



TO: COHEAO Members

FROM: Robert Moran, Executive Director

DATE: 11/23/22

RE: US Departments of Justice and Education cooperation on student loan bankruptcy

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On Thursday, November 17, 2022, the US Department of Justice (DOJ) announced a new policy on handling cases involving bankruptcy of student loan debt in cooperation with the Department of Education (ED). DOJ released guidance to Department attorneys that handle bankruptcy cases outlining a new process for recommending the discharge of student loan debt to bankruptcy judges.

Discharging student loan in bankruptcy is subject to a higher bar than that of most other debt. In order to discharge student loan debt, borrowers need to demonstrate undue hardship. Bankruptcy courts typically apply one of two tests to determine undue hardship – the *Brunner* test or the “totality of circumstances” test (Totality test). The *Brunner* test requires a borrower to demonstrate undue hardship by meeting the following three criteria:

- 1) The borrower is unable to maintain a minimal standard of living if required to repay the student loan(s);
- 2) Circumstances exist that indicate the borrower’s financial situation is likely to persist into the future during a significant portion of the loan repayment period; and
- 3) The borrower has made good faith efforts in the past to repay their loan(s).

The Totality test also has three similar criteria, as highlighted:

- 1) A review of the borrower’s past, present, and reasonably reliable future financial resources;
- 2) A calculation of the borrower’s and any dependents reasonably necessary living expenses; and
- 3) Any other relevant facts and circumstances surrounding each particular bankruptcy case.

The Department of Justice argues that the process for a borrower to demonstrate they meet these criteria is burdensome and costly. Others are deterred from seeking discharge due to the low probability of success and the mistaken belief that student loans are not eligible for discharge. As such, the DOJ guidance essentially removes the burden from a borrower and moves it to the government to determine. Specifically, the guidance states “the Department shares with (ED) the responsibility to represent the interests of the United States in accord with existing law and in the interests of justice. This responsibility includes recommending that a bankruptcy court grant full or partial discharge of student loan debts in appropriate cases.”

The guidance establishes three criteria for DOJ attorneys to pursue in order to stipulate the facts demonstrate that the borrower’s student loan(s) impose an undue burden and recommend to the court the loans be discharged. U.S attorneys are to determine whether the following criteria are met in cases where student loans are involved:



- 1) The borrower presently lacks an ability to repay the loan;
- 2) The borrower's inability to repay the loan is likely to persist in the future; and
- 3) The borrower has acted in good faith to repay the loan in the past.

The DOJ points out that these criteria would satisfy either the *Brunner* test or the Totality test.

In order to assist DOJ attorneys in this evaluation, the DOJ indicates that borrowers will be asked to complete an attestation form. The form is designed to have the borrower provide information that pertain to each criteria above. In addition, ED will provide borrower payment records including any outreach or correspondence with servicers related to the borrower's loans. ED will also provide any further information to assist the attorney in this process.

The issued guidance breaks down how an attorney should approach and evaluate each criteria and provides examples of facts that would satisfy those criteria. ED will assist the attorney evaluate whether a borrower is able to pay their loan into the future by determining what the standard payment amount would be for the borrower. The guidance specifically calls for the attorney to use the ED provided standard payment when evaluating whether a borrower will have the ability to repay their loan(s), while acknowledging that the borrower could elect an income driven repayment program with a lower amount.

The DOJ guidance can be found [here](#). (Have not found links to the Appendices, but will continue to look.)

#### ANALYSIS

Currently, bankruptcy court judges determine what debts will and won't be included in any bankruptcy settlement. The DOJ guidance does not change this, but now requires US attorneys to make a recommendation to the judge for discharge or partial discharge of student loan debt. The guidance drastically changes the role of a US attorney in bankruptcy cases involving student loan debt; however, it does not change the process of whether a debt is included or not in a settlement.

Some have stipulated that this guidance will have a minimal long-term impact on private student debt. However, it is plausible that a judge might apply the US attorney's recommendation to all student debt, rather than just federal student loan debt. (The guidance never clearly delineates between or specifically states federal student loan debt or private education loan debt.) It is presumed that a US attorney would not be involved if the person holding the loan debt did not have a federal student loan. However, most students with private education loan debt, also have federal student loans.

Should judges make a distinction and discharge federal loan debt, but not private education loan debt, it is anticipated that student/borrower advocacy groups will call for bankruptcy law changes favorable to borrowers. However, the announced guidance may result in current legislative efforts to reform the treatment of federal loan debt in bankruptcy to no longer be necessary.