

August 30, 2018

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Submitted electronically via: <http://regulations.gov>

Re: Docket ID ED-2018-OPE-0027-0001

Dear Secretary DeVos:

Thank you for the opportunity to comment on the critical borrower defense to repayment rule.

Borrower defense rules, which protect students and taxpayers from fraud, deception, and other misconduct by unscrupulous colleges, both provide relief to students who have been cheated by illegal conduct and deter illegal conduct by colleges. As 80 organizations and advocates working on behalf of students, consumers, veterans, servicemembers, faculty and staff, civil rights, and college access, we emphatically support strong borrower defense rules that hold colleges accountable and help make students whole.

The U.S. Department of Education claims to espouse similar goals.¹ However, the proposed rule would do virtually nothing for the students who have been victimized by schools' bad behavior. The Department's own projections show that, under the proposed rule, it would discharge no more than 2 percent of loan volume made due to an illegal misrepresentation.² Because the Department would collect only a fraction of that sum from colleges, the proposal also does little or nothing to hold unscrupulous colleges accountable and deter their illegal conduct.

The proposal appears to be premised on a fundamental factual error: that a 2015 policy change triggered a flood of frivolous borrower defense applications. In fact, there was no such policy change: the Department has always allowed students to submit defense to repayment claims without regard to their repayment status.³ Moreover, as the Department itself admits, it has no evidence of large numbers of frivolous applications either before or after 2015.⁴ As a result, the rule's extensive efforts to limit claims, raise the standard of proof, and impose new procedural requirements are unjustified, as well as punitive to students and lax to colleges.

¹ U.S. Department of Education, Notice of Proposed Rulemaking, 83 FR 37242 at 37242, July 31, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2018-07-31/pdf/2018-15823.pdf> ("These proposed regulations are designed to: Provide students with a balanced, meaningful process... to ensure that borrower defense to repayment discharges are handled swiftly, carefully, and fairly").

² Calculations by TICAS using data from U.S. Department of Education, 83 FR 37242 (see Table 5). Calculations assume that "borrower percent" is the share of the loan volume of potential borrower defense claims that are expected to lead to successful discharges and does not include the proposed defensive claims requirement

³ See U.S. Department of Education, 81 FR 39353; U.S. Department of Education, 81 FR 75956; and Eileen Connor, Project on Predatory Student Lending, Letter to Jean-Didier Gaina, August 2, 2018, www.goo.gl/NKnf3H..

⁴ 83 FR 37242 at 37243.

Students who are cheated by their colleges should not be left to struggle to repay their loans for years to come. We urge you to make the following changes in your final rule:

1. Create a fair process to provide relief to students who have been harmed.

By narrowing the range of recognized illegal acts by colleges, creating new evidentiary burdens, and imposing new procedural obstacles, the vast majority of cheated students would be prevented from getting relief under the Department's proposal. We urge the Department to instead adopt a process that will quickly and fairly identify students who have suffered from illegal conduct by their colleges, and to provide them the relief they are entitled to under the law.

First, the 2016 regulations recognized borrower defense claims made based upon a substantial misrepresentation, a breach of contract, or a judgment against the school. By eliminating claims based upon a breach of contract or a judgment, the proposed rule would limit claims to those based on substantial misrepresentations, even when colleges were clearly in violation of other laws.

Second, the proposal would require students to prove that the college "acted with an intent to deceive, knowledge of the falsity of a misrepresentation, or a reckless disregard for the truth." As it is highly unlikely that borrowers have access to evidence that could prove such malintent on the part of the school -- particularly without the benefit of legal counsel or the process of discovery -- requiring them to prove as much would effectively deny relief to most applicants.

Third, the Department is considering applying a clear and convincing standard of evidence. Such a standard would be out of step with consumer protection law and with ED's other administrative proceedings, without advancing the Department's goal of limiting frivolous applications.

Fourth, the Department's proposal imposes strict timing limitations, leaving borrowers only a narrow window during which their applications could be considered. Its primary proposal allows only 30 to 65 days after notice of adverse actions being taken against the borrower such as wage garnishment. Its alternative contemplates allowing borrowers only three years from the date they left their school. Yet these narrow application windows are likely to shut out the most disadvantaged of borrowers who do not yet know of their right to seek relief or of the evidence that would be needed to prove their claim. Further, deceived borrowers may not understand the extent of the deceit or have the evidence to prove it until long after they enrolled, when promised jobs have failed to materialize despite the borrowers' best efforts. Imposing strict time limitations for borrowers to apply is unnecessary and out-of-step with the realities harmed borrowers' experience.

Fifth, the proposal only recognizes financial harm suffered by borrowers, and requires them to show that their financial harm is not the result of their workplace performance, decision to work less than full-time, or a variety of other factors. The language in this Notice of Proposed Rulemaking seems designed to dissuade borrower applications and appears to blame borrowers for the failings of institutions. Suggesting that deceived borrowers are themselves to blame for their lack of employment or for believing an institution's lies is out of touch with well-documented abuses of colleges.

Finally, it would eliminate group applications, even in cases of clear, widespread fraud. Requiring that harmed borrowers apply individually even when there is convincing evidence that they were harmed as a group is both unfair to borrowers and unnecessarily onerous to the Department. Indeed, the Department states that the current, individualized process "has proven to be burdensome to borrowers,

given the time it takes to adjudicate each claim, and costly to taxpayers.” This rationale would call for *expanding* access to group applications as a means of reducing borrower burden and the time needed to adjudicate, not eliminating them.⁵

The net effect of these changes would -- by the Department’s own estimates -- prevent the vast majority of students with loans connected to illegal misrepresentations from receiving loan relief. Correspondingly, the proposal would have little or no deterrent effect on illegal behavior by colleges. It would also substantially increase administrative burden on the Department by increasing the complexity of the standard and preventing the Department from considering claims together even in cases of widespread fraud.

We recommend that the Department, at minimum, retains the 2016 borrower defense provisions. Any changes should make access to relief more accessible to borrowers who have been subject to misrepresentations and other unlawful school conduct.

2. Do not force harmed borrowers to default in order to apply for relief.

Requiring borrowers to default before applying for borrower defense would add insult to injury, forcing harmed borrowers to suffer even greater damaging consequences with a long process and uncertain result.

The Department itself recognized the dangers of default in 2016 by writing, “When borrowers default on their loans, everyday activities like signing up for utilities, obtaining insurance, or renting an apartment can become a challenge. Borrowers who default might also be denied a job due to poor credit, struggle to pay fees necessary to maintain professional licenses, or be unable open a new checking account.”⁶

Contrary to the claims in the Department’s notice, it has never previously interpreted the law to allow borrower defense claims only from borrowers who have defaulted.⁷ Nor has its decades of experience administering borrower defense provisions produced any evidence of a significant number of frivolous or abusive claims.

We recommend that the Department continue to accept defense to repayment claims from borrowers in good standing and all other repayment statuses.

3. Protect borrowers' right to their day in court.

The 2016 rule ensured that students can hold colleges accountable for wrongdoing in the courts, rather than being forced to pursue any claims in arbitration proceedings that often favor schools. In addition to denying students their right to a trial, the secrecy of the the arbitration process obscures problems from the Department, which could use such information in its oversight of schools, and from prospective students, who could use the information to guide their choice of school. Moreover, the secrecy of arbitration would further compound the challenges facing borrowers seeking to demonstrate that the school intended to deceive them, as required by the proposal.

⁵ 83 FR 37251

⁶ 81 FR 76051 <https://www.gpo.gov/fdsys/pkg/FR-2016-11-01/pdf/2016-25448.pdf>

⁷ Refer to note 3 above.

Simply requiring that colleges employing pre-dispute arbitration disclose as much to students, as the Department's proposal would do, addresses none of these challenges.

We recommend that the final rule retain the current prohibition against colleges participating in the Direct Loan Program from using or enforcing, with any of their students, a pre-dispute arbitration agreement or class-action waiver that shields schools from accountability related to federal loans or the school's marketing or provision of educational services. Such a prohibition protects students' right to choose the dispute resolution they deem most appropriate.

4. Retain students' ability to get a fresh start when their schools close.

Current law allows students to obtain a student loan discharge if they are unable to complete their programs due to the closure of the institution and choose not to continue their studies at another institution. The proposal would require students to continue their education at a program chosen by the closing institution (a so-called "teach-out"). However, there is no guarantee that the new program will suit students' needs.

After the closure of Corinthian Colleges, for example, several of the colleges on the Department's own list of transfer options were at colleges under investigation by federal or state agencies. Forcing students to move from one problematic institution to another is a disservice to both students and taxpayers.

Even quality programs may vary in terms of their affordability, relevance, and location. It is unfair to deprive these vulnerable students of a reasonable choice in how and whether they wish to continue pursuing their education.

Where closed school discharges are not foreclosed by a mandatory teach-out arrangement, the Department proposes to expand eligibility for students who withdrew prior to closure, from within 120 days of closure to within 180 days of closure. While we commend this change, which recognizes that some students who withdrew one semester prior to closure may deserve relief, it does not make up for the proposed elimination of automatic discharges to students who have not re-enrolled in the three years following their schools' closure.

We recommend that the Department reverse course on its proposed closed school discharge changes, except to expand eligibility to include students who withdrew within the 180 days prior to school closure.

5. Retain financial incentives designed to hold colleges accountable and protect taxpayers.

Colleges -- not taxpayers -- should foot the bill for college misconduct. However, the proposal weakens standards requiring troubled colleges to set aside funds to cover potential taxpayer costs, making it more difficult to hold college accountable and reducing deterrence of illegal activity.

We recommend retaining the scheme created by the 2016 regulation that identified early-warning signs for the potential costs of closure or unlawful behavior, and required institutions to put up financial protection before it is too late. The Department's proposed changes would put taxpayers on the hook for colleges' risky behavior -- an abandonment of the federal government's obligation to serve as responsible stewards of taxpayer dollars.

In conclusion, the borrower defense rule finalized in 2016 made substantial progress toward establishing a fair process for mistreated borrowers to have an opportunity for adequate recourse. The rule the Department proposes now would rob wronged borrowers of any realistic opportunity to recover from illegal actions, make it harder to hold colleges accountable for illegal actions, and unnecessarily increase burdens on both students and the Department.

The changes outlined above are the minimum necessary to protect students and taxpayers. We urge you to include them in the final rule.

Sincerely,

American Association of University Professors
American Association of University Women (AAUW)
American Federation of Labor & Congress of Industrial Organizations (AFL-CIO)
American Federation of State, County, and Municipal Employees (AFSCME)
American Federation of Teachers
Americans for Financial Reform Education Fund
Association of Young Americans (AYA)
California Low-Income Consumer Coalition
Center for Public Interest Law
Center for Responsible Lending
Children's Advocacy Institute
CLASP
Coalition of State University Aid Administrators (COSUAA)
Coastal Enterprises, Inc.
Consumer Action
Consumer Advocacy and Protection Society ("CAPS")
Consumer Federation of America
Consumer Federation of California
Consumers Union
Covenant House International
Cypress Hills Local Development Corporation
Democrats for Education Reform
Demos
East Bay Community Law Center
The Education Trust
EMPath
Empire Justice Center
Equal Justice Works
Generation Progress
Goddard Riverside Community Center
Government Accountability Project
The Harvard Project on Predatory Student Lending
Higher Ed, Not Debt
Higher Education Loan Coalition
Hildreth Institute
Housing and Economic Rights Advocates
The Leadership Conference on Civil and Human Rights

Legal Aid Society of San Bernardino
Legal Services NYC
Maine Center for Economic Policy
Maine Equal Justice Partners
Martin Luther King Jr. Fellows
Maryland Consumer Rights Coalition
NAACP
NAACP Legal Defense & Educational Fund, Inc.
National Association for College Admission Counseling
National Association of Consumer Advocates
National Association of Consumer Bankruptcy Attorneys (NACBA)
National Center for Law and Economic Justice
National Consumer Law Center (on behalf of its low-income clients)
National Consumers League
National Student Legal Defense Network
National Urban League
New America Education Policy Program
New Jersey Citizen Action
New York Legal Assistance Group
New Yorkers for Responsible Lending
One Wisconsin Now
PHENOM (Public Higher Education Network of Massachusetts)
Public Citizen
Public Counsel
Public Good Law Center
Public Law Center
Service Employees International Union (SEIU)
Student Action
Student Debt Crisis
Student Veterans of America
The Institute for College Access & Success (TICAS)
Third Way
U.S. Public Interest Research Group (PIRG)
UnidosUS
United States Student Association
University of San Diego Veterans Legal Clinic
The Urban Assembly
Veterans Education Success
Veterans for Common Sense
VetJobs.com
Vietnam Veterans of America
Woodstock Institute
Young Invincibles