



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

September 1995

GEN-95-42

**SUBJECT:** Loan discharges based on improper determination that a student had the ability-to-benefit (ATB) from the school's training.

**REFERENCE:** 34 CFR 682.402(e) and §685.214(a)

Dear Colleague:

Section 437(c)(1) of the Higher Education Act of 1965, as amended (HEA) provides for the discharge of a borrower's loan obligation under the Federal Family Education Loan (FFEL) Program, and §455(a)(1) makes this relief available under the William D. Ford Federal Direct Loan Program, if the student's eligibility to borrow was falsely certified by the school. In September 1994, initial guidance concerning these loan discharges was provided in "Dear Colleague" Letter 94-L-166/G-256 issued to lenders and guaranty agencies in the FFEL Program. However, in the area of discharges based on a school's defective determination of a student's ability-to-benefit (ATB), the "Dear Colleague" Letter promised more detailed guidance concerning those discharges.

This letter addresses some common questions about discharges based on improper ATB determinations that have been asked by borrowers, lenders, guaranty agencies, and other parties. The Department intends to apply the guidance in this letter to similar false certification discharges in the William D. Ford Federal Direct Loan Program.

Thank you for ensuring that the intent of the false certification discharge provision is achieved. For further information, you may contact the Department's Customer Support Inquiry Service between the hours of 9:00 AM and 5:00 PM Eastern Time, at 1-800-433-7327. After hours calls will be accepted by an automated voice response system. Callers leaving their name and phone number will receive a return call the next business day. You may FAX your inquiry to the Customer Support Inquiry Service at any time by calling (202) 260-4199.

Sincerely,

Elizabeth M. Hicks  
Deputy Assistant Secretary  
for Student Financial Assistance

## **SUMMARY OF ATB REQUIREMENTS <sup>1</sup>**

### **For periods of enrollment beginning January 1, 1986<sup>2</sup> through June 30, 1987**

The school could determine that the student had the ability to benefit from the school's training in accordance with the requirements of 34 CFR 668.6, as those regulations existed at that time. The school simply had to "develop and consistently apply criteria" to determine if regular students who did not have a high school diploma or GED, and who were beyond the age of compulsory attendance, had the ability to benefit from the school's training.

### **For periods of enrollment beginning July 1, 1987 through June 30, 1991**

Schools were required to use one of the following standards for admission of students without a high school diploma or its equivalent on the basis of ATB in accordance with 34 CFR 668.7 as it was in effect at that time: (1) the student received a GED prior to the student's completion of the program or by the end of the first year of the program, whichever was earlier; (2) the student was counseled prior to admission and successfully completed the school's program of remedial or developmental education that did not exceed one academic year or its equivalent; (3) the student passed a nationally recognized, standardized, or industry-developed ATB test, subject to criteria developed by the school's accrediting association; or (4) if the student failed the ATB test, he or she successfully completed the school's program of remedial or developmental education that did not exceed one academic year or its equivalent.

### **For periods of enrollment beginning July 1, 1991 through July 22, 1992**

A student who was not a high school graduate or did not have a GED at the time of enrollment must have passed an independently administered ATB test approved by the Department<sup>3</sup> before the student's receipt of Title IV aid.

### **For periods of enrollment beginning on or after July 23, 1992**

A student who was not a high school graduate or did not have a GED at the time of enrollment must meet one of the following standards before receiving Title IV aid: (1) achieve a score specified by the Department on an independently

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<sup>1</sup> This summary presents a brief overview of some of the major ATB requirements over time. The Department has issued several "Dear Colleague" Letters that explained ATB requirements in greater detail. The reader may find "Dear Colleague" Letters GEN-89-55 (December 1989), GEN-90-33 (September 1990), and GEN-91-20 (June 1991) to be particularly helpful.

<sup>2</sup> Sections 437(c)(1) and 455(a)(1) of the HEA do not authorize loan discharges based on defective ATB determination for loans made before January 1, 1986.

<sup>3</sup> Listings of approved tests were published in the Federal Register on December 19, 1990 and December 30, 1992, and in "Dear Colleague" Letter GEN-93-21 (August 1993). A comprehensive listing was published in Chapter 2 of the 1995-96 *Federal Student Financial Aid Handbook*.

administered ATB test approved by the Department; or (2) be considered to have the ability to benefit from the school's training in accordance with a process prescribed by the state in which the school is located.

**GENERAL RULES FOR LOAN DISCHARGES BASED ON A SCHOOL'S DEFECTIVE DETERMINATION OF A STUDENT'S ATB**

1. The regulations<sup>4</sup> require the borrower to certify, under penalty of perjury, that the school failed to determine (or improperly determined) the student's ability-to-benefit from the school's training.
2. A student may, nevertheless, be considered to have had the ability to benefit from the school's training even though the school failed to determine the student's ability or did so improperly. The regulations recognize that a student who obtains employment in the occupation for which the school's program was designed to prepare him or her has proved, on the basis of that employment, that he or she actually possessed the ability to benefit from that training, without regard to whether the school was negligent in its implementation of the Department's ATB regulations. Therefore, the borrower must further certify that the student did not secure employment in the occupation for which the school stated its program was designed to prepare the student, or if the student completed the training program, he or she either was not able to find employment in that occupation, despite a reasonable attempt, or was able to get a job in that occupation only after receiving training from another school.
3. The regulations also recognize that a student would not be regarded as having had the ability-to-benefit from the school's training, despite a school's conclusion that the student had such ability if, at the time the school certified the student's eligibility for a loan, the student would not meet the legal requirements for employment (in the student's state of residence) in the occupation for which the training program was intended because of a physical or mental condition, age, or criminal record or other reason accepted by the Secretary.<sup>5</sup>

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<sup>4</sup> 34 CFR 682.402(e) for the FFEL Program, and 34 CFR 685.214(c) for the William D. Ford Federal Direct Loan Program.

<sup>5</sup> 34 CFR 682.402(e)(13)(iii)(B), published November 29, 1994, and §685.214(a)(1)(iii), published December 1, 1994.

## QUESTIONS AND ANSWERS

### No evidence

- 1. If a borrower asserts in a claim for discharge that the school improperly determined the student's ATB, and the borrower presents neither documentary evidence from an oversight authority nor any other information to support that claim, and the guaranty agency has no specific information about the ATB testing practices of the school the student attended, is the statement, by itself, sufficient to qualify the borrower for a false certification discharge?***

In evaluating an application for discharge, a guaranty agency must consider the statements in the application together with other evidence about the testing and admission practices of the school, and inferences that can reasonably be drawn from that other evidence. Because several authorities with oversight responsibilities, including the Department, accrediting agencies, guarantors, state licensing bodies, and the school's own auditor, would typically have both the opportunity and responsibility to find and report improper ATB admission practices, the absence of any such finding in reports about a school raises an inference that no improper practices were reported because none were taking place.

A borrower's statement must be evaluated in light of such an inference and the possibility that the borrower's statement may be motivated or affected by the borrower's financial self-interest in obtaining relief from the debt. Thus, a borrower's statement that he or she (or the student, in the case of a PLUS Loan) was "falsely certified" or "improperly tested" would not ordinarily be persuasive, and would not therefore be sufficient to establish entitlement to discharge, if it is not supported by some other evidence that as a result of improper ATB admissions practices, students were admitted on the basis of ATB who should not have been admitted. That supporting evidence can include a finding by an entity or organization that had oversight responsibility over the school's SFA administration or educational programs, statements or admissions by school officials with knowledge of the school's practices, or statements made by other students who attended the school that are both sufficiently detailed and consistent with each other to appear reliable. Those statements can include statements made in other claims for discharge relief.

The Department expects a guaranty agency to obtain existing documentation available from any public or private agency that reviewed or had oversight responsibility for the school. If the guaranty agency concludes that such documentation either does not exist or does not support the borrower's assertion, it becomes the responsibility of the borrower making the claim to produce persuasive evidence that would corroborate his or her allegation of improper ATB determination.

## Testing violations

**2. *In those instances where a school used an ATB test to determine a student's eligibility, what violations of ATB testing procedures justify discharge of a borrower's loan obligation, assuming the borrower is otherwise eligible?***<sup>6</sup>

Discharge is warranted only in those cases where the ATB test was not "administered substantially in accordance with the requirements for use of the test."<sup>7</sup> For periods of enrollment beginning prior to July 1, 1991, a violation of the requirements for the use of an ATB test will be considered to have occurred if the school: (1) failed to substantially comply with the school's accrediting agency standards for ATB testing; or (2) if no such accrediting agency standards existed, the school failed to substantially comply with the test publisher's requirements for the use of the test. For periods of enrollment beginning on or after July 1, 1991, compliance with the Department's ATB requirements could only be met if the ATB test was approved by the Department and was administered substantially in accordance with the test publisher's rules for the use of the test.

The following violations of the applicable testing procedures are substantial enough to invalidate the results of the test, even though the violation may not have been knowingly committed:

- A test that was required to have been administered by an independent test administrator was not administered by such an individual.
- A school permitted a student who failed an ATB test to retake the test earlier than the minimum waiting period prescribed.
- A school permitted a student who failed an ATB test to retake the test more frequently than allowed.
- A school allowed more time for students to complete their ATB tests than was permitted.
- A school considered a student to have passed an ATB test even though the student did not achieve a minimum passing score which was permissible under the statute, regulations, and Departmental guidance in effect at the time the test was given.

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<sup>6</sup> Note: A borrower who obtains employment in the occupation for which the school's training program was intended does not qualify for a loan discharge unless the borrower obtained employment only after receiving additional training at another school. See §682.402(e)(3)(ii)(C) and §685.214(c)(1)(iii).

<sup>7</sup> 34 CFR 682.402(e)(13)(ii)(B)(2).

- The school administered only part of a multi-part test, unless giving less than the entire test was permissible under the school's accrediting agency standards.
- For ATB tests given for periods of enrollment beginning on or after July 1, 1991, the version of the test used by the school was a version not approved by the Department.
- A school supplied answers to the ATB test, or permitted students to discuss the questions among themselves, in violation of the testing rules.

**3. *Even though a guaranty agency determines that a school did not completely comply with the Department's ATB regulations with respect to the use of an ATB test during periods when a test was required, are there violations of those regulations that are not sufficient to justify discharge of a borrower's loan obligation because, despite those technical regulatory violations, the test was administered substantially in accordance with the requirements for use of the test? §682.402(e)(13)(ii)(B)(2).***

The Department has identified three violations of an accrediting agency's or a test publisher's requirements that, in the Department's view, do not have the effect of helping the student pass the test. These violations are not substantial enough to justify loan discharge.

- A school used photocopied versions of the ATB test.
- A school used a version of an ATB test that was obsolete by less than one year.
- A school used an ATB test that was approved by the U.S. Department of Education, but had not been approved by the school's accrediting agency.

Although some states have laws addressing the conditions under which postsecondary institutions may properly admit students who do not have a high school diploma or GED, violation of such state requirements does not make borrowers eligible for false certification loan discharge under §437(c) of the HEA. State ATB requirements address the institution's qualification for a state license, and not whether students attending such schools are eligible for federal aid.

Section 437(c) of the HEA provides for loan discharge where a student's eligibility to borrow was falsely certified by the school. Student eligibility to borrow under the FFEL and William D. Ford Federal Direct Loan Programs is defined by the HEA and implementing regulations, and not by state laws addressing ATB admission. The regulations implementing the false certification discharge provision provide, among other things, that a borrower is eligible for false certification discharge if he or she (or the student in the case of a PLUS Loan) did not meet the requirements for admission

on the basis of ability to benefit under **federal** law. The regulations describe **federal** standards for ATB admission between 1986 and the present, and explicitly refer to the **federal** regulatory standards in place during those periods.

**Foreign language ATB test**

- 4. *A school's program was taught entirely or substantially in English. The ATB test used by the school for periods of enrollment beginning July 1, 1991 or later was given in a language other than English. The school admitted such students who passed their non-English ATB tests. Would a non-English language ATB test given to these students be considered a valid determination of their ATB?***

The answer depends on whether the student was enrolled in a program with an English as a Second Language ("ESL") component, and whether the test instrument selected by the school was appropriate. The Department has approved examinations for testing students enrolled in ESL programs, programs with an ESL component, or for testing non-native speakers of English enrolling in regular academic or vocational programs taught in English. The approved examinations expect some degree of functional literacy in English. Before selecting an appropriate test, schools are encouraged to consider whether the examinations can determine the degree of English language proficiency necessary to succeed in the student's particular program of study. Whether a particular test used by a school could appropriately be used for a non-native English speaking student depends on the scope of approval of the test. For example, some tests were approved for use if Spanish is both the student's native language and the language of instruction, while others were approved for use where the student's native language is Spanish and the language of instruction is English.

**Remedial Program**

- 5. *If a school admitted students for periods of enrollment beginning during the period July 1, 1987 - July 1, 1991, and the school chose the ATB option of enrolling students in a program of remedial or developmental education, what rules applied to those programs?***

For a school to be considered as having complied with the ATB requirements if it chose this option,<sup>8</sup> the school had to ensure that the students enrolled in, and successfully completed, the institutionally prescribed program of remedial or developmental education. In addition, students had to be either: (1) counselled before admission; or (2) fail an ATB test administered by the school. Those programs may not exceed one academic year or its equivalent. [Note: Extensive discussions concerning remedial programs were contained in "Dear Colleague" Letters GEN-89-55, issued December 1989, and GEN-91-20, June 1991.]

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<sup>8</sup> This option was not available to schools for periods of enrollment beginning on or after July 1, 1991.

**Student unable to get a job**

**6. *What documentation is required to show that a student whose ATB was improperly determined was unable to get a job in the occupation for which he or she was trained?*<sup>9</sup>**

The answer depends on whether the student completed the school's training program. If the student did not complete the program, the student must simply certify that he or she did not find employment in that occupation. The student's sworn statement that he or she could not get a job in that occupation will be considered proof that the school's defective (or non-existent) determination of the student's ability-to-benefit harmed the student to the extent that a discharge is permissible.

If the student completed the school's training program, it appears that, notwithstanding the school's improper ATB determination, the student's ability to successfully comprehend the subject matter was equivalent to a student who had a high school diploma or GED. The student obtained the degree or certificate that he or she desired, and for which the loan was obtained. However, the Department's regulations recognize that it is also important to consider whether the student was able to obtain employment after completing the school's program. For this reason, the loan discharge regulations permit a discharge if the student is unable to obtain employment in the occupation for which he or she was trained by the school, despite making a "reasonable attempt" to obtain employment in that occupation.

To fairly balance the interests of the student and the federal taxpayer, the Department believes that a student who completed the school's training program and who claims that he or she was unable to obtain employment in that occupation because of the school's defective determination of his or her ATB, should be expected to provide evidence that he or she made a "reasonable attempt" to obtain employment in that occupation. Ordinarily, a person who makes a reasonable attempt to obtain employment does not limit his or her job search to only one such effort. More commonly, an individual will try several times to obtain employment in a specific occupation. Therefore, if there were no unusual circumstances faced by a specific individual, it would be reasonable for a guaranty agency to consider three separate attempts by the student to find a job as a persuasive indication of the student's good-faith effort.

The type of information about a job search that most people could readily recall would include the basic facts, such as the name and address of the employer contacted, the date the employer was contacted, the position applied for, and the reason (if any) given by the employer for not hiring the person. Other information (for example, the employer's phone number or the name or title of the person contacted) may be remembered by the student, and would support his or her claim. In situations where an employer contacted by a student routinely declined to hire individuals who were

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<sup>9</sup> 34 CFR 682.402(e)(3)(ii)(C) and §685.214(c)(1)(iii).

trained by the school attended by the student, a generic statement from the employer to that effect would serve as evidence of the student's reasonable attempt to obtain employment with that employer.

**Student's age, mental or physical condition, or criminal record**

**7. *Are the regulatory provisions with respect to factors such as the student's age, mental or physical condition, or criminal record applicable to all students at all schools?***

Those provisions<sup>10</sup> apply to all categories of students at all schools, including students for whom the school was not required to make ability-to-benefit determinations or for whom the school made such determinations properly.

**8. *What documentation is required from a borrower who requests a discharge on the basis that the student's age, mental or physical condition, criminal record, or other reason accepted by the Secretary prohibited the student from meeting the requirements for employment in the student's state of residence in the occupation for which the student was trained?***

The borrower must provide evidence that the student had that disqualifying status at the time of enrollment, and evidence that a state prohibition (in the student's state of residence) against employment in that occupation based on that status also existed at the time of enrollment. However, a loan discharge is not authorized if it can be shown that the school asked the student if he or she had such a disqualifying status, but the student did not divulge that information.

**9. *To whom should information be sent if it is believed that a possible "other reason" (in addition to the student's age, mental or physical condition, or criminal record) should be accepted by the Secretary?***

Those parties that wish to provide such information should submit it to:

Ms. Carney McCullough  
Chief, General Provisions Branch  
Policy, Training, and Analysis Service  
Policy Development Division  
U.S. Department of Education  
600 Independence Avenue, S.W.  
Washington, DC 20202-5345

The submitted information must include unambiguous evidence that a state prohibition based on that "other reason" existed at the time of the student's

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<sup>10</sup> 34 CFR 682.402(e)(13)(iii)(B), published November 29, 1994, and §685.214(a)(1)(iii), published December 1, 1994.

enrollment that would prohibit employment (in the student's state of residence) in the occupation for which the student was trained.

### Group discharges

- 10. Does the Department regard as reasonable the approval of discharges for all borrowers who fall within a specified group, for example, ATB students who enrolled in a school with serious and well-documented ATB violations that could be considered to have affected every student admitted to the school based on ATB? If so, would those borrowers still be required to complete discharge applications?**

In some cases, discharge may be authorized by the Department for borrowers who demonstrate that they fall within a particular cohort of students and who are otherwise eligible for false certification discharge. Such borrowers may receive discharge without individually presenting proof of improper determination of ATB or admission. All borrowers will, however, still be required to request a discharge and sign the sworn statement prescribed by the regulations. The Department will inform guaranty agencies when it has made such a determination, and notify them of the requirements and procedures for handling such discharges as they occur.

The Department invites interested parties to notify it of such special circumstances that may justify this approach. The type of documentation described in response to question #1 will be considered if it shows that a school committed pervasive and serious violations of the Department's regulations during the time period covered by the documentation. Those parties who wish to provide such documentation should submit it to Ms. Carney McCullough, at the address given in question #9.

### Suspected fraud

- 11. What steps should a guaranty agency take if it suspects that a borrower has made false statements on a discharge request, but the agency is unable to disprove those suspected false statements?**

The agency should contact the Department's Inspector General for assistance (1-800-MISUSED). Depending on the investigative strategy in a specific case, the agency will be advised whether it should grant the discharge.

### Reporting school violations

- 12. The FFEL regulations [§682.402(e)(6)(i)] require a guaranty agency to notify the Department immediately whenever it becomes aware of reliable information indicating that a school may have falsely certified a student's eligibility. To what address should this notification be sent?**

Guaranty agencies should notify the Guarantor and Lender Review Branch in the Department's regional office responsible for the state in which the school is located.

**Former 34 CFR 668.6**

- 13. *The regulations state that for periods of enrollment beginning prior to July 1, 1987, a student's ATB was to be determined "in accordance with the requirements of 34 CFR 668.6." However, that section of the current regulations has nothing in it except the word "reserved."***

The text of §668.6 as it existed during the applicable time period follows:

§ 668.6 Ability to benefit.

(a) "Ability to benefit" means that a person admitted to an institution of higher education has the ability to benefit from the education or training he or she is to receive.

(b) (1) An institution that admits as regular students persons who do not have a high school diploma or the recognized equivalent of a high school diploma and who are beyond the age of compulsory school attendance in the State in which the institution is located, shall develop and consistently apply criteria for determining whether these students have the ability to benefit from the education or training offered.

(2) An institution must be able to demonstrate, upon request of the Secretary, that these students have the ability to benefit.

(Authority: 20 U.S.C. 1088, 1141)

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