

# Suggested Protocols for Responding to Individual Borrower Defense to Repayment Claims

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Under the Higher Education Act and its implementing regulations, students may file a claim with the U.S. Department of Education (“ED”) to discharge their federal Direct Loans (or Direct Consolidated Loans) if, generally, their institution misled them or engaged in other misconduct related to the making of their federal loans or the provision of their educational services. This is referred to as a “borrower defense to repayment” or “BDR” claim.<sup>1</sup> On November 1, 2022, the Biden administration promulgated a revised version of the BDR rule, which took effect on July 1, 2023.<sup>2</sup> On August 7, 2023, the U.S. Court of Appeals for the Fifth Circuit issued a nationwide [injunction](#) of the new, revised BDR rule, postponing its implementation. The current BDR rule remains in effect, however, and the injunction does not prevent the processing of BDR claims under the existing framework.

With regard to BDR claims, data released by ED suggests that virtually every institution in the United States has at least a handful of claims pending against it and over 500 institutions have 30 or more.<sup>3</sup> Anecdotally, Thompson Coburn has observed a rise in outreach from ED notifying institutions of BDR claims. Given this trend, we anticipate that many institutions may want to establish protocols for responding to BDR claims. We have developed this document to aid institutions with this process. In addition to this resource, we welcome institutions to review our webinar, “Responding to Student BDR Claims,” available [here](#). Please note that this document is not intended to cover every possible consideration, but, instead, to highlight key concepts we suggest should be part of any protocol for responding to individual BDR claims.<sup>4</sup>

## I. Initial Assessment of the Claim

When triaging individual BDR claims, there are several initial matters we suggest an institution consider. First, we recommend institutions quickly determine whether ED’s response deadline affords sufficient time to reply, or if an extension may be necessary. Second, as institutions review individual claims, they should identify the specific misconduct the student is alleging and determine whether, on its face, it is a valid basis for a BDR claim under applicable law. Generally, a BDR claim requires a misrepresentation or a breach of a promise or contract by an institution. These allegations most commonly take the form of promises related to cost, post-graduation employment or salary, transferability of credit, or accreditation. However, we routinely see claims that do not actually assert any conduct that would support a BDR claim, even if presumed true (e.g., disciplinary matters, academic disputes, quality of education). Third, institutions should consider whether any of the student’s statements or omissions are inconsistent with or otherwise undermine the asserted misconduct. Finally, we suggest institutions identify and carefully consider their response to any information requests from ED that may accompany the claim or claims, but be unrelated to any specific alleged misconduct.

<sup>1</sup> Congress introduced the BDR concept in 1993, when it directed ED to “specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [federal student loan]...” 20 U.S.C. § 1087e(h); see also 34 C.F.R. § 685.206; 34 C.F.R. § 685.222.

<sup>2</sup> See 87 Fed. Reg. 65904 (Nov. 1, 2022).

<sup>3</sup> In response to a FOIA request filed by the Legal Defense Fund, the Department supplied a list of BDR claims pending as of July 31, 2022, organized by institution. The resulting spreadsheet is available for download [here](#).

<sup>4</sup> In some cases, ED has the authority to certify group claims, which could cover scores of borrowers. While many of the suggestions detailed in this document would still be worthwhile, we note that group claims are managed under different legal procedures and should be handled carefully and accordingly.

## II. Investigating the Claim

After completing the initial assessment, institutions should turn to investigating the claim. This likely will involve gathering all documents potentially relevant to the student's allegation(s) (e.g., application for admission, disclosures and acknowledgments, enrollment or registration documentation, catalogs and handbooks). Additionally, institutions may need to identify and talk to key school employees, particularly those who dealt with the student or are familiar with the relevant school processes. Finally, in preparing to respond to the claim, institutions may wish to examine the student's employment history following his or her period of attendance, as well as social media activity.

## III. Responding to the Claim

There are several components of a response, each of which an institution should carefully consider. First, institutions should plan to provide student background information, including the student's name, BDR case number, social security number, student ID number, dates of attendance, program, graduation date (if any), and credential awarded (if any). Second, institutions should formulate claim-specific arguments, which might include:

- The student had no Direct Loans related to the institution.<sup>5</sup>
- The student did not allege a sufficient basis for a borrower defense discharge.
- The student did not provide evidence supporting the claim, as required under the law.
- The alleged misconduct did not occur, as demonstrated by facts and evidence.
- The alleged conduct occurred but did not constitute misconduct (e.g., the representation was not misleading, no contract was breached), as demonstrated by facts and evidence.

Third, institutions should consider whether to challenge the process for adjudicating individual BDR claims, observing, for example, that the process lacks a hearing, an opportunity to cross-examine the student, discovery, and an independent, impartial hearing officer, among other things. We appreciate that this is a more aggressive approach, but for institutions facing a high volume of claims, including process objections could prove prescient, should an institution ultimately challenge the individual BDR process in court.

With regard to approach, we strongly recommend that institutions methodically address each student's allegations one-by-one, restating each verbatim. If an allegation is without merit, institutions should deny the allegation directly with affirmative statements (i.e. "[Institution] never promised the student that it would find the student a job"; "The school explained to the student that her credits might not transfer to other institutions"; "The student's program was accredited by [accreditor] during the entire time of the student's enrollment"). Institutions should quote from documents that disprove the student's allegation (e.g., enrollment or registration documentation, institutional policies). Any documents an institution cites in its response should be attached to the response as exhibits. If possible, an institution also should identify whether any specific employees with personal knowledge can refute the student's allegations, and, if so, should consider having such employees submit affidavits stating facts that refute the student's allegations.<sup>6</sup>

## Inquiries and Disclaimer

Institutions with questions regarding responding to BDR claims are welcome to contact Aaron Lacey ([alacey@thompsoncoburn.com](mailto:alacey@thompsoncoburn.com)), Jeff Fink ([jfink@thompsoncoburn.com](mailto:jfink@thompsoncoburn.com)), or Scott Goldschmidt ([sgoldschmidt@thompsoncoburn.com](mailto:sgoldschmidt@thompsoncoburn.com)). Please note that the purpose of this document is to provide news and information on legal issues and all content provided is for informational purposes only and should not be considered legal advice. The transmission of information from this document does not establish an attorney-client relationship with the reader. If you desire legal advice for a particular situation, you should consult an attorney.

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<sup>5</sup> Note that students who attended for periods prior to July 2010 are less likely to have Direct Loans.

<sup>6</sup> After an institution submits its response to ED, the agency will decide whether the student is entitled to a borrower defense discharge. If ED grants the discharge, it could pursue the school to recoup amounts discharged. In the case of individual claims, this recovery process would be separate from and subsequent to the initial discharge adjudication.