COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES
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WASHINGTON, DC 20515–6100

August 30, 2018

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

Re: Docket ID ED-2018-OPE-0027

Dear Secretary DeVos:

We write in opposition to the U.S. Department of Education's (Department) proposed rule on borrower defense to repayment that would effectively dismantle debt relief for defrauded student loan borrowers – a legal right created by Congress in 1993. The proposed rule would shortchange students by $12.7 billion over 10 years in favor of predatory colleges.[1]

After the collapse of Corinthian Colleges, Inc., the Department engaged in rulemaking to both establish a process for the provision of loan relief in cases of institutional wrongdoing and safeguard taxpayer dollars by requiring financial protection from risky institutions. The 2016 rules were finalized after a negotiated rulemaking process and careful consideration of more than 10,000 comments. It is, therefore, concerning that this Administration now seeks to rewrite the 2016 rule in a manner that would not only reverse the progress made under the Obama Administration, but also retreat from the longstanding protections that have been in effect pursuant to the Department's 1995 regulation.

Taken in total, the Department's proposed rule is based on a faulty premise: that the greatest risk to taxpayers is posed by students submitting frivolous claims and not by fraudulent institutions. The Notice of Proposed Rulemaking (NPRM) severely limits eligibility of defrauded borrowers to seek and ultimately receive relief by applying an unrealistically high federal standard for borrower defense claims, forbidding automatic discharge, and imposing a short time limit to file a claim. To further limit relief for deserving students, the Department seeks to create barriers that will deter borrowers from applying for borrower defense. Such barriers include requiring a borrower to default on his or her loans, submit personal information that is irrelevant to the school's misconduct, release educational records, and agree to institutional retribution.

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[1] U.S. Department of Education. Notice of proposed rulemaking: 83 FR 37242. Net Budget Impacts & Accounting Statement. July 31, 2018. Retrieved from https://www.federalregister.gov/d/2018-15823/p-654

While we understand that the Department wants to reduce cost to taxpayers, the effects of this approach undermine the premise of a defense and shift the burden of fraud from institutions to students. If the Department truly wants to protect taxpayers from waste, fraud, and abuse, it should curtail the number of fraudulent institutions that remain eligible for federal student aid.

Below are major concerns we have with the proposed rule:

The proposed rule creates an unfair federal standard, making it nearly impossible for borrowers to receive a discharge.

This federal standard severely narrows the defenses a borrower can use to assert a claim. Whereas an institution's breach of contract and final judgements made by state and federal courts would make a borrower eligible for discharge under the 2016 final rule, the proposed rule excludes these acts and judgements from the list of defenses. This means that a borrower may be forced to continue repaying loans used for a school they just successfully sued for fraud in state court. The Department's approach effectively nullifies a state's longstanding role in consumer protection. Further, the proposed rule also eliminates a provision dating back to the 1995 regulation, which allowed a borrower to assert a claim when an institution's behavior gave rise to a cause of action against the institution under state law. States have been an integral part of ensuring program integrity in the *Higher Education Act* and serve to protect its consumers. The Department should not disregard a state's role in protecting its residents.

Additionally, borrowers would be required to prove that the institution "knowingly made false, misleading, or deceptive statements" or that the company acted with a "reckless disregard for the truth." Proving intentional misrepresentation would require gaining access to internal documents and emails, which the Department does not plan on providing to students, and hiring a lawyer to spend hours poring through this material to find the smoking gun. Defrauded students are the party least suited to carry the burden – they do not have the means or time to meet this standard.

Lastly, the NPRM's preamble mentions the possibility of using a higher evidentiary standard (i.e., the "clear and convincing evidence" standard) for borrowers in positive repayment status. A borrower's repayment status tells us nothing about the institution's fraudulent activities and, thus, should not bear any weight on the evidentiary standard. We encourage the Department to only have one evidentiary standard for all borrowers. Moreover, given the current use of "preponderance of the evidence" in borrower defense claims and the overwhelming use of this standard in civil litigation, we urge the Department to maintain the use of this standard.

The proposed rule would ban automatic group discharge, making the process inefficient for students and the Department.

To further upend the 2016 rule, the Department is proposing to prohibit automatic discharge for similarly-situated defrauded borrowers. The first reason stated in the NPRM is that misrepresentation must be proven by each applicant wanting a borrower defense and, thus discharging loans for groups of people is inappropriate. Using the proposed standard for misrepresentation as an excuse to ban automatic discharge is circular reasoning. If the

Department wanted, it could make an exception for borrowers attending the same institution or program around the same time and create conditions under which group discharge would be allowable. The second reason stated in the NPRM is that group discharge would increase the number of claims that need to be reviewed and burden the Department. However, when an institution harms whole groups of students in similar ways, the Department should expect an increase in claims. Thus, allowing for group discharge, instead of reviewing each individual claim, would require less Departmental resources and expedite the process for students. The rationales used are a thinly veiled attempt to simply make the process more difficult for borrowers.

The proposed rule establishes an unrealistic time frame for borrowers to file a claim in an attempt to limit applications.

Defaulted borrowers will only have 30 to 65 days, depending on the collection action, to apply for a defense to repayment. For example, once the Department intends to garnish a borrower's wages, it sends the borrower a notice. Under this proposal, the borrower would only have 30 days from the wage garnishment notice to file a claim. After that window, a borrower would no longer be able to apply for a defense to repayment. Borrowers are at their most vulnerable during the collections stage, and often may be unreachable by mail or telephone. Requiring that borrowers file a claim within such a short window would penalize defrauded borrowers unnecessarily.

The proposed rule would incentivize loan defaults, causing long-term harm to borrowers and taxpayers.

Defaulting on a federal student loan has dire consequences. Borrowers can face wage garnishment, loss of eligibility for additional federal student aid, and a damaged credit score, which can make it more difficult to get a job and even rent an apartment. For veterans, going into default can also mean losing their security clearance. Defaulting also has negative consequences for taxpayers – defaults increase collection costs and requires the federal government to spend more money. Yet, despite the Department's understanding of these outcomes, it still proposes to force borrowers into default and uses faulty logic to arrive at that policy.

Throughout the NPRM, the Department wrongly declares that prior to the 2016 final borrower defense rule, the agency only accepted claims from borrowers who were in post-default collection proceedings (i.e., defensive claims). As seen in the evidence submitted by the Legal Services Center of Harvard Law School on August 2, 2018, the Department has been accepting claims from borrowers who were in good standing on their loans dating back to 1998.[2] This mischaracterization of history should be enough to consider withdrawing this proposed rule.

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[2] Legal Services Center of Harvard Law School (2018, Aug 2). Comment letter submitted in reference to Docket ID ED-2018-OPE-0027. Retrieved from https://predatorystudentlending.org/wp-content/uploads/2018/08/LSC-Prelim-Cmt-FINAL.pdf

Additionally, the Department uses an unfounded fear of frivolous claims as rationale to limit claims only to borrowers in collection proceedings. However, other than pointing to the increase of claims since 2015, which are related to the closures of Corinthian Colleges, Inc. and ITT Technical Institutes and not due to accepting affirmative claims, the Department fails to include any real evidence of mounting unjustified claims in the NPRM. The Department also does not provide an analysis on the stated anticipated increase in trivial claims.

Only accepting defensive claims would bar defrauded students committed to making timely payments on their loans from accessing their legal right to assert a claim.

The proposed rule would require borrowers to submit irrelevant information and subject themselves to institutional retribution in order to thwart interested borrowers in asserting a claim.

Not only is the borrower required to sign a waiver allowing the institution to share relevant portions of the student's education record with the Department, but the borrower is also required to disclose massive amounts of extraneous information to prove that their financial harm is not the result of their own actions. For example, borrowers would be asked to confirm their "ability to pass a drug test, satisfy criminal history or driving record requirements, and meet any health qualifications…". This information is irrelevant in understanding the misconduct of the institution and tries to place the blame on the defrauded student instead of treating the individual as the injured party. These requirements are clearly intended to discourage borrowers asserting claims of fraud.

Further, under the proposed rule, an institution can refuse to provide borrowers who receive a full loan discharge with access to their transcripts and can deny any verification of information found in the transcripts. Although the Department states that this is current practice, it provides no evidence in the NPRM nor does it cite any regulations. Further, receiving a loan discharge does not invalidate the time or out of pocket expenses, which can be paid using non-federal money such as private loans and savings accounts, spent to take the courses. Permitting such actions would only allow fraudulent institutions to use this to discourage students from pursuing a borrower defense claim.

The proposed rule allows mandatory arbitration and class action waivers, undermining a student's legal right to seek relief.

Restrictive clauses that protect the financial interests of an institution at the expense of a student's legal right have been found amongst tens of pages of legalese in enrollment contracts, particularly at for-profit institutions.[3] This is why two such clauses – mandatory arbitration and class action waivers – were specifically banned under the 2016 final rule. In fact, institutions have acknowledged that these clauses are detrimental to students. Before the Obama Administration issued the 2016 final rule, two of the largest for-profit companies decided to

[3] Tariq, H. & Shireman, R. (2016, Apr 28). How college enrollment contracts limit students' rights. The Century Foundation. Retrieved from https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights

discontinue the practice.[4] While the Department recognizes that these restrictive clauses are not well understood by consumers, the proposed rule refuses to prohibit the use of these clauses and instead mandates the information to be in plain language. This is simply not enough. Mandatory arbitration, which requires students to settle disputes behind closed doors with well-paid arbitrators hired by the institution, places students at a disadvantage. Similarly, requiring students to waive their rights to class actions forbids students from working with other students to seek resolution. Further, the NPRM acknowledges that these clauses prevent the Department from knowing about issues students face at their institutions. Banning these clauses would be an easy step towards preventing these abuses.

The proposed rule impedes loan discharge for students enrolled in schools that close.

Preventing enrolled or recently enrolled students from seeking a discharge if their institution offers a teach-out plan is not the right approach to encourage an orderly closure. Because each accreditor establishes the criteria that an institution must meet when submitting a teach-out plan, teach-out plans vary in quality and have no standard components. Further, for some students, completing their degree through a teach-out plan may simply be undesirable. Students may be required to commute longer, take classes at times that do not work for them, or take courses taught in a different mode. For example, when the International Career Development Center (ICDC) College closed in 2016, they partnered with an institution that only provides distance education courses.[5] Had this provision in your proposed rule been in effect, you would have forced brick-and-mortar students to forfeit their right to a closed school discharge and required them to continue their education solely online. The 2016 final rule provided students with the option to choose. We recommend retaining the closed school discharge option for students enrolled or previously enrolled at a closed school, regardless if the institution has a teach-out plan.

Further, the Department proposes to eliminate automatic closed school discharge for borrowers who do not re-enroll within three years of the school's closure. To justify this prohibition, the Department once again uses circular reasoning. It states that because the institution can withhold a borrower's transcripts, providing automatic discharge would hurt students who want to continue their education in the future. However, the Department has the ability to propose a different rule that prohibits institutions from withholding transcripts.

The proposed rule fails to hold risky institutions financially liable, shifting the burden onto students and taxpayers.

As good stewards of taxpayer dollars, the 2016 final rule contained several mandatory and discretionary triggers that would be used as early warnings for potential risk. Risky institutions would then then be required to provide financial protection through letters of credit. However, to

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[4] Douglas-Gabriel, D. (2016, May 23). Two of the biggest for-profit colleges are making it easier for students to sue. *The Washington Post.* Retrieved from https://www.washingtonpost.com/news/grade-point/wp/2016/05/23/two-of-the-biggest-for-profit-colleges-are-making-it-easier-for-students-to-sue/?utm_term=.04915ae3e42a

[5] U.S. Department of Education, Federal Student Aid. Closure of ICDC (International Career Development Center) College. Retrieved from https://studentaid.ed.gov/sa/about/announcements/icdc

protect institutions, this proposed rule makes several of the mandatory triggers discretionary (e.g., cohort default rate and failure of the 90/10 rule), eliminates several of the original discretionary triggers, and makes the triggers less predictive by narrowing the remaining triggers. These changes would make it easier for institutions to continue operating even when there is high likelihood for closure, making the taxpayer take on the risk.

For all the reasons outlined above, we oppose these changes to the borrower defense rule and urge the Department to abandon its regulatory proposal. We firmly believe that any regulatory changes must make the borrower defense to repayment standards and process fair for defrauded student borrowers and must protect taxpayer dollars by holding risky institutions accountable.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Ranking Member

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Member of Congress

RAÚL M. GRIJALVA
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