

# United States Senate

WASHINGTON, DC 20510

September 1, 2022

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

Dear Attorney General Garland:

On August 24, 2022, the Biden-Harris administration took historic action to cancel up to \$20,000 of student loan debt, providing critical relief for up to 43 million borrowers.<sup>1</sup> “[A]s part of a comprehensive effort to address the burden of growing college costs and make the student loan system more manageable for working families,” the administration also announced it would propose a new income-driven repayment (IDR) plan, strengthen the Public Service Loan Forgiveness program, and take steps to hold schools accountable for price increases.<sup>2</sup> Together, these steps will change the lives of millions of borrowers, allowing them to move forward without being crushed by student debt.

The administration’s bold action to provide debt relief and reform the student loan system for current and future borrowers underscores the urgent need for the Department of Justice (DOJ) to do its part to ensure that borrowers who continue to struggle with student debt have a path toward additional relief. I am writing today to follow up on my previous inquiry regarding DOJ’s work to update guidance on how it handles undue hardship claims by student borrowers in bankruptcy proceedings. To support the administration’s efforts to overhaul the student loan system and ensure that bankruptcy relief is a viable option for borrowers in severe financial straits, it is critical that you issue and implement this updated guidance without delay.

In a March 2022 letter to you, I joined colleagues in requesting information on how DOJ was handling hardship claims by student borrowers in bankruptcy hearings.<sup>3</sup> Your June 2022 response to that request indicated that DOJ and the Department of Education (ED) “are collaborating to develop guidance for implementing [the undue hardship standard] in a more consistent and streamlined way,” and provided a copy of a separate DOJ guidance for U.S. Attorneys’ Offices, issued in September 2021 and updated in April 2022, on agreeing to stay of pending student loan discharge proceedings.<sup>4</sup> In July 2022, I requested a staff-level briefing on

<sup>1</sup> The White House, “FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most,” August 24, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/>.

<sup>2</sup> *Id.*

<sup>3</sup> Letter to Secretary Cardona and Attorney General Garland from Senators Durbin, Schumer, Murray, and 24 U.S. Senators, March 31, 2022, [https://www.durbin.senate.gov/imo/media/doc/Letter\\_Secretary%20Cardona%20re%20Policies%20on%20Student%20Loans%20and%20Bankruptcy\\_no%20signatures.pdf](https://www.durbin.senate.gov/imo/media/doc/Letter_Secretary%20Cardona%20re%20Policies%20on%20Student%20Loans%20and%20Bankruptcy_no%20signatures.pdf).

<sup>4</sup> Letter to Senator Warren from the Department of Justice, June 3, 2022, <https://www.warren.senate.gov/download/08/31/2022/20220603-out-warren-student-loan-debt-ecats-2022-067980>; Memorandum to All United States Attorneys from the Department of Justice, April 11, 2022, <https://www.warren.senate.gov/download/08/31/2022/enclosure-guidance-on-department-of-education-debts-memo-1>.

the delay in issuing the updated undue hardship guidance, only to receive a brief email which included no additional details about the guidance's status.<sup>5</sup>

Months have passed since my March 2022 request and borrowers are still waiting for this new undue hardship guidance. This is a severe problem for many borrowers who are in or on the brink of bankruptcy. As noted in the March 2022 letter, Congress and the courts have nearly eliminated bankruptcy as an option for Americans seeking relief from crushing student debt.<sup>6</sup> The Bankruptcy Code's undue hardship exception has been narrowly interpreted by courts, with most courts requiring borrowers to prove that their inability to repay the loan would persist into the future, that they could not maintain a "minimal" standard of living if forced to repay the loan, and that they have made good faith efforts to repay the loans.<sup>7</sup> In practice, this standard has proven to be so difficult to meet that most borrowers do not even attempt to discharge their student loans through bankruptcy.<sup>8</sup>

Those who do pursue undue hardship claims face aggressive litigation challenges by the federal government that fail to acknowledge borrowers' challenges in navigating the student loan system.<sup>9</sup> In particular, the current 2015 guidance assumes a borrower can easily access an income-based or income-driven repayment plan and that their failure to enroll in IDR may constitute a poor-faith effort to repay their loans.<sup>10</sup> This is despite a well-documented history of servicers' gross mismanagement of the IDR program, including miscounting payments, failing to update and correct borrowers' records, misleading borrowers about their payment options, and even steering borrowers eligible for IDR away from these programs.<sup>11</sup> As a result, only 157 people had ever received forgiveness under IDR through January 2021 according to a Government Accountability Office report, even though more than 4.4 million borrowers have been in repayment for at least 20 years and ostensibly should have access to loan forgiveness under IDR.<sup>12</sup>

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<sup>5</sup> Email to Office of Senator Elizabeth Warren on July 20, 2022, [On File with the Office of Senator Elizabeth Warren].

<sup>6</sup> Letter to Secretary Cardona and Attorney General Garland from Senators Durbin, Schumer, Murray, and 24 U.S. Senators, March 31, 2022, [https://www.durbin.senate.gov/imo/media/doc/Letter\\_Secretary%20Cardona%20re%20Policies%20on%20Student%20Loans%20and%20Bankruptcy\\_no%20signatures.pdf](https://www.durbin.senate.gov/imo/media/doc/Letter_Secretary%20Cardona%20re%20Policies%20on%20Student%20Loans%20and%20Bankruptcy_no%20signatures.pdf).

<sup>7</sup> 11 U.S.C. 523(a)(8); CRS, "How Hard Should it be to Discharge a Student Loan in Bankruptcy?," Kevin M. Lewis, August 27, 2018, <http://www.crs.gov/reports/LSB10192>.

<sup>8</sup> The New York Times, "For Millions Deep in Student Loan Debt, Bankruptcy Is No Easy Fix," Ron Lieber and Tara Siegel Bernard, September 10, 2021, <https://www.nytimes.com/2020/11/07/your-money/student-loans-bankruptcy.html>.

<sup>9</sup> Department of Education, "Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings," July 7, 2015, <https://fsapartners.ed.gov/sites/default/files/attachments/dpccletters/GEN1513.pdf>.

<sup>10</sup> CRS, "Bankruptcy and Student Loans," Kevin M. Lewis, July 18, 2019, <https://www.crs.gov/Reports/R45113>; Law 360, "Barriers To Discharging Student Loans In Bankruptcy Persist," Rachel Rippetoe, May 6, 2022, <https://www.law360.com/articles/1490971/barriers-to-discharging-student-loans-in-bankruptcy-persist>; Department of Education, "Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings," July 7, 2015, <https://fsapartners.ed.gov/sites/default/files/attachments/dpccletters/GEN1513.pdf>.

<sup>11</sup> Student Borrower Protection Center, "Restoring the Promise of Income-Driven Repayment: An IDR Waiver Program Proposal," <https://protectborrowers.org/wp-content/uploads/2022/01/Final-SBPC-NCLC-CRL-IDR-Waiver-Proposal.pdf>; NPR, "How the most affordable student loan program failed low-income borrowers," Cory Turner, April 1, 2022, <https://www.npr.org/2022/04/01/1089750113/student-loan-debt-investigation>.

<sup>12</sup> GAO, "Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment Forgiveness," March 2022, <https://www.gao.gov/assets/gao-22-103720.pdf>; Response to Senator Elizabeth Warren

ED has repeatedly acknowledged the historical failure of these programs, including in the administration's August 24 announcement that it would propose a new IDR plan because "the existing versions of these plans are too complex and too limited . . . millions of borrowers who might benefit from them do not sign up, and the millions who do sign up are still often left with unmanageable monthly payments."<sup>13</sup> In April 2022, Secretary Cardona also announced that ED would provide a one-time revision of IDR-qualifying payments and take other steps to "begin to remedy years of administrative failures that effectively denied the promise of loan forgiveness to certain borrowers enrolled in IDR plans."<sup>14</sup> While these actions will provide critical relief to current and future borrowers, those who continue to struggle with student debt are in need of updated undue hardship guidance that, among other things, reflects the realities borrowers have faced in accessing and affording payments under IDR.

There have been several recent cases that have come to my attention where borrowers have struggled to receive relief because of the failures of the existing bankruptcy guidance and consequent actions by DOJ and ED. These include:

- ED and DOJ contested Heather Smart's claim that she is unable to pay her \$95,000 in student loans, despite Smart being unemployed because she was "receiving extensive medical care and treatment for myriad issues relating to several forms of aggressive and invasive cancer, as well as a blood disorder."<sup>15</sup>
- Monique Wheat, a single mother of three who also serves as the primary caregiver for her mother, had \$111,000 in student loan debt discharged in court this past January, but ED and DOJ also appealed that decision.<sup>16</sup>
- As referenced in the March 2022 letter, Ryan Wolfson, had approximately \$100,000 in student loans discharged by a judge this past January, only to have ED and DOJ appeal the decision.<sup>17</sup>

In your response to the March 2022 letter from me and my colleagues, DOJ stated "we share your goal of ensuring that the bankruptcy process provides borrowers in financial distress with a meaningful opportunity to discharge their student loan debts."<sup>18</sup> But DOJ must prioritize

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from Department of Education, April 2, 2021, <https://www.warren.senate.gov/imo/media/doc/Education%20Department%20Response%20to%20Sen%20Warren%20-%202024-8-21.pdf>.

<sup>13</sup> The White House, "FACT SHEET: FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most", August 24, 2022,

<https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/>.

<sup>14</sup> U.S. Department of Education, "Department of Education Announces Actions to Fix Longstanding Failures in the Student Loan Programs," April 19, 2022, <https://www.ed.gov/news/press-releases/department-education-announces-actions-fix-longstanding-failures-student-loan-programs>.

<sup>15</sup> The American Prospect, "The Biden Education Department Drags a Bankrupt Cancer Patient Into Court," Alexander Sammon, "March 4, 2022, <https://prospect.org/education/biden-education-department-drags-bankrupt-cancer-patient-into-court/>;

<sup>16</sup> The Washington Post, "Biden administration promised bankruptcy reforms. So why is it still fighting student loan borrowers in court?," Danielle Douglas-Gabriel, February 17, 2022,

<https://www.washingtonpost.com/education/2022/02/17/biden-student-loans-bankruptcy-dispute/>.

<sup>17</sup> 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>.

<sup>18</sup> Letter to Senator Warren from the Department of Justice, June 3, 2022, <https://www.warren.senate.gov/download/08/31/2022/20220603-out-warren-student-loan-debt-ecats-2022-067980>.

updating the student bankruptcy guidance and provide clear answers about the status of its plans to address bankruptcy discharge claims. I ask that you provide answers to the following questions no later than September 15, 2022:

1. Please provide a detailed update on the status of DOJ's discussions and any updated rulemaking or guidance to address undue hardship bankruptcy discharge claims for student borrowers.
2. Since DOJ issued stay guidance on September 7, 2021, how many borrowers have sought a DOJ stay? How many have received such a stay?<sup>19</sup>
3. Will the DOJ stay guidance remain in place until DOJ and ED release new policies on discharging student loans through the bankruptcy process?
4. Since September 7, 2021, in how many instances have judges granted borrowers discharges of student loans? In how many of these cases has DOJ appealed the discharge? Why did the DOJ appeal these decisions? What steps have DOJ put in place to ensure that they are not causing unnecessary hardships through these appeals?

Sincerely,



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Elizabeth Warren  
United States Senator

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<sup>19</sup> Memorandum to All United States Attorneys from the Department of Justice, April 11, 2022, <https://www.warren.senate.gov/download/08/31/2022/enclosure-guidance-on-department-of-education-debts-memo-1>.