

United States Senate

WASHINGTON, DC 20510

March 31, 2022

The Honorable Dr. Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Secretary Cardona and Attorney General Garland:

We write to request an update on efforts by the Department of Education (ED) and Department of Justice (DOJ) to change how the agencies handle undue hardship claims by student borrowers in bankruptcy proceedings.

Over the past several decades, Congress and the courts have together nearly eliminated bankruptcy as a viable path towards financial recovery for most Americans struggling with student loan debt. The undue hardship exception (11 U.S.C. 523(a)(8)) currently serves as the only option in the bankruptcy code for discharge of student loans, and that exception has been narrowly construed by most courts. The federal government's aggressive litigation challenges against students who pursue undue hardship claims further exacerbates this situation.

Last month, in *In re Wolfson*, ED withdrew its appeal of a bankruptcy court decision to discharge nearly \$100,000 of student loan debt held by an individual with a serious disability.¹ We are pleased that ED changed course in the *Wolfson* case and decided not to spend taxpayer dollars attempting to force this individual to continue shouldering crushing debt. Unfortunately, this case has been an exception to the standard practice. All too often, ED and DOJ oppose undue hardship discharges in adversarial bankruptcy proceedings, requiring debtors to effectively demonstrate a certainty of hopelessness before they can obtain relief.² Clearing this statutorily unnecessary high bar is challenging enough for individuals who are represented by experienced attorneys. It is virtually impossible for those without representation.

While a bipartisan effort is underway in Congress to reform the bankruptcy code's treatment of student loans, changes to administrative policies related to undue hardship are also necessary and long overdue. We appreciate the public acknowledgement of this problem by members of this Administration, and we were encouraged specifically to see Secretary Cardona's

¹ Vince Sullivan, "Student Loan Discharge Appeal Dropped in Delaware Court," LAW360 (Feb. 11, 2022), <https://www.law360.com/articles/1464581/student-loan-discharge-appeal-dropped-in-delaware-court>.

² Danielle Douglas-Gabriel, "Education Dept. shows limits of pandemic relief by fighting borrowers in bankruptcy," WASHINGTON POST (July 17, 2021), <https://www.washingtonpost.com/education/2021/07/17/education-department-bankruptcy-policy/>.

March 9 announcement that ED is “working to change [its] policies so that bankruptcy is an option for those struggling with student debt.”³

As ED works to make those policy changes, we ask you to answer the following questions:

1. Will ED promptly issue an update to its 2015 guidance on undue hardship adversary proceedings to make it simpler and fairer for borrowers who have demonstrated legitimate hardships to receive a discharge?⁴ We urge you to do so, and request that such updated guidance do the following, at minimum:
 - Identify situations of disability or financial adversity where ED will stipulate that, when presented with satisfactory documentation of the situation, the borrower should qualify for a determination of undue hardship;
 - Avoid forcing student debtors to incur additional costs by providing that ED will accept from the debtor satisfactory documentation of undue hardship without engaging in formal litigation discovery;
 - Indicate ED’s preference for the “totality of the circumstances” interpretation of undue hardship, rather than the so-called *Brunner* test; and
 - Acknowledge that a borrower’s participation in an income-driven repayment plan does not preclude a claim of undue hardship.
2. Secretary Cardona also revealed that ED has asked DOJ to pause any active bankruptcy litigation if the student borrower wishes, in order to “ensure that every borrower can benefit from these changes.”⁵ Has DOJ issued guidance to its attorneys handling active bankruptcy cases consistent with ED’s request that stays be available to borrowers?
3. What public outreach has ED or DOJ done to ensure that borrowers and their legal representatives are aware of the option for a stay?

³ Cardona, M. [@SecCardona]. (2022, March 9). Twitter.
<https://mobile.twitter.com/SecCardona/status/1501646447103643655>

⁴ Office of Federal Student Aid, “Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings.” *The Department of Education*, July 7, 2015.

⁵ Cardona, M. [@SecCardona]. (2022, March 9). Twitter.
<https://mobile.twitter.com/SecCardona/status/1501646447103643655>

We look forward to working with ED and DOJ to promptly implement the goals articulated by Secretary Cardona and to help bring clarity, fairness, and cost-effectiveness to the federal government's approach on undue hardship claims. Thank you for your attention to this matter, and we look forward to your prompt response. Thank you.

Sincerely,

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