



Testimony of Christopher P. Chapman, AccessLex Institute

Before the U.S. Senate Committee on the Judiciary

Hearing on Student Loan Bankruptcy Reform

August 3, 2021

Chairman Durbin, Ranking Member Grassley and Members of the Committee:

Good morning and thank you for the chance to testify about the treatment of student loans in bankruptcy, an often-overlooked component of the higher education financing landscape.

My name is Christopher Chapman, and I am the President and CEO of AccessLex Institute, a non-profit organization with a membership comprised of the nearly 200 nonprofit and state-affiliated American Bar Association-approved law schools. AccessLex applies its resources to expand access to law school, while working to increase its affordability and value for the benefit of aspiring lawyers and ultimately, the society they will serve.

I am pleased to offer a proposal today that we believe appropriately balances the important interests implicated by the discharge of student debt in bankruptcy. Before I begin, though, a brief history will provide important context.

Student Loan Bankruptcy Discharge Primer

Prior to 1976, student loans were dischargeable in bankruptcy on par with other consumer credit. However, due in large part to anecdotes of purported “opportunistic” graduates declaring bankruptcy on the “eve of a lucrative career” (deemed inconsequential shortly thereafter by a GAO study), Congress adopted a “waiting period,” whereby a debtor was required to prove that “undue

hardship” would result for any loan in repayment less than five years. In 1990, this waiting period was extended to seven years and, finally, eliminated entirely without public debate in Conference Committee as a fiscal offset to the Higher Education Act Amendments of 1998.

The jurisprudence around this issue appears on its face to offer a clear and objective test to assess undue hardship, established in 1987 by the Brunner case. However, by remaining static despite the aforementioned legislative changes, this test has effectively morphed from an arguably appropriate basis for analysis and application of the law to an overly strict and uneven exercise for the small percentage of people who successfully navigate the procedural hurdles, serving to frustrate the underlying goals of both the Higher Education Act and the Bankruptcy Code.

More specifically, the vast majority of the Bankruptcy Courts require that proof that (1) the debtor cannot maintain a minimum standard of living if forced to repay the loans, (2) additional circumstances exist that demonstrate such a state of affairs is likely to persist for a significant portion of the repayment period, and (3) the debtor has made a good faith effort to repay the debt. Importantly, most courts now impose a requirement that the debtor prove a “certainty of hopelessness” during the full repayment period, which can be decades into the future—a standard that is as high as it is ephemeral. I will note that a few courts use a “totality of the circumstances” test, which, while offering a potentially wider scope of analysis, tends to generate similar and equally inconsistent outcomes.

AccessLex Proposal

AccessLex Institute has long advocated for responsible borrowing, offered quality counseling, and encouraged diligent and timely repayment. However, we recognize that access-driven student loan programs will necessarily lead to some borrowers who are unable to repay the debt—and until we have a working crystal ball, defaults and, in some cases bankruptcies, are a necessary cost of maximizing the intellectual capital of the country.

In our view, there are three core factors which must be properly calibrated to maximize the efficacy of the substantial investment in higher education by various stakeholders and the value to the country as a whole.

- First, equal and affordable opportunities for all who pursue higher education, which forms the basis of the Higher Education Act;
- Next, the ability for the “honest but unfortunate debtor” to obtain a “fresh start,” while promoting equitable treatment of creditors, representing the core tenets of the Bankruptcy Code; and
- Finally, the ready availability of capital to allow Americans to reliably and affordably pursue their educational dreams, a factor equally applicable to the both the government as a lender and private sector lenders.

In that spirit, we propose a return to the framework that existed immediately prior to the 1998 Higher Education Act amendments, with one substantive addition. Specifically, we propose that the Undue Hardship standard remain for loans which:

- first enter repayment within the 7-year period preceding the applicable bankruptcy filing; or,
- without regard to time in repayment, are eligible to participate in an income-driven repayment plan providing for monthly payments no greater than 15% of discretionary income with loan forgiveness available after a period no longer than 25 years.

All other student loans would be evaluated in bankruptcy proceedings consistent with other consumer debt.

In addition, we encourage Congress to revisit the definition of Undue Hardship. The term has never been defined by Congress and the judiciary’s attempts have resulted in an unduly strict standard that is unevenly applied. For example, creating clear guidelines for the minimum standard of living and

establishing safe harbors for certain type of expenses, like caring for a sick parent, could help rationalize the undue hardship analysis with the realities of today's borrowers, who have larger loan balances and longer repayment periods than those of prior decades. We believe Congress is the proper venue for this review, a position espoused by the courts themselves in published opinions.

In sum, we believe our proposal effectively balances the interests of all parties involved to support a vibrant student loan structure that encourages opportunity, access, affordability, and personal responsibility, all set against appropriate and acceptable capital risk for the private sector and taxpayers alike.

For additional background and amplification on the matters I have discussed, I refer you to the list of sources and other materials that we have submitted for the record.

Thank you for listening. I am happy to answer any questions that you may have today or as the Committee works to advance these efforts at student loan bankruptcy reform.