

ANALYSIS

Making Students the First Priority: Removing Barriers to Education Through Legislative Reform

By Darryl Hamm and Jessie Brown

The Higher Education Act¹ (HEA) was passed in 1965 with a clearly articulated goal: to provide access to higher education for students who otherwise would be unable to attend. The act allocated federal funds to supply financial assistance to needy students for the cost of postsecondary education. The federal government now spends more than \$50 billion a year to help students at 6,600 institutions of higher education.² While the act aims to remove barriers to education, the 1998 Higher Education Act Drug Provision³ has consistently hampered the ability of some students to gain federal assistance.⁴

The amendment makes students ineligible for aid if they have been convicted of any type of drug offense. This undercuts the goal of removing barriers for needy stu-

dents, punishes students twice for the same mistake, isolates drug offenders by focusing exclusively on drug-related crimes, and has a discriminatory effect on the distribution of federal aid.

The drug provision works on a timeline, making students ineligible to receive aid for a period of time based on the offense. For a first-time possession offense, the student is ineligible for one year. For that student's second possession offense, he or she is ineligible for two years, and for any subsequent offense, the student is ineligible to receive aid indefinitely. For sale of a controlled substance, a student is ineligible for two years after the first offense, and indefinitely for the second offense.

There is an exception for students who complete an approved drug rehabilitation program, which includes two unannounced drug tests.⁵ This exception is of little help to low-income students because no-cost, 12-step programs, such as Narcotics Anonymous, do not conduct unannounced drug tests. Needy students who require federal aid to attend college are exactly the same students who cannot afford private substance abuse treatment. Furthermore, there are no federal funds allocated to assist students with drug treatment programs.

There are no analogous provisions in the HEA for non-drug crimes. Thus, any prospective student convicted of a serious violent crime such as robbery, assault and battery, or rape remains eligible for federal financial aid under the HEA. However, another student convicted of a minor drug possession offense would be denied financial aid for at least one year.

Large Numbers of Students Lose Assistance

According to the Coalition for Higher Education Act Reform (CHEAR),⁶ more than 128,000 students have already been denied federal assistance under this provision. This is due, in part, to what some legislators say is a misunderstanding of the original provision. U.S. Rep. Mark Souder, (R-IN), the author of the original amendment, has said that the provision has been misinterpreted by both the Clinton and Bush administrations. He says that the law was intended to apply only to those students who are convicted of a drug offense while they are receiving federal education aid.

To date, the amendment has been applied retroactively, to bar any student applying for financial aid from receiving it because of a drug offense that occurred at



Marlene Desautels

¹ 20 U.S.C. §1071 (2004).

² James B. Stedman, *Higher Education Act: Reauthorization Status and Issues*, Almanac of Policy Issues, http://www.policyalmanac.org/education/archive/crs_higher_education.shtml (Oct. 9, 2002).

³ 20 U.S.C. §1091 (2004).

⁴ Federal assistance is defined as grants, loans, or work assistance (work study).

⁵ 20 U.S.C. §1091(r).

⁶ Coalition for Higher Education Act Reform (CHEAR), *1998 Amendment to the Higher Education Act fact sheet*, <http://www.raiseyourvoice.com/docs/Factsheet-CHEAR.doc> (Mar. 3, 2004).

any time. This penalizes potential students a second time, after they already have been punished by the criminal justice system. Souder said, "I am an evangelical Christian who believes in repentance, so why would I have supported that?"⁷

In essence, as currently implemented, the HEA drug provision effectively works as a zero-tolerance provision for higher education. Like comparable disciplinary provisions in many elementary and secondary school systems, which expel students from school for certain offenses for one year without consideration of individual circumstances, the HEA drug provision essentially acts as an absolute bar to federal financial assistance for at least one year. For most low-income students, this penalty is essentially the same as an expulsion, since their receipt of federal financial assistance is crucial for their continued attendance at a college or university.⁸ Further, the one exception for completing a drug rehabilitation program that conducts at least two unannounced drug tests is an option that is typically too expensive and beyond the reach of most low-income students.

The HEA drug provision not only increases the likelihood that low-income students will have to withdraw from college, but also places these students at an increased risk for a long-term disruption of their higher education. CHEAR reports that 36 percent of students who are forced to leave four-year institutions after the first year do not return to school

within six years; that figure rises to 50 percent for students at two-year institutions.⁹ These risks to low-income students mean that they are less likely to obtain the level of education necessary to rise out of poverty, and are more likely to enter the criminal justice system.¹⁰ The U.S. Department of Labor estimates that job growth between 2000 and 2010 will overwhelmingly be in fields requiring a college education.¹¹

Low-income students feel the brunt of the HEA drug provision, the very group the original HEA was designed to help. Wealthy students who commit the exact same drug offense as low-income youth

Punitive drug conviction provisions undercut the goals of the Higher Education Act.

are far less likely to have their education disrupted through a loss of federal financial aid. In 1999-2000, nearly 84 percent of low-income students received financial aid grants, compared to 38.5 percent of high-income students.¹² The law does nothing to deter drug use among wealthy students, while it penalizes low-income students without any assessment of the individual circumstances surrounding their convictions.

Even more disturbing is the continued discriminatory impact against racial minorities that the HEA drug provision perpetuates. In recent years, numerous researchers have pointed out the disproportionate drug conviction

rates for African Americans and Latinos in comparison to whites.

Even though national surveys indicate that whites constitute 74 percent of monthly drug users, African-Americans, 13 percent, and Latinos, 9 percent, the drug conviction and incarceration rates are virtually the reverse of user rates.¹³ For example, the Sentencing Project reports that whites constitute only 19 percent of those actually sentenced to state prison for drug offenses, while African-Americans comprise 56 percent, and Latinos, 23 percent of those convicted and sentenced to state prison for drug offenses.¹⁴

The penalty in the HEA drug provision does not turn on drug use, but actual drug convictions. While there is no inherent problem with relying on convictions, the disproportionate rate at which minorities are convicted, even though their reported drug use is comparable to that of whites, places minority youth at a disproportionate risk of falling victim to the HEA drug provision.

Further exacerbating the risk for minority youth is their heavier reliance on financial aid for college.¹⁵ Half of all African-American and 45 percent of Hispanic undergraduates receive federal aid, while only 33 percent of white students do.¹⁶ The latest education data confirms that minority youth already face a number of barriers to higher education, such as insufficient financial resources and inadequate academic preparation at low-performing K-12 schools.¹⁷

⁷ Greg Winter, *A Student Aid Ban for Past Drug Use Is Creating a Furor*, N.Y. Times, Mar. 13, 2004, at A14.

⁸ See National Center for Education Statistics (NCES), *Paying for College: Changes Between 1990 and 2000 for Full-Time Dependent Undergraduates* (June 2004). Most low-income youth (78.6%) attending college received some form of financial aid.

⁹ See CHEAR, *supra* note 6.

¹⁰ See *Id.*, Information from Federal Bureau of Prisons. Only 48% of low-income students attend college, compared to 77% of high-income students. See Institute for Higher Education Policy and Scholarship America, *Investing in America's Future: Why Student Aid Pays Off for Society and Individuals*, <http://www.ihep.org> (May 2004), at 2.

¹¹ See Institute for Higher Education Policy, *supra* note 10 at 7.(citing U.S. Department of Labor, Bureau of Labor Statistics).

¹² See NCES, *supra* note 8, at 18.

¹³ The Sentencing Project, *Distorted Priorities: Drug Offenders in State Prison*, <http://www.sentencingproject.org> (September 2002), at 11.

¹⁴ See *id.*

¹⁵ NCES, *Characteristics of Undergraduate Borrowers: 1999-2000*, <http://www.nces.ed.gov/pubs2003/2003155.pdf> (January 2003).

¹⁶ See CHEAR, *supra* note 6.

¹⁷ Education Week, *College Access*, <http://www.edweek.org/context/topics/issuespage.cfm?id=45> (updated September 9, 2004).



Marlene Desautels

As compared to whites, African-Americans and Latinos also have lower rates for obtaining college degrees.¹⁸ Given the importance of higher education, anything that acts as a barrier to higher education should be carefully scrutinized.¹⁹

Repeal Efforts Continue

Efforts to reform the drug provision have been widespread. Many advocacy groups, such as CHEAR, support a complete repeal of the provision. U.S. Rep. Barney Frank, (D-MA), introduced a bill (H.R. 685) in 2003 to repeal the provision. The bill had 69 co-sponsors, all Democrats, and garnered support from the Drug Policy Alliance,

National Association of Financial Aid Administrators, National Association for the Advancement of Colored People, U.S. Student Association, Legal Action Center, and more than 100 colleges and universities.²⁰

If Congress repeals the HEA drug provision, students convicted of drug offenses would still be held accountable for their federal financial aid on a case-by-case basis. Under a provision of the Anti-Drug Abuse Act of 1988, both state and federal judges have the authority to revoke federal financial benefits, including financial aid, for anyone convicted of a drug offense.²¹ In addition, students would still

be subject to school disciplinary procedures for any drug use. Most schools suspend or expel students for illegal drug use.²²

Proposed Amendments Miss the Mark

Rather than supporting a total repeal, many in Congress support relatively narrow amendments to the HEA drug provision. For example, in June, U.S. Rep. Rob Portman, (R-OH), introduced H.R. 4676, the Second Chance Act of 2004. This bill has 18 co-sponsors.²³ It seeks to reduce recidivism, and facilitate re-entry into the community for those who have been in prison. The bill would amend the HEA

¹⁸ The percentage of Latinos and African Americans with a bachelor's degree or higher is considerably lower than for whites – 11% for Latinos and 17% for African Americans, compared to 28% for whites. See Alliance for Equity in Higher Education, *News Release: Minority Serving Colleges and Universities Propose Bold New Agenda for Federal Investment in Higher Education*, <http://www.ihep.com/Organization/Press/Alliance20030213.htm>. (Feb. 13, 2003).

¹⁹ Unemployment rates and median salaries are just two examples of the dramatic differences between those with a bachelor's degree or higher compared to those without a degree. In January 2004, the unemployment rate for those with a bachelor degree or higher was 2.9%, compared to 4.9% for those with a high school diploma and 8.8% for those with less than a high school education. In addition, 2002 Census statistics indicated that those with a professional degree average \$82,421, compared to \$29,187 for those with a high school diploma.

See Institute for Higher Education Policy, *supra* note 10, at 5-6.

²⁰ The bill, H.R. 685, was referred to the House Committee on Education and the Workforce on Feb. 11, 2003, and referred to the Subcommittee on 21st Century Competitiveness on Mar. 3, 2003. No further action has been taken. Bill status is available at <http://thomas.loc.gov/>.

²¹ See Public Law No. 100-690, 21 U.S.C. §862.

²² See, e.g., Boston University, University Policies and Procedures: Statement on Illegal Drugs and Alcohol, http://www.bu.edu/personnel/policies_procedures/university/drug_free.shtml. (September 2004).

²³ The bill was referred to House Education and the Workforce on June 23, 2004, and referred to the House Subcommittee on 21st Century Competitiveness and the Subcommittee on Select Education on July 15, 2004. Bill status is available at: <http://thomas.loc.gov/>.

drug provision, by stating that only those students who commit an offense while receiving federal aid would become ineligible. There are at least two other bills with similar amendments also pending in Congress.²⁴

While the proposed amendments are a step in the right direction, they fail to address a whole host of problems with the current HEA drug provision. They all reduce the harshest aspect of the current law, as they would eliminate the prohibition against prospective students receiving financial aid if they had an old drug conviction prior to applying for college.

On the other hand, the zero-tolerance approach for those convicted of drug offenses while in college would still apply. The amendments do not allow room for any individual assessment of a student's circumstances. Further, the amendments would perpetuate the denial of access to educational opportunities for those convicted of minor drug offenses, while imposing no such consequence for those convicted of violent crimes.

Similarly, the amendments would do little to change the disproportionate impact the provision has on low-income and minority youth. Wealthy students who do not need federal financial assistance would still have the right to continue their education, even if they are convicted for the same drug offense as a low-income student. In addition, by continuing to rely solely on drug convictions without factoring in individual circumstances, minority youth will continue to face a disproportionate risk relative to white youth of having their higher education disrupted.

The amendments also fall short on the drug treatment issue. First, if a student is enrolled in a treatment program but has not yet completed it, he or she is still ineligible; and second, there would still be no federal assistance for approved drug treatment programs. Professionals at the National Association of Alcohol and Drug Abuse Counselors (NAADAC) assert that students need to stay in school in order to improve treatment outcomes. Denying access to a college education actually increases the chances that those students will continue to misuse drugs, according to Pat Ford-Roegner, NAADAC executive director.²⁵

Conclusion

Given the weaknesses of the current amendments, the best solution for securing access to higher education opportunities for low-income and minority youth is the total repeal of the HEA drug provision. As long as students face the risk of revocation of their federal financial aid by federal and state judges at the time of their drug conviction, there will be an ongoing deterrent in place. The current provisions in the HEA drug provision also highlight the need for more substance abuse treatment programs for youth. Given that many low-income youth cannot afford access to the types of treatment programs necessary for expeditious reinstatement of their financial aid, federal and state legislators should introduce legislation to expand the availability of drug treatment programs for high school and college age youth.

The current HEA drug provision is an example of an absolutist and punitive law that acts to deprive low-income and minority youth of the very educational opportunities they need to break the cycle of poverty. While our society does not want to promote the illegal usage of drugs, there are better ways to address this problem than a zero-tolerance approach, which turns a blind eye to the individual circumstances of our youth. Denying or disrupting education should be a consequence reserved for those whose individual circumstances clearly indicate that they have abused their financial aid, or who are otherwise not open to treatment and rehabilitation.

Allowing low-income students increased access to treatment without disruption to their education will enhance the likelihood of their educational success. The original goal of the Higher Education Act for low-income youth is explicit. The drug provision is a roadblock to achieving this goal, and undercuts the original aim of the program.

Darryl Hamm is a senior attorney at NCYL, specializing in Youth Employment and Education, Child Welfare, and Juvenile Justice. Jessie Brown was a Summer 2004 law clerk at NCYL, working with attorney Patrick Gardner on children's mental health issues. She is a second year law student at Harvard Law School.

²⁴ The first bill, S.1860, introduced by Senator Orrin G. Hatch, (R-UT), in November 2003, is the Office of National Drug Control Policy Reauthorization Act of 2003. This reauthorization, like the Second Chance Act, would punish

only those who are convicted of drug crimes while receiving aid. Bill status is available at: <http://thomas.loc.gov/>. Another bill, H.R. 4283, introduced in May by U.S. Rep. John A. Boehner, (R-OH), chairman of the House Committee on Education and the Workforce, is the College Access and Opportunity Act of

2004. Again, this bill would only penalize those students who commit a drug offense while receiving aid. This bill was referred to the Subcommittee on 21st Century Competitiveness, Subcommittee Hearings were held, and then Committee on Education and the Workforce Hearings were held on July 13, 2004. Bill status is available at: <http://thomas.loc.gov/>.

²⁵ Coalition for Higher Education Act Reform, *Drug Treatment, Rehabilitation and Policy Reform Leaders Call for Repeal of Financial Aid Drug Penalty*, <http://www.raiseyourvoice.com/Press/PR-Natl-5-12-04.pdf> (May 12, 2004).