

Federal Student Loan Debt in Bankruptcy: Recent Movement Towards Income-Driven Repayment Plans in Chapter 13

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I. Introduction

Student loan debt is generally nondischargeable. If an individual with student loan debt files for relief under Chapter 7, 11, 12, or 13 of the Bankruptcy Code, at the end of the bankruptcy case the debtor is still personally liable for any balance due on the student loan debt. Some debtors find that at the end of five years of Chapter 13 plan payments, they owe more in student loan debt than when they started because interest continues to accrue.

Recently, some Chapter 13 debtors have proposed to repay their student loan debts during their Chapter 13 plans through Income-Driven Repayment (IDR) plans offered by the United States Department of Education (ED). The Executive Office for United States Attorneys (EOUSA), in consultation with ED, developed a template that describes the responsibilities of debtors who wish to repay student loans through an IDR plan during a Chapter 13 plan, and that protects ED from claims in these cases that its IDR loan servicing activities violate the automatic stay. This article will first provide data on student loan debt in the United States and discuss the history of dischargeability of student loans in bankruptcy proceedings. Next, the types of student loans and student loan repayment plans available from ED are reviewed. Lastly, to explain the need for the template and how it works in Chapter 13, a discussion of the challenges of addressing student loan debt in Chapter 13 cases, a description of the template and some thoughts on the benefits of using the template are provided.

The template has been reviewed by ED, EOUSA, the National Association of Chapter 13 Trustees, Assistant United States Attorneys (AUSAs) who handle bankruptcy cases, and bankruptcy judges, who provided input and suggested revisions. The template is not in the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or the Official Bankruptcy Forms. It is not nationally adopted, mandated, or required. Developed in response to efforts by the debtors' bar to include student loan plan payments in Chapter 13 plans, the template provides the minimum requirements and terms necessary to facilitate the debtor's participation in an IDR plan during Chapter 13. Use of the template could expedite

consent and approval of a Chapter 13 plan that includes IDR provisions. There is no guarantee that bankruptcy judges, the Chapter 13 bankruptcy trustee, or other unsecured creditors in a case will accept the template language. However, earlier versions of this template have been successfully included in Chapter 13 plans and agreed orders. Using the template will assist Chapter 13 debtors with management of their nondischargeable student loan debt, and will benefit the United States as payments on the student loans will be made, and not deferred, in individual Chapter 13 cases.

II. Federal Student Loan Data

In his introductory letter to the *Federal Student Aid Annual Report FY 2015*, the Chief Operating Officer of Federal Student Aid states:

Federal Student Aid witnessed a number of significant organizational milestones in FY 2015. The federal student loan portfolio grew to more than \$1.2 trillion, representing an increase of over 7 percent compared to FY 2014. In total, Federal Student Aid delivered over \$128 billion in aid to almost 12 million students at over 6,100 schools this past fiscal year.¹

According to the Federal Reserve Bank of New York, “[s]tudent loan debt is the only form of consumer debt that has grown since the peak of consumer debt in 2008. Balances of student loans have eclipsed both auto loans and credit cards, making student loan debt the largest form of consumer debt outside of mortgages.”² In fiscal year (FY) 2016, there were 19.2 million Federal Student aid applications processed by ED, and 13.2 million postsecondary student aid recipients received \$125.7 billion in federal student aid.³ At the close of FY 2016, 42.3 million student loan borrowers had outstanding student loan debt in excess of \$1.29 trillion.⁴ The debt continues to increase. At the end of the fourth quarter of FY 2017, 42.6 million student loan borrowers had outstanding student loan debt totaling over \$1.36 trillion.⁵

The use of IDR plans to repay student loan debt is growing. In an introduction to the *Federal Student Aid Annual Report FY 2016*, the Chief Operating Officer of Federal Student Aid states:

[W]e have continued expanding our push to enroll borrowers who would benefit most from income-driven repayment, or IDR, plans . . . This past spring’s announcement that IDR growth will see enrollment of 2 million borrowers between April, 2016, and April, 2017, helped us become even more focused on meeting that goal. I am pleased to say we are on target, which will mean nearly 7 million borrowers will be in IDR plans by next April.⁶

A nondischargeable student loan debt is almost assured to be too large for a debtor to repay in the five year span of a Chapter 13 plan. Further, a student loan debtor is not required by the Bankruptcy Code to accelerate their loan payments and pay the student loan debt in full during the course of a Chapter 13 case. Student loan debtors in bankruptcy may pay that debt according to the terms of their original loan, such as a ten-year standard repayment plan. However, once in Chapter 13, the debtor’s Chapter 13 plan

¹ U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2015*, Washington, D.C., 2015. (“Federal Student Aid, a principal office of the United States Department of Education, is required by legislation to produce an *Annual Report*, which details Federal Student Aid’s financial and program performance. The *Federal Student Aid Annual Report FY 2015* is a comprehensive document that provides an analysis of Federal Student Aid’s financial and program performance results for Fiscal Year 2015.”).

² *Student Loan Debt by Age Group*, FED. RESERVE BANK OF NEW YORK (Mar. 29, 2013).

³ U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2016*, Washington, D.C., 2016.

⁴ The Department of Education’s Federal Student Aid Office provides statistics by student loan type, including dollars outstanding and number of loan recipients. See <https://studentaid.ed.gov/sa/about/data-center/student/portfolio>.

⁵ *Id.*

⁶ U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2016*, Washington, D.C., 2016.

payments or plan percentage might be too low to fulfill the standard plan monthly payment amount. If the debtor's confirmed Chapter 13 plan provides for less than the full monthly payment on the Federal student loan, then due to partial payments the student loan will soon be in default. Additionally, the nondischargeable debt will continue to grow due to interest. The bankruptcy community should encourage Chapter 13 debtors to pay down their student loan debt while their bankruptcy cases proceed. By addressing student loan debt in an IDR plan during the Chapter 13 plan, the debtor will not face later the setback of an undischarged student loan debt with accrued interest in default status.

III. The History of Student Loan Dischargeability in Bankruptcy Proceedings

The United States Constitution provides, “[t]he Congress shall have the power . . . to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . .”⁷ From the Constitution's effective date in 1789 until 1800, only state insolvency laws existed. From 1800 until 1898, Congress enacted temporary Federal bankruptcy laws in response to specific financial and economic crises. Once each crisis passed, the Federal law was repealed, and creditors and debtors were dependent again upon state insolvency laws. The three temporary Federal bankruptcy laws were:

- The Bankruptcy Act of 1800 that provided involuntary bankruptcy proceedings applicable to merchants only;
- The Bankruptcy Act of 1841 that provided voluntary bankruptcy proceedings for individuals; and
- The Bankruptcy Act of 1867 that provided both voluntary and involuntary proceedings and applied to individuals and merchants.

The first permanent Federal bankruptcy law in the United States was enacted by Congress as the Bankruptcy Act of 1898, commonly known as the Nelson Act, later amended by the United States Bankruptcy Act of 1938—the Chandler Act. The Chandler Act (aka the Bankruptcy Act) provided for both voluntary and involuntary proceedings for a corporation, partnership, or an individual.

Section 17 of the Chandler Act provided: “Debts Not Affected By A Discharge—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part. . .” The Chandler Act excepted from discharge: debts incurred for tax levied by the United States; liabilities for obtaining money or property by false pretenses or representation; willful and malicious injuries; alimony or for maintenance and support of a wife or child; debts not scheduled; debts created by fraud, embezzlement, misappropriation, or defalcation; three months wages due to employees; money of an employee received or retained by the employer to secure the employees' faithful performance under an employment contract.⁸

Private student loans were not excepted from discharge under the Act. At this time, bankruptcy proceedings were available as liquidation [think today's Chapter 7] or through a court approved plan [akin to Chapter 11]. A wage-earners repayment plan like today's Chapter 13 proceedings did not exist.

Federal student loans first became available in 1958. In the late 1960s to early 1970s, student loan balances and discharge in bankruptcy were under scrutiny. News reports and anecdotes indicated that students completing college and graduate school would immediately file bankruptcy proceedings to shed all of their student loan debt, and then proceed on to lucrative careers. In 1970, Congress authorized the formation of a *Commission on the Bankruptcy Laws of the United States*. Following public hearings,

⁷ U.S. CONST. ART I, § 8 cl. 4.

⁸ Pub. L. No. 75-696, 52 Stat. 851 (1938).

testimony, and research, the Commission produced its *Report to Congress* on July 30, 1973.⁹ As is true today, at the time of the Commission's 1973 Report, the Federal government ". . . [was] by far the largest higher education student loan financing system in the country . . ." ¹⁰ The 1973 Report states the Commission heard testimony and received communications and information "to the effect that easy availability of discharge from education loans threatens the survival of existing educational loan programs."¹¹ At public hearings, concern was expressed by representatives of the National Council of Higher Education Loan Programs and the New Jersey Board of Higher Education about anticipated student loan defaults and bankruptcies.¹² Although the Commission was not aware of evidence suggesting significant problems with student loan discharge, it advised that the use of bankruptcy to avoid payment of student loans without "any real attempt to repay the loan . . . discredit[s] the system and cause[s] disrespect for the law and those charged with its administration."¹³ The Commission stated:

. . . examples of the abuse of the discharge in the case of educational loans have . . . come to the Commission's attention. Some individuals have financed their education and upon graduation have filed petitions under the Bankruptcy Act and obtained a discharge without any attempt to repay the educational loan and without the presence of any extenuating circumstances, such as illness. The Commission is of the opinion that not only is this reprehensible but that it poses a threat to the continuance of educational loan programs. The Commission, therefore, recommends that, in the absence of hardship, educational loans be nondischargeable unless the first payment falls due more than five years prior to the petition.¹⁴

Part II of the 1973 Report contains proposed statutory language to effect the Commission's recommendations. The proposed definition of educational debt was "any debt to a nonprofit educational institution for expenses of post-secondary education or a debt for a loan made, guaranteed, or funded by the United States, a state, or a subdivision thereof or by a nonprofit educational or charitable organization for such expenses. . . ." And, for the first time in United States history, a dischargeability exception concerning student loans was proposed:

. . . any educational debt if the first payment of any installment thereof was due on a date less than five years prior to the date of the petition and if its payments from future income or other wealth will not impose an undue hardship in the debtor and his dependents . . .¹⁵

Concerned over high student loan losses, Congress enacted statutory provisions—outside of the Bankruptcy Act—to protect Federal investments. This was the first legislated restriction on discharge of student loan debt in the United States. In 1976, Congress enacted section 1087-3 of Title 20, United States Code, providing that for bankruptcy petitions filed on or after September 30, 1977, guaranteed student loan program loans that were in repayment status less than five years could be discharged if the court determined undue hardship and a general discharge order was entered. Enacting the 1973 Report recommendations, this measure was intended to prevent students from graduating with a higher degree and then immediately entering bankruptcy to shed their student loan debt. However, it provided an exception for cases in which the court determined repayment for loans in repayment status

⁹ House Doc. No. 93-137 Part I, II (September 6, 1973) (hereinafter 1973 Report). The Commission's recommendations formed the basis for discussion and debate in Congress, and the foundation for the next bankruptcy legislation—the 1978 Bankruptcy Reform Act.

¹⁰1973 Report, Part I, fn 4, at 178-79.

¹¹1973 Report, Part I, at 11.

¹²1973 Report Part I, fn 4, at 178.

¹³1973 Report, Part I, at 170.

¹⁴1973 Report, Part I, p. 176-77.

¹⁵1973 Report, Part II, pp. 3, 136.

less than five years would cause undue hardship. Loans in repayment status for five years or more and national direct student loans/Perkins Loans still could be discharged by a general bankruptcy discharge order.

Soon thereafter, the Bankruptcy Code¹⁶ made significant changes to the bankruptcy laws in the United States based upon the Commission’s 1973 Report. In addition to eliminating the necessity to “prove” debts, eliminating the requirement of insolvency to file bankruptcy, creating Bankruptcy Courts, creating bankruptcy judgeships, and generally modernizing the U.S. bankruptcy system, the legislative measure created Chapter 13 proceedings for individual debtors—the Chapter 13 wage earners plan. Restrictions on the discharge of student loans appeared in section 523(a)(8):

(a) A discharge under section 727, 1141, or 1328 of this title does not discharge an individual debtor from any debt . . .

(8) to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless—

(A) such loan first became due before five years before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor’s dependents . . .¹⁷

This restriction on the discharge of student loan debts in the Bankruptcy Code reflected the Higher Education Act’s 1976 provisions that absent a finding of undue hardship, student loans could not be discharged within the first five years after they became due. A student loan debt in repayment status for five years or more still could be discharged under the Bankruptcy Code.

In 1990, the five year period was extended. Section 3621(1) of Pub. L. No. 101-647¹⁸ amended section 523(a)(8) of title 11, United States Code, by adding that “educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution or for an obligation to repay funds received as an educational benefit, scholarship or stipend” and by extending subparagraph (A) from five years to seven years “exclusive of any applicable suspension of the repayment period.” This reflected the legislative intent that after a seven year repayment period had expired, the public policy concerns over potential abuse of the student loan system and risks to the system’s financial stability are outweighed by the public policy to provide debtors with a fresh start. The seven-year period began to run on the date the first installment payment on a student loan became due.

In 1998, Congress amended the Bankruptcy Code and deleted section 523(a)(8)(A), leaving “undue hardship” as the sole basis for discharging an educational loan or benefit. The elimination of the seven-year rule applied to all bankruptcy cases commenced after October 7, 1998. In 2005, Congress expanded nondischargeability to include private student loans.

¹⁶ Pub. L. No. 95-598, 92 Stat. 2549 (1978).

¹⁷ 11 U.S.C. § 523(a)(8) (2012) (amended 2016).

¹⁸ Pub. L. No. 101-647, 104 Stat. 4789 (1990).

IV. Nondischargeability and Undue Hardship Discharge Today

Section 523(a)(8) of the Bankruptcy Code excepts from discharge:

- (A) (i) an education benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
- (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
- (B) any other educational loan that is a qualified education loan.¹⁹

Student loan debt is presumptively nondischargeable. The Bankruptcy Code permits a court to discharge student loan debt only upon a finding that payment of the debt will cause undue hardship to the debtor and debtor's dependents. A debtor seeking discharge of student loan debt must affirmatively seek an exception to nondischargeability by filing a complaint to determine dischargeability.²⁰

A complaint to determine dischargeability of student loan debt may be filed at any time. A closed bankruptcy case can be reopened to file the complaint.²¹ No-asset Chapter 7 cases are processed somewhat quickly. The debtor may file a complaint to determine dischargeability of student loan debt at any time before or after a Chapter 7 discharge is entered in the case. If the Chapter 7 case is closed, the debtor may file a motion to reopen for the purpose of filing a complaint to determine dischargeability.

But what about debtors in Chapter 13 repayment plans, which can last up to sixty months before a discharge is entered? Some courts hold that a Chapter 13 debtor cannot file a complaint to determine dischargeability of student loan debt at the beginning of the Chapter 13 case, but must wait until they are closer to the issuance of a discharge.²²

Once the adversary proceeding complaint to determine dischargeability is filed, the initial burden is on the student loan lender to establish the existence of the debt.²³ Once the debt is established, the burden shifts to the debtor to prove undue hardship. Nine Federal Judicial Circuits²⁴ use the *Brunner* test, first articulated in *Brunner v. New York Higher Education Services Corp.*²⁵ The *Brunner* test uses a three prong assessment to evaluate whether the debtor has proven undue hardship warranting discharge of their student loan debt:

- That the debtor cannot, based on current income and expenses, maintain a minimal standard of living for himself or herself and his or her dependents if forced to repay the student loans;
- That this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and
- That the debtor has made good faith efforts to repay the loans.

The Eighth Circuit rejects the *Brunner* test, and instead relies upon a *totality of the circumstances* test to determine whether the debtor would face undue hardship absent a discharge of student loans.

¹⁹ § 523(a)(8).

²⁰ FED. R. BANKR. P. 4007.

²¹ FED. R. BANKR. P. 4007(b).

²² See *Wheeler v. ECMC*, 555 B.R. 464 (Bankr. M.D. Pa 2016).

²³ *In re Rumer*, 469 B.R. 553 (Bankr. M.D. Pa 2012).

²⁴ The *Brunner* test is used in the 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 10th, and 11th Circuits.

²⁵ *Brunner v. New York Higher Education Services Corp.*, 831 F.2d 395 (2nd Cir. 1987).

Under the *totality of the circumstances* test, courts in the Eighth Circuit²⁶ assess:

- The debtor’s past, present, and reasonably reliable future financial resources;
- A calculation of the debtor’s reasonable necessary living expenses; and
- Any other relevant facts and circumstances surrounding the case.

The First Circuit has not explicitly adopted either the *Brunner* test or the *totality of the circumstances* test to determine whether a debtor has established undue hardship and eligibility for discharge of student loan debt. As described by the First Circuit Bankruptcy Appellate Panel, “[a]lthough the First Circuit acknowledged the two approaches in *Nash*,²⁷ it declined to adopt formally a particular test for determining undue hardship, and it remains an undecided issue in this circuit.”²⁸ Bankruptcy and District Courts within the First Circuit apply either test and hybrid variations.²⁹

V. Federal Student Loan Programs

An important first step for an AUSA when handling a bankruptcy case involving student loans is to determine the type of loans involved, and whether each loan is financed by ED, another Federal agency, or by a non-Federal organization. ED finances a number of student loan programs that involve a variety of lenders and guarantors. Rules for discharge of loans made by other Federal agencies may differ from those governing discharge of Department of Education financed loans. Appendix 2 provides a description of each type of ED-financed Federal student loan. Most bankruptcy cases involve loans made under the following three Federal student loan programs: the Federal Family Educational Loan Program (FFELP); the William D. Ford Federal Direct Loan Program (Direct Loans); and the Federal Perkins Loan Program (Perkins Loans).

VI. Loan Servicers and Loan Holders

A loan holder is the entity that holds the loan promissory note and has the right to collect from the borrower. ED is the legal holder of all Direct Loans. FFELP loans, on the other hand, may be held by a lender, guaranty agency, or ED—if defaulted or sold. Perkins Loans may be held by the school that made the loan or by ED.

ED and many lenders, guarantors, and schools contract with loan servicers. Servicers are the primary point of contact for borrowers related to their student loans. A loan servicer is a company that collects payments, responds to customer service inquiries, and performs other administrative tasks associated with maintaining a Federal student loan on behalf of a loan holder. Servicers are the primary point of contact for borrowers related to their student loans. ED currently uses nine loan servicers. Most loans are serviced by one of the following four: Nelnet, Navient, FedLoan Servicing, or Great Lakes. The other servicers are Cornerstone, MOHELA, Granite State, HESC/Edfinancial, and OSLA servicing.

VII. Repayment of Student Loans

Borrowers in repayment status—not in default—have several repayment options depending on the type of loans and when the loans were obtained. Repayment plans include:

²⁶ *Hurst v. Southern Arkansas University*, 553 B.R. 133 (B.A.P. 8th Cir. 2016); *Fern v. Fedloan Servicing et al*, (*In re Fern*) Case No. 14-00168, 2016 WL 3564376 (Bankr. N.D. Iowa 2016).

²⁷ *In re Nash*, 446 F. 3d 188, 190 (1st Cir. 2006).

²⁸ *In re Bronsdon*, 435 B.R. 791, 797 (B.A.P. 1st Cir. 2010).

²⁹ *See In re Blanchard*, 2014 WL 4071119 (Bankr. D. N.H. August 14, 2014); *Ayele v. Educational Credit Management Corp.*, 490 B.R. 460 (D. Mass. 2013).

Standard—Under a Standard repayment plan, payments are fixed and made for up to ten years (between ten and thirty years for consolidated loans). Monthly payments may be slightly higher than payments made under other plans, but this often results in the loan being paid in the shortest time;

Extended—A borrower may extend repayment over a longer period of time, up to twenty-five years, and make lower payments than under a Standard plan. This plan results in the borrower repaying a larger amount to pay off the loan;

Graduated—Under a graduated plan, monthly payments start low and increase every two years, for up to ten years (between ten and thirty years for consolidated loans);

Income-Sensitive—Income-sensitive plans are available to low income borrowers who have FFELP Loans (Direct Loans are not eligible). Monthly payments increase or decrease based on annual income and are made for a maximum period of ten years; or

Income-Driven—Under an IDR plan, the monthly loan payment is a percentage of discretionary income. After twenty to twenty-five years, unpaid balances are forgiven.³⁰

VIII. Income-Driven Repayment Plan

The first IDR plan, the Income Contingent Repayment Plan, was authorized by Congress in the 1990s. Generally, the monthly payment amount under an IDR plan is a percentage of the individual's *discretionary income*. The percentage differs depending on the type of IDR plan. Under all four IDR plans, any remaining loan balance is forgiven if the Federal student loans are not fully repaid at the end of the repayment period. Whether the individual will have a balance to be forgiven at the end of the repayment period depends on a number of factors, such as how quickly the individual's income rises and the individual's income relative to debt. Because of these factors, an individual might fully repay the loan before the end of the repayment period; in such a case, there would be no amount remaining due to be forgiven.

Only borrowers who are *not in default* on their Federal student loans can apply to enroll in an IDR plan. IDR Plans require application by the borrower, approval by ED, and annual recertification by the student loan borrower. The student loan borrower's monthly payments can be adjusted up or down by ED based upon the annual recertification data.

If the borrower is making payments under an IDR plan and simultaneously working toward loan forgiveness under the Public Service Loan Forgiveness (PSLF) Program, the borrower may qualify for forgiveness of any remaining loan balance after making ten years of qualifying payments, instead of twenty or twenty-five years. Qualifying payments for the PSLF Program include payments made under any of the IDR plans.

Due to borrower outreach initiatives, approximately four million Direct Loan borrowers were enrolled in IDR plans at the close of FY 2015,³¹ a fifty percent increase over FY 2014 enrollments.³² By the close of FY 2015, loan servicers were enrolling several thousands of borrowers in IDR plans daily.³³ IDR enrollments continued to increase in 2016; ED reported 6.5 million borrowers enrolled in IDR plans as of December 31, 2016.³⁴ The different IDR plans are:

³⁰ Perkins loans are not repayable under IDR plans, but a borrower may consolidate those loans into a Direct Consolidation Loan, which would be eligible.

³¹ U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2015*, Washington, D.C., 2015.

³² *Id.*

³³ *Id.*

³⁴ U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2016*, Washington, D.C., 2016, p. ii.

REPAYE: Any borrower with eligible Federal student loans can make payments under this plan. Payment is generally ten percent of discretionary income, over a term of twenty years if all loans being repaid under the plan were received for undergraduate study, or twenty-five years if any loans being repaid under the plan were received for graduate or professional study.

PAYE and Income-Based Repayment (IBR): Each of these plans has an eligibility requirement. To qualify, the payment, which is based on income and family size, must be less than what the individual would pay under the Standard Repayment Plan with a ten-year repayment period.

If the amount the individual would have to pay under the PAYE or IBR plan was more than what the individual would have to pay under the ten year Standard Repayment Plan, the individual would not benefit from having the monthly payment amount based on income, so the individual does not qualify. Generally, individuals meet this requirement if their Federal student loan debt is higher than their annual discretionary income or represents a significant portion of their annual income.

In addition, to qualify for the PAYE Plan, an individual must also be a new borrower as of Oct. 1, 2007, and must have received a *disbursement* of a Direct Loan on or after Oct. 1, 2011. An individual is a new borrower if the individual had no outstanding balance on a Direct Loan or FFELP loan when the individual received a Direct Loan or FFELP loan on or after Oct. 1, 2007.

PAYE: Payment is generally ten percent of discretionary income, but never more than the ten-year Standard Repayment Plan amount, over a twenty year term.

IBR: Payment is generally ten percent of discretionary income for a *new borrower* on or after July 1, 2014, but never more than the ten-year Standard Repayment Plan amount, or fifteen percent of discretionary income for an individual who is not a new borrower on or after July 1, 2014, but never more than the ten-year Standard Repayment Plan amount. The repayment term is twenty years for a new borrower on or after July 1, 2014, and twenty-five years for an individual who is not a new borrower on or after July 1, 2014.

Income Contingent Repayment (ICR): Any borrower with a Direct Loan can make payments under this plan. This plan is the only available income driven repayment option for parent *PLUS loan* borrowers. Although PLUS loans made to parents cannot be repaid under any of the income driven repayment plans (including the ICR Plan), parent borrowers may consolidate their Direct PLUS Loans or Federal PLUS Loans into a *Direct Consolidation Loan* and then repay the new consolidation loan under the ICR Plan (though not under any other income-driven plan). Payment is twenty percent of discretionary income or what the individual would pay on a repayment plan with a fixed payment over the course of twelve years, adjusted according to the individual's income, over a twenty-five year term.

Details on each plan can be found at <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven>. Table 1, below, provides a comparison of the various repayment plans using the same fact scenario assuming \$30,000 in Federal student loan debt and income that increases over time, starting with an income of \$25,000.

TABLE 1³⁵

Repayment Plan	Initial Payment	Final Payment	Time in Repayment	Total Paid	Loan Forgiveness
Standard	\$666	\$666	10 years	\$79,935	N/A
Graduated	\$381	\$1,143	10 years	\$85,272	N/A
Extended-Fixed	\$387	\$387	25 years	\$115,974	N/A
Extended-Graduated	\$300	\$582	25 years	\$126,173	N/A
REPAYE	\$185	\$612	25 years	\$131,444	\$0
PAYE & IBR (new borrowers)	\$185	\$612	20 years	\$97,705	\$41,814
IBR (not new borrowers)	\$277	\$666	18 years, 3 months	\$107,905	\$0
ICR	\$469	\$588	13 years, 9 months	\$89,468	\$0

Comparison of Repayment Plans for Undergraduate Loan Debt in Direct Unsubsidized Loans*

*Loan debt does not include any consolidation loans.

IX. Hurdles and Obstacles for Chapter 13 Debtors With Student Loan Debt

Generally, when a debtor is not in default on student loans and files a petition for relief under Chapter 7, 11, 12, or 13 of the Bankruptcy Code, ED and the student loan servicer will put the debtor’s Federal student loans into *administrative forbearance* status to comply with the bankruptcy automatic stay in section 362 of title 11. ED suspends collection and communication activity until the bankruptcy case is dismissed or a discharge is entered. Nondischargeable student loans continue to accrue interest after the debtor files a bankruptcy petition.

Because ED is an unsecured nonpriority creditor, it might receive small sums monthly under the terms of a Chapter 13 plan. While the loan is in forbearance status, ED posts and applies payments it receives but, because of the automatic stay, does not send the debtor billing statements or other communications. If the debtor’s Chapter 13 plan payments to ED are not sufficient to pay the debtor’s monthly student loan payment in full, the loan may go into default status; due to administrative forbearance, the debtor will not receive notice of the underpayment, balance due, or status change.

At the end of the bankruptcy case, the debtor continues to owe the balance due on the nondischargeable student loan debt. The outstanding accrued interest is capitalized (added to the principal balance), which can significantly increase a borrower’s balance and result in higher monthly student loan payments *after* the bankruptcy case ends. If the student loan went into default status during the Chapter 13 case, ED can initiate collection activity against the student loan borrower at the conclusion of the bankruptcy case, including garnishment, Treasury Offset Program, and other measures. After five years of bankruptcy plan payments, the debtor is still in debt and faces collection action.

As Chapter 13 cases last between three to five years,³⁶ some debtors seek to continue to repay their student loans under their ED repayment plan³⁷ during the Chapter 13 case. A Chapter 13 plan may

³⁵ *Federal Student Aid: Income Driven Plans*, U.S. DEPT. OF ED. (last visited February 27, 2018).

³⁶ 11 U.S.C. § 1322(d) (2012) (amended 2016).

³⁷ See *supra* Repayment of Student Loans.

separately classify claims, and must provide the same treatment for all claims within a class.³⁸ For example, a Chapter 13 plan can have a class consisting of the secured mortgage lender, a class of secured automobile note holders, a class of priority tax debts, and a class of general unsecured creditors (credit cards, doctors' bills etc.). "The plan may designate a class or classes of unsecured claims . . . but may not discriminate unfairly against any class designated."³⁹ To put a substantially similar type of claim into a different class to treat it better or worse than the other similar claims is claims discrimination. There must be a valid reason to classify and treat seemingly similar claims differently.

If student loan debt is included in the class of general unsecured creditors, the proposed percentage to be paid to the student loan holder might be less than the amount of the debtor's monthly student loan plan payment. For example, if the debtor owes \$150,000 in student loan debt, and under the Chapter 13 plan the class of general unsecured creditors will receive ten percent of their claims, the student loan would be paid \$15,000 through the plan over the course of sixty months—\$250 per month. That monthly payment amount might be *well below* the amount the debtor was paying under the Standard student loan repayment plan. By only paying the unsecured creditor percentage provided in the Chapter 13 plan towards the nondischargeable Federal student loan, the debtor will underpay the Federal student loan for three to five years. The deficit will grow each month the debtor is in bankruptcy, and interest will accrue to be capitalized later.

If, however, the Chapter 13 plan classifies unsecured student loan debt separately from general unsecured debt, and the plan proposes that student loan debt receives the full monthly student loan repayment plan amount (at a higher percentage of repayment than to other unsecured creditors), the Chapter 13 trustee or a general unsecured creditor could object to plan confirmation, or the court could reject the Chapter 13 plan as proposed based on unfair discrimination within the unsecured debt class.⁴⁰ Recently, some bankruptcy courts now permit nondischargeable student loan debt to be classified separately from other general unsecured creditors.⁴¹ When a bankruptcy court confirms a Chapter 13 plan in which the debtor separately classifies unsecured student loan debt to be paid at a rate that satisfies an ED repayment plan, the Chapter 13 debtor will make substantial and actual progress towards the repayment of that nondischargeable debt during the course of the bankruptcy case. For debtors enrolled in an IDR plan, the time spent making IDR payments while in bankruptcy also applies towards the total time required to attain student loan forgiveness under the IDR plan.

X. Chapter 13 Plan Template for IDR in Chapter 13 Cases

In response to Chapter 13 debtors who have proposed to repay their student loan debts through IDR plans during their Chapter 13 bankruptcy cases, EOUSA has developed template language for use in

³⁸ § 1322(a)(3), (b)(1).

³⁹ § 1322(b).

⁴⁰ *McCullough v. Brown* (In re Brown), 162 B.R. 506 (D. N.D. Ill. 1993) (reversing judgment, holding that debtors' plans, which provided for full payment of their student loans and payments of only 10 percent to other unsecured creditors, "discriminated unfairly" against the other unsecured creditors in violation of the Bankruptcy Code).

⁴¹ *In re Engen*, 561 B.R. 523 (Bankr. D. Kan. 2016) (separate classification of a student loan debt in a Chapter 13 plan did not discriminate unfairly or violate 11 U.S.C. § 1322(b)(1)). *See also In re Boscaccy*, 442 B.R. 501 (Bankr. N.D. Miss. 2010) (Debtor may separately classify student loan debt under cure-and-maintenance provisions); *In re Johnson*, 446 B.R. 921 (Bankr. E.D. Wis. 2011) (holding that student loans could be separately classified as long-term debts); *In re Williams*, 253 B.R. 220 (Bankr. W.D. Tenn. 2000) (the court allowed student loan arrearages to be paid in full through the plan as long as the student loan was treated as a long term debt under § 1325(b)(5)); *In re Chandler*, 210 B.R. 898 (Bankr. D. N.H. 1997) (the court held separate treatment of student loans was permitted as long as there was no "unfair" discrimination); *In re Cox*, 186 B.R. 744 (Bankr. N.D. Fla. 1995) (§ 1322(b)(5) specifically sanctions separate classification long term debts); *In re Benner*, 156 B.R. 631 (Bankr. D. Minn. 1993) (the court held § 1322(b)(5) authorizes separate treatment of long term debts, and any resulting discrimination is not "unfair").

a Chapter 13 repayment plan. This is not part of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or the Official Bankruptcy Forms. It is only suggested language that may be considered to accommodate an IDR plan during Chapter 13 bankruptcy. The template is designed as an insert into the section of a Chapter 13 plan for “non-standard plan provisions,” or alternatively, to be used as the basis for an agreed order separate from, but referenced in, the Chapter 13 plan. Only student loan borrowers who are not in default are eligible to apply for the IDR repayment plan. Student loan borrowers who are in default will not be able to use a proposed Chapter 13 plan to gain entry into an IDR plan. The main features of the template:

- Provide the debtor may not use the Chapter 13 plan to discharge all or part of the debtor’s unpaid student loan (which is nondischargeable absent an undue hardship finding by the court);
- Identify the student loan(s);
- Confirm the debtor is not in default on Federal student loan debts;
- Provide the debtor may continue in or apply to enroll in IDR;
- Provide the amount of the debtor’s monthly IDR plan payment and the day each payment is due;
- Indicate the student loan(s) creditor class;
- Indicate if IDR plan payment will be made through the Chapter 13 trustee’s office or outside of the Chapter 13 plan by the debtor;
- Explicitly provide that the debtor waives 362(a) stay violation and 362(d) causes of action against ED for its communication, administrative processing, and recertification of the debtor’s IDR plan; and
- Provide a process for debtor to exit the IDR plan voluntarily, and the consequences of a debtor’s failure to pay the monthly IDR plan payment.

XI. How the Template Contemplates the Initiation or Continuation of an IDR plan While the Debtor is in Chapter 13

The template contemplates that the debtor will make monthly IDR plan payments during the life of the Chapter 13 plan, either through the Chapter 13 trustee’s office or outside of the Chapter 13 plan. Separate claim classification is warranted because unlike dischargeable general unsecured debts, the unsecured student loan debt will not be discharged at the conclusion of the Chapter 13 case. As one Bankruptcy Court noted:

Failing to allow separate classification and favorable treatment of student loans leads to a disharmonious outcome under the Code in which student loans are special enough not to discharge unless the rigorous undue hardship test is met, but not sufficiently special to separately classify. Separate classification is proper under the Code and student loans “can be classified separately from other types of Schedule F nonpriority unsecured debt.”⁴²

⁴² *In re Engen*, 561 B.R. at 533 (citing Daniel A. Austin & Susan E. Hauser, *Graduating with Debt: Student Loans under the Bankruptcy Code 69-70* (ABI, 2013)). *See also In re Potgieter*, 436 B.R. 739, 743 (Bankr. M.D. Fla. 2010) (“[T]he separate classification of the debtor’s student loan obligations does not violate Section 1122.”); *In re Counce*, 213 B.R. 344, 345 (Bankr. S.D. Ill. 1997) (separate classification of student loan debt is permissible).

Under this reasoning, to create separate classes of unsecured debt based on this substantial distinction is not discriminatory against other fully dischargeable unsecured debt classes. “Debtors with student loan obligations face a quagmire. Without separate classification, debtors may face a higher debt burden after bankruptcy than before. This Court respectfully disagrees with other courts' holdings that without more, nondischargeability of student loans is an insufficient reason for discriminating in favor of Student Loan Claims.”⁴³

By classifying the student loan debt separately, the debtor will be able to make IDR plan payments during the Chapter 13 plan at a different percentage than is paid to general unsecured creditors. By making IDR plan payments during the life of the Chapter 13 plan, the debtor receives credit from ED for the three to five years of IDR plan payments. Without the ability to enter into or remain in an IDR plan, the debtors would most likely spend that time in student loan administrative forbearance status with interest continuing to accrue, and would emerge from bankruptcy with a larger student loan principal balance at the conclusion of their Chapter 13 plan than at the start. And they would emerge from bankruptcy in default on the loan.

It is important, however, that routine loan servicing not be considered in violation of the automatic stay as ED processes the debtor’s IDR plan enrollment, requests recertification documentation, and attends to administrative matters relating to the IDR plan. Therefore, the template Chapter 13 plan language includes a waiver by the debtor of the automatic stay concerning ED and the IDR plan administrative actions. Without this waiver, ED is unlikely to agree to a Chapter 13 plan that contemplates initiation or continuation of an IDR repayment plan.

The Chapter 13 trustee may request assurances in the plan that the IDR plan payment will be remitted timely by the debtor, that delayed or missed IDR plan payments will not affect the Chapter 13 trustee’s remittance to other creditors in the case, and that the Chapter 13 trustee’s office will not be liable to fund any missed IDR plan payments. The trustee’s participation as a pass-through entity for debtor’s IDR plan payments is as a courtesy to the debtor, with the mutual goal that the debtor with nondischargeable student loan debt will be in a better financial position at the conclusion of the bankruptcy case.

A draft of the template language has been successfully used in several jurisdictions, both as an insert to the ‘special provisions’ section of the national Chapter 13 plan form and as a separate agreed order. The Northern and Southern Districts of Ohio, districts in North Carolina, and the Northern District of New York have experimented with the template language permitting an IDR plan to proceed simultaneously with a Chapter 13 plan.

XII. Conclusion

Students in the United States have amassed a staggering amount of higher education loan debt. Congress has determined as a matter of public policy that students who borrow funds to finance their education should repay those loans, absent undue hardship. EOUSA, in consultation with ED, the National Association of Chapter 13 Trustees, and Bankruptcy Judges, has devised template Chapter 13

⁴³ *In re Engen*, 561 B.R. at 541.

plan language that may be considered to accommodate an IDR payment plan during Chapter 13 bankruptcy. This method can help honest debtors with student loans work their way toward resolution of all their debts and a fresh start.

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Appendix 1: Federal Student Aid Portfolio Summary

Data Source: National Student Loan Data System (NSLDS)

<i>Includes outstanding principal and interest balances</i>									
		Direct Loans		Federal Family Education Loans (FFEL)		Perkins Loans		Total¹	
Federal Fiscal Year²	Dollars Outstanding (in billions)	Recipients³ (in millions)	Dollars Outstanding (in billions)	Recipients (in millions)	Dollars Outstanding (in billions)	Recipients (in millions)	Dollars Outstanding (in billions)	Unduplicated Recipients (in millions)	
2007	\$106.8	7.0	\$401.9	22.6	\$8.2	2.8	\$516.0	28.3	
2008	\$122.5	7.7	\$446.5	23.7	\$8.5	2.9	\$577.0	29.9	
2009	\$154.9	9.2	\$493.3	25.0	\$8.7	3.0	\$657.0	32.1	
2010	\$224.5	14.4	\$516.7	25.1	\$8.4	2.9	\$749.8	34.3	
2011	\$350.1	19.4	\$489.8	23.8	\$8.3	2.9	\$848.2	36.5	
2012	\$488.3	22.8	\$451.7	22.4	\$8.2	2.9	\$948.2	38.3	
FY 13	Q1	\$508.7	23.4	\$444.9	22.1	\$8.2	3.0	\$961.9	38.7
	Q2	\$553.0	24.1	\$437.0	21.6	\$8.3	3.0	\$998.6	38.9
	Q3	\$569.2	24.3	\$429.5	21.2	\$8.2	2.9	\$1,006.8	38.7
	Q4	\$609.1	25.6	\$423.0	20.9	\$8.1	2.9	\$1,040.2	39.6
FY 14	Q1	\$626.5	26.2	\$417.1	20.6	\$8.2	3.0	\$1,051.8	40.0
	Q2	\$669.0	26.5	\$409.7	20.2	\$8.3	3.0	\$1,087.0	40.0
	Q3	\$685.7	26.7	\$402.5	19.8	\$8.2	2.9	\$1,096.5	39.9

	Q4	\$726.6	27.9	\$395.0	19.4	\$8.2	2.9	\$1,129.8	40.7
FY 15	Q1	\$744.3	28.5	\$387.6	19.1	\$8.2	3.0	\$1,140.1	41.1
	Q2	\$787.0	28.7	\$379.1	18.6	\$8.3	2.9	\$1,174.4	41.0
	Q3	\$803.1	28.8	\$370.9	18.2	\$8.2	2.9	\$1,182.1	40.8
	Q4	\$840.7	29.9	\$363.6	17.9	\$8.1	2.8	\$1,212.4	41.6
FY 16	Q1	\$854.8	30.3	\$357.3	17.5	\$8.1	2.9	\$1,220.3	41.8
	Q2	\$896.6	30.5	\$350.2	17.2	\$8.2	2.8	\$1,254.9	41.7
	Q3	\$911.6	30.5	\$342.6	16.8	\$8.0	2.7	\$1,262.2	41.5
	Q4	\$949.1	31.5	\$335.2	16.4	\$7.9	2.7	\$1,292.2	42.3
FY 17	Q1	\$963.5	31.9	328.3	16.1	\$7.9	2.7	\$1,299.7	42.4
	Q2	\$1,003.3	32.1	\$320.5	15.7	\$7.9	2.6	\$1,331.7	42.3
	Q3	\$1,017.0	32.0	\$312.6	15.2	\$7.8	2.6	\$1,337.4	42.0
	Q4	\$1,053.5	33.0	\$305.8	14.9	\$7.6	2.5	\$1,366.9	42.6

Notes:

¹ Totals may not equal the sum of Direct Loans, FFEL, and Perkins Loans due to rounding and the timing of the data runs.

² Data is run at the end of the corresponding Federal fiscal year or at the end of each quarter listed by Federal fiscal year. Each Federal fiscal year begins October 1 and ends September 30. Q1 ends 12/31, Q2 ends 3/31, Q3 ends 6/30, and Q4 ends 9/30.

³ Recipient is the student that benefits from the Federal student loan. In most cases, the recipient is the borrower, but in parent PLUS loans, the parent is the borrower and their child is the recipient.

Appendix 2: Federal Student Loan Programs

- A. Federal Family Education Loan Program (FFELP) (formerly Guaranteed Student Loan Program) (Title IV-B of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. §§1071 et. seq.)) (Regulations at 34 C.F.R. Part 682)

As of July 1, 2010, no new FFELP loans may be made, pursuant to the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, 3/30/2010). All Federal Stafford, PLUS, and Consolidation Loans first disbursed on or after July 1, 2010, are made under the Federal Direct Loan Program. Nevertheless, FFELP loans continue to be serviced according to the terms and conditions of the FFELP and the borrowers' promissory notes. ED purchased some outstanding FFELP loans under authority granted by Ensuring Continued Access to Student Loans Act during the credit crisis of 2008. FFELP loans continue to comprise a significant percentage of the outstanding student loans.

In the FFELP, ED acts primarily as reinsurer of student loans. Different types of guaranteed loans are described here. The promissory note, ED, and the guarantor's computer records identify the type of loan.

Under the FFELP, loans made by banks or other lending institutions were guaranteed by state or non-profit guarantors and reinsured by ED. 20 U.S.C. §1078(c). At least one guaranty agency operated in every state; several guaranty agencies, such as United Student Aid Funds, operated in numerous States. Most FFELP loans were made by few large banks with nationwide lending programs. A variety of financial institutions comprised a very active secondary market in FFELP loans, including banks, State and non-profit student loan "Authorities," and the Federally-chartered Student Loan Marketing Association ("Sallie Mae" or SLMA, now known as Navient).

If a debtor defaults, files a bankruptcy petition, dies, or becomes disabled, the guaranty agency reimburses the holder of the loan, takes assignment of the loan, and promptly claims reimbursement from ED under its reinsurance agreement. Although ED pays reinsurance promptly to the guaranty agency, the guarantor retains the loan and must then use "due diligence" in collecting the loan, remitting most of its recoveries to ED. 34 C.F.R. 682.4101(b)(4). ED can demand assignment of reinsured loans from guarantors, and has taken assignment of a large number of these loans.

FFELP loans include the following:

1. Federal Stafford Loans: The basic FFELP student loan (the type you are most likely to have used to finance your own education) was called a "GSL" and is now called a Stafford Loan. Interest that accrues on Stafford Loans may be subsidized by ED during in-school, grace, and deferment periods for borrowers who qualify under a need-based assessment process, 20 U.S.C. § 1078(a); a borrower who does not meet the needs test may receive an "Unsubsidized Stafford Loan," 20 U.S.C. § 1078-8, on which interest accruing during these periods is typically capitalized. Unsubsidized Stafford Loans replace the Supplemental Loans for Students.

2. Supplemental Loans for Students (SLS): Under the SLS Program, banks and other financial institutions made loans to independent undergraduate students and to graduate and professional students. 20 U.S.C. § 1078-1 (1991). The authority for SLS Loans ended July 1, 1994. A similar program, the Auxiliary Loans to Assist Students (ALAS) Program, which provided loans to students and parents, was authorized under 20 U.S.C. § 1078-2 (1986) from 1980 to 1986, when it was replaced by SLS and PLUS. Many SLS and ALAS loans remain outstanding.
3. Federal PLUS Loans: PLUS loans were made by banks and other financial institutions to parents of dependent students. 20 U.S.C. § 1078-2. Unlike Stafford and SLS loans, repayment must begin on PLUS loans promptly after disbursement. PLUS loans are also available to graduate students. The loans are commonly called Parent PLUS or Graduate PLUS to distinguish which type of borrower is incurring the loan.
4. Federal Consolidation Loans under the Consolidation Loan Program: Lenders made loans to borrowers to pay off ("consolidate") outstanding student loans. 20 U.S.C. § 1078-3. Consolidation Loans have longer repayment terms that, depending on the amount borrowed, may extend for up to 30 years.

B. William D. Ford Federal Direct Loan Program (Title IV-D of the HEA (20 U.S.C. § 1087a et seq.), regulations at 34 C.F.R. Part 685).

Under the Direct Loan Program, ED makes loans directly to borrowers, who repay the loans to ED. Direct Loan Program loans generally mirror the FFELP program loans: ED makes -

1. Federal Direct Stafford Loans;
2. Federal Direct PLUS Loans;
3. Federal Direct Unsubsidized Stafford Loans; and
4. Federal Direct Consolidation Loans.

Direct Loans generally have the same terms as their FFELP counterparts. Unlike their FFELP counterparts, ED makes the loans with Federal funds, which are serviced by ED directly or by contract servicers, and no financial institution or guarantor is involved. The vast majority of all Federal student loans made after July 1, 2010, are Direct Loans

C. Federal Perkins Loan Program (formerly known as the National Direct Student Loan Program or the National Defense Student Loan Program) (Title IV-E of the HEA (20 U.S.C. 1087aa-1087hh)) (Regulations found in 34 C.F.R. Part 674).

Some schools continue to make Perkins Loans. Federal funds partially capitalize a loan fund from which colleges make student loans under the Perkins Loan Program (formerly known as the National Direct Student Loan Program, which was in turn the successor to the National

Defense Student Loan Program), authorized under Title IV, Part E of the HEA. 20 U.S.C. §§ 1087aa - 1087hh. Regulations are found in 34 C.F.R. Part 674.

D. Federal Insured Student Loan Program (FISLP)

ED has in the past directly guaranteed student loans, under FISLP. 20 U.S.C. §§1077, 1079, 1080. Some FISLP loans remain outstanding.

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