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STUDENT DEFENSE

Action Memorandum

Automating the Discharge of Federal Student Loan Debt for Individuals who are Totally and Permanently Disabled

(Revised December 14, 2020)

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I. Summary

Under the Higher Education Act ("HEA"), student loan borrowers who are "totally and permanently" disabled are entitled to a complete discharge of their federal student loans.[1] But under current practices, even after the Social Security Administration ("SSA") determines that an individual is eligible for such a discharge, the U.S. Department of Education ("Department") requires a borrower to go through additional hoops. Rather than using information shared between agencies to automate the process after an SSA determination, the Department forces borrowers to separately apply for a total and permanent disability ("TPD") discharge. As a result, and because of this additional hurdle, nearly 70% of borrowers identified by SSA as eligible for relief (approximately 400,000 borrowers) had not applied for, let alone received, the relief to which they are entitled.[2]

In order to promptly provide relief to these borrowers, before student loan payments are once again due, the Department should waive negotiated rulemaking and immediately issue a notice of proposed rulemaking ("NPRM") with a thirty-day comment period that proposes to: (i) eliminate the need for a TPD application[3] and grant automatic discharges to all individuals who have matched as TPD-eligible through the SSA data ("SSA matches") and (ii) eliminate the three-year post-discharge monitoring period.[4] These changes could provide an estimated $14 billion in student loan discharges to approximately 400,000 student loan borrowers with disabilities who are not receiving the relief to which they are entitled.[5]

II. Background and Current State

Under the HEA, student loan borrowers with total and permanent disabilities are entitled to a discharge of their outstanding debt.[6] Borrowers with FFEL Program loans, Direct Loans, and Perkins Loans are entitled to the discharge.[7] Borrowers are considered to have a total and permanent disability if they are "unable to engage in any substantial gainful activity," which relates to earning income, by reason of any medically determinable physical or mental impairment that can be expected to result in death, expected to last for a continuous period of sixty months, or has lasted for a continuous period of sixty months.[8]

Pursuant to 2013 changes to the Department's TPD regulations, an SSA designation of "Medical Improvement Not Expected" ("MINE") qualifies a borrower for TPD relief.[9] Borrowers are also considered to have a total and permanent disability if they have been determined by the Secretary of Veterans Affairs ("VA") to be unemployable due to a service-connected condition.[10] Generally, borrowers will apply for a TPD discharge based on a doctor's certification, certain disability documentation or identification from the SSA, or a VA determination that the borrower is unemployable due to a service-connected condition.

As a practical matter, the Department regularly receives lists of borrowers who are eligible for TPD discharges thanks to information-sharing agreements signed with the VA (under a program announced in the Trump Administration)[11] and with SSA (under a program initiated in the Obama Administration).[12] The Department then notifies these borrowers—hundreds of thousands of individuals—that they are eligible for relief. According to data the Department provided to the National Student Legal Defense Network ("Student Defense") through the Freedom of Information Act ("FOIA"), as of November 2019, 571,527 borrowers matched through the SSA process alone.[13] But most of these borrowers fail to seek relief even though the Department has sent them notices: according to the Department's response to the Student Defense FOIA, as of November 2019, 353,445 SSA-matched borrowers, or over 60%, had not received the relief to which they are entitled.

When borrowers fail to apply, and thus fail to receive the discharge, but are delinquent in repayment, the Department

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often sends these individuals to forced collections and garnishes their disability benefits, all for debts they should no longer owe. If the facts present themselves, the Department's alternative means of involuntary collections may also be used against these borrowers.

After years of bipartisan public pressure, in August 2019 President Trump signed a Presidential Memorandum directing Secretary DeVos to automatically discharge federal student loan debt for veterans identified as eligible by the VA, explaining that the TPD application process was "prevent[ing] too many of our veterans from receiving the relief for which they are eligible" which, in turn, was "frustrat[ing] the intent of the Congress that their Federal student loan debt be discharged."[14]

Approximately three months after the Presidential Memorandum, "Trump Administration lawyers" determined that the agency could not legally move ahead with automatic discharges unless they rewrote the TPD regulations to allow for relief without an application.[15] On November 26, 2019, the Department published an IFR to amend the Perkins, FFEL, and Direct Loan TPD regulations to allow for automatic discharges for VA matches ("VA IFR").[16]

According to the VA IFR, the TPD application process was "a barrier that creates significant and unnecessary hardship for our disabled veterans" and removing it was therefore "a pressing problem of national concern."[17] Pursuant to the VA IFR, automatic TPD discharges for veterans appear to be back on track.

Although the same principle applies to approximately 400,000 SSA matches who have not received relief, the Trump Administration has not taken any steps to automatically discharge their loans.

In general, the Department treats determinations made by SSA differently from those made by the VA in one key respect: post-discharge monitoring requirements. Once the Department discharges a debt due to a VA determination of disability, there is no further monitoring of the borrower, seemingly due to a statutory provision that a borrower who is eligible for a TPD discharge due to a determination by the VA "shall not be required to present additional documentation…"[18] But the HEA also provides that "[t]he Secretary *may* develop" safeguards to prevent fraud and abuse involving non-VA disability determinations.[19]

In response to a 1999 Department of Education Inspector General report finding a large percentage of likely fraudulent discharges,[20] the Department took a series of steps to respond to the fraud. The processes have evolved over the years, but since 2010, the Department requires borrowers to be monitored for three years after discharge, during which time the loans can be reinstated for any of the following three reasons: (i) the borrower has earnings beyond a minimally acceptable amount; (ii) the borrower has incurred new federal student loans; or (iii) SSA changes its disability determination.[21] If the borrower does not satisfy these reinstatement period requirements, the "Secretary reinstates [the] borrower's obligation to repay" the previously discharged loan.[22] The Department will also reinstate a borrower's loans if the borrower fails to provide the required information during the monitoring period, though the regulatory text is ambiguous on this point.[23]

There is widespread support to extend automatic TPD relief to SSA matches. Student Defense, along with a bipartisan coalition in Congress, has called upon the Trump Administration to do so.[24] In response to a March 3, 2020 letter from Student Defense and over 30 other advocacy

groups,[25] the Trump Administration signaled interest in providing such relief, stating to NPR:

> The Department's current implementing regulations require it to receive an application before completing a civilian [total and permanent disability] discharge, but we are interested in providing automatic discharge to these borrowers and believe the FUTURE Act makes this a possibility — but will require the department to undergo negotiated rulemaking.[26]

Although the Trump Administration did not act on this "interest," the Biden Administration should. There are simply no significant or persuasive reasons not to extend the automatic relief to all borrowers—veterans or civilians—who share the statutory right to relief and who have been identified by the federal government as eligible.

III. Proposed Action

In an earlier version of this memo, we suggested that the Department could take a series of executive actions to effectuate relief to eligible borrowers. We suggested that the Department immediately issue an Interim Final Rule ("IFR") to suspend all collection activity for individuals who have "matched," and then commencing a negotiated rulemaking to grant automatic discharges to those individuals and eliminate the post-discharge monitoring period.

Although we continue to believe that our prior memorandum provides the Department with a path towards affording affected borrowers (*i.e.*, borrowers with a MINE designation) the relief to which they are entitled, it was written at a time when the "freeze" on student loan repayment—in light of the COVID-19 crisis—was set to expire on December 31, 2020. Given the growth of the pandemic, and the extent to which we anticipate student loan repayment problems continuing into 2021, we have conducted additional thinking about how to expedite relief to borrowers, in a manner that remains consistent with governing law.

At the time of this writing, the Trump Administration has extended the "freeze" on student loan repayments through January 31, 2020.[27] Based on public reporting, we presume—and base our analysis upon the presumption—that the incoming administration will continue that freeze, although for an unknown period of time. Given the freeze, an IFR suspending collection appears to be an unnecessary step for the Department to take. Nevertheless, the path towards relief for disabled borrowers must continue.

Perhaps the most expeditious approach to consider relief for disabled borrowers, and to afford such relief before the expiration of any further freeze, is for the Department to promptly issue an NPRM proposing to (i) grant automatic discharges to SSA matches by eliminating the need for a TPD application and (ii) eliminating the three-year post-discharge monitoring period. This NPRM can be relatively short—although it will need to provide a regulatory impact analysis ("RIA") that estimates and quantifies burden. We suspect that an NPRM could be prepared and issued within the first 30-45 days of the new Administration.

Although the Department is ordinarily required by the HEA to use negotiated rulemaking to develop a proposed rule for programs authorized under Title IV, it has the statutory authority to bypass that process when it finds that "applying such a requirement with respect to given regulations is impracticable, unnecessary, or contrary to the public interest."[28] In light of the express cross-reference to, and incorporation of, section 553 of the APA, 5 U.S.C. § 553, this is often referred to as the "good cause" requirement.

"Good cause" under Section 553 of the APA "is determined on a 'case-by-case' basis, based on the 'totality of the factors at play.'" *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (citing *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010)); *see also Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014) (explaining that the good cause analysis is an "inevitably fact-or-context dependent" inquiry). The good cause exemption "excuses agencies from the notice and comment requirement—and, by extension, excuses the Department from the negotiated rulemaking requirement for Title IV regulations—only 'in emergency situations, or where delay could result in serious harm.'" *Bauer v. DeVos,* 325 F. Supp. 3d 74, 96–97 (D.D.C. 2018) (quoting *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)); *see also Sorenson Commc'ns Inc.,* 755 F.3d at 706 (explaining that good cause exists "where delay would imminently threaten life or physical property"); *California v. Azar*, 911 F.3d 558, 576 (9th Cir. 2018) (holding that good cause may be found where "delay would do real harm to life, property, or public safety").

Here, there is good cause to waive negotiated rulemaking with respect to the need for an application because the Department has already determined that once it becomes aware that SSA has made a certain determination, the Department has the necessary "proof of [the] borrower's TPD" eligibility.[29] In 2016, the Department announced that it had been working closely with SSA to "complete a data match to identify federal student loan borrowers" who have the MINE designation which "qualifies them for loan forgiveness under the TPD discharge program."[30] Thus, as a result of this ongoing data-match program, described above, the Department has already determined that a particular category of borrowers are entitled to a loan discharge, and already knows—from SSA—which individual borrowers are part of that category.

Accordingly, as the Department determined in connection with the VA match, "there will no longer be a need for" an application from a borrower, because the Department no longer has discretion to deny an SSA-matched-borrower's application for a TPD discharge. Thus, the Department's prior statements, made in connection with the VA IFR, are prescient:

> As the Court found in *Metzenbaum* v. *Federal Energy Regulatory Commission,* 675 F.2d 1282, 1291 (D.C. Cir. 1982), the opportunity for notice and comment where there is no discretion is "unnecessary." *Id.* (quoting 5 U.S.C. 553(b)(B)). The Court further stated that notice and comment for such a nondiscretionary action "might even have been 'contrary to the public interest,' given the expense that would have been involved in a futile gesture." *Id.* See also *Lake Carriers' Ass'n* v. *E.P.A.,* 652 F.3d 1, 10 (D.C. Cir. 2011) (notice and comment rulemaking "would have served no purpose" where EPA lacked the authority to amend or reject the conditions at issue).[31]

In the context of the VA IFR, the Department used this rationale to find "good cause" to waive both notice-and-comment rulemaking *and* negotiated rulemaking. These are, of course, separate analyses; and good cause to waive one requirement should not be concomitant with good cause to waive the other. Here, because the negotiated rulemaking process is time intensive, and may outlast the current repayment freeze, and in light of the discussion above, we believe that the Department can waive the negotiated rulemaking requirement. But for the freeze, the Department would likely have good cause to waive the notice and comment requirement, as it did with respect to the VA IFR. Nevertheless, the freeze has afforded the opportunity to balance the interests (providing required discharges to eligible borrowers immediately vs. engaging in the required administrative processes) and provide an opportunity for the public to comment on a NPRM.

The economic fallout from the COVID-19 pandemic provides further good cause for bypassing negotiated rulemaking in order to provide automatic relief to entitled borrowers before the freeze ends. Borrowers who are totally and permanently disabled and saddled with debt are among the most in need of swift economic relief.[32] Because TPD relief allows only for a discharge of the borrower's outstanding balance, these borrowers would be unable to recoup payments made while the lengthy negotiated rulemaking process plays out. They should not be required to continue making payments that they cannot recoup after-the-fact, on loans that the Department knows they do not owe, while a lengthy negotiated rulemaking process takes place.

There is also good cause to waive negotiated rulemaking with respect to changes to the monitoring period. As discussed above, the HEA contemplates, but does not require, a post-discharge monitoring period.[33] Thus, the Department has the authority, through a new rulemaking, to eliminate the monitoring period for SSA matches.[34]

Importantly, the elimination of the application requirement for borrowers who have matched must be conducted in tandem with elimination of the monitoring period because the two issues are inextricably linked. It would cause enormous confusion—at a great harm to the public interest—for the Department to provide automatic discharges to 400,000 borrowers and then require those borrowers to submit to a monitoring period that they may not know exists. Even when borrowers take the affirmative step to apply, the monitoring period is causing tens of thousands of borrowers to have their loans reinstated not because of fraud in the system, but for the simple failure to fill out paperwork.[35] If the Department were to keep the monitoring period in place, it is possible that hundreds of thousands of borrowers would have their loans reinstated, defeating the

entire purpose of this effort while simultaneously creating an unnecessary administrative nightmare. Regardless, because of the timing issues created by the freeze on student loan repayments, a balance of the factors suggests that the Department should still provide an opportunity for the public to comment on a NPRM.

Finally, there is a question of the effective date – which has three distinct components.

First, under the "Master Calendar" provision in the HEA, "regulatory changes initiated by the Secretary affecting the programs under [Title IV] that have not been published in final form by November 1 prior to the start of the award year shall not become effective until the beginning of the second award year after such November 1 date." 20 U.S.C. § 1089(c)(1). In effect, if this provision applied, any changes that the Department finalized before November 1, 2021 would not take effect until July 1, 2022. And while the provision allows for "early implementation," 20 U.S.C. § 1089(c)(2)(B), designating a regulation for early implementation permits an "entity" to "choose[] to implement a regulatory provision prior to the effective date" under the Master Calendar rule.

With respect to the Master Calendar requirement, the Department should be guided by its actions with respect to the VA IFR, in which it did not subject the regulatory change to the master calendar rule. In that rulemaking, the Department did not even mention the Master Calendar requirement when discussing the effective date of the rule. Such an approach is consistent with what we believe to be the best reading of the Master Calendar requirement, *i.e.*, it only applies to situations in which it is possible for the Secretary—exercising her authority under 20 U.S.C. § 1089(c)(2)—to designate a rule for early implementation. Under such a reading, the requirement applies to regulations that impact entities that could early implement a rule, but does not apply to purely borrower-facing provisions that have no impact on any "entity." Regardless, even if the Master Calendar requirement does apply, the Department should be guided by its interpretation of the early implementation language in other contexts, and simply designate the rule for early implementation—even where there is no "entity" that can choose to implement the regulatory change before the presumptive July 1 effective date.[36]

Second, the APA also requires regulations to be published at least 30 days before their effective date, but excepts from that requirement rules which grant or recognize an exemption or relieve a restriction. 5 U.S.C. § 553(d)(1). Here too, the Department should take guidance from the VA IFR, where the Department noted that it was taking action to "relieve restrictions on veterans by removing unintended administrative burdens[.]"[37] Because the same justification applies to borrowers with disabilities, who will have unintended administrative burdens removed with respect to the post-match application, the 30-day requirement in the APA need not apply.

Third, the Congressional Review Act requires that a major rule may take effect no sooner than 60 calendar days after an agency submits a CRA report to Congress or the rule is published in the Federal Register, whichever is later.[38] Nevertheless, the CRA also provides that if the agency has "good cause"—and includes within the rule a "brief statement of the reasons therefore" that "notice and public procedure" is "impracticable, unnecessary, or contrary to the public interest," such a rule can take effect upon publication in the Federal Register.[39] In the VA IFR, the Department expressly tied its "good cause" finding to dispense with notice and comment rulemaking to the good cause requirement under the CRA.[40] Putting aside the question of whether good cause to dispense with one procedure *de facto* constitutes good cause for dispensing with other components, in this case, for the reasons stated above with respect to the impact on borrowers with disabilities, the agency would have good cause to ensure that the rule takes effect before the expiration of the current "freeze."

IV. Risk Analysis

We see little risk in eliminating the post-discharge monitoring period and need for a TPD application for SSA matches, and in granting the automatic discharges. While it is possible that some will raise concerns of borrower-fraud without the monitoring period for SSA matches, we believe the SSA MINE designation process provides a sufficient guardrail and see little risk of a party being injured by the rule proposed here.[41] Politically, we do not see pushback on efforts to help Americans with permanent disabilities.

Endnotes

1 HEA § 437(a); 20 U.S.C. § 1087(a).

2 As of February 2020, "approximately 589,000 borrowers were identified through the SSA match process, which began in April 2016. Of those borrowers, more than 227,000 borrowers with loans totaling $8.2 billion have been approved for discharges." *See* U.S. Department of Education Responses to Questions for the Record Submitted by Senator Patty Murray Following the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies March 5, 2020 Hearing to Review of the FY2021 Budget Request for the U.S. Department of Education at 40, *available at* https://www.help.senate.gov/download/wordmurrayqfrs5mar20hearingonfy21edbudget. Accordingly, as of February 2020, 362,000 borrowers were eligible for, but had not received, TPD relief. Subsequently, on November 9, 2020, the Office of the Inspector General for the SSA issued a report finding that SSA erroneously omitted 36,248 borrowers who should have matched through the SSA process, and SSA agreed with the finding. *See* Office of the Inspector General, Social Security Administration Audit Report, "Social Security Administration Beneficiaries Eligible for Total and Permanent Disability Federal Student Loan Discharge,"(Nov. 9, 2020), *available at* https://www.oversight.gov/node/92106. Therefore, while some borrowers may have applied since February 2020, it appears that nearly 400,000 borrowers have matched through the SSA process but not received relief.

3 *See* 34 C.F.R. § 685.213(b)(1) ("To qualify for a discharge of a Direct Loan based on a total and permanent disability, a borrower must submit a discharge application to the Secretary on a form approved by the Secretary.").

4 *See* 34 C.F.R. § 685.213(b)(7)-(8).

5 This estimate is based on the Department's reporting that the 227,00 borrowers who matched through the SSA process and successfully applied for TPD relief received $8.2 billion in discharges, or an average of $36,123.35 per borrower. *See supra* note 2.

6 HEA § 437(a); 20 U.S.C. § 1087(a).

7 34 C.F.R. §§ 674.61 (Perkins), 682.402(c) (FFEL), 685.213 (Direct Loan).

8 HEA § 437(a)(1); 20 U.S.C. § 1087(a)(1).

9 *See* 77 Fed. Reg. 66,088, 66,091-93 (Nov. 1, 2012).

10 HEA § 437(a)(2); 20 U.S.C. § 1087(a)(2).

11 *See* 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.

12 *See* Press Release, U.S. Dep't of Educ., "U.S. Department of Education Acts to Protect Social Security Benefits for Borrowers with Disabilities" (Apr. 12, 2016), *available at:* https://www.ed.gov/news/press-releases/us-department-education-acts-protect-social-security-benefits-borrowers-disabilities.

13 *See* U.S. Department of Education, Final Response to FOIA Request No. 20-00411-F (Jan. 29, 2020), *available at:* https://www.defendstudents.org/foia/disability#matchingagreements.

14 *See* Presidential Memorandum on Discharging the Federal Student Loan Debt of Totally and Permanently Disabled Veterans (Aug. 21, 2019), *available at:* https://www.whitehouse.gov/presidential-actions/presidential-memorandum-discharging-federal-student-loan-debt-totally-permanently-disabled-veterans/.

15 *See* Michael Stratford, "Trump pledge to forgive disabled veterans' student loans delayed — at Education Department," *Politico* (Nov. 21, 2019), *available at:* https://www.politico.com/news/2019/11/21/trump-disabled-veterans-student-loans-072750. We do not know whether this determination was made by the Department of Education or elsewhere in the executive branch.

16 *See* 84 Fed. Reg. 65,000 (Nov. 26, 2019), *available at:* https://www.govinfo.gov/content/pkg/FR-2019-11-26/pdf/2019-25813.pdf.

17 *Id.* at 65,002.

18 20 U.S.C.A. § 1087(a)(2) (language added August 14, 2008).

19 20 U.S.C.A. § 1087(a)(1) (emphasis added) (language added July 1, 2010).

20 U.S. Dep't of Educ., Office of Inspector Gen., A06-80001, Improving the Process for Forgiving Student Loans (June 7, 1999).

21 34 C.F.R. § 685.213(b)(7)(i).

22 *Id.*

23 34 C.F.R. § 685.213(b)(8). The regulatory text does not specifically require reinstatement, but rather, in a section titled Borrower s responsibilities after a [TPD] discharge, provides that, during the monitoring period, the borrower must provide the Secretary with the required information. The preamble to the 2012 rule states that a borrower who does not provide the required documentation (particularly income documentation) will have his or her loans reinstated and will be required to resume payment on the loan. 77 Fed. Reg. at 66,097; *see also* FSA Website at https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/disability-discharge#postdischarge ("During the postdischarge monitoring period, Nelnet will require you to submit documentation of your annual earnings from employment on a form that Nelnet will provide. If you don't submit this form with the required documentation of your income, your obligation to repay your loans or complete your TEACH Grant service obligation will be reinstated."). The Department further explained that "a large proportion of discharged borrowers end up with their loans reinstated because of failure to submit adequate information during the post-discharge monitoring period." 77 Fed. Reg. at 66,119.

24 *See* Press Release, "Sen. Coons leads bipartisan effort to urge Trump Administration to immediately discharge outstanding federal student loans for permanently disabled Americans," (Oct. 9, 2019), *available at:* https://www.coons.senate.gov/news/press-releases/sen-coons-leads-bipartisan-effort-to-urge-trump-administration-to-immediately-discharge-outstanding-federal-student-loans-for-permanently-disabled-americans.

25 *See* Letter from Advocacy Groups to Sec. DeVos (Mar. 3, 2020), *available at:* https://www.defendstudents.org/news/coalition-urges-devos-to-provide-critical-loan-relief-to-350000-americans-with-disabilities.

26 Cory Turner, "Letters Urge Betsy DeVos To Erase Student Loans For Borrowers With Disabilities," *National Public Radio* (March 3, 2020), *available at:* https://www.npr.org/2020/03/03/811170628/letters-urge-betsy-devos-to-erase-student-loans-for-borrowers-with-disabilities.

27 On March 27, 2020, Congress passed and President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), which suspended all student loan payments until September 30, 2020. On August 8, 2020, President Trump issued a memorandum directing the Department to extend CARES Act student loan relief through December 31, 2020. On December 4, 2020, Secretary DeVos announced a further extension of the student loan forbearance period to run through January 31, 2021. *See* Press Release, U.S. Dep't of Educ., "Secretary DeVos Extends Student Loan Forbearance Period Through January 31, 2021, in Response to COVID-19 National Emergency" (Dec. 4, 2020), *available at:* https://www.ed.gov/news/press-releases/secretary-devos-extends-student-loan-forbearance-period-through-january-31-2021-response-covid-19-national-emergency.

28 5 U.S.C. § 553(b)(B). *See also* 20 U.S.C. § 1098a(b)(2) ("All regulations pertaining to [Title IV of the HEA] . . . shall be subject to a negotiated rulemaking . . . unless the Secretary determines that applying such a requirement with respect to given regulations is impracticable, unnecessary, or contrary to the public interest (within

the meaning of section 553(b)(3)(B) of title 5), and publishes the basis for such determination in the Federal Register at the same time as the proposed regulations in question are first published."); *Nat'l Educ. Ass'n v. DeVos*, 379 F. Supp. 3d 1001, 1020 (N.D. Cal. 2019) (discussing the HEA's "good cause" requirement).

29 Final Regulations, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 77 Fed. Reg. 66088, 66091 (Nov. 1, 2012).

30 *See* Press Release, U.S. Dep't of Educ., "U.S. Department of Education Acts to Protect Social Security Benefits for Borrowers with Disabilities" (Apr. 12, 2016), *available at:* https://www.ed.gov/news/press-releases/us-department-education-acts-protect-social-security-benefits-borrowers-disabilities.

31 84 Fed. Reg. 65,005-06.

32 *See* Clare Lombardo and Cory Turner, "Student Loan Borrowers With Disabilities Aren't Getting Help They Were Promised" *National Public Radio* (Dec. 4, 2019) (explaining that, as of June 2019, 225,000 borrowers who had matched through the SSA process had already defaulted on their loans, and many were having their disability checks garnished), *available at:* https://www.npr.org/2019/12/04/776058798/why-student-loan-borrowers-with-disabilities-arent-getting-the-help-they-deserve; *see also* Nat'l Council on Disability, National Disability Policy: A Progress Report at 11 (Oct. 26, 2017) ("[P]eople with disabilities live in poverty at more than twice the rate of people without disabilities."), *available at:* https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_508.pdf.

33 20 U.S.C. § 1087(a)(1) (The Secretary *may* develop such safeguards as the Secretary determines necessary to prevent fraud and abuse" and "the Secretary *may* promulgate regulations to reinstate the obligation of, and resume collection on, loans discharged under this subsection. . .") (emphasis added).

34 In December 2019, Congress added an "automatic income monitoring" section to the HEA's TPD provisions. *See* 20 U.S.C. § 1087(a)(3). The new section requires the Secretary to establish and implement procedures to use IRS tax return information in order to determine continued eligibility for a TPD discharge during the monitoring period. The provision does not require a monitoring period, but rather requires automatic income monitoring where there is one. To the extent the monitoring period is not eliminated for borrowers who apply for TPD relief based on a doctor's certification, this new automatic monitoring provision would apply.

35 *See* Lombardo and Turner, *supra* note 32. According to a 2016 GAO Report: in fiscal year 2014, of the 62,303 borrowers that had their loans reinstated, 61,074 of them (or 98%) were due to failure to submit an annual income verification form. The percentage was the same in 2015. *See* GAO Report: "Social Security Offsets: Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief" at 35, Fig. 10 (Dec. 2016), *available at:* https://www.gao.gov/assets/690/681722.pdf.

36 The Department has taken such an approach in a number of other cases. *See, e.g.*, Final Regulations, Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 67,204, 67,205 (Oct. 30, 2015) (designating for early implementation regulations specific to the REPAYE repayment plan); 81 Fed. Reg. 75,926, 75,927 (Nov. 1, 2016) (designating the automatic closed school discharge regulation for early implementation).

37 84 Fed. Reg. at 65,006.

38 5 U.S.C. § 801(a)(3)(A).

39 5 U.S.C. § 808.

40 84 Fed. Reg. at 65,006 ("As stated above, the Department has found good cause to issue this rule without notice and comment rulemaking and thus we are not including the 60-day delayed effective date in this rule.").

41 Because SSA has already gone through its process to designate these borrowers as "Medical Improvement Not Expected," the risk of fraud in the system is low. SSA's procedures and criteria for setting a MINE designation are available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0426525045. *See also* 77 Fed. Reg. at 66,091-93 (describing SSA's MINE designation process and noting that such designations are reviewed by SSA no less frequently than once every seven years and no more frequently than once every five years). There is no need for the Department (let alone borrowers) to shoulder the extensive burden and cost of imposing even more hurdles on borrowers SSA has already found qualify.

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