

May 22, 2018

Jean-Didier Gaina
U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue SW
Washington, D.C. 20202-6110

Re: Evaluating Undue Hardship Claims in Bankruptcy
Docket ID ED-2017-POE-0085

Dear Jean-Didier Gaina,

I am writing on behalf of the National Student Legal Defense Network (“NSLSDN”) in response to the recent Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge Bankruptcy Proceedings. 83 Fed. Reg. 7460 (Feb. 21, 2018). NSLSDN is a non-partisan, non-profit organization that works, through litigation and advocacy, to advance students’ rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility. NSLSDN appreciates the opportunity to comment on this Request for Information (“Request”).

As noted in the Request, if a holder of a federally issued student loan (issued under either the Federal Family Education Loan Program (“FFEL”) or the Federal Perkins Loan Program (“Perkins”)) determines that the required repayment of such a loan would impose an “undue hardship” on a borrower or the borrower’s dependents (collectively “borrower”), the holder must concede such a claim in an adversary proceeding. The Department previously has issued guidance on how the holder should evaluate whether or not to make such a concession and applies that same analysis to loans issued by the Department under the Direct Loan program, or for FFEL or Perkins loans held by the Department.¹

The “central purpose” of the Bankruptcy code “is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy ‘a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.’”² The Department’s guidance to holders, as well as its own application of that guidance, in actions defending adversary proceedings in bankruptcy must be guided by this fundamental principle. Although there are many important issues for borrowers related to bankruptcy standards, we focus on only a few discrete items in this comment.

¹ See generally Office of Postsecondary Education, U.S. Dep’t of Educ., Dear Colleague Letter: Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings (July 7, 2015), available at: <https://ifap.ed.gov/dpccletters/attachments/GEN1513.pdf>.

² *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, (1934)).

1) Whether the use of two tests results in inequities among borrowers

The Request seeks information and comment on whether the existence of two distinct tests, *i.e.* the so-called “*Brunner*” test³ and the “totality of the circumstances”⁴ test, results in inequities among borrowers seeking undue hardship discharge.

The *Brunner* test was first articulated in 1987. Since that time, numerous courts have recognized that both the Bankruptcy Code and the extent of student loan borrowing have changed significantly.⁵ For example, between 2001 and 2016, student loan debt has nearly tripled, growing from about \$340 billion in 2001 to \$1.3 billion in 2016.⁶ Student loan default rates continue to rise and, as applied to the 2004 entry cohort, an estimated 40 percent of borrowers will default by 2023.⁷ Courts have recognized that *Brunner* has significant limits and its requirement to review the borrower’s past conduct for good faith efforts to repay the loan is subjective and not based on interpretation of the statute.⁸ As noted by the Department’s Request, under the *Brunner* test, the debtor must show that: (1) he or she cannot maintain, based on current income and expenses, a minimal standard of living for himself or herself and any dependents if forced to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) he or she has made good faith efforts to repay the loans. Also noted by the Department, even though the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits use the *Brunner* test,⁹ the Eighth Circuit uses the more flexible “totality of circumstances” test.¹⁰ Under the Totality of the Circumstances test, the court examines: (1) the debtor’s past, present, and likely future financial resources; (2) his or her

³ *Brunner v. N.Y. State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2d Cir. 1987).

⁴ *In re Long v. Educ. Credit Mgmt. Corp.*, 322 F.3d 529 (8th Cir. 2003).

⁵ See, e.g., *In re Myhre*, 503 B.R. 698, 703 (Bankr. W.D. Wis. 2013); see also Nat’l Consumer Law Center, Student Loan Law, § 11.4.1.2 (5th Ed. 2015).

⁶ Laura Feiveson, Alvaro Mezza, & Kamila Sommer, “Student Loan Debt and Aggregate Consumption Growth,” FEDS Notes (Feb. 21, 2018), available at <https://www.federalreserve.gov/econres/notes/feds-notes/student-loan-debt-and-aggregate-consumption-growth-20180221.htm>.

⁷ Judith Scott-Clayton, “The Looming Student Debt Crisis Is Worse Than We Thought,” 2 Evidence Speaks Reports (Jan. 10, 2018), available at <https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/>.

⁸ *In re Hicks*, 331 B.R. 18 (Bankr. D. Mass. 2005); *In re Kopf*, 245 B.R. 731 (Bankr. D. Me. 2000).

⁹ *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987); *In re Faish*, 72 F.3d 298, 306 (3d Cir. 1995); *In re Frushour*, 433 F.3d 393, 400 (4th Cir. 2005); *In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003); *In re Oyler*, 397 F.3d 382, 385 (6th Cir. 2005); *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993); *In re Pena*, 155 F.3d 1108, 1112 (9th Cir. 1998); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *In re Cox*, 338 F.3d 1238, 1241 (11th Cir. 2003).

¹⁰ *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003).

reasonably necessary living expenses; and (3) any other relevant facts and circumstances. Courts applying the *Brunner* test have held that borrowers must satisfy every prong of the test,¹¹ whereas the “totality of the circumstances” test is “a less restrictive approach.”¹² The Supreme Court has declined to resolve this split.¹³

In providing guidance to holders, and in applying that guidance itself, the Department should indicate that holders should not oppose undue hardship discharge based on a rigid application of the *Brunner* factors where a borrower otherwise would be eligible for discharge under a fair application of the “totality of the circumstances” review. There is no reason for borrowers to be subject to differing eligibility for discharge based on tests in different jurisdictions.

2) Circumstances under which loan holders should concede an undue hardship claim by the borrower under *Brunner*

Even within the application of *Brunner*, courts have split on the requirements of “prong two,” whether additional circumstances exist to indicate that that borrower’s state of affairs is likely to persist for a significant portion of the repayment period. Some courts have required a borrower to show a “certainty of hopelessness” that the borrower will be able to repay the loans within the repayment period.¹⁴ Other courts have expressly rejected this “vague, speculative[,] and completely subjective” standard in favor of “a realistic look” at the borrower’s circumstances,¹⁵ and the Supreme Court has declined to resolve this split.¹⁶ The Department should guide holders not to contest an undue hardship claim on the basis of whether a borrower has met the “certainty of hopelessness” standard where a realistic look at the borrower’s circumstances indicates the borrower’s inability to repay is likely to persist into the future.

Courts are also split on the quantum of proof required to establish that a medical condition prevents a borrower from repaying student loans under the second prong of *Brunner*. Some courts do not require independent medical evidence in addition to the borrower’s testimony.¹⁷ One such court noted that “requiring that a debtor provide corroborative medical evidence beyond their own

¹¹ See, e.g., *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993).

¹² *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003).

¹³ *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 136 S. Ct. 803 (2016) (denying petition for writ of certiorari).

¹⁴ *In re Triplett*, 357 B.R. 739, 743 (Bankr. E.D. Va. 2006); *In re Brightful*, 267 F.3d 324, 328 (3d Cir. 2001).

¹⁵ *In re Jackson*, Bankr. No. 05-15085 (PCB), Adv. No. 06-01433, 2007 WL 2295585, at *6 n.11 (Bankr. S.D.N.Y. Aug. 9, 2007); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); see also *In re Demmons*, Case No. 14-11638, Adv.P. No. 15- 1024, 2016 WL 5874831, at *5 (Bankr. E.D. La. Oct. 7, 2016).

¹⁶ *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 136 S. Ct. 803 (2016) (denying petition for writ of certiorari).

¹⁷ *In re Mosley*, 494 F.3d 1320, 1325-26 (11th Cir. 2007); see also, e.g., *In re White*, No. 07-41509, 2008 WL 5272508, at *5 (Bankr. E.D. Tex. Dec. 17, 2008) (“A debtor is not required to present expert testimony to corroborate her own testimony about her health.”); *In re Benjumen*, 408 B.R. 9, 17-18 (Bankr. E.D.N.Y. 2009).

testimony in order to sustain the evidentiary burden for a hardship discharge of a student loan on medical grounds is likely to prevent *pro se* debtors from receiving the relief to which they are entitled because they ‘cannot afford to hire medical experts to testify to the effect of their disease on their earning capacity.’”¹⁸ Other courts require additional corroboration.¹⁹ Bankruptcy is meant to give borrowers a fresh start—they should not be prevented from getting that fresh start because they cannot afford to hire expensive experts to prove their medical condition prevents them from working. The Department should give guidance to loan holders to consent to undue hardship claims where the testimony of the borrower (and, if available, friends, family, or a treating physician) is sufficient to satisfy *Brunner*.

Courts also are split on whether borrowers must pursue employment opportunities outside the borrower’s chosen field. The U.S. Court of Appeals for the Ninth Circuit has persuasively held that when a person has chosen to go into a certain field and, despite her best efforts, has “topped out in her career with no possibility of future advancement cannot obtain a discharge of her student loans,” she should not be required to “either uproot her family and move, or switch careers to try to obtain a higher paying job.”²⁰ Other courts have held that a borrower must pursue more profitable employment outside her chosen field.²¹ The Department should give guidance to holders to consent to undue hardship claims where the borrower has used her best efforts to pursue her chosen field, but whose inability to maintain a minimal standard of living is still likely to persist in the future. Borrowers should not be required to switch from their chosen field to satisfy the undue hardship standard in *Brunner*.

Courts also have split on whether it is proper to consider the quality of the debtor’s education. Some courts have held that *Brunner* “does not permit discharge of a student loan on the basis that the Debtor made a poor career choice (or was misled) in selecting the curriculum that the loan financed.”²² But other courts, including the Ninth Circuit, have held that it is proper to consider the quality of the debtor’s education.²³ Others courts also consider whether the borrower’s school closed.²⁴ Notably, a school’s closure may mean a borrower cannot access her school’s career

¹⁸ *In re Jackson*, No. 05-15085 (PCB), 2007 WL 2295585, at *6 (Bankr. S.D.N.Y. Aug. 9, 2007) (quoting *In re Doherty*, 219 B.R. 665, 669 (Bankr. W.D.N.Y. 1998)).

¹⁹ *In re Pobiner*, 309 B.R. 405, 419 (Bankr. E.D.N.Y. 2004); *In re Brosnan*, 323 B.R. 533, 538 (Bankr. M.D. Fla. 2005); *In re Chime*, 296 B.R. 439, 445 (Bankr. N.D. Ohio 2003).

²⁰ *In re Nys*, 446 F.3d 938, 945 n.6 (9th Cir. 2006).

²¹ *In re Gerhardt*, 348 F.3d 89, 93 (5th Cir. 2003); *In re Frushour*, 433 F.3d 393, 401 (4th Cir. 2005); *In re Kraft*, 161 B.R. 82, 85-86 (Bankr. W.D.N.Y. 1993).

²² *In re Kraft*, 161 B.R. 82, 85 (Bankr. W.D.N.Y. 1993).

²³ *In re Nys*, 446 F.3d 938, 947 (9th Cir. 2006); *In re Cota*, 298 B.R. 408, 419 (Bankr. D. Ariz. 2003) (granting discharge where borrower “made a good faith effort to obtain employment as an electrician, but has been unable to do so because the substandard education he obtained did not qualify him for the work”).

²⁴ *In re Gregory*, 387 B.R. 182, 189 (Bankr. N.D. Ohio 2008) (noting the “untimely closure of a debtor’s educational institution”).

services department for assistance finding employment. The Department should give guidance to holders to consent to undue hardship claims where borrowers did not receive educational benefit from their institution or where the school closed and the borrower was not able to complete her program.

3) Whether and how the 2015 Dear Colleague Letter should be amended

To the extent that the 2015 Dear Colleague Letter relies on the availability of Total and Permanent Disability discharge, the Department should continue progress to ensure that all available matching databases are used to locate eligible borrowers and that the discharge process is as seamless as possible for borrowers, especially given the change in the Code clarifying that this discharge is not income.²⁵ It would be a true failure of the entire system if eligible borrowers who could be matched either with Social Security or VA data continue to need to raise these claims through the bankruptcy process. To the extent that these borrowers, or those who could not be matched, do continue to raise these claims, the Department should instruct holders not to oppose borrowers in these proceedings. Also, holders should be required to assist borrowers in filing for discharge, including providing paperwork and personnel who are trained to assist borrowers in filling it out.

The 2015 Dear Colleague letter requires consideration of whether the borrower is eligible for an income-driven repayment plan—it should revoke this guidance and should no longer give guidance that holders can rely on the availability of IDR plans in evaluating undue hardship claims. The 2015 Dear Colleague letter analysis conflicts with the touchstone of the bankruptcy code, which is to provide borrowers with a fresh start. A borrower in an income-driven repayment plan *may* reach forgiveness after many years in repayment. But such a borrower who pays under an income-driven repayment plan, particularly one who makes zero loan payments over a series of many years, will necessarily “be burdened by a huge and growing obligation that remains on her credit record.”²⁶ Moreover, § 523(a)(8) of the Bankruptcy Code does not require courts to look at whether the loan might eventually be forgiven. It instead asks if a borrower will face undue hardship if required to *repay* the loan.²⁷ In addition, borrowers likely will be taxed on the debt forgiven.²⁸ (Some borrowers

²⁵ Press Release, U.S. Dep’t of Educ., “U.S. Department of Education and U.S. Department of Veterans Affairs Team Up to Simplify Student Loan Discharge Process for Disabled Veterans” (Apr. 16, 2018), available at <https://www.ed.gov/news/press-releases/us-department-education-and-us-department-veterans-affairs-team-simplify-student-loan-discharge-process-disabled-veterans>; Patrick Campbell & Seth Frotman, “Help is here for people with severe disabilities struggling with student loans,” Consumer Financial Protection Bureau Blog (Feb. 7, 2018), <https://www.consumerfinance.gov/about-us/blog/help-here-people-severe-disabilities-struggling-student-loans/>.

²⁶ *In re Durrani*, 311 B.R. 496, 508 (Bankr. N.D. Ill. 2004).

²⁷ Nat’l Consumer Law Center, Student Loan Law, § 11.4.2.3.3 (5th Ed. 2015).

²⁸ 26 U.S.C. § 61(a)(12).

may escape these disastrous tax consequences, if they are insolvent at the time of forgiveness.²⁹) In addition, borrowers encounter significant difficulty seeking to enroll in and annually recertifying their income-driven repayment plan.³⁰ At a bare minimum, until such time as the Department and its servicers have made enrollment in and recertification of income-driven repayment plans truly seamless and error free for eligible borrowers, the Department provide guidance that its holders should not rely on their availability to contest discharge.

4) **Bankruptcy treatment of private student loans**

As originally enacted, § 523(a)(8) of the Bankruptcy Code did not exempt the discharge of private education loans. In 2005, however, Congress changed the definition in § 523(a)(8) to cover private education loans. Unlike federal student loans, where bankruptcy discharge theoretically costs the taxpayer, private loans are obligations to banks and other financial institutions, who are free to underwrite the loans and do so. Private student loans resemble other unsecured credit, but, inexplicably, enjoy drastically different bankruptcy protection. The Department and the Administration more broadly should call on Congress to repeal the 2005 amendment and make private student loans dischargeable in bankruptcy without meeting the undue hardship standard.³¹

Thank you for your attention to these important issues facing student loan borrowers.

Sincerely,

Martha Upton Fulford
Senior Counsel
National Student Legal Defense Network
1015 15th Street NW, Suite 600
Washington, D.C. 20005

cc: Senator Lamar Alexander (Chairperson, U.S. Senate HELP Committee)
Senator Patty Murray (Ranking Member, U.S. Senate HELP Committee)

²⁹ *Educ. Credit Mgmt. Corp. v. Jesperson*, 571 F.3d 775, 782 (8th Cir. 2009) (“Cancellation results in taxable income only if the borrower has assets exceeding the amount of debt being cancelled.”).

³⁰ See Consumer Financial Protection Bureau, “Annual Report of the CFPB Student Loan Ombudsman” (Oct. 2017), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf; Consumer Financial Protection Bureau, “Staying on track while giving back” (June 2017), available at https://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf.

³¹ See, e.g., Fairness for Struggling Students Act of 2017, S. 1262, 115th Cong. (1st Sess. 2017), see also <https://www.durbin.senate.gov/newsroom/press-releases/durbin-dem-senators-push-for-student-loan-measures-in-banking-bill>.

Senator Ben Sasse (Chairperson, U.S. Senate Judiciary Committee, Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts)
Senator Richard Blumenthal (Ranking Member, U.S. Senate Judiciary Committee, Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts)
Representative Virginia Foxx (Chairperson, U.S. House of Representatives Committee on Education and the Workforce)
Representative Bobby Scott (Ranking Member, U.S. House of Representatives Committee on Education and the Workforce)
Representative Tom Marino (Chairperson, U.S. House of Representatives Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law)
Representative David Cicilline (Ranking Member, U.S. House of Representatives Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law)