

insights

TYPES NOT MAPPED YET November 16, 2023 | TTR not mapped yet | Jeffrey R. Fink, Scott Z. Goldschmidt, Aaron D. Lacey, Stephanie C. Fredman

ED's latest BDR guidance, and why institutions should always respond to claims

The U.S. Department of Education published [an electronic announcement](#) on November 8, 2023, offering guidance on the notification process for Borrower Defense to Repayment ("BDR") claims received by the agency between June 23, 2022, and November 15, 2022. As discussed in our September 21 webinar [Responding to Student Borrower Defense to Repayment \(BDR\) Claims: 2023 Edition](#), the *Sweet v. Cardona* litigation requires the Department to process the backlog of student BDR claims in accordance with specific timelines and standards.

For claims filed between June 23, 2022, and November 15, 2022, the Department must notify schools, adjudicate the claims, and issue a decision no later than January 28, 2026. The *Sweet* litigation requires the Department to adjudicate this cohort of claims under the 2016 version of the BDR regulation ([34 C.F.R. 685.222](#)). Notably, if the Department does not issue a decision by January 28, 2026, borrowers will receive a full discharge of their federal student loans.

The November 8 guidance offers helpful confirmations and clarifications. For example, the Department confirms it is focused on claims filed June 23, 2022, to November 15, 2022, and hopes to complete all notifications relating to this cohort of claims by April 2024. It also observes that the vast majority of schools now receiving notices "have fewer than 100 applications" and indicates that for the minority of schools that have "over 500 applications" filed during this period, it will reach out later in the year with further guidance. Confirming a point widely believed by institutions, the Department also acknowledges that it is not conducting any substantive review of the applications (e.g., determining whether an application even asserts a valid basis for a BDR claim) before sending them to the institutions.

This having been said, we fear some elements of the Department's guidance might cause confusion among institutions and even lead to inaccurate conclusions. Specifically, we are concerned that some institutions might conclude there is no adverse consequence if they decide not to respond to a BDR claim - **a conclusion that would be inaccurate.**

In the guidance, the Department observes:

- "Schools have the option to respond to the notices, and there is no negative inference against a school if it does not respond";
- "A nonresponse does not create an inference in favor of the borrower"; and
- "Under the 2016 Regulation, it is optional for a school to respond to the applications, and a nonresponse does not give rise to a negative inference against the school."

The Department also advises in the frequently asked questions that "you have to decide for yourself how to respond, if at all, to any application. If you conclude that an application is vague or doesn't have a clear allegation against your school, you may include that conclusion in your response to the Department, should you decide to respond."

An institution might conclude, after reviewing such commentary, that there is no adverse consequence for an institution that forgoes a response. And the Department is correct in observing that institutions are not required to respond under the law and that the agency is not directed to presume an institution is guilty of the alleged misconduct based strictly on its decision not to respond.

We observe, however, that this is the case in most legal settings. A defendant in a civil case is not required to provide evidence in support of his case. However, when the time comes for the jury to weigh the evidence and render a decision, a defendant who has provided no testimony or evidence in his defense is unlikely to enjoy a positive outcome, **as the only evidence being considered and weighed by the jury will be the evidence provided by the plaintiff making the claim.**

Similarly, an institution that does not respond to the allegations in a BDR claim loses the opportunity to present the Department with evidence that it has not engaged in the misconduct alleged by the borrower, which as the Department acknowledges in its guidance, is most commonly an assertion that the institution engaged in "[s]ubstantial misrepresentations." Consequently, the only evidence considered by the Department when it adjudicates the claim will likely be the claim itself and any supporting evidence the borrower provides, which presumably back the allegations of misconduct.

The Department is required to adjudicate the claim using a preponderance of the evidence standard (see 34 C.F.R. 685.222(a)(2)), meaning that based on the evidence, it must be more likely than not that the misconduct occurred to approve the claim. In the absence of any statement or other evidence from the institution, it would be all but certain that a preponderance of the evidence review would conclude with a finding in favor of the borrower.

We hope this clearly illustrates why and how declining to respond to a BDR claim almost certainly would result in an adverse consequence for an institution. We also offer the following reasons institutions should respond to every claim.

- If someone alleges that your institution engaged in misconduct and it did not, you should **always** state that for the record;
- There is nothing preventing the Department from initiating a program review or other enforcement action based on the allegations of misconduct made in a BDR proceeding, even if the BDR claims are discharged under the *Sweet* settlement without meaningful adjudication or the Department declines to initiate a recovery action;
- There is nothing preventing those unaffiliated with the Department (e.g., plaintiffs' attorneys, attorneys general) from obtaining BDR complaints through a FOIA request and using discharges as evidence of wrongdoing, even if the claims were discharged under the *Sweet* settlement without meaningful adjudication or the Department declines to initiate a recovery action;
- Any claims filed after November 15, 2022, are not part of the *Sweet* settlement, and a discharge would represent a determination by the Department that the school engaged in misconduct and serve as a basis for the Department to seek recovery; and
- The response affords institutions an opportunity to provide defenses to its claims that may not be included in the BDR application. These defenses include, but are not limited to, 1) the claims are untimely; 2) the student fails to state a valid claim; and 3) facts specific to a student, including that the student never enrolled at the school or never received federal aid.

Finally, we emphasize that if the Department determines to pursue the school to recoup the amounts discharged through a secondary, recovery proceeding, this secondary proceeding does not represent a new opportunity for the institution to make its case. As we have discussed in [prior posts](#), the 2022 version of the BDR Rule is enjoined in the Fifth Circuit. If the Department prevails and the 2022 BDR Rule is implemented, recovery actions will be managed under a revised process that places the burden on the institution to demonstrate that it did not engage in the alleged misconduct. In other words, there is a presumption that it did so.

For all these reasons, we encourage institutions to provide a thorough and thoughtful response to each allegation asserted in a BDR claim.

Managing BDR Claims

As many REGucation readers know, Thompson Coburn has followed the BDR rule closely over many years. In addition to the webinar referenced above, institutions may wish to review our past webinars explaining the final [2016 BDR rule](#), the [2019 BDR rule](#), and the [proposed 2022 BDR rule](#).

If you would like assistance responding to BDR claims, institutions are welcome to contact Scott Goldschmidt (sgoldschmidt@thompsoncoburn.com) or Jeff Fink (jfink@thompsoncoburn.com). Scott and Jeff lead our BDR Claim Response Team, which also includes Stephanie Cohan and Aaron Lacey. In 2017, Aaron was selected by ED to serve as one of 17 negotiators charged with developing the 2019 BDR rule. ED appointed him to negotiate on behalf of general counsels, attorneys, and compliance officers at postsecondary institutions nationwide.

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Our goal is to serve as a practical, concise, and accessible resource for institutions confronting regulatory and policy issues. The blog focuses on the extraordinarily broad and sophisticated set of legal challenges faced by contemporary post-secondary institutions, including those involving real estate, construction, joint ventures, litigation, intellectual property, immigration, taxation, financing, employees and benefits, and government relations, to name a few. We also cover the staggering collection of federal, state, and accrediting agency laws and standards specific to higher education.

If there are topics you would like us to cover, or questions you may have regarding a topic that already has been addressed, please do not hesitate to reach out. Finally, if you would like to contribute a guest article, we would love to hear from you.

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