



BORROWER DEFENSE: 101

What is Borrower Defense?

Borrower defense to repayment, or “borrower defense,” refers to the provision in law that federal student loan borrowers should not be forced to repay loans for classes or degrees from schools that have lied to, deceived, and misled them.

Borrower defense is an important safeguard for student borrowers whose loans should not have been made in the first place and were only made because of a failure in the higher education system at large – by the Department of Education, the accreditor, and/or the school itself. It is also a critical safeguard for the taxpayer investment in higher education. The Higher Education Act, U.S. Department of Education regulations, student loan contracts, and rules that govern creditor–borrower relationships all support borrower defense.

If a borrower has experienced misconduct by the school they attended, the borrower can assert a borrower defense to repayment claim, which is reviewed and adjudicated by the Department of Education. If approved, the borrower does not have to pay back their federal student loans from that school and may receive a refund of what they have already paid. In extraordinary cases of widespread and systemic misconduct by a school, the Department can grant borrower defense to affected students without requiring them to apply.

History of the Borrower Defense Rule

Stretching back to the 1970s, the federal government was aware of the need to implement protections for student borrowers in the face of rising federal student loan defaults. The Nixon administration created an interagency committee to examine and address this growing problem. It recommended that a “central mechanism on educational consumer complaints” be created that would both ensure that complaints are addressed and serve as “an ‘early warning system’ against educational abuses.”¹

An amendment to the Higher Education Act’s renewal in 1993 codified borrower defense to repayment.² The law empowers the Secretary of Education to determine when and under what circumstances to recognize valid defenses against repayment of federal student loans. Loans made to students attending a school within the jurisdiction of the Federal Trade Commission—that is, those operated for profit—also must preserve a borrower’s right to assert school misconduct as a defense to repayment under the FTC’s 1976 “Holder Rule.”³

¹ ‘Toward a Federal Strategy for Protection of the Consumer of Education. Report of the Subcommittee on Educational Consumer Protection.’ Office of the Assistant Secretary for Education, Department of Health, Education and Welfare, July 1975.

² Student Loan Reform Act of 1993, Pub. L. 103-66, 107 Stat. 351 (codified at 20 U.S.C. § 1087e(h)) (the borrower defense statute.)

³ Rule Concerning the Preservation of Consumers’ Claims and Defenses, 16 C.F.R. Part 433.

The availability of borrower defense has long been a component of federal student loans, although its necessity as a safety valve has come into clearer focus only over the last decade. Although the Department received and resolved dozens of borrower defense claims in the 1990s and 2000s, it only began to develop an administrative process for borrower defense in the wake of the 2015 collapse of Corinthian Colleges.

As of 2023, more than 770,000 people have applied for borrower defense to repayment. The borrower defense regulations underwent more revisions – in 2019 under the Trump administration⁴ and again in 2022 under the Biden administration⁵ – but have continued to serve as a critical protection for student borrowers.

770,000

PEOPLE HAVE APPLIED FOR BORROWER DEFENSE TO REPAYMENT

The Fight for Borrower Defense

Borrower defense regularly comes under attack by hostile administrations, the for-profit college lobby, and trade groups with direct financial interests in removing accountability guardrails and keeping the spigot of federal money flowing to profit-making ventures. Since borrowers began asserting claims in significant numbers in 2015, borrower defense has become a political football across administrations. In the past decade, the borrower defense rule has been rewritten three times and has been subject to questionable implementation policies, court challenges to and eventual rescinding of such policies, inaction on claims, multiple court battles to force adjudications, and a contempt hearing on unlawful collections.⁶ The cost of this wrangling has been borne by first-generation college students, military veterans, Black and Latino students, and other borrowers targeted by predatory colleges – among them would-be nurses, plumbers, mechanics, social workers, and more – who have been left in financial uncertainty for nearly a decade.

Under the previous administration, a judge described the Department’s approach to borrower defense as “disturbingly Kafkaesque.”⁷

In 2019, the prior administration rewrote the ground rules to ensure that over 95 percent of meritorious claims would be denied, introduced a nonsensical and draconian formula to reduce the amount of loan cancellation for those few successful claims, and instituted claim review protocols designed to disregard evidence of misconduct. Despite the recent implosion of several large for-profit college companies, only a fraction of borrowers eligible for borrower defense discharge had received one as of 2021. There was no link between back-end cleanup and front-end enforcement. There wasn’t even an enforcement unit within the Department of Education’s office of Federal Student Aid to review borrowers’ claims.

The good news is that borrower defense has historically enjoyed broad bipartisan support. In 2019, several Members of Congress introduced a resolution to overturn regulations published that year under Secretary DeVos that made it nearly impossible to have a borrower defense claim approved.

⁴ 84 Fed. Reg. 49788 (Sept. 23, 2019)

⁵ 87 Fed. Reg. 65904 (Nov. 1, 2022)

⁶ <https://protectborrowers.org/wp-content/uploads/2020/12/Delivering-on-Debt-Relief.pdf>

⁷ <https://static.politico.com/b2/90/1a23cb2a4ee0add1bd049a3c1cd6/bd-decision.pdf>

This resolution passed both the House and Senate with bipartisan support. However, when it reached President Trump's desk, he vetoed the resolution in the final hour, a setback for those committed to providing protections for borrowers and accountability for taxpayers.⁸

Upon taking office, the Biden–Harris administration undertook an overhaul of the broken borrower defense system that it inherited. In 2022, the administration finalized updated borrower defense regulations that strengthened the Department's ability to grant relief to both individual borrowers and groups of borrowers deceived by their schools and streamlined the process for recouping the cost of approved claims from fraudulent institutions.

In the class action lawsuit *Sweet v. Cardona*, the administration settled long-standing litigation in which the Project on Predatory Student Lending (PPSL) represents hundreds of thousands of student borrowers whose borrower defense applications had been ignored by the Department of Education for years. In November 2022, a court approved a \$6 billion settlement to cancel these loans under the Secretary of Education's discretionary authority. The administration also took decisive action to deliver relief to borrowers who attended known bad-actor schools such as Corinthian Colleges, ITT Technical Institute, and others. It reconstituted its enforcement division, which has acted to stamp out predatory actors. And it has held schools accountable by demanding that they take financial responsibility for loan discharges caused by their misconduct.

Current Threats and the Need for Action

This progress has not gone unnoticed by those who side with predatory schools over students. They have money, lawyers, and the courts on their side.⁹

In April 2024, the latest threat to borrower defense arrived. The U.S. Court of Appeals for the Fifth Circuit issued an order maintaining the injunction of the most recent borrower defense rule in the case *Career Colleges and Schools of Texas v. Cardona*. This order halts the implementation of the 2022 rule and the protections it would offer to borrowers. It revives the Trump-era borrower defense rule that had bipartisan, bicameral opposition. Most worryingly, the Fifth Circuit offers an interpretation of the HEA that would tie the Department of Education's hands, requiring it to continue to collect on predatory and fraudulent loans with valid borrower defenses against them, unless and until a borrower experiences the financial catastrophe of default.

This threat is a call to action for elected officials, policymakers, government agencies, advocacy groups, and student borrowers everywhere: we need to protect borrower defense at all costs or risk losing the only true recourse for student borrowers ripped off by predatory schools.

To further protect borrowers, we recommend:

- Codifying the existing 2022 regulation in statute to protect it from future attacks;
- Clearing the current backlog of applications;
- Processing group discharges where there is known misconduct.

⁸ <https://www.nytimes.com/2020/05/29/us/politics/devos-trump-student-loan-rules.html>

⁹ For just a few examples: Three well-known multinational law firms have teamed up against borrowers to represent schools that intervened in the *Sweet v. Cardona* case to try to derail the settlement agreement, taking their arguments all the way to the Supreme Court. For-profit DeVry University, which settled FTC charges of deceptive advertising for \$100 million, has sued in federal court to stop the Department of Education from recouping money from it to cover the cost of loans the Department discharged for defrauded DeVry students. Defunct for-profit CollegeAmerica, found liable for misleading students by a Colorado court, has sued the Department of Education seeking \$500 million in damages. And Grand Canyon University – currently under investigation by both the FTC and the Veterans Administration – spent years in court fighting the Department's refusal to recognize Grand Canyon's sham attempt to convert to non-profit status.

Additional Resources

- **Student Borrower Protection Center:** ['Delivering Distress: How Student Loan Companies Cheat Borrowers Out of Their Rights'](#)
- **Student Borrower Protection Center:** ['Delivering on Debt Relief – Proposals, Ideas and Actions to Cancel Student Debt on Day One and Beyond.'](#)
- **Federal Student Aid of the Department of Education:** [On Borrower Defense Loan Discharge](#)

Press Coverage

- **USA TODAY:** [Biden's student debt forgiveness for defrauded borrowers blocked in federal court](#) (August 7, 2023).
- **CNBC:** [Supreme Court declined to block \\$6 billion student loan settlement. Here's who qualifies for forgiveness](#) (April 17, 2023).
- **The Washington Post:** [\\$6 billion student loan settlement is finalized, resolves 2018 lawsuit](#) (November 17, 2022).
- **New York Times:** [Over Veterans' Protests, Trump Vetoes Measure to Block Student Loan Rules](#) (May 20, 2020).



The Project on Predatory
Student Lending
www.ppsl.org

The Institute for College
Access & Success
www.ticas.org

