

BORROWER DEFENSE TO REPAYMENT

BACKGROUND

The Higher Education Act includes a section known as borrower defense to repayment (BDR). The BDR provisions allow student loan borrowers to seek loan forgiveness if a college or university misled them or engaged in fraudulent behavior. This type of student loan forgiveness was rarely used until 2015, when several proprietary schools shut down. In response, the Department of Education announced a new rule pertaining to student debt relief in June 2015.

While well-intentioned, the BDR rule broadly defined “fraud” in higher education, allowing students to request that their loans be discharged if they believed the education they received was not what was promised. The rule imposed serious penalties on institutions based only on allegations of misbehavior, on regulatory circumstances that do not fairly indicate a lack of financial responsibility, or even on unintended errors in record-keeping involving federal student aid programs under Title IV. On July 1, 2020, a rewrite of the borrower defense rule that streamlines the claim process went into effect.

ISSUE

Every stakeholder in higher education has a sincere interest in operating under a fair and comprehensive set of rules that protect students and educational institutions, prevents fraud, and imposes appropriate penalties on institutions that abuse the public trust. Further, the Department of Education is obligated by its enabling legislation to address these issues in a manner that treats all higher education institutions equally and fairly. However, while the goals of BDR are sound, there have been many unintended consequences.

The BDR rule threatened to discontinue the proprietary sector’s participation in the Title IV programs by making the proprietary model unsustainable, thereby depriving students access to distinctive, career-focused programs. The BDR rule established an opaque system that painted a broad brush across the proprietary sector, and lumped the good actors with the bad actors. For example, accused schools often have no indication as to the substance of the claims against them, nor the process by which the Department intends to adjudicate those claims. The process lacks objectivity and there are no guidelines for what might trigger a BDR claim.

SOLUTION

It is important that the federal government maintain an appropriate protocol for students to seek relief when warranted. However, for such a system to be fair, credible, and legal, it must also establish an appropriate protocol to determine when and how much liability schools should incur. It is also essential that all sectors have a seat at the table and are included when the Department is holding discussions about these important issues. Finally, if the Department chooses to take measure of the success of institutions of higher education and their students, those measures should apply to all institutions that receive federal funding.