Comments from the Legal Aid Community

to the U.S. Department of Education re:

Proposed Regulations on Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program

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Comments submitted on behalf of:

National Consumer Law Center (on behalf of its low-income clients)
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Center for Elder Law & Justice
Center for Public Representation
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Community Legal Aid SoCal
Community Legal Aid Society Inc. (Delaware)
Community Legal Services of Philadelphia
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Texas RioGrande Legal Aid
The Legal Aid Society of Cleveland
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Volunteer Lawyers Project

Introduction and Summary of Comments

These comments, submitted on behalf of organizations across the country that provide free legal assistance to people with low incomes, address the Department's proposed changes to improve income-driven repayment (IDR) of student loans in the Direct Loan program.[1] Our comments are informed by our work as legal aid attorneys and our experience helping low-income borrowers navigate the student loan system.

The proposed regulations are of critical importance to the borrowers we represent, and to the millions of low-income borrowers like them across the country who lack legal assistance. Our clients are often the first in their family to pursue higher education and rely on student loans to access education and career training. Unfortunately, for too many of our clients, the student loans meant to build a bridge to economic stability or mobility do the reverse, trapping them and their families in snowballing and long-lasting debt, with unaffordable payments and an overly complex and difficult to navigate system leading them to struggle to afford both their loan payments and basic necessities for themselves and their families.

Ultimately, many borrowers do not access an IDR plan or cannot afford payments under the current IDR plans, and so default on their loans. Once in default, low-income borrowers and their families face financially devastating consequences, including inflation of their amount owed via collection fees, acceleration of their loan balance such that it becomes immediately due in full, damaged credit, ineligibility for financial aid to go back to school, and involuntary seizures of their wages, Social Security, and anti-poverty payments such as the Earned Income Tax Credit.

The Department's proposed changes to IDR would positively impact our clients, and low-income borrowers like them, in several important ways:

- Those eligible for the Revised Pay As You Earn Plan (REPAYE) would have more affordable payments, would not have to make payments while their income is below 225% of the federal poverty level (FPL), and would be protected from balance growth while making payments, and some would be eligible for forgiveness of their outstanding balance after 10 years.
- Low-income borrowers in REPAYE would have substantially lower total lifetime payments than under either the Standard repayment plan or the current version of REPAYE, meaning that low-income people who are in debt for pursuing education could keep more of their limited income to provide for themselves and their children.
- All borrowers would benefit from much-needed design fixes, such as ending the policy of erasing borrowers' progress toward IDR forgiveness when they consolidate their loans.
- The Department's proposals to automatically enroll eligible borrowers who are 75 days late in making payments in IDR and to allow borrowers with loans in default to enroll in Income-Based Repayment (IBR) have the potential to reduce the staggeringly high

[1] Proposed Regulations Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, 88 Fed. Reg. 1894 (Jan. 11, 2023).

default rate in the federal student loan program generally and among low-income borrowers in particular, and to make default less devastating for people in financial distress.

These are all critical steps in the right direction and will meaningfully improve the lives of our clients and their families. We applaud this important progress. But there is more that must be done to fix IDR and to make sure it works for low-income borrowers. In particular, we urge the Department to prioritize including the following improvements in the final rule:

- **Shorten the timeline to loan forgiveness** so that low-income borrowers can experience freedom from debt sooner and focus on other life and financial priorities, including saving for emergencies, having children, paying for childcare, buying a home, starting a business, helping their children pay for college, and saving for or entering retirement. The Department should also consider more fundamental reforms to the structure of IDR, such as using incremental forgiveness during repayment, to ensure that low-income borrowers can make steady progress in reducing their balances.
- **Increase the amount of protected income** further to ensure that low-income borrowers in all parts of the country can meet their families' basic needs, and apply the protection to all low-income borrowers.
- **Expand access to the improvements being made to REPAYE to low-income borrowers with Parent PLUS loans and loans in default**, who are currently excluded.
- **Make IDR protections for borrowers in default effective** by ensuring that borrowers in default are automatically enrolled in IDR, are only responsible for paying their IDR payment amount, and cannot have more than that amount seized from them.

In addition to explaining these four priorities for improvement, our comments make further recommendations to strengthen income-driven repayment in the final rule. We address each of the following aspects of the proposed rule:

I. Timeline to Loan Forgiveness / Cancellation
II. Amount of Income Protected to Meet Basic Needs
III. Payment Amount - Percentage Income
IV. Protection Against Balance Growth
V. Treatment of Parent PLUS Borrowers
VI. Expansion of IDR to Defaulted Loans
VII. Automatic Enrollment in IDR for Delinquent Loans
VIII. IDR Application and Annual Recertification Process
IX. Consequences of Failing to Recertify
X. Credit for Time in Deferments and Forbearances
XI. Consequences of Consolidation
XII. Treatment of Spousal Income and Debt

I. Timeline to Loan Forgiveness / Cancellation

The Department proposes to leave in place the existing 20 year repayment period before it will cancel any remaining balance for borrowers repaying only undergraduate debt, and the 25-year period for borrowers repaying any graduate debt, but adding a shorter timeline to cancellation for borrowers who take out smaller amounts. It proposes that borrowers who take out $12,000 (the total 2-year borrowing limit for dependent students) or less will be eligible for cancellation after 10 years, and that each additional $1,000 borrowed will add a year to the time until cancellation, up to the 20/25 year caps.

A. We commend the Department for recognizing that it can and should change the existing 20- to 25-year time before cancellation of remaining balances in REPAYE, and agree that such a timeline is too long and discouraging for many low-income borrowers, including those who borrow for short-term educational programs.

Our clients who borrowed small amounts would benefit greatly from having their balances canceled after 10 years instead of 20 to 25, both because they would be more likely to participate in IDR and because they would become debt free much sooner.

When we speak to our clients about IDR, they are often interested in reducing their monthly payments, but are unimpressed by the prospect of potential debt cancellation after 20 to 25 years. That feels like a lifetime. And for older borrowers, it often is. As a result, the benefits of enrolling in IDR—instead of using a much easier to access forbearance—can feel theoretical and slippery. The slipperiness of this promise is made worse by the fact that borrowers' time credited toward forgiveness is not currently tracked and displayed to borrowers, and that few borrowers have ever actually had their loans canceled under IDR. But if we could tell our clients that they can be debt-free within 10 years through IDR, rather than 20-25, relief is much more likely to feel real and attainable. As a result, they will be much more likely to jump through the many hoops to enroll and stay enrolled in IDR until they complete payment or reach cancellation.

And critically, becoming student debt free after 10 years instead of 20 or more would allow low-income borrowers like our clients to improve their often tenuous financial security much sooner, with trajectory-altering consequences for their lives and those of their children. Without student debt, many of our clients would be better able to secure safe and reliable housing and transportation for their families, pay off other debt, secure loans on better terms, support and invest more in their children and extended families, pursue new job training, and save for emergencies. Indeed, recent research found that when borrowers' student loan debt was discharged, borrowers were significantly less likely to be behind on other forms of debt (like credit cards, auto loans, or mortgages), their geographic mobility increased, and they were able to earn more income.[2] Without student debt, our clients would also finally experience relief from

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[2] Marco Di Maggio, Ankit Kalda, & Vincent Yao, *Second Chance: Life Without Student Debt*, Nat'l Bureau. Econ. Rsch. (2019), https://www.nber.org/system/files/working_papers/w25810/w25810.pdf.

the often quite significant stress and anxiety their student debt causes. The benefits of this financial and psychological relief will flow not only to low-income borrowers, but to their children, their extended families, and their communities.

B. We urge the Department to extend the trajectory-altering relief of a shorter timeline to forgiveness to all low-income borrowers.

Unfortunately, the Department's proposal would still leave over 80% of borrowers with a 20+ year wait for relief. Two decades is simply too long for anyone to be kept in debt for pursuing an education. And because low-income borrowers are projected not to pay back their balances in full under the proposed plan,[3] low-income borrowers may disproportionately stay in repayment the full 20+ years, as they will not be among those who pay off their balances early.

We urge the Department to shorten the maximum time until student loan forgiveness in IDR to no more than 15 years for all borrowers, and to consider shortening it further still, particularly for low-income borrowers. A shorter timeline for everyone will increase borrowers' motivation and faith in repaying their loans, ensure that those who must borrow to access higher education do not have to spend the majority of their working lives in debt and paying what is effectively a tax on social mobility, and ensure that no financially vulnerable borrowers are left behind.

Historically, 10 years has been understood to be the appropriate amount of time for people to spend paying back their student loans, and the Department should be wary of extending indebtedness longer than 10 years as the answer to student debt affordability problems. The standard plan, which is the default plan borrowers are placed into, is a 10-year plan. This 10-year standard plan has long been the primary way that borrowers with sufficient means have repaid their loans, and then been able to move on with their lives debt free. Public Service Loan Forgiveness similarly adopts this 10-year standard, promising those who work for the government or nonprofits that they can be debt-free after 10 years of IDR payments, regardless of their incomes. Many legal aid attorneys rely on PSLF to manage their own debts and to secure their financial futures. Indeed, PSLF is a lifeline for legal aid attorneys. But it is hard to tell our clients working in low-wage, often insecure jobs that they will have to make IDR payments for 20 to 25 years before they finally be debt free, while knowing that we will be relieved of our debt in half that time. They deserve the same grace and financial opportunity.

Further, a 20- to 25-year forgiveness timeline all but assures that most low-income borrowers who pursue postsecondary education as young adults will still be paying their own student loan debt by the time their children are ready for college. The average age of first-time

[3] 88 Fed. Reg. at 1915 (Table 3).

mothers in the United States is 26,[4] and the average age of college students is 26[5]—with repayment beginning later, after completion. Many of our low-income clients had young children while they were in school. A student loan system that expects low-income borrowers to still be in debt for their own postsecondary education when their children are college-age is a system that will perpetuate intergenerational indebtedness and inhibit college access and success.

C. We urge the Department to consider shorter forgiveness timelines for low-income borrowers and borrowers in long-term financial distress

In addition to setting a reasonable, and much shorter limit on the maximum time until forgiveness for all borrowers, we encourage the Department to consider setting shorter timelines for low-income borrowers and borrowers in long-term financial distress. Borrowers who continue to have low incomes over an extended period have generally not received a reasonable economic value for their investment of time and debt in postsecondary education. Their financial situation is often precarious. Even if left in IDR for 20 or 25 years, they would be unlikely to pay off their debt, and their income-adjusted payments might never even touch their principal. Leaving them in debt for so long, and requiring them to keep up with annual paperwork and prove their low incomes, while they make $0 payments or payments that only service interest, inflicts unnecessary pain and financial distress, as well as unnecessary administrative burden on both borrowers and the Department.

We strongly urge the Department to consider providing earlier cancellation to any borrower whose low income qualifies them for either a $0 payment or for payments insufficient to reach principal for an extended period of time, such as 3 to 5 years. Additionally, to avoid cliff effects, the Department could consider the proposal the legal aid negotiators put forward during the negotiated rulemaking to scale forgiveness timelines based on annual income.[6] Under that proposal, the Department would use a cancellation formula that looks at borrowers' income each year in repayment and provides cancellation to the lowest income borrowers after 3 years, scaling up to 15 years for the highest income borrowers.

D. The Department's proposal to shorten the timeline to forgiveness to 10 years for those who borrow under $12,000 would help some of our clients tremendously but would unfairly exclude many independent students who may borrow up to $20,000 for 2-year programs and who are disproportionately low-income, women, and people of color.

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[4] Haley Swenson & Rebecca Gale, *The State of U.S. Mothers in 2022: A Fact Sheet*, New America (May 3, 2022), https://www.newamerica.org/better-life-lab/blog/the-state-of-us-mothers-in-2022/#:~:text=Who%20Are%20America's%20Moms%3F&text=Age%20of%20moms%3A%20According%20to,multiple%20socioeconomic%20groups%20%5BLINK%5D.

[5] Rachel Fishman, *Perception v. Reality: The Typical College Student*, New America (2017), https://www.newamerica.org/in-depth/varying-degrees/perception-vs-reality-typical-college-student/.

[6] Persis Yu and Josh Rovenger, Memo re: IDR Proposals - Structure of Forgiveness and Discretionary Income Threshold (Nov. 2, 2021), https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/legaididrpropdiscincomecanc.pdf.

The Department has proposed shortening the time until forgiveness to 10 years, but only for people who borrow $12,000—the two-year borrowing limit for dependent students—with an extra year in repayment added for every additional $1000 borrowed. As explained above, we welcome this relief for the low-income borrowers who will be eligible, but urge the Department to extend it to similarly situated borrowers who attended two years or less of school but are excluded because they were subject to the two-year independent borrowing limit of $20,000.

The Department explains this numerical cut-off point in part by referencing its calculations showing that at the $12,000 borrowing level, no higher income borrowers would benefit from the earlier forgiveness. But its approach suffers from its focus on designing a plan around ensuring that higher-income borrowers are *excluded* from benefiting, rather than designing a plan around ensuring that low-income borrowers—including the many "nontraditional" borrowers served by legal aid programs—are *included*. The Department offers no similar calculations or rationale showing that its proposal would ensure relief to all or even most of the low-income borrowers who need it. Additionally, by using the two-year borrowing limit for *dependent* students as its limit for which students can benefit from a shorter time to forgiveness, the Department ignores that many of the borrowers most burdened by student debt were considered "financially independent" from their parents when paying for school and thus are subject to a higher two-year independent borrowing limit of $20,000. Indeed, this proposal is likely to exclude a majority of postsecondary students who are now "nontraditional" students.[7]

To the extent the Department sets a shorter timeline to forgiveness based on amount borrowed, beginning from $20,000 rather than $12,000 would ensure that nontraditional students—who face particular difficulty in repayment and higher default rates[8]—are not left to struggle longer in debt for short-term educational programs than their financially "dependent" peers. Increasing the limit to $20,000 would also better encompass the student loan burdens of women and people of color who borrow for shorter term educational programs. Women and people of color are much more likely to be considered "independent" students and thus often need to borrow more to access education and are subject to the higher independent loan limits. Indeed, a 2018 study found that 55% of women in college are considered financially independent (compared to 46% of men), and that more than half of all students of color are independent, including 65% of Black students and 63% of Native American students.[9]

Setting the limit at $12,000 instead of $20,000 further risks exacerbating existing inequities in the student loan system because students from low-income families must and do

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[7] *See, e.g.*, Leigh Guidry, *Older Students are the New Normal at College. The Reason? The Recession and New Technology*, USA Today(Oct. 3, 2018), https://www.usatoday.com/story/news/2018/10/03/adult-older-nontraditional-college-students-louisiana/1504180002/.

[8] See, e.g., A. Looney & C. Yannelis, *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions they Attended Contributed to Rising Loan Defaults* at p.63, Brookings (Fall 2015), https://www.brookings.edu/wp-content/uploads/2015/09/LooneyTextFall15BPEA.pdf.

[9] Lindset Reichlin Cruse, Eleanor Eckerson, Barbara Gault, *Understanding the New College Majority: The Demographic and Financial Characteristics of Independent Students and their Postsecondary Outcomes*, Inst. for Women's Pol'y Rsch. (2018), https://iwpr.org/wp-content/uploads/2020/10/C462_Understanding-the-New-College-Majority_final.pdf.

borrow more to access the same level of education as their better-off peers.[10] Similarly, Black students must borrow more at every level of education due to the racial wealth gap and longstanding inequities that have prevented their families from being able to accrue enough wealth to put their children through school without significant debt,[11] and women students borrow more than men, including in part because they are more likely to be supporting dependent children while in school.[12]

More generally, we caution the Department against adopting a forgiveness approach that bases time until forgiveness on the amount borrowed without tying it to maximum borrowing limits for independent students by year or credential. Otherwise, the Department risks exacerbating economic, racial, and gender inequities. We are aware of the economic justifications some use to argue that setting longer timelines to forgiveness for those who borrow more is more "fair" because it will better align payment obligations with "value" received. To that, we urge you to consider the above-cited evidence that students from families with limited financial resources, women, and people of color *must* borrow more to access the same level of education, yet they earn less than their peers after graduating.[13] It is not at all clear that these students who borrow more are getting more, or that it is fair to make them stay in debt longer.

Similarly, we are aware of the arguments that setting longer timelines to forgiveness for those who borrow more will incentivize students to borrow less. We urge you to approach this argument with healthy skepticism in light of evidence that the higher education and student lending sectors are far from theoretical rational markets. In reality, schools are adept at obfuscating their actual prices to students, the financial aid process that helps determine what each student will actually have to pay and to borrow is famously complex, and students are rarely in a position to accurately assess the economic value the school will impart to them. Students are even less likely to be able to project out their future repayment obligations (which will be impacted not just by debt, interest rate, and future earnings, but also by whether they marry, what their spouse earned and borrowed, and how many children they may have) and

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[10] Nancy Wong, *New Data Show Recent Graduates Who Received Pell Grants Left School with $6 Billion More in Debt than Their Peers*, TICAS (Feb, 5, 2021), https://ticas-org.medium.com/new-data-show-recent-graduates-who-received-pell-grants-left-school-with-6-billion-more-in-debt-660022973b55.

[11] Report, Leadership Conf. on Civ. & Human Rights, *Civil Rights Principles for Student Debt Cancellation* (Apr. 18, 2021), https://civilrights.org/wp-content/uploads/2021/04/Civil-Rights-Principles-for-Student-Loan-Debt-Cancellation.pdf.

[12] Fact Sheet, Nat'l Women's L. Ctr., *Higher Education, Recession, and COVID-19: What Students and Student Borrowers Need from a Federal Stimulus Package* (Apr. 2021), https://nwlc.org/wp-content/uploads/2020/04/COVID-Stimulus-and-Higher-Ed-Factsheet.pdf.

[13] For example, according to an analysis of 2018 U.S. Census data by the National Women's Law Center, Black women earn significantly less than White, non-Hispanic men at every level of educational credential earned, including at the associate's degree level, where Black women earn on average $37,994 – significantly less than the $57,586 average earned by White, non-Hispanic men with associate's degrees. See Jasmine Tucker, *The Wage Gap for Black Women: Working Harder and Making Less*, p.4, Nat'l Women's L. Ctr. (Aug. 2019), https://nwlc.org/wp-content/uploads/2019/08/Wage-Gap-for-Black-Women.pdf.

ultimately whether or not they would rely on or benefit from IDR forgiveness 10 or 20 years after graduating.[14] Further, particularly when considering first-generation students, students from low-income backgrounds, and nontraditional students, many do not apply to and receive acceptances from multiple schools and compare financial aid offers or net tuition prices after sticker price discounts. Rather, they are often recruited by a single for-profit school, and they pay the price they are told and borrow the amount they are told they need to, with assurances that they're doing the right thing for their future.[15]

Additionally, while some low-income students may borrow too much, others suffer from borrowing too little. Recent research has found that when low-income students are debt-averse or are encouraged to reduce the amount they borrow, they often have worse academic, career, and loan repayment outcomes.[16] Borrowing less each year, without getting more grant support, can lead to worse outcomes for low-income students when it causes them to have to work more hours while in school and have less time to study, go without needed childcare, experience increased financial stress that interferes with academic performance, spend insufficiently on food, books, and other learning materials, reduce the number of credits they take per term and delay or reduce the likelihood of earning a credential, or drop out.

Given this reality, the Department should not assume that establishing separate timelines for forgiveness based on amount borrowed, without regard to borrowing limits, will effectively encourage students—and low-income students in particular—to borrow less, much less to borrow the optimal amount to maximize their and taxpayers' return on investment in education. While reducing the loan burden that students graduate with is an admirable goal and a goal we share, it is not a goal that can be effectively or equitably accomplished by requiring those who borrow more to pay longer. Instead, the government must address the core causes of increased borrowing, including reduced public investment in higher education, particularly in the face of changing student demographics, and predatory school conduct.

II. Amount of Income Protected to Meet Basic Needs

The Department proposes to increase the amount of income protected to meet borrowers' basic needs (and thus excluded from the calculation of borrowers' monthly payment amounts) from 150% to 225% of the applicable federal poverty guidelines (FPL) in the REPAYE plan. Borrowers in REPAYE who earn at or below these amounts pay $0, while borrowers who

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[14] *See, e.g.*, The Daily, *The College Pricing Game*, N.Y. Times (Sept. 14, 2022), https://www.nytimes.com/2022/09/14/podcasts/the-daily/college-student-debt.html?showTranscript=1.

[15] *See, e.g.*, Report, Public Agenda, Who Profits? Students' Experiences at For-Profit Colleges (Jan. 31, 2023), https://www.publicagenda.org/reports/for-profit-colleges-2023/.

[16] Andrew Kreighbaum, *The Downside of Reduced Student Borrowing*, Inside Higher Ed (July 12, 2019), https://www.insidehighered.com/news/2019/07/12/new-research-shows-reducing-borrowing-can-hurt-students-success-college.

earn above these amounts owe 5-10% of the amount they earn in excess of the protected amount.

Household size	Annual income at 150% FPL for 2022	Annual income at 225% FPL for 2022
1	$20,385	$30,577
2	$27,465	$41,197
3	$34,545	$51,817
4	$41,625	$62,437

A. We strongly support increasing the amount of protected income for all borrowers (including those with graduate debt) in REPAYE, but we recommend that the Department increase the amount protected further.

We agree with the Department that the current amount of income protected, 150 percent of the federal poverty level (150% FPL), is too low. As the legal aid negotiators explained during the rulemaking committee meetings, "Contrary to the assumptions underlying current IDR formulas, many borrowers who earn more than 150% of the FPL simply do not have any discretionary income—every dollar is needed to pay for necessities, and many are still in the red."[17] A recent report by The Education Trust on the experiences of Black borrowers in income-driven repayment reflects our clients' experiences, as more than one-fifth of Black borrowers enrolled in an IDR plan in their study reported not being able to afford either food, rent, or health care.[18]

The proposed increase to 225% FPL is a critical step in the right direction and will allow many more of the low-income borrowers we work with to avoid either defaulting or spending years or decades in extreme financial hardship. But more income should be protected to ensure that student loan debt does not prevent many low-income borrowers from meeting their basic needs, particularly borrowers with young children, borrowers with high or ongoing medical expenses, and the many borrowers who struggle to pay for housing in high cost-of-living parts of the country.

Data on the amount of income needed to meet basic needs, including the food insecurity data cited by the Department, demonstrates that at least 300% FPL must be protected to prevent student loans from pushing a sizable portion of low-income borrowers into food

[17] Persis Yu and Josh Rovenger, Memo re: IDR Proposals - Structure of Forgiveness and Discretionary Income Threshold (Nov. 2, 2021), https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/legaididrpropdiscincomecanc.pdf.
[18] J.B. Mustaffa and J.C.W. Davis, *Jim Crow Debt: How Black Borrowers Experience Student Loans*, The Educ. Tr.(2021), https://edtrust.org/wp-content/uploads/2014/09/Jim-Crow-Debt_How-Black-Borrowers-Experience-Student-Loans_October-2021.pdf.

insecurity, financial hardship, or default. For example, in explaining the need to raise the amount of protected income, the Department cited data that appears to show that among families earning 225-250% FPL, approximately 20% are food insecure or unable to afford their utility bills.[19] The Department should not adopt a payment formula that expects 20% of the lowest income families making payments to either default on their loans, risk utility shut off, or go without food. Instead, this dataset supports setting the protected income threshold at a higher level where a significantly smaller portion of families are food insecure. For example, 325-350% FPL is the point at which the percentage of families experiencing food insecurity or inability to afford utility bills drops below 10%. That would be more reasonable. And at 400-450% FPL, approximately 6% of families—closer to 1 in 20—experience food insecurity or are behind on utilities. Similarly, other research on the amount of income people need to pay for basic needs indicates that in much of the United States, income of at least 300% FPL is necessary to meet basic needs, particularly for families with young children.[20]

Although treating 300% or more of the federal poverty level as non-discretionary income needed to meet basic needs may sound surprising, it is necessary to address flaws in how the federal poverty level is calculated. The Federal Poverty Guidelines are set based on a widely criticized and outdated formula: the annual cost of basic food for a household of a given size in 1964, multiplied by three, and then indexed for inflation.[21] It's not clear that this calculation was ever a good measure of poverty, but it is particularly inappropriate now since the cost of food has decreased since 1964 while other costs—particularly housing, childcare, and healthcare—have increased significantly. As a result, food costs are much less than one-third of most people's budgets today, and the resulting federal poverty guidelines are far too low.[22]

Additionally, neither the FPL nor the IDR plan has an escape valve to protect borrowers who have higher than average necessary expenses, which borrowers may have due to high housing, childcare, and medical expenses as a result of both regional cost differences and

[19] 88 Fed. Reg. 1894, 1902 (Table 1).

[20] *See, e.g.*, Kinsey Dinan, *Budgeting for Basic Needs: A Struggle for Working Families*, Nat'l Ctr. for Children in Poverty (2009), http://www.nccp.org/publications/pdf/text_858.pdf ("It takes an income of about 1.5 to 3.5 times the official poverty level . . . to cover the cost of a family's minimum day-to-day needs"); Report, Insight Ctr. for Cmty. Econ. Dev., *2011 California Family Economic Self-Sufficiency Standard* (2011), www.insightcced.org (finding a family of four in California would need nearly triple the federal poverty guideline to cover basic needs); John Howat, *Testimony to Public Utilities Regulatory Authority of Connecticut*, Nat'l Consumer L. Ctr. (2021), https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/howatprefilledtestimony.pdf (finding that in much of Connecticut, income above 300% of FPL is necessary to meet basic needs); John Howat et al., *Utility Bill Affordability in Colorado*, Nat'l Consumer L. Ctr. (Oct. 2020), https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/codoraholdharmreportfin.pdf (finding that families with young children in Colorado need income above 300% of FPL to meet basic needs).

[21] Rourke O' Brien & David Pedulla, *Beyond the Poverty Line*, Stanford Social Innovation Review, Fall 2010, https://ssir.org/articles/entry/beyond_the_poverty_line.

[22] Natalia Kolesnikova, & Yang Liu,*Understanding Poverty Measures and the Call to Update Them*, Federal Reserve Bank of St. Louis (July 1, 2012), https://www.stlouisfed.org/publications/regional-economist/july-2012/understanding-poverty-measures-and-the-call-to-update-them.

differences in family and health situations.[23] In the absence of a mechanism to readily consider such individual and regional differences in necessary expenses, protecting a higher amount of income, such as 350-400% FPL, may be best. Such a threshold would be intended to protect the amount of income needed to meet necessary expenses for all borrowers throughout the country with different family structures, childcare needs, and medical needs.

B. Increasing the Amount of Protected Income Provides More Protection to Low-income Borrowers than Reducing the Percentage of Discretionary Income Owed

We commend the Department for recognizing the need to increase the protected income threshold, and not addressing affordability solely by changing the percentage of discretionary income that borrowers must pay. A borrower's monthly payment under an IDR plan is determined by two main variables: (A) the "income protection threshold," which protects a certain amount of income recognized as needed to meet basic needs and excludes it from being considered as part of a borrower's discretionary income, and (B) the percentage of discretionary income that a borrower is required to put toward loan payments.

For low-income borrowers like our clients, increasing protected income has a much more pronounced effect than changing the percentage of discretionary income, and so should be prioritized.[24] For example, for a borrower earning $30,577 (the equivalent of $15/hr), the increased income protection to 225% will reduce monthly payments vs current REPAYE from about $84 to $0, whereas a reduction of payment percentage to 5% alone without altering the income protection would have resulted in the borrower still having to pay $42/month.

C. We urge the Department to apply the increased income protection to all continuing IDR plans so that no borrowers are forced to choose between making student loan payments and meeting their families' basic needs.

While we applaud the Department for proposing to increase the amount of protected income in REPAYE, it should correspondingly increase the amount of protected income in all continuing IDR plans that are not phased out. Barring statutory barriers, there is no principled reason to have different definitions of discretionary income within IDR, and as the Department works to reduce repayment complexity and confusion, "discretionary income" should ideally be given a single, consistent definition. As part of the Department's laudable effort to simplify IDR, to ensure that low-income borrowers can meet their basic needs, and to reduce defaults, it

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[23] Report, Student Borrower Protection Ctr., *Driving Unaffordability: How Income-Driven Repayment Currently Fails to Deliver Financial Security to Student Loan Borrowers* (Sept. 2021), https://protectborrowers.org/wp-content/uploads/2021/09/Driving-Unaffordability.pdf

[24] Both the Urban Institute and TICAS have modeled potential changes to IDR by changing the amount of protected income and changing the percentage of discretionary income that is charged, and found that changing the amount of protected income had more pronounced effects on the monthly payment amount of low- and moderate-income borrowers. *See* Urban Institute, Who Should Pay? (June 1, 2022), https://www.urban.org/features/who-should-pay; TICAS, How Reforming Income-Driven Repayment Can Reduce the Burden of Student Debt, (April 2022), https://ticas.org/wp-content/uploads/2022/04/How-Reforming-Income-Driven-Repayment-Can-Reduce-the-Burden-of-Student-Debt.pdf#page=4.

should establish a single, consistent definition of discretionary income for IDR that incorporates the increased amount of protected income for REPAYE.

It is particularly critical that the amount of protected income in IBR and Income Contingent Repayment (ICR) be increased in parity with the amount in REPAYE if, as the Department proposes, those are the only plans it makes available to borrowers with default loans or Parent PLUS loans, respectively. The current 150% FPL protection in IBR and the 100% FPL protection in ICR are insufficient to ensure that student loans do not prevent families from meeting their basic needs.

<u>IBR Protected Income Amount:</u> The Department notes that it "agrees . . . that the current amount of protected income" in REPAYE, 150% FPL, "is too low," to meet basic needs[25] And yet, inexplicably, the Department has proposed to leave this demonstrably "too low" income protection unchanged in IBR, while proposing to make IBR the only plan available to borrowers with loans in default. This risks continuing to prevent borrowers in default – who are disproportionately low-income, low-wealth, first-generation, and Black – from accessing an affordable repayment plan. And it threatens that student loan obligations will push these borrowers' families into poverty and prevent them from meeting their basic needs.

We recognize that the statutory authorization for IBR utilizes 150% FPL in its definition of "partial financial hardship" and that this formula is referenced in the provision governing monthly payment amounts.[26] But we encourage the Department to consider whether the IBR statute nonetheless allows the Department to set a lower monthly repayment amount in IBR–including by increasing the level of protected income–for borrowers who have a partial financial hardship. Notably, the provision describing payment for eligible borrowers electing to repay under the plan while they have a partial financial hardship does not state that payments during that period shall be set at the amount determined by the referenced partial financial hardship calculation, but rather only that payments shall "not exceed" that amount.[27] Such language allows the Department to set a lower payment amount for borrowers in IBR so long as they are experiencing a partial financial hardship consistent with the statutory formula.

<u>ICR Protected Income Amount:</u> More glaringly, the Department has proposed to leave unchanged the exceedingly low income protection of only 100% FPL in Income-Contingent Repayment (ICR) – the only plan available to people repaying Parent PLUS loans. If 150% is "too low" to protect basic needs, then 100% of FPL is far too low. Indeed, according to the financial hardship data the Department relies on, 27.9% of people with income below 100% FPL are food insecure or behind on utility bills. FR 1902. In real terms, in 2022, 100% FPL was an annual income of $13,590 for a household of 1, and $18,310 for a household of 2. If the Department is unwilling to allow borrowers with Parent PLUS loans to access REPAYE, then it must protect more of their income in ICR.

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[25] 88 Fed. Reg. 1894, 1901.
[26] *See* 20 U.S.C. § 1098e(a)(3)(B); 20 U.S.C. § 1098e(b)(1).
[27] *Id.*

III. Payment Amount - Percentage of Income

The Department proposes to lower the percentage of discretionary income that borrowers must pay monthly in REPAYE such that borrowers with only outstanding loans for an undergraduate program would pay 5 percent of their discretionary income and those who have outstanding loans for undergraduate and graduate programs would pay between 5 and 10 percent based upon the weighted average of their original principal balances attributable to those different program levels.

We agree that IDR payments should be made more affordable. This change will do so by cutting monthly payments in half for borrowers who earn above the protected income threshold who only have debt for an undergraduate program, while reducing monthly payments by a smaller amount for those who have debt from both undergraduate and graduate programs. Protecting more income from the repayment formula altogether would do more to increase affordability for low-income borrowers than decreasing the percentage of discretionary income paid, as discussed in Section II.B, *supra*, but this change certainly also helps.

While increasing the amount of protected income and shortening the timeline to forgiveness will benefit more low-income borrowers and should be prioritized, we encourage the Department to also consider eliminating the difference in the percentage of income that borrowers must pay based on whether they borrowed for graduate school.

First, if the amount of protected income is left at the proposed 225% of FPL, there is a risk that low-income graduate borrowers with income above the protected amount will be left without access to an affordable payment plan. Although most legal aid clients do not have graduate debt, some certainly do, including clients who went to for-profit and online graduate programs, and they need affordable payments. Spending time in graduate school is not a guarantee of financial security, particularly for students from financially insecure backgrounds. And graduate school today is not the domain of the elite as many assume: In 2015-2016, nearly half of first-year graduate students were from low-income families.[28] Further, the rapid growth of for-profit schools in graduate education adds to the risk that there may be more low-income borrowers struggling with graduate debt in the future.[29] Although income and outcome data is limited, one analysis found that at many of the largest for-profit graduate schools, borrowers owe significantly more 5 years after leaving school than they originally borrowed.[30]

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[28] Policy Brief, Council of Graduate Schools, *Maximizing Pell grants to Support Graduate Students* (July 2021), https://cgsnet.org/wp-content/uploads/2021/12/Maximizing-Pell-Grants-to-Support-Graduate-Students.pdf

[29] *See, e.g.*, Danielle Douglas-Gabriel, *The Surprising Growth of Graduate Enrollment at For-Profit Colleges*, Wash. Post (Dec. 1, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/12/01/the-surprising-growth-of-graduate-enrollment-at-for-profit-colleges/.

[30] *See* Michael Itzkowitz (@mikeitzkowitz), Twitter (Aug. 9, 2022 8:46 AM), https://twitter.com/mikeitzkowitz/status/1556985356888801284?lang=en (showing data for Walden University, University of Phoenix, Capella University, and Strayer University, among others).

Second, the Department should use borrower data at its disposal to assess whether requiring borrowers with debt for graduate school to pay a higher percentage of their income than those without graduate debt exacerbates racial and gender inequities in the student loan program. We share the concerns of civil rights advocates that making this distinction may inadvertently result in charging more to women and people of color at any given income level, because women and people of color often must attain more academic credentials to earn the same income as white men.[31]

Finally, eliminating the distinction between payment percentages for those with and without graduate debt would further simplify the complex student loan repayment system and make it easier for borrowers to understand their repayment options.

IV. Protection Against Balance Growth

Current IDR program design allows interest to accrue when borrowers' income-adjusted monthly payments are less than the interest they are charged each month, causing loan balances to go up rather than down each month for borrowers with low incomes or high debts relative to their income. The Department proposes to address this problem by effectively waiving any interest in excess of the borrower's monthly payment each month in the REPAYE plan.

A. We agree that it is critical that IDR be reformed to prevent balances from increasing even while borrowers are making payments.

Legal aid organizations recommended ending balance growth through negative amortization as part of this rulemaking in 2021,[32] and we commend the Department for doing so. Ending negative amortization is critical to making IDR work for low-income borrowers, whose low or $0 payments are often insufficient to cover the interest that accrues each month, leading their balances to balloon. Swelling balances and difficulty making progress in repayment while in IDR increases the lifetime costs of student loans for low-income borrowers, extends the amount of time they spend in repayment, and is a source of tremendous frustration and confusion for borrowers who are understandably upset that their balance keeps going up even

[31] For example, according to an analysis of 2018 U.S. Census data by the National Women's Law Center, Black women with masters degrees earn on average $61,642, which is significantly less than the $76,868 average earned by White, non-Hispanic men with only bachelor's degrees. See Jasmine Tucker, *The Wage Gap for Black Women: Working Harder and Making Less*, p.4, Nat'l Women's L. Ctr. (Aug. 2019), https://nwlc.org/wp-content/uploads/2019/08/Wage-Gap-for-Black-Women.pdf.

[32] Press Release, Nat'l Consumer L. Ctr., Legal Aid Coalition Comments to the Department of Education Regarding Intent to Establish Negotiated Rulemaking Committee: Title IV of the HEA (July 1, 2021), https://www.nclc.org/resources/legal-aid-coalition-comments-to-the-department-of-education-regarding-intent-to-establish-negotiated-rulemaking-committee-title-iv-of-the-hea/.

while they make their required payments. Borrowers who experience balance growth in IDR report feeling hopeless[33] and trapped.[34]

And perhaps counter-intuitively, the current IDR design that allows for negative amortization means that some low-income borrowers are made worse off if they enroll in IDR and make required payments and then subsequently default than if they had simply defaulted sooner without ever enrolling in IDR or making any payments. This is because their balance at the time of default may be significantly higher than it was at the time they enrolled in IDR due to negative amortization, and as a result they'll be subject to involuntary collection of a higher amount. Unfortunately, as the Department recognizes, it is too hard for borrowers to stay enrolled in IDR and most borrowers miss paperwork requirements and thus fall out of the program at some point, and when that happens they risk default. Thus legal aid attorneys sometimes express concern that by helping enroll a financially insecure borrower in IDR, they may be not just delaying the inevitable but setting the borrower up for a bigger default burden down the road.

We also note that balance growth disproportionately impacts women and people of color, exacerbating the unequal burden of student loan debt. For example, one recent analysis found that 12 years after beginning college, 66% of Black borrowers owed more than they originally borrowed, compared to 30% of white borrowers.[35]

B. The Department should consider ways to ensure that low-income borrowers' balances decrease when they make payments in IDR.

While we commend the Department for proposing to end balance growth, we urge the Department to consider going further by ensuring that low-income borrowers' balances actually decrease when they make their required payments in IDR. Payments should mean progress, not simply treading water. But under the Department's proposal for REPAYE, many low-income borrowers would not make any progress toward reducing their student loan balances for years or even decades. Their balances would be reduced only when they finally reach forgiveness after 20 to 25 years of making payments. This is because for low-income borrowers, their income-adjusted monthly payment of $0 or 5% of income over 225% of FPL will often be less than the amount of interest they are charged each month, meaning their payments will never touch their principal.

It doesn't have to be this way: There are many potential models that could be used to ensure that all borrowers can make progress toward reducing their balances in IDR, any one of

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[33] Report, Pew Rsch. Ctr., Borrowers Discuss the Challenges of Student Loan Repayment (May 20, 2020), https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/borrowers-discuss-the-challenges-of-student-loan-repayment

[34] Report, The Educ. Tr., *Jim Crow Debt: How Black Borrowers Experience Student Loans* p.10 (Oct. 20, 2021), https://edtrust.org/wp-content/uploads/2014/09/Jim-Crow-Debt_How-Black-Borrowers-Experience-Student-Loans_October-2021.pdf#page=10

[35] Letter, Elizabeth Warren, Senator, Congress, Letter Addressing Existing Proposals to Cancel Student Debt (May 3, 2022), https://www.warren.senate.gov/imo/media/doc/Eaton%20et%20al%20analysis_05.03.22.pdf

which would improve upon the Department's current proposal to cancel unpaid interest. For example, during the negotiated rulemaking, the legal aid negotiators put forward a proposal to cancel all outstanding interest plus a percentage of principal each year a borrower spends in the program. The proposal recommended that the percentage of principal canceled each year be based on the borrower's income that year, such that low-income borrowers who are otherwise unlikely to make progress in paying off their loans would get a higher portion of their principal canceled each year than higher income borrowers. Under that proposal, borrowers with incomes low enough to qualify for $0 payments would have a third of their principal canceled each year, and thus would receive full cancellation and be removed from the student loan system after 3 years of persistently low earnings. The percentage of principal that would be canceled annually would decrease gradually as income increased, such that the maximum time in repayment would be 15 years for the highest-income borrowers.

A simpler design could also work well for low-income borrowers. For example, instead of only writing off any unpaid interest every month — as under the current proposed plan — the government could write off any difference between the borrower's income-adjusted payment and what their payment would be on a standard repayment plan for the same term.[36] As a result, loan balances for all borrowers would decrease steadily over the repayment period, just as they do in the standard plan, with nothing remaining to cancel at the end of the term. Some elite schools offer programs like this to their students,[37] but few very low-income people have access to such programs.

An IDR plan design that ensures that all borrowers, including low-income borrowers, can make steady progress toward reducing their debt has many benefits:

- Borrowers' experience and faith in the student loan system would significantly improve if all borrowers were able to see their payments and time in the system result in progress in reducing their debt. Borrowers in IDR with low incomes or high debt-to-income ratios would no longer feel like they were simply throwing money into a black hole year after year, while crossing their fingers that the promised forgiveness at the end of 20+ years will be delivered.

- Borrowers would also experience other meaningful mental health improvements and cognitive benefits from reducing their indebtedness.[38]

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[36] *See* Abby Shafroth, *Ending the Black Hole that's Devouring Student Loan Payments*, The Hill (Jan. 18, 2023), https://thehill.com/opinion/finance/3817930-interest-is-a-black-hole-thats-devouring-student-loan-payments/.

[37] For example, Harvard, Yale and Stanford Law Schools all offer versions of this program.

[38] For example, in a NPR interview discussed during the rulemaking committee, John Beshears, an economist at Harvard Business School who specializes in financial choices and decision-making, said that "[b]eing heavily indebted does change your cognitive capacity," that "over-indebtedness is dehumanizing to the borrower," and noted recent research suggesting that being relieved of debt has multiple benefits, including increasing work' productivity. Morning Edition, NPR, *How Debt Can Affect Our Decision Making* (Oct. 29, 2021), https://www.npr.org/2021/10/29/1050379842/how-debt-can-affect-our-decision-making. Similarly, reviews of health effects have found that indebtedness is associated with depression, anxiety, and anger. *See* Elina Turunen & Heidi, *Health Effects of Indebtedness, a Systemic*

- Borrowers' financial status would improve steadily during the repayment term, as they would be able to reduce their debt and debt-to-income ratio over time, which may enable them to access credit at better rates or be able to buy a home sooner.

- Ensuring that borrowers are able to make progress in reducing their balances, even in low-income years, would mean that more borrowers could pay off their loans earlier and move on with their lives. Fewer borrowers would feel that their only option is to "wait for forgiveness" and thus spend 20+ years in debt.[39]

- Low-income borrowers who experience default after making payments in IDR would be treated more fairly. For a low-income borrower who has made years of faithful payments in IDR before defaulting, it is unfair and potentially financially devastating to be subject to collection of the full amount they owed when they began repayment as would often occur under the Department's proposal. Effectively, these borrowers would get no credit or benefit for their years of payments if they default. An incremental relief plan, in contrast, would reduce their financial liability in default based on how long they had spent making what payments they could afford.

For all of these reasons, we recommend that the Department adopt an IDR plan design that allows all borrowers, not just high-income borrowers, to make steady progress toward reducing their debt.

V. Treatment of Parent PLUS Borrowers

The Department's proposal excludes Parent PLUS loans or Direct Consolidation Loans that repaid Parent PLUS loans from REPAYE. It also proposes no changes to the only IDR plan that is available to those with Parent PLUS loans: Income-Contingent Repayment (ICR). ICR often requires much higher monthly payments than other IDR plans, particularly for low income borrowers and borrowers with high debt burdens, and requires lower-income borrowers to make payments from income between 100% and 150% of FPL that would be protected for basic needs in other plans. Borrowers in ICR must pay either a hefty 20% of every dollar they earn over 100% FPL, or an alternative amount set as a varying percentage of what they would owe on a 12-year plan, for 25 years before their balance may be forgiven.[40] As such, the Department's proposal would continue to leave low-income Parent PLUS borrowers without access to an affordable payment plan or a realistic path out of indebtedness.

A. The growing number of low-income Parent PLUS borrowers need a way to manage their debt.

Review, BMC Public Health (2014), https://bmcpublichealth.biomedcentral.com/articles/10.1186/1471-2458-14-489.

[39] *Hearing on The Student Debt Burden and Its Impact on Racial Justice, Borrowers, & the Economy* (Apr. 13, 2021) (statement of Jack Remondi, President and CEO of Navient), https://www.banking.senate.gov/imo/media/doc/Remondi%20Testimony%204-13-21.pdf

[40] 34 C.F.R. § 685.209(b)(1)(ii)(A); *see also* 87 Fed. Reg. 50615 (Aug. 17, 2022) (providing annual updates to the ICR plan formula for 2022 and showing example payment calculations).

There are currently 3.7 million families with Parent PLUS loans incurred by parents to ensure that their children could access education,[41] and the many low-income families among them desperately need a way to manage their debt. While the Parent PLUS loan program was initially used by middle-class parents seeking flexibility in how they pay for college, the program has increasingly been used by low-income, low-wealth families, and particularly Black and Latino families, that have exhausted other forms of financial aid and rely on Parent PLUS loans to give their children access to education and a shot at upward mobility. Because Pell Grants, federal student loans, and other financial aid are now often insufficient to cover the cost of attendance for children from low-income families, parents cover the difference through large Parent PLUS loans that they are "awarded" without any consideration of their ability to repay.[42]

This increase has been sharpest among parents of students of color, with parents of Black students now borrowing at the highest rates.[43] Many of these parents are low-income. Approximately one-third of Black families that take on Parent PLUS loans have income below $30,000[44]—the amount that the Department has proposed must be protected from student loan burdens in REPAYE to ensure that borrowers can meet basic needs. And indeed, many parents of color who take on Parent PLUS loans have such limited incomes and financial resources that they are not expected to be able to contribute to the cost of their child's education at all. In 2018, 42% of Black Parent PLUS borrowers had sufficiently limited wealth or income that their expected family contribution (EFC) to a college education was zero, and 25% of Latino/a Parent PLUS borrowers had $0 EFCs.[45] And yet, the federal government issued them tens of thousands of dollars in student debt anyway, then offered little to no safety net to protect them when they could not afford repayment.

Unsurprisingly, many low-income Parent PLUS borrowers cannot afford repayment in the existing plans. Recent College Scorecard data shows that after only three years of entering repayment, 9.1% of Parent PLUS borrowers whose children received Pell Grants had

[41] Wenhua Di, Carla Fletcher & Jeff Webster, A *Rescue or a Trap? An Analysis of Parent PLUS Student Loans*, p.1, Federal Reserve Bank of Dallas (Sept. 2022), https://www.dallasfed.org/~/media/documents/research/papers/2022/wp2217.pdf.

[42] *Id.* at 4.

[43] Between the 1995–96 award year and the 2017–18 award year, the share of Black students whose parents took out Parent PLUS loans rose from 3.5 percent to 6.2 percent, a larger increase than that for white students (3.6 percent to 5.1 percent). Meanwhile, the rates for Latino/a students saw a considerable rise relative to a low starting point, from 2.0 percent to 3.1 percent. Peter Granville, *Parent PLUS Borrowers: The Hidden Casualties of the Student Debt Crisis*, The Century Foundation (May 31, 2022), https://tcf.org/content/report/parent-plus-borrowers-the-hidden-casualties-of-the-student-debt-crisis/.

[44] Rachel Fishman, *The Wealth Gap PLUS Debt: How Federal Loans Exacerbate Inequality for Black Families*, New America (May 15, 2018), https://www.newamerica.org/education-policy/reports/wealth-gap-plus-debt/.

[45] Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shumbaugh, *Examining the Black-white Wealth Gap*, Brookings Inst. (Feb. 27, 2020),https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/.

defaulted.[46] And at 76 schools, including many minority serving institutions, more than 20% of Parent PLUS borrowers defaulted in just three years.[47]

In light of these problems, many reasonably question whether the Parent PLUS program should continue in its present form or whether it should be replaced with more robust financial aid for students from families with limited resources, along with more public funding for HBCUs and other historically underfunded minority serving institutions where reliance on Parent PLUS loans is greatest.[48] But so long as the Department continues to manage and collect Parent PLUS loans, it is its responsibility to ensure that parent borrowers have access to affordable payments, a pathway out of debt, and a reasonable safety net. Parents should not be punished and put in a ruinous debt trap they cannot escape simply because they tried to help their child get a better education.

B. We urge the Department to provide a path forward for Parent PLUS borrowers by allowing them to consolidate their loans to become eligible for the REPAYE plan.

Over the years, legal aid organizations have seen multitudes of Parent PLUS borrowers who are low-income and unable to afford their loans. Many are older and live on limited, fixed incomes. Many are people of color or first-generation immigrants. Many of our clients did not get a college education themselves, but took out these loans to help their children achieve the American dream. But these parents often do not understand how difficult it will be to repay the loans the government has approved them for on their limited incomes, or what the hefty interest rates will mean for repayment, and those who do understandably determined that they had little choice but to incur unaffordable debt for their children's education.

While ICR is available if they consolidate their loans, ICR payments are still very high and cause significant hardship. As a result, low-income Parent PLUS borrowers often come to us with large debts and few options for affordably managing their payments, averting or resolving defaults, or ever escaping their indebtedness. Our clients must often choose between making their ICR payments or paying for housing, medical care, transportation, and other basic living necessities. Many end up defaulting and then face garnishment of their wages, their Social Security, and tax refund offsets. They suffer from years of defaulted debt with no way out. Parents should not be punished for the decisions they make to support their children; they should have access to the same affordable IDR plans that all other borrowers have.

An example of the discrepancy between a low-income borrower's treatment in proposed REPAYE vs ICR is instructive. Using the Federal Student Aid loan repayment simulator, we generated repayment results for a hypothetical single parent who makes $30,000 a year and owes $30,000 in Parent PLUS loans, which have an interest rate of 7.5% (the current rate for new Parent PLUS loans is 7.54%):

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[46] Granville, supra note 41.
[47] *Id.*
[48] *Id.*

- Under the proposed REPAYE, her monthly payments would be $0, whereas under ICR her monthly payments would be $219 (and her annual payment would total $2,628).

- Further, because she is older and low-income, her income is unlikely to increase meaningfully over time (and may decrease). If we assume no income increases, then under the proposed REPAYE she would pay $0 in total and have $30,000 forgiven after 20-25 years, whereas under ICR she would pay $53,429 in total (nearly twice what she originally borrowed) and still owe $24,315, nearly the full original balance, after 25 years, at which point her balance would be forgiven. This is a terrible outcome, and a likely financially devastating situation, for an elderly, very low-income parent who simply wanted to help her child get an education.

The Department can provide low-income Parent PLUS borrowers with better options and a more effective safety-net through this rulemaking by allowing Parent PLUS borrowers to enroll in the proposed REPAYE plan if they consolidate their loans. While statutory barriers prevent Parent PLUS loans from being repaid directly in IDR, the ICR statute permits payment of Direct Consolidation loans that repaid Parent PLUS loans in both REPAYE and the Income-Contingent Repayment plan (ICR). The Department has recognized this for years by allowing Direct Consolidation loans that repaid Parent PLUS loans to be repaid in ICR, but has withheld access to REPAYE as a policy choice.

We urge the Department to reconsider that choice, and to finally allow Parent PLUS borrowers to access REPAYE via consolidation. In its proposed rule, the Department has recognized that a much more affordable and protective repayment plan is necessary to ensure that student loan debt doesn't threaten borrowers' ability to meet their basic needs, balloon during the term of repayment, or push low-income borrowers into default. The same need exists for low-income Parent PLUS borrowers, and they should receive the same protections.

C. If the Department is unwilling to allow Parent PLUS borrowers to access REPAYE, then it should improve the ICR plan available to parents to make it an affordable option.

If the Department is unwilling to allow Parent PLUS borrowers to access REPAYE, then it should significantly improve the ICR plan to ensure that it offers a more affordable path to repayment and protects the amount of income borrowers need to meet their basic needs.

The current ICR option is better than no income-driven option at all, but it is insufficient to meet the needs of many of our clients. Most problematically, it only protects income below the official poverty line (100% FPL) from repayment even though that amount is far far below what many people, in many parts of the country, need to survive. That income protection must be raised to parallel the amount protected in REPAYE to ensure that student debt does not imperil low-income borrowers’ ability to meet their basic needs, as discussed in Section II.C, *supra*. Additionally, ICR generally calls for payments of 20% of income over the protected amount—twice the percentage required in other IDR plans, and four times the amount proposed in

REPAYE for undergraduate debt. This payment percentage should be reduced. And to ensure student loan debt does not prevent parents who borrow for their children's education from retiring with financial security, or follow them to their death, the current 25-year timeline until forgiveness should be shortened significantly.

VI. Expansion of IDR to Defaulted Loans

The Department proposes to allow borrowers in default to enroll in income-based repayment (IBR), which is one of the income-driven repayment plans, and to earn credit toward forgiveness both for any payments made through the IBR plan and any amounts collected through wage garnishment, tax refund offset, social security offset, or other forced collections that are equal to or greater than what the borrower would have paid on the 10-year standard plan.

A. Borrowers in default need and deserve the protections of IDR, and we commend the Department for proposing to allow them to participate in IDR.

Legal aid attorneys have long called on the Department to provide borrowers with loans in default access to income-driven repayment, and we applaud the Department for proposing to do so through this rulemaking. More often than not, the low-income borrowers who reach out to us for assistance are in default on their loans. The extraordinarily punitive and expensive collection tactics used against borrowers in default, including wage garnishment and offset of social security benefits, the Earned Income Tax Credit and the Child Tax Credit, threaten the financial security of our clients and their families.

Student loan default is a systemic problem: As of March 2022, 7.5 million borrowers—close to one in five—were in default on their federal student loans.[49] Borrowers default because they are financially distressed and haven't received the help they need to navigate the complex student loan program or cannot afford payments in the current IDR program.[50] Borrowers from low-income backgrounds disproportionately experience default: A 2017 study found that roughly 90% of those who had defaulted within 12 years of enrolling in college were Pell Grant recipients, meaning they entered school with a household income of less than $40,000.[51]

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[49] Report, Federal Student Aid, *Federal Student Aid Posts Quarterly Portfolio Reports to FSA Data Center* (July 13, 2022), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-07-13/federal-student-aid-posts-quarterly-portfolio-reports-fsa-data-center. .

[50] Sarah Sattelmeyer, *Trapped by Default*, New America (July 27, 2022), https://www.newamerica.org/educationpolicy/briefs/trapped-by-default.

[51] Report, Ctr. for Am. Progress,*Who Are Student Loan Defaulters?* (2017), https://www.americanprogress.org/article/student-loan-defaulters/.

People of color,[52] first-generation college students,[53] people with debt and no degree,[54] and people who attended for-profit schools also experience default at high rates.[55]

Rather than helping these disadvantaged and financially vulnerable borrowers, current default practices force them to pay more and prevent them from accessing loan management and relief programs like economic hardship deferments and income-driven payment plans. Under current policies, borrowers cannot enroll in IDR while in default. Although some can consolidate or rehabilitate their loans to remove them from default and then enroll in IDR, those pathways to IDR are foreclosed entirely for some borrowers because of limits on use of those paths. Even for those who could theoretically consolidate or rehabilitate out of default and then enroll in IDR, the path is unnecessarily difficult to navigate and few borrowers make it through. For example, in 2017 the CFPB found that fewer than 1 in 10 borrowers who completed rehabilitation were enrolled in an income-driven plan within the first nine months of exiting default.[56]

B. The Department should ensure that borrowers in default do not have to pay more or longer than other borrowers.

The Department has proposed making borrowers in default eligible for IBR rather than REPAYE, despite the significant advantages of REPAYE for borrowers, because it interprets the Higher Education Act to allow time in default to count toward IBR forgiveness but not toward forgiveness under REPAYE. It asks for comments on how to address the trade-off for borrowers in default between earning credit toward forgiveness in IBR vs. being eligible for lower monthly payments in REPAYE.[57] Our position is that earning credit toward forgiveness is critical and a top priority, but that borrowers in default should also not have to pay more or longer than other borrowers.

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[52] A 2017 study found that nearly half (47%) of Black borrowers, and over one-third (36%) of Hispanic borrowers had defaulted within 12 years of entering college, compared with approximately 20% of white borrowers. *See* Sarah Sattelmeyer, *Trapped by Default*, New America (2022), https://www.newamerica.org/education-policy/briefs/trapped-by-default/.

[53] Nearly a quarter (23%) of first-generation students defaulted on their loans within 12 years, compared to 14% of non-first generation students. *See* Report, TICAS, *Students at Greatest Risk of Loan Default* (2018), https://ticas.org/files/pub_files/students_at_the_greatest_risk_of_default.pdf. https://bit.ly/3yjdYTu.

[54] *See* Judith Scott-Clayton, *What Accounts for Gaps in Student Loan Default, and What Happens After*, Brookings Inst. (June 21, 2018), https://www.brookings.edu/research/what-accounts-for-gaps-in-student-loan-default-and-what-happens-after/; Report, Ctr. for Am. Progress, Who Are Student Loan Defaulters? (2017), https://www.americanprogress.org/article/student-loan-defaulters/. =

[55] Defaulted borrowers are over 2 1/2 times as likely to have attended a for-profit college than nondefaulters (45% vs. 17%). Lindsay Ahlman, *Casualties of College Debt: What Data Show and Experts Say About Who Defaults and Why*, TICAS (2019), https://ticas.org/affordability-2/casualties-of-college-debt-what-data-show-and-experts-say-about-who-defaults-and-why/.

[56] Report, Consumer Fin. Prot. Bureau, *Update From the CFPB Student Loan Ombudsman* (2017), https://files.consumerfinance.gov/f/documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf.

[57] Proposed Regulations Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, 88 Fed. Reg. 1894, 1910 (Jan. 11, 2023).

We agree that it is critical that borrowers be able to earn credit toward forgiveness for qualifying payments made while in default. Giving all borrowers equal credit for their payments is both a matter of basic fairness and necessary to ensure that financially vulnerable borrowers who fall behind on payments and go into default do not get trapped in perpetual debt because they simply cannot afford to pay off their loans in full but cannot earn credit toward forgiveness. It would not be a reasonable solution to tell borrowers with persistent poverty-level incomes that they are eligible for low or $0 payments, but they'll never be able to escape their debt.

Default already acts as a lifelong debt trap for too many borrowers, and will continue to do so if borrowers in default do not receive credit toward IDR forgiveness. More than 2.1 million borrowers who were in default or at least 91 days delinquent on their federal student loans at the end of 2019 had already been in repayment for 20 years or more, and another 3.4 million in default or delinquency had been in repayment for between 10 and 20 years.[58] This is often because borrowers in default have such low incomes that they simply cannot afford to pay down their debt. For example, one tool that the government uses to collect defaulted loans is seizure of 15% of a borrower's Social Security benefits each month that exceed $750. The GAO has found that for the majority of defaulted borrowers over age 50, money seized from their benefits went entirely to interest and fees and never touched principal–meaning that without cancellation, these borrowers may be stuck in debt, without ever making progress in reducing their balance, until they die.[59] This is all the more troubling because many of these borrowers rely entirely on their Social Security payments for income, and, for the majority, the seizure from their Social Security payments either pushed them below the poverty level or further reduced income that was already below the poverty level.[60] Keeping borrowers like these in debt serves no one, and does tremendous harm to our most vulnerable citizens.

However, borrowers in default—who again, are often the most financially vulnerable—should also not have to pay more or longer than other borrowers, as many would if they are denied the various critical improvements proposed for REPAYE that protect more income for basic needs, reduce payment amounts, protect against balance growth, and shorten the timeline to forgiveness for low-balance borrowers. Therefore, the Department should adopt an approach that both ensures that borrowers receive credit while in default and, to the maximum extent possible under any statutory constraints, gives borrowers in default the same protections as are provided in REPAYE.

For example, the Department could move forward with its proposal to allow defaulted loans to be repaid via IBR, but improve key terms of IBR to better align with the terms of REPAYE in the final rule. In doing so, it should put particular priority on increasing the amount of protected income to mirror that in REPAYE, as discussed in Section II.C, *supra*, so that

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[58] Education Department Responses to Data Request by Senator Warren (Apr. 2, 2021), https://www.warren.senate.gov/imo/media/doc/Education%20Department%20Response%20to%20Sen%20Warren%20-%204-8-21.pdf.

[59] U.S. Gov't Accountability Off., GAO-17-45, Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief (December 2016), at p.19, available at https://www.gao.gov/assets/gao-17-45.pdf.

[60] *Id.* at Table 18, p. 19.

payment in default does not prevent families from meeting their basic needs. It should also incorporate any improvements to the forgiveness timeline offered by REPAYE.

Alternatively, the Department could consider allowing borrowers in default to enroll in REPAYE and commit to tracking their payments that would otherwise qualify toward REPAYE forgiveness while in default and providing forgiveness relief under another authority. For example, it could exercise its authority under IBR to grant credit toward forgiveness for payments in other IDR programs, including REPAYE payments.[61] It could alternatively exercise its authority to compromise, modify, or terminate collection of the debt after the borrower has made the requisite number of qualifying payments toward forgiveness in REPAYE without being able to repay the loan in full.[62]

C. Borrowers should receive credit toward IDR forgiveness for any forced payments that equal or exceed the amount that they owe under IDR and for all time in default prior to the effective date of the rule.

Inexplicably, the Department has proposed that borrowers in default would receive credit toward IBR forgiveness for forced payments (via involuntary collection such as wage garnishment, tax refund offset, and social security offset) *only* if those payments equal or exceed what the borrower would have paid on the 10-year standard plan. This suggests that under the proposed rule, borrowers would *not* receive credit for forced payments that equal or exceed the typically lower amount that the borrower would owe in IBR. In other words, a borrower who owes $20/month in IBR would not receive credit toward IBR forgiveness if their Social Security benefits were offset by $20 each month if their monthly payments would be $100/month under the standard plan.

This is unfair and inconsistent with the premise of all income-driven repayment programs, including IBR. It would also significantly limit the value of allowing borrowers in default to enroll in and earn credit toward forgiveness under IBR. As the Department recognizes, “many borrowers in default may not make voluntary payments but could be subject to forced collections activity” that produces forced payments. 88 Fed. Reg. at 1910. If those payments satisfy either the amount the borrower owes in IBR or the amount they would owe under the standard plan, then they should count toward ultimately relieving the borrower of the obligation of continuing payments. Otherwise, low-income borrowers in default who make forced payments through wage garnishment or social security offsets will likely be denied credit toward IBR forgiveness, despite making payments that exceed their IBR burden, because their income

[61] *See* Persis Yu, *Relief for Borrowers in Income-Driven Repayment*,p. 82–83, Student Borrower Prot. Ctr. (Nov. 2020), https://protectborrowers.org/wp-content/uploads/2021/02/Delivering-on-Debt-Relief-Final.pdf#page=74 (noting that since there is no statutory requirement that borrowers be enrolled in IBR *while* making payments toward IDR cancellation, default borrowers may earn credit towards cancellation for payments made under ICR payment plans as long as the borrower enrolls in IBR at some point during their repayment period).

[62] *See* 34 C.F.R. § 30.70(a)(1), 31 C.F.R. § 902.2(a)(1)-(2) (allowing for settlement or termination of collection of debts for which “the debtor is unable to pay the full amount in a reasonable time” or “the Government is unable to collect the debt in full within a reasonable time”).

is too low to allow for payments at the standard plan amount. Similarly, for any months in which the Department determines a defaulted borrower is or was eligible for a $0 IBR payment, the borrower should receive credit toward forgiveness.

Finally, in the years between when IBR was first created and when it will finally be made available to borrowers with loans in default, many borrowers have either made years of payments (voluntarily or forced) in excess of their IBR payment amount or would have qualified for $0 payments in IBR, but the Department has not tracked those payments as qualifying or included any of this time in the current IDR Account Adjustment. Rather than attempting an individualized recounting now, which would necessitate documenting years of past income information and comparing it against payment amounts, we recommend that the Department provide credit toward forgiveness for all time borrowers spent in default prior to the effective date of this rule.

D. The Department should ensure that defaulted borrowers in IDR are protected against involuntary collection of amounts that exceed their IDR payment obligation.

Under the Department's proposal, it is not clear how enrollment of a defaulted borrower in IBR impacts involuntary collections. Enrollment in IBR should ensure that borrowers are not obligated to make payments in excess of the amount they are determined to be responsible for, based on their income and family size, in IBR. We therefore recommend that, in the final rule, the Department make clear that defaulted borrowers who are enrolled in IBR will not be subject to any involuntary collections so long as they are satisfying IBR payment obligations through voluntary payments (including $0 payments for those eligible). The Department should further make clear that as soon as a borrower requests an IBR plan by phone or otherwise, any involuntary collections should either be prevented (if requested after notice is provided but before the collection) or suspended while the IBR request is pending. If the request is approved, all involuntary collections and any referrals to the Department of Justice for collection litigation should cease as long as a borrower is making the required monthly payment.

Additionally, we recommend that the Department specify that borrowers who fall behind on their IBR payments or who do not make voluntary payments may only be subject to forced payments through involuntary collection of the amount they owe in IBR. Thus, for example, a low-income borrower with loans in default who is determined to be able to pay $10/month ($120/year) under the IBR formula should not be forced to make payments in excess of those amounts through the involuntary collection tools.

For loans that are subject to a court collection action, the Department should provide for the dismissal of the action for all borrowers who obtain an IBR plan before any judgment is entered. In addition, the Department should also make sure IBR plans are available to borrowers with judgments against them. As long as they are making the required IBR payments, borrowers with judgments against them should not be subject to involuntary collection.

E. The Department should automatically enroll defaulted borrowers in IDR.

We applaud the Department's proposal to automatically enroll eligible borrowers who are 75 days delinquent in IDR (see discussion below in Section VII), and we urge the Department to similarly automatically enroll eligible borrowers in default in IDR to the extent possible. While enrolling defaulted borrowers in IDR would not prevent default, it would help ensure that distressed borrowers do not miss out on earning credit toward forgiveness, would help connect them to a more affordable payment plan, and, ideally, would protect them against forced collection of amounts in excess of the amount they owe in IDR.

The Department should therefore revise proposed § 685.209(m)(3) to ensure that borrowers in default can be automatically enrolled in IDR if they have provided consent for the Department to access their income and family size data from the IRS. As proposed, the provision allowing automatic enrollment in IDR for past due loans is limited to borrowers "in repayment," and so may, unless amended, be read to exclude automatic enrollment in IDR for borrowers in default.

F. The Department should provide a path for borrowers with Parent PLUS loans in default to access IDR.

Under the current proposal, borrowers with Parent PLUS loans in default, or Consolidated Loans in default that repaid Parent PLUS loans, would not be eligible for any IDR plan. Because the IBR statute excludes Parent PLUS borrowers, but the ICR statute that authorizes the REPAYE program permits those who consolidate their loans to access ICR-based plans, we urge the Department to consider allowing defaulted borrowers with Consolidated Loans that repaid Parent PLUS loans to enroll in REPAYE, or to identify another path for such borrowers to access affordable payments and a road to relief.

G. The Department should consider making enrollment in IDR and satisfaction of payment obligations in IDR a streamlined path out of default.

In this rulemaking or the next rulemaking opportunity, the Department should consider making enrollment in IDR and satisfaction of payment obligations in IDR a streamlined path out of default, without requiring the borrower to complete additional, unnecessary and burdensome rehabilitation paperwork or to first consolidate their loans. The Department should also consider making enrollment in IDR and payments for a sufficient period of time as the basis for setting aside and voiding judgments.

VII. Automatic Enrollment in IDR for Delinquent Loans

The Department proposes to automatically enroll eligible borrowers in the IDR plan that provides them the lowest monthly payment once they are 75 days late in payment. This automatic enrollment would only occur if the borrower has provided approval for the IRS to share their tax information with the Department of Education, and if the borrower's monthly payment would be lower in IDR.

We strongly support this proposal because it has the potential to substantially decrease default rates among low-income borrowers and to better ensure that borrowers who would benefit from enrollment in an IDR plan access that benefit. Thus far, IDR has failed to deliver relief to the borrowers who need it most. According to a recent GAO report, only 132 people have ever had their student loans canceled through IDR,[63] though over 4 million have been in repayment for over 20 years.[64] Part of the problem is rampant implementation errors and mismanagement,[65] but the core problem is that borrowers have to know about the benefits of IDR and annually apply and document their income to benefit from the program, and too few of the low-income people the program is supposed to serve have succeeded in doing so. For example, according to research by the Student Borrower Protection Center, only 43% of borrowers enrolled in means-tested public benefits programs like SNAP, TANF, or SSI were enrolled in IDR.[66] And over half of borrowers with incomes below $20,000 fell behind on their student loans without accessing IDR—even though they would be entitled to $0 payments in the program.[67]

Available data also indicates that the administrative burden of IDR disproportionately hurts Black borrowers, who disproportionately underutilize IDR. Black borrowers, who take on more student debt to access education yet are paid lower incomes, are more likely than white borrowers to enroll in IDR and rely on it to manage their loan burdens.[68] But there is greater need for IDR among Black borrowers, and that need is disproportionately going unmet. Black

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[63] GAO, Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment Forgiveness (March 2022), https://www.gao.gov/assets/gao-22-103720.pdf.

[64] Education Department Responses to Data Request by Senator Warren (April 2, 2021), https://www.warren.senate.gov/imo/media/doc/Education%20Department%20Response%20to%20Sen%20Warren%20-%204-8-21.pdf

[65] Cory Turner, How the most affordable student loan program failed low-income borrowers, NPR (April 1, 2022) https://www.npr.org/2022/04/01/1089750113/student-loan-debt-investigation.

[66] Ben Kaufman, New Data Show Borrowers of Color and Low-Income Borrowers are Missing Out on Key Protections, Raising Significant Fair Lending Concerns, Student Borrower Protection Ctr. (Nov. 2, 2020), https://protectborrowers.org/new-data-show-borrowers-of-color-and-low-income-borrowers-are-missing-out-on-key-protections-raising-significant-fair-lending-concerns/.

[67] *Id.*

[68] PEW Charitable Trusts, *Redesigned Income-Driven Repayment Plans Could Help Struggling Student Loan Borrowers* (Feb. 8, 2022) https://www.pewtrusts.org/en/research-and-analysis/reports/2022/02/redesigned-income-driven-repayment-plans-could-help-struggling-student-loan-borrowers.

borrowers are twice as likely to fall behind on their loans without accessing IDR, with 30% of Black borrowers in a recent study having fallen behind on their federal student loan payments without accessing IDR, compared with 15% of white borrowers.[69]

This data is consistent with the experience of legal aid attorneys, who frequently work with low-income borrowers who would be eligible for $0 payments in IDR but instead are either in default or have cycled for years between the standard plan, delinquency, and forbearances–all while their balances have increased and they have made no progress toward being debt-free. We therefore urge you to adopt this proposal in the final rule.

Additionally, because Parent PLUS loans are not directly eligible to be enrolled in IDR, we urge the Department to add regulatory language requiring the Department and its servicers to notify borrowers with Parent PLUS loans that are 75 days delinquent of their right to consolidate their loans and enroll their consolidated loans in IDR.

But making automatic enrollment possible is only the first step. For this proposal to be effective, the Department must prioritize prompt and effective implementation of the IRS data-sharing provisions of the FUTURE Act and, most importantly, obtain consent of financially-insecure borrowers to participate in the data-sharing program. We therefore also urge the Department to implement a robust campaign to obtain borrowers' consent to participate in the data-sharing program that prioritizes obtaining the consent of the borrowers most likely to benefit from IDR and most at risk of default.

VIII. IDR Application and Annual Recertification Process

Pursuant to the FUTURE Act, the Department proposes to provide borrowers an easier path for participating in IDR: The Department, with borrowers' consent, could access borrowers' tax information to simplify initial enrollment in IDR as well as to recertify borrowers in IDR and calculate their new monthly payment amount without requiring annual paperwork.

While we think it can be improved further, we strongly support this proposal. It would substantially reduce administrative burdens in enrolling and recertifying borrowers in IDR that cost borrowers and the Department substantial time and headaches and cause huge numbers of eligible, low-income borrowers to miss out on the benefits of IDR or to inadvertently get stuck in debt longer. As the Department recognizes in its comments, a substantial portion of borrowers miss out on the benefits of IDR because they miss the recertification deadline: "Department data from 2019 show that 39 percent of borrowers on an IDR plan recertified on

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[69] Ben Kaufman, New Data Show Borrowers of Color and Low-Income Borrowers are Missing Out on Key Protections, Raising Significant Fair Lending Concerns, Student Borrower Protection Ctr. (Nov. 2, 2020), https://protectborrowers.org/new-data-show-borrowers-of-color-and-low-income-borrowers-are-missing-out-on-key-protections-raising-significant-fair-lending-concerns/.

time and that only 57 percent had certified within 6 months after their recertification deadline."[70]. Automatic re-enrollment using consenting borrowers' federal tax data offers the potential to dramatically improve these numbers and help more low-income borrowers experience the full benefits of IDR, while also improving their experience managing their student loans. We have championed this reform for years,[71] and are excited to see it finally on the horizon.

However, as explained above, making automatic recertification possible is only the first step, and for this proposal to achieve its desired goal the Department must obtain borrowers' consent to participate in the data-sharing program.

We are concerned that the Department's proposed regulatory language may limit its ability to obtain this consent for existing borrowers. Proposes section 685.209(l) identifies only three instances when borrowers may provide this consent: (1) when taking out new loans (and completing the Direct Loan Master Promissory Note), (2) when consolidating existing loans (and completing the Direct Consolidation Loan Application and Promissory Note), and (3) when completing an application for an IDR plan. These touchpoints would effectively capture all new Direct Loan borrowers after implementation, but threaten to miss many of the existing borrowers who are in the most financial distress and whom the IDR program should most strive to serve. This includes the many existing low-income borrowers who are still unaware of the benefits of IDR or how to participate, borrowers in default, and populations that face barriers to applying for IDR, such as incarcerated borrowers, borrowers with limited English proficiency, and borrowers without access to or comfort using internet portals like studentaid.gov.

There are potentially many other touchpoints when the Department could seek borrower consent, including but not limited to when borrowers apply for rehabilitation, Fresh Start, a non-IDR payment plan, deferments or forbearances, discharges, or cancellation; when borrowers log in to their student loan portal; when borrowers contact their servicer for help managing their loans; when borrowers are notified that their loans are past due or will be subject to collection; or when the payment pause ends and borrowers are notified of what they should do to prepare to resume repayment.

We therefore urge the Department to ensure that its final regulatory language does not unnecessarily limit the instances in which it can obtain borrowers' consent to participate in data sharing, and to implement a robust campaign to obtain borrowers' consent to participate in the data-sharing program that prioritizes obtaining the consent of existing borrowers most likely to benefit from IDR and most at risk of, or already in, default.

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[70] 88 Fed. Reg. 1894, 1911.

[71] *See, e.g.*, Nat'l Consumer L. Ctr., Comment to the Department of Education on Proposed Revised Pay as You Earn Repayment Plan (Aug 10, 2015), https://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/comments-ed-nprm-aug2015.pdf.

IX. Consequences of Failing to Recertify

The Department proposes to simplify the consequences of failing to recertify in REPAYE, explaining, “Borrowers who fail to recertify [their income] would initially be placed on an alternative payment plan with payments set to the amount the borrower would have paid on a 10-year . . . plan based on the current loan balances and interest rates on the loans at the time the borrower was removed from the REPAYE plan, except that no more than 12 of these payments could count toward forgiveness.”

We appreciate that this is an improvement from the current consequences of failing to recertify in REPAYE, which set Alternative Plan payments at the higher of this proposed amount or the amount the borrower would need to repay in full by the end of their 20/25 year REPAYE period. However, we urge the Department to consider making IDR simpler and easier for borrowers to understand and benefit from by instead placing borrowers who fail to recertify into the existing Standard Plan rather than this similar–but slightly different–Alternative Plan. That way, borrowers eligible for a 10-year Standard Plan who miss recertification but who can afford their standard plan payments can continue to make progress toward being debt-free by earning credit toward PSLF and IDR. And those who cannot afford Standard Plan payments should be helped to get back into IDR.

As the Department recognizes in its comments, a substantial portion of borrowers miss the recertification deadline for IDR: “Department data from 2019 show that 39 percent of borrowers on an IDR plan recertified on time and that only 57 percent had certified within 6 months after their recertification deadline.”[72] This is a systemic failure, not an individual responsibility problem. As such, the problem has not been solved to date by threatening borrowers who miss the recertification deadline with being booted into a confusing “Alternative Plan,” and would not be solved now by continuing to do so. Further, as a realistic matter, borrowers overwhelmingly do not know about the effectively “off-menu” Alternative Plan or what their payment in the plan would be, so any such threat is meaningless.

Attorneys who work with borrowers note that borrowers’ monthly payment amounts often feel confusing and arbitrary. Automatically enrolling borrowers in the Alternative Plan as proposed here contributes to that perception. We are also concerned that borrowers who miss recertification will not understand that their payment amounts under the new plan, which will often be higher than what they owed in IDR, and may be quite similar to the amount they would owe under the standard plan, do not count toward PSLF or IDR cancellation after 12 months. Borrowers may inadvertently stay in the Alternative Plan for years, unknowingly missing out on credit toward cancellation, and be shocked when they apply for PSLF or reach 20 years in repayment and are denied relief. Indeed, just days ago, a legal aid client told their attorney that they were enrolled in IDR, when in fact their loan history showed that they had been in the Alternative Plan for years.

[72] 88 Fed. Reg. at 1911.

We applaud the Department for working to address the systemic failure of missed recertifications by implementing fixes to allow automatic re-enrollment for borrowers who consent to data-sharing via the FUTURE Act, but until auto-enrollment has begun and all borrowers have provided consent, we will continue to see missed recertifications. We therefore urge the Department to take the course that will most help borrowers who miss recertification to understand the consequence and the payment plan they are now in and that will allow borrowers to continue making progress toward loan forgiveness.

X. Credit for Time in Deferments and Forbearances

The Department proposes to expand the types of deferments and forbearances that will count as qualifying time toward IDR forgiveness to include: deferments tied to unemployment, cancer treatment, rehabilitation training, military service, service in the Peace Corps and post-active duty; forbearances related to national service or National Guard Duty; forbearance for loan repayment through the U.S. Department of Defense; and mandatory administrative forbearances for emergencies and paperwork processing. Additionally, the Department proposes to allow borrowers who wish to receive credit for past time in other types of deferments and forbearances to obtain it if they essentially pay “make-up” payments for that time at the lesser of what they would have paid on the 10-year standard plan or on an IDR plan at the time of their deferment/forbearance. A borrower who can demonstrate that they would have had a $0 IDR payment during past time they were in deferment or forbearance could get credit without making additional payments.

We support this proposal because it will help reduce the amount of credit toward being debt-free that borrowers miss out on simply because the options for managing their loans in times of financial distress or service to the country are confusing, or they did not receive the best servicing support or advice for managing their loans in these times, or they were placed in a forbearance for reasons outside of their control. However, we offer several recommendations to strengthen the proposal:

- To better effectuate the proposal to provide borrowers in other types of deferments and forbearances with credit toward IDR forgiveness if they are willing to make up payments they would have owed in IDR, we recommend that the Department relieve borrowers of the burden of finding out about this right and determining what it means in real terms. In our experience, all borrowers, but especially financially distressed borrowers, struggle to understand and access the potential benefits and protections of the student loan system, and putting the onus of navigating this new and rather complex safety valve on them is unlikely to succeed.
    - Instead, we recommend that the Department first simply provide credit for all periods of deferment and forbearance up through the date that the Department effectuates the data-sharing provisions of the FUTURE Act that will begin enabling it to readily calculate what borrowers’ IDR payment amounts would be.

The Department may do this by regulation or via extension of the current IDR Account Adjustment.

    - Then, once the data-sharing is underway, we recommend that the Department automatically provide IDR credit to anyone in a deferment or forbearance who would be eligible for a $0 IDR payment, without requiring the borrower to (implausibly) find out about their right to such credit and make such a request.
    - Additionally, we recommend that once data-sharing is underway, the Department annually notify borrowers who have spent time in a nonqualifying deferment or forbearance of the number of months they spent in nonqualifying statuses, the amount they would have owed monthly if enrolled in IDR during that time, and their right to obtain credit for any such months if they make payments in those amounts now or in the future.

- We recommend that the Department eliminate language in § 209(k)(4)(i) that inexplicably states that these otherwise qualifying periods of deferments and forbearances do not count toward the forgiveness under the shorter timeline for people who borrow low amounts. This seemingly arbitrary exclusion is not explained in the rules, singles out the borrowers that the Department has determined should otherwise receive forgiveness sooner for less-generous terms regarding what time qualifies toward forgiveness, adds needless complexity, and introduces high potential for borrowers' expectations of early forgiveness to be upset.
- We recommend that the Department include credit for forbearances related to bankruptcy as well as forbearances that cover time in which the Department is processing discharge applications under § 685.205(b)(6).
- We recommend that the Department include credit for comparable deferments and forbearances, including but not limited to:
    - Deferments that are available under 34 CFR § 685.204(j)(2) to Direct Loan borrowers who had an outstanding balance on a FFEL Program loan made before July 1, 1993, when they received their first Direct Loan, and
    - All comparable Perkins and FFEL deferments and forbearances when borrowers consolidate into a Direct Consolidation Loan.

XI. Consequences of Consolidation

The Department proposes to end the practice of restarting the clock toward IDR loan forgiveness when borrowers consolidate their loans. Instead, the Department proposes to give borrowers credit toward forgiveness for payments made prior to consolidation by calculating the weighted average of qualifying payments made on the original balance of all loans repaid by the consolidation loan. For example, if a borrower has made 20 qualifying payments on a loan with an original principal balance of $10,000 and consolidates it with another $10,000 loan that the borrower has not previously made qualifying payments on, then the borrower's consolidation loan would be credited with 10 payments toward forgiveness. If the borrower made 20 qualifying payments on each of the two loans, then they would continue to be credited with the full 20 payments toward forgiveness when they consolidate.

We strongly support this proposal, which we and others made during the prior REPAYE rulemaking in 2015.[73] The Department's proposal here at long last offers a critical fix to a technical problem that has unnecessarily and unfairly prevented many borrowers from getting credit for the payments they have made toward loan forgiveness in IDR and PSLF. This problem has too often forced borrowers to choose between keeping their progress toward forgiveness and getting out of default, simplifying their loan management, accessing a borrower defense or PSLF discharge, or accessing a more affordable payment plan. Further, there is no principled reason to take credit earned toward forgiveness away from borrowers when they consolidate.

The existing consolidation penalty is little known by most borrowers, who are often encouraged to consolidate to simplify their loan management, get out of default, access PSLF, access a more affordable payment plan, or apply for or receive a borrower defense discharge of certain of their loans. As a result, these borrowers often make the decision to consolidate without knowing the downside. Years later, when the time comes that they apply for a PSLF discharge or expect a discharge via IDR, they will be understandably shocked and frustrated by a denial.

Further, as specialized attorneys who do know about the consolidation penalty, the penalty makes it much harder for us to provide general and actionable advice to help low-income borrowers manage student loans and access relief. For example, prior to the current waivers, we could not generally encourage public service workers or defrauded borrowers pursuing borrower defense to consolidate into the Direct Loan Program to access PSLF or borrower defense discharges, because some borrowers may be made worse off by consolidating and losing the credit they've already accrued toward cancellation. As a result, we have to spend more time doing highly individualized assessments of the pros, cons, and likely best path forward for each borrower based on their specific loan history. And when offering more general advice, we must throw out lots of confusing caveats that threaten to overwhelm borrowers and cause them to throw up their hands and walk away from student loan relief. These same issues undoubtedly make loan servicing harder and cause quality of servicing to suffer.

For all of these reasons, we commend the Department for proposing to end the consolidation penalty and we look forward to seeing the proposal in the final rule.

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[73] Nat'l Consumer L. Ctr., Comment to the Department of Education on Proposed Revised Pay as You Earn Repayment Plan (Aug 10, 2015), https://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/comments-ed-nprm-aug2015.pdf.

XII. Treatment of Spousal Income and Debt

The Department proposes to align the treatment of income of married borrowers in all IDR plans to be consistent with the PAYE and IBR plans, which only include the borrower's income in calculating the monthly payment for married borrowers who file their taxes separately.

We support this proposal. It respects the choices of people who keep their finances separate from their spouse's, ensures that REPAYE is not a worse IDR plan for borrowers who file separately, and, perhaps most importantly, simplifies and streamlines access to IDR.

As we have explained in prior comments, there are many legitimate reasons why low-income taxpayers choose to file their taxes separately, often at great financial cost and loss of eligibility for various tax credits.[74] Requiring these borrowers to provide their spouse's income to calculate their income-driven repayment introduces another layer of administrative burden and complexity to enrollment and recertification in IDR. For example, under the existing rules, when legal aid attorneys meet with a borrower who is married and files her taxes separately, we generally cannot sit with them and help them complete an application for IDR, as we often do for other borrowers.[75] Instead, we can only get partway through the process by providing only the borrower's signature and importing their own income information into the application. Finishing the application must then wait for later, when the borrower's spouse must successfully go through these same steps. This added layer of process, which depends not on the borrower but their otherwise financially independent spouse successfully navigating the process, creates more administrative burden and more risks that low-income borrowers will fall through the cracks and miss out on enrolling in IDR or recertifying on time to stay in IDR. As the Department notes, these process issues also impact the ease of automatic enrollment and reenrollment when IRS data-sharing becomes possible.

Conclusion

Thank you for your consideration of these comments. Please contact Abby Shafroth at ashafroth@nclc.org with any questions or for additional information.

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[74] *Id.*

[75] If the borrower wants to enroll in PAYE or IBR, they should be able to apply without submitting their spouse's income, but because of the current different treatment of spousal income in REPAYE the system and many servicers do not allow it. Further, for the many borrowers who, when they apply for IDR, do not choose a plan but instead request to be placed in the plan with the lowest monthly payments, the application requires spousal income for those who are married filing separately.