

Jason Altmire ([00:04](#)):

Hello. Welcome to another edition of Career Education Report. I am Jason Altmire. Today we are going to be talking about borrower defense to repayment, which is an enormous issue that is pending right now here in the summer of 2023. We have someone who knows more about that regulation and was involved, in the past, in the Department of Education's review and writing about that than anybody. His name is Jonathan Helwink. Many people know him as an attorney at the Duane Morris Law Firm specializing in a huge number of higher education issues. Many of them, he worked and had oversight over at the department. In the Trump administration, he served as the attorney advisor to the Undersecretary of Education and Special Counsel at the US Department of Education. He, among other things, co-authored both the 2019 rescission of the prior gainful employment rule and the 2019 borrower defense to repayment regulations. So he is well-equipped to have the conversation. Jonathan, thank you very much for being with us.

Jonathan Helwink ([01:19](#)):

Thank you, Jason. Thank you for that great introduction. Happy to be with you today.

Jason Altmire ([01:24](#)):

We, of course, represent, generally speaking, the proprietary sector of the career education community. We have expressed concern about the current administration's new rule regarding borrower defense to repayment. As you know, there is an ongoing lawsuit in Texas relating to that. Given your background and the history that you have, you are called upon to comment about this. You authored a very popular opinion piece that ran recently at Inside Higher Ed, a trade publication for higher education. Can you talk a little bit about just the history of borrower defense to repayment? Why does it exist right now? While it's been ping-ponged back and forth between Democrat and Republican administrations, you were involved in the most recent attempt before the Biden administration conducted their change. Why does borrower defense exist in the first place?

Jonathan Helwink ([02:27](#)):

Thanks, Jason. Great question to get us started. There's a very short little line in the Higher Education Act, which the Obama administration used as a basis to respond to two really catastrophic school closures slash failures during that administration. From there, and because of the Obama administration's concern about similar things happening in the future and recouping tuition money and making students whole, they created this whole apparatus that we know as borrower defense to repayment. Unfortunately, for the community and for students and, really, for regulatory consistency, they did it a day or two before the 2016 election. As a result of the way that election went, there was an administration change in January following the publication of the 2016 Borrower Defense Rule and prior to when the rule became effective, which was July 1st, 2017.

([04:01](#)):

Look, elections have consequences. The Trump administration, the administration that I was a part of, took a different tact on borrower defense that was finalized in the 2019 rule. We certainly made some changes from the Obama administration's rule. Then, of course, as I said, elections have consequences. The 2020 Election created a whole new rebirth of the borrower defense rule and the rule that we're here to talk about today.

Jason Altmire ([04:35](#)):

Can you talk about what the issues that you faced were with regard to your work during the Trump administration as it relates to some of these more comprehensive issues that you've written about relating to third-party groups filing claims, the expansion of the definition of misrepresentation and things like that? What are the differences between what you finalized and what's occurring now?

Jonathan Helwink ([05:01](#)):

There are a lot of differences. One that I would add, that I think is one of the most significant changes, between not only the Trump administration rule and the Biden administration rule, but really, between the Obama administration rule and the Biden administration rule, because even though it's the same party, obviously, there are some pretty significant ... Maybe the better word for it is evolutions between the 2016 rule and the rule that's going to become effective in a little less than a month.

([05:39](#)):

For us in the previous administration, we put an emphasis on harm and the borrower actually making a showing of harm. That's something that we struggled with because it is true that the borrowers who are filing these claims are not typically attorneys. They didn't have the assistance from legal counsel. So it is a pro se claim. If you were getting into court, that's probably what you would call it. That is something that we struggled with. We tried to find a balance between a legal case standard for fraud, or what we were internally calling fraud light, and just to ... I think that my college lied to me. I don't have any evidence of that other than what I think I remember hearing three or four years ago when I signed up for classes. It's hard. It's hard to thread that needle there. Frankly, the administrations have a different approach to that.

([06:55](#)):

The Biden administration, which I guess is the most important rule now because, really, the current rule, the one that's going to become effective in a month, really just aggregates the previous rules, especially on the borrower side, they began the negotiated rulemaking on borrower defense issues with a very simple plan. That plan was to make it more borrower friendly. That's what they were interested in. They wanted to streamline the process for borrowers so that they could get to relief faster than the previous rules. The reality is that there is a ... I mean, this isn't a legal term, but there is a ridiculous backlog of claims at the department, hundreds and hundreds of thousands of claims that are just waiting to be adjudicated. Obviously, the Biden administration has taken steps outside of the borrower defense process internally to remove some of those claims and adjudicate those claims, in a sweeping action to get rid of them as quickly as possible.

([08:07](#)):

But the thing that gets me and, as a former regulator, the thing that concerns me, is that there are elements of the new rule that, even if the current backlog of claims could be wiped out in a single act, just assuming that's even possible, there are things in this new rule that are going to lead to a large backlog of claims that the department is not going to be able to adjudicate in a timely fashion. The thing that I think about with regards to that concern, strictly from an administrative perspective so that we're not just kind of back to where we are now in five years or whatever it is, is the group claim process and the third-party requester process. As I said, the Biden rule and the Obama administration rule are not the same rule. It's not just a resurrection. It is an evolution. The thing that separates it in my mind in the most significant way is this third-party requester element.

[\(09:20\)](#):

The department, originally in the negotiations, kicked around this idea that it wouldn't be just borrowers that could file claims, or the department, because obviously the department can start borrower defense claims as well. We can talk about the bases for that in a minute. But they also kicked around this idea of third-party requesters, i.e, non-federal government agents like the department or borrowers themselves, filing claims on behalf of borrowers. It seemed like something that the department was going to go for with regards to state agencies. When I say state agencies, what do I mean? Primarily, what we're talking about is state attorney generals.

[\(10:07\)](#):

We know from communications that have been made public from the department and some of the things that they have said out in the open that the department is already working with state AGs on borrower issues. Whether that means filing borrower defense claims, I don't think it's obvious that that's what it means. But there is coordination that's going on with state AGs. State AGs are included. State oversight entities would be able to file group borrower defense claims. State agencies responsible for approving education institutions within the state, and then a catchall regulatory agencies with state authority. That was something that the department started the conversation with. There were negotiators who also thought that non-state entities should be included in third-party requesters. These were primarily negotiators from the legal aid organizations, the consumer protection organizations. Those are nonprofit, mostly attorneys who file cases on behalf of consumers who believed that they were wronged in some sort of transaction, whether it's in the higher education industry or in other industries as well.

[\(11:33\)](#):

Initially, the department didn't go for it. They thought, "No, no, no. That's probably going too far. We're not going to do that." But between the NPRM, which is the notice of proposed rule making, which is like the first step in the publication of a borrower defense rule, and the final rule, the department changed their mind and said, in fact, they were going to allow legal assistance organizations to file claims on behalf of borrowers. That opens up an entirely new avenue of claims. When you think about all of the group claims from state agencies and then all of the group claims from these legal assistance organizations, you could very well be looking at a true backlog of claims. Even if we were able to clear out those that already exist, I'm afraid that we're going to repeat history here.

Jason Altmire [\(12:35\)](#):

There's a few things to work with, with everything that you just said, that are incredibly alarming. You talk about the group claims, so claims will be reviewed by the department as a group rather than individually. There's a presumption of merit when the claim is filed. In many cases, it will not be the students themselves who are filing the claims. It will be a third-party entity. Everyone who listens to this podcast regularly knows there are individuals and groups out there that wake up every day thinking about how they can put for-profit higher education institutions out of business. They just have an ideological disagreement with the idea that for-profit schools exist, and they have made it their mission to make it as difficult as possible for them to operate, and make the regulatory structure so onerous that it just makes it impossible for them to continue. So you're going to have these groups going out there.

[\(13:36\)](#):

As you have pointed out in other forums, I've heard you speak and right about this, the student in the beginning doesn't even have to be aware that the claim has been filed on their behalf. They will be asked after the fact, "Do you want to go forward with this? Do we have your consent?" But when you're presented with the opportunity, "Hey, do you want to get your loan repaid?" who's going to say no to that? So you're going to have these third-party organizations with a strong chip on their shoulder, a bias against the sector that we represent. They're going to file these claims. They're going to be reviewed as a group.

[\(14:12\)](#):

One of the examples I've heard of how this could work with regard to the ambiguous definition of misrepresentation, the way things could be worded on a website. Certainly, if there's legitimate misrepresentation by a recruiter and things like that, that is absolutely something that should not be allowed. But something as simple as, let's say there's a tour going on for prospective students, and one of the students that they're interacting with during the tour says, "Oh, this is a great program. Everyone gets jobs. It's just so life-changing. I've had such a good experience." That is the type of thing that they could bring forward and say, "I was told that everyone got jobs." Now, the person who said that was not necessarily a position of authority and whatnot. Then now you have borrower defense claims.

[\(15:05\)](#):

Then, on top of all this, you talk about the backlog. Correct me if I'm wrong, but there is a mechanism in the Biden rule that says, "After a claim has been pending for a period of time, it is presumed to have merit, and it is approved if they don't get around to adjudicating that claim by a certain period of time." So if they're overwhelmed with claims, they can't get to them, then they're adjudicated as having merit, which is incredibly harmful, obviously, for institutions and just really an unbelievable part of the rule. They're creating a backlog that's going to result in loans probably not being adjudicated by that deadline and then just forgiven without even a review. Did I characterize that correctly?

Jonathan Helwink [\(15:58\)](#):

Yeah, that's right, Jason. What I would add as well is that any claims that are currently pending on July 1 are going to get the Biden rule treatment. So even if you filed your claim, let's say, last year when the Trump administration rule was still enforced, if it is pending on July 1, then you get Biden administration rule treatment. Like I said, it aggregates the other rules in its passage.

[\(16:34\)](#):

A couple of things in response to what you said. While I agree with you that there are organizations that I think meet the characteristics that you outlined, one of the things that I noticed, because I wrote a number of comments to the notice of proposed rule making, poured over the final rule. I find that when I read these rules, that it's so convoluted. They're so long that you kind of look for moments of clarity within the rule. A lot of where I find that clarity can be found is not necessarily in the preamble to the rule. For those of you who don't know, that's where the rule is essentially explained to the audience. But in fact, in a different rule that isn't written by attorneys, by and large, that's called a regulatory impact analysis, which is essentially an explanation of the rule written by what amounts to an accountant. It's very, very short and very clear and gets right to the point. Lots of numbers in it, which is I think why people don't read it.

[\(17:44\)](#):

But what I ended up finding, and I was really surprised by this and made sure that my math was correct with a colleague, the regulatory impact analysis states that between 2015 and June of last year, the department had received 554,000 borrower defense claims. Then the department does something weird. It says, "Three-quarters of them are from proprietary institutions, and only five percent are from public institutions." Then it just moves on. What I found interesting about that, and I think this is the genesis of the article that I wrote for Inside Higher Ed, is that there's an unspoken number of claims in that 554,000. That is claims against private nonprofit institutions. You figure that number is a little over 100,000 claims. Look, 100,000 is just a fraction of the 554,000, but it's nothing to sneeze at. It's a significant number of claims against private institutions. Here you have this rule essentially designed for what the department sometimes calls predatory institutions that just happen to be proprietary, that you have 100,000 claims where that characteristic or that characterization doesn't apply.

[\(19:26\)](#):

So one has to wonder, "Where do those 100,000 claims, how do they get treated? Why are we not talking about those?" One of the things that I have spoken to colleagues, both at the firm and at the department and at other law firms as well, is that a lot of us see borrower defense as the new frontier for regulatory enforcement, not necessarily against proprietary institutions, but against nonprofit institutions. You see all of the news stories from time to time. This institution fudged its rankings numbers. This institution fudged its placement numbers. This one fudged its enrollment numbers. You think to yourself, as an attorney who thinks a lot about borrower defense, "Are these borrower defense claims?" Frankly, looking at the standards, whether it's substantial misrepresentation, omission, or the new aggressive and deceptive recruitment, you were getting at that a little earlier, the answer is yes. The answer is, "Yes, those would be borrower defense claims."

[\(20:49\)](#):

For many years since the passage of the rule, the refrain has been, "Well, the administration is never going to take action against a nonprofit institution." They're not going to do it. It's a favored status, they believe, and they have actually said before, they said it in the NPRM, they said it in the 2016 rule, "Highly selective nonprofit institutions have value in and of themselves." Interestingly, that language isn't found in the 2022 borrower defense rule. The Biden Administration final rule doesn't have that language in it. It causes you to wonder about what the future holds for borrower defense enforcement, especially since, and this is, I think, the kicker, the claims aren't going to come from the department, even if the department has favored status for these institutions that they deem valuable, just assuming that for a second.

[\(21:45\)](#):

That doesn't say anything about state AGs. It doesn't say anything about any of the regulatory agencies at the state level. It doesn't have anything to say about the Consumer Protection organizations, which, over the past few years, have not specifically targeted, but have taken actions against nonprofit, and even public institutions, who they feel are presenting misrepresentations to the students or omitting certain important facts about the program. So yeah, I think when I talk to my colleagues, we say, "Look, we're lone wolf on these issues, but when we talk to even our nonprofit clients, we say, 'Look, you got to start taking borrower defense seriously.'" Oftentimes, the refrain back to us is, "What's borrower defense? What's that?" You get 10 claims for borrower defense, and they think it's no big deal, like, "Oh, okay. Well, whatever."

[\(22:44\)](#):

I wonder about that. I wonder about what the future of borrower defense holds because this could be like so many things in our environment nowadays, and I think you'll agree with this, Jason. It could get politicized. I can imagine a state AG who's concerned about quote-unquote, "woke institutions" that he decides to weaponize, or she decides to weaponize the borrower defense process. That's what this rule engenders. That's a real possibility, and certainly goes far beyond what either the Obama administration or the Trump administration's intentions were for borrower defense.

Jason Altmire [\(23:27\)](#):

That's exactly the point that I wanted this conversation to evolve to. As we begin to close, we've had a very difficult time getting the nonprofit institutions and their association representatives in Washington, and certainly the public institutions. We've had a hard time getting them interested in this issue. We've made the same case that you did. You look at these schools. I won't name them. But people know very high-profile cases of doctoring outcomes for US News rankings. One of the more prominent schools in the Northeast, somebody went to jail over that, and then there was a fine involved. That kind of thing happens. Again, we're talking about a very ambiguous definition of misrepresentation.

[\(24:14\)](#):

I think what I get from the people that we have this conversation with, and maybe you hear the same, is even if these claims are filed, maybe you have an adversarial, they would classify as a right-wing anti-woke attorney general, let's say a Governor DeSantis, whoever it might be. You look at what's happening in Florida you could very easily envision it happening. I think the backstop currently for a lot of these nonprofit and public schools is, "Well, the department under President Biden is not going to adjudicate them favorably. Those claims are not going to be accepted." Perhaps that's the case. But eventually, you're going to have a different administration with a different point of view.

[\(24:58\)](#):

Let's say, instead of Governor DeSantis, you have a President DeSantis or somebody like President Tim Scott. Whoever it might be in the future may have a very different opinion of how those claims should be adjudicated and what constitutes misrepresentation for a nonprofit or even a public school. When you think about the future and moving forward and the ambiguous way that the rule is written, it does open the door for very substantial involvement for people who have a political interest in taking on that side of the higher education sector as well.

Jonathan Helwink [\(25:37\)](#):

Yeah. I think that's a great point, Jason. I'll add one thing to this. In fact, I'll add two things. First off, what I would add is that the borrower defense rule is not just about the borrower defense rule because, to the Biden Administration's credit, they have intertwined and interlocked all of these rules that they are revising together. So borrower defense is not just about borrower defense claims. It becomes a financial responsibility issue. Then it becomes a certification issue and an administrative capability issue. It all links together. Once the dominoes begin to fall, the way that they have set up these rules is that it isn't just about a single domino called borrower defense. That's the first thing that I would say.

[\(26:25\)](#):

For those who think that a Biden administration, or for that matter, any Democrat administration, would never go after nonprofit or private nonprofit institutions, I am not going to say that, look, they're wrong or they're right. I would simply point their attention to the recently published financial value transparency rule as part of the gainful employment rulemaking, which, obviously, gainful employment targets proprietary institutions and a couple of programs at nonprofits. But the financial value transparency, or low financial value regulations that are being promulgated, those apply to all institutions.

[\(27:11\)](#):

If it goes through as it's proposed, I don't know because we're still early in the process, that's going to require student disclosures. The student's going to have to sign a piece of paper that says, "I'm aware that this program at such-and-such private nonprofit institution is a high debt, low earnings program." Now, that isn't gainful employment, we're going to come to close your school down. I get that. It's not the same, but that looks like targeting to me. That looks like, "Wow, we haven't done that kind of thing before, where it doesn't matter. Harvard is going to have to say, 'Yeah, this is a great program, but you got to sign this piece of paper that says X, Y, and Z.'" That's not good. It might not be good information that they want their students to have front and center.

Jason Altmire [\(28:06\)](#):

Our guest today has been Jonathan Helwink. He is one of the nation's foremost experts on this issue of borrower defense to repayment. He's currently an attorney at the Duane Morris Law Firm specializing in higher education, and he is a former senior official at the US Department of Education. Jonathan, thank you very much for being with us.

[\(28:32\)](#):

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