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STATE OF COLORADO  
DEPARTMENT OF LAW

March 10, 2022

U.S. Attorney Cole Finegan  
U.S. Attorney's Office for the District of Colorado  
1801 California Street  
Suite 1600  
Denver, CO 80202

RE: Fulfilling the promise of grace for federal student loan borrowers who face  
“undue hardship”

Dear U.S. Attorney Finegan:

I write to highlight an important issue for your office and ask you to carefully evaluate federal student loan bankruptcy cases litigated by your office to be sure that borrowers who face “undue hardship” in repaying their student loans receive the grace promised to them in the Bankruptcy Code.

The Bankruptcy Code provides that an educational loan is not dischargeable in bankruptcy unless “excepting such debt from discharge ... will impose an undue hardship on the debtor and the debtor’s dependents.” 11 U.S.C. § 523(a)(8). The Court of Appeals for the Tenth Circuit has adopted the three-part *Brunner* test, which requires the debtor to prove:

(1) that 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 loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

*Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1307, 1309 (10th Cir. 2004) (citing *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir.1987)).

In recent weeks, the Justice Department, on behalf of the Department of Education, has [withdrawn two appeals](#) of discharges of federal student loans for two borrowers in bankruptcy proceedings. The Justice Department has also argued for denial of a petition for certiorari to the United States Supreme Court on the basis

that the Department of Education is currently considering issues related to the undue hardship standard. *See* Brief for the United States in Opposition to Petition for Writ of Certiorari at 20, *McCoy v. United States*, No. 20-886, 2021 WL 1877477 (May 2021). Specifically, the Department of Education has regulations that require loan holders “to evaluate undue-hardship claims and concede an undue hardship in certain circumstances.” *Id.* (citing 34 C.F.R. §§ 674.49(c), 682.402(i)(1), 685.212(c)). The Department “is currently considering the appropriate factors to be taken into account in making that determination.” *Id.* In 2018, the Department of Education sought public comment these issues. *Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings*, 83 Fed. Reg. 7460 (Feb. 21, 2018).


I applaud the careful consideration of these issues by the Department of Justice and the Department of Education. I also note the important role the U.S. Attorney’s Offices such as your own play on these issues in individual cases. Student loan borrowers who meet the statutory “undue hardship” standard must have a viable path to discharge to fulfill the promise of a fresh start enshrined in the Bankruptcy Code.

As your office handles such cases in our federal courts, I encourage you to carefully consider the role your office can play in extending grace to student loan borrowers who face an “undue hardship” in repaying their loans. This could mean considering what arguments your office chooses to make about the application of the “undue hardship” standard. It could also mean exercising discretion about whether to engage in the adversary process if borrowers experience certain circumstances, such as dependence on public benefits or an ongoing state of poverty.

In my role as Attorney General, I hear firsthand and am well aware of the difficulties borrowers face in repaying their loans. Consequently, our department, which has a student loan ombudsperson role we established, has played a leadership role in protecting borrowers in suits against servicers like [Navient](#) and [PHEAA](#). And our student loan ombudsperson regularly assists borrowers in navigating the complex and fraught repayment process. Bankruptcy is an important and necessary safety valve for borrowers and, where they meet the “undue hardship” standard, they should be able to discharge their loans and receive a fresh start in life.

Thank you for your consideration of this important matter.

Sincerely,

A handwritten signature in blue ink that reads "Phil J. Weiser". The signature is written in a cursive, flowing style.

PHIL WEISER  
Attorney General of Colorado