



AMERICAN  
BANKRUPTCY  
INSTITUTE

# Southeast Bankruptcy Workshop

*Consumer Session*

## **Student Loans**

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# DOJ'S NEW GUIDANCE ON THE DISCHARGE OF STUDENT LOANS

## DISCHARGE OF STUDENT LOANS: DOJ'S NEW GUIDANCE PRESENTATION OUTLINE

- Discharge of Student Loans under 11 U.S.C. § 523(a)
- DOJ's Student Loan Discharge Guidance
- *Brunner*/Totality of Circumstances vs. DOJ Guidance
- Implementation of DOJ Guidance
- Prefiling Considerations
- Status of Student Loan Repayment

## THE UNDUE HARDSHIP STANDARD

- The Undue Hardship Standard: The “heightened standard for discharge of student loans.”
- 11 U.S.C. § 523(a)(8)
  - Student loans may not be discharged “unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents[.]”
- Courts apply two standards to discharge student loans:
  - *Brunner Test*
  - Totality of the Circumstances Test

## DOJ GUIDANCE: OBJECTIVES

- Set clear, transparent, and consistent expectations for debtors;
- Reduce burdens by simplifying the fact-gathering process through a form Attestation; and
- Identify proceedings where the government may stipulate to facts demonstrating undue hardship.
- Attestation focuses on debtor’s present, future, and past circumstances.

# DOJ GUIDANCE: OBJECTIVES

- The Guidance has two components:
  - Recommendations to attorneys representing the United States for assessing undue hardship; and
  - Procedure for the submission of an Attestation from plaintiff to facilitate the assessment.
- Important Principles
  - The Guidance and the Attestation work together for prompt and efficient results.
  - The Guidance relies on open communication between the parties to reduce litigation burdens.
  - The Court may ultimately make a finding, regardless of the Guidance. The Guidance cannot compel a result or negate case law.

## DOJ GUIDANCE

## ATTESTATION

The image shows a sample of the DOJ Attestation form. The form is titled "ATTESTATION OF (NAME) IN SUPPORT OF REQUEST FOR YOUR CHAPTER 12 OR 13 DISCHARGE". It includes fields for the debtor's name, address, and the attorney's name. The form also contains a section for the attorney to provide information about the debtor's financial situation and the reasons for the discharge request.

- Six Parts
  - Personal Information
  - Current Income and Expenses
  - Future Inability to Repay Student Loans
  - Prior Efforts to Repay Student Loans
  - Current Assets; and
  - Additional Circumstances

## DOJ GUIDANCE

### STEP ONE: ASSESSING PRESENT CIRCUMSTANCES

- Focused on debtor's present circumstances.
- Can the debtor make loan payments "while maintaining a minimal standard of living."

[Updated January 2023]

3. My household includes the following persons (including myself):

\_\_\_\_\_[full name] \_\_\_\_\_[age] \_\_\_\_\_[sex]  
 \_\_\_\_\_[full name] \_\_\_\_\_[age] \_\_\_\_\_[relationship]  
 \_\_\_\_\_[full name] \_\_\_\_\_[age] \_\_\_\_\_[relationship]

*Questions four through eight request information related to your outstanding student loan debt and your educational history. The Department of Education will furnish this information to the Assistant United States Attorney ("AUSA") handling your case, and it should be provided to you. If you agree that the information provided to you regarding your student loan debt and educational history is accurate, you may simply confirm that you agree, and these questions do not need to be completed. If you have not received the information from Education or the AUSA at the time you are completing this form, or if the information is not accurate, you may answer these questions based upon your own knowledge. If you have more than one student loan which you are seeking to discharge in this adversary proceeding, please confirm that the AUSA has complete and accurate information for each loan, or provide that information for each loan.*

4. I confirm that the student loan information and educational history provided to me and attached to this Attestation is correct and complete: YES / NO / No Information Provided [If you answered anything other than "YES," you must answer questions five through eight].

5. The outstanding balance of the student loan(s) I am seeking to discharge in this adversary proceeding is \$\_\_\_\_\_.

6. The current monthly payment on such loan(s) is \_\_\_\_\_. The loan(s) are scheduled to be repaid in \_\_\_\_\_ [month and year] [OR] \_\_\_\_\_ My student loan(s) went into default in \_\_\_\_\_ [month and year].

7. I incurred the student loan(s) I am seeking to discharge while attending \_\_\_\_\_, where I was pursuing a \_\_\_\_\_ degree with a specialization in \_\_\_\_\_.

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## ATTESTATION

## DOJ GUIDANCE

### STEP ONE: ASSESSING PRESENT CIRCUMSTANCES

#### MEASURING HOUSEHOLD INCOME

[Updated January 2023]

8. In \_\_\_\_\_ [month and year], I completed my course of study and received a \_\_\_\_\_ degree. [OR] In \_\_\_\_\_ [month and year], I left my course of study and did not receive a degree.

9. I am currently employed as a \_\_\_\_\_. My employer's name and address is \_\_\_\_\_. [OR] I am not currently employed.

#### II. CURRENT INCOME AND EXPENSES

10. I do not have the ability to make payments on my student loans while maintaining a minimal standard of living for myself and my household. I submit the following information to demonstrate this:

##### A. Household Gross Income

11. My current monthly household gross income from all sources is \$\_\_\_\_\_.<sup>1</sup>

This amount includes the following monthly amounts:

\_\_\_\_\_ my gross income from employment (if any)  
 \_\_\_\_\_ my unemployment benefits  
 \_\_\_\_\_ my Social Security Benefits  
 \_\_\_\_\_ my \_\_\_\_\_  
 \_\_\_\_\_ my \_\_\_\_\_  
 \_\_\_\_\_ gross income from employment of other members of household  
 \_\_\_\_\_ unemployment benefits received by other members of household  
 \_\_\_\_\_ Social Security benefits received by other members of household  
 \_\_\_\_\_ other income from any source received by other members of household

<sup>1</sup> "Gross income" means your income before any payroll deductions (for taxes, Social Security, health insurance, etc.) or deductions from other sources of income. You may have included information about your gross income on documents previously filed in your bankruptcy case, including Form B 106d, Schedule I - Your Income (Schedule I). If you filed your Schedule I within the past 18 months and the income information on those documents has not changed, you may refer to that document for the income information provided here. If you filed Schedule I more than 18 months prior to this Affidavit, or your income has changed, you should provide your new income information.

## DOJ GUIDANCE

### STEP ONE: ASSESSING PRESENT CIRCUMSTANCES

#### MEASURING EXPENSES

- The Guidance encourages use of the IRS Standards to assess a "minimal standard of living."
  - National Standards: Food, housekeeping supplies, apparel, personal care products and services, and miscellaneous (plus uninsured medical costs)
  - Local Standards: Housing and transportation
  - Other necessary expenses: Taxes, health, and life insurance, day care, and other expenses

## DOJ GUIDANCE

### STEP ONE: ASSESSING PRESENT CIRCUMSTANCES

#### MEASURING EXPENSES

14. My current monthly household expenses do not exceed the amounts listed below based on the number of people in my household for the following categories. (Indicate "yes" if your expenses do not exceed the referenced amount)

(a) **Living Expenses:**

1. Food: YES / NO

2. The living expenses listed in Questions 14 and 15 have been adopted from the United States Service Collection Manual's "National Standards" and "Local Standards" for the year in which this form is used. This form is updated annually to reflect changes to these expenses.

(b) **Updated Household 2022:**

1. Housing (rent/mortgage, utilities, etc.): YES / NO

2. Food: YES / NO

3. Transportation: YES / NO

4. Entertainment: YES / NO

5. Medical: YES / NO

6. Insurance: YES / NO

7. Debt: YES / NO

8. Other: YES / NO

## DOJ GUIDANCE

### STEP ONE: ASSESSING PRESENT CIRCUMSTANCES

#### MEASURING EXPENSES

- Debtor can claim the National Standard expense amounts (even if actual expenses are lower)
  - Example: With food, debtor can claim the full National Standard amount even if actual cost is lower.
- Debtor can claim the combined total National Standard Expense amount (for categories other than uninsured medical costs).
  - Family of two can claim total of \$1410 for combined National Standard expenses regardless of amounts in categories.
- Debtor can claim standard uninsured medical expenses amount (for each household member).

## DOJ GUIDANCE

### STEP ONE: ASSESSING PRESENT CIRCUMSTANCES

#### MEASURING EXPENSES

- Debtor may request the AUSA to consider allowing amounts in excess of IRS National Standards.
  - If a debtor claims more than the *combined* standard amount for food, housekeeping supplies, apparel, personal care and miscellaneous expenses, the debtor may explain which category is over the standard and why.
  - For out-of-pocket medical costs, a debtor may explain the reason for exceeding the standard amount for each household member.
  - The Guidance asks whether the additional expenses are necessary for a debtor's minimal standard of living.

## DOJ GUIDANCE

### STEP ONE: ASSESSING PRESENT CIRCUMSTANCES

#### MEASURING EXPENSES

- IRS Local Standards
  - Unlike the National Standards, the local standards are "caps," and the debtor may claim the lesser of the actual or standard amounts
  - Debtor should list actual expenses in these categories.
- Housing Expenses encompass:
  - Rent or mortgage payments;
  - Taxes and insurance;
  - Home maintenance; and
  - Utilities
- Transportation Expenses include:
  - Vehicle "Ownership Costs" (car payments);
  - Vehicle "Operating Costs" (gas, insurance, repairs);
  - Public transportation costs; and
  - Standards apply to each vehicle
- As with the National Standards, a debtor may request allowance of amounts in excess of the Local Standards.



## DOJ GUIDANCE

### STEP ONE: ASSESSING PRESENT CIRCUMSTANCES

#### MEASURING EXPENSES

**(d) Housing Costs<sup>4</sup>**

i.	Mortgage or rent payments:	\$ _____
ii.	Property taxes (if paid separately):	\$ _____
iii.	Homeowners or renters insurance (if paid separately):	\$ _____
iv.	Home maintenance and repair (average last 12 months' amount):	\$ _____
v.	Utilities (include monthly gas, electric, water, heating oil, garbage collection, residential telephone service, cell phone service, cable television, and internet service):	\$ _____

**(e) Transportation Costs**

i.	Vehicle payments (average per vehicle):	\$ _____
ii.	Monthly average costs of operating vehicles (including gas, routine maintenance, monthly insurance cost):	\$ _____
iii.	Public transportation costs:	\$ _____

**(f) Other Necessary Expenses**

i.	Court-ordered alimony and child support payments (if not deducted from pay):	\$ _____
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(You may refer to line 19 of Form 122A-2 or 122C-2 or Schedule I, line 18.)

<sup>4</sup> You should list the expenses you actually pay in Housing Costs and Transportation Costs categories. If these expenses have not changed since you filed your Schedule I, you may refer to the expenses listed there, including housing expenses (generally on lines 4 through 6 of Schedule I) and transportation expenses (generally on lines 12, 15c and 17).

## DOJ GUIDANCE

### STEP ONE: ASSESSING PRESENT CIRCUMSTANCES

#### MEASURING EXPENSES

- Other Necessary Expenses
  - IRS Standards impose no formal caps, but these should be necessary and reasonable
  - Most require some form of explanation on the Attestation
  - The Attestation has sections for payroll deductions and Other Necessary Expenses but these are all “other necessary expenses” under the IRS Standards.

## DOJ GUIDANCE

### STEP ONE: ASSESSING PRESENT CIRCUMSTANCES

#### MEASURING EXPENSES

- Anticipated Future Expenses: Expenses the debtor is not currently incurring but needs to incur for a minimal standard of living (e.g. upgrade substandard housing or a new car).
- The Guidance allows such expenses if they are
  - Consistent with the IRS National and Local Standards (or where the debtor adequately explains why their expenses would exceed the allowed amounts), or
  - They are IRS Other Necessary Expenses and are necessary and reasonable for a minimal standard of living.

## DOJ GUIDANCE

### STEP ONE: ASSESSING PRESENT CIRCUMSTANCES

#### EXPENSES VS. INCOME

- After the debtor's allowed expenses are calculated, they are compared to the debtor's gross income
  - As with expenses, the entire household's income should be provided.
  - Income must be verified as described in the Attestation.
  - If income does not exceed expenses, the debtor satisfies the first step.
  - If income exceeds allowed expenses by enough to make the regular student loan payment, the debtor fails the first step.
  - If income exceeds expenses by less than the standard monthly payment amount, the debtor satisfies step one, but only a partial discharge may be appropriate.

## DOJ GUIDANCE

### STEP TWO: ASSESSING FUTURE CIRCUMSTANCES

WILL CURRENT INABILITY TO  
REPAY PERSIST FOR A  
SIGNIFICANT PORTION OF  
THE REPAYMENT PERIOD?

- The Guidance creates presumptions that the inability to repay will persist if:
  - The debtor is 65 or older;
  - The debtor has a disability or injury impacting income potential;
  - The debtor has been unemployed for at least 5 of the last 10 years;
  - The debtor failed to obtain the degree for which the loan was procured;
  - The debtor's loan has been in repayment status for 10 years.
- Presumptions are *rebuttable* if there is *concrete* evidence that the debtor would have the future ability to pay.
- Presumptions are *not* the only basis for satisfying Step Two.

## DOJ GUIDANCE

### STEP TWO: ASSESSING FUTURE CIRCUMSTANCES

WILL CURRENT INABILITY TO  
REPAY PERSIST FOR A  
SIGNIFICANT PORTION OF  
THE REPAYMENT PERIOD?

[Updated January 2023]

17. In addition to the foregoing expenses, I anticipate I will incur additional monthly expenses in the future for my, and my dependents', basic needs that are currently not met.<sup>6</sup> These include the following:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

#### III. FUTURE INABILITY TO REPAY STUDENT LOANS

18. For the following reasons, it should be presumed that my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

- ☐ I am age 65 or older.
- ☐ The student loans I am seeking to discharge have been in repayment status for at least 10 years (excluding any period during which I was enrolled as a student).
- ☐ I did not complete the degree for which I incurred the student loans[ ].

Describe how not completing your degree has inhibited your future earning capacity:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- ☐ I have a disability or chronic injury impacting my income potential.

Describe the disability or injury and its effects on your ability to work, and indicate whether you receive any governmental benefits attributable to this disability or injury:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

<sup>6</sup> If you have forgone expenses for any basic needs and anticipate that you will incur such expenses in the future, you may list them here and explain the circumstances making it necessary for you to incur such expenses.

## DOJ GUIDANCE

### STEP TWO: ASSESSING FUTURE CIRCUMSTANCES

WILL CURRENT INABILITY TO REPAY PERSIST FOR A SIGNIFICANT PORTION OF THE REPAYMENT PERIOD?

[Updated January 2023]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I have been unemployed for at least five of the past ten years.  
Please explain your efforts to obtain employment.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

19. For the following additional reasons, my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

\_\_\_\_\_  
I incurred the student loans I am seeking to discharge in pursuit of a degree from an institution that is now closed.

Describe how the school closure has inhibited your future earning capacity:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
I am not currently employed.

\_\_\_\_\_  
I am currently employed, but I am unable to obtain employment in the field for which I am educated or have received specialized training.

Describe reasons for inability to obtain such employment, and indicate if you have ever been able to obtain such employment.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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## DOJ GUIDANCE

### STEP THREE: ASSESSING PAST CIRCUMSTANCES

HAS DEBTOR MADE A GOOD FAITH ATTEMPT TO ADDRESS STUDENT LOANS?

- The good faith test is fact-sensitive and multi-factored.
- No single factor is dispositive.
- The Guidance assesses:
  - The debtor's behavior relating to the student debt, and
  - The debtor's efforts to obtain employment, maximize income, and minimize expenses

DOJ GUIDANCE

STEP THREE: ASSESSING  
PAST CIRCUMSTANCES

HAS DEBTOR MADE A  
GOOD FAITH ATTEMPT  
TO ADDRESS STUDENT  
LOANS?

- The following behaviors toward the debt are treated as evidence of good faith:
  - Meaningful engagement with servicers or others regarding student loans
  - Past payments
  - Applications for deferment or forbearance
  - Consideration of or enrollment in an income driven repayment plan ("IDRP")

DOJ GUIDANCE

STEP THREE: ASSESSING  
PAST CIRCUMSTANCES

HAS DEBTOR MADE A  
GOOD FAITH ATTEMPT  
TO ADDRESS STUDENT  
LOANS?

- The following factors are also considered when determining whether a debtor has made efforts to obtain employment, maximize income, and minimize expenses:
  - Does the debtor display responsible debt management?
  - Do the debtor's expenses fall within the IRS standards?
  - Do the debtor's personal or family obligations reduce employment opportunities or increase expenses?

## DOJ GUIDANCE

### STEP THREE: ASSESSING PAST CIRCUMSTANCES

#### HAS DEBTOR MADE A GOOD FAITH ATTEMPT TO ADDRESS STUDENT LOANS?

- A debtor's failure to make payments is not *dispositive* of good faith.
  - Department attorneys will consider payment history within the broader context of the debtor's financial means and personal circumstances.
  - Department attorneys will consider behavior towards the debt and other evidence of good faith.

## DOJ GUIDANCE

### STEP THREE: ASSESSING PAST CIRCUMSTANCES

#### HAS DEBTOR MADE A GOOD FAITH ATTEMPT TO ADDRESS STUDENT LOANS?

- Non-enrollment in an IDRPs also is **not** *per se* lack of good faith.
- Guidance asks whether there was a *reasonable explanation* for non-enrollment rather than a *willful attempt* to avoid repayment.
- Reasonable explanations could include:
  - Debtor was discouraged from enrolling or denied access
  - Debtor was given inaccurate information regarding available programs
  - Debtor held a plausible belief that an IDRPs would not improve their circumstances
  - Debtor was unaware of IDRPs options, despite engagement with the loan servicer
  - Debtor was concerned about the impact of potential tax consequences

## DOJ GUIDANCE

ANYTHING ELSE TO FLAG  
FOR AUSA OR DOE?

SIGN UNDER PENALTY OF  
PERJURY

[Updated January 2023]

Total balance of \_\_\_\_\_  
Vehicle loans  
And other loans

29. I hold a total of \_\_\_\_\_ in retirement assets, held in 401k, IRA  
and similar retirement accounts.

30. I own the following interests in a corporation, limited liability company,  
partnership, or other entity:

Name of entity	State incorporated <sup>8</sup>	Type <sup>9</sup> and %age interest
_____	_____	_____
_____	_____	_____

31. I currently am anticipating receiving a tax refund totaling \$ \_\_\_\_\_.

### VI. ADDITIONAL CIRCUMSTANCES

32. I submit the following circumstances as additional support for my effort to  
discharge my student loans as an "undue hardship" under 11 U.S.C. §523(a)(5):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and  
correct.

Signature: \_\_\_\_\_

<sup>8</sup> The state, if any, in which the entity is incorporated. Partnerships, joint ventures and some other  
business entities might not be incorporated.

<sup>9</sup> For example, shares, membership interest, partnership interest.

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## DOJ GUIDANCE

### HOW TO HANDLE ASSETS?

- How are assets to be judged in looking at undue hardship?
  - Recommending discharge may not be appropriate where debtor retains significant assets inconsistent with a minimal standard of living.
  - The exempt status of property is generally not dispositive.
  - Dispositive weight is not given to the existence of assets that are not easily converted to cash.
- The Guidance provides for:
  - Consideration of whether the retention of the asset is necessary for debtor to maintain a minimal standard of living
  - AUSAS should exercise great caution in assessing whether a residence or retirement assets demonstrate a lack of undue hardship. Including such assets is an "extreme measure that should be exceptionally rare."

## DOJ GUIDANCE

## HOW TO HANDLE ASSETS?

[Updated January 2023]

a loan servicer or collector, or engage meaningfully with a third party you believed would assist you in managing your student loan debt.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

### V. CURRENT ASSETS

27. I own the following parcels of real estate:

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Owners:<sup>7</sup> \_\_\_\_\_  
\_\_\_\_\_

Fair market value: \_\_\_\_\_

Total balance of mortgages and other liens: \_\_\_\_\_

28. I own the following motor vehicles:

Make and model: \_\_\_\_\_  
Fair market value: \_\_\_\_\_

<sup>7</sup> List by name all owners of record (self and spouse, for example)

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## DOJ GUIDANCE

## PARTIAL DISCHARGE OF STUDENT LOANS

- The Guidance encourages partial discharge where debtor satisfies the undue hardship elements but has some ability to make payments on the loan.
  - Generally possible if debtor has significant assets or disposable income to part of the loan(s).
  - Partial discharge should be tailored to leave only a balance debtor can pay over the remaining loan term.
  - Case law in some jurisdictions might not allow partial discharge.





BRUNNER/TOTALITY  
OF CIRCUMSTANCES

VS.

DOJ GUIDANCE

## DOJ GUIDANCE IMPLEMENTATION

- DOJ's Form Attestation
  - Attestation is designed to be user friendly and to make the Guidance easier to apply.
  - May be used at any point in the litigation, but debtor is strongly encouraged to complete early.
  - Does not *limit* the United States' ability to seek verification or supporting documentation.
  - May avoid the need for costly fact-finding in discovery.
  - Should not be docketed or filed with Court. This is for the internal consideration of DOJ and Education.

## DOJ GUIDANCE IMPLEMENTATION



HOW TO SHARE DOCUMENTS  
FOR DEBTOR TO COMPLETE  
ATTESTATION?



TIMING? SCHEDULING ORDER



HOW TO PRESENT  
DETERMINATION TO COURT?

## DOJ GUIDANCE: HOW TO PRESENT STIPULATION TO COURT

- Guidance is flexible to accommodate different jurisdictions and local rules.
  - Guidance is not binding on the Court.
- Stipulation of Facts/Findings of Fact
- Stipulation of Dischargeability/Consent Judgment
  - How detailed does this need to be?
  - Do you need a motion to approve a stipulation?
    - See Fed. R. Civ. P. 7(b)(1), made applicable by Fed. R. Bankr. P. 7007.
  - Also tender a proposed order approving the stipulation/consent judgment and closing the case
- Motion for Summary Judgment
- Stipulation of Dismissal
  - Fed. R. Bankr. P. 7041. Dismissal of Adversary Proceedings
- Rule 9019 Motion to Approve Settlement
  - Rule 9019(a) provides that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.”

## DOJ GUIDANCE:

## HOW TO PRESENT STIPULATION TO COURT

- Local Rule or Standing Order when DOE is the defendant?
  - United States Bankruptcy Court for Northern District of California
  - Requires parties to file a form Stipulation after service of plaintiff's Complaint.
  - Extends DOE's answer or response deadline by 120 days.
  - Continues scheduling conference until after DOE's response deadline.
  - Extends Rule 26 deadlines.
- Debtor has burden of proof in these cases.
  - *Educ. Credit Mgmt. Corp. v. Frushour* (In re Frushour), 433 F.3d 393, 400 (4th 2005)
  - *Thomas v. Department of Education* (In re Thomas), 931 F.3d 449, 454 (5th Cir. 2019).
  - *Tirch v. Pennsylvania Higher Education Assistance Agency* (In re Tirch), 409 F.3d 677 (6th Cir. 2005).
  - *Educ. Credit Mgmt. Corp. v. Mosley* (In re Mosley), 494 F.3d 1320, 4324 (11th Cir. 2007).

## Pre-Filing Tips

- Only applicable to cases pending or filed after November 17, 2022 (not available for reopened cases)
- Address this service in your retainer agreement
- Assess the case (1) to determine if presumptions are met, and (2) to confirm that the Debtor has **Direct Loans** (current guidelines do not apply to FFEL Loans)
  - FFEL loans can be consolidated into Direct Loans, but you'll want to complete consolidation before the case is filed (post-petition debt will not be subject to discharge)
- Client will need to access their NSLDC Report from Studentaid.gov (<https://nslds.ed.gov/npas/index.htm>)
  - If they have never set up an account, it will take 1 – 3 days
- Full disability is no longer required; an injury that affects earnings is contemplated in the guidelines and will be considered for discharge

## Student Loan Forgiveness?

- In September 2022, the Department proposed to forgive \$10,000 in federal student loan debt for borrowers earning less than \$125,000 or \$20,000 in forgiveness for Pell Grant recipients.
  - 43 million people would qualify for some relief or 98.5% of all borrowers.
  - 20 million borrowers would have student loan balances totally forgiven.
  - Plan would wipe out \$430 billion in loan principal.
- Administration relied on Higher Education Relief Opportunities for Students Act of 2003 (“HEROES Act”), which allows Education Secretary to modify student financial assistance programs “in connection with a war or other military operation or national emergency” without formal rulemaking. Secretary argued that relief was necessary to alleviate hardship when payments resume.
- On June 30, 2023, the U.S. Supreme Court rejected the forgiveness program, finding that the Biden administration did not have authority to wipe out the federal loans under the HEROES Act.

## Student Loan Forgiveness?

*Department of Education, et al. v. Brown*, 22-535 (June 30, 2023).

- A unanimous Court found that the two, nonqualifying students lacked standing to bring suit. Students argued that the Department should not use the HEROES Act and instead should rely on the Higher Education Act for debt forgiveness.

*Biden, et al. v. Nebraska*, 22-506 (June 30, 2023).

- Case filed by six-GOP-led states
- Missouri has standing based on injury to MOHELA, including \$44 million in annual servicing fees if loans are forgiven.
- HEROES Act allows Secretary to waive or modify existing requirements. He cannot rewrite the statute, creating a new program cancelling debt.

“This fight is not over.”

- Higher Education Act of 1965 authorizes the Secretary to “compromise, waive, or release any right, title, claim, lien, or demand.” 20 U.S.C. 1082(a)(6).
- Negotiated rulemaking is a “lengthy deliberative process” involving consultation and review by multiple stakeholders plus a notice and comment period for the public.

Student loan payments have been paused since March 2020 due to the COVID-19 pandemic, but payments are expected to resume in October 2023, with interest accruing on September 1, 2023.



## QUESTIONS?

MATERIALS INCLUDE:

DOJ GUIDANCE

ATTESTATION FORM

ATTESTATION EXAMPLE SCENARIO

LOCAL RULES BANKR. N.D. CAL.

JOHN RAO ARTICLE, NEW PROCESS TO DISCHARGE STUDENT LOANS IN BANKRUPTCY

**UNITED STATES BANKRUPTCY COURT  
for the  
NORTHERN DISTRICT OF CALIFORNIA**

**Guidelines for Adversary Proceedings under 11 U.S.C. § 523(a)(8)  
in which the United States is a Defendant**

Pursuant to 11 U.S.C. § 523(a)(8), individual debtors may seek a judgment declaring certain student loans and related obligations (“Student Loans”) dischargeable, where excepting Student Loans from discharge would impose an undue hardship on the debtor and their dependents. The United States Department of Justice (“DOJ”), in cooperation with the United States Department of Education (“DOE”), promulgated guidance for its attorneys with respect to Student Loan bankruptcy litigation (the “Guidance”). The Guidance became effective November 17, 2022 and applies *only* to loans held by DOE.

In order to accommodate this Guidance, the court deems it appropriate to provide its bar and litigants with these Guidelines. These Guidelines apply *only* to adversary proceedings under 11 U.S.C. § 523(a)(8) in which DOE is a defendant.

**I. Summary of DOJ Guidance**

The Guidance applies to future bankruptcy cases and proceedings, as well as (wherever practical) to pending matters. Given that the Guidance constitutes internal policy, it does not create any substantive or procedural rights enforceable at law. The Guidance seeks to promote three goals:

- (1) To set clear, transparent, and consistent expectations for discharge that debtors can understand, regardless of whether they are represented by counsel;

- (2) To reduce debtors' burden in pursuing adversary proceedings aimed at obtaining a discharge of their Student Loans by simplifying the fact-gathering process; **and**
- (3) Where the facts support it, to increase the number of proceedings in which the government stipulates to facts demonstrating the existence of undue hardship and recommends that the court discharge a debtor's Student Loans.

After a debtor commences an adversary proceeding under 11 U.S.C. § 523(a)(8), the DOJ attorney assigned to the proceeding should provide the debtor/plaintiff with an "Attestation", along with the debtor's Student Loan account history and details, which DOE will provide to DOJ.

The Attestation consists of a lengthy form, which must be completed under penalty of perjury. The Attestation requires the debtor to provide detailed information concerning the debtor's current income and expenses, their future inability to repay their Student Loans, their prior efforts to repay their Student Loans, their current assets, and any additional circumstances relevant to the showing of undue hardship that the debtor bears the burden of proving in order to be entitled to a judgment of dischargeability. The Attestation also requests that the debtor provide documentation that corroborates the debtor's stated income. The DOJ may request additional evidence where necessary to verify the information set forth in the debtor's Attestation.

The Guidance offers detailed instructions for evaluating an Attestation and supporting documentation, focusing on the factors relevant to a court's determination of dischargeability under *Brunner v. New York State Higher Educ. Svcs. Corp.*, 831 F.2d 395 (2d Cir. 1987), which applies in the Ninth Circuit pursuant to *In re Pena*, 155 F.3d 1108, 1112 (9th Cir. 1998). The Guidance also requires DOJ to consult with DOE in reviewing a debtor's Attestation and corroborating

documentation in order to determine an appropriate course of action in each proceeding.

Where DOJ and DOE determine that a debtor has shown that: **(a)** absent a discharge of their Student Loans, the debtor and their dependents would suffer undue hardship; **(b)** the debtor presently lacks an ability to repay their Student Loans; **(c)** the debtor's ability to pay their Student Loans is likely to persist in the future; **and (d)** the debtor has acted in good faith in the past in attempting to repay their Student Loans, the Guidance advises DOJ attorneys to stipulate to such facts and to recommend that the court issue a partial or full discharge of the debtor's Student Loans. DOJ must advise debtors that its stipulation and recommendation do not bind the court, which will render its own determination as to whether the Student Loans are dischargeable. The Guidance encourages debtors and DOE attorneys to cooperate in filing the appropriate documents to enable the court to consider whether to issue an order to discharge Student Loans.

## **II. Guidelines for the Prosecution of Adversary Proceedings Under 11 U.S.C. § 523(a)(8)**

Once a debtor commences an adversary proceeding under 11 U.S.C. § 523(a)(8), they must timely serve DOE with process.<sup>1</sup> Assuming timely, proper service of process, DOE must answer or otherwise respond to the complaint within 35 days following issuance of the summons.<sup>2</sup> The court must generally issue a scheduling order within 90 days following service of the complaint.<sup>3</sup> And the parties must convene a discovery conference, exchange the material described in Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure, and file a

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<sup>1</sup> See Fed. R. Bankr. P. 7004(e).

<sup>2</sup> Fed. R. Bankr. P. 7012(a).

<sup>3</sup> Fed. R. Bankr. P. 7016 and Fed. R. Civ. P. 16(b)(2).



discovery plan within 21 days prior to the initial scheduling conference or the deadline for issuing a scheduling order.<sup>4</sup>

These deadlines do not allow sufficient time for DOE to provide DOJ with the debtor/plaintiff's Student Loan history and account details, for transmittal of that information and the Attestation to the debtor, for the debtor to gather the necessary documentation to complete the Attestation, for the DOJ and DOE to analyze the debtor's Attestation and corroborating documentation, and for DOJ to make its recommendation to the court, all as required by the Guidance.

The court believes that allowing time for the parties to comply with the Guidance will save the parties' and the court's resources, and will make management of adversary proceedings under 11 U.S.C. § 523(a)(8) efficient and fair. Accordingly, the court has promulgated and adopted these Guidelines, which apply to adversary proceedings in which DOE is a defendant and to which the Guidance applies.

After the Debtor/Plaintiff files their complaint and serves DOE with process in compliance with Rule 7004(e) of the Federal Rules of Bankruptcy Procedure, the parties shall file a Stipulation that conforms to that attached here as **Exhibit A**. This Stipulation sets forth the parties' agreement to, and requests the court's approval of, the following:

- (1) Extension of the deadline by which DOE must answer or otherwise respond to the Debtor/Plaintiff's complaint by 120 days;
- (2) Continuance of the initial scheduling conference to a date that is no sooner than 60 days after DOE's extended responsive pleading deadline;

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<sup>4</sup> See Fed. R. Civ. P. 16(b), 26(a)(1)(A), 26(a)(1)(C), 26(f)(1), and 26(f)(2); and Fed. R. Bankr. P. 7016 and 7026.

- (3) Calculation of the deadlines set forth in Rules 26(a)(1)(C) (exchange of initial disclosures), 26(f)(1) (conduct discovery conference), and 26(f)(2) (filing discovery plan), which apply to sections under 11 U.S.C. § 523(a)(8) pursuant to Rule 7026 of the Federal Rules of Bankruptcy Procedure, from the date of the continued scheduling conference; **and**
- (4) Good cause for delay in issuing a scheduling order after the deadline set forth in Rule 16(b)(2) of the Federal Rules of Civil Procedure, which applies to adversary proceedings pursuant to Rule 7016 of the Federal Rules of Bankruptcy Procedure.

When the parties file the Stipulation, they also shall upload a proposed order approving the Stipulation. Such order shall conform to the example attached here as **Exhibit B**.

If the parties are able to reach agreement that the Student Loans should be dischargeable in whole or in part, they shall upload a proposed Stipulated Judgment for review and entry by the court.

If the parties are unable to agree to a Stipulated Judgment, then the adversary proceeding will proceed in accordance with the Stipulation.

**Exhibit A**

**UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

In re:	)	Case No. XX-XXXXX HLB
	)	
[INSERT DEBTOR'S NAME],	)	Chapter 7
	)	
Debtor.	)	
	)	
[INSERT PLAINTIFF'S NAME],	)	
	)	Adv. Proc. No. XX-XXXX HLB
Plaintiff,	)	
v.	)	
	)	
[INSERT DEFENDANT'S NAME],	)	
	)	
Defendant.	)	
	)	

**STIPULATION TO EXTEND DEADLINES**

Debtor/Plaintiff \_\_\_\_\_ commenced this proceeding on \_\_\_\_\_, 20\_\_\_\_. Plaintiff seeks a judgment declaring student loans owed to the United States Department of Education ("DOE") dischargeable under 11 U.S.C. § 523(a)(8). On November 17, 2022, the United States Department of Justice ("DOJ"), in coordination with DOE, promulgated guidance with respect to proceedings brought pursuant to 11 U.S.C. § 523(a)(8) (the "Guidance").

In order to accommodate the Guidance and the processes contemplated thereby, the parties hereby stipulate and agree as follows:

1. The Guidance applies to this adversary proceeding;
2. This action constitutes one in which this court may enter final orders and judgment, and the parties consent to this court's exercise of jurisdiction and entry of final orders or judgment;
3. The deadline by which DOE must answer or otherwise respond to Plaintiff's complaint is hereby extended by 120 days, to \_\_\_\_\_, 20\_\_\_\_;
4. The scheduling conference set pursuant to the court's order of \_\_\_\_\_, 20\_\_\_\_ (Dkt. \_\_\_\_\_) is hereby continued to \_\_\_\_\_, 20\_\_\_\_ at \_\_\_\_:\_\_\_\_ a/p.m. [insert available date and time that is no sooner than 60 days after DOE's extended responsive pleading deadline, then delete this bracketed text];
5. The parties shall calculate the deadlines set forth in Civil Rules<sup>1</sup> **26(a)(1)(C)** (exchange initial disclosures), **26(f)(1)** (conduct discovery conference), and **26(f)(2)** (file discovery plan), which apply in this proceeding pursuant to Bankruptcy Rule 7026, from the date of the continued scheduling conference; and
6. The need to afford the parties time to comply with the Guidance constitutes good cause for delaying the issuance of a scheduling order beyond the deadline set forth in Civil Rule

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<sup>1</sup> Unless otherwise indicated, all citations to a "Bankruptcy Rule" shall refer to one of the Federal Rules of Bankruptcy Procedure and all citations to a "Civil Rule" shall refer to one of the Federal Rules of Civil Procedure.

1 16(b)(2), which applies in this proceeding pursuant to Bankruptcy  
2 Rule 7016.

3 The parties respectfully request that the foregoing  
4 stipulation be approved and made an order of this court.

5  
6  
7  
8  
9 \_\_\_\_\_  
10 [INSERT NAME OF ATTORNEY FOR DOE]  
11 Assistant United States Attorney  
12 Counsel for the United States Department of Education  
13  
14  
15  
16

17 \_\_\_\_\_  
18 [INSERT NAME OF DEBTOR OR DEBTOR'S COUNSEL]  
19 [Debtor/Plaintiff or Counsel for Debtor/Plaintiff]  
20  
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24 **\*\*END OF ORDER\*\***  
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Court Service List

[None]

## Exhibit B

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re:	)	Case No. XX-XXXXX
	)	
[INSERT DEBTOR'S NAME],	)	Chapter 7
	)	
Debtor.	)	
[INSERT PLAINTIFF'S NAME],	)	
	)	Adv. Proc. No. XX-XXXX
Plaintiff,	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF	)	
EDUCATION,	)	
	)	
Defendant.	)	

**ORDER APPROVING STIPULATION**

This proceeding comes before the court on a Stipulation filed by Plaintiff/Debtor \_\_\_\_\_ and Defendant United States Department of Education ("DOE").<sup>1</sup> The court has analyzed the Stipulation, finds it well-taken, and **ORDERS** as follows:

1. The Stipulation is hereby **APPROVED**;
2. DOE shall answer or otherwise respond to this complaint no later than \_\_\_\_\_, 20\_\_;

<sup>1</sup> Dkt. \_\_\_\_.

AMERICAN BANKRUPTCY INSTITUTE

1       **3.**    The initial scheduling conference is hereby **CONTINUED**  
2 to \_\_\_\_\_, 20\_\_ at \_\_:\_\_ a/p.m.;

3       **4.**    The parties shall calculate the deadlines set forth in  
4 Rules 26(a)(1)(C), 26(f)(1), and 26(f)(2) of the Federal Rules of  
5 Civil Procedure, which apply in this proceeding pursuant to Rule  
6 7026 of the Federal Rules of Bankruptcy Procedure, from the date  
7 of the continued scheduling conference; **and**

8       **5.**    Good cause justifies delay of the issuance of a  
9 scheduling order within the time set forth in Rule 16(b)(2) of  
10 the Federal Rules of Civil Procedure, which applies in this  
11 action pursuant to Rule 7016 of the Federal Rules of Bankruptcy  
12 Procedure.

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14                               **\*\*END OF ORDER\*\***  
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Court Service List

[Insert Debtor/Plaintiff's Name and Service Address]



NATIONAL HEADQUARTERS  
7 Winthrop Square, Boston, MA 02110  
(617) 542-8010

WASHINGTON OFFICE  
Spanogle Institute for Consumer Advocacy  
1001 Connecticut Avenue, NW, Suite 510  
Washington, DC 20036  
(202) 452-6252

**NCLC.ORG**

## New Process to Discharge Student Loans in Bankruptcy

By John Rao

December 12, 2022 (updated March 7, 2023)

A new [Guidance](#) from the Department of Justice (Department), issued in coordination with the Department of Education (Education), has the potential to change bankruptcy practice dramatically. Until now, attorneys have not thought of bankruptcy as a way to help clients struggling with student loan debt. If the Guidance is implemented as intended, however, more bankruptcy debtors will be eligible for discharge of their student loans. Attorneys will need to become familiar with its terms in order to evaluate their clients' chances of obtaining an undue hardship discharge.

The Guidance recognizes that “some debtors have been deterred from seeking discharge of student loans in bankruptcy due to the historically low probability of success and due to the mistaken belief that student loans are ineligible for discharge.” Another barrier to relief acknowledged by the agencies is the “cost and intrusiveness” of litigating an adversary proceeding. The Guidance is intended to redress these concerns so that discharges are more readily obtained, by 1) to setting “clear, transparent, and consistent expectations” for discharge, 2) reducing burdens on debtors by simplifying the process, and 3) increasing the number of cases in which a settlement is offered.

The Guidance is accompanied by two attachments: Attachment A - an [Attestation](#) form that debtors will submit that includes information used to evaluate a settlement, and Attachment B – a [Sample Scenario](#) that is a sample filled-in Attestation form based on a hypothetical case. Another version of this article that explains how to complete the Attestation form in a ten-step process is available [here](#) on NCLC's digital library.

Soon after the Guidance was released, in January 2023, the Department issued an updated Attestation and Sample Scenario. While many of the changes were technical corrections, several changes make the Attestation more consistent with the Guidance, and others may have a substantive impact. These changes are noted and discussed in this article.

## General Framework

The general framework for the Guidance is the application of the three-part test courts have used in deciding undue hardship cases, often referred to as the “*Brunner*” test. An earlier guidance on undue hardship issued by Education in 2015 took a similar approach. However, it simply rehashed the existing case law and actually made matters worse by restating Education’s prior unhelpful policy positions, such as encouraging use of long-term income-driven repayment plans (IDRP) as a means to restrict bankruptcy discharges.<sup>1</sup> The new Guidance reevaluates many of these positions, often siding with interpretations of the test found in the better-reasoned court opinions.

It is important to note that this reimagining of the *Brunner* test is for purposes of case settlement only. If a pre-trial settlement is not reached in accordance with the Guidance, it is not binding on the positions that the agencies may take later in litigating the case. And while it also does not create any enforceable rights, debtor attorneys should use their advocacy skills to urge Education and the Department to follow the Guidance.

The Guidance states that it applies only to “bankruptcy proceedings” that were pending on the date the Guidance was issued, which was November 17, 2022, and to future bankruptcy proceedings. While the reference to “proceedings” rather than “cases” might suggest that the Guidance would apply to an adversary proceeding filed after November 17, 2022 in a re-opened bankruptcy case that was closed before November 17, 2022, we believe that the agencies intended it to apply only to pending and future bankruptcy cases. Rather than move to reopen closed cases, attorneys should consider alternatives, such as whether in appropriate circumstances a former client may wish to seek bankruptcy relief in a new case and then file an undue hardship adversary proceeding in the new case.

## Primer on Undue Hardship Discharge

If a student loan is the type of debt that falls within the coverage of section 523(a)(8) of the Bankruptcy Code, it may be discharged only if the bankruptcy court determines that “excepting such debt from discharge would impose an undue hardship on the debtor and the debtor’s dependents.”<sup>2</sup> The phrase “undue hardship” is not defined in the Bankruptcy Code. Most

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<sup>1</sup> U.S. Dep’t of Educ., Dear Colleague Letter Gen.-15-13, Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings (July 7, 2015). See National Consumer Law Center, Student Loan Law (6th ed. 2019), § 11.7.6, updated at [www.nclc.org/library](http://www.nclc.org/library).

<sup>2</sup> Some student loans or educational financial arrangements, particularly private loans that are not qualified educational loans, may be discharged in bankruptcy without proving undue hardship. See National Consumer Law Center, Student Loan Law (6th ed. 2019), § 11.2,

courts have adopted a test for determining “undue hardship” that is very similar, based on the test first developed in *Brunner v. New York State Higher Educ. Servs. Corp.*<sup>3</sup> Some courts have adopted a “totality of circumstances” test for determining undue hardship, though in practice it is similar to *Brunner*.

The *Brunner* test requires the debtor to show:

- (1) **Present Circumstances** - the debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the student loans;
- (2) **Future Circumstances** - additional circumstances exist indicating that the hardship is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) **Good Faith** - the debtor has made a good-faith effort to repay the loans.

For a more detailed discussion of the undue hardship tests, see NCLC’s Consumer Bankruptcy Law and Practice § 15.4.3.8.2 and NCLC’s Student Loan Law § 11.4, updated at [www.nclc.org/library](http://www.nclc.org/library).

Academic studies have noted that application of the *Brunner* (and totality) test has been random, arbitrary and unfair.<sup>4</sup> Significantly, the Guidance provides a more objective framework for applying the *Brunner* factors and the totality test. For the first present circumstances factor, the Guidance instructs Department attorneys to rely in part upon the IRS Collection Financial Standards in determining whether the debtor can maintain a minimal standard of living and also repay the student loans. For the second future circumstances factor, there is a presumption that the debtor’s inability to repay will persist if certain circumstances are applicable to the debtor’s situation. For the third good faith factor, the Guidance attempts to restrict discretion by providing objective criteria Department attorneys should consider in evaluating good faith. Each of these factors will be discussed in detail below.

## Overview of Settlement Process

To obtain an undue hardship discharge settlement under the Guidance, the debtor must first initiate an adversary proceeding seeking a declaratory judgment that the student loan debt may

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updated at [www.nclc.org/library](http://www.nclc.org/library).

<sup>3</sup> *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 46 B.R. 752 (S.D.N.Y. 1985), *aff’d*, 831 F.2d 395 (2d Cir. 1987).

<sup>4</sup> Rafael I Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. Cin. L. Rev. 405 (Winter 2005).

be discharged. An adversary proceeding is a lawsuit within the bankruptcy case initiated by the filing of an adversary complaint, and is subject to Bankruptcy Rules that are almost identical to the Federal Rules of Civil Procedure. See Fed. R. Bankr. P. 7001–7087. Under the current fee schedule adopted by the Administrative Office of the U.S. Courts, there is no filing fee for an adversary complaint brought by a debtor in a bankruptcy case.<sup>5</sup> For a sample undue hardship complaint, see NCLC’s Consumer Bankruptcy Law and Practice, Appx. G, Form 132, Complaint to Determine Dischargeability of Student Loan.

Attorneys should request that their clients obtain a complete list of their federal student loans by viewing their National Student Loan Data System (NSLDS) report at <http://studentaid.gov>, using their FSA ID. This database receives data from schools, guaranty agencies, the Direct Loan program, and other Education programs, and it should identify the lender, guaranty agency, or current servicer of each loan. All of the entities listed for the particular loan should be named as defendants in the adversary complaint unless it is clear that the entity no longer has an interest in the loan. However, it is important that the current holder of the loan be named as defendant. The United States Department of Education should be named as a defendant for all Direct loans and for all loans in which it serves as the guarantor.

Based on the Department of Education’s contractual relationship with Educational Credit Management Corporation (ECMC), ECMC is authorized to accept assignment of FFEL loans when a borrower on the loan has filed bankruptcy. Thus, ECMC will typically move to intervene as a student loan guarantor agency and be substituted as a party defendant for the original guaranty agency named in the complaint by the debtor. At present, however, the Guidance applies only to the actions of the Department’s attorneys while representing Education. We believe that Education will soon issue a similar Guidance (or Dear Colleague Letter) that will apply to guarantors and holders of FFEL and Perkins loans.

Similarly, the Guidance does not apply to holders of private student loans. However, if a settlement is reached with Education and other loan holders granting a discharge of the debtor’s federal loans, this should put pressure on the private loan holders to follow suit.

The settlement process under the Guidance is triggered by the debtor submitting a completed Attestation form to the Department attorney, typically an assistant U.S. Attorney (AUSA), who is or will be representing Education in the adversary proceeding. Debtor attorneys should become familiar with the AUSAs in the local U.S. Attorney’s office who handle undue hardship cases, and request their advice on how best they would like to receive the Attestation forms. Some AUSAs may be willing to accept the Attestation as soon as the adversary proceeding is filed, even before the complaint is served. The Guidance also instructs AUSAs to solicit the Attestation form from debtors early in the adversary proceeding in order to facilitate prompt

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<sup>5</sup> See Bankruptcy Court Miscellaneous Fee Schedule, available at: <http://www.uscourts.gov/FormsAndFees/Fees/BankruptcyCourtMiscellaneousFeeSchedule.aspx>.

consideration of whether a stipulation can be reached. However, AUSAs are “not required to impose any strict time limit for the Attestation.”

After the adversary proceeding is filed, the AUSA should request that Education provide its litigation report. The Guidance makes clear that “Education is committed to supporting Department attorneys handling these cases.” For each adversary proceeding, Education will provide with its litigation report to the AUSA a record of the debtor’s account history, loan details, and, if available, an educational history. Importantly, the AUSA will share this information with the debtor. Debtor attorneys should request this information from the AUSA if it is not routinely provided. The information from Education could be helpful in preparing the Attestation form, if it has not yet been submitted, or could be used to supplement an already submitted Attestation.

Although the Guidance does not specifically address this point, the stated goal of the Guidance, to reduce litigation burdens on debtors and to simplify the “fact-gathering process,” should mean that Department attorneys will not proceed with formal discovery in the adversary proceeding until a decision has been made that the case cannot be settled. Thus, the debtor’s attorney may wish to request that the AUSA enter into a stipulation extending the time for the parties to make the initial discovery disclosures under Rule 7026(a)(1) and for the scheduling of the parties’ Rule 7026(f) conference.

AUSAs are expected to consult with Education in each case, by sharing the completed Attestation and “conferring on an appropriate course of action.” The initial litigation report that Education submits to the AUSA should include data Education has relating to the presumptions under the second *Brunner* factor and whether it considers that the debtor has made good faith efforts under the third *Brunner* factor. The Guidance states that this “process will ensure the final decision is informed by Education’s experience administering student loans and its role as creditor.”

The next step in the process is for the AUSA to make a recommendation on settlement in accordance with the Guidance. The AUSA shall then submit their recommendation, along with Education’s recommendation, under the “standard procedures applicable in that attorney’s component.” This is apparently referring to the protocol within the local U.S. Attorney’s office for obtaining review and approval of settlement offers in civil litigation.

If a recommendation to settle the case is approved, the final step is for Education and the debtor to “stipulate to the facts demonstrating that a debt would impose an undue hardship and recommend to the court that a debtor’s student loan be discharged.” While the Guidance notes that the stipulation is not binding on the bankruptcy court, consent judgments entered into by the parties in an adversary proceeding are routinely approved by bankruptcy courts.

## Application of the Guidance

### *Present Circumstances*

The first factor considers whether the debtor presently can pay the student loan while also maintaining a minimal standard of living, considering the debtor's income and expenses. The Guidance instructs the AUSAs to rely in part upon the IRS Collection Standards to determine the debtor's allowable expenses. The IRS Standards are used to "ensure more consistent and equitable treatment of debtors seeking discharge." Attorneys will note that while many of the expense categories are similar to those under the means test in bankruptcy, there are some significant differences.

**Debtor's Income.** In assessing present payment ability, the debtor's expenses are compared to the debtor's household gross income. Unlike the means test in bankruptcy, gross income includes Social Security and unemployment benefit payments. This gross income is reported on Line 11 of the Attestation, as a total amount from all sources and also separately listed. For employment income, Line 11 requests gross income be listed separately for the debtor and any other members of the debtor's household. If the debtor has filed a Schedule I in the bankruptcy case no more than 18 months before filling out the Attestation, the debtor can use the amounts listed in Schedule I if they have not changed.

Line 12 of the Attestation has the debtor check a box indicating the form of employment income verification (most recent tax return, four consecutive paystubs, or other documentation) the debtor is attaching to the Attestation, and the debtor can describe in Line 13 the information submitted to verify non-employment income.

**IRS National Standards.** The first category of expenses is derived from the IRS National Standards. This will look familiar to bankruptcy attorneys as it has the same categories that are on Official Forms 122A-2 and 122C-2: food; housekeeping supplies; apparel and services; personal care products and services; and miscellaneous. Lines 14(a)(i) through (v) of the Attestation request that debtors affirm that their current monthly expenses do not exceed the amounts listed for each of these IRS National Standards. Debtors must check a box for either "do exceed" or "do not exceed" next to each expense item. The dollar amount for each expense item based on family size is listed on the Attestation (the form will be updated annually to reflect adjustments to the IRS dollar amounts). If the debtor's expenses for each item do not exceed the standards, no further inquiry is needed by the AUSA and the listed dollar amounts are allowed.

Line 14(a)(vi) provides a total amount based on the IRS National Standards expense categories, and requests that the debtor check a box for either "do exceed" or "do not exceed" this total amount. The instructions state the debtor may add \$344 per each additional member if more than four in household.

Line 14(a) ends with instructions (added to the current Attestation) stating that If the debtor answered that her expenses for any of the categories in Lines 14(a)(i) through (v) exceed the applicable amount, and the debtor would like the AUSA to consider any additional expenses for those categories, the debtor should list of the additional expenses and explain the need for such expenses in the space provided on the Attestation at the end of Line 14(a). If the debtor’s actual budget exceeds a particular expense amount, the Guidance states that the AUSA, in consultation with Education, should consider whether the debtor has a reasonable explanation for the additional expense and may allow it.

Confusingly, the instructions also state: “You do not need to provide any additional information if you answered that your total expenses did not exceed the applicable amount listed in subsection (vi) (emphasis in original).” This should mean that if the debtor adds all of their actual expenses for Lines 14(a)(i) through (v) and that total is less than the total amount in subsection (vi), it will not matter that their expenses for one of the particular categories exceed the IRS standard. For example, if the debtor is in a two-person family and their actual food expense in Line 14(a)(i) is \$979 (\$200 more than the IRS standard) because they have a special diet for medical reasons, the debtor would check the “do exceed” box, and under the prior form would have provided an explanation for the additional \$200 expense. But if the debtor’s actual expenses in total for all the expenses for Lines 14(a)(i) through (v) is \$1400 (\$210 less than the total for a two-person household) rather than the \$1610 listed in Line 14(a)(vi), the instructions suggest that the debtor can check the “do not exceed” box, and it would seem that no explanation for the excess food expense for Line 14(a)(vi) is needed, and the AUSA will not question whether it is necessary. However, until some clarification is provided by the Department, better practice would be for the debtor to continue to provide an explanation for all excess expenses.

The current Attestation has an expense category in Line 14(b) for “Uninsured medical costs” (this was Line 14(a)(v) in the prior form). This category now has a description that uses the IRS terminology for “out-of-pocket” health care expenses (currently \$75 for debtors under 65, and \$153 for debtors 65 and older). Again, the debtor must check a box indicating whether her actual out-of-pocket medical costs either “do exceed” or “do not exceed” the IRS standard. Line 14(b) is followed by a section for the debtor to list and explain any out-of-pocket medical costs that exceed the IRS standard. For example, the debtor in the Sample Scenario (Exhibit B) states that she must pay \$150 per month for inhalers and medication, not covered by insurance, for her daughter who has asthma. The explanation provided in the Sample Scenario states that because Ms. Smith has adequately explained this excess expense, she will be allowed the full \$150 per month rather than \$75 per month that is listed on Line 14(b).

**IRS Local Standards.** The Local Standards provide expense standards for the categories of housing, utilities, and transportation. These expense items are reported on Line 15(b) and 15(c) of the Attestation. Unlike the means test in bankruptcy, debtors are limited to their **actual expenses** for these expenses, and the Local Standards serve only as a cap on what is deemed reasonable. For example, if the debtor’s actual monthly payment on an auto loan is \$485 and the vehicle Ownership Costs under the IRS Local Transportation Expense Standards is \$588, the



AUSA should treat the expense as allowed and consistent with a minimal standard of living. However, if the debtor is paying \$425 per month on gas and other expenses to operate the auto, and the Operating Costs under the IRS Standard is \$307, the AUSA should limit the debtor to \$307 for that expense. Similar to the treatment of the National Standards, the debtor can provide an explanation, probably on Line 15(d)(viii), as to why the additional \$118 is needed to operate the auto, such as the need to travel a long distance to get to work and the increased cost of gas. The AUSA, in consultation with Education, should “carefully consider and accept” the debtor’s reasonable explanation and allow the additional expense.

**IRS Other Necessary Expenses.** Similar to the means test in bankruptcy, the Guidance allows the debtor actual monthly expenses for some of the IRS Other Necessary Expenses categories if not deducted from the debtor’s pay and actually being paid, including court-ordered alimony and child support payments; baby-sitting, day care, nursery and preschool costs; health insurance; life insurance; dependent care; and delinquent taxes. In addition, the debtor is permitted to list in this category payments made on other student loans the debtor is not seeking to discharge. These Other Necessary Expenses are consistent with a minimal standard of living as long as they are necessary and reasonable in amount. These expense items are reported on Line 15(d) of the Attestation. For some expenses, the Attestation requests that the debtor provide additional information or an explanation as to why the expense is necessary. Line 15(d)(viii) permits the debtor to list and explain other necessary expenses that do not fall within the specific categories contained in Line 15(d) and not otherwise reported.

**Payroll Deductions.** Most payroll deductions, such as taxes, Social Security, health insurance, and union dues, are treated under the IRS Collection Standards as Other Necessary Expenses. While the Guidance does not refer to them in that manner, the debtor is permitted to list payroll deductions on the Attestation as a household expense in Line 15(a). If the debtor listed gross income from other members of the household in Line 11, the debtor should list here those household members’ payroll deductions, either added to the debtor’s listed amounts or as a total under “other payroll deductions” in Line 15(a)(vii). The Attestation advises that the debtor can refer to the amounts for the same deductions that were listed on Schedule I or Forms 122A-2 and 122C-2. For contributions to retirement accounts, the debtor is asked to state whether these contributions are required as a condition of employment. However, the Guidance does not address how retirement contributions will be treated if they are voluntary and not a condition of employment.

**Reasonable Expenses Not Yet Incurred.** Significantly, the Guidance recognizes that a debtor currently may have actual expenses that are lower than needed for a minimal standard of living and may be foregoing certain expenses due to circumstances that the debtor is working to resolve. For example, the debtor and her children may be living with her parents until she is able to find an affordable apartment, or may be living in substandard or overcrowded housing until able to find more suitable housing. Similarly, the debtor may be forgoing or limiting spending on expenses such as childcare, dependent care, vehicle replacement or repair, technology, or healthcare. In this situation, the Guidance states that the AUSA should not conflate foregone expenses with an ability to make student loan payments and should use the

debtor's projected expenses in assessing present and future financial circumstances. If the projected expenses do not exceed the Local Standards for those items, the AUSA need not "probe the debtor's calculation."

The Attestation in Line 17 gives the debtor an opportunity to identify and explain these projected expenses that the "debtor would incur if able to address needs that are unmet or insufficiently provided for." For example, on the Sample Scenario (Attachment B), the debtor states that she is living in a basement apartment at her mother's house, that it is impossible for her to continue doing so because her daughter is turning 10 and the living space is too small, and that she is hoping to move in a few months to an apartment for \$1300 per month.

**Repayment Ability.** An evaluation of the first factor ends with a comparison of the debtor's income and expenses and a determination of whether the debtor has sufficient disposable income to make payments on the student loans. A critical question in this analysis concerns how to calculate the payment amount on the student loan. While the *Brunner* court referred to an ability to repay during the contractual term defined by the loan documents, Education and the Department often argued before the Guidance that courts should ignore the scheduled monthly payment and instead consider what the borrower's payment would be under an IDRP. See NCLC's Student Loan Law § 11.4.2.1.2a.

Under the Guidance, AUSAs are instructed to consult with Education to determine the monthly payment amount. In general, the AUSA should use the monthly payment amount due under a "standard" repayment plan for the loan, which is the payment amount required to pay the student loan within the remaining loan term.<sup>6</sup> The Guidance further states that "[e]xcept as required by controlling law, the Department attorney should not use the monthly payment amount available through income-driven repayment plan options as the comparator." When a student loan has been accelerated, based on payment default or otherwise, the AUSA should again consult with Education and use the "standard repayment amount either prior to default or as calculated if the loan were removed from default status."

The debtor is asked to list the current monthly payment for the loan in Line 6, and the month and year when the loan is scheduled to be repaid or when the loan went into default. The outstanding balance on the loan is provided in Line 5. The debtor's NSLDS report and information in Education's litigation report should help in answering these questions. Attorneys can get an estimate of the standard repayment amount on the loan, based on the loan amount, by using the Loan Simulator on the FSA website, [www.studentloans.gov](http://www.studentloans.gov).

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<sup>6</sup> The monthly payments under standard plans are based on a maximum repayment period of ten years. For more recent Direct loan consolidation borrowers with loans that entered repayment on or after July 1, 2006, the standard loan repayment period varies depending on the total amount of student loans. 34 C.F.R. § 685.208(c), (j). This ranges from a ten-year repayment for consolidation loans less than \$7,500 to thirty years of entering repayment for loans equal to or greater than \$60,000. See NCLC's Student Loan Law § 3.2.

## 2023 SOUTHEAST BANKRUPTCY WORKSHOP

The debtor must deduct allowed expenses from gross income and list this monthly remaining or net income on Line 16. Unlike the bankruptcy schedules and means test forms, the Attestation form does not guide the debtor in performing this calculation. The following is the basic calculation for determining the debtor's net monthly income reported on Line 16:

<b>Total Gross Income</b> (Line 11)		\$ _____
National Standards (Line 14)		\$ _____
Payroll Deductions (Line 15(a))		\$ _____
Local Standards (Lines 15(b), (c))		\$ _____
Other Necessary Expenses (Line 15(d))		\$ _____
Unmet Needs (Line 17)	+	\$ _____
<b>Total Expenses</b>	<i>Copy total here .....</i>	\$ _____
<b>Net Monthly Income</b>	<i>Subtract expenses from Line 11 .....</i>	\$ _____

If the debtor's allowable expenses exceed the debtor's income and \$0 is therefore inserted on Line 16, the AUSA should conclude that there is no present ability to repay the student loan and the debtor's loan is eligible for discharge, subject to consideration of the other two factors of the test. If the debtor has sufficient income to make full student loan payments, no recommendation for settlement will be made. If the analysis shows that the debtor can pay some portion of the full payment, the AUSA should consider the potential for a partial discharge, as discussed below.

### ***Future Circumstances***

The second factor under the *Brunner* test considers whether additional circumstances exist indicating that the debtor's hardship is likely to persist for a significant portion of the loan repayment period. This aspect of the test has been challenging, as it often requires debtors to prove a negative; that their future is as hopeless as their present. Before the Guidance, the Department and Education had taken the position in some cases, consistent with some of the more extreme court opinions, that the debtor must prove a "certainty of hopelessness" or "total incapacity." They typically would not have considered as eligible for discharge a debtor who has been stuck in low or modest paying jobs for many years, achieved only modest pay increases over that time, and maximized their income potential based on their education, experience and skills. See NCLC's Student Loan Law § 11.4.2.2.1.

The Guidance takes a much different approach in assessing the test's second factor. If the debtor shows that certain circumstances apply to their situation, there is presumption that the debtor's inability to repay will persist. A presumption exists if one or more of the following circumstances applies:

- debtor is age 65 or older;<sup>7</sup>
- debtor has a disability or chronic injury impacting their income potential;
- debtor has been unemployed for at least five of the last ten years;
- debtor has failed to obtain the degree for which the loan was procured; and
- loan has been in payment status other than “in-school” for at least ten years.

While these circumstances are generally self-explanatory, it is worth noting that a total and permanent disability is not required to create a presumption.<sup>8</sup> Moreover, unlike the position taken in the earlier 2015 guidance, the potential for the debtor to obtain an administrative Total and Permanent Disability (TPD) nonbankruptcy discharge does not foreclose a debtor from showing future inability to pay for purposes of a bankruptcy discharge. The Guidance also notes that the debtor may, but is not required to, submit information from a treating physician to show a disability or chronic injury. The presumption may exist “even in the absence of a formal medical opinion.”

The presumption based on loan payment status for a period of at least ten years includes periods when the debtor has been in forbearance or participating in IDRP. The only period that is excluded is when the debtor was in an in-school deferment, typically when enrolled at least half-time at an eligible school. For consolidation loans, the time the debtor was in repayment on the original underlying loans counts towards the ten-year period.

If one or more of the circumstances creating a presumption apply, the debtor should check the applicable boxes on Line 18 of the Attestation. For example, the debtor in the Sample Scenario (Exhibit B) indicated that her student loans had been in repayment status for at least 10 years and that she did not complete the degree for which she incurred the student loans. The debtor also added an explanation on not getting a degree: “I was in nursing school but had to drop out to care for my daughter. Without a degree, I cannot obtain employment as a nurse and cannot increase my income.”

For certain factors, such as a disability or chronic injury, the form requests that the debtor describe the condition and how it affects the debtor’s ability to work. Because this may require the debtor to disclose highly sensitive personal information, such as medical or employment

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<sup>7</sup> In Education’s 2015 guidance letter, the agency stated that for a debtor who is approaching retirement, loan holders should consider the debtor’s age when student loans were incurred and whether the debtor “chose to incur student loan at an older age.” The obvious implication of that inquiry was that debtors should be penalized for pre-bankruptcy decisions to incur debt later in life. This was inconsistent with the *Brunner* second prong as a forward-looking test and fortunately was not included in the new Guidance.

<sup>8</sup> The first version of the Attestation referred to a “permanent” disability or chronic injury for the presumption. However, the current Attestation, in part III, Line 18, has deleted the word “permanent” and now refers to: “I have a disability or chronic injury impacting my income potential.” These changes make it consistent with the Guidance.

records, the Attestation should not be attached to adversary complaint and filed with the court. If for some reason it is filed with the court, the debtor's attorney may wish to file a motion under Bankruptcy Rule 9037(d) requesting a protective order in which the court may, for cause, limit or prohibit nonparties remote electronic access to the document.

The presumptions in the Guidance are rebuttable. However, the Guidance states that circumstances supporting rebuttal "will likely be uncommon" and "must be based on concrete factual circumstances" – "[m]ere conjecture about the debtor's future ability is not enough." For some debtors, more than one of the circumstances may apply, which should make the presumption more difficult to rebut. As noted earlier, any presumption applies for purposes of settlement and cannot be used in court at trial if the case must be litigated.

The Guidance also provides that the presumptions are not the only way for a debtor to show future inability to pay. Other facts and circumstances can be described on the Attestation by the debtor and should be considered by the AUSA. For example, the Attestation in Line 19 permits a debtor who is employed to describe reasons why the debtor has not been able to obtain employment in the field of the debtor's education or training, or why it is unlikely that the debtor's pay will increase sufficiently to make substantial payments on the student loans. Another circumstance that can result in a discharge settlement even without a presumption, and identified in the Guidance, is where "the institution that granted the debtor's degree has closed, and that closure has inhibited a debtor's future earning capacity."<sup>9</sup> Any other circumstances that support the debtor's future inability to make payments should be described in the final section of Line 19 of the Attestation.

### ***Good Faith***

The third factor under the *Brunner* test requires that the debtor show a good faith attempt to repay the student loans. In addition to whether the debtor has made payments on the loans, courts have considered whether the debtor made efforts to obtain employment or maximize income, and whether the debtor willfully or negligently caused the default. This requirement looks to the debtor's past conduct. While initially somewhat narrow in scope, Education and other student loan creditors have urged courts in litigation to inappropriately extend the good faith inquiry to matters beyond payment efforts. It has been used by some loan holders as a morality test in which the debtor's life choices and past conduct are called into question. Debtors in some cases had been forced to respond to extensive discovery that has probed into intimate details of their personal lives. See NCLC's Student Loan Law § 11.4.2.3.1.

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<sup>9</sup> The first version of the Attestation provided in Line 19 that the debtor could affirm that the debtor incurred loans in pursuit of "a degree I was unable to complete for reasons other than closure of the educational institution." This was inconsistent with the Guidance. This language has been replaced in the current Attestation, in Line 19, with: "I incurred the student loans I am seeking to discharge in pursuit of a degree from an institution that is now closed."

The Guidance attempts to distance itself from some of the earlier formulations of the good faith inquiry. It initially notes that good faith may be shown in numerous ways and that the “good faith inquiry ‘should not be used as a means for courts’ or Department attorneys ‘to impose their own values on a debtor’s life choices,’” quoting *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1310 (10th Cir. 2004). It then shifts the analysis somewhat by setting out an initial inquiry that considers evidence of the debtor’s bad faith, noting that this would clearly deny the debtor a discharge settlement, such as when a debtor has willfully contrived a hardship or abused the student loan system by fraudulently obtaining the student loans.

The Guidance then sets out certain objective factors that would demonstrate good faith. The debtor can establish good faith if at least one of the following steps has been taken:

- making a payment;
- applying for a deferment or forbearance (other than in-school or grace period deferments);
- applying for an IDR plan;
- applying for a federal consolidation loan;
- responding to outreach from a servicer or collector;
- engaging meaningfully with Education or their loan servicer, regarding payment options, forbearance and deferment options, or loan consolidation; or
- engaging meaningfully with a third party they believed would assist them in managing their student loan debt.

The debtor can provide information about several of these factors in Part IV of the Attestation, in response to Lines 21 to 25. For example, the debtor should report payments that have been made on the loan, if any, in Line 21. Some of the information that can be reported about the debtor’s good faith in Part IV may be contained in the litigation report that Education will prepare that is provided to the debtor.

The first version of the Attestation did not have a specific line containing a statement or affirmation for some of the listed factors, such as applying for a consolidation loan or engaging meaningfully with a third party, requiring the debtor to describe these efforts in response to the general question in Line 26. The current Attestation revises Line 26 and adds that in addition to describing any factors that would show good faith, such as efforts to obtain employment, maximize income and minimize expenses, the debtor can “also may include any efforts you made to apply for a federal loan consolidation, respond to outreach from a loan servicer or collector, or engage meaningfully with a third party you believed would assist you in managing your student loan debt.”

The Guidance gives AUSAs discretion to consider “countervailing circumstances” that would potentially override this evidence of the debtor’s good faith. This involves consideration of “the

debtor's efforts to obtain employment, maximize income and minimize expenses."<sup>10</sup> Contrary to the goal of relying upon objective factors, the Guidance notes that in weighing considerations of good faith, "[i]ssues concerning employment, income, and expenses are case-specific and may be highly dependent on a debtor's family, community, and individual circumstances." Hopefully, highly fact-specific inquiries by AUSAs that probe whether the debtor has responsibly handled their finances or made certain life choices will be limited to exceptional cases. Debtors are given the opportunity in Line 26 of the Attestation to describe efforts they have made to obtain employment, maximize income and minimize expenses, and AUSAs are instructed to weigh this explanation in consultation with Education.

An extremely positive development, however, is the lengthy discussion of the weight that should be given to the debtor's actual payment history and enrollment in IDRPs. This is a must read for debtor's attorneys. It begins by referring to CFPB supervisory reports that found that debtors have been wrongfully denied IDRPs and Education's own studies that have "shown that the servicing of student loan debt has been plagued at times by administrative errors and dissemination of confusing and inaccurate information, and that these issues may have affected debtors' responses to their loan obligations." AUSAs are instructed that a debtor should not be disqualified for discharge based on good faith because the debtor may not have "meaningfully engaged with the repayment process due to possible misinformation, wrongful IDRPs determinations, or a lack of adequate information or guidance," and that AUSAs should not focus only on the recent loan history but instead should consider the entire life of the loan.

Most courts have held that debtors who clearly lacked sufficient income to make minimal payments can still show good faith and qualify for a discharge.<sup>11</sup> The Guidance adopts this reasoning and advises AUSAs that evidence that the debtor lacked financial means to pay should be considered. In addition, it is noted that Education may not have complete records about a debtor's loan history, and this lack of data should not invalidate the borrower's evidence.

Citing the many barriers debtors face in enrolling and participating in IDRPs, the Guidance emphatically states that non-enrollment in IDRPs by itself does not show a lack of good faith. If a debtor has not enrolled in an IDRPs, the AUSA is expected to first consider the debtor's response in Line 25 of the Attestation and should "accept any reasonable explanation or evidence supporting the debtor's non-enrollment in an IDRPs." Acceptable explanations or evidence may include:

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<sup>10</sup> *In re Mosko*, 515 F.3d 319, 324 (4th Cir. 2008) (citing *In re O'Hearn*, 339 F.3d at 564).

<sup>11</sup> *In re Mosley*, 494 F.3d 1320, 1327 (11th Cir. 2007) (failure to make any payments, by itself, does not establish lack of good faith); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302 (10th Cir. 2004) (same); *In re Roth*, 490 B.R. 908, 918 (B.A.P. 9th Cir. 2013) ("[L]ack of even minimal voluntary payments is not lack of good faith if the debtor did not have the financial wherewithal to make them.").

- that the debtor was denied access to, or diverted or discouraged from using, an IDRPs, and instead relied on an option like forbearance or deferment;
- that the debtor was provided inaccurate, incomprehensible, or incomplete information about the merits of an IDRPs;
- that the debtor had a plausible belief that an IDRPs would not have meaningfully improved their financial situation;
- that the debtor was unaware, after reasonable engagement, of the option of an IDRPs and its benefits; or
- where permitted under controlling case law, that the debtor was concerned with the potential tax consequences of loan forgiveness at the conclusion of an IDRPs.

In sum, the Guidance anticipates that AUSAs should consider all evidence of a debtor's good faith and that they should not oppose discharge where the "debtor's IDRPs non-enrollment was not a willful attempt to avoid repayment."

## Debtor's Assets

Under both the *Brunner* and totality tests, student loan creditors have argued that the debtor's ownership of certain assets, such as a home or car, should be considered, and that these assets, if liquidated, might pay off all or part off a student loan debt. Often these arguments are made without consideration that the liquidation might only exacerbate the debtor's current hardship, forcing the debtor into more expensive housing or causing job loss due to lack of transportation. See NCLC's Student Loan Law § 11.4.2.1.4a.

The Guidance provides that AUSAs may consider the debtor's assets, but that they should not "give dispositive weight to the existence of assets that are not easily converted to cash or are otherwise critical to the debtor's well-being, and should be cautious in concluding that the existence of real property or other financial assets demonstrates a lack of undue hardship." While the Guidance does not take a position on whether the exempt status of property is dispositive, such as a home or retirement funds that may be fully exempt, it states that AUSAs "should be careful in considering such property in the undue hardship analysis."

Debtors are required to describe their assets in Part V, Lines 27-31, of the Attestation. For Attestations that are submitted soon after a bankruptcy case is filed, it is unfortunate that the Guidance does not simply rely upon the detailed schedules (Schedule A/B) that the debtor has filed in the bankruptcy case. Although Part V does not have a line or question where debtors can describe the hardships they will face if forced to liquidate assets, that information should be provided in Line 32, Part VI of the Attestation, that permits the debtor to describe additional circumstances that support discharge. For debtors who have listed that they anticipate receiving a tax refund, including the Earned Income Tax Credit, Line 32 can also be used to include an explanation of the household's need for the refund or credit, such as to make necessary auto repairs or to buy children's clothing.



## Partial Discharge

While some courts have held that the Bankruptcy Code does not give authority for granting a partial discharge, other courts have found that a debtor who has some future earnings potential, but not enough to pay the entire debt, may have only part of the debt discharged. See NCLC's Student Loan Law § 11.5. The Guidance recognizes that in circumstances where the debtor has some repayment ability, including when a debtor may be able to liquidate assets to pay a portion of the debt, a settlement that provides a partial discharge may be appropriate if not contrary to controlling case law.

While a partial discharge may seem attractive to a debtor who has an excessive amount of student loan debt, debtor attorneys should be cautious of recommending a partial discharge settlement when there are doubts about the debtor's future earning capacity or potential expenses. Debtors should also avoid consenting to a conditional judgment that provides that the entire debt will spring back and become nondischargeable if the debtor fails to make agreed-upon scheduled payments on the portion of the debt not discharged.

AMERICAN BANKRUPTCY INSTITUTE

[Updated November 2022]

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	
[DEBTOR],	)	Case No. _____
	)	Chapter [7]
Debtors.	)	
	)	
_____	)	
	)	
[DEBTOR],	)	
	)	
Plaintiff,	)	Adversary Pro. _____
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT	)	
OF EDUCATION, [et al.],	)	
	)	
Defendant[s].	)	
_____	)	

ATTESTATION OF [NAME] IN SUPPORT  
OF REQUEST FOR STIPULATION CONCEDING  
DISCHARGEABILITY OF STUDENT LOANS

I, [NAME], make this Attestation in support of my claim that excepting the student loans described herein from discharge would cause an “undue hardship” to myself and my dependents within the meaning of 11 U.S.C. §523(a)(8). In support of this Attestation, I state the following under penalty of perjury:

I. PERSONAL INFORMATION

1. I am over the age of eighteen and am competent to make this Attestation.
2. I reside at \_\_\_\_\_ [address], in \_\_\_\_\_ County, [State].
3. My household includes the following persons (including myself):  
\_\_\_\_\_ [full name] \_\_\_\_\_ [age] \_\_\_\_\_ [self]

## 2023 SOUTHEAST BANKRUPTCY WORKSHOP

[Updated November 2022]

\_\_\_\_\_ [full name] \_\_\_\_\_ [age] \_\_\_\_\_ [relationship]

\_\_\_\_\_ [full name] \_\_\_\_\_ [age] \_\_\_\_\_ [relationship]

***Questions four through nine request information related to your outstanding student loan debt and your educational history. The Department of Education will furnish this information to the Assistant United States Attorney (“AUSA”) handling your case, and it should be provided to you. If you agree that the information provided to you regarding your student loan debt and educational history is accurate, you may simply confirm that you agree, and these questions do not need to be completed. If you have not received the information from Education or the AUSA at the time you are completing this form, or if the information is not accurate, you may answer these questions based upon your own knowledge. If you have more than one student loan which you are seeking to discharge in this adversary proceeding, please confirm that the AUSA has complete and accurate information for each loan, or provide that information for each loan.***

4. I confirm that the student loan information and educational history provided to me and attached to this Attestation is correct: YES / NO [If you answered “NO,” you must answer questions five through nine].

5. The outstanding balance of the student loan[s] I am seeking to discharge in this adversary proceeding is \$ \_\_\_\_\_.

6. The current monthly payment on such loan[s] is \_\_\_\_\_. The loan[s] are scheduled to be repaid in \_\_\_\_\_ [month and year] [OR] \_\_\_\_\_. My student loan[s] went into default in \_\_\_\_\_ [month and year].

7. I incurred the student loan[s] I am seeking to discharge while attending \_\_\_\_\_, where I was pursuing a \_\_\_\_\_ degree with a specialization in \_\_\_\_\_.

8. In \_\_\_\_\_ [month and year], I completed my course of study and received a \_\_\_\_\_ degree [OR] In \_\_\_\_\_ [month and year], I left my course of study and did not receive a degree.

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9. I am currently employed as a \_\_\_\_\_. My employer's name and address is \_\_\_\_\_ [OR] \_\_\_\_\_ I am not currently employed.

## II. CURRENT INCOME AND EXPENSES

10. I do not have the ability to make payments on my student loans while maintaining a minimal standard of living for myself and my household. I submit the following information to demonstrate this:

### **A. Household Gross Income**

11. My current monthly household **gross** income from all sources is \$ \_\_\_\_\_.<sup>1</sup>

This amount includes the following monthly amounts:

\_\_\_\_\_ my **gross** income from employment (if any)  
\_\_\_\_\_ my unemployment benefits  
\_\_\_\_\_ my Social Security Benefits  
\_\_\_\_\_ my \_\_\_\_\_  
\_\_\_\_\_ my \_\_\_\_\_  
\_\_\_\_\_ my \_\_\_\_\_  
\_\_\_\_\_ **gross** income from employment of other members of household  
\_\_\_\_\_ unemployment benefits received by other members of household  
\_\_\_\_\_ Social Security benefits received by other members of household  
\_\_\_\_\_ other income from any source received by other members of household

12. The current monthly household gross income stated above (select which applies):

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<sup>1</sup> "Gross income" means your income before any payroll deductions (for taxes, Social Security, health insurance, etc.) or deductions from other sources of income. You may have included information about your gross income on documents previously filed in your bankruptcy case, including Form B 106I, Schedule I - Your Income (Schedule I). If you filed your Schedule I within the past 18 months and the income information on those documents has not changed, you may refer to that document for the income information provided here. If you filed Schedule I more than 18 months prior to this Attestation, or your income has changed, you should provide your new income information.

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\_\_\_\_\_ Includes a monthly average of the gross income shown on the most recent tax return[s] filed for myself and other members of my household, which are attached, and the amounts stated on such tax returns have not changed materially since the tax year of such returns; OR

\_\_\_\_\_ Represents an average amount calculated from the most recent two months of gross income stated on four (4) consecutive paystubs from my current employment, which are attached; OR

\_\_\_\_\_ My current monthly household gross income is not accurately reflected on either recent tax returns or paystubs from current employment, and I have submitted instead the following documents verifying current gross household income from employment of household members:

\_\_\_\_\_

13. In addition, I have submitted \_\_\_\_\_ verifying the sources of income other than income from employment, as such income is not shown on [most recent tax return[s] or paystubs].

**B. Monthly Expenses**

14. My current monthly household expenses do not exceed the amounts listed below based on the number of people in my household for the following categories [Indicate “yes” if your expenses do not exceed the referenced amounts]:

**(a) Living Expenses<sup>2</sup>**

i.	Food	YES / NO
	\$431 (one person)	

<sup>2</sup> The living expenses listed in Question 14 and 15 have been adopted from the Internal Revenue Service Collection Financial Standards “National Standards” and “Local Standards” for the year in which this form is issued. This form is updated annually to reflect changes to these expenses.

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- |      |   |          |
|------|---|----------|
|      | \$779 (two persons)<br>\$903 (three persons)<br>\$1028 (four persons)   |          |
| ii.  | Housekeeping supplies<br>\$40 (one person)<br>\$82 (two persons)<br>\$74 (three persons)<br>\$85 (four persons)   | YES / NO |
| iii. | Apparel & Services<br>\$99 (one person)<br>\$161 (two persons)<br>\$206 (three persons)<br>\$279 (four persons)   | YES / NO |
| iv.  | Personal care products and services<br>(non-medical)<br>\$45 (one person)<br>\$82 (two persons)<br>\$78 (three persons)<br>\$96 (four persons)                      | YES / NO |
| v.   | Uninsured medical costs<br>\$75 (per individual under 65)<br>\$153 (per individual over 65)   | YES / NO |
| vi.  | Miscellaneous expenses<br>not included elsewhere on this Attestation:<br>\$170 (one person)<br>\$306 (two persons)<br>\$349 (three persons)<br>\$412 (four persons) | YES / NO |

**(b) Households Greater Than Four Persons**

If your household consists of more than four people, please provide your *total* expenses for the categories in Question 14(a): \$ \_\_\_\_\_

[If you filed a Form 122A-2 Chapter 7 Means Test or 122C-2 Calculation of Disposable Income in your bankruptcy case, you may refer to lines 6 and 7 of those forms for information.]<sup>3</sup>

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<sup>3</sup> Forms 122A-2 and 122C-2 are referred to collectively here as the “Means Test.” If you filed a Means Test in your bankruptcy case, you may refer to it for information requested here and in other expense categories below. If you did not file a Means Test, you may refer to your Schedule

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(c) Excess Expenses

If your current monthly household expenses exceed the amounts listed above for any of the categories in Question 13(a) and you would like the AUSA to consider such additional expenses as necessary, you may list those expenses and explain the need for such expenses here.

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15. My current monthly household expenses in the following categories are as follows:

(a) Payroll Deductions

i. Taxes, Medicare and Social Security \$ \_\_\_\_\_  
[You may refer to line 16 of the Means Test or Schedule I, line 5]

ii. Contributions to retirement accounts \$ \_\_\_\_\_  
[You may refer to line 17 of the Means Test or Schedule I, line 5]

Are these contributions required  
as a condition of your employment? YES / NO

iii. Union dues \$ \_\_\_\_\_  
[You may refer to line 17 of the Means Test or Schedule I, line 5]

iv. Life insurance \$ \_\_\_\_\_  
[You may refer to line 18 of the Means Test or Schedule I, line 5]

Are the payments for a term policy  
covering your life? YES / NO

v. Court-ordered alimony and child support \$ \_\_\_\_\_  
[You may refer to line 19 of the Means Test or Schedule I, line 5]

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I and Form 106J – Your Expenses (Schedule J) in the bankruptcy case, which may also list information relevant to these categories. You should only use information from these documents if your expenses have not changed since you filed them.

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- vi. Health insurance \$ \_\_\_\_\_  
[You may refer to line 25 of the Means Test or Schedule I, line 5]

Does the policy cover any persons other than  
yourself and your family members? YES / NO

- vii. Other payroll deductions  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ \$ \_\_\_\_\_  
\$ \_\_\_\_\_  
\$ \_\_\_\_\_

## (d) Housing Costs<sup>4</sup>

- i. Mortgage or rent payments \$ \_\_\_\_\_  
ii. Property taxes (if paid separately) \$ \_\_\_\_\_  
iii. Homeowners or renters insurance \$ \_\_\_\_\_  
(if paid separately)  
iv. Home maintenance and repair \$ \_\_\_\_\_  
(average last 12 months' amounts)  
v. Utilities (include monthly gas, electric \$ \_\_\_\_\_  
water, heating oil, garbage collection,  
residential telephone service,  
cell phone service, cable television,  
and internet service)

## (e) Transportation Costs

- i. Vehicle payments (itemize per vehicle) \$ \_\_\_\_\_  
ii. Monthly average costs of operating vehicles \$ \_\_\_\_\_  
(including gas, routine maintenance,  
monthly insurance cost)  
iii. Public transportation costs \$ \_\_\_\_\_

## (f) Other Necessary Expenses

- i. Court-ordered alimony and child support payments \$ \_\_\_\_\_  
(if not deducted from pay)  
[You may refer to line 19 of Form 122A-2 or 122C-2 or Schedule J, line 18]

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<sup>4</sup> You should list the expenses you actually pay in Housing Costs and Transportation Costs categories. If these expenses have not changed since you filed your Schedule J, you may refer to the expenses listed there, including housing expenses (generally on lines 4 through 6 of Schedule J) and transportation expenses (generally on lines 12, 15c and 17).



[Updated November 2022]

- ii. Babysitting, day care, nursery and preschool costs \$ \_\_\_\_\_  
[You may refer to line 21 of Form 122A-2 or 122C-2 or Schedule J, line 8]<sup>5</sup>

Explain the circumstances making it necessary  
for you to expend this amount:

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- iii. Health insurance \$ \_\_\_\_\_  
(if not deducted from pay)  
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Does the policy cover any persons other than YES / NO  
yourself and your family members?

- iv. Life insurance \$ \_\_\_\_\_  
(if not deducted from pay)  
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Are the payments for a term policy YES / NO  
covering your life?

- v. Dependent care (for elderly or disabled \$ \_\_\_\_\_  
family members)  
[You may refer to line 26 of the Means Test or Schedule J, line 19]

Explain the circumstances making it necessary  
for you to expend this amount:

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<sup>5</sup> Line 8 of Schedule J allows listing of expenses for “childcare and children’s education costs.” You should not list any educational expenses for your children here, aside from necessary nursery or preschool costs.

[Updated November 2022]

- vi. Payments on delinquent federal, state or local tax debt \$ \_\_\_\_\_  
[You may refer to line 35 of the Means Test or Schedule J, line 17]

Are these payments being made pursuant YES / NO  
to an agreement with the taxing authority?

- vii. Payments on other student loans \$ \_\_\_\_\_  
I am not seeking to discharge

- viii. Other expenses I believe necessary for \$ \_\_\_\_\_  
a minimal standard of living.

Explain the circumstances making it necessary  
for you to expend this amount:

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16. After deducting the foregoing monthly expenses from my household gross  
income, I have \_\_\_\_\_ [no, or amount] remaining income.

17. In addition to the foregoing expenses, I anticipate I will incur additional monthly  
expenses in the future for my, and my dependents', basic needs that are currently not met.<sup>6</sup> These  
include the following:

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<sup>6</sup> If you have forgone expenses for any basic needs and anticipate that you will incur such  
expenses in the future, you may list them here and explain the circumstances making it necessary  
for you to incur such expenses.

[Updated November 2022]

III. FUTURE INABILITY TO REPAY STUDENT LOANS

18. For the following reasons, it should be presumed that my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

\_\_\_ I am over the age of 65.

\_\_\_ The student loans I am seeking to discharge have been in repayment status for at least 10 years (excluding any period during which I was enrolled as a student).

\_\_\_ I did not complete the education for which I incurred the student loan[s].

\_\_\_ I have a permanent disability or chronic injury which renders me unable to work or limits my ability to work.

Describe the disability or injury and its effects on your ability to work, and indicate whether you receive any governmental benefits attributable to this disability or injury:

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\_\_\_ I have been unemployed for at least five of the past ten years.

Please explain your efforts to obtain employment.

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19. For the following additional reasons, my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

\_\_\_ I incurred student loans I am seeking to discharge in pursuit of a degree I was unable to complete for reasons other than the closure of the educational institution.

Describe your reasons for being unable to complete the degree:

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\_\_\_ I am not currently employed.

\_\_\_ I am currently employed, but I am unable to obtain employment in the field for which I am educated or have received specialized training.

Describe reasons for inability to obtain such employment, and indicate if you have ever been able to obtain such employment:

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\_\_\_ I am currently employed, but my income is insufficient to pay my loans and unlikely to increase to an amount necessary to make substantial payments on the student loans I am seeking to discharge.

Please explain why you believe this is so:

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\_\_\_ Other circumstances exist making it unlikely I will be able to make payments for a significant part of the repayment period.

Explain these circumstances: \_\_\_\_\_

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[Updated November 2022]

IV. PRIOR EFFORTS TO REPAY LOANS

20. I have made good faith efforts to repay the student loans at issue in this proceeding, including the following efforts:

21. Since receiving the student loans at issue, I have made a total of \$\_\_\_\_\_ in payments on the loans, including the following:

\_\_\_\_ regular monthly payments of \$\_\_\_\_\_ each.

\_\_\_\_ additional payments, including \$\_\_\_\_\_, \$\_\_\_\_\_, and \$\_\_\_\_\_.

22. I have received \_\_\_\_ forbearances or deferments, for a period totaling \_\_\_\_ months.

23. I have attempted to contact the company that services or collects on my student loans or the Department of Education at least \_\_\_\_\_ times.

24. I have sought to enroll in one or more “Income Deferred Repayment Programs” or similar repayment programs offered by the Department of Education, including the following:

Description of efforts:

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25. [If you did not enroll in such a program]. I have not enrolled in an “Income Deferred Repayment Program” or similar repayment program offered by the Department of Education for the following reasons:

[Updated November 2022]

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26. Describe any other facts indicating you have acted in good faith in the past in attempting to repay the loan, including efforts to obtain employment, maximize your income, or minimize your expenses:

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V. CURRENT ASSETS

27. I own the following parcels of real estate:

Address: 

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Owners:<sup>7</sup> 

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Fair market value: 

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<sup>7</sup> List by name all owners of record (self and spouse, for example)

[Updated November 2022]

Total balance of \_\_\_\_\_  
mortgages and  
other liens.

28. I own the following motor vehicles:

Make and model: \_\_\_\_\_

Fair market value: \_\_\_\_\_

Total balance of \_\_\_\_\_  
Vehicle loans  
And other liens

29. I hold a total of \_\_\_\_\_ in retirement assets, held in 401k, IRA  
and similar retirement accounts.

30. I own the following interests in a corporation, limited liability company,  
partnership, or other entity:

Name of entity	State incorporated <sup>8</sup>	Type <sup>9</sup> and %age Interest
_____	_____	_____
_____	_____	_____
_____	_____	_____

31. I currently am anticipating receiving a tax refund totaling \$\_\_\_\_\_.

## VI. ADDITIONAL CIRCUMSTANCES

32. I submit the following circumstances as additional support for my effort to  
discharge my student loans as an “undue hardship” under 11 U.S.C. §523(a)(8):

\_\_\_\_\_

<sup>8</sup> The state, if any, in which the entity is incorporated. Partnerships, joint ventures and some other business entities might not be incorporated.

<sup>9</sup> For example, shares, membership interest, partnership interest.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_  
Signature:

\_\_\_\_\_  
Name:

\_\_\_\_\_  
Date:



**APPENDIX B:**  
**Debtor Example Scenario**

On January 3, 2022, Jane Smith filed a chapter 7 bankruptcy case in Maryland. She later filed a complaint to seek to discharge approximately \$26,000 in student loans. The complaint and summons were served on February 12, 2022. In the complaint, Ms. Smith pleads that her student loan debt should be discharged because requiring payment will cause an “undue hardship” for her and her ten-year-old daughter, Sarah. Ms. Smith’s bankruptcy attorney forwards a signed Attestation to the Department Attorney with a copy of Ms. Smith’s 2020 tax return. (She has not yet completed the 2021 return.) Pursuant to the Guidance, the Department Attorney would evaluate the information provided in the Attestation as follows to determine if the facts in Ms. Smith’s case justify stipulating that she has shown an undue hardship within the meaning of Section 523(a)(8) of the Bankruptcy Code.

*Part I: Personal Information*

Part I of Ms. Smith’s Attestation lists relevant background information. It shows that she lives in Baltimore County, Maryland, in a household consisting of herself (age 30) and her daughter (age 10). She lists a student loan balance of \$26,369 and indicates her loan has been in default since June 2012. Part I also shows that Ms. Smith incurred her student loans to attend John Doe Community College, seeking a nursing degree, but that Ms. Smith left school in December 2010 and did not receive a degree. Ms. Smith is currently employed as a nursing assistant at Baltimore County Hospital in Baltimore.

*Part II: Present Ability to Pay*

Ms. Smith provided information about her income and expenses in Part II of the Attestation. Ms. Smith has reported on her Attestation that she earns \$3900 per month and has current monthly expenses of \$3782, including \$600 that is deducted from her paycheck for taxes, Medicare, Social Security, and health insurance. Ms. Smith has indicated that she resides in inadequate housing and needs to incur additional housing expenses to achieve a minimal standard of living which will increase her total expenses by \$800 (for a total expense amount of \$4582). Below are the steps the Department attorney, in consultation with Education, takes in analyzing Ms. Smith’s income and expenses:

- (1) The Department attorney checks Ms. Smith’s submitted tax return to determine if it is consistent with her stated monthly gross income (\$3900). Ms. Smith has not yet filed her 2021 tax return, so the only income the Department attorney can review is from her 2020 return. That return shows Adjusted Gross Income of \$45,952. This amount divided by 12 is \$3829, a monthly average which is consistent with (and

slightly less) than the \$3900 Ms. Smith has listed on the Attestation. The income stated on the Attestation thus appears correct.<sup>1</sup>

(2) The Department attorney should use the IRS standards to determine Ms. Smith's allowable expenses:

- (a) Payroll deductions. Ms. Smith's payroll deductions of \$600 are almost certainly allowable. She has deducted \$400 for taxes, Medicare, and Social Security expenses, which are generally allowed under the IRS Standards, and the Department attorney should accept the amount of tax withholdings as an expense unless there is an obvious pattern of over withholding. In general, excessive withholding will be accompanied by a significant tax refund; however, Ms. Smith's most recent tax refund is \$3000<sup>2</sup> (which averages to a hypothetical \$250 in monthly income) an amount which is not significant. Accordingly, there is no basis to conclude that Ms. Smith has engaged in excessive withholding.

Ms. Smith's payroll deduction for health insurance of \$200 (Line 15(a)(vi)) is also almost certainly allowable. The Department attorney should generally allow health insurance expenses (whether payroll deductions or not) as long as the debtor indicates the policy covers only family members and not others. Here, Ms. Smith has indicated this on Line 15(a)(vi), and the deduction therefore appears appropriate.

- (b) Living Expenses (National and Local Standards).

Line 14 of the Attestation asks the debtor to confirm whether certain expenses are within amounts allowed under the IRS National Standards. Here, Ms. Smith has confirmed that her household monthly expenses do not exceed the allowed amounts for the following categories, and the Department attorney should allow the full amount for these categories (for a household of two):

Food: \$779  
Housekeeping supplies: \$82  
Apparel & Services: \$161  
Personal care products and services: \$82  
Miscellaneous: \$306

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<sup>1</sup> The Department attorney may request further corroboration if necessary, for example, where a debtor's bankruptcy filings in total reflect unexplained inconsistencies.

<sup>2</sup> The Department attorney may review the debtor's most recent tax return to assess whether a listed refund suggests potential over-withholding.

Ms. Smith has indicated that her uninsured medical costs are \$150, an amount which exceeds the IRS allowed amount of \$75. However, she has explained that her daughter requires medication and an inhaler, and the total cost not covered by insurance is \$150. Because Ms. Smith has reasonably explained why she needs this excess expense in order to meet her daughter's health care needs, she should be allowed her actual expense amount of \$150.

Ms. Smith's total expense amount for the categories identified in Line 14 is \$1560.

Lines 15(d) and (e) of the Attestation allow the debtor to list living expenses in categories corresponding to the IRS Local Standards. The following chart compares Ms. Smith's listed expenses to those allowed under the Local Standards for a family of two based on her locality. The final column shows the amount—typically, the lesser of the IRS Local Standards expense and Ms. Smith's actual expense in the category—that the Department attorney may treat as allowed, unless the Department attorney finds the higher amount within specific categories is justified.

Expense	Ms. Smith's Actual Expense	IRS Allowed Amount	Department Attorney Allowed Amount
Housing & Utilities	\$765	\$2233	\$765
Vehicle Payments	\$400	\$588	\$400
Average costs of operating vehicles	\$350	\$307	\$307
<b>TOTAL</b>	\$3290	\$4232	\$1472

Ms. Smith's actual expenses in each category other than "vehicle operating costs" are less than the amount allowed by the IRS Local Standards. Accordingly, they are consistent with a minimal standard of living. Ms. Smith exceeds the IRS Local Standards amount for vehicle operating costs. The Department attorney should generally limit the debtor's allowable expenses to the IRS Standard expenses amount, unless allowing the additional expenses is warranted by the debtor's circumstances.<sup>3</sup>

- (c) Other Necessary Expenses. Line 15(f) allows a debtor to list expenses consistent with the IRS Other Necessary Expenses categories. Ms. Smith has listed only one expense, \$150 per month for babysitting, day care or

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<sup>3</sup> The Department attorney may ask the debtor to provide an explanation for any expenses over the standard expense amount, but the Department attorney need not do so where, as shown below, the debtor's aggregate expenses as limited still show an inability to make student loan payments.

nursery and preschool costs. The Other Necessary Expenses categories require explanation of the necessity for these expenditures, and Ms. Smith explains that she needs to pay for her daughter to attend before and after care because her daughter's school schedule conflicts with her work schedule. Because Ms. Smith must pay this expense in order to maintain her job, and it is reasonable that she use the services provided by her daughter's school, this expense is "reasonable and necessary."

- (d) Expenses for Unmet Needs. The expenses calculated above total \$3782, an amount less than Ms. Smith's income. However, the Department attorney should also consider anticipated expenses that the debtor has identified on Line 17 of the Attestation. Ms. Smith has explained in Line 17 that she currently lives in her mother's basement apartment, but that this living situation is not sustainable. She has located an apartment for \$1300 per month where she intends to move within a few months, increasing her total housing and utilities expense by \$800. Because Ms. Smith will need to incur this additional expense in order to meet basic housing needs for her and her daughter, the Department attorney should consider Ms. Smith's anticipated rent increase when calculating her total expenses.

(e) Ms. Smith's allowable expenses (including the additional housing expense) total \$4582:

- \$600 – Payroll deductions
- \$1560 – National Standards
- \$1472 - Local Standards (without additional future housing expense)
- \$150 – Other Necessary Expenses
- \$800 – future expenses (additional housing expense)

- (3) Comparison to income. Ms. Smith's allowed expenses of \$4582 exceed her monthly income of \$3829, which has been verified by her tax returns. Because her allowed expenses exceed her income, the Department attorney should find she currently does not have sufficient means to pay her student loans while maintaining a minimal standard of living.

### *Part III: Future Circumstances*

Part III of the Attestation allows a debtor to attest to matters showing that the inability to pay will persist into the future. In Line 18, the debtor can attest to circumstances that justify a *presumption* of a future inability to pay. Ms. Smith has indicated that her student loan went into repayment more than 10 years ago.<sup>4</sup> Accordingly, she is entitled to a presumption that she will remain unable to repay the loan in the future.

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<sup>4</sup> This assertion is supported by Ms. Smith's statement in the Attestation that her loans entered repayment in June 2011, more than 10 years before she filed her bankruptcy case.

Although the presumption of future inability to pay is rebuttable, those circumstances should be infrequent. Illustratively, Ms. Smith has not provided any information in her Attestation that indicates a likely future ability to pay or that her financial circumstances are likely to change. The Attestation, as a whole, supports her claim that she will remain unable to pay. She has indicated on Line 19 that she (1) was forced to drop out of nursing school to care for her infant daughter, (2) she cannot obtain employment as a nurse because she did not obtain her degree, (3) her current job does not offer significant raises or promotions, and (4) she has been unable to obtain a second job and likely could not do so because her daughter suffers from asthma. None of that information provides a basis to rebut the presumption of future inability to pay. Indeed, this information would appear to support a conclusion that she lacks a future ability to pay even in the absence of any presumption. In this situation, there does not appear to be a need for the attorney to investigate further. Although there are circumstances where the Department attorney may reasonably make inquiry to supplement or elucidate statements in the Attestation, that need may be infrequent. In this example, the Department attorney should conclude that Ms. Smith's inability to pay will continue for a significant portion of the repayment period.

*Part IV: Prior Efforts to Repay Loans*

Part IV of the Attestation provides information the Department attorney should use to determine if Ms. Smith has made a good faith effort to repay her loans. In this case, good faith should likely be found, because the information provided on Ms. Smith's Attestation reflects that she has maximized income by obtaining full-time employment, minimized expenses, and has not willfully attempted to avoid repaying her loans.

Ms. Smith reports that she has made no payments on her loans (Line 21). Indeed, her responses on Part I of the Attestation show that the loans went into repayment in May 2011 and went into default in June 2012. While these facts are relevant to the "good faith" determination, the failure to make payments alone does not justify finding a lack of good faith. Here, Ms. Smith has offered an explanation for her failure to make payments (Line 26). She left school when her daughter was less than one year old. She had no support from the child's father and initially was unable to obtain part-time employment. Since that time, she has never obtained employment permitting her to pay her student loans.

Ms. Smith also indicates she has not enrolled in an IDR (Line 25). Failure to enroll in an IDR, however, is not dispositive of a lack of good faith. Here, Ms. Smith attests that she contacted her loan servicer to discuss IDRs. The servicer did not explain the process for enrolling and stated to Ms. Smith that she would pay a heavy tax burden if she completed a payment plan. Given the circumstances, as well as Ms. Smith's extremely limited income preventing any substantial payments under an IDR, nothing in the Attestation suggests she acted "willfully" by not enrolling in an IDR or was disinterested in repaying her loans. Rather, her lack of enrollment was reasonable in light of her confusion over the process as well as her concerns about tax consequences.

The Attestation also shows that Ms. Smith sought to maximize income and minimize expenses. On Line 26, she states that she continually worked full-time after her daughter started school, and that she cannot work more hours due to the need to care for her daughter. She also states she could not find higher paying work due to her lack of a degree. Line 26 presents information about minimization of expenses, including that Ms. Smith has lived with her mother for four years to reduce expenses. Finally, while Ms. Smith acknowledges she has acquired a vehicle with a car payment, she explains the need for reliable transportation. In addition, the vehicle payment is within the Local Standards above. Obtaining the vehicle is not evidence of a refusal to minimize expenses.

*Part V: The Debtor's Assets*

Ms. Smith's only asset is a 2018 Toyota Camry with approximately \$5000 in equity (Line 28). Even if Ms. Smith did not claim an exemption for her car, it would be unreasonable to expect Ms. Smith to liquidate this asset in order to pay her student loan. Ms. Smith's Attestation demonstrates that she needs her vehicle to maintain a minimal standard of living for herself and her daughter. Ms. Smith would therefore have to purchase a new vehicle if this asset were liquidated. Additionally, requiring Ms. Smith to pay down the student loan would still leave approximately \$20,000 due, and there is no showing that Ms. Smith would have the ability to satisfy this part of the student loan after liquidating the vehicle and paying \$5000. For these reasons, liquidation of the asset would be inappropriate.

*Conclusion*

Based on review of the Attestation, it is appropriate for the Department attorney to conclude that Ms. Smith is entitled to a discharge of her student loans. She does not have a current ability to pay her loans while maintaining a minimal standard of living; this inability is likely to persist into the future; and she has made good faith efforts to repay her loans. In addition, she does not have any assets that are reasonably available for liquidation.

The Department attorney should contact Ms. Smith's counsel and indicate the United States would be willing to enter into a stipulation that Ms. Smith has shown undue hardship under Section 523(a)(8) and recommend the Court grant her a judgment discharging her loans.

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	
JANE SMITH,	)	Case No.
	)	Chapter [7]
Debtors.	)	
	)	
_____	)	
	)	
JANE SMITH,	)	
	)	
Plaintiff,	)	Adversary Pro. _____
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT	)	
OF EDUCATION, [et al.],	)	
	)	
Defendant[s].	)	
_____	)	

ATTESTATION OF JANE SMITH IN SUPPORT  
OF REQUEST FOR STIPULATION CONCEDING  
DISCHARGEABILITY OF STUDENT LOANS

I, JANE SMITH, make this Attestation in support of my claim that excepting the student loans described herein from discharge would cause an “undue hardship” to myself and my dependents within the meaning of 11 U.S.C. §523(a)(8). In support of this Attestation, I state the following under penalty of perjury:

I. PERSONAL INFORMATION

1. I am over the age of eighteen and am competent to make this Attestation.
2. I reside at 123 Main Street, Towson MD 20204, in Baltimore County, Maryland.
3. My household includes the following persons (including myself):

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NAME:            AGE:            RELATIONSHIP:

*Jane Smith      30 years      [self]*

*Sarah Smith    10 years      daughter*

***Questions four through nine request information related to your outstanding student loan debt and your educational history. The Department of Education will furnish this information to the Assistant United States Attorney (“AUSA”) handling your case, and it should be provided to you. If you agree that the information provided to you regarding your student loan debt and educational history is accurate, you may simply confirm that you agree, and these questions do not need to be completed. If you have not received the information from Education or the AUSA at the time you are completing this form, or if the information is not accurate, you may answer these questions based upon your own knowledge. If you have more than one student loan which you are seeking to discharge in this adversary proceeding, please confirm that the AUSA has complete and accurate information for each loan, or provide that information for each loan.***

4.        I confirm that the student loan information and educational history provided to me and attached to this Attestation is correct: YES / NO [If you answered “NO,” you must answer questions five through nine].

5.        The outstanding balance of the student loan[s] I am seeking to discharge in this adversary proceeding is \$26,369.

6.        The current monthly payment on such loan[s] is \$132. The loan[s] are scheduled to be repaid in ??? [month and year] [OR] \_\_\_\_ My student loan[s] went into default in June 2012 [month and year].

7.        I incurred the student loan[s] I am seeking to discharge while attending John Doe Community College, where I was pursuing a nursing degree with a specialization in n/a.

8.        In \_\_\_\_\_ [month and year], I completed my course of study and received a \_\_\_\_\_ degree [OR] In December 2010 [month and year], I left my course of study and did not receive a degree.



9. I am currently employed as a certified nursing assistant. My employer's name and address is Baltimore County Hospital, Baltimore MD [OR] \_\_\_\_\_ I am not currently employed.

## II. CURRENT INCOME AND EXPENSES

10. I do not have the ability to make payments on my student loans while maintaining a minimal standard of living for myself and my household. I submit the following information to demonstrate this:

### A. Household Gross Income

11. My current monthly household **gross** income from all sources is \$3900.<sup>1</sup>

This amount includes the following the following monthly amounts:

\$3900 my **gross** income from employment (if any)  
 \_\_\_\_\_ my unemployment benefits.  
 \_\_\_\_\_ my Social Security Benefits  
 \_\_\_\_\_ my child support  
 \_\_\_\_\_ my \_\_\_\_\_  
 \_\_\_\_\_ my \_\_\_\_\_  
 \_\_\_\_\_ **gross** income from employment of other members of household  
 \_\_\_\_\_ unemployment benefits received by other members of household  
 \_\_\_\_\_ Social Security benefits received by other members of household  
 \_\_\_\_\_ other income from any source received by other members of household

12. The current monthly household gross income stated above (select which applies):

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<sup>1</sup> "Gross income" means your income before any payroll deductions (for taxes, Social Security, health insurance, etc.) or deductions from other sources of income. You may have included information about your gross income on documents previously filed in your bankruptcy, including Form B 106I, Schedule I - Your Income (Schedule I). If you filed your Schedule I within the past 18 months and the income information on those documents has not changed, you may refer to that document for the income information provided here. If you filed Schedule I more than 18 months prior to this Attestation, or your income has changed, you should provide your new income information.

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  X   Includes a monthly average of income shown on the most recent tax return[s] filed for myself and other members of my household, which are attached, and the amounts stated on such tax returns have not changed materially since the tax year of such returns; OR

           Represents an average amount calculated from the most recent two months of gross income stated on four (4) consecutive paystubs from my current employment, which are attached; OR

           My current monthly household gross income is not accurately reflected on either recent tax returns or paystubs from current employment, and I have submitted instead the following documents verifying current gross household income from employment of household members: \_\_\_\_\_

13. In addition, I have submitted \_\_\_\_\_ verifying the sources of income other than income from employment, as such income is not shown on [most recent tax return[s] or paystubs].

**B. Monthly Expenses**

14. My current monthly household expenses do not exceed the amounts listed below based on the number of people in my household for the following categories [Indicate “yes” if your expenses do not exceed the referenced amounts]:

**(a) Living Expenses<sup>2</sup>**

i.	Food	<b>YES / NO</b>
	\$431 (one person)	
	\$779 (two persons)	
	\$903 (three persons)	
	\$1028 (four persons)	

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<sup>2</sup> The living expenses listed in Question 14 and 15 have been adopted from the Internal Revenue Service Collection Financial Standards “National Standards” and “Local Standards” for the year in which this form is issued. This form is updated annually to reflect changes to these expenses.

- |      |   |                 |
|------|---|-----------------|
| ii.  | Housekeeping supplies<br>\$40 (one person)<br>\$82 (two persons)<br>\$74 (three persons)<br>\$85 (four persons)   | <b>YES / NO</b> |
| iii. | Apparel & Services<br>\$99 (one person)<br>\$161(two persons)<br>\$206 (three persons)<br>\$279 (four persons)  | <b>YES / NO</b> |
| iv.  | Personal care products and services<br>(non-medical)<br>\$45 (one person)<br>\$82 (two persons)<br>\$78 (three persons)<br>\$96 (four persons)                      | <b>YES / NO</b> |
| v.   | Uninsured medical costs<br>\$75 (per individual under 65)<br>\$153 (per individual over 65)   | <b>YES / NO</b> |
| vi.  | Miscellaneous expenses<br>not included elsewhere on this Attestation:<br>\$170 (one person)<br>\$306 (two persons)<br>\$349 (three persons)<br>\$412 (four persons) | <b>YES / NO</b> |

**(b) Households Greater Than Four Persons**

If your household consists of more than four people, please provide your *total* expenses for the categories in Question 14(a): \$ \_\_\_\_\_

[If you filed a Form 122A-2 Chapter 7 Means Test or 122C-2 Calculation of Disposable Income in your bankruptcy case, you may refer to lines 6 and 7 of those forms for information.]<sup>3</sup>

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<sup>3</sup> Forms 122A-2 and 122C-2 are referred to collectively here as the “Means Test.” If you filed a Means Test in your bankruptcy case, you may refer to it for information requested here and in other expense categories below. If you did not file a Means Test, you may refer to your Schedule I and Form 106J – Your Expenses (Schedule J) in the bankruptcy case, which may also list information relevant to these categories. You should only use information from these documents if your expenses have not changed since you filed them.

(c) Excess Expenses

If your current monthly household expenses exceed the amounts listed above for any of the categories in Question 13(a) and you would like the AUSA to consider such additional expenses as necessary, you may list those expenses and explain the need for such expenses here.

I buy inhalers and medications for my daughter, who has asthma, and the total cost not covered by insurance is approximately \$150 per month.

15. My current monthly household expenses in the following categories are as follows:

(a) Payroll Deductions

i. Taxes, Medicare and Social Security \$400  
[You may refer to line 16 of the Means Test or Schedule I, line 5]

ii. Contributions to retirement accounts \$ 0  
[You may refer to line 17 of the Means Test or Schedule I, line 5]

Are these contributions required  
as a condition of your employment? YES / NO

iii. Union dues \$ n/a  
[You may refer to line 17 of the Means Test or Schedule I, line 5]

iv. Life insurance \$ n/a  
[You may refer to line 18 of the Means Test or Schedule I, line 5]

Are the payments for a term policy  
covering your life? YES / NO

v. Court-ordered alimony and child support \$ n/a  
[You may refer to line 19 of the Means Test or Schedule I, line 5]

vi. Health insurance \$200  
[You may refer to line 25 of the Means Test or Schedule I, line 5]

Does the policy cover any persons other than  
yourself and your family members? YES / **NO**

## 2023 SOUTHEAST BANKRUPTCY WORKSHOP

vii. Other payroll deductions

_____	\$ <u>n/a</u>
_____	\$ _____
_____	\$ _____

(d) Housing Costs<sup>4</sup>

i.	Mortgage or rent payments	\$ <u>500</u>
ii.	Property taxes (if paid separately)	\$ <u>n/a</u>
iii.	Homeowners or renters insurance (if paid separately)	\$ <u>15</u>
iv.	Home maintenance and repair (average last 12 months' amounts)	\$ <u>n/a</u>
v.	Utilities (include monthly gas, electric water, heating oil, garbage collection, residential telephone service, cell phone service, cable television, and internet service).	\$ <u>250</u>

(e) Transportation Costs

i.	Vehicle payments (itemize per vehicle)	\$ <u>400</u>
ii.	Monthly average costs of operating vehicles (including gas, routine maintenance, monthly insurance cost)	\$ <u>350</u>
iii.	Public transportation costs	\$ <u>n/a</u>

(f) Other Necessary Expenses

i.	Court-ordered alimony and child support payments (if not deducted from pay) [You may refer to line 19 of Form 122A-2 or 122C-2 or Schedule J, line 18]	\$ <u>n/a</u>
ii.	Babysitting, day care, nursery and preschool costs [You may refer to line 21 of Form 122A-2 or 122C-2 or Schedule J, line 8] <sup>5</sup>	\$ <u>150</u>

<sup>4</sup> You should list the expenses you actually pay in Housing Costs and Transportation Costs categories. If these expenses have not changed since you filed your Schedule J, you may refer to the expenses listed there, including housing expenses (generally on lines 4 through 6 of Schedule J) and transportation expenses (generally on lines 12, 15c and 17).

<sup>5</sup> Line 8 of Schedule J allows listing of expenses for "childcare and children's education costs." You should not list any educational expenses for your children here, aside from necessary nursery or preschool costs.

AMERICAN BANKRUPTCY INSTITUTE

Explain the circumstances making it necessary  
for you to expend this amount:

I have to send my daughter to before care  
and after care for school because her school day is  
from 7:45-3:00 but I work from 7:00-3:30.  
This is what her school charges.

- iii. Health insurance \$ n/a  
(if not deducted from pay)  
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Does the policy cover any persons other than YES / NO  
yourself and your family members?

- iv. Life insurance \$ n/a  
(if not deducted from pay)  
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Are the payments for a term policy YES / NO  
covering your life?

- v. Dependent care (for elderly or disabled \$ n/a  
family members).  
[You may refer to line 26 of the Means Test or Schedule J, line 19]

Explain the circumstances making it necessary  
for you to expend this amount:

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- vi. Payments on delinquent federal, state or local tax debt \$ n/a  
[You may refer to line 35 of the Means Test or Schedule J, line 17]

Are these payments being made pursuant YES / NO  
to an agreement with the taxing authority?

- vii. Payments on other student loans \$ n/a  
I am not seeking to discharge

- viii. Other expenses I believe necessary for \$ n/a

a minimal standard of living.

Explain the circumstances making it necessary  
for you to expend this amount:

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16. After deducting the foregoing monthly expenses from my household gross income, I have \$128 remaining income.

17. In addition to the foregoing expenses, I anticipate I will incur additional monthly expenses in the future for my, and my dependents', basic needs which are currently not met.<sup>6</sup>

These include the following:

I live in a basement apartment at my mother's house, but it is not possible to live there anymore with my daughter turning 10 years old. We don't have our own kitchen and the living space is too small. I have found an apartment in our area near where I work for \$1300 per month. We are hoping to move there in a few months.

### III. FUTURE INABILITY TO REPAY STUDENT LOANS

18. For the following reasons, it should be presumed that my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

- ☐ I am over the age of 65.
- ☒ The student loans I am seeking to discharge have been repayment status for at least ten years (excluding any period which I was enrolled as a student).
- ☐ I did not complete the education for which I incurred the student loan[s].
- ☐ I have a permanent disability or chronic injury which renders me unable to work or limits my ability to work.

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<sup>6</sup> If you have forgone expenses for any basic needs and anticipate that you will incur such expenses in the future, you may list them here and explain the circumstances making it necessary for you to incur such expenses.

Describe the disability or injury and its effects on your ability to work, and indicate whether you receive any governmental benefits attributable to this disability or injury:

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☐ I have been unemployed for at least five of the past ten years.

Please explain your efforts to obtain employment.

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19. For the following additional reasons, my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

☒ I incurred student loans I am seeking to discharge in pursuit of a degree I was unable to complete for reasons other than the closure of the educational institution.

Describe your reasons for being unable to complete the degree:

*I was in nursing school but had to drop out to care for my daughter.*

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☐ I am not currently employed.

☒ I am currently employed, but I am unable to obtain employment in the field for which I am educated or have received specialized training.

Describe reasons for inability to obtain such employment, and indicate if you have ever been able to obtain such employment:



## 2023 SOUTHEAST BANKRUPTCY WORKSHOP

I was in nursing school but did not complete my degree, so I cannot get a job as a nurse. I work as a nursing assistant.

- X I am currently employed, but my income is insufficient to pay my loans and unlikely to increase to an amount necessary to make substantial payments on the student loans I am seeking to discharge.

Please explain why you believe this is so:

I have looked for other jobs that pay more, but they require a degree. My current job does not offer any significant raises or promotions. I also need to work during the hours that my daughter is in school, so I can't work the night or weekend shifts at my current job even though it would pay more.

- X Other circumstances exist making it unlikely I will be able to make payments for a significant part of the repayment period.

Explain these circumstances:

My daughter is ten years old. She has severe asthma, requiring inhalers and other medication. Because of these conditions, working a second job is not possible for me. I need to be at home to ensure she is safe after school, and I can't afford a babysitter or additional after school care.

### IV. PRIOR EFFORTS TO REPAY LOANS

20. I have made good faith efforts to repay the student loans at issue in this proceeding, including the following efforts:

21. Since receiving the student loans at issue, I have made a total of \$ 0 in payments on the loans, including the following:

\_\_\_ regular monthly payments of \$ \_\_\_ each.

\_\_\_ additional payments, including \$ \_\_\_, \$ \_\_\_, and \$ \_\_\_.

22. I have received no forbearances or deferments, for a period totaling \_\_\_ months.

23. I have attempted to contact the company that services or collects on my student loans or the Department of Education at least 10 times.

24. I have sought to enroll in one or more "Income Deferred Repayment Programs" or similar repayment programs offered by the Department of Education, including the following:

Description of efforts:

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25. [If you did not enroll in such a program]. I have not enrolled in an “Income Deferred Repayment Program” or similar repayment program offered by the Department of Education for the following reasons:

I had heard of repayment plans, but I was confused when I tried to ask my servicer about the plans. They did not explain how to sign up, and they told me I might end up paying a lot of taxes if I did a payment plan. I can't afford to pay additional taxes.

26. Describe any other facts indicating you have acted in good faith in the past in attempting to repay the loan, including efforts to obtain employment, maximize your income, or minimize your expenses:

I've always worked full time after my daughter was old enough to go to school. I can't work more hours because I have to take care of her on the weekends and after school. I have looked for higher paying jobs, but they all require degrees.

I drove a used car for a long time, but I had to buy a new car a few years ago because my old one was starting to need a lot of repairs and I needed a reliable car to get to work and take my daughter to school, doctors etc. I've been living with my mother for the past 4 years to try and save expenses, but I need to move to an apartment. I'll need to stay in this area, though, because this is where my job and my daughter's school are.

All of my paycheck goes toward providing my daughter and myself with our necessities, including groceries, clothes for her, and her school supplies.

#### V. CURRENT ASSETS

27. I own the following parcels of real estate:

Address:                      None

Owners:<sup>7</sup> \_\_\_\_\_  
 \_\_\_\_\_

Fair market value: \_\_\_\_\_

Total balance of  
 mortgages and  
 other liens. \_\_\_\_\_

28. I own the following motor vehicles:

Make and model: 2018 Toyota Camry

Fair market value: \$25,000

Total balance of \$20,000  
 Vehicle loans  
 And other liens

29. I hold a total of \$ 0 in retirement assets, held in 401k, IRA and similar retirement accounts.

30. I own the following interests in a corporation, limited liability company, partnership, or other entity:

Name of entity	State incorporated <sup>8</sup>	Type <sup>9</sup> and %age Interest
_____	_____	_____

<sup>7</sup> List by name all owners of record (self and spouse, for example)

<sup>8</sup> The state, if any, in which the entity is incorporated. Partnerships, joint ventures and some other business entities might not be incorporated.

<sup>9</sup> For example, shares, membership interest, partnership interest.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

31. I currently am anticipating receiving a tax refund totaling \$3,000

VI. ADDITIONAL CIRCUMSTANCES

32. I submit the following circumstances as additional support for my effort to discharge my student loans as an “undue hardship” under 11 U.S.C. §523(a)(8):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ Jane Smith  
Signature:

Jane Smith  
Name:

Date: February 25, 2022

November 17, 2022

**GUIDANCE FOR DEPARTMENT ATTORNEYS REGARDING STUDENT LOAN  
BANKRUPTCY LITIGATION**

**I. Introduction**

This memorandum provides guidance (Guidance) to Department of Justice (Department) attorneys regarding requests to discharge student loans in bankruptcy cases. Developed in coordination with the Department of Education (Education), this Guidance will enhance consistency and equity in the handling of these cases. In accordance with existing case law and Education policy, the Guidance advises Department attorneys to stipulate to the facts demonstrating that a debt would impose an undue hardship and recommend to the court that a debtor's student loan be discharged if three conditions are satisfied: (1) the debtor presently lacks an ability to repay the loan; (2) the debtor's inability to pay the loan is likely to persist in the future; and (3) the debtor has acted in good faith in the past in attempting to repay the loan.

To assist the Department attorney in evaluating each of these factors, a debtor will typically be asked to provide relevant information to the government by completing an attestation form (Attestation). The Attestation requests information about the debtor's income and expenses to enable the Department attorney to evaluate the debtor's present ability to pay. The Attestation also seeks information that will help the Department attorney evaluate the other two factors. In the following sections, this Guidance provides more detail about the Attestation that a debtor will be asked to complete, and how the information provided in the Attestation will be considered by the Department attorney. In Appendix A, this Guidance provides a sample attestation form. In addition, in Appendix B, this Guidance provides a concrete example of how a debtor's request for discharge of a student loan will be evaluated.

**II. Objectives of the Guidance and Education's Role in Supporting Discharge Cases**

In cases where a debtor seeks the discharge of a student loan in bankruptcy, the Department shares with Education 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. To fulfill that responsibility, Department attorneys should stipulate to facts necessary to demonstrate undue hardship and recommend discharge where the debtor provides information in the Attestation (or otherwise during the adversary proceeding) that satisfies the elements of the analysis below. Some debtors have been deterred from seeking discharge of student loans in bankruptcy due to the historically low probability of success and due to the mistaken belief that student loans are ineligible for discharge. Other student loan borrowers have been dissuaded from seeking relief due to the cost and intrusiveness entailed in pursuing an

adversary proceeding. This Guidance is intended to redress these concerns so that discharges are sought and received when warranted by the facts and law. In addition, Department attorneys are expected to consult proactively with Education to evaluate the specific circumstances of each case.

In collaborating in the preparation of this Guidance, the Department and Education have sought to promote three goals in particular:

1. To set clear, transparent, and consistent expectations for discharge that debtors understand regardless of representation;
2. To reduce debtors' burdens in pursuing an adversary proceeding by simplifying the fact-gathering process. This includes use of an Attestation, and where feasible, information provided through prior submissions to the bankruptcy court and available student loan servicing records;
3. Where the facts support it, to increase the number of cases where the government stipulates to the facts demonstrating a debt would impose an undue hardship and recommends to the court that a debtor's student loans be discharged.

Education is committed to supporting Department attorneys handling these cases. Department attorneys should expect that, for each adversary proceeding, Education will provide to the Department attorney a record of the debtor's account history, loan details, and—where available—educational history, which the Department attorney will share with the debtor. This information will be provided with the Education litigation report.

The Department attorney is expected to consult with Education in each case; consultation includes sharing the completed Attestation and conferring on an appropriate course of action. In its initial litigation report, Education will advise on matters including whether it has data relating to the presumptions in this Guidance regarding assessment of future circumstances and whether it considers the debtor made good faith efforts to repay their student loans. This process will ensure the final decision is informed by Education's experience administering student loans and its role as creditor. Once the Department attorney reaches a recommendation in accordance with this Guidance, the Department attorney shall submit their recommendation or approval, as appropriate, along with Education's recommendation, under the standard procedures applicable in that attorney's component.

### III. Applicable Law

Under Section 523(a)(8) of the Bankruptcy Code, certain student loans may not be discharged in bankruptcy unless the bankruptcy court determines that payment of the loan “would impose an undue hardship on the debtor and the debtor’s dependents.” 11 U.S.C. § 523(a)(8); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 278 (2010) (“the bankruptcy court must make an independent determination of undue hardship . . . even if the creditor fails to object or appear in the adversary proceeding.”).<sup>1</sup> This inquiry is undertaken through a formal adversary proceeding in the bankruptcy court. *United Student Aid Funds*, 559 U.S. at 263-64; Fed. R. Bankr. P. 7001(6). The parties in that proceeding may stipulate to the existence of certain facts and recommend that the bankruptcy court find, based on such facts, that repayment of the student loan would cause the debtor an undue hardship.

The most common framework for assessing undue hardship is the so-called *Brunner* test, emanating from *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987). To discharge a student loan under the *Brunner* test, a bankruptcy court must find that the debtor has established that (1) the debtor cannot presently maintain a minimal standard of living if required to repay the student loan, (2) circumstances exist that indicate the debtor’s financial situation is likely to persist into the future for a significant portion of the loan repayment period, and (3) the debtor has made good faith efforts in the past to repay the student loan. *Id.* at 396.

Other courts have employed a “totality of circumstances” test (Totality Test) to determine whether repayment of student loan debt would cause an undue hardship. *See, e.g., In re Long*, 322 F.3d 549, 553 (8th Cir. 2003). The Totality Test looks to: (1) the debtor’s past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor’s and their dependents’ reasonably necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. *Id.*

This Guidance applies in both *Brunner* and Totality Test jurisdictions. Courts have recognized the *Brunner* and Totality Tests “consider similar information—the debtor’s current and prospective financial situation in relation to the educational debt and the debtor’s efforts at repayment.” *In re Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *see also In re Jespersen*, 571

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<sup>1</sup> Section 523(a)(8) requires the debtor to demonstrate an undue hardship to discharge nearly all federal student loans, excluding Health Education Assistance Loans, as well as private education loans that meet the definition of qualified education loans under the Internal Revenue Code. *See* 26 U.S.C. § 221(d)(1).

F.3d 775, 779 (8th Cir. 2009).<sup>2</sup> Both tests require assessment of the debtor’s income and reasonable expenses to determine whether the debtor has the present and future ability to maintain a “minimal standard of living” while making student loan payments. *See, e.g., In re Hurst*, 553 B.R. 133, 137 (B.A.P. 8th Cir. 2017) (“[I]f the debtor’s reasonable financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged.”) (citing *In re Jespersen*, 571 F.3d at 779). Finally, both tests direct the court to review the debtor’s past efforts at repayment. *In re Polleys*, 356 F.3d at 1309; *see also In re Bronsdon*, 435 B.R. 791, 797 (B.A.P. 1st Cir. 2010).

#### IV. Discussion of the Applicable Factors

As explained above, consideration of student loan debt discharge requires an evaluation of a debtor’s present, future, and past financial circumstances. This Guidance offers a framework for Department attorneys to apply each of these factors.

With respect to the first factor, the Guidance relies upon the Internal Revenue Service Collection Financial Standards (the IRS Standards) to assess whether a debtor can presently maintain a “minimal standard of living” if required to repay student loan debt. In particular, the Department attorney is advised to use the IRS Standards to evaluate a debtor’s expenses, and then to compare those expenses to the debtor’s income, to determine whether the debtor has a present ability to pay the loan.

With respect to the second factor, the Guidance uses presumptions for determining whether inability to repay is likely to persist in the future. The Guidance recognizes, however, that even in the absence of such presumptions a debtor may be able to establish that their inability to pay will continue in the future.

With respect to the third factor, the Guidance identifies certain objective criteria that evidence a borrower’s good faith. In addition, the Guidance discusses how to evaluate a debtor’s

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<sup>2</sup> The Eighth Circuit has described the Totality Test as “less restrictive” than the *Brunner* framework, *In re Long*, 322 F.3d at 554, but it has also recognized that the distinction between the standards “may not be that significant.” *Jespersen*, 571 F.3d at 779 n.1, 782. *See, e.g., In re Long*, 322 F.3d at 554-55 (“Simply put, if the debtor’s reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged. Certainly, this determination will require a special consideration of the debtor’s present employment and financial situation—including assets, expenses, and earnings—along with the prospect of future changes—positive or adverse—in the debtor’s financial position”); *see also Jespersen*, 571 F.3d at 782 (the totality approach also requires consideration of “evidence of a less than good faith effort to repay . . . student loan debts”). The Guidance does not supersede applicable case law in the circuits. Department attorneys should advance the principles and goals described in this Guidance consistent with that case law.



payment history and decision to participate in an income-driven repayment plan, and clarifies that neither of these factors are dispositive evidence where other evidence of good faith exists.

Finally, the Guidance also provides direction to Department attorneys regarding the treatment of a debtor's assets and the availability of partial discharge.

The Attestation provided with this Guidance will assist in the assembly of the information needed to assess these factors.<sup>3</sup> Department attorneys are expected to review completed Attestations in consultation with Education.

#### **A. Assessment of Present Circumstances**

The first factor relevant to whether a student loan debtor can meet the statutory undue hardship standard requires the debtor to prove an inability to presently maintain “a minimal standard of living” while making student loan payments. To address this factor, the Department attorney should complete two steps. First, the Department attorney should use the IRS Standards to determine the debtor's “allowable” expenses. Second, the attorney should compare those allowable expenses to the debtor's income to determine whether the debtor has income after expenses with which to make student loan payments. If the debtor's allowable expenses exceed their gross income, this element of the analysis is satisfied. If the debtor's financial circumstances changed since filing the initial bankruptcy petition, the Department attorney can look to the debtor's actual financial circumstances when making an undue hardship determination. *Cf. In re Walker* 650 F.3d 1227, 1232 (8th Cir. 2011).

##### *1. Assessment of the Debtor's Expenses*

The Attestation solicits expense information from debtors in categories corresponding to the IRS Standards, particularly the portions of the IRS Standards described as “National and Local Standards” and “Other Necessary Expenses.”<sup>4</sup> The IRS Standards are a useful guide to assess a debtor's expenses for purposes of the “minimal standard of living” inquiry. Use of these standards will ensure more consistent and equitable treatment of debtors seeking discharge. The IRS has established and updated the IRS Standards to determine appropriate collection actions where taxpayers have outstanding unpaid tax obligations. The IRS Standards evaluate what

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<sup>3</sup> As discussed in more detail below, the Attestation requires a debtor to present information relevant to the Department attorney's analysis in an efficient, organized manner. If the debtor's satisfaction of the requirements for discharge are clearly demonstrated by the complaint or other facts available outside the Attestation, then upon verification of those facts, a Department attorney may recommend discharge without requiring that the debtor complete the Attestation.

<sup>4</sup> Links to the IRS Standards are found at <https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards>.

expenses are “necessary to provide for a taxpayer’s health and welfare[.]”<sup>5</sup> or, as described in the IRS Collection Manual, “the *minimum* a taxpayer and family needs to live.”<sup>6</sup> Courts have recognized the IRS Standards as useful objective criteria in assessing “undue hardship” under Section 523(a)(8). *See, e.g., In re O’Hearn*, 339 F.3d 559, 565 (7th Cir. 2003); *In re Cota*, 298 B.R. 408, 415 (Bankr. D. Ariz. 2003). The IRS Standards list certain expenses (the National and Local Standards) for which they provide a recommended maximum allowance, but also recognize other potential expenses (Other Necessary Expenses) that are potentially necessary for an individual’s health and welfare.

*Allowance of Expenses in National Standard Categories:* The IRS National Standards consist of tables of allowable expense amounts in the following categories: food; housekeeping supplies; apparel and services; personal care products and services; and miscellaneous. Where the debtor’s expenses are below the amount allowed under the IRS National Standards, no further inquiry into the debtor’s actual expense amount is needed and the debtor is allowed the full National Standards amount. If a debtor’s reported expenses exceed the IRS National Standard amount, a debtor’s reasonable explanation for why particular actual expenses exceed the standard should be considered carefully by the Department attorney, in consultation with Education, and may be accepted if allowing the additional expenses is warranted by the debtor’s circumstances and would comport with a “minimal standard of living.”<sup>7</sup>

*Allowance of Expenses in Local Standards Categories:* The Local Standards provide expense standards for the categories of housing, utilities, and transportation. Unlike the expenses in the National Standards category, for the Local Standards categories, the Department attorney should limit the debtor to their *actual* expenses. To the extent such expenses do not exceed the amount prescribed in the Local Standards for the debtor’s location and household size, Department attorneys should consider the debtor’s actual expenses in these categories to be consistent with a minimal standard of living and treat such amount as allowed. If the debtor’s actual expense exceeds the Local Standards amount, Department attorneys should generally limit the debtor’s allowable expense to the standard amount. However, as with those expenses categorized as National Standards expenses, the Department attorney should, in consultation

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<sup>5</sup> IRS, *Collection Financial Standards*, <https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards>.

<sup>6</sup> IRS, Internal Revenue Manual: Part 5.15.1.8 (July 24, 2019), [https://www.irs.gov/irm/part5/irm\\_05-015-001#idm139862108264304](https://www.irs.gov/irm/part5/irm_05-015-001#idm139862108264304) (emphasis added).

<sup>7</sup> The decision whether to allow expenses in excess of the National and Local Standards will necessarily be fact-intensive, but allowable excess expenses could, for example, include specific health-related costs, costs for special dietary needs, unique commuting requirements, or other needs of the debtor or dependents.

with Education, carefully consider and accept a debtor's reasonable explanation for the need for the additional expenses.

*Allowance of Other Necessary Expenses:* The IRS Standards recognize "Other Necessary Expenses" in addition to the National and Local Standards expenses. The Attestation requests that debtors list expenses in these "Other Necessary Expense" categories. For example, the IRS Standards allow expenses for alimony and child support payments if they are court-ordered and actually being paid, as well as for baby-sitting, day care, nursery and preschool costs where reasonable and necessary. These Other Necessary Expenses are consistent with a "minimal standard of living," so long as they are necessary and reasonable in amount.<sup>8</sup>

*Allowance for Reasonable Expenses Not Incurred:* In addition to the comparison of expenses and income described above, Department attorneys should also recognize there may be circumstances in which a debtor's actual expenditures fall below the expenses required to maintain a minimal standard of living and to meet basic needs. For example, a debtor may be living in housing that the debtor is not paying for (e.g., the debtor is staying with a family member) or living in substandard or overcrowded housing but should not be required to remain there indefinitely. Likewise, a debtor may be forgoing spending on childcare, dependent care, technology, or healthcare that would otherwise be expenses one would reasonably expect to maintain a minimal living standard. A simple comparison of present expenses and income could unduly assess the debtor's financial situation against a standard that is below a minimal standard of living. In such circumstances, it would be inappropriate to conclude a debtor possesses income with which to make student loan payments and ignore the debtor's actual living standard. To address these situations, the Attestation provides an opportunity for a debtor to identify and explain expenses the debtor would incur if able to address needs that are unmet or insufficiently provided for. The Department attorney should use those projected expenses in assessing the debtor's present and future financial circumstances. Unless the amount of the projected expenses exceeds the Local Standards, it is not necessary to probe the debtor's calculation.

Appendix B includes specific examples of the recommended analysis of expenses.<sup>9</sup>

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<sup>8</sup> The Department attorney may consult the IRS Standards themselves to assist in determining whether these expenses are necessary to a debtor's minimal standard of living.

<sup>9</sup> The Attestation process is intended to be distinct from the bankruptcy "means test," which is used to determine a debtor's eligibility for Chapter 7 relief. Although the means test also uses the IRS Standards as part of its calculation of a debtor's household disposable income for the purpose of establishing bankruptcy eligibility, courts have recognized that the means test is not a test of a "minimal standard of living." See *In re Miller*, 409 B.R. 299, 319–320 (Bankr. E.D. Pa. 2009) (means test not appropriate to determine whether the "undue hardship" standard is met) (citing *In re Savage*, 311 B.R. 835, 840 n.7 (1st Cir. B.A.P. 2004)). Moreover, the means test calculation differs from the Attestation in specific ways, including that (1) the means test (unlike

## 2. *Comparison of Expenses with the Debtor's Gross Income*

After determining the debtor's allowable household expenses using the National and Local Standards and Other Necessary Expenses, the Department attorney should compare the debtor's expenses to the debtor's household gross income. Gross income includes income from employment of the debtor and other household members, as well as unemployment benefits, Social Security benefits and other income sources. Debtors normally provide this information in the Schedule I filing. Where debtors filed this form less than 18 months prior to the adversary proceeding, the debtor may use the information on Schedule I to complete the Attestation. Where Schedule I was filed more than 18 months prior to the adversary proceeding or the debtor's circumstances have changed, the Attestation directs the debtor to provide the new income information.

Using the expense and income information provided in the Attestation, the Department attorney should determine whether the debtor possesses income with which to make student loan payments. If the debtor's allowable expenses exceed the debtor's income, the minimal standard of living requirement is satisfied and the debtor may be eligible for a student loan discharge, subject to consideration of the additional factors below. If, however, after considering the analysis described above, the debtor has sufficient discretionary income to make full student loan payments as required under their loan agreement, the debtor has not satisfied the test for undue hardship.<sup>10</sup> Where a debtor's income allows for payment toward the student loan debt but in an amount insufficient to cover the required monthly student loan payment, the Department attorney

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the Attestation) is required only for "consumer" debtors whose income exceeds a state "median," and (2) in practice, the means test often allows expenses regardless of their necessity to the debtor's basic or minimal standard of living, such as payments on multiple vehicles or for real property other than the debtor's residence.

<sup>10</sup> Department attorneys are expected to consult with Education to determine the monthly repayment amount. Generally, where permitted in a given jurisdiction, the Department attorney should use the monthly payment amount due under a "standard" repayment plan for the student loan in question when determining whether the debtor has the ability to make payments. The standard repayment amount is the payment amount required to pay the student loan within the remaining term of the loan, as determined by Education. *See* 34 C.F.R. § 685.208. Where the account includes unpaid interest, Department attorneys should take care to ensure that the monthly payment amount would be sufficient to pay the loan obligation in full. Except as required by controlling law, the Department attorney should not use the monthly payment amount available through income-driven repayment plan options as the comparator. Finally, where a student loan has been accelerated, whether based on a debtor's payment default or otherwise, the Department attorney should, following consultation with Education, determine the standard repayment amount either prior to default or as calculated if the loan were removed from default status.

should consider the potential for a partial discharge (discussed more fully in Section IV.E. below).

## **B. Assessment of Future Circumstances**

The second factor for discharge is whether the debtor's current inability to repay the debt while maintaining a minimal standard of living will likely persist for a significant portion of the repayment period. This showing is required in both *Brunner* Test and Totality Test jurisdictions. See *In re Thomas*, 931 F.3d 449, 452 (5th Cir. 2019); *In re Long*, 322 F.3d at 554.

A presumption that a debtor's inability to repay debt will persist is to be applied in certain circumstances, including: (1) the debtor is age 65 or older; (2) the debtor has a disability or chronic injury impacting their income potential;<sup>11</sup> (3) the debtor has been unemployed for at least five of the last ten years; (4) the debtor has failed to obtain the degree for which the loan was procured; and (5) the loan has been in payment status other than 'in-school' for at least ten years.<sup>12</sup> The Attestation is designed to identify any such circumstances, and it advises the debtor to disclose all of the circumstances applicable to their situation and not rely exclusively on a single presumptive basis for claiming a continuing inability to repay.

The presumptions identified in this Guidance are rebuttable. Although circumstances supporting rebuttal of a presumption will likely be uncommon, the Department attorney need not apply a particular presumption if the debtor's attestation nonetheless indicates a likely future ability to pay. Such a rebuttal must be based on concrete factual circumstances. Mere conjecture about the borrower's future ability is not enough. For example, the presumption in favor of a

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<sup>11</sup> The debtor may, but is not required to, submit information from a treating physician indicating that the debtor suffers from a disability or chronic injury impacting their income potential, and when provided, that information should be considered carefully. The presumption may be applied even in the absence of a formal medical opinion.

Education offers Total and Permanent Disability (TPD) discharge for qualifying borrowers with certain severe disabilities. Because TPD discharge has its own requirements, the existence of that potential administrative relief generally should not foreclose the debtor from showing a future inability to pay. If, in the view of the Department attorney, the debtor may qualify for TPD discharge, the attorney can provide information to the debtor about the program. Finally, Education's denial of a TPD discharge request is not dispositive of the future circumstances analysis: a prior denial for TPD discharge only implies that Education determined the borrower is likely to have some ability to earn income at the time of the application based on the information provided and evaluation criteria in place, but does not otherwise suggest that the debtor's income is sufficient to service student loan debt or that future circumstances are likely to change.

<sup>12</sup> In the case of consolidation loans, the length of time the debtor has been in repayment includes periods in repayment on the original underlying loans.

debtor who failed to obtain a degree may be rebutted by evidence that the debtor has received employment offers with salaries significantly higher than their current income. In sum, a presumption may be rebutted by evidence that a debtor's future financial circumstances render them able to pay their outstanding debt.

The presumptions identified above are not the sole bases upon which a future inability to pay may be found. A debtor may attest to any facts the debtor believes are relevant to future inability to pay, and the Department attorney should review the Attestation to determine whether the facts presented by the debtor satisfy the standards for proof of likely persistence of inability to pay. A Department attorney may find, for example, that a debtor's financial circumstances are unlikely to improve in the future where the debtor has a significant history of unemployment, even if the debtor's unemployment does not meet the criteria for a presumption. A stipulation may also be appropriate, even absent a particular presumption, where the institution that granted the debtor's degree has closed, and that closure has inhibited a debtor's future earning capacity.<sup>13</sup> Education has indicated that closure of a school after completion of the debtor's degree may affect a debtor's future ability to pay where the debtor incurs reputational harm from such closure or where the debtor's lack of access to records hampers employment efforts.<sup>14</sup>

### C. Assessment of Good Faith

Whether a debtor has demonstrated good faith with regard to repayment of student loan debt depends upon the debtor's actions relative to their loan obligation.<sup>15</sup> Good faith may be demonstrated in numerous ways and the good faith inquiry "should not be used as a means for courts" or Department attorneys "to impose their own values on a debtor's life choices." *Polleys*, 356 F.3d at 1310. A debt should not be discharged if the debtor has "willfully contrive[d] a hardship in order to discharge student loans," *id.*, abused the student loan system, *In re Coco*, 335 Fed. App'x 224, 228-29 (3rd Cir. 2009), for example, by committing fraud in connection with obtaining the loans, or otherwise demonstrated a lack of interest in repaying the debt, *id.*

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<sup>13</sup> Education offers a loan discharge for students attending a school that closed while the borrower was in attendance or shortly after withdrawal. As with a TPD discharge, the availability of this administrative relief should have limited influence on the analysis discussed in this Guidance. Debtors may not receive the "closed-school" discharge for a range of reasons that do not implicate their financial status.

<sup>14</sup> The presumptions discussed in this Guidance are intended to direct a Department attorney's assessment of the debtor's situation and do not shift any burden of proof in undue hardship litigation. Before the court in the adversary proceeding, the debtor retains the burden of proof on all elements of the undue hardship claim.

<sup>15</sup> In discussing good faith, this Guidance intends to encompass satisfaction of both Prong Three of the *Brunner* test and good faith as considered under the Totality Test in evaluating the debtor's past efforts at repayment.

Where the debtor has taken at least one of the following steps and in the absence of countervailing circumstances as discussed below, the steps demonstrate good faith. We would normally expect the Department attorney to be able to determine the presence of any countervailing circumstances based on the information contained in the Attestation and provided by Education or that is publicly available.

*Evidence of good faith:* The following steps evidence good faith:

- making a payment;
- applying for a deferment or forbearance (other than in-school or grace period deferments);
- applying for an IDR plan;
- applying for a federal consolidation loan;
- responding to outreach from a servicer or collector;
- engaging meaningfully with Education or their loan servicer, regarding payment options, forbearance and deferment options, or loan consolidation; or
- engaging meaningfully with a third party they believed would assist them in managing their student loan debt.

The good faith standard also assesses criteria such as “the debtor’s efforts to obtain employment, maximize income and minimize expenses.” *In re Mosko*, 515 F.3d 319, 324 (4th Cir. 2008) (citing *In re O’Hearn*, 339 F.3d at 564); *see, e.g., In re Jespersen*, 571 F.3d at 780. A debtor’s handling of finances in a manner that suggests responsible management of their debts, including student loan debts, also suggests good faith. A debtor has minimized expenses if their expenses fall within the IRS Standards as discussed in this Guidance.<sup>16</sup> Good faith can be satisfied where debtors’ personal or family obligations significantly reduce their employment opportunities or increase their expenses.” Issues concerning employment, income, and expenses are case-specific and may be highly dependent on a debtor’s family, community, and individual circumstances. Debtors may provide an explanation of those circumstances, and the Department attorney should weigh the explanation in consultation with Education.

*Actual payment history and IDR enrollment:* Department attorneys should consider the following two issues that frequently arise and deserve additional attention: a debtor’s actual payment history and a debtor’s enrollment or non-enrollment in an IDR. Department of Education studies have shown that the servicing of student loan debt has been plagued at times

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<sup>16</sup> By contrast, a debtor whose expenses exceed the IRS Standards should not be foreclosed from showing they have minimized expenses, and the Department attorney and Education should carefully assess any explanations debtors may provide for exceeding the standard expenses.

by administrative errors and dissemination of confusing and inaccurate information, and that these issues may have affected debtors' responses to their loan obligations. In addition, the Consumer Financial Protection Bureau has found that debtors have been wrongfully denied IDRPs and that monthly payments have been inaccurately calculated. *See* Consumer Financial Protection Bureau, *Supervisory Highlights* Fall 2022, Summer 2021, and Fall. The Bureau has also found that servicers falsely but affirmatively represented to borrowers that loans were never dischargeable in bankruptcy. *See* Consumer Financial Protection Bureau, *Supervisory Highlights*, Fall 2014 & Fall 2015. These problems have also given rise to a lack of trust by debtors in the repayment process. As a result, the good faith inquiry should not disqualify debtors who may not have meaningfully engaged with the repayment process due to possible misinformation, wrongful IDRPs, or a lack of adequate information or guidance. When considering a debtor's attempts to engage with their student loan, attorneys should look at the entire life of the loan rather than merely considering the recent history.

Department attorneys should consider payment history within the broader context of the debtor's financial means and personal circumstances. Where other evidence of good faith exists, including evidence that the debtor lacked financial means to pay or that the debtor made meaningful contact with Education or the servicer to explore repayment options, the failure to repay (or inconsistent or limited repayment) does not indicate a lack of good faith. In some circumstances, the Department of Education may not have records or have incomplete records about a debtor. The absence of ED data should not reduce the weight of the borrower's evidence.<sup>17</sup>

Department attorneys should also exercise caution in assessing IDRPs. IDRPs are intended to provide a means through which debtors may respond to difficult financial circumstances, and the model Attestation asks a debtor to identify if they enrolled in an IDRPs and to offer an explanation if they did not. Where a debtor participated in an IDRPs, this factor is evidence of good faith.<sup>18</sup>

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<sup>17</sup> Between March 2020 and December 2022, borrowers were placed into an automatic COVID-related forbearance. The vast majority of borrowers remained in that forbearance for the duration of the period because it included a zero percent interest rate and eligibility toward IDRPs and PSLF forgiveness. Due to this extended period, many debtors may not have taken any action toward their loans. This period of inactivity is not evidence of bad faith and actions taken prior to March 2020 should not be discounted because they are not recent.

<sup>18</sup> *See, e.g., In re Tingling*, 990 F.3d 304, 309 (2d Cir. 2021); *In re Krieger*, 713 F.3d 882, 884 (7th Cir. 2013); *In re Coco*, 2009 WL 1426757, at \*228–229; *In re Mosko*, 515 F.3d at 323; *In re Barrett*, 487 F.3d 353, 363–64 (6th Cir. 2007); *In re Mosley*, 494 F.3d 1320, 1327 (11th Cir. 2007); *In re Jespersen*, 571 F.3d at 782–83; *In re Nys*, 446 F.3d 938, 947 (9th Cir. 2007); *In re Alderete*, 412 F.3d 1200, 1206 (10th Cir. 2005); *In re Bronsdon*, 435 B.R. at 802.



However, where a debtor has not enrolled in an IDR, the Department attorney should give significant weight to the fact that, as noted, Education has found widespread problems with IDR servicing. In particular, Education has advised that IDRs have not always been administered in ways that have been effective for, or accessible to, student loan debtors. In some cases, borrowers may not have been aware of their IDR options. At times, servicers failed to inform borrowers about these options in favor of other repayment plans or nonpayment options like forbearance. Likewise, many schools have failed to advise prospective borrowers about IDRs, despite being legally obligated to do so. *See* 20 U.S.C. § 1092(d). Thus, non-enrollment alone does not show a lack of good faith.

Where a debtor did not enroll in an IDR, the Department attorney is expected to look first to the debtor's Attestation response and to accept any reasonable explanation or evidence supporting the debtor's non-enrollment in an IDR. Acceptable explanations or evidence could include, for example:

- that the debtor was denied access to, or diverted or discouraged from using, an IDR, and instead relied on an option like forbearance or deferment;
- that the debtor was provided inaccurate, incomprehensible, or incomplete information about the merits of an IDR;
- that the debtor had a plausible belief that an IDR would not have meaningfully improved their financial situation;
- that the debtor was unaware, after reasonable engagement, of the option of an IDR and its benefits; or
- where permitted under controlling case law, that the debtor was concerned with the potential tax consequences of loan forgiveness at the conclusion of an IDR.

Where these explanations are based in part on contact or attempted contact with Education, servicers, or trusted third parties, they evidence good faith.

If a debtor provides an explanation that lacks sufficient detail or is not otherwise acceptable (or fails to provide any explanation), the debtor may still demonstrate good faith through other actions such as making payments, responding to outreach from a servicer or collector, enrolling in deferment or forbearance, making contact with Education or their servicer about their loan, or otherwise taking professional or financial steps that indicate a good-faith attempt to meet their loan obligations. In sum, we would expect Department attorneys not to oppose discharge for lack of good faith where there is a basis to conclude that the debtor's IDR non-enrollment was not a willful attempt to avoid repayment.

**D. Consideration of a Debtor's Assets**

A debtor's assets must also be considered in the undue hardship analysis. Department attorneys, however, should not give dispositive weight to the existence of assets that are not easily converted to cash or are otherwise critical to the debtor's well-being, and should be cautious in concluding that the existence of real property or other financial assets demonstrates a lack of undue hardship.<sup>19</sup>

The Attestation facilitates this inquiry by seeking information regarding the debtor's assets. It may be appropriate to suggest that a debtor consider liquidating an asset where the asset is unnecessary to the debtor's and dependents' support and welfare. Residential real property and funds in retirement accounts are often exempt from collection under federal or state exemption laws. Although the exempt status of property may not be dispositive of whether that property is necessary for a minimal standard of living, the Department attorney should be careful in considering such property in the undue hardship analysis. *In re Marcotte*, 455 B.R. 460, 471 (Bankr. D.S.C. 2011).<sup>20</sup> The Department recognizes that liquidating a primary residence or retirement account is an extreme measure and therefore requests to liquidate those assets should be exceptionally rare.

**E. Partial Discharge.**

Where appropriate and permissible under governing case law, Department attorneys may recognize the availability of partial discharge. Partial discharge occurs where the bankruptcy

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<sup>19</sup> The debtors' assets may be liquidated by a bankruptcy trustee to fund payments to creditors of the estate. Such property, if liquidated by the trustee, would not be available for the payment of student loan debt and thus should not be considered.

<sup>20</sup> The question of how exempt property should be considered under the "undue hardship" analysis has generated disagreement among courts. Generally, courts find that "the exempt character of an asset does not necessarily preempt its relevance to a hardship evaluation." *In re Armesto*, 298 B.R. 45, 48 (Bankr. W.D.N.Y. 2003); *see also In re Nys*, 446 F.3d at 947 (recognizing courts must consider availability of assets "whether or not exempt, which could be used to pay the loan"); *In re Gleason*, 2017 Bankr. LEXIS 3455, at \*14 (Bankr. N.D.N.Y. Oct. 6, 2017) (allowing consideration of IRA or 401K account, regardless of exemption status). Other courts, however, have noted the necessity to weigh the policies underlying certain exemptions, for example, the homestead exemption in the debtor's residence, before considering such assets in assessing undue hardship. *Schatz v. Access Grp., Inc. (In re Schatz)*, 602 B.R. 411, 427-28 (1st Cir. B.A.P. 2019) (reversing bankruptcy court's treatment of exempt equity in homestead as dispositive of a lack of undue hardship). Notably, the *Schatz* opinion states that the bankruptcy court failed to make any finding whether the equity in the debtor's home could be liquidated without imposing an undue hardship on the debtor. *Id.* at 428.

court discharges a portion of the outstanding student loan debt while requiring payment of the remainder.<sup>21</sup>

Department attorneys may consider recommending partial discharge based upon a determination that the debtor has the ability to make some payments on the loan while maintaining a minimal standard of living, but an inability to make the full standard monthly repayment due. A partial discharge should not result in a remaining (undischarged) balance larger than what a debtor's discretionary income (as determined under the Prong One analysis) permits them to pay off in monthly payments over the remaining loan term. In practice, a full discharge is appropriate for debtors whose expenses are equal to or greater than their income where they meet the other elements of the analysis. Partial discharge may also be available to a debtor who is able to liquidate assets to pay a portion of the debt but remains unable to pay the remainder while maintaining a minimal standard of living. *See In re Stevenson*, 463 B.R. 586, 598-99 (Bankr. D. Mass. 2011); *In re Clavell*, 611 B.R. 504, 531-32 (Bankr. S.D.N.Y. 2020).

## **V. Procedures**

Although the process for soliciting and reviewing the Attestation may vary from case to case, Department attorneys should generally observe the following procedures in soliciting Attestations.

### **A. Submission of the Attestation**

Upon a debtor's commencement of an adversary proceeding seeking discharge pursuant to 11 U.S.C. § 523(a)(8), the Department attorney should provide a debtor the opportunity to complete and submit the Attestation. The Department attorney is encouraged to contact the debtor or debtor's counsel as soon as practicable after service of process in an adversary

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<sup>21</sup> Section 523(a)(8) is silent with respect to whether bankruptcy courts may discharge part of a student loan based on undue hardship. The concept, however, has been recognized by several courts of appeals. *See generally In re Miller*, 377 F.3d 616, 622 (6th Cir. 2004); *In re Saxman*, 325 F.3d 1168, 1173-1174 (9th Cir. 2003); *In re Alderete*, 412 F.3d at 1207; *In re Cox*, 338 F.3d 1238, 1243 (11th Cir. 2003). In most jurisdictions where no circuit level authority exists, lower courts have permitted partial discharges. *See, e.g., In re Rumer*, 469 B.R. 553, 564 n.12 (Bankr. M.D. Pa. 2012) (recognizing majority rule is to allow partial discharges); *In re Gill*, 326 B.R. 611, 644 (Bankr. E.D. Va. 2005) (recognizing lower courts have generally allowed partial discharges); *but see, e.g., In re Conway*, 495 B.R. 416, 423 (B.A.P. 8th Cir. 2013) (explaining that the general rule prevents discharging parts of individual loans). Prior to any partial discharge, a debtor must have established all elements necessary for an undue hardship determination. *See In re Saxman*, 325 F.3d at 1175; *Hemar Ins. Co. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1243 (11th Cir. 2003).

proceeding, advising the debtor of the opportunity to submit the Attestation for review by the United States. Any Attestation should be submitted by a debtor under oath by signing under penalty of perjury pursuant to 28 U.S.C. § 1746. The Attestation requests that a debtor provide documents corroborating the debtor's stated income (tax returns, or where appropriate, paystubs or other documents proving income). The Department attorney may seek additional evidence where necessary to support representations in the Attestation.

Education will provide debtors' account history and loan details to the Department and that information will be provided to the debtor with the Attestation form.

#### **B. Time for Attestation**

Ideally, the Department attorney would solicit the Attestation from the debtor at the outset of the case to permit early consideration whether to stipulate to facts relevant to undue hardship. The Department attorney is not required to impose any strict time limit for the Attestation.

#### **C. Bankruptcy Court Authority**

The Department attorney should advise debtors that although the United States may stipulate to facts relevant to undue hardship and recommend to the bankruptcy court that a finding of undue hardship is appropriate, the United States' position is not binding on the bankruptcy court, which will render its own determination whether a debtor has met the standard for an undue hardship discharge. Department attorneys and debtors should cooperate to file appropriate documents to enable the court to consider whether to issue an order to discharge student loan debt based upon undue hardship.

### **VI. Conclusion**

The goal of this Guidance is to provide Department attorneys with a consistent and practical approach for handling student loan discharge litigation. Because of the fact-specific nature of such litigation, questions may arise about how the Guidance should be applied in particular cases. For assistance in interpreting and implementing the Guidance, Department attorneys are invited to contact the Commercial Litigation Branch, Corporate/Financial Litigation Section of the Civil Division.<sup>22</sup>

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<sup>22</sup> This memorandum applies only to future bankruptcy proceedings, as well as (wherever practical) matters pending as of the date of this Guidance. This Guidance is an internal Department of Justice policy directed at Department components and employees. Accordingly, it is not intended to and does not create any rights, substantive or procedural, enforceable at law by any party in any matter.

# Faculty

**Katherine A. Bell** is an Assistant U.S. Attorney for the Western District of Kentucky in Louisville, where she leads the office's Financial Litigation Program, coordinates its community outreach efforts and co-manages the externship program. Her legal practice focuses on the collection of criminal and civil debt owed to the U.S., with an emphasis on bankruptcy and foreclosures. Outside of the office, Ms. Bell chairs the IWIRC KIT Network, which encompasses IWIRC insolvency professionals from Kentucky, Indiana and Tennessee, and serves as board chair for Summerbridge Louisville, a six-week summer program for Louisville's bright but underserved middle school students. Prior to joining the U.S. Attorney's Office, she was a partner with Stites & Harbison, PLLC, where she represented banks, servicers and other financial institutions in complex collection matters and lender liability actions in state and federal court. Ms. Bell received her undergraduate degree *summa cum laude* from the University of Louisville and her J.D. *magna cum laude* from the the University of Louisville Louis D. Brandeis School of Law.

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