new schools, including provisions about how Zenith would calculate placement rates and the appointment of a monitor to oversee Zenith's compliance with the regulations surrounding the federal financial aid program. In the transaction, the Department settled future liabilities against Zenith that might have arisen from Corinthian's management of the schools for an initial sum of \$12 million, and an earn-out of \$17.5 million over seven years. In contrast, the Department gave no release to Corinthian and indicated that its pending investigations into Corinthian would continue.

¹² *See id.*

¹³ <http://www.ed.gov/news/press-releases/fact-sheet-protecting-students-abusive-career-colleges>.

¹⁴ Heightened Cash Monitoring is an administrative status that Federal Student Aid can impose on institutions to provide additional oversight for a number of financial or federal compliance issues.

In the following months, the Department continued its regulatory activity. In March 2015, after Corinthian failed to file audited financial statements, the Department requested a letter of credit. In April, the Department concluded part of its investigation into Corinthian's placement rate falsification and issued a fine letter against Corinthian. That fine letter concluded that Corinthian had misled students about its programs by inflating placement rates at its Heald College locations. Corinthian did so by, among other means, counting students as placed based in jobs they held before enrolling at Corinthian, creating temporary unsustainable jobs for its students and counting those students as placed, and counting students as placed when their jobs were unrelated to the education they received at Corinthian. The Department notified Corinthian that it intended to fine Heald \$30 million for those violations, and also ordered that Corinthian stop enrollments at those locations.¹⁵

On April 27, 2015, shortly after the Department notified Corinthian of its intention to impose a fine based on the falsified placement rates, Corinthian announced the closure of all of its schools and then filed for bankruptcy in May 2015. Approximately 13,500 students were enrolled at Corinthian's locations at the time of its closure.

The collapse of Corinthian Colleges was a landmark event for the concept of borrower defense to repayment. In the 20 years between the establishment of these regulations and Corinthian's collapse, borrowers had made borrower defense claims to the Department only a handful of times. As a result, the Department did not have in place an established infrastructure for accepting, processing, and reviewing large numbers of such claims from borrowers. Corinthian's collapse almost immediately produced over 1,000 claims from borrowers for a defense to repayment, before the Department took any action to clarify how to seek such relief. Along with other factors, this significant increase in claims volume necessitated building a durable system to collect, process, and review such claims. The great burden already facing many of the affected students underscored the importance of making this system fair, transparent, and efficient.

In keeping with its desire to use established evidence of wrongdoing, where appropriate, the Department analyzed the applicability of its findings against Heald College to potential borrower defense claims. Because Heald was headquartered in and managed from California, the Department looked to California law and determined that Heald's misrepresentation of placement rates constituted prohibited unfair competition under California's Unfair Competition Law (UCL).¹⁶ Accordingly, students that relied on such misleading placement rates when they enrolled at Heald would have a cause of action under state law. Based on this analysis, the Department created a simple attestation form that allows borrowers to document the inflated rates' impact on them in a manner that supports a cause of action under the UCL. The Department anticipates being able to grant relief to borrowers who provide the necessary information on the form.

¹⁵ The letter detailing those findings is available at <http://www2.ed.gov/documents/press-releases/heald-fine-action-placement-rate.pdf>.

¹⁶ Cal. Bus. & Prof. Code § 17200 *et seq.*

III. Department Actions to Assist Borrowers Seeking Debt Relief

In the wake of Corinthian Colleges' collapse and prior to my appointment as Special Master, the Department took significant steps to help borrowers learn about their options and apply for appropriate loan relief. This section summarizes these steps.

A. Expanded Eligibility for Closed School Discharge

The Department's first set of actions related to closed school discharge. Under the law, if a college closes while a student who has not yet finished her program coursework is enrolled (or soon after she withdraws), that student may seek a discharge of her federal student loans.¹⁷ This relief is available if a student is not completing a comparable educational program at another school. (Completing a comparable program could happen through a teach-out agreement with the school or after transferring credits from the closed school to that new school.)

On April 27, 2015, Corinthian closed its remaining campuses, rendering students enrolled at the time eligible for a closed school discharge. Given the unique circumstances faced by former Corinthian students, the Secretary exercised his authority to expand eligibility for students to apply for a closed school loan discharge by extending the window of time back to June 20, 2014 (instead of the typical 120-day window). This captured students who attended the now-closed campuses after Corinthian entered into an agreement with the Department to terminate Corinthian's ownership of its schools. As a result, about 15,000 students in total are now eligible to have their federal loans discharged through a closed school discharge.

After acting to extend the window back to June 20, 2014, the Department engaged in a multi-prong approach to contact students who were potentially eligible for closed school discharge relief. The Department, through its servicers, sent closed school discharge application forms to potentially eligible students by physical and electronic mail. The Department also placed the closed school discharge application form on the Corinthian information page of the Federal Student Aid website where borrowers could easily access it. As a result of this outreach, the Department has received closed school discharge applications from borrowers at a much greater rate than it has in prior closed school instances (about 500% higher). Information about closed school discharge applications received and discharged is found in section IV below.

B. Help for Students Seeking Relief Based on Borrower Defense

On June 8, 2015, the Department made a series of announcements to help clarify borrowers' options and the borrower defense process.¹⁸ Following those announcements, the Department has provided helpful information and meaningful pathways to relief for former Corinthian students through a number of borrower-facing actions taken by Federal Student Aid (FSA):

- **Forbearance or stopped collections.** Corinthian students who believe they were defrauded by their school and intend to submit claims based on borrower defense can request that their federally serviced loans be placed into forbearance for twelve months while their claim is reviewed. If those loans are in default, they can request that collection activities be stopped. Students can request this relief

¹⁷ 20 U.S.C. § 1087(c)(1).

¹⁸ <http://www.ed.gov/news/press-releases/fact-sheet-protecting-students-abusive-career-colleges>.

by either filling out a simple web-based form, submitting a request by phone to a dedicated call center, or—for students submitting an attestation form for Heald College programs covered by Department findings—by checking a box on that form. As a result, the burden to the borrower of continuing to make payments on these loans or facing collection activities is relieved while the Department establishes its processes and claims are reviewed.

- **Streamlined relief for certain Heald College students.** As discussed above, the Department made findings that Heald College had published misleading placement rates related to the majority of programs at its campuses between 2010 and 2014. The Department determined that students who relied on misleading placement rates when they enrolled in a program at Heald College could be eligible for streamlined relief based on borrower defense by filling out a simple attestation form and providing other basic information. The Department has posted the list of programs covered by its findings online,¹⁹ and has created a specific online form (also available as a fillable PDF) for affected Heald College borrowers to submit their borrower defense claims.²⁰ Through this form, these borrowers can also request that their federal loans be placed in forbearance or stopped collections while their claim is reviewed.
- **Direct outreach to former Heald College students.** Beginning in July, FSA conducted an email outreach campaign to over 50,000 borrowers who attended Heald College since 2010 to notify them that they may be eligible for debt relief based on borrower defense. That email, sent to borrowers' last known email addresses, provided general information about borrower defense and described the Department's findings related to misleading placement rates published by Heald College. The email provided information about eligibility and linked to both the list of programs covered by the Department's findings and the page where they could fill out the attestation form. Borrowers were also informed how to request forbearance of payments or stopped collection. Additional outreach efforts will continue to ensure borrowers are aware of their options.
- **Dedicated call center for borrower defense information.** A dedicated call center was created to provide guidance and assistance for students seeking to learn more about their options and how to apply for relief. This call center also is processing requests for forbearance or stopped collections from Corinthian students who intend to submit a borrower defense claim. The center has received over 7,000 calls to date.
- **Updated information posted online.** Updated information and frequently asked questions about the availability for relief under the borrower defense regulations, including how borrowers can apply for relief, has been posted on FSA's website.²¹

¹⁹ The list is available here: <https://studentaid.ed.gov/sa/sites/default/files/heald-findings.pdf>.

²⁰ The form is available here: <https://borrowerdischarge.ed.gov/attestation>.

²¹ See here: <https://studentaid.ed.gov/sa/about/announcements/corinthian>.

These actions with regard to borrower defense have resulted in a significant response—summarized in the following section of this report—that has provided me with actionable cases upon which to begin my work as Special Master.

IV. Current Borrower Defense and Closed School Claims

Since the collapse of Corinthian and the announcements made by the Department in early June and subsequent outreach activities, the Department has received several thousand claims from borrowers seeking borrower defense relief, in addition to phone calls to its dedicated call center and emails to a dedicated inbox.

Specifically, as of August 26, 2015, the Department has received the following:

- **Borrower Defense claims: 4,140**
 - Heald Attestation Forms: 1,992
 - ~ 97% reported attending Heald
 - < 2% reported attending Everest
 - < 0.5% reported attending WyoTech
 - < 2% reported attending other schools
 - Other Borrower Defense claims: 2,148
 - ~ 68% reported attending Everest
 - ~ 14% reported attending Heald
 - ~ 6% reported attending WyoTech
 - ~ 11% reported attending other schools
- **Forbearance/stopped collection requests processed: 7,696**
- **Phone calls to dedicated call center for borrower defense: 7,344**
- **Incoming emails to dedicated email inbox: 4,114**
- **Outgoing emails sent to Heald College students: 54,170**

In addition, it is worth noting the numbers of applications from Corinthian students seeking a **closed school discharge**, as some of those borrowers may seek a closed school discharge in lieu of making a borrower defense claim. As of August 21, 2015, the Department has received **7,815 closed school claims** from Corinthian students. Of these, **3,128 have been approved** (representing an estimated \$40 million in loans) with the rest still under review. These claims break down among the Corinthian colleges as follows:

- Everest: 2,359 (925 approved)
- Heald: 4,513 (1,893 approved)
- WyoTech: 943 (310 approved)

V. Building an Infrastructure to Implement BDP

As described above, the number of borrower defense claims received to date is in the thousands. At this point, it is difficult to say how quickly that number of claims will grow, but it is safe to assume it will increase—although it should be noted that not all borrowers that attended affected schools may wish to submit a borrower defense claim. Department leadership agrees that the best way to meet its goal of creating a fair, transparent, and efficient process for handling borrower defense claims is to establish an infrastructure that is flexible and scalable. This will allow the Department to handle current claims in a way that is fair to students, effective, and efficient, and expand the infrastructure as needed to meet future demand.

By “infrastructure,” I mean both the human and physical resources necessary to handle claims, as well as a decision-making framework that will accommodate efficient and fair resolution of borrower defense matters. Current human and physical resources include the ED and FSA personnel and systems devoted to the issue. The Department has recognized the need for additional staff dedicated solely to this issue and committed to hiring staff for that purpose. To bolster that capacity, in addition to myself, the Department has hired four attorneys for the sole purpose of working on BDP so far. These attorneys, who will begin work in early September, will assist me in reviewing the batches of claims that the Department already has received, analyzing the state laws involved in such claims, and developing analytical templates to facilitate claims intake and assessment processes that are scalable and durable. Moving forward, I will recommend adding additional staff or systems capacity as appropriate.

The intellectual infrastructure of BDP will be a set of rules for deciding cases in a consistent way. I will start by analyzing claims where both facts and law are clear, and will develop rules of decision for other cases as my colleagues and I gain experience in reviewing and analyzing claims. The clearest claims at present are claims from Heald College students using the Attestation Form created by the Department that meet the criteria set forth in that form. For other claims, the rules of decision will be based on a review of the factual allegations made by borrowers about, for example, the conduct of school personnel in the inducement of the student to pursue a course of study and take on the debt that is now disputed. Factual information established by state attorneys general, proceedings in state courts, and other federal enforcement agencies is also relevant. Having reviewed a number of claims from various sources, my initial view is that a student’s description about what happened to her, in her own words, will be crucial in developing this set of rules. Creating a durable, fair, transparent, and efficient process will likely require the borrower to provide information about school misconduct that would be available to her.

This process will reduce the burdens on borrowers to the maximum extent possible. I share the urgency felt by borrowers who were defrauded, and believe it is important to reach decisions in this project in a deliberate way that will support the relief that students deserve, protect taxpayers, and justify public trust and confidence in this process. I will do everything possible to serve those goals.

VI. Special Master Outreach and Engagement

In my work as Special Master, I believe it is important to engage with and listen to stakeholders affected by student debt issues, particularly borrowers and those who counsel, represent and

advocate for borrowers. This view is based on my experience as North Carolina Commissioner of Banks and as Monitor of the National Mortgage Settlement, where interaction with counsellors and advocates, while sometimes challenging, was always informative and helpful.

Accordingly, since my appointment I have met with multiple representatives of a large coalition of advocates for debtors on student loans. I have also established email and written communications with several advocacy groups and have received from them detailed proposals regarding borrower defense.

I have also spoken with several State Attorneys General regarding borrower defense and have heard from a number of them regarding a suggested course of conduct for the project. Given the importance of state law to borrowers' defenses and the critical roles that State Attorneys General have played and are playing in regard to this important issue, I value their input immensely and I look forward to working with them to ensure that every borrower receives the relief they deserve with the minimum burden.

As this work continues, I will continue to engage with these and other stakeholders. And I will continue to give their ideas, expertise, and proposals due consideration.

VII. Next Steps

Over the past few months, the Department has made significant process in clarifying borrowers' options based on closed school discharge and borrower defense to repayment, and in building the intake systems to collect borrower defense claims.

Over the coming months, I will continue to work with Department personnel to build a durable system and infrastructure within the Department to review borrower defense claims and discharge loans for eligible borrowers. To that end, I expect to undertake the following efforts:

- Along with newly hired attorneys, review the current inventory of attestation forms from students enrolled in Heald College programs covered by ED's findings. I expect that over the course of the next three months, all Heald attestation forms submitted to this point will be initially reviewed and determinations of eligibility for loan discharges will be made.
- Along with newly hired attorneys, review other borrower defense claims to begin developing rules of decision. When coupled with further consultation and engagement with stakeholders, this review will help the Department develop a streamlined intake form that aggrieved borrowers can use to submit borrower defense claims.
- Advise the Department on further outreach efforts that will help ensure that borrowers are aware of their options in seeking relief.
- Further engage State Attorneys General and other enforcement agencies to discuss pending or past investigations they may have pursued against career colleges; evidence of wrongdoing emerging from those investigations that may be relevant to the Department's borrower defense process; and their own state statutes and case law as it relates to wrongdoing relevant for borrower defense

claims. I will also create processes by which the State Attorneys General can submit evidence developed through their investigatory findings, so that wherever possible, like claims can be treated together and alike.

- Analyze the effects of loan discharge on students' credit reports and engage with credit reporting bureaus on the proper treatment of loan discharge.
- Report to the public on a quarterly basis, beginning no later than November 30, 2015, as to the status of pending assertions of borrower defense and relief granted.

This report is a baseline report intended to inform stakeholders and the public about the current status of the BDP. By necessity, it emphasizes process and start-up issues. Readers should know, however, that the leadership of the Department and I well understand that the success of this effort will be measured in the relief granted to aggrieved borrowers who requested relief and the establishment of fair and transparent rules for future assertion of the defense. To that end, I will continue working to process these claims in an efficient manner and to set up a durable process that can be used for future claims by aggrieved borrowers.